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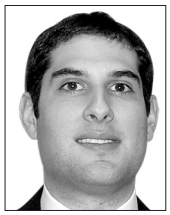
Expert Analysis

Court Toughens Application of Rule 8 Pleading Standards for Civil Cases



By **Richard D. Bernstein**

And **Frank M. Scaduto**

The U.S. Supreme Court's most important decision this term affecting business litigation did not involve a business. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), will make it harder for numerous civil plaintiffs to escape dismissal of claims brought in federal court. Although the facts in *Iqbal* concern racial and religious discrimination claims by a post-Sept. 11 Muslim detainee, *Iqbal* will have a major impact in business litigation. This is because *Iqbal* expressly applies to the pleading of each element, including knowledge and intent, of every claim in federal court.

Iqbal arose out of the arrest and detention of Javaid Iqbal, a Muslim Pakistani, in the wake of Sept. 11. Mr. Iqbal filed suit in New York federal district court alleging that government officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, adopted certain policies that unconstitutionally discriminated against him while he was in a special maximum security housing unit. Mr. Ashcroft and Mr. Mueller moved to dismiss for failure to state a claim. In particular, they argued that Mr. Iqbal's complaint did not sufficiently allege that they had a discriminatory purpose in adopting the policies at issue. The district court denied their motion.

While appeal to the U.S. Court of Appeals for the Second Circuit was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which held that, at least in the context of an antitrust suit, a complaint must allege "enough facts to state a claim to relief that is plausible on its face."[1] The fatal defect of the complaint in *Twombly* was its failure to plausibly allege an antitrust conspiracy. The Second Circuit considered whether *Twombly* applied to Mr. Iqbal's discrimination claims.

Citing "conflicting signals" in the Supreme Court's decision, the circuit court held that *Twombly* did not create a "universal standard of heightened fact pleading," but rather provided "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."[2] According to the Second Circuit,

> 'Iqbal' and 'Twombly' hold that plaintiffs must plead facts plausibly demonstrating all the elements of their claims.

Mr. Iqbal's discrimination claims, including the allegations of discriminatory intent, did not require *Twombly* "amplification." The court based this conclusion on pre-*Twombly* cases by the Supreme Court that specifically disclaimed the application of heightened pleading standards to allegations of discriminatory intent, as well as the fact that the district court could exercise its discretion to allow limited discovery and expedited summary judgment on the part of the government officials. Consequently, the circuit court affirmed the district court's denial of the motions to dismiss.

The Supreme Court reversed. It held that *Twombly* did indeed apply, and that Mr. Iqbal's complaint fell short of the *Twombly* pleading standard because it failed to allege facts that plausibly established discriminatory purpose on the part of Mr. Ashcroft and Mr. Mueller. The Court made clear that *Twombly* established the governing pleading standard in all federal cases, not just certain circumstances requiring "amplification."

In reaching this result, Justice Anthony M. Kennedy's majority opinion expanded on what the Court had said in *Twombly*. The Court explained that much of Mr. Iqbal's allegations were conclusory and not entitled to a presumption of truth. For instance, allegations that Mr. Ashcroft and Mr. Mueller designed the policies at issue "'solely on account of [Iqbal's] religion, race, and/or national origin and for no legitimate penological interest'" were conclusory and not factual.[3] Such "bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[4]

The Court went on to analyze whether any of the actual factual content alleged by Mr. Iqbal plausibly suggested an entitlement to relief, and determined that it did not. Rather, as it explained, "[a]ll it plausibly suggests is that the nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[5]

While the Court recognized that there were certain differences between the factual content alleged in *Twombly* and *Iqbal*—namely, the "alleged general wrongdoing that extended over a period of years" in *Twombly* contrasted with the "discrete wrongs" alleged in *Iqbal*, the Court nonetheless concluded that Mr. Iqbal's complaint was still fatally implausible.

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Iqbal and *Twombly* adopt a more rigorous reading of Rule 8(a)(2)'s requirement that a pleading must contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief." (Emphasis added). In particular, both decisions rely on Rule 8(a)(2)'s requirement of "showing" to hold that plaintiffs must plead facts plausibly demonstrating all the elements of their claims.[6] For instance, *Twombly* noted that factual allegations are necessary because "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."[7]

Iqbal further recognized, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions…. [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."[8]

Consequences

Iqbal's extended discussion of this tougher application of Rule 8 beyond what was already outlined in *Twombly* has four significant consequences for federal civil litigation.

First, the heightened pleading standards of *Twombly* apply in all federal civil actions. The Court specifically rejected the argument that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute."[9] It explained: "Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"[10] Thus, the heightened pleading standards of *Iqbal/Twombly* will apply in every federal civil case, including product liability, employment discrimination, RICO, and diversity cases.

Second, the heightened pleading standards of *Iqbal/Twombly* apply to allegations of all elements of a claim, including knowledge and intent.[11] This holding expressly applies even when Rule 9(b) is inapplicable because the plaintiff has not alleged fraud.[12] Thus, in securities cases, for example, *Iqbal/Twombly* will require the pleading of factual content that makes allegations such as causation, falsity, and negligence plausible, even when fraud is not alleged.

Third, the *Iqbal/Twombly* standard specifically requires plaintiffs to "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[13] The Court explained that this standard rests on two important principles. The first is that conclusory allegations do not count for purposes of determining whether each element of a cause of action is well pled.[14] And the second is that *Iqbal/Twombly* "requires the reviewing court to draw on its judicial experience and common sense" in deciding whether an alleged element is plausible and not merely possible.[15] In particular, the complaint's allegations are not plausible when there are "more likely explanations" that are consistent with innocent conduct.[16]

Fourth, plaintiffs cannot evade *Iqbal/Twombly*'s heightened pleading standards through promises that discovery will be limited.

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As already mentioned, "Rule 8…does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[17] Similarly, "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."[18] Indeed, given the logic of *Iqbal*, a district court judge should at least have discretion to stay discovery in any federal civil case when a motion to dismiss is pending.

Raising the Bar

Taking these holdings collectively, by requiring factual allegations that show each element of a claim, *Iqbal* and *Twombly* essentially require the complaints of civil plaintiffs to allege particular facts—not conclusions or recitations of elements—that if proven would establish every element of the claim sufficiently to avoid summary judgment before trial or judgment as a matter of law during or after trial.[19] The Supreme Court's decisions have thus established a unitary system under which the plaintiff in every civil case must show, first by allegations and later by proof, all the facts necessary to entitle it to relief.

The plaintiff in *Iqbal* failed to allege facts that, if proven, would have defeated summary judgment or judgment as a matter of law with respect to the essential element of intent, just as the plaintiff in *Twombly* failed to allege facts that, if proven, would have defeated summary judgment or judgment as a matter of law with respect to the essential element of conspiracy. Consequently, in both cases the Supreme Court refused to allow fatally defective complaints to proceed based on the hope or even expectation that discovery would reveal other unalleged facts that would entitle the plaintiff to relief.

Twenty-three years ago in the *Celotex-Anderson-Matsushita* trilogy,[20] the Supreme Court changed the everyday practice of federal civil litigation by resurrecting summary judgment as a major obstacle for plaintiffs by requiring proof of each element at that stage. *Iqbal* and *Twombly* have now raised a similar and earlier bar for every federal civil plaintiff at the motion to dismiss stage by requiring a complaint to contain factual allegations sufficient to support each element. The impact on federal civil practice may be even greater than that of the summary judgment trilogy.

1. *Twombly*, 550 U.S. at 570.
2. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).
3. *Iqbal*, 129 S.Ct. at 1951.
4. Id.
5. Id. at 1952.
6. *Twombly*, 550 U.S. at 555-56; *Iqbal*, 129 S.Ct. at 1949.
7. *Twombly*, 550 U.S. at 556 n.3.
8. *Iqbal*, 129 S.Ct. at 1950.
9. Id. at 1953.
10. Id.
11. Id. at 1954.
12. Id.
13. Id. at 1949.
14. Id. at 1949-50.
15. Id. at 1950.
16. Id. at 1951.
17. Id. at 1950.
18. Id. at 1953.
19. Of course, at the post-pleading stages, the defendant also may present proof and that proof may warrant summary judgment or judgment as a matter of law. In contrast, the facts considered on a motion to dismiss are generally limited to a plaintiff's allegations and admissions, and matters of which a Court may take judicial notice. See, e.g., *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).
20. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986).