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Revolution or Minor Disruption – *Twombly* and *Iqbal* Through the Rear View Mirror

William Frank Carroll
Cox Smith Matthews Incorporated
1201 Elm Street, Suite 3300
Dallas, Texas 75270
Board Certified, Civil Trial Law and Civil Appellate Law by
Texas Board of Legal Specialization

(214) 698-7828
fcarroll@coxsmith.com
www.coxsmith.com

Introduction

- A brief review of *Conley*, *Twombly*, and *Iqbal*.
- The Procedural Rules
- How the Courts of Appeals have interpreted and treated *Twombly* & *Iqbal*
- *Twombly/Iqbal* Effect on:
  - Antitrust Cases
  - Securities Fraud Cases
  - Rule 9(b) Pleading
  - Affirmative Defenses
  - MDL and Fraudulent Joinder
- Recent news

Applicable Federal Rules of Civil Procedure

- Rule 8(a)(2) – “A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief”

- Rule 12(b)(6) – “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted.”

Conley v. Gibson, 355 U.S. 41 (1957)

Background

Certain black members of the Brotherhood of Railway and Steamship Clerks brought a class action against their union alleging that black employees had been discharged from their jobs because their jobs had been abolished. In fact, their jobs had been given to whites. Despite repeated requests, the union did nothing to protect the black employees. Plaintiffs alleged that the union had failed to represent black members equally and violated their rights under the Act to fair representation. The Supreme Court granted certiorari and held:

The Result

The "No Set of Facts" Standard

"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."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

Background

Consumers brought an anti-trust class action against incumbent local exchange carriers (ILECs), the "Baby Bells" that held regional telephone service monopolies alleging that the ILECs had violated the Sherman Act by (a) engaging in "parallel conduct" to inhibit the growth of competitive local exchange carriers (CLECs) and (b) refraining from competing against each other in their respective markets. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Second Circuit reversed. The Supreme Court granted certiorari.

The Result

The Plausibility Standard

- The complaint must contain “enough facts to state a claim to relief that is plausible on its face.”
- Grounds for entitlement to relief under FRCP 8(a)(2) requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
- “Factual allegations must be enough to raise a right to relief above the speculative level.”

Ashcroft v. Iqbal, 566 U.S. 662 (2009)

Background

In November 2001, Iqbal, a Pakistani Muslim, was arrested for having false identification documents. He was designated a person of "high interest" in the 9/11 investigation and held in maximum security. Iqbal served a term in prison, returned to Pakistan, and then brought suit against numerous officials, for the purportedly unconstitutional actions taken against him while he was in prison. The District Court denied the defendant's motion to dismiss. The Second Circuit affirmed. The Supreme Court granted certiorari.

The Result

Clarification of Twombly

- "*Twombly* expounded the pleading standard for 'all civil actions'"
- "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
- "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."

Underlying Rationale

- Promotes litigation efficiency:
  - Narrows the issues
  - Reduces the cost of litigation
  - Reduces unnecessary work and docket clutter

- Promotes efficiency in the discovery process

Courts of Appeals' Treatment of *Twombly* and *Iqbal*

Fifth Circuit

Rhodes v. Prince, 360 Fed. Appx. 555, 558 (5th Cir. 2010).

- Has followed the "two-pronged approach" laid out in *Iqbal* to determine whether a complaint states a plausible claim for relief:
- "First, we must identify those pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Legal conclusions must be supported by factual allegations."
- Upon identifying the well-plead factual allegations, we then assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
- This is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Fifth Circuit
(cont'd)

Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009).

- Take facts alleged as plausible when reasonable minds could differ about their legal outcome.

- In close cases where reasonable minds could differ about the facts alleged, further inquiry is needed before a motion to dismiss can be granted.

First Circuit
(Two-Pronged)

United Auto Workers v. Fortuno, 633 F.3d 37 (1st Cir. 2011).

- Dismissed a plaintiff's complaint holding that the plaintiff had failed to plead sufficient facts to state a plausible claim that the legislation at issue was not reasonable and necessary.

- The Complaint merely alleged conclusory statements, but failed to describe the specific provisions allegedly impaired, the extent of the impairment, why the law was excessively drastic, or the alternative measures available for resolving the budgetary problem.

Second Circuit
(Plausibility)

Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321, 323 (2d Cir. 2010).

- In a case factually similar to *Twombly* – an allegation of an illegal prime-fixing agreement, the details of which were unknown to the plaintiffs – the Second Circuit held that to survive a motion to dismiss, plaintiffs need allege only "enough factual matter (taken as true) to suggest that an agreement was made."
- The complaint succeeded where Twombly's failed "because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants."

Second Circuit
(cont'd)

Anderson News, L.L.C. v. Am. Media, Inc., 2012 U.S. App. LEXIS 6715 (2d Cir. Apr. 3, 2012).

- In a recent case, the Second Circuit held "because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible.
- The choice between or among plausible inferences or scenarios is one for the fact finder . . . A court ruling on a Rule 12(b)(6) motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."
- Thus, if there are two plausible interpretations of the alleged facts, then the complaint cannot be dismissed.

Third Circuit
(Two-Pronged)

Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

- Follows *Iqbal* describing the process for evaluating a complaint as follows:
- First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions.
- Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible legal claim for relief.

Fourth Circuit
(Plausibility)

Coleman v. Md. Court of Appeals, 626 F.3d 187 (4th Cir. 2010).

- "To survive a motion to dismiss, the complaint must state a plausible claim for relief that permits the court to infer more than the mere possibility of misconduct based upon its judicial experience and common sense.
- In this regard, while a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level . . . ."

Sixth Circuit
(Plausibility)

Mediacom Southeast LLC v. BellSouth Telcoms., Inc., 672 F.3d 396, 400 (6th Cir. 2012).

- Held "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 613 (6th Cir. 2009).

- Held that it does not matter if facts *might* exist to support a plaintiff's allegations; rather, it is up to a plaintiff to allege such facts in the complaint itself.

Seventh Circuit
(Notice)

Reynolds v. CB Sports Bar, Inc., 623 F.3d 1143, 1146-7 (7th Cir. 2010).

- Seventh Circuit has taken a different approach to *Twombly* and *Iqbal*.
- These decisions "did not eliminate a plaintiff's opportunity to suggest facts outside the pleading, including on appeal, showing that a complaint should not be dismissed.
- Although a plaintiff is required to plead more than bare legal conclusions to survive a motion to dismiss, once the plaintiff pleads sufficient factual material to state a plausible claim – that is, sufficient to put the defendant on notice of a plausible claim against it – nothing in *Iqbal* or *Twombly* precludes the plaintiff from later suggesting to the court a set of facts, consistent with the well-plead complaint, that shows that the complaint should not be dismissed."

Seventh Circuit
(cont'd)

Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 743 (7th Cir. 2010).

- Although *Twombly* and *Iqbal* "require that a complaint in federal court allege facts sufficient to show that the case is plausible, they do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories."

Eighth Circuit
(Plausibility)

Hamilton v. Palm, 621 F.3d 816, 817-18 (8th Cir. 2010).

- "*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2).

- Rather, those decisions confirmed that Rule 8(a)(2) is satisfied when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

- A pleading that merely pleads labels and conclusions or a formulaic recitation of the elements of a cause of action, or naked assertions devoid of factual enhancement will not suffice."

Ninth Circuit
(Two-Pronged)

Moss v. United States, 572 F.3d 962, 970 (9th Cir. 2009).

- Followed *Iqbal*'s two part approach to pleadings analysis:
- (1) First, a court is to exclude pleadings which are legal conclusions;
- Then (2) the court is to look at the remaining factual allegations and determine whether they state a plausible claim for relief.

Tenth Circuit
(Plausibility)

Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008).

- Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible."

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011).

- Court has also noted that "the nature and specificity of the allegations required to state a plausible claim will vary based on context."

Eleventh Circuit
(Plausibility)

Speaker v. U.S. HHS CDC, 623 F.3d 1371, 1380 (11th Cir. 2010).

- A plaintiff "need not prove his case on the pleadings – [the] complaint must merely provide enough factual material to raise a reasonable inference, and thus a plausible claim, that the CDC was the source of the disclosures at issue."

DC Circuit
(Plausibility)

Hettinga v. United States, 677 F.3d 471 (D.C. Cir. 2012).

- "To survive a motion to dismiss, a complaint must have facial plausibility, meaning it must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

- In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inference that can be derived from the facts alleged.

- Factual allegations, although assumed to be true, must still be enough to raise a right to relief above the speculative level.

- The court need not accept inferences drawn by plaintiff if those inferences are not supported by the facts set out in the complaint, nor must the court accept legal conclusions cast as factual allegations."

Federal Circuit (Plausibility)

Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1062 (Fed. Cir. 2012).

- "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face.
- A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
- The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.
- Determining whether a claim states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Tests that have Evolved in the Wake of Iqbal

The Two-Pronged Test

- First, a court is to exclude allegations which are legal conclusions;
- Then the court is to look at the remaining factual allegations and determine whether they state a plausible claim for relief.

Circuits that follow this test: Fifth, First, Third and Ninth

Tests that have evolved in the Wake of Iqbal

The Plausibility Test

To survive a motion to dismiss, the complaint must :

- State a plausible claim for relief that permits the court to infer more than the mere possibility of misconduct based upon its judicial experience and common sense.
- A plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss.
- Factual allegations must be enough to raise a right to relief above the speculative level.

Circuits that follow this test: Second, Fourth, Sixth, Eighth, Tenth, Eleventh, DC, Federal

Tests that have evolved in the Wake of Iqbal

The Notice Test

- *Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2).

- Those decisions confirmed that Rule 8(a)(2) is satisfied when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Circuits that follow this test: Seventh, Eighth

Test that most Mirrors *Twombly* and *Iqbal* → The Two-Pronged Test

- Most closely follows the language and spirit of the opinion
- Plausibility Test a and is somewhat of a hybrid of the two steps in the Two-Pronged Test
- Notice Test more closely resembles the old *Conley* standard.

Pleading in Antitrust Cases

- Immediately following *Twombly*, some lower courts seemed willing to give the decision its broadest possible interpretation, reasoning that a plaintiff had to plead sufficient facts to exclude possible legitimate justifications for the defendant's conduct.

Pleading in Antitrust Cases

- Examples of *Twombly* in Antitrust Cases:
  - *West Penn Allegheny Health Systems Inc. v. UPMC, Highmark Inc.*, 627 F.3d 85 (3d Cir. 2010).
    - Third Circuit reversed a district court's determination that the complexity of the plaintiff's antitrust case required a heightened, plausibility-plus pleading standard.
    - "It is inappropriate to apply Twombly's plausibility standard with extra bite in antitrust or other complex cases."
  - *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010):
    - Seventh Circuit refused to push *Twombly's* plausibility standard from a "non-negligible probability" threshold to a "preponderance of the evidence" requirement and found the complaint sufficiently pled a plausible antitrust conspiracy to fix prices.

Pleading in Antitrust Cases

- Taken together → Antitrust complaint is sufficient under emerging *Twombly*:
  - Plaintiffs allege direct evidence of an antitrust conspiracy
  - Plaintiffs allege parallel conduct or behavior by defendants and allege facts that suggest such conduct or behavior does not result from chance, coincidence or independent responses to common stimuli.

Pleading in Securities Fraud Cases

Strict pleading standards under the Private Securities Litigation Reform Act:

- Requires that false statements be plead "with particularity"
- Requires that pleading create a "strong inference" of scienter
- Requires that plaintiff prove loss causation

Twombly/Iqbal standard not as high as standard established by PSLRA

Pleading in Securities Fraud Cases

Securities Fraud decision in the wake of *Twombly* and *Iqbal* – *Matrixx Initiatives, Inc. v. Siracusano,* 131 S.Ct. 1309 (2011):

- Requiring an allegation of statistical significance to establish a strong inference of scienter is just as flawed as [the defendant's] approach to materiality."

- Court determined that scienter was adequately plead, because the compliant alleged facts that "taken collectively," gave rise to a "cogent and compelling inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market."

Rule 9(b) and Pleading

FRCP 9(b) – In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Twombly/Iqbal Treatment of Rule 9(b)

- *Twombly/Iqbal* Treatment:
  - *Iqbal* Rule 9(b) allows plaintiffs to prove certain elements of a claim "generally" such as malice, intent, knowledge, and other conditions of a person's mind.
  - "Generally is a relative which, in the context of Rule 9 is to be compared to the particularity requirement applicable to fraud or mistake. "
  - Rule 9 merely "excuses a party from pleading discriminatory intent under an elevated pleading standard, but does not "give him license to evade the less rigid – though still operative – strictures of Rule 8."
  - "Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."

Rule 9(b) in the Wake of Twombly/Iqbal

- Post-*Twombly/Iqbal*:
  - Applies to all cases generally.
  - Heightened pleading standards apply to allegations of all elements of a claim, including knowledge and intent under Rule 9.

Affirmative Defenses

Courts holding *Twombly/Iqbal* does apply:

- Reason that defendants – like plaintiffs when asserting claims – bear the burden of proof and thus should provide plaintiffs fair notice of the defenses.
- Stress the importance of litigation efficiency.
- Cite to the sample affirmative defense form that is appended to the Federal Rules of Civil Procedure, which includes factual detail in support of a statute of limitations defense.

Affirmative Defenses

Twombly applies:

- *Burns v. Dodeka LLC*, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (Cureton, M.J.)
  - "The Court concludes the defendant's affirmative defenses of proximate cause and failure to mitigate are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Twombly* and its progeny."

Affirmative Defenses

Courts holding *Twombly/Iqbal* does not apply:

- Federal Rules of Civil Procedure describe affirmative defenses differently.
  - FRCP 8(a)(2) requires that "claims for relief," including complaints contain "a short and plain statement of the claim showing that the pleader is entitled to relief." But Rule 8(b)(1)(A), governing affirmative defenses, merely requires that a responding party "state in short and plain terms its defenses to each claim asserted against it." There is no required "showing that the defendant is entitled to relief."
  - Some courts do not see it as "fair" to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who have 21 days to respond to a complaint, who did not initiate the lawsuit, and who risk waiving any defense not raised.

Affirmative Defenses

Northern District of Texas example:

- *EEOC v. Courtesy Bldg, Servs. Inc.*, 2011 WL 208408, at *2 (N.D. Tex. Jan. 21, 2011)(Fitzwater)
  - Declining "in the absence of complete briefing and guidance from the Fifth Circuit or the Supreme Court, to extend the *Iqbal* and *Twombly* plausibility standard to the pleading of affirmative defenses."

Multidistrict Litigation and Fraudulent Joinder

Recently, defense attorneys have used the *Twombly/Iqbal* pleading standards to argue fraudulent joinder.

- The test for whether a party has been fraudulently joined is difficult to meet, and the burden is generally on the removing party to show fraudulent joinder by clear and convincing evidence.
- But coupled with a challenge to the pleading itself based on *Twombly/Iqbal*, some removal actions have seen successful.
- Example → *Beavers v. DePuy Orthopedics, Inc.*, 2012 WL 1945603 (N.D. Ohio May 20, 2012).
  - When defendants argued plaintiffs failed to meet the pleading standards articulated in *Twombly*, court held that the allegations against the defendants fell "well below the threshold required to meet the plausibility standard required under *Twombly* . . . Plaintiffs' allegations fail to distinguish between the [defendants'] allegedly wrongful acts and those of [the other defendants]."
  - If no possible basis to recover against non-diverse defendant.
  - Compare *Freitas v. McKesson Corp.,* 2012 U.S. Dist. Lexis 91256 (E.D. Ken. 2012).

Erikson v. Pardus

551 U.S. 89 (2007)

Pleading Standard for Pro Se Litigants

Supreme Court found pro se litigant's allegations sufficient to meet the pleading standard established by *Twombly/Iqbal* and noted that "a document filed *pro se* is to be liberally construed."

Recent News

- Federal Judicial Center Report (http://www.fjc.gov/public)
  - Found that there was an increase in the rate of motion-to-dismiss filings in the wake of *Twombly* and *Iqbal*
  - Found no general increase in the rate at which federal judges granted motions to dismiss with prejudice.
- Yale Law Journal Article [121 Yale L.J. 270 (2012)]
  - Argues that a simple comparison of dismissal rates, like the FJC's study, is not the proper way to evaluate the impact of the two decisions.
  - Concludes that subsequent to *Twombly* and *Iqbal*, 20% more cases fail to reach discovery under the heightened pleading standard.

CONCLUSION

- Attitude Adjustment
- Complex Case Application
- Practice Points

PRACTICE POINTS

1. Complex Cases
2. Plaintiff's Complaint
3. Do you want to file that Motion to Dismiss
   a) Incurable
   b) Take the Court's temperature
   c) Set the Discovery Plate