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Best Pleading Practices in Federal Court Following Twombly and Iqbal

Article By:

C. James Zeszutek

Federal court litigation can be a regular occurrence for many organizations. Often, litigants invest the bulk of their time and resources in managing discovery, developing experts and setting up cases for summary judgment. While these are critical aspects of the case, in light of recent U.S. Supreme Court case law, litigants may be well served to invest additional time and resources into developing what many consider to be more basic documents in litigation: complaints, answers, and motions to dismiss.

Indeed, the standards for drafting and challenging civil complaints in federal court have changed a great deal in light of the recent *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) decisions issued by the United States Supreme Court. Case law interpreting these two decisions is rapidly developing in each circuit, and litigants may be able to survive or achieve an early exit based on how well they understand this body of law in the jurisdictions where they may engage or be engaged in litigation.

In understanding how to draft and challenge civil complaints in light of *Twombly* and *Iqbal*, it is helpful, if not essential, to understand the policy behind Rule 8 of the Federal Rules of Civil Procedure. The starting point for analyzing and responding to complaints always must be Rule 8(a)(2), which requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *See Amer. Dental Assoc. v. Cigna Corp.*, 2010 U.S. App. LEXIS 9928, *10 (11th Cir. May 14, 2010) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). According to one federal judge in the Western District of Pennsylvania, the policy driving the application of Rule 8 has always been finding the right balance between allowing plaintiffs access to federal courts while still conserving defendants' and the court resources.

After *Conley*, which set out a fairly liberal pleading standard, federal court dockets across the country experienced mounting pressure due to increasing case volume. This pressure led to a judicial backlash resulting in heightened pleading standards being implemented through case law in piecemeal fashion. The United States Supreme Court effectively slammed the door on these heightened standards over the years in various cases, by noting the difference between Rules 8 and 9 (dealing with heightened pleading requirements for fraud).

The Court explained that - had the authors of the Rules intended for there to be heightened pleading requirements in cases other than fraud - the authors would have specifically included them in the Rules as they did with Rule 9. Thus, for years, the Court has taken the position that any changes to the pleading standards should come not via case law but instead via the rule-making process. Without much explanation, the Supreme Court totally reversed its position in its recent opinions in *Twombly* and *Iqbal*.

The United States Court of Appeals for the Eleventh Circuit's recent decision in *Amer. Dental Assoc. v. Cigna Corp.*, 2010 U.S. App. LEXIS 9928 (11th Cir. May 14, 2010) provides a helpful discussion of *Twombly* and *Iqbal*.

In *Twombly*, the Supreme Court expressly "retired" *Conley*. *See Amer. Dental Assoc.*, 2010 U.S. App. LEXIS 9928 at *10 (citing *Twombly*, 550 U.S. at 563). Justice Black wrote for the Court in *Conley* of "the accepted rule that 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." *See Id.* (quoting *Conley*, 355 U.S. at 45-46). "In rejecting that language, the Court in *Twombly* noted that courts had read the rule so narrowly and literally that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."" *Id.* (quoting *Twombly*, 550 U.S. at 561 (internal quotation marks and alterations omitted).

"In *Twombly*, the plaintiffs alleged an antitrust conspiracy among certain regional telecommunications providers in violation of the Sherman Act, 15 U.S.C. § 1 (2006)." *Id.* at *11 (citing *Twombly*, 550 U.S. at 550). "Their complaint relied on allegations of the defendants' parallel behavior to allege the conspiracy." *Id.* "The Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Id.* (citing *Twombly*, 550 U.S. at 553). Justice Souter, writing for a substantial majority, first noted:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. (citing *Twombly*, 550 U.S. at 555). The Court explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level...on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at *12 (quoting *Twombly*, 550 U.S. at 555).

The *Twombly* Court ultimately held that to survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 570). "Cautioning that its new plausibility standard is not akin to a "probability requirement" at the pleading stage, the Court nonetheless held that the standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the claim." *Id.* (citing *Twombly*, 550 U.S. at 556). "The Court was careful to note that "we do not require heightened fact pleading of specifics," but concluded that when plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."" *Id.* (citing *Twombly*, 550 U.S. at 570). "Finding that the plaintiffs' complaint did not plausibly suggest an illegal conspiracy by merely alleging parallel conduct--because such parallel conduct was more likely explained by lawful, independent market behavior--the Court held that the district court properly dismissed the complaint."

Id. (citing *Twombly*, 550 U.S. at 567-70).

"The Supreme Court has since applied the *Twombly* plausibility standard to another type of civil action in *Ashcroft v. Iqbal*,129 S. Ct. 1937 (2009)." *Id.* at *13. "*Iqbal* involved a Bivens action brought by a Muslim Pakistani who had been arrested and detained following the September 11, 2001 terrorist attacks." *Id.* (citing *Iqbal*,129 S. Ct. at 1943). He sued current and former federal officials, including John Ashcroft, former Attorney General of the United States, and Robert Mueller, the Director of the FBI. *Id.* (citing *Iqbal*,129 S. Ct.at 1942). Iqbal alleged that Ashcroft and Mueller adopted and implemented a detention policy for persons of high interest after September 11, and that they designated him a person of high interest on account of his race, religion, or national origin, in violation of the First and Fifth Amendments to the Constitution. *Id.* at *13-14 (citing *Iqbal*,129 S. Ct. at 1944). Iqbal's complaint alleged that Ashcroft was the "principal architect" of the policy and identified Mueller as "instrumental in [its] adoption, promulgation, and implementation," but also stated that both men "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement "as a matter of policy...for no legitimate penological interest." *Id.* at *14 (citing *Iqbal*,129 S. Ct. at 1944) (alteration in original).

In evaluating the sufficiency of Iqbal's complaint in light of *Twombly's* construction of Rule 8, the Court explained the "working principles" underlying its decision in that case. *Id.* (citing *Iqbal*,129 S. Ct. at 1949). First, the Court held that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Second, restating the plausibility standard, the Court held that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.'" *Id.* (citing *Iqbal*,129 S. Ct. at 1950) (quoting Fed. R. Civ. P. 8(a)(2)). "The Court suggested that courts considering motions to dismiss adopt a "two-pronged approach" in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."" *Id.* at *14-15. "Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Id.* at *15 (citing *Iqbal*,129 S. Ct. at 1951-52) (quoting *Twombly*, 550 U.S. at 567)). Finally, the *Iqbal* Court explicitly held that the *Twombly* plausibility standard applies to all civil actions, not merely antitrust actions, because it is an interpretation of Rule 8. *Id.* (citing *Iqbal*,129 S. Ct. at 1953).

"Applying these principles to Iqbal's complaint, the Court began by disregarding as wholly conclusory Iqbal's allegations that Mueller was "instrumental" in adopting the detention policy and Ashcroft was the "principal architect" of the policy, and that they willfully agreed to subject Iqbal to harsh treatment for a discriminatory purpose." *Id.* (citing *Iqbal*,129 S. Ct. at 1951). "The Court then determined that the remaining factual allegations--that Mueller and Ashcroft approved the FBI's policy of arresting and detaining thousands of Arab Muslim men as part of its investigation into the events of September 11--did not plausibly establish the purposeful, invidious discrimination that Iqbal asked the Court to infer." *Id.* at *15-16 (citing *Iqbal*,129 S. Ct. at 1951-52). "The alternative inferences that could be drawn from the facts--namely, that the arrests were likely lawful and justified by a nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts--were at least equally compelling." *Id.* at *16. "Accordingly, the Court ruled that Iqbal's complaint must be dismissed." *Id.* at *16 (citing *Iqbal*,129 S. Ct. at 1954).

In short, *Twombly* and *Iqbal* provide defendants with a real opportunity to be dismissed from cases

much earlier than under *Conley*; however, these opinions are seemingly interpreted differently depending on context, jurisdiction, and judge. For example, according to one judge of the U.S. Court of Appeals for the Third Circuit, the facts averred in a complaint must be viewed in the context of the type of case, i.e., certain levels of specificity might work for some cases (e.g., negligence), while more detail may be required for others (e.g., antitrust).

Twombly and *Iqbal* have been interpreted in the Third Circuit in two key cases: *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008) and *Fowler v. UPMC Shadyside*, 578 F.3d 303 (3d Cir. 2009). These cases should likely be addressed in all motions to dismiss based on failure to state a claim brought in the Third Circuit.

Phillips basically adopts *Iqbal*, but makes it even more explicitly clear that context matters, i.e., what might be ripe for 12(b)(6) in one case may not be in another case. *Fowler* developed a two-part analysis for determining whether a Complaint should be dismissed under 12(b)(6). First, the Court must accept all facts in the Complaint as true, but may disregard legal conclusions. Second, the Court must determine whether the facts alleged are sufficient to show a plausible claim for relief. Basically, not a great deal has changed since *Conley*, except that context matters. Plaintiffs must show the "how, when, and where" of their claim such that relief is plausible. If defendants are left asking these questions after reading the complaint, the complaint may be susceptible to a 12(b)(6) motion to dismiss.

In short, there is a move away from notice pleading toward fact pleading in the federal courts (much like the standard that exists in various state courts), but how many and what sort of facts are required will differ from case to case based on context. It is absolutely essential to note that *Twombly* and *Iqbal* not only vary in application from jurisdiction to jurisdiction, but also likely vary in application from judge to judge within a jurisdiction. Thus, it might be beneficial to research cases actually decided by one's particular judge, e.g., in the Western District of Pennsylvania, doing research for Fischer opinions, McVerry opinions, Conti opinions, and others.

Recently, one judge in the Western District of Pennsylvania stressed that plaintiffs and defendants should spend a great deal of time drafting complaints and answers and preparing for the Rule 16 Conference. This judge explained that she is much more apt to grant a motion for judgment on the pleadings following a very detailed voir dire during the Rule 16 conference about the complaint, the answer, and the defenses. This judge hinted that - given the heightened pleading standards following *Twombly* and *Iqbal* coupled with the notice pleading tradition under Rule 8 - detailed questions about the merits during Rule 16 may be asked and parties can use this as an opportunity to set up a motion for judgment on the pleadings. In other words, according to at least one federal judge, if litigants take time to follow *Twombly* and *Iqbal*. even though Rule 8 may still preclude an outright dismissal under (12)(b)(6), a motion for judgment on the pleading may be used to achieve an early exit from litigation. This judge also explained that she - and presumably other judges - will also use common sense and experience in determining whether discovery may bear out a claim that appears to be deficient in the Complaint.

Twombly and *Iqbal* set up a whole host of other issues, including (1) whether *Twombly* and *Iqbal* should apply to affirmative defenses (i.e., should defendants be required to fact plead defenses) and (2) how many chances should plaintiffs get to amend before dismissal is with prejudice under 12(b)(6). In some jurisdictions, including the Western District of Pennsylvania, it has already been held that these standards do not apply to affirmative defenses. However, one Western District of Pennsylvania judge has explained that more detailed pleading by defendants -- like more detailed pleading by plaintiffs -- can lead to a successful motion for judgment on the pleadings where 12(b)(6)

dismissal may not be appropriate. Also, according to the same judge, trial court judges have wide latitude to allow amendments. Different judges may allow a pro se plaintiff to amend a complaint multiple times, while corporate defendants may only get one chance to amend.

In sum, civil complaints must state the elements and facts supporting the claim. Basically federal pleading, particularly in the Third Circuit, is essentially now "notice pleading plus," that shifts closer to notice pleading or closer to factual pleading depending upon the subject matter and context of the case. The best practice is likely to fully understand the context of the case, how one's jurisdiction applies *Twombly* and *Iqbal*, and how one's judge tends to interpret these decisions. In any event, if litigants spend the time and resources at the pleading stage, they may have more success than they had prior to *Twombly* and *Iqbal* when filing 12(b)(6) motions to dismiss or on motions for judgment on the pleadings.

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