Are You Drafting a Motion to Dismiss?

The Paradigm Shift in Civil Action Pleading Standards

By Paul M. da Costa and Ingrid E. Melnichuk

It is imperative that young lawyers equip themselves with the necessary tools to draft motions that will satisfy the new plausibility standard.

With the May 2, 2009, decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a new era of pleading standards was ushered in by the Supreme Court. The *Iqbal* decision eviscerated the precedent of *Conley v. Gibson*, 355 U.S. 41 (1957), which had established the "no set of facts" pleading standard. Consequently, the new, heightened pleading standard expressed in *Iqbal* will now provide young lawyers with opportunities to directly impact the outcome of cases in drafting motions to dismiss. These motions to dismiss will focus on satisfying the new "plausibility standard" enunciated by the Supreme Court.

Background: Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*

In a deceptively simple manner, Federal Rule of Civil Procedure 8(a)(2) sets forth the requirements for a pleading as "a short and plain statement of the claim showing that the pleader is entitled to relief." No mention of the requisite level of detail is contained in the rule, thereby engendering dispute among practitioners over the specificity necessary to survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.

The Fed. R. Civ. P. 8(a)(2) pleading standard was first clarified by the United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957). The *Conley* Court announced 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." *Conley*, 355 U.S. at 45–46. In establishing the "no set of facts" standard, the Court reasoned that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. In *Conley*, the Court explained that these two essential and simple requirements of notice were justified by the "liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47–48.

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Furthermore, in *Conley*, the Court found support for its standard in Fed. R. Civ. P. 8(f), which provides that "'all pleadings shall be so construed as to do substantial justice.'" Conley, 355 U.S. at 48 (quoting Fed. R. Civ. P. 8(f)). The Court also emphasized and admonished that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* Thus, following *Conley*, practitioners followed a "notice pleading" standard that provided minimal detail—a short, plain statement that provided a defendant with notice of the plaintiff's complaint and the grounds for the claim—to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

The *Iqbal* decision eviscerated the precedent of *Conley v. Gibson*..., which had established the "no set of facts" pleading standard.

This standard, however, caused great consternation for practitioners, especially when read in conjunction with *Conley*'s "no set of facts" pronouncement. A literal reading of the "no set of facts" standard could obviate all chance that a defendant could prevail on a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Despite the great uncertainty that the *Conley* decision created, practitioners and courts soldiered on for half a century before the United States Supreme Court had occasion to address and reconstruct the pleading standard.

Bell Atlantic Corp. v. Twombly

After fifty years of confusing courts and practitioners alike, *Conley*'s "no set of facts" pleading standard "earned its retirement" in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007). Reasoning that literally interpreting the "no set of facts" language could result in a claim surviving a Fed. R. Civ. P. 12(b)(6) motion to dismiss "whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery," despite the claim's conclusory nature, the Supreme Court proclaimed a new pleading standard in *Twombly*. *Id.* at 561. Cautioning that the new standard did not require heightened fact pleading and focusing its application of the new standard on the viability of Sherman Act claims, without expressly declining to extend the new standard to other claims, the *Twombly* court embarked on a dramatic change of course in pleading requirements. The *Twombly* decision, however, did not provide practitioners with a reliable compass to lead them.

In *Twombly*, the Court framed the issue as "whether a §1 [of the Sherman Act, 15 U.S.C. §1] Complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Twombly*, 550 U.S. at 548. After briefly discussing that detailed factual allegations were not necessary to survive a Fed. R. Civ. P. 12(b)(6) motion, the Court emphasized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Thus, to satisfy the requirements of "fair notice" and "grounds," the Court explained that the factual allegations must fall somewhere on the spectrum between detailed and merely speculative. *Id.* This acceptable level of "showing," as opposed to a mere blanket assertion, was articulated by the *Twombly* court as "plausibility." *Id.* at 556–57. A showing of plausibility, as opposed to possibility, was necessary to equip the "plain statement" with sufficient "heft" to demonstrate a plaintiff's entitlement to the requested relief. *Id.* at 557.

The main concern propelling the Court to dramatically alter the landscape of pleading requirements was the recognition that deficient and groundless claims were draining the resources of defendants who, as a result of the holding in *Conley*, were forced to expend substantial time and money in discovery. *Id.* at 557–60. Of particular dismay to the Court in *Twombly* was the fact that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the summary judgment stage]." *Id.* at 559.

Therefore, *Twombly* appeared to retire the *Conley* standard. In particular, the Court held that "[t]he ['no set of facts'] phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the Complaint." *Twombly*, 550 U.S. at 562–63. In his dissent, Justice Stevens foreshadowed the confusion that would follow in the wake of the majority's decision, commenting that "[w]hether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a Complaint will inure to the benefit of all civil defendants, is a question that the future will answer." *Id.* at 596 (Stevens, J., dissenting).

After *Twombly*, practitioners and courts vigorously debated whether the change in the pleading standard announced by the Court could and should be applied in contexts other than Sherman Act or antitrust cases. Confusing matters further was the Supreme Court's decision in *Erickson v. Pardus*, 551 U.S. 89 (2007), which was handed down a mere two weeks after *Twombly*.

Erickson v. Pardus

In *Erickson*, the Supreme Court vacated the lower courts' dismissal of a *pro se* prisoner's Complaint, which alleged Eight and Fourteenth Amendment violations. *Erickson v. Pardus*, 551 U.S. 89, 90 (2007). The lower courts based the dismissal on the finding that the allegations of the Complaint were "conclusory." *Id.* Without much analysis, the *Erickson* court reached its conclusion, noting the requirements of Fed. R. Civ. P. 8(a)(2), citing *Conley*'s requirement of fair notice of the claim and its grounds, and citing *Twombly*, stating that "[i]n addition, when ruling on a defendant's motion to dismiss, a judgment must accept as true all of the factual allegations contained in the Complaint." *Id.* at 93–94 (citations omitted). Consequently, the Court found that the plaintiff's allegations that the decision to remove treatment was "endangering

[his] life" were not "too conclusory" to survive a motion to dismiss. *Id.* at 94.

To Extend, but How Far?

Over the next two years, the circuit courts took divergent approaches in addressing whether *Twombly* applied beyond the antitrust context and in determining just how far. Some circuits extended the holding in *Twombly* to all civil cases without any fanfare regarding *Twombly*'s antitrust roots. For example, in a case involving a section 1983 Civil Rights Act action, the Eleventh Circuit set forth *Twombly*'s newly articulated plausibility standard without mentioning the antitrust context from which the standard had emerged and without hesitating to apply it to a non-antitrust matter. *Watts v. Florida Int'l. Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007).

Similarly, in a case involving allegations of race discrimination, the Eighth Circuit articulated that *Twombly* overruled *Conley* and established "a plausibility standard for motions to dismiss," but without mentioning *Twombly*'s antitrust underpinnings. *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009). Additionally, the Fifth Circuit, in a case involving allegations of First and Fourth Amendments violations, simply stated, in passing, that "[t]o resist dismissal, plaintiffs must plead 'enough facts to state a claim for relief that is plausible on its face.'" *Club Retro LLC v. Hilton*, 568 F.3d 181 (5th Cir. 2009) (quoting *Twombly*, 550 U.S. at 570). No further discussion of *Twombly*'s plausibility standard or antitrust context followed. The District of Columbia Circuit followed suit in a case involving allegations of breach of contract and violations of the First Amendment and the District of Columbia Whistleblower Act by merely stating, "[a] court may dismiss under Rule 12(b)(6) if, accepting the allegations in the Complaint as true, the plaintiff has nonetheless failed to state plausible grounds for relief." *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009).

While extending the applicability of *Twombly*'s plausibility standard beyond antitrust actions, other circuits directly addressed the inherent confusion regarding the scope of *Twombly*. Ultimately, the extensive analysis of one of these circuits, the Second Circuit, served as the catalyst that definitively altered the pleadings landscape. In *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), the Second Circuit engaged in a sweeping discussion of the confusion created by the Supreme Court's conflicting signals and the possible impact of *Twombly*'s antitrust context. The court reasoned that the following four signals indicated that the Supreme Court had established a new, heightened pleading standard: (1) the explicit renunciation of *Conley*'s "no set of facts" standard; (2) the indication through use of various phrases that "more than notice of a claim is needed to allege a section 1 violation based on competitors' parallel conduct"; (3) the dismissive attitude toward case management's utility in weeding out claims; and (4) the abundant use of the word "plausibility" in various forms throughout the opinion. *Id.* at 155–56.

Conversely, the court reasoned that the following five signals indicated that the Supreme Court had intended to limit *Twombly*'s application to section 1 allegations and support a somewhat lenient pleading standard: (1) the *Twombly* court had explicitly refuted that it had formulated a heightened pleading standard; (2) the Court had expressly approved Form 9 of the Federal Civil Rules, Complaint for Negligence; (3) the Court had emphasized the all-consuming and expensive discovery antitrust actions that often pushed defendants to settle otherwise weak cases; (4) the decision, while expressing doubts about the weeding out process, did not overturn its prior comment in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) that "federal courts and litigations must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later;" and (5) the Court had rendered a decision supporting this view in the subsequent *Erickson*'s decision. *Id.* at 156–57.

Ultimately, the Second Circuit concluded that it was "reluctant to assume" that *Twombly* applied only to antitrust cases or section 1 claims, stating that "we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring 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*." *Id.* at 157–58 (emphasis in original).

Subsequent Second Circuit cases noted that "[w]e have declined to read *Twombly*'s flexible 'plausibility standard' as relating only to antitrust cases." *Atsi Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98, n.2 (2d Cir. 2007) (securities fraud action); *see also In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007) ("A narrow view of *Twombly* would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that *Twombly* affects pleading standards somewhat more broadly").

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Likewise, the Third Circuit recognized that the *Twombly* decision had left unanswered questions respecting the scope of applicability of its groundbreaking alteration of the pleading standard. *See Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008); *Wilkerson v. New Media Technology Charter School Inc.*, 522 F.3d 315 (3d Cir. 2008); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162 (3d Cir. 2008).

In *Phillips*, the Third Circuit discussed the question raised by Justice Stevens in his *Twombly* dissent regarding whether *Twombly* applied only to antitrust cases. *Phillips*, 515 F.3d at 233–34. Finding an answer to this question "difficult to divine," the Third Circuit, at the end of the day, "decline[d] at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context," thereby applying it to an action for violations of 42 U.S.C. §1983. *Id.* at 234. Subsequently, in *Wilkerson*, the Third Circuit "extend[ed] [its] holding in *Philips* to the employment discrimination context." *Wilkerson*, 522 F.3d at 322. The Third Circuit also later extended its holding to a case involving equitable indemnification claims. *Sovereign Bank*, 533 F.3d at 173, n.7 (noting the holdings in *Phillips*

and *Wilkerson* and concluding that "[w]e see no reason why *Twombly*'s plausibility standard does not apply to the Complaint before us now").

Ashcroft v. Iqbal

When the Supreme Court rendered its decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), all ambiguity and conflict among the various federal courts were conclusively resolved. Specifically, the Supreme Court clearly enunciated that the heightened pleading standard established in *Twombly* applied to all civil actions, as opposed to merely antitrust claims.

The absence of facts to support elements of a cause of action becomes evidence to support the position that the plaintiff's complaint contains no more than legal conclusions.

The *Iqbal* matter came before the Supreme Court through a writ of certiorari, and the respondent Javaid Iqbal alleged that he had been deprived of his constitutional rights while in federal custody. Mr. Iqbal was a Pakistani citizen who was arrested in the United States on criminal charges following the September 11, 2001, terrorist attacks. Mr. Iqbal filed a complaint against several federal officials, including the former Attorney General of the United States, John Ashcroft, and the Director of the Federal Bureau of Investigation, Robert Mueller. In particular, Mr. Iqbal alleged that he had been subjected to harsh conditions of confinement due to his race, religion or national origin. The complaint filed by Mr. Iqbal did not challenge his arrest or confinement; rather, the complaint asserted that he had been unconstitutionally designated as a person of high interest solely on the basis of his race, religion or national origin, which he claimed was a clear violation of the First and Fifth Amendments of the Constitution.

Consequently, the issue before the Supreme Court was whether Mr. Iqbal "plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established Constitutional rights." *Ashcroft*, 129 S. Ct. at 1943. The *Iqbal* Court held that the pleadings contained in Mr. Iqbal's complaint were insufficient. *Id.* The Supreme Court's undoubtedly made its holding through the prism of its earlier decision in *Twombly*.

The Supreme Court's prior pronouncements that had in practice amounted to a new, heightened pleading standard were all expressly adopted in *Iqbal*. As enunciated in *Twombly*, the *Iqbal* decision held that a complaint is insufficient if it contains mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'…." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555). The new plausibility standard was also unequivocally adopted insofar as the *Iqbal* decision reiterated that "a Complaint must 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). Furthermore, the plausibility standard was clarified and reinforced.

Specifically, the Supreme Court clearly stated that the plausibility standard is not analogous to a probability requirement, but rather the standard is satisfied when a plaintiff's pleadings permit a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A court's exercise in determining whether a complaint satisfies the plausibility standard involves context-specific tasks that draw on the court's experience and common sense. *Id.* at 1950 (internal citation omitted). Moreover, the plausibility standard will only be met if a review of the facts in a complaint "do[es] not permit the court to infer more than the mere possibility of misconduct…." *Id.*

In *Iqbal*, the Supreme Court outlined a two-pronged approach, which courts should use when considering a motion to dismiss. *Id.* First, a court should begin its analysis by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Second, assuming that a court can identify "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly given rise to an entitlement to relief." *Id.* Succinctly, the Supreme Court further explained the plausibility standard as the difference between specifying claims with sufficient facts to make allegations contained in a complaint *conceivable*, as opposed to the claims that simply seem *plausible*. *Id.* at 1951. The *Iqbal* decision also made a vital distinction between allegations in a complaint that are conclusory in nature, rather than fanciful in nature, which "disentitles them to the presumption of truth." *Id.*

The new, heightened pleading standard in *Iqbal* was also grounded in Federal Rule of Civil Procedure 8. In particular, the Court emphasized that its decision in *Twombly* established the pleading standard for all civil actions, which was based on an "interpretation and application of Rule 8"… that "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Id.* at 1953 (citing *Twombly*, 550 U.S. at 554). The respondents' argument in *Iqbal* that Fed. R. Civ. P. 8 should be constructed in such a manner that a complaint should survive a motion to dismiss in an effort to allow discovery to flush out the allegations' merits was plainly rejected. The Court rejected this argument, opining that "the question presented by a motion to dismiss a Complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Id.* (citing *Twombly*, 550 U.S. at 559). Accordingly, the Court held that Mr. Iqbal was not entitled to discovery since his complaint was deficient under Fed. R. Civ. P. 8. *Id.* at 1954. The Court's interpretation of rule 8 also resulted in the conclusion that the rule did not empower a plaintiff "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." *Id.*

Importance to Young Lawyers of the New, Heightened Pleading Standard Enunciated in *Twombly* and *Iqbal*

Since young lawyers certainly will confront the task of drafting motions to dismiss plaintiffs' complaints based on the new, heightened pleading standard enunciated in *Twombly* and *Iqbal*, it is imperative that they

equip themselves with the necessary tools to draft motions that will satisfy the Supreme Court's new plausibility standard. Accordingly, the *Iqbal* decision provides several guideposts for young lawyers to follow when drafting motions to dismiss.

First, after initially reviewing a plaintiff's complaint, the young lawyer should identify the explicit and implicit causes of action that the plaintiff has asserted. Then, a young lawyer should conduct research to discern all of the necessary elements that a plaintiff must satisfy to state a claim based on each cause of action. It is essential that the young lawyer have a command on all of the necessary elements corresponding to each cause of action insofar as that will serve as his or her framework for analyzing the complaint to determine whether the plaintiff has satisfied the new, heightened pleading standard articulated in *Iqbal*.

Second, a young lawyer must perform a thorough review of a complaint to determine whether the plaintiff has set forth facts in support of each element of the causes of action plead in the complaint. If no facts support the elements in the causes of action, a motion to dismiss becomes that much easier to draft: the absence of facts is conclusive evidence that a complaint is an insufficient pleading. Specifically, the absence of facts to support elements of a cause of action becomes evidence to support the position that the plaintiff's complaint contains no more than legal conclusions, which a young lawyer can argue in the motion to dismiss. Accordingly, the plaintiff cannot satisfy the plausibility standard discussed in *Twombly* and *Iqbal* with mere conclusions: conclusions are not entitled to a court's assumption of truth.

The task of identifying facts plead in support of the elements of each cause of action is also imperative when a plaintiff has plead some facts. Even if a plaintiff has included some facts in its complaint, a young lawyer drafting a motion to dismiss should focus his or her efforts on arguing why and how the facts are not well-plead facts that should receive court deference and as such, presumed as true. Furthermore, an argument in support of the motion to dismiss should devote attention to explaining how and why the factual allegations in a complaint cannot plausibly give rise to an entitlement to relief.

Third, a young lawyer should juxtapose the facts contained in a complaint with the elements of each cause of action asserted. This exercise will likely allow a young lawyer to directly argue with some ease that the facts alleged in the complaint are not entitled to the presumption of truth since they are conclusory in nature. Comparing the facts plead with the causes of action will permit the motion to dismiss to prove that the facts "amount to nothing more than a 'formulaic recitation of the elements'" of the causes of action asserted in the complaint. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

Fourth, the motion to dismiss should preemptively address a plaintiff's prospective argument that the motion is premature since no, or only sparse, discovery had been conducted at the time that the motion was filed. Irrespective of the complexity of the underlying dispute that forms the basis of a plaintiff's complaint, the Supreme Court unequivocally rejected a "careful-case-management approach." *Id.* at 1953. Thus, a motion to dismiss should make an effort to methodically explain how none of the factual allegations in a plaintiff's complaint could be buttressed by conducting any discovery. Rather, the motion to dismiss ought to argue that no discovery tools will transform the plaintiff's bare allegations into well-plead factual allegations the veracity of which a court must then assume.

Last, a young lawyer must focus on establishing that discovery mechanisms cannot overhaul a plaintiff's complaint, thereby pushing the asserted claims "across the line from conceivable to plausible." *Id.* at 1951. Assuming that a complaint does contain some factual allegations, a young lawyer's task in drafting the motion to dismiss is best served if an analysis is provided that can show none of the elements of the causes of action can be plausibly supported by the facts plead in the complaint. As mentioned above briefly, compare each fact plead in the complaint with the elements of each cause of action, and then explain why and how the factual allegations cannot plausibly establish these causes of action. If possible, use the factual allegations affirmatively to show alternative explanations for the outcome asserted by a plaintiff. FD