Opening Statement

Twombly and *Iqbal*: A License to Dismiss

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For 50 years, decisions on motions to dismiss for failure to state a claim were a fairly simple matter in federal court.

They were, by and large, denied.

Rarely was a motion to dismiss granted under Federal Rule of Civil Procedure 12(b)(6) in light of the famous admonition in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), 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 that would entitle him to relief."

Then, the U.S. Supreme Court decided *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), in which it discarded the oft-cited "no set of facts" standard. "[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement." Those words have proved to be a bit unfortunate because, in the two years or so since *Twombly* was decided, it appears to have caused more than its own share of confusion as litigators and judges have struggled with the meaning and scope of the opinion.

Did the Court intend to create a heightened standard? If so, would it apply only in antitrust cases such as *Twombly*, or to any complex litigation case? Or was it meant to be applied in all civil cases? With the Court's recent decision in *Ashcroft v. Iqbal*, 2009 WL 1361536 (U.S.), we have some answers, even more questions, and, at a minimum, it seems fair to conclude that *Conley* is not merely retired, it is dead and buried. Of particular note is the fact that the 5-4 majority in *Iqbal* did not include the author of the *Twombly* decision, retiring Justice David Souter, who wrote a dissent criticizing the majority for taking the holding in *Twombly* far beyond its original intent.

In *Twombly*, the Court was not so much concerned with the niceties of the pleading standard as it was with restricting access to the keys to the discovery kingdom. For with those keys comes the power to impose huge costs, both in terms of dollars and time, on the defendant. So imposing are those costs, the Court noted in *Twombly*, that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." 550 U.S. at ___.

To remedy the problem it perceived of defendants being subjected to costly discovery based on marginal pleadings, the Court took an indirect approach—stop the offenders at the discovery gate—rather than trying to deal with the discovery process itself. Somewhat surprisingly, in *Twombly* the Court imposed a more fact-based pleading requirement on an antitrust class action plaintiff only after acknowledging that district court judges have been largely unsuccessful at controlling discovery through case management.

Iqbal arises in a very different context but also involves the intersection of pleading and discovery. In *Iqbal*, the Court's concern was not so much with the financial costs of discovery as it was with allowing a lawsuit to divert the attention of two of the nation's top government officials—the attorney general and the FBI director—from their official duties. So instead of discussing, as it did in *Twombly*, the risk of parties capitulating to unreasonable settlements rather than spending large amounts of time and money defending the action, here the Court focused on the qualified-immunity doctrine's goal of "free[ing] officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" 2009 WL 1361536 at 15.

But *Iqbal* differed from *Twombly* in yet another important way. Even after dividing the allegations in the complaint into allegations of law and fact, disregarding the former and parsing the latter, the Court could not say that, taken as true, the factual allegations failed to set forth the basis for a claim. So under the guise of explaining the concept of "plausibility" first announced in *Twombly*, the Court imposed a gatekeeper-type duty

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on the district court that applies even if the allegations of the complaint are well pleaded and thus assumed to be true.

This is where *Iqbal* drastically changed the landscape for Rule 12(b)(6) motions. The Court described the gatekeeper process as "a context-specific task that requires the reviewing court to *draw on its judicial experience and common sense*." *Id*. at 13 (emphasis added). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. Then, in a particularly troubling sentence, the Court suggests that a complaint must not only be consistent with the claim asserted, but must also exclude "more likely explanations." *Id*. at 14.

What, exactly, does that mean? At a minimum, it appears to be a standard that invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint. For example, in *Iqbal*, the plaintiff—a Pakistani Muslim—sued numerous government officials asserting violation of various constitutional rights, alleging that, following the events of September 11, 2001, he was classified as a "high interest" detainee and held in extremely harsh conditions as a matter of policy based "solely on account of [his] religion, race, and/or national origin, and for no legitimate penological reason." *Id*. at 14. Although conceding his allegations, taken as true, are consistent with his theory of being classified as "of high interest" based on race, religion or national origin, the Court nonetheless found Iqbal's allegations of discriminatory treatment implausible:

> It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, *even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent* to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Id. at 15 (emphasis added).

Of course, Iqbal did not ask the Supreme Court to "infer" anything. He merely sought to have the allegations in his complaint taken as true for purposes of the motion to dismiss so that the case could move forward with discovery and proceed to trial.

Instead, based on the majority's subjective determination of the "purpose" of the government's policy, as well as the "likely" lawfulness of the conduct at issue and "non-discriminatory intent" of FBI Director Robert Mueller, *Iqbal* was tossed out of court.

Perhaps the majority's pleading stage findings were factually correct. Perhaps not. Perhaps *Iqbal* is best explained as a result driven by the majority's stated goal of supporting the qualified immunity defense, designed to "free officials from the concerns of litigation, including 'avoidance of disruptive discovery,'" particularly in the context of those decisions made in the heat of post-9/11 fears and emotions. *Id*.

But here's the problem. The approach taken by the Court has broad and potentially far-reaching application—well beyond claims based on deprivation of constitutional rights related to post-9/11 governmental actions—because the *Iqbal* Court clarified that *Twombly* was intended to apply to all civil actions, not just complex cases such as the alleged concerted action antitrust claims asserted in *Twombly*, which impose huge discovery expenses on the defendant.

Thus, *Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in the plaintiff's favor.

Compounding the problem is the *Iqbal* Court's decision expressly rejecting the notion that district courts may allow a limited amount of discovery to go forward

for cases on the margins of plausibility, instead taking a strict view that there is no right to any discovery if the complaint fails to meet the new plausibility requirement of Rule 8. In so holding, the Court rejected the approach suggested by the Second Circuit in *Iqbal*, which encouraged use by the district court of "discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in the challenged conduct." *Iqbal*, 490 F.3d at 158.

The Eleventh Circuit took a similar approach pre-*Iqbal* when it reversed an order granting a motion to dismiss for failure to state a claim by finding the complaint "at least arguably allege[s]" the basis for the plaintiff's claim and further noting that, "at the pleading stage, [the plaintiff] could not possibly have had access to the inside [defendant] information necessary to prove conclusively—or even plead with greater specificity—the factual basis" for its claim. *United Technologies Corp. v. Mazer*, 2009 WL 263329 *6 (11th Cir. 2009). Without such an approach, dismissal becomes far more likely, especially in cases involving facts generally not available to plaintiffs without discovery, such as evidence of fraudulent concealment or of concerted antitrust conduct.

Strikingly, in his dissent, Justice Souter characterized the 5-4 majority opinion as "bespeak[ing] a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true." *Id.* at 22. To the contrary, Souter says, *Twombly* requires that the court "must take the allegations as true, no matter how skeptical the court may be." The only exception is where the factual allegations "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. That is not what we have here." *Id.*

The holdings in *Twombly* and *Iqbal* present some significant challenges for our civil justice system as it wrestles with the parameters of the plausibility determination. But the real question we should be asking is whether those opinions represent a reasonable approach to dealing with a very complex issue—the burden and expense of discovery in complex litigation—or whether the civil justice system would be best served by reexamining the rules of pleading and discovery, as well as the case management powers under which the district courts now supervise the process, in context with each other, in order to find a comprehensive solution.

Indeed, the Supreme Court's summary rejection of the proposition that district judges can effectively weed out groundless claims through careful case management is not so much a criticism of district court judges as it is an acknowledgement of a systemic failure to provide a mechanism for alternative, innovative, and comprehensive approaches to pleading, discovery, and case management that might avoid the high price imposed in *Twombly* and *Iqbal*, (i.e., compelling early dismissal of potentially valid claims).

Surely, there is not a need for full-bore, no-holds-barred discovery in every case and by every party to reach a point at which a more time-efficient, cost-efficient, and merit-based disposition of cases (including the possibility of summary judgment or a reasonable settlement) than is now possible. The first step should be a more thorough examination of the extent to which discovery is being abused. That could be followed by a dialogue to explore innovative solutions to whatever problems can be documented by more than the anecdotal horror stories that we all have heard about, witnessed, or had visited upon us, but which—from a neutral perspective rather than the subjective view of the disgruntled litigant—may or may not represent the norm in our civil justice system.

The Section of Litigation is undertaking just such an effort. Together with the Federal Judicial Center, the Section is engaged in a survey of its members that will follow a similar survey conducted by a joint project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System at the University of Denver.

The final report of the joint project, released in March 2009, called for substantial and dramatic changes in the discovery process, noting that "[D]iscovery can cost far too much and can become an end in itself. As one respondent noted: 'The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.'" The report also suggested that judges need to become much more active in designing and enforcing discovery guidelines early in a case. Notably, approximately 75 percent of the attorneys who responded to this survey had a defense orientation, with 31 percent representing defendants exclusively and another 44 percent representing both sides, but primarily defendants. Twenty-four percent of the respondents indicated they represent plaintiffs exclusively.

A survey of Section of Litigation members by the Federal Judicial Center would broaden the base of respondents and thus provide additional empirical evidence of the scope of the issues that may need to be addressed. At the same time, the Civil Rules Advisory Committee of the Judicial Conference is planning a major conference on civil litigation in federal courts for the spring of 2010 to examine pretrial costs, burdens, and delays. It is expected that the conference will consider possible rules and other changes to the civil justice system. The Section of Litigation likewise has been invited to participate in planning for this conference.

Thus, while *Twombly* represented an attempt to deal with abusive discovery, the confusion of the lower courts since that case was decided—and the Supreme Court's response in *Iqbal* of turning district court judges into ill-defined "common sense" gatekeepers of probable truth—demonstrates that a quick fix is not likely to be found merely through an adjustment to the pleading requirements. Indeed, any serious effort to craft a solution must include evaluating and balancing the legitimate needs of plaintiffs and defendants and allowing for consideration of alternative approaches to pleading, discovery, case management, and case-resolution mechanisms that might look considerably different from our current one-size-fits-all approach to civil litigation. Fortunately, it appears that significant efforts are underway to evaluate those options.