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I. INTRODUCTION

On May 18, 2009, in a 5-to-4 decision, the Supreme Court decided *Ashcroft v. Iqbal* and continued a trend of toughening federal pleading standards that started with *Bell Atlantic Corp. v. Twombly*. Until *Iqbal*, *Twombly*'s effect had been relatively modest because courts tended to distinguish it, often finding that its teachings applied only to antitrust cases or similar types of cases. In *Iqbal*, the Supreme Court rejected these attempts to circumscribe *Twombly*, holding unequivocally that the pleading standard announced by *Twombly* applies to all civil actions in federal court.

This development will make it considerably more difficult for plaintiffs armed only with vague factual allegations to launch expensive litigation. At the same time, however, the advent of this new pleading standard complicates the calculus for plaintiffs and defendants alike at the pleading stage of civil cases in federal courts. These complications result in part from the difficult questions that *Iqbal* and *Twombly* left unanswered about how properly to apply the new federal pleadings standard. As a result, it may not be possible to definitively assess *Iqbal*'s impact until the Courts of Appeals have answered some of these questions. What is immediately clear after *Iqbal*, however, is that district courts have significantly more discretion to manage cases at the pleading stage, and that some cases which would have previously continued to discovery will now end with the pleadings.

II. IQBAL SUED AFTER HIS POST-9/11 DETENTION

Iqbal arose from the Federal Bureau of Investigation's ("FBI's") investigation of the terrorist attacks of September 11, 2001. Following the attacks, the FBI and Immigration and Naturalization Service ("INS") arrested and detained hundreds of individuals on immigration charges. The FBI classified a subset of these detainees, including Javaid Iqbal, a Muslim Pakistani, as of "high interest" and kept them in highly restrictive conditions until the FBI cleared them. In addition to complaining about the restrictive conditions, Iqbal alleged that he was subjected to a series of abuses, including being beaten and denied medical care. Iqbal pled guilty to fraud charges in connection with his presence in the United States and served an 18-month sentence.

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After he was released and deported to Pakistan, Iqbal brought a Bivens action² against officials at various levels of the federal government, from low-level prison staff all the way up to former Attorney General John Ashcroft and current FBI director Robert Mueller. Ashcroft and Mueller moved to dismiss, arguing, *inter alia*, that the allegations of their involvement were too conclusory to state a claim. The trial court denied the motion to dismiss and defendants appealed. While the appeal was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*.

III. IQBAL'S PREDECESSOR: BELL ATLANTIC CORP. V. TWOMBLY

In *Twombly*, consumers brought a putative class action alleging that regional telephone and internet service providers engaged in an antitrust conspiracy to stifle competition. The conspiracy allegation was based on the defendants' parallel pricing and failure to attempt to compete in each other's respective service areas. In an opinion by Justice Souter, the Court held that neither the alleged parallel pricing nor the failure to enter each others' areas gave rise to a plausible inference of conspiracy. The Court discounted the direct allegation that defendants engaged in a "contract, combination or conspiracy," holding that "these are merely legal conclusions resting on the prior allegations." Thus, the Court held that plaintiffs failed to state an antitrust conspiracy claim.

Twombly expressly overruled the statement from *Conley v. Gibson*, a case decided by the Supreme Court in 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 which would entitle him to relief." *Twombly* held that a complaint which merely states the legal theory of the claim is not sufficient. "While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' for 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." Thus, a complaint alleging conspiracy must include "enough factual matter (taken as true) to suggest that an agreement was made." The Court emphasized the enormous cost of discovery in antitrust suits and the impossibility of alleviating such costs through careful management of discovery or summary judgment.

IV. THE SECOND CIRCUIT'S INTERPRETATION OF TWOMBLY

Three weeks after *Twombly*, the Court of Appeals for the Second Circuit affirmed the denial of the motion to dismiss in *Iqbal*. The Second Circuit noted that *Twombly* created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings." The court then examined *Twombly* in detail. It concluded that *Twombly* "is not requiring a universal standard of heightened fact pleading, but is instead requiring a

² The Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation* recognized an implied cause of action against federal employees for violating certain constitutional rights.

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.”

Applying this standard, the Court of Appeals found that plaintiff’s allegations that Ashcroft and Mueller knew of, condoned, and agreed to a policy of detaining individuals in severe conditions based on discriminatory criteria were not implausible, and thus required no further factual enhancement. Accordingly, the Court of Appeals affirmed.

V. THE SUPREME COURT’S EXPLANATION OF *TWOMBLY*

The Supreme Court rejected the Second Circuit’s and other lower courts’ readings of *Twombly*’s plausibility requirement. The Court, in a decision written by Justice Kennedy, held that whether a complaint is “plausible,” as that term is used by *Twombly*, turns not on whether the alleged conduct is unlikely, but on whether the complaint contains sufficient non-conclusory factual allegations to support a reasonable inference that the conduct occurred.

“To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs’ express allegation of a ‘contract, combination or conspiracy to prevent competitive entry,’ because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitled them to the presumption of truth.”

Likewise, the Court rejected the narrow reading that had been percolating in some lower courts that *Twombly*’s pleading standard applied only to expensive, complicated litigation like that considered in *Twombly*. The Court held that “*Twombly* expounded the pleadings standard for ‘all civil actions,’ . . . and it applies to antitrust and discrimination suits alike.”

VI. *IQBAL*’S TWO-PRONGED APPROACH TO ANALYZING COMPLAINTS

Iqbal, elaborating on *Twombly*, sets out a two-pronged approach for evaluating whether a complaint satisfies Rule 8’s pleading requirement. First, the court must “identify[] the allegations in the complaint that are not entitled to the assumption of truth.” That is, the court must separate pleadings of fact from pleadings of conclusion. Next, the court must evaluate the factual assertions to determine if “they plausibly suggest an entitlement to relief.”

A. Prong One: Separating Facts from Conclusions

How to differentiate fact from conclusion under *Twombly* and *Iqbal* is unclear. The five-Justice *Iqbal* majority easily found that the allegation that Ashcroft and Mueller “each knew of, condoned, and willfully and maliciously agreed to” the unconstitutional policies under which *Iqbal* was detained was too conclusory to be entitled to the presumption of truth. The four-Justice dissent—written by Justice Souter, the author of *Twombly*—just as easily viewed the same as allegations of fact. Lower courts have pointed to the tension between the *Twombly* pleading standard and Federal Rule of Civil Procedure 84, which provides that certain form pleadings set forth in the Appendix to the Federal Rules “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” Many of these form pleadings contain direct allegations similar to those found insufficient in *Iqbal* and *Twombly*. For example, Form 11 provides that “[o]n date, at place, the defendant negligently drove a motor vehicle against the plaintiff.” Form 14 provides that “[a]s a result of the defendant’s negligent conduct and the unseaworthiness of the vessel, the plaintiff was injured.”

It is difficult to draw a clear line between the allegations found insufficient in *Iqbal* and *Twombly*, on the one hand, and the allegations of Forms 11 and 14, on the other, which are, by rule, sufficient. Nevertheless, the distinction between factual allegations and those that are merely conclusory will often determine whether a given complaint survives a 12(b)(6) motion.

Initial decisions show that some lower courts will look to the unique factual and legal issues giving rise to *Iqbal* as a reference in trying to navigate this apparent tension—notwithstanding the Court’s assertion that the standard applies to all cases. Other courts have applied *Iqbal* more rigorously, disregarding as conclusory allegations which previously would have been likely upheld. Perhaps, a fair conclusion to draw from *Iqbal* is that direct allegations of the legal elements of a claim are conclusions and adding adjectives and adverbs is not enough to elevate them to factual allegations. However, that does not help answer the question of how extensive or detailed the facts must be to support such direct allegations.

B. Prong Two: Do the Facts Plausibly Suggest an Entitlement to Relief?

With respect to the second prong of the analysis, the Court made clear that “plausibility” required under Rule 8 demands more than the “mere possibility of misconduct” and that if the facts in the complaint are “not only compatible with, but indeed more likely explained by lawful . . . behavior,” then the pleading will be insufficient. The Court found that to allege a cause of action, a plaintiff must plead facts which “plausibly suggest an entitlement to relief.”

To analyze whether *Iqbal* had done so, the Court started by noting that the September 11 attacks were “perpetrated by 19 Arab Muslim hijackers who counted

themselves members in good standing of Al Qaeda” and described Al Qaeda as an “Islamic fundamentalist group” headed by Osama bin Laden and “composed in large part of his Arab Muslim disciples.” Notably, none of these facts were from plaintiff’s complaint, but they provided the background against which the Court assessed the plausibility of plaintiff’s allegations. With this background, the Court concluded that plaintiff needed to plead facts plausibly showing that the defendants “purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin.” The Court then held that the complaint was not sufficient because the facts that were pleaded—i.e., “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”—could be easily explained by a lawful motive, and therefore were not “sufficient to plausibly suggest” the defendants’ “discriminatory state of mind.”

Iqbal’s discussion of *Twombly* recognizes that determining whether well-pleaded facts plausibly suggest an entitlement to relief is a “context-specific task” that calls upon a reviewing court “to draw on its judicial experience and common sense.” Further, the Supreme Court’s analyses in *Iqbal* and *Twombly* permit the trial court to look beyond the complaint to the surrounding factual context—whether that be to recognize the prevalence of lawful parallel pricing or the events of the 9/11 terrorist attacks. However, neither *Iqbal* nor *Twombly* draws a clear boundary as to when such reliance extends too far. Thus, the Supreme Court has provided little guidance for district courts attempting to apply the new federal pleading standard in dissimilar circumstances, other than that it should be a “common sense” approach.

VII. IQBAL IMPLICATIONS FOR RULE 12(b)(6) MOTION PRACTICE

The obvious consequence of *Iqbal* will be an increase in Rule 12(b)(6) motion practice. Although some courts were reluctant to apply *Twombly*’s departure from traditional Rule 12(b)(6) analysis to all cases, *Iqbal* leaves no doubt that they now should do so. *Iqbal*’s two-pronged approach raises the bar a plaintiff must clear to state a claim for relief. Exactly how much more is needed after *Iqbal* is not clear, and early cases applying *Iqbal* have not been uniform. It is clear, however, that some cases previously permitted to proceed to discovery will, instead, end with the pleadings. It is also clear that the vaguely defined line between fact and conclusion in *Twombly* and *Iqbal*, coupled with *Iqbal*’s invitation to trial courts to draw on their own experience and common sense, vests courts with broad discretion to manage the course of litigation from the outset.

While the number of 12(b)(6) motions undoubtedly will increase, case-specific, practical considerations should guide whether such a motion makes strategic sense in a given case. These will involve careful analysis that takes into account a variety of factors,

including the likelihood that plaintiff has sufficient facts to re-plead, the potential costs associated with responding to a factually detailed complaint, the value in previewing plaintiff's knowledge of the case, the possible merits of the claims, and the scope and expense of discovery.

VIII. IS A SUCCESSFUL 12(B)(6) MOTION WELL-SPENT TIME AND MONEY?

Defendants will need to do an early strategic analysis to balance the costs and benefits of a motion to dismiss. The possibility of an early, successful motion to dismiss is always attractive. But winning a 12(b)(6) motion only to have a plaintiff re-plead with sufficient factual detail may prove a hollow victory. Moreover, responding to detailed factual allegations may require early investigation of a nature and scope unnecessary to respond to general, conclusory allegations. The keys will be trying to ascertain what a plaintiff knows, assessing whether the size of the case and the possibility of success justify the cost of the motion and understanding the given judge's reading of *Iqbal* and whether he or she had relied on it to dismiss previous cases.

Sometimes a failure to plead adequate facts may not mean that sufficient facts are unknown to plaintiff. When attempting to divine the likely state of plaintiff's knowledge, defendants can take clues from several sources. Experience with opposing counsel, whether government announcements or media reports that lacked detail likely triggered the filing, whether included facts are just dead wrong, and the length of time between an event and an associated lawsuit are all useful pieces of data when deciding whether to file a 12(b)(6) motion.

In certain circumstances, even when plaintiffs have sufficient "facts" to properly re-plead, post *Iqbal* 12(b)(6) motions may have value. First, they may give defendants who are uncertain about the genesis of plaintiffs' claims more information that will be useful in investigating the allegations internally and assessing the merits of the case early. Second, if plaintiffs do amend to survive *Iqbal*, defendants may be able to use the detailed pleading to define the boundaries of discovery and to frame an early summary judgment motion.

Of course, cases will continue to arise, as they have in the past, based on nothing more than a few facts, or even speculation, wrapped in legal conclusions. Plaintiffs might have been able to squeak by before by filling in gaps with "information and belief" allegations. Now, even if those types of allegations remain permissible, courts relying on *Iqbal* should view such pleadings with a skeptical eye when deciding what is fact and what is conclusion. While perhaps a plaintiff can spin a web sufficient to clear the pleading hurdle, knowing how thin plaintiff's knowledge is at the outset may help frame the defense or an effective settlement strategy. In some instances, where allegations in the complaint are obviously wrong or "information and belief" pleadings seem suspiciously thin, defendants may want to challenge the basis for the allegations

by serving a Rule 11 motion under the safe harbor provision, to determine how willing plaintiffs are to stand by them.

IX. REQUESTS FOR DISCOVERY STAYS MAY BE FAVORABLY RECEIVED

District courts are often hostile to discovery stays during the pendency of motions to dismiss. Defendants' cries of expensive fishing expeditions disguised as discovery have frequently been rejected. But now that the Supreme Court has specifically recognized the validity of the concern—"Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"—defendants should be better armed to seek a total or limited stay of discovery pending resolution of a motion to dismiss. Courts must now require plaintiffs to plead a plausible claim before opening the floodgates to costly discovery. A few courts have already recognized the merit of this approach for complex, costly cases in the wake of *Twombly* and *Iqbal*. Indeed, it would turn *Iqbal* on its head to allow plaintiffs to take discovery based on a conclusory complaint simply because the defendant has not yet had time to get a motion to dismiss heard.

Absent a discovery stay, defendants intent on bringing a Rule 8 challenge to a complaint may want to move forward quickly, rather than seeking the typical extension before filing a motion to dismiss. Then the clock will be working against plaintiffs who are trying to take discovery to shore up an otherwise defective complaint.

X. CONCLUSION

The *Iqbal* decision marks a significant stiffening of the federal pleading standard. By requiring sufficient specificity and plausible allegations of misconduct or misfeasance in all civil actions, the Supreme Court has made clear that non-specific "notice" pleadings can no longer unleash costly litigation.