FEDERAL PLEADING IN 2010

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Chapter [#]

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Mark Temple is a Partner with Jones Day, named in 2008 as having the nation's best Labor & Employment practice by *The American Lawyer* as part of the magazine's "Litigation Department of the Year" competition. Mark has a national practice that focuses on trade secret and noncompete issues and other types of labor and employment law concerns. He handles a wide variety of matters ranging from counseling to all phases of litigation. He has litigated cases pending in state agencies, before arbitration panels, and before state and federal courts involving illegal discrimination (race, age, gender, national origin, disability, and workers' compensation), unlawful harassment, Employee Retirement Income Security Act violations, Family and Medical Leave Act claims, False Claims Act (qui tam actions), Sarbanes-Oxley claims, Fair Labor Standards Act (wage and hour) claims, breach of contract claims, and other workplace-related causes of action. Mark is admitted to practice in Texas and before all U.S. District Courts in Texas and the Western District of Michigan and Northern District of Illinois; and U.S. Court of Appeals for the Fifth Circuit.

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PUBLICATIONS AND SPEAKING ENGAGEMENTS

- July 2009 – What to Do When Your Employee Takes Your Technology, State Bar of Texas 8th Annual Advanced In-House Counsel Course
- July 2008 – Health Care Organizations Act Now to Avoid Problems with Unions, *Houston Business Journal*
- June 2008 – How to Successfully Navigate Through the Mine Field of Noncompetition Agreements and Trade Secret Protection in Today's Environment, Dallas Bar Association, Labor and Employment Section
- June 2008 – Recent Developments Impacting Health Care Providers - Legal and Practical Considerations: How to Keep From Getting Sued in an Employment Case, Union Organizing in Texas Seminar
- February 2008 – To the Readers of the Metropolitan Corporate Counsel: *The Metropolitan Counsel*
- January 2008 – Texas Case Serves as Warning for Disloyal Employees Jumping Ship, *Houston Business Journal*
- November 2007 – Age Discrimination Legal Update – Institute for Applied Management & Law, Certificate in Employee Relations Seminar
- November 2007 – Trade Secrets and Noncompetes from a Global Perspective
- April 2007 – Data Protection and Data Privacy
- December 2006 – HR issues on the hot plate: Houston Experts Share Insights on the Ever-Changing Human Resources Scene, *Houston Business Journal*
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- 2005 – Get Rich by Turning in Your Boss? Provided defense perspective on television interview for Houston ABC affiliate nightly news
- 2005 – Employee Discipline and Corrective Action, Lorman Educational Services
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PUBLICATIONS

- April 2009 – Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?, *The Review of Litigation*

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FEDERAL PLEADING IN 2010

I. Introduction

This Article discusses the shifting explanations of the pleading standard governing federal court practice. It will discuss the statutory pleading framework, the evolution of statutory interpretation, and detail important considerations for the federal court practitioner.

II. Statutory Pleading Framework

The United States Supreme Court has altered its explanation of the federal pleading standard over the past few years. Although the concept of pleading one's case may appear to be fairly elementary, determining exactly how to plead can be delicate. The importance of proper pleading cannot be overlooked. For plaintiffs, the pleading standard represents the line between a suit (and possible recovery) and the case being immediately dismissed. Defendants are also affected by the pleading standard. Not only is the nature of a plaintiff's pleading critical for a defendant to be able to understand the plaintiff's claims, but the ability to raise pleading defects prior to answering can result in significant cost savings.

A. Rule 8

The pleading framework is laid out in the Federal Rules of Civil Procedure:

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8.

Although this statute has not changed over the last fifty years, the United States Supreme Court's explanation of the statute's provisions has varied.

B. The Supreme Court's Pre-*Twombly* Interpretation of Rule 8

On November 18, 1957, the United States Supreme Court issued the *Conley v. Gibson* decision, which shaped discussion of the federal pleading standard for fifty years. 355 U.S. 41 (1957). The *Conley* plaintiffs were black railroad employees who alleged that their union collective bargaining agent failed to represent them fairly. In a motion to dismiss, the defendants claimed that the "complaint failed to state a claim upon which relief could be given." *Id.* at 43. In language that would be often repeated, the Supreme Court, arguably in dicta, stated:

> [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.

Id. at 45–46.

The *Conley* plaintiffs' complaint, which alleged that the plaintiffs "were discharged wrongfully by the Railroad and that and the union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negros," was deemed sufficient to survive this standard. *Id.* at 46.

III. *Twombly* Presents a New Interpretation of the Statutory Pleading Standard

In 2007, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court issued a ruling that abandoned *Conley*'s "no set of facts" language in favor of a "plausibility" standard. 550 U.S. 544 (2007).

Twombly was a class action alleging an antitrust conspiracy between regional telephone and Internet service providers. The *Twombly* plaintiffs pled allegations of an antitrust conspiracy:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another."

Id. at 551 (quoting plaintiff's complaint).

The district court dismissed the complaint because it alleged only parallel conduct without facts to show conspiracy, but the Second Circuit reversed, holding that the complaint needed to show only some set of facts that would make the claim possible. Under *Conley*'s "no set of facts" test, the Second Circuit held that parallel conduct was sufficient to allege a conspiracy claim, even if the claim was not plausible. *Id.* at 552–53.

The United States Supreme Court overturned the Second Circuit's decision and held that parallel conduct, by itself, was not enough; the complaint must state "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. Then, the Supreme Court explicitly overruled *Conley*'s "no set of facts" test. *Id.* at 563. Looking at the *Twombly* complaint, the Supreme Court agreed "with the district court that plaintiffs' claim of conspiracy in restraint of trade comes up short" because it alleged only parallel conduct, not specific facts of an agreement. *Id.* at 564. The Court held that a complaint that states only legal theories is not sufficient. Detailed factual allegations are not necessary, but the plaintiff must present more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.

The *Twombly* decision complicated federal pleading standard interpretation, and litigants and academics alike speculated on the decision's reach. Some wondered whether the specific claims pled mattered, while others believed that *Twomby* applied to only complex cases. In its decision, the Court stressed the enormous cost of discovery in antitrust suits and impossibility of alleviating costs through careful management of discovery or summary judgment. *Id.* at 557–59. The Supreme Court seemed to be approving of the Second Circuit's discussion of a plausibility standard,[1] but how this would be different from the statutory standard was unclear. Plausibility appears to require more proof than the "no set of facts" standard; in fact, the Second Circuit referred to the additional facts as "plus factors." *Twombly*, 425 F.3d at 114. One issue that the Court did make clear, although the discussion was in a footnote, is that the statutory pleading standard remains intact:

> The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. *See* post, at 10 (opinion of Stevens, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, 355 U. S. 41, 47 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. *See* 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, 550 U.S. at 555 n.3.

The Court derived the "showing" language from Federal Rule of Civil Procedure 8(a)(2), which requires a complaint to assert "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In *Twombly*, the Court held that although the facts did not have to be detailed, some facts were required.

After *Twombly* was issued, lower courts contemplated the reach of what many believed was a "new" standard. Litigants raised questions about whether the decision heightened fact pleading, required a heightened plausibility standard, or changed the standard in some other way. It was crystal clear that the Supreme Court specifically rejected the imposition of heightened fact pleading: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Using this language, lower courts began to apply a plausibility standard, which had the added benefit of appearing to fit squarely within the statutory pleading standard. In fact, in *Twombly*, the Court noted that "[p]laintiffs do not, of course, dispute the requirement of plausibility . . . their

[1] In *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), the court stated, "Of course, if a plaintiff can plead facts in addition to parallelism to support an inference of collusion—what we have referred to above as 'plus factors' at the summary judgment stage—that only strengthens the plausibility of the conspiracy pleading. But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."

main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8." *Id.* at 560–61.

IV. *Iqbal* Attempts to Clarify *Twombly*

Less than a month after the *Twombly* decision, the Second Circuit applied *Twombly*'s interpretation of the federal pleading standard in *Iqbal v. Hasty*. 490 F.3d 143 (2d Cir. 2007). Iqbal, a Pakistani Muslim, asserted claims against the United States government and various officials for discriminatory treatment and prisoner abuse in the aftermath of September 11. The circuit court detailed the confusion over *Twombly*, noting that "[t]he nature and extent of that alteration [to the federal pleading standard] is not clear because the Court's explanation contains several, not entirely consistent, signals." *Id.* at 155. The Second Circuit specifically noted that *Twombly* could indicate a heightened pleading standard, a "more than notice" requirement for antitrust conspiracy claims (and perhaps for antitrust claims only), the need for careful case management, or a reaffirmation of notice pleading. *Id.*

The Second Circuit concluded that *Twombly* "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. After attempting to explain when, and how, to apply "plausibility," the Second Circuit held that Iqbal's complaint, which alleged specific facts about Iqbal's arrest and detention and facts about the detention of Arab Muslim men after 9/11, was sufficiently plausible to survive at Rule 12(b)(6) motion. *Id.* at 177–78.

On June 16, 2008, the United States Supreme Court granted certiorari to *Iqbal*, and on May 18, 2009, the Court issued a decision that clarified some of the lower courts' ruminations regarding the scope and impact of *Twombly*. In its decision, the Supreme Court made clear that the interpretation of the pleading standard outlined in *Twombly* was <u>not</u> limited to certain types of cases, but instead applies to <u>all</u> federal civil actions. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1953 (2009) (emphasis added). The Court also clarified that *Twombly*'s "plausibility" does not mean "probable," but rather "reasonable" and more than "possible." As the Court noted:

> 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. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 1949 (quoting *Twombly*, 544 U.S. at 556–57).

The *Iqbal* Court then described a two-prong procedure for evaluating whether a compliant should be dismissed: "We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. . . . We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 1951. Although the first prong—determine which allegations are factual—of the test seemed simple, determining which allegations were factual was an issue in *Iqbal* itself. The majority and dissent did not agree on the difference between fact and conclusion. The five-Justice majority found that the claim that Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to" unconstitutional detention policies was not entitled to the presumption of truth because it was "conclusory." *Id.* "These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy '"because of," not merely "in spite of," its adverse effects upon an identifiable group.'" *Id.* (citing *Twombly*, 550 U.S. at 555).

But the four-Justice dissent—written by *Twombly*-majority-author Justice Souter—just as easily viewed the same allegations as factual. *Id.* at 1959 (Souter, J., dissenting). The dissent noted that the complaint alleged "that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it." *Id.* In his dissent, Justice Souter also noted that a complaint should only be dismissed when a plaintiff presents "allegations that 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." *Id.* Although Justice Souter had written the decision that eliminated the "no

set of facts" test, his stance on case dismissal recalls the *Conley* standard.

V. Where Are We After *Twombly* and *Iqbal*?

Even though *Iqbal* ostensibly sought to clarify *Twombly*, many practitioners and legal scholars are still somewhat unsure of how the decision affected the pleading standard. Many grapple with the degree of factual detail required and the manner in which courts will differentiate fact from conclusion. Similarly, parties often differ on what constitutes adequate factual allegations and legal conclusions.

Many courts have also pondered the new questions raised by the Supreme Court's decision in *Iqbal*. Justice Posner of the Seventh Circuit questioned whether the interpretation of Rule 8 actually applies in all cases, noting that "*Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery 'provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.'" *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.) (citing *Iqbal*, 129 S. Ct. 1937, 1954) (emphasis added). In addition, some courts still view *Twombly* and *Iqbal* as requiring "'a heightened pleading standard in those contexts where factual amplification is needed to render a claim plausible.'" *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009) (quoting *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008)).

Without regard to any new interpretation of the federal pleading standard outlined in Rule 8, the statutory standard has not changed, and general notice pleading still exists.[2] "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009) (quotation omitted; omission in original). Pleadings must comply with *Iqbal*'s interpretation of Rule 8—that is, they must be more than conclusions but do not have to detail every fact. What appears to have changed is the application of Rule 8 by the courts.

[2] Shortly after the *Twombly* decision, the United States Supreme Court issued *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), which recited the notice pleading standard from Federal Rule of Civil Procedure 8(a)(2).

Federal courts are diligently applying the test set forth in *Iqbal* to determine when a complaint is sufficient, although whether the results are different than under *Twombly* or *Conley* is an open question.

A. Recent Fifth Circuit Cases Discussing the Pleading Standard

Courts in the Fifth Circuit have applied *Iqbal* numerous times since the Supreme Court handed down its decision. In one case, *Rhodes v. Prince*, the Fifth Circuit determined that "[b]ecause an 'arrest' is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim," an allegation of "arrest" is not entitled to an assumption of truth. No. 08-10794, 2010 WL 114203, at *4 (5th Cir. Jan. 12, 2010). The court examined the complaint using *Iqbal*'s two-prong test:

> Rhodes points us to the events of December 9, 2003 to establish a Fourth Amendment violation. We must first, however, identify the allegations in his complaint that are entitled to a presumption of truth. Rhodes alleges that Defendant Roach "intentionally and falsely arrested" him, "when he knew such conduct was a violation of [his] Fourth Amendment right to be free from unlawful search and seizures," and that Defendant Roach did so with the support of the other Defendants. Because an "arrest" is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim, Rhodes's allegation of "arrest" is "nothing more than a 'formulaic recitation of the elements' of a constitutional . . . claim . . . . and [is] not entitled to be assumed true."

Id. (citations omitted).

In another case, *Floyd v. City of Kennar, Louisiana*, the Fifth Circuit examined claims against five separate defendants and held that while there were sufficient pleadings for two of the defendants, the allegations against the other three were "bare" allegations that did "not make it plausible" that he had a case. No. 08-30637, 2009 WL 3490278, at *8 (5th Cir. Oct. 29, 2009). The plaintiff in *Floyd* was a city's chief administrative officer who accused police officers and national guardsmen of conspiring to illegally search his residence and arrest him. Against one defendant, the plaintiff alleged only a "general background of why [the defendant] would have animosity towards [the plaintiff]" without any specific about how the officer participated in the conspiracy. *Id.*

at *9. Even a statement that the defendant "attempted to persuade the district attorney to prosecute" plaintiff was not enough to make the claims plausible, according to the court. *Id.* Against another defendant, the plaintiff asserted only that the defendant "'participated in, approved and directed' the filing of false and misleading affidavits." *Id.* at *8. The district court found that the "participated in, approved and directed" allegation was "conclusory" and "needed further factual amplification" to meet the *Iqbal* standard. *Id.* The district court had dismissed the entire case, but the plaintiff's claims against two of the defendants included sufficient facts—dates, locations, and specific instances of misconduct—to survive a rule 12(b)(6) motion. *Id.* at *3–5. The Fifth Circuit reversed the district court's finding that there were not enough facts in the complaint to survive a 12(b)(6) motion and allowed the plaintiff's case to proceed against those two defendants. *Id.* at *9.

The Fifth Circuit also utilized *Iqbal*'s explanation of the pleading standard in *Gonzalez v. Kay*, a Fair Debt Collection Practices Act case that the district court had dismissed on a 12(b)(6) motion. 577 F.3d 600, 601 (5th Cir. 2009). Gonzalez owed a consumer debt, and the defendant sent a debt collection letter on a law firm's letterhead. The law firm asserted that a disclaimer in the letter was "sufficient to notify Gonzalez that lawyers were not involved in the debt collection," while the plaintiff asserted that the law firm was actually a "debt collection agency that uses the imprimatur of a law firm to intimidate debtors." *Id.* at 602–03. After reciting *Iqbal*'s explanation of the pleading standard, the court noted that the key issue with the pleading was whether the letter sent to collect the debt was deceptive under the FDCPA. The claim could be dismissed only if the letter was not deceptive. Because "reasonable minds can differ as to whether this letter is deceptive," the Fifth Circuit held that the lower court should not have dismissed the case. *Id.* at 607.

District courts in the Southern District of Texas have also examined complaints under *Iqbal*, with varying outcomes. In one case, *Hairston v. Geren*, although the complaint did "not contain an overabundance of facts to support [the plaintiff's] claims of racial and gender discrimination," the court deemed it to be sufficient. No. C-08-382, 2009 WL 2207181, at *4 (S.D. Tex. July 21, 2009). The factual allegations were that the plaintiff "was the target of discrimination on the basis of her race and gender when she was subjected to 'repeated and ongoing harassment by her coworker,' and that Defendant did not take appropriate steps to remedy the situation." *Id.* The plaintiff alleged that the coworker had falsely accused the plaintiff of "banging on her door," and the plaintiff's supervisor investigated the incident and determined the coworker's accusation was false. *Id.* at *1. The supervisor did not discipline the coworker. The defendant claimed that the plaintiff did not plead enough facts to show "'extreme' conduct or an actionable hostile environment" or "to support a finding that she was harassed due to her gender." *Id.* at *4. The court noted that, under *Iqbal*, the complaint must plead more than facts that are consistent with liability. The court was, however, "able to draw the reasonable inference that Defendant is liable for the misconduct alleged" from the complaint. *Id.* at *1. The case was also permitted to proceed in part based on the court's observance that dismissals based on the pleadings are "disfavored and rarely granted." *Id.* at *4 (quotation omitted).

The defendants in another Southern District of Texas case, *Hoffman v. Cemex*, moved to dismiss a complaint on a 12(b)(6) motion, or, in the alternative, moved for a more definite statement. H-09-3144, 2009 WL 4825224, at *1 (S.D. Tex Dec. 8, 2009) (Rosenthal, J.). The court denied both motions, finding sufficient allegations in the complaint:

> "Ginco support technicians, field service/command support technicians, mixer drivers, [and] plant managers, including Hoffman and Hayes, are responsible for providing information technology support and related services." The plaintiffs alleged that although they did not fall under any exemption to the FLSA's overtime requirement, they and others in similar positions at Cemex regularly worked more than 40 hours per week but were paid at regular rates for the overtime hours. The plaintiffs alleged that Cemex did not make a good faith effort to comply with the FLSA and undercompensated them "knowingly, willfully, and with reckless disregard."

Id. (citations omitted, quoting plaintiffs' complaint).

The court noted that "[t]he allegations give [the defendant] notice that the claim is one for unpaid overtime under the FLSA and that it is based on a failure to pay employees time-and-a-half for hours worked in excess of 40 per workweek," even if the complaint was "not replete with detailed factual allegations." *Id.* at *3. In addition, "specific context of FLSA overtime claims" do not require highly

detailed allegations because the company must keep detailed records of when an employee works. *Id.*

In a third case, *Stewart v. U.S.*, a Southern District of Texas court dismissed an action for medical malpractice and negligence for failure to sufficiently state a claim. No. H-09-2462, 2009 WL 3334366, at *1 (S.D. Tex. Oct. 14, 2009). The complaint stated, "On 7-24-2007, 10-24-2007, 8-28-2007 thru 9-6-2007, the employees acts of Negligence, abuse of the Patients Rights, endangerment of Health the Plaintiff suffered pain and suffering, endangerment of health, abuse of his Rights by the government employee omissions and commission while they Were acting within the scope of their employment." *Id.* at *2. Even though the plaintiff was a pro se litigant "entitled to a liberal interpretation of his Complaint," the district court determined that the complaint consisted "only of conclusory statements and 'naked assertions devoid of further factual enhancement'" and was therefore insufficient. *Id.*

B. Application of *Iqbal* in Other Federal Circuits

Other circuit courts have also attempted to parse the federal pleading requirement set out in *Iqbal*. The Second Circuit, in *Arar v. Ashcroft*, a prisoner mistreatment case similar to *Iqbal*, held that "[t]he assertion of relevant places, times, and events—and names when known—is lengthy and specific" in the plaintiff's complaint, and therefore the complaint "passes muster" under what the court viewed as *Iqbal*'s more stringent standard of review for pleadings. 585 F.3d 559, 594 (2d Cir. 2009). The Second Circuit also noted that "plausibility is 'context-specific,' requiring the reviewing court 'to draw on its judicial experience and common sense.'" *Id.* at 617. In explaining how the standard works in practice, the court stated:

> Allegations are deemed "conclusory" where they recite only the elements of the claim. They become implausible when the court's commonsense credits far more likely inferences from the available facts. Plausibility thus depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations. As Rule 8 implies, a claim should only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer appears plausible.

Id.

The court determined that the factual particulars of the case made Arar's claim plausible. Arar was suspected member of al Qaeda whose arrival at New York's JFK airport was noticed by many high-level government officials. *Id.* at 584. He was taken from airport in government convoy and transported to Syria. The court noted that "In contrast to *Iqbal*, it is the alternative here that is difficult to fathom. To think that low-level agents had complete discretion in setting the conditions for holding a suspected member of al Qaeda defies commonsense." *Id.* at 617–18. The court further concluded, "[U]nlike *Iqbal*, Arar's due process claims do not ask the Court to speculate about the mental state of government officials." *Id.* at 618.

The Second Circuit examined the *Iqbal* requirements in the context of an antitrust complaint in *Starr v. Sony BMG Music Entertainment* and held that the complaint was sufficient. --- F.3d ---, 2010 WL 99346, at *7 (2d Cir. Jan. 13, 2010). In that case, the plaintiff, *Starr*, alleged parallel conduct and made the following factual allegations: one defendant's CEO stated that the music service "was formed expressly as an effort to stop the 'continuing devaluation of music,'" songs on the service were almost three times the price of songs on other services even though the cost of providing internet music had "decreased substantially due to completion of the initial digital cataloging of all Internet Music and technological improvements that reduced the costs of digitizing new releases," the defendants attempted to hide their music service, and the defendants are the subject of a price-fixing investigation by the New York State Attorney General and two Department of Justice investigations. *Id.*

In *Fowler v. UPMC Shadyside*, the Third Circuit examined the pleading requirements in an employment discrimination case and found that the plaintiff "nudged her claims against UPMC 'across the line from conceivable to plausible'" because the "complaint pleads how, when, and where [the defendant] allegedly discriminated against [the plaintiff]." 578 F.3d 203, 212 (3d Cir. 2009). The plaintiff provided a detailed timeline of the events giving rise to her claims, and explained her actions and the defendant's responses. In addition, the plaintiff alleged that she was "terminated because she was disabled" and alleged discrimination because her employer failed to accommodate her disability. *Id.*

The Fourth Circuit examined the sufficiency of a complaint, as well as why the pleading requirements

need to be reinforced, in *Francis v. Giacomelli*. 588 F.3d 186, 193 (4th Cir. 2009). The court noted that strike suits and the high cost of frivolous litigation "brought to the forefront the Federal Rules' requirements that permit courts to evaluate complaints early in the process." *Id.* The complaint at issue "conclusorily alleged that the searches and seizures violated [the plaintiffs'] constitutional rights because no charges had been filed against them, nor had any warrant issued." *Id.* at 194. Another claim alleged discrimination based on race, but the only factual assertions were "(1) that Commissioner Clark and Deputy Francis are African-American males; (2) that the defendants are all white males; and (3) that the defendants have never initiated or undertaken the actions of terminating employment and physically removing the employee against white members of the Police Department." *Id.* at 195. Another count alleged conspiracy, but "makes no other allegations and contains no facts to support the conspiracy alleged." *Id.* at 196.

In *Brooks v. Ross*, the Seventh Circuit, in a vein similar to the Fourth Circuit, noted that *Iqbal* was designed to "admonish[] those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims, that they must do more. These are the plaintiffs who have not provided the 'showing' required by Rule 8." 578 F.3d 574, 581 (7th Cir. 2009). The court included the specific paragraph of the complaint that failed under the *Iqbal* standard:

> "Plaintiff is informed, believes and alleges that the Defendants while acting in concert with other State of Illinois officials and employees of the Attorney General's Office, Department of Corrections and Prisoner Review Board did knowingly, intentionally and maliciously prosecute Plaintiff and Ronald Matrisciano in retaliation for Plaintiff and the said Ronald Matrisciano exercising rights and privileges under the Constitutions and laws of the United States and State of Illinois."

Id. at 582 (quoting plaintiff's complaint).

This paragraph is a "formulaic recitation of cause of action and nothing more" that "does not put the defendants on notice of what exactly they might have done to violate Brooks's rights." *Id.*

In an ERISA class action case, *Braden v. Wal–Mart Stores, Inc.*, the Eighth Circuit held that a plaintiff's complaint was sufficient, in spite of one "bare allegation" of a cheaper fund, because "the totality of the specific allegations" were sufficient. 588 F.3d 585, 596 n.7 (8th Cir. 2009). The court was not permitting a more relaxed threshold, but rather reminding the defendant that the court must look at the entire complaint. The court noted that the plaintiff's complaint alleged specific allegations about the size of the plan, the competitiveness of the marketplace, and the ability of a large plan to "obtain institutional class shares of mutual funds." *Id.* at 505. The complaint then alleged that the plan was not run in way that would benefit the participants; instead, "the funds included in the Plan made revenue sharing payments to the trustee, Merrill Lynch, and . . . these payments were not made in exchange for services rendered, but rather were a quid pro quo for inclusion in the Plan." *Id.* at 595–96.

The Ninth Circuit examined pleading sufficiency in *Al-Kidd v. Ashcroft*, an unlawful detention case like *Iqbal*. 580 F.3d 949 (9th Cir. 2009). The complaint, which "does more than contain bare allegation of an impermissible policy," stated specific facts, including "'one account' of material witness practices stating that 'nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify'" and a declaration where "a DOJ official admitted that, of those detained as material witnesses, 'it may turn out that these individuals have no information useful to the investigation.'" *Id.* at 975. Therefore, the complaint was sufficient.

In *Atherton v. District of Columbia Office of Mayor*, the D.C. Circuit dismissed a complaint asserting an equal protection claim when the plaintiff alleged only facts about himself, facts about others "based on information," and conspiracy in basic terms. 567 F.3d 672, 688 (D.C. Cir. 2009).[3] The court noted

[3] "The only factual allegations in Atherton's complaint on his equal protection claim are that: (1) after a witness who could not speak English testified before the grand jury, Atherton openly thanked the witness in Spanish, Compl. ¶¶ 64-65; (2) 'based on information, Atherton was the only semi-fluent Spanish speaking grand juror,' *id.* at ¶ 67; and (3) Atherton is 'half Mexican,' *id.* From these facts, Atherton alleges that, 'based upon information,' his removal without cause from the grand jury was an act of discrimination against him 'and Hispanics in particular because there were no other Hispanics on the jury.' *Id.* at ¶ 73. He also alleges that the defendants conspired to illegally

that "[t]he complaint and supporting materials simply do "not permit the court to infer more than the mere possibility of misconduct," and this is insufficient to show that [the plaintiff] is entitled to relief." *Id.* (citation omitted).

VI. Impact of *Iqbal* on Particular Categories of Cases

A. Employment Cases

In 2002, the United States Supreme Court issued the *Swierkiewicz* decision, which held that employment discrimination cases are only subject to the general pleading standard of Rule 8; they do not need to set forth specific facts establishing a prima facie case as required by *McDonnell Douglas Corp*. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). *Swierkiewicz* relied on *Conley* for the assertion that the "simplified notice pleading standard relies on liberal discovery rules and summary judgment and motions to define disputed facts and issues and to dispose of unmeritous claims." *Id.* at 512.

After the *Iqbal* decision, the Third Circuit overturned a dismissal in *Fowler v. UPMC Shadyside*, a disability discrimination case. 578 F.3d 203, 211 (3d Cir. 2009). Fowler was injured while she was working as a "janitor/housekeeper" at a hospital, and after she recovered she returned to work in a clerical position. *Id.* at 206. Her clerical position was soon eliminated. Fowler claimed that she applied for another clerical position, but the hospital never contacted her about the position and she was ultimately fired. The court held that Fowler's complaint "adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*." *Id.* at 212. Although the *Swierkiewicz* decision did not factor into the court's decision in *Fowler*, the *Fowler* court concluded "that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*." *Id.* at 211. The court stated that the plaintiff only had to plead a plausible claim; she did not need to establish the elements of a prima facie failure-to-transfer claim in her complaint. *Id.* at 212–13.

Less than a month after *Fowler*, the Third Circuit decided *Guirguis v. Movers Specialty Services, Inc.*, another employment discrimination case. 346 F. App'x 774 (3d Cir. 2009). In *Guirguis*, the court noted that *Swierkiewicz* "remains instructive" because the complaint at issue contained fewer factual assertions the *Swierkiewicz*. *Id.* at 776 n.7. In fact, Guirguis only asserted facts about himself and that he "was terminated by the defendant in violation of his rights due to the fact he is Arab, due to his native origin, having been born in Egypt." *Id.* at 775. The court, recognizing that the complaint lacked any facts, hedged on its discussion of *Swierkiewicz* in *Fowler*. *Swierkiewicz* was only overruled "insofar as it concerns the pleading requirements and relies on *Conley*," *id.* at 776 n.7, but *Swierkiewicz* only relied on *Conley* to espouse the liberal pleadings standards in federal court. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). Therefore, the repudiation of *Conley*'s "no set of facts" language in *Twombly* likely did not overrule *Swierkiewicz*'s assertion that there is no heightened pleading standard for employment cases.

B. Securities and Complex Financial Cases

Securities cases are often subject to heightened pleading standards. Therefore, *Iqbal*, to whatever extent it requires more factual assertions, will likely have a minimal effect in this area. For example, securities fraud claims are required to be pleaded with particularity by Federal Rule of Civil Procedure 9(b),[4] the Private Securities Litigation Reform Act requires facts supporting allegations of scienter,[5] and certain shareholder derivative actions subject to heightened pleading under Federal Rule of Civil Procedure 23.1.[6]

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remove him from the grand jury 'for ethnic purposes.' *Id.* at ¶ 68." *Atherton*, 567 F.3d at 688.

[4] "Fraud or Mistake; Condition of Mind. 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." Fed. R. Civ. P. 9(b).

[5] "In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

[6] In shareholder derivative suits, the plaintiff must "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or

C. Negligence

In negligent misrepresentation cases, plaintiffs may feel the impact of the explanation of the pleading standard in *Twombly* and *Iqbal*. In *Panther Partners v. Ikanos Communications, Inc.*, a Second Circuit decision, the court affirmed the dismissal of a negligent misrepresentation claim arising out of the Securities Act. No. 08-3398-cv, 2009 WL 2959883, at *1 (2d Cir. Sept. 17, 2009). The court, quoting from the lower court's opinion, held that the complaint was insufficient because "'[n]o plausibly pleaded fact suggests that [the defendant] knew or should have known the scope or magnitude of the defect.'" *Id.* at *2 (quoting *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 538 F. Supp. 2d 662, 673 (S.D.N.Y. 2008)). In fact, any civil claim that requires a mental state as an element likely requires specific factual assertions. The United States Supreme Court criticized the *Iqbal* complaint because it did "not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1952 (2009). In *Arar*, the Second Circuit noted that, unlike the *Iqbal* Court, it was not required "to speculate about the mental state of government officials." *Arar v. Ashcroft*, 585 F.3d 559, 618 (2d Cir. 2009).

D. Civil Rights

While civil rights cases do not have special pleading requirements, issues of immunity and conspiracy, which are often raised in such cases, may require additional factual representations.[7] As in all civil cases after *Twombly* and *Iqbal*, vague and conclusory allegations are insufficient to satisfy a plausibility requirement.

In one civil rights case, *Cooney v. Rossiter*, Judge Posner opined that "the height of the pleading requirement is relative to the circumstances." 583 F.3d 967, 971 (7th Cir. 2009). He noted that complex civil litigation and immunity issues both have been two circumstances where the bar has been raised. *Cooney* was not a complex case, but rather "paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy." *Id.* The plaintiff alleged a vast conspiracy by her ex-husband, the ex-husband's lawyer, her son's representative, her children's psychiatrist, her children's therapist, and the court that led to the plaintiff losing custody of her children. *Id.* at 969–70. Even in a pro se case, the plaintiff must present a plausible claim "before defendants in such a case become entangled in discovery proceedings." *Id.* The court affirmed the dismissal of the plaintiff's § 1983 conspiracy claim because "[t]he complaint in this case, though otherwise detailed, is bereft of any suggestion, beyond a bare conclusion, that the remaining defendants [those not entitled to absolute immunity] were leagued in a conspiracy with the dismissed defendants." *Id.* at 971.

VII. What it All Means for Attorneys and Litigants

Although the impact of *Twombly* and *Iqbal* on pleading practice in federal court is still subject to debate, litigants must be aware of several issues when determining how to plead or how to answer a complaint. Plaintiff's counsel practicing in federal court should develop sufficient facts early in order to fulfill the requirement of Rule 8. If the complaint is not factually adequate, the defendant can file a motion to have the complaint dismissed for "failure to state a claim upon which relief can be granted" based on Federal Rule of Civil Procedure 12(b)(6). If the pleadings are deficient and the plaintiff's claim is plainly frivolous or futile, the court may dismiss the case.[8] However, the court may allow the plaintiff to

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members; and (B) the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3).

[7] *See, e.g., Sinaltrainal v. Coca-cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (allegations are insufficiently vague and conclusory because the scope of the conspiracy and its participants is undefined); *Hall v. Witteman*, 584 F.3d 859 (10th Cir. 2009) (conclusory allegations that fail to provide facts or description of misuse of state power do not pass the facial plausibility requirement). *But see Sanchez v. Pereira-Castillo*, No. 08-1748, 2009 WL 4936397, at *12 (1st Cir. Dec. 23, 2009) (finding that facts supported a plausible inference that defendants were the "primary violator[s] . . . in the rights-violating incident").

[8] *See, e.g., United States ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir. 2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification . . . is considered an abuse of discretion."); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."); *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co.*, 195 F.3d 765, 771 (5th Cir. 1999) ("A district court acts within its discretion when

re-plead. Nevertheless, even if the court allows the plaintiff to re-plead, the defendant may discover additional facts about the plaintiff's claims before the answer is due. Some believe, however, that the same result can be accomplished through a motion for a more definite statement under 12(e). Of course, nothing prevents a defendant from filing a motion to dismiss under 12(b)(6) and a motion for a more definite statement, in the alternative, under 12(e). The end result of either motion can be a more detailed and concise framework for the discovery in the case. A defendant may also request the costs and fees associated with the filing of a dismissal motion pursuant to a court's inherent power.[9] Finally, the strategic benefit of an initial win early in a case can also be beneficial.

The decision of whether to file a motion to dismiss still depends, as it always has, on the circumstances of the particular case. Parties must also realize that although the standard has not changed, the United States Supreme Court's interpretation of the standard has.

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dismissing a motion to amend that is frivolous or futile." (footnote omitted)).

[9] *See, e.g., NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 698 (5th Cir. 1990) (holding that a court has inherent power to award costs and fees for bad-faith actions).