

Rule 12(b)(6) Motions: Not Just for “Little Green Men” Anymore

By Brian D. Wassom

Only occasionally does a Supreme Court decision (or series of decisions) significantly alter the daily lives of most civil litigation practitioners. The *Anderson v. Liberty Lobby* line of cases in the 1980s, which made summary judgment a more potent weapon, is one such example. The revision of expert witness rules in *Daubert* and *Kumho Tire* is another.

An earthquake of similar magnitude is still reverberating through the world of Rule 12 motions to dismiss. In 2007’s *Bell Atlantic Corp. v. Twombly*,¹ the Supreme Court toughened the “notice pleading” requirement of Fed. R. Civ. P. 8, significantly raising the bar that a plaintiff must overcome in order to reach the discovery phase. Unwilling to accept that the Court meant what it said, however, a surprisingly high number of courts and attorneys rationalized that the decision’s rationale must have been intended to apply only in *Twombly*’s specific context of anti-trust law.

Not so, said the Court in *Ashcroft v. Iqbal*,² decided May 18, 2009. Because “Rule 8 ... governs the pleading standard ‘in all civil actions and proceedings in the United States district courts,’”³ *Twombly*’s interpretation of that rule (as further elaborated by *Iqbal*) governs all civil litigation in federal courts. Now, unless certain senators intent on reversing these decisions have their way,⁴ jurists and practitioners alike must completely rethink their understanding of what constitutes an acceptable pleading.

What *Twombly* and *Iqbal* Held

In *Twombly*, the Supreme Court rejected the decades-old “no set of facts” standard of *Conley v. Gibson* that had prevailed for the last few decades. It reconceptualized the standard as one of “plausibility.” The Sixth Circuit explains that, while this new standard “screens out the ‘little green men’ cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are ‘implausible.’”⁵ “[A] civil complaint [now] only survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.”⁶

“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.”⁷ The mere possibility of liability is insufficient to survive a motion to dismiss. Even when presumed to be true, factual allegations are insufficient when they are “merely consistent with a defendant’s liability,”⁸ or are subject to an “obvious alternative explanation.”⁹ Well-pled allegations are those that nudge the claim “across the line from conceivable to plausible.” *Id.* at 1949. This is “a context-specific [inquiry] that requires [courts] to draw on [their] judicial experience and common sense.” *Id.*

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹⁰ “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.”¹¹

These decisions are a backlash against flimsy complaints being used as a gateway to lengthy, costly discovery. “[The plaintiff] is not entitled to discovery [where the complaint alleges any of the elements] ‘generally,’ [i.e., as] a conclusory allegation [since] Rule 8 does not [allow] pleading the bare elements of [the] cause of action [and] affix[ing] the label ‘general allegation’ [in hope to develop facts through discovery].”¹²

Practice Tips for Civil Litigators

There are plenty of complaints currently pending that were drafted pre-*Iqbal*, or without an understanding of its requirements. These low-hanging fruit should be subject to easy Rule 12 motions. Even as the new standard sets in, however, Rule 12 motions will still be an increasingly potent weapon for bringing litigation to an early end.

- Chart out each element of each cause of action.¹³ Plaintiffs, be sure you have alleged specific facts to support each element. Defendants, be ready to pounce on elements lacking direct factual support.
- Chart out each defendant, and the specific actions that suggest his/her/its liability. Allegations should identify the specific facts that give rise to each defendant’s liability. Where liability rests on actions taken by, or statements made by, a party, identify those actions/statements with particularity. *Iqbal* dismissed claims against John Ashcroft and other Department of Justice officials that were based on the alleged existence of a “policy,” rather than actions of specific individuals.
- Focus particularly on knowledge/intent elements. Where liability rests on a party’s knowledge or intent (including the existence of an agreement), make sure you allege all the facts you can that are not only consistent with that allegation, but which nudge the allegation over the line from conceivable to plausible. *Iqbal* required evidence specifically demonstrating each defendant’s discriminatory intent—a daunting task for a plaintiff who has not yet taken discovery. One court lamented that, post-*Iqbal*, “even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without ‘smoking gun’ evidence.”¹⁴
- Show and tell. *Iqbal* requires factual allegations that “show” entitlement to relief. But also make it clear to the court how those facts support each element. You may even want to go as far as specifically pleading each element in the complaint. There are page limits on your response brief to a Rule 12 motion; there are no page limits on complaints.
- Attach documents to the complaint. These can be considered in a Rule 12 analysis. This is an easy way to incorporate a lot of specific facts.
- Avoid “information and belief” allegations as much as possible. Many—but not all—courts applying *Iqbal* have held that these fail to provide plausible factual support.
- Factual research. Do more research into the facts of the case pre-complaint than you may have in the past. Consider hiring a private investigator if necessary.
- Legal research. Do a “(*Twombly* or *Iqbal*) and ___” search on Lexis or Westlaw before filing your complaint, to see how

courts have applied *Twombly/Iqbal* in your specific area of law. Learn from others' mistakes in drafting your pleading. Also, research how your judge has applied the standard, since it gives judges significant discretion to decide what is plausible, and to discuss what may be "obvious alternative explanations."

- Plaintiffs, always ask to amend in the alternative. Almost all post-*Iqbal* dismissals have permitted amendment, especially since the standard is such a departure from prior practice.
- Consider filing in state court. If satisfying *Iqbal* will be a problem, file in state court, where the standard does not (yet) apply.
- Defendants, move to delay Rule 26 initial disclosures. By making initial disclosures, you will give your opponent ammunition to bolster its factual allegations.
- Look for "obvious alternative explanations." If the complaint gives no reason to believe that its explanation of a particular set of facts is more likely than an "obvious alternative explanation," then those facts are not plausible support for the complaint.
- What goes around, comes around. Remember that Rule 8 applies to counterclaims too. They are just as subject to scrutiny as are complaints.
- Consider a Rule 12(c) motion instead of Rule 12(b)(6). This prevents plaintiffs from mooting a motion to dismiss by exercising their automatic right to one free amendment.
- Pro se complaints are still construed liberally. The Court's only arguable deviation from this new theme has come in the *pro se* context. In *Erickson v. Pardus*¹⁵—decided shortly after *Twombly*—the Court found a prisoner's factual allegations in support of his 8th Amendment claim to be sufficient, and reiterated that *pro se* pleadings are to be construed more liberally—although it is not clear that the result in *Erickson* would have been different if the complaint had been drafted by counsel.

This area of civil procedure is still in flux. Federal courts everywhere are still just beginning to flesh out the implications of *Iqbal*, which may not be the Supreme Court's last word on

the issue. Now more than ever, litigators who stay abreast of these changes will have the upper hand over less-informed opponents.

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Endnotes

¹550 U.S. 544.

²129 S. Ct. 1937.

³*Id.* at 1953 (quoting Fed. R. Civ. P. 1).

⁴Sen. Arlen Specter has already introduced the "Notice Pleading Restoration Act" in an effort to overrule *Twombly* and *Iqbal*.

⁵*Courie v. Alcoa Wheel & Forged Prods.*, __ F.3d __, 2009 WL 2497928, *2 (6th Cir. Aug. 18, 2009)

⁶*Id.* (quotations omitted).

⁷*Iqbal*, 129 S.Ct. at 1949.

⁸*Id.* (emphasis added).

⁹*Id.* at 1951-52.

¹⁰*Id.* at 1949-50.

¹¹*Id.* at 1950.

¹²*Id.* at 1949-54.

¹³See *Twombly*, 550 US at 562 ("a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery") (quoting approvingly from *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d. 1101, 1106) (7th Cir. 1984)).

¹⁴*Ocasio-Hernandez v. Fortuno-Burset*, 2009 US Dist. Lexis 67714, *22 (D.P.R. Aug. 4, 2009).

¹⁵551 US 89 (2007).

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To develop an effective social media strategy, counsel must understand the company's goals, how to respond to third-party references to the company in social media, and how to address employees' use of social media.

The development of a comprehensive social media policy also requires the involvement of many stakeholders—including public relations/communications, information technology, customer service, marketing, and human resources. Launching that strategy requires continued involvement of these stakeholders, but those companies that exploit social media successfully will find the rewards can far outweigh the risks.

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