As appeared in Law.com, November 17, 2009

Lowering the Raised Bar

The Notice Pleading Restoration Act's attempt to reverse 'Twombly' and 'Iqbal' pleading standards

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In *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court held that in order to survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In so doing, the Court described as "best forgotten" and "incomplete" (see id. at 563) the less stringent standard set forth in *Conley v. Gibson*, with which federal courts have grappled since 1957 and which provided that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Subsequently, the Court issued *Ashcroft v. Iqbal*, which confirmed and made more exacting the "plausibility" standard set forth in *Twombly*. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Now, pending federal legislation seeks to undo the holdings of *Twombly* and *Iqbal* by requiring federal courts to return to the *Conley* standard when confronting motions to dismiss.

Twombly and *Iqbal* marked a significant change in the way federal courts evaluate motions to dismiss made under Fed. R. Civ. P. 12(b)(6). In *Twombly*, the Court held that to state a "plausible" claim for relief for an alleged Sherman Act violation, the complaint must plead sufficient factual allegations that enable a court to draw a reasonable inference that the defendant is liable for the conduct asserted in the complaint. See *Twombly*, 550 U.S. at 556; see also *Iqbal*, 129 S. Ct. at 1949. This contrasts with a "literal" reading of the "no set of facts" approach taken in *Conley*, under which a conclusory complaint could survive a motion to dismiss "whenever the pleadings left open the possibility" that the plaintiff might subsequently establish some set of facts to support recovery. *Twombly*, 550 U.S. at 561. In *Iqbal*, the Court confirmed that *Twombly*'s pleading standard, though issued in the antitrust context, was in fact predicated on a general interpretation of Fed. R. Civ. P. 8 and as such *Twombly* "expounded the pleading standard for 'all civil actions.'" *Iqbal*, 129 S. Ct. at 1953 (quoting Fed. R. Civ. P. 1). *Iqbal* further explained that, after *Twombly*, when the facts alleged "do not permit the court to infer more than the mere possibility of misconduct," the complaint has not shown "'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

Application of *Twombly* and *Iqbal* has increased as defendants have deployed the more stringent standard in dismissal motions and as courts have applied this standard in granting those motions. See, e.g., Alison Frankel, Two More '*Iqbal*' Dismissals Emerge in Product Liability Cases, August 4, 2009; Shannon Henson, *Iqbal* Ruling Impact Starting To Be Felt, Oct. 6, 2009.

In direct response to *Twombly* and *Iqbal*, Sen. Arlen Specter, D.-Pa., introduced the Notice Pleading Restoration Act of 2009 (S. 1504). The bill seeks to reverse *Twombly* and *Iqbal* in favor of a return to the dismissal standard set by *Conley*, and in effect lower the pleading bar that *Twombly* and *Iqbal* have raised. The legislation's intent to resurrect the *Conley* standard is set forth in unmistakably direct terms: "Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure,

except under the standards set forth by the Supreme Court of the United States in *Conley* v. Gibson, 355 U.S. 41 (1957).” S. 1504, 111th Cong. §2 (2009). See also David Ingram, Specter Proposes Return to Prior Pleading Standard, July 24, 2009.

In introducing the bill, Specter remarked that it would “restore the system of notice pleading that has served our Federal judicial system well since 1938, the year the Federal Rules of Civil Procedure were adopted.” 154 Cong. Rec. S7890 (July 22, 2009). Specter characterized *Twombly* as “jettison[ing]” the standard set by *Conley*, and Rule 8, by requiring not only factual specificity in complaints, but also that a complaint’s allegation of wrongdoing appear “plausible” to the court. Id. at S7891. Per Specter, the U.S. Supreme Court effectively “end-ran” the Rules Enabling Act by issuing *Twombly* and *Iqbal* instead of proposing an amendment to Rule 8 for Congressional approval. Id.

The proposed legislation, if passed in its current form, presumably would reinstitute the “no set of facts” standard that previously made it difficult for defendants to succeed in motions to dismiss before the weight of discovery fell upon their shoulders — the very situation the *Twombly* Court sought to avert, noting that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management.” *Twombly*, 550 U.S. at 559 (quotation omitted). See also *Iqbal*, 129 S. Ct. at 1953 (noting that “the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process”).

Specter’s bill was referred on July 22, 2009 (the day it was introduced) to the Senate Judiciary Committee, where Specter is a long-time member and former chairman. The bill remains in committee. Plaintiffs lawyers and others reportedly met in September to discuss ways to galvanize support for this admittedly “esoteric” issue. See Tony Mauro, Plaintiffs Groups Mount Effort to Undo Supreme Court’s ‘*Iqbal*’ Ruling, Sept. 21, 2009. At present, the legislation has one Senate co-sponsor, Specter’s fellow Judiciary Committee member Sen. Russell Feingold, D-Wis., and no related legislation has been introduced in the House of Representatives as of Nov. 6, 2009.

The House Judiciary Committee, and more specifically its Subcommittee on the Constitution, Civil Rights, and Civil Liberties, however, held a tellingly entitled “Access to Justice Denied — *Ashcroft v. Iqbal*” on Oct. 27, 2009. Three of the four witnesses at the hearing condemned the decision’s pleading standard as departing fundamentally from legal precedent and blocking legitimate lawsuits, while only one (former assistant attorney general at the DOJ’s Civil Division, Gregory Katsas) countered that the standard set by *Iqbal* was consistent with precedent and that overruling it would “open the floodgates for what lawyers call ‘fishing expeditions’ — intrusive and expensive discovery into implausible and insubstantial claims.” Hearing on Access to Justice Denied — *Ashcroft v. Iqbal* Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 1 (Oct. 27, 2009) (statement of Gregory G. Katsas). See also Alison Frankel, “*Iqbal*” Fails to Find Fan Base at House Judiciary Committee Hearing, Oct. 29, 2009.

The lack of formal legislative movement to date on the Notice Pleading Restoration Act may merely indicate that congressional attention is currently directed elsewhere (such as health care reform), or else may point to an underlying lack of support for reversing the current *Twombly* and *Iqbal* paradigm. Given the recent House hearing, however, it would seem that momentum is building for some legislative initiative addressing federal court pleading standards. Time will tell.

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