

ClientAlert

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Supreme Court Decision on Terrorism Suspect's Civil Rights Claims May Also Help Commercial Defendants Win Early Dismissals

A recent U.S. Supreme Court decision on constitutional civil rights claims brought by a terrorism suspect may have eased the way for commercial defendants to obtain early pre-discovery dismissals of claims against them. The Supreme Court's May 18, 2009 decision in *Ashcroft v. Iqbal*, No. 07-1015, should make it easier for defendants to win motions to dismiss commercial cases, especially in cases involving seemingly weak or speculative claims or where allegations of the defendant's knowledge or intent play a critical role.

The Claims in *Iqbal*

Iqbal involved claims brought by a Pakistani Muslim who was arrested and detained in the wake of the September 11 attacks. He brought constitutional civil rights claims against certain federal officials, including then-Attorney General John Ashcroft and FBI Director Robert Mueller, alleging that they had adopted an unconstitutional policy that subjected him to harsh conditions of detention because of his race, religion, or national origin. While both the district court and the Second Circuit upheld the plaintiff's claims against motions to dismiss filed by Ashcroft and Mueller, the Supreme Court reversed.

The Supreme Court's decision focused on the application of the Court's landmark revision of pleading rules two years ago in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), an antitrust case in which the Court held that to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief *that is plausible on its face.*" (Emphasis added.)

The Court in *Iqbal* stated that the constitutional claims raised by the plaintiff required the defendants not merely to have been aware that their actions would have an adverse effect on a particular group, but actually to have undertaken those actions for the purpose of discriminating against that group. The Court then considered what the plaintiff needed to plead in his complaint in order to properly state such a claim under *Twombly*.

Twombly's "Plausibility Standard"

The Court explained that while *Twombly*'s "plausibility standard" is not a "probability requirement," it does require allegations that raise "more than a sheer possibility that a defendant has acted unlawfully." Thus, "[w]here 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." Moreover, notwithstanding the general principle that factual allegations in a complaint are assumed to be true on a motion to dismiss, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and need not be accepted as true. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Thus, even though *Iqbal* had summarily alleged that the defendants had acted with the purpose of inflicting a discriminatory impact on persons of his race, religion or national origin, the Court determined that the complaint failed to allege any basis for concluding that the detention conditions were adopted for discriminatory purposes as opposed to legitimate law enforcement purposes. Because the Court believed there existed other “more likely explanations” for the conduct in question, the allegations “do not plausibly establish [the claimed illicit] purpose.”

Even if it were “conceivable” that the defendants had acted with improper purposes, and frankly conceding such an assertion might not be “unrealistic or nonsensical,” the Court held that the bare allegations of the complaint failed to “nudge[e] [the claim] across the line from conceivable to plausible.” The Court stressed that it was “the conclusory nature” of the allegations,” rather than their having any “extravagantly fanciful nature, that disentitles them to the presumption of truth.”

Attempts to Sidestep *Twombly* Rejected

The Court also rejected several arguments that the plaintiff had made for why his claims should not be subjected to the *Twombly* “plausibility” standard. The Court rejected the suggestion — which had been much discussed in the two years since *Twombly* was issued — that *Twombly* should be limited to the antitrust context in which it arose. The Court bluntly held that “*Twombly* expounded the pleading standard for ‘all civil actions,’” whether sounding in antitrust or not.¹

The Court also held that the plaintiff could not seek refuge for his pleading in the provisions of Rule 9(b) of the Federal Rules of Civil Procedure, which, while requiring certain matters to be pled with particularity, specifically provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Whatever this rule allowed, the Court said, it still did not permit a plaintiff to plead such matters as a bare conclusion. Rather, such allegations must be supported by enough “factual context” to pass the plausibility requirement:

“Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8 [discussed in *Twombly*]. . . . And Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”

Potential Impact on Commercial Litigation

Why should the fate of a terrorism suspect’s civil rights claims matter to litigants in commercial cases? Because the difficulties in pleading knowledge and intent, which led to the dismissal in *Iqbal*, arise frequently in many commercial claims as well.

Many business torts and commercial claims turn on questions of intent, knowledge or malice. Tortious interference claims, for example, may depend on whether the defendant knew of a contract

¹ Although the idea of an antitrust-only view of *Twombly* has been much discussed, it had not gained much traction in decisions by federal courts of appeals over the past two years. See generally, e.g., “Rule 8(a)(2) After *Twombly*: Has There Been a Plausible Change?”, a report of the Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, reprinted in 14 *NYLitigator* 23 (Spring 2009).

that the plaintiff had with a third party, and on whether the defendant was acting for legitimate competitive purposes or from some other improper motive. Negligence claims may turn on what knowledge the defendant possessed at the time when the actions in question were committed. Punitive damage and commercial defamation claims may raise issues of whether malice was present.

Sometimes there can be clear evidence of such matters, such as if a defendant's own statement concedes what his intent was, or when the sending and receipt of an e-mail can be used to show that the recipient had knowledge of the information contained therein. But not infrequently, a plaintiff who is drafting a complaint has no hard evidence or suggestive facts as to what the defendant's state of mind actually was. While it is possible that the defendant had a culpable state of mind, it is also equally possible that the defendant had an innocent state of mind. In such circumstances, the plaintiff may have little choice as a practical matter except to allege summarily that the actual facts were whichever possibility would result in liability.

In a pre-*Twombly* world, such an allegation might have passed muster so long as the matter alleged was not plainly impossible. But *Iqbal* now makes clear that unless the complaint provides some supporting facts to bolster its conclusory allegation as to the defendant's state of mind, the claim could face dismissal if the court finds the allegation implausible compared to other possibilities based on the court's "judicial experience and common sense."

Potential Risks and Opportunities in a Post-*Iqbal* World

The rubric of "judicial experience and common sense" itself creates the risk — or opportunity, depending on one's point of view — that claims could wind up being dismissed even before any discovery is taken based largely on unspoken and/or untested judicial assumptions about which types of conduct should be presumed to be the norm and which the aberration in particular situations. Such assumptions could well turn on judicial preconceptions as to how certain categories of defendants typically act in certain situations. On the other hand, some judges may be reluctant to deny a plaintiff's "day in court" based upon somewhat subjective views of how "plausible" the claims are, out of concern that allegations which seem implausible may nevertheless still be true.

Iqbal's invitation to judges to draw upon their own "judicial experience and common sense" will arguably introduce more judicial discretion into the motion to dismiss stage of litigation, which could make analytic consistency in decision-making harder to maintain. Indeed, in *Iqbal* itself, nine Justices reviewed the same claims and split 5-4 on whether they were "plausible" enough to survive a motion to dismiss.

But no matter how judges choose to evaluate what is plausible in the situations presented in complaints, *Iqbal* should make it easier for them to dismiss those claims they think are weak or speculative. Plaintiffs may also find it harder to sufficiently allege knowledge or intent — key elements of many commercial claims — given *Iqbal's* requirement that such allegations be supported by adequate "factual context." Cases that would involve burdensome discovery may be especially good candidates for early dismissal, since *Iqbal* (like *Twombly*) was animated at least in part by the Supreme Court's reluctance to permit a plaintiff "with nothing more than conclusions" to "unlock the doors of discovery."

Even if *Iqbal* increases the chances of obtaining an early dismissal, it may end up increasing the costs of getting there. As experience has shown in securities fraud cases subject to the special pleading requirements of the Private Securities Litigation Reform Act, complaints could become longer and more dense, as plaintiffs allege every “fact” that could conceivably support their claims. Such lengthy complaints can be expensive to respond to. The resulting motions to dismiss may also end up taking on the character of “mini-summary judgment” motions, and thus increase in cost and complexity as well. Such motions could also take longer to decide — which could be an expensive possibility if discovery is not stayed while the motion to dismiss is pending.

Conclusion

In the [May 25, 2007 client alert](#) that we wrote after the *Twombly* ruling was first issued, we noted that the decision “may signal a desire [by the Supreme Court] to impose more restrictive requirements on the pleading of complaints that could create a more favorable atmosphere for obtaining early dismissals of many types of seemingly weak or speculative claims.” *Iqbal* suggests this more favorable atmosphere may now be a reality.

It is premature to know just how much impact *Iqbal* will have on defendants’ real-world ability to obtain dismissal of claims. *Iqbal* seems likely, however, to increase the chances that at least weak or speculative cases are dismissed prior to discovery. And, like *Twombly* before it, *Iqbal* could be a step towards even more restrictive pleading requirements going forward.

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