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Terrorism Ruling May Help Corporate Defendants Win Early Dismissals

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A recent U.S. Supreme Court decision on a terrorism suspect's constitutional claims may help commercial defendants obtain pre-discovery dismissals of claims against them. The Court's May 18 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.

Iqbal involved claims brought by a Pakistani Muslim who was arrested and detained in the wake of the Sept. 11 attacks. He brought 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 detention conditions because of his race, religion or national origin. While the district court and the 2nd U.S. Circuit Court of Appeals upheld *Iqbal*'s claims against motions to dismiss, the Supreme Court reversed.

The Supreme Court's decision focused on the application of the Court's landmark revision of pleading rules 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).

APPLYING 'TWOMBLY'S PLAUSIBILITY STANDARD

The Court noted that the claims at issue required Ashcroft and Mueller not merely to have known 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 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 principle that factual allegations 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."

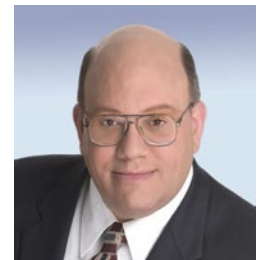
Thus, even though *Iqbal* had summarily alleged that the defendants had acted with the purpose of inflicting a discriminatory impact on persons of his race, religion or national origin, the Court determined that the complaint failed to allege any basis for concluding that the detention conditions were 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 indeed 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."

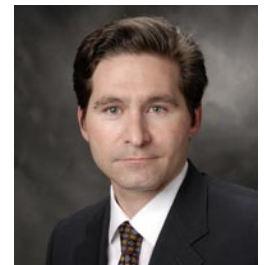
ATTEMPTS TO SIDESTEP 'TWOMBLY' REJECTED

The Court also rejected several arguments for why *Iqbal*'s claims should not be subjected to *Twombly*'s "plausibility" standard. The Court rejected the suggestion that *Twombly* should be limited to the antitrust context in which it arose. The Court held that "*Twombly* expounded the pleading standard for 'all civil actions.'"

The Court also held that *Iqbal* could not seek refuge for his pleading in the provisions of Rule 9(b) of the Federal Rules of Civil Procedure, which 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 did not permit a plaintiff to plead such



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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*]."

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 commercial claims as well. Tortious interference claims, for example, may depend on whether the defendant knew of a contract 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 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 when an e-mail can be used to show that the recipient had knowledge of the information contained therein. But not infrequently, a plaintiff drafting a complaint has no hard evidence or suggestive facts as to what the defendant's state of mind was. In such circumstances, the plaintiff may have little choice 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 be dismissed based largely on unspoken and/or untested judicial assumptions about 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 expensive if discovery is not stayed while the motion is pending.

CONCLUSION

After *Twombly* was issued, many asked whether it might 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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