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Twombly, Iqbal And The Prisoner's Pleading Dilemma

Law360, New York (October 20, 2009) -- Rule 8 of the Federal Rules of Civil Procedure requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."^[1] But does it?

In its May 2007 decision in *Bell Atlantic Corp. v. Twombly*,^[2] the U.S. Supreme Court gutted 50 years of established legal precedent and judicially amended Rule 8's "short and plain" requirement.

Twombly expressly overruled the oft-quoted language from the 1957 decision in *Conley v. Gibson* that no complaint should be dismissed for failing to properly 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."^[3]

Believing that this phrase allows any conclusory statement of a claim that might theoretically find support from undisclosed facts, the court declared that the *Conley* language had "earned its retirement."^[4]

In its place, the court articulated a "plausibility standard — a requirement that pleaders allege enough facts to raise their claims beyond the level of speculation, thus "nudg[ing] them across the line from conceivable to plausible."^[5]

Two years later, in *Ashcroft v. Iqbal*,^[6] the court further complicated Rule 8's pleading requirements by creating a muddled two-step process to assess plausibility.

First, the court's opinion directs that "all factual [nonconclusory] allegations contained in a complaint" must be accepted as true.^[7] Next, a court must determine whether those well plead factual allegations plausibly give rise to entitlement of relief."^[8]

This analytic process, the court explained, "[is] a context specific task that require[s] the reviewing court to draw on its judicial experience and common sense."

In combination, Twombly and Iqbal have generated greater confusion than guidance. District courts have interpreted the Twombly/Iqbal principles as obligating a pleader to state a claim somewhere in a continuum between a short and plain statement and a detailed tome comparable to that required in matters of fraud.

To differing degrees in different courts, a plaintiff must now not only allege a theory and claim that is plausible, but also include, with an undefined modicum of particularity, the “sufficient” underlying facts supporting both the plausibility of the theory and the reality of the conduct.

Iqbal’s dissenting justices warned that “this response bespeaks a fundamental misunderstanding of the enquiry that Twombly demands. Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true.”[9]

To the contrary, the dissenters note, “a well pleaded complaint [under Twombly] may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable.”[10]

Only when the allegations “are sufficiently fantastic to defy reality”[11] should a court dismiss an otherwise well-pled complaint. Scenarios fitting this narrow exception, they wrote, would include “claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”[12]

However, as the majority in Twombly had stated, “It 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,”...given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”[13]

The key to the majority opinion may lie in the definition of “groundless” which could equate to little green men or interplanetary travel. To date, however, that phrase remains undefined.

Scholars have predicted the negative effects of Twombly and Iqbal.

Some have warned that “[a]pplying a restrictive pleading standard transsubstantively will surely result in fewer meritorious cases filed, more meritorious cases dismissed, and less unlawful conduct redressed, particularly for cases in which a less restrictive standard could achieve a better balance between efficiency and justice.”[14]

Likewise, others have written that “[t]he Supreme Court’s general disapproval of Conley sweeps far too wide,” and that “[d]iscovery should only be denied when the plausible inferences that can be drawn from the complaint and publicly available evidence clearly imply further discovery is of little value.”[15]

Antitrust decisions interpreting *Twombly* and *Iqbal* have been highly disparate. Antitrust decisions (and *Twombly* was an antitrust case) provide a useful example.

After *Twombly*, many courts, while recognizing that the “no set of facts” approach in *Conley* was gone, viewed notice pleading under Rule 8 as alive and well, distinguishing *Twombly* as a case involving little more than conscious parallelism.[16]

After *Twombly* and/or *Iqbal*, several district courts have upheld complaints alleging multiyear conspiracies with many actors, albeit complaints with more factual details than found in either of the two Supreme Court decisions.[17]

The Ninth Circuit said recently, in a non-antitrust context, that *Iqbal*, effectuated no sea change in the law. *Al-Kidd v. Ashcroft*, No. 06-36059, 2009 WL 2836448 at *11 (9th Cir. Sept. 4, 2009).

As the same court noted, “[b]ut *Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff’s burden. ‘Asking for plausible grounds to infer’ the existence of a claim for relief ‘does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence’ to prove that claim.” *Id.* at *24 (quoting *Twombly*, 550 U.S. at 556).

On the other hand, many federal courts, in decisions rendered after *Twombly* and/or *Iqbal*, have taken a hard line and dismissed numerous antitrust conspiracy complaints containing more detailed factual averments.[18]

Dissenting from the Sixth Circuit’s opinion in *Travel Agent*, where dismissal of an antitrust conspiracy complaint was upheld, Judge Merritt stated, “district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act.”[19]

The dissent in *Travel Agent* illustrates how the standards set forth in *Twombly* and *Iqbal* are extremely vexing in the context of antitrust price-fixing conspiracies.

Although recognized by the Supreme Court as “the supreme evil of competition,”[20] price-fixing conspiracies are self-concealing by nature and difficult if not impossible to disclose at the initial pleading stage.[21]

Facts evidencing the nature, scope, and duration of the conspiracies are only known or knowable if there is access to inside information which otherwise is not obtainable except through formal discovery or through a public disclosure (e.g., investigative reporting or governmental indictment) of otherwise private information.

This “information asymmetry,” undermines the Twombly assumption that the plausibility standard only will bar cases that have no “reasonably founded hope” of reveal[ing] relevant evidence” in discovery.[22]

On the contrary, the twin principles of Twombly and Iqbal have created the most bizarre results.

As Judge Merritt has commented, “[t]he uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims.”[23]

Defendants in alleged price-fixing cartels have routinely sought refuge in the plausibility morass of Twombly and Iqbal.

In situations, for example, where the government opens an investigation because it has received information indicating a reasonable basis to believe that an antitrust violation may have been committed, courts have dismissed private civil suits for failure to allege conspiratorial conduct with plausible specificity.[24]

Even where there have been guilty pleas, defendants have moved to dismiss civil complaints for failure to state a plausible claim.

In *In re Air Cargo Antitrust Litigation*, [25] seven major defendants were criminally indicted and pled guilty for their participation in a global conspiracy to fix prices in air cargo rates. Notwithstanding their indictments and subsequent guilty pleas, all seven moved to dismiss the civil complaint for failure to state a plausible claim.

The magistrate judge recommended dismissal on the grounds that the plaintiffs’ claims are “insufficient to raise a plausible inference of an agreement.”[26] Nearly a year later, the district judge reversed this portion of the Magistrate Judge’s opinion, finding that with now 15 guilty pleas, plausibility was established.[27]

The guilty plea scenario is particularly troubling. In those situations in which a company has acknowledged guilt by receiving conditional leniency in the U.S. Department of Justice’s leniency program, or actually pled to participation in a felonious conspiracy, a civil complaint should not be dismissible as being implausible in theory or fact.

Where criminal conduct has been admitted by plea or acknowledgement, no civil complaint consistent with the plea or acknowledgement should be foreclosed before the plaintiff has the opportunity to discover the information that would fill the gaps of absent details.

The irony is compounded by the fact that the necessary details for a civil pleading following a criminal plea, for example, are under the control of the public enforcement agency.

Whether by plea or amnesty, the government, pursuant to its investigatory authority, has possession of the essential information relating to the conspiracies. In order to protect the prosecutorial process, however, the agencies routinely deny access to the material until completion of their investigations or trials.[28]

Civil plaintiffs are thus required to plead details from which they are foreclosed by reason of claimed prosecutorial necessity or the inherently covert nature of the conspiracy.

In the end, either the Supreme Court or Congress must acknowledge the frequent injustices being caused by the Twombly and Iqbal plausibility standard — especially in cases involving guilty plea and amnesty applicant antitrust defendants.

Otherwise, “fewer meritorious cases will be filed, more meritorious cases will be dismissed, and less unlawful conduct will be redressed ...”[29]

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[1] Fed. R. Civ. Pro. 8(a)(2).

[2] 550 U.S. 544 (2007).

[3] See Twombly, 550 U.S. at 553 (abrogating language in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[4] See id.

[5] See id. at 570.

[6] 129 S.Ct. 1937 (2009).

[7] Id. at 1949.

[8] Id.

[9] *Id.* at 1959 (Souter, J., joined by Stevens, Ginsberg & Breyer, JJ., dissenting).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] 550 U.S. at 559.

[14] Posting of Scott Dodson to Civil Procedure Prof Blog, lawprofessors.typepad.com/civpro/ (last visited May 18, 2009).

[15] Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments* (University of Chicago John M. Olin Program in Law & Econ., Working Paper No. 403, 2008), available at ssrn.com/abstract=1126359.

[16] E.g., *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 900 (N.D. Cal. 2008) (“SRAM”) (complaint need only present a short and plain statement of the claim; no detailed factual recitations are needed); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F.Supp.2d 363, 370 (M.D. Pa. 2008) (Rule 8 pleading standards continue to apply after *Twombly*; no heightened pleading standard is applied to antitrust complaints); *Babyage.com, Inc. v. Toys “R” Us, Inc.*, 558 F. Supp. 2d 575, 582 (E.D. Pa. 2008) (denying motion to dismiss complaint alleging parallel conduct and plus factors that tend to negate independent action); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp.2d 404, 408 n.2 (D. Del. 2007) (court read *Twombly* liberally in declining to dismiss most of the indirect purchaser antitrust claims at issue); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 5 (D.D.C. 2008) (“a complaint need not be dismissed where it does not ‘exclude the possibility of independent business action.’ ... Such a requirement at this stage in the litigation would be counter to Rule 8’s requirement of a short, plain statement with ‘enough heft to “sho[w] that the pleader is entitled to relief”’); *In re Flash Memory Antitrust Litig.*, No. C 07-00086 SBA, 2009 WL 1096602 at *4 (N.D. Cal. March 31, 2009) (“Flash Memory”) (specific factual allegations are not necessary; the statement in a complaint need only give the defendants fair notice of what the claim is and the grounds upon which it rests); *Fair Isaac Corp. v. Equifax, Inc.*, No. 06-4112 ADM/JSM, 2008 WL 623120 at *6 (D. Minn. March 4, 2008) (*Twombly* does not require specific pleading of the evidentiary details of a conspiracy); *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030, 2007 WL 3254765 at *1 (D. Utah Nov. 2, 2007), interlocutory appeal denied, 2007 WL 4165749 at *2 (D. Utah Nov. 20, 2007) (*Twombly* imposed no heightened pleading standard; a short and plain statement of a claim is still all that is needed); *Trans World Technologies, Inc. v. Raytheon Co.*, No. 06-5012 (RMB), 2007 WL 3243941 at * 4 (D.N.J. Nov. 1, 2007) (“[a]s long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient”); *Hyland v. Homeservices of America, Inc.*, No. 3:05-CV-612-R, 2007 WL 2407233 at *3 (W.D. Ky. Aug. 17, 2007) (complaint sufficed if “[p]laintiffs had alleged

more than parallel business conduct and a 'bare' assertion of a 'belief' of a conspiracy); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 at *3 (E.D. Pa. Aug. 6, 2007) (in denying a motion to dismiss a price-fixing conspiracy claim, "[p]laintiffs situate these allegations of parallel conduct in a context that suggests preceding agreement"); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225 at *6, *8 (D.N.J. June 29, 2007) (liberal antitrust pleading standards apply after *Twombly*; allegations of anticompetitive exclusive dealing arrangements stated a claim under § 1 of the Sherman Act).

[17] In *Flash Memory*, for example, the court, in a ruling issued after *Twombly* but before *Iqbal* upheld a complaint alleging a conspiracy against thirteen defendants to fix prices for NAND Flash memory and products containing such memory that lasted from 1999 to February of 2008. 2009 WL 1096602 at *3, *26. Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F.Supp.2d 1179, 1193 (N.D. Cal. 2009), the court upheld a complaint alleging a conspiracy against 26 defendants to fix prices for TFT-LCD panels and products containing them from 1996 through late 2006. And in *SRAM*, another post-*Twombly*, pre-*Iqbal* decision, the court upheld a complaint alleging a conspiracy among 24 defendants to fix prices for various types of SRAM from 1996 through 2005. See 580 F.Supp.2d at 899 & nn. 2 & 4, 910. As another example, the court in *In re Chocolate Confectionary Prods. Antitrust Litig.*, 602 F.Supp.2d 538, 574-77 (E.D. Pa. 2009), also decided after *Twombly* but before *Iqbal*, the court upheld against a plausibility challenge a complaint alleging that members of four corporate families fixed prices for a variety of chocolate confectionary products over a five year period. Likewise, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F.Supp.2d 27, 33 (D.D.C. 2008), again decided after *Twombly* but before *Iqbal*, the court upheld a complaint against railroads who controlled 90% of freight traffic in the United States and were alleged to have entered into a conspiracy going back to 2003 to fix fuel surcharges. *Id.* at 29, 37. Similarly, in *Standard Iron Works v. Arcelormittal*, No. 08 C 5315, 2009 WL 1657449 (N.D. Ill. June 12, 2009), the court, in a decision rendered after *Iqbal*, upheld a complaint alleging a multiyear output-restriction conspiracy against the major United States steel producers that encompassed steel manufactured pursuant to different methods of production. 2009 WL 1657449 at *1-*3, *21. In a similar vein, the court in *In re ATM Fee Antitrust Litig.*, No. 04-02676 CRB, 2009 U.S. Dist. LEXIS 83199 at *22-*25 (N.D. Cal. Sept. 4, 2009), another post-*Iqbal* case, the court ruled, in response to motions to dismiss by eleven banking entities who were members of the Star network and who were accused of fixing interchange fees going back to the 1990s, that the amended complaint alleged a plausible conspiracy. And in the "Order" (Aug. 21, 2009) in *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y.) ("Air Cargo Order"), yet another post-*Iqbal* ruling, the district court reversed the ruling of a magistrate judge granting motions to dismiss under for failure to plead a plausible conspiracy by 34 airlines accused of participating since 2000 in an international conspiracy to fix air cargo fuel surcharges. See also *In re Southeastern Milk Antitrust Litig.*, 555 F.Supp.2d 934, 942-43 (E.D. Tenn. 2008) (denying motion to dismiss in antitrust conspiracy case).

[18] See, e.g., *Kendall v. Visa U.S.A, Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007); *Tam Travel, Inc. v. Delta Airlines, Inc.*, No. 07-4464, 2009 WL 3151315 (6th Cir. Oct. 2, 2009) (“Travel Agent”); *Hinds County, Miss. v. Wachovia Bank, N.A.* 620 F.Supp.2d 499 (S.D.N.Y. 2009) (“Hinds”); *Arista Records LLC v. Lime Group LLC*, 532 F.Supp.2d 556 (S.D.N.Y. 2007); *In re California Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025 (N.D. Cal. May 21, 2009); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009); *In re Less-Than-Truckload (“LTL”) Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. 2009); *In re Digital Music Antitrust Litig.*, No. 06 MDL No. 1780 (LAP), 2008 WL 4531821 (S.D.N.Y. Oct. 9, 2008); *In re Insurance Brokerage Antitrust Litig.*, No. 04-5184 & 05-1079, 2007 WL 2533989 (D.N.J. Aug. 31, 2007).

[19] *Travel Agent*, 2009 WL 3151315 at *15 (Merritt, J., dissenting).

[20] *Verizon Comic’s Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[21] *Scott Dodson, Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 Va. L. Rev. In Brief 135 (2007), www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf.

[22] *Twombly*, 550 U.S. at 556.

[23] *Travel Agent*, 2009 WL 3151315 at *16 (Merritt, J., dissenting).

[24] *Hinds*, 620 F.Supp.2d at 514 (ruling “that the various investigations, inquiries, and subpoenas do not make the [complaint’s] allegations plausible, for the purpose of deciding a motion to dismiss under the standards laid out in *Twombly* and *Iqbal*.”) (citing *SRAM*, 580 F.Supp.2d at 903 and *In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011, 1024 (N.D. Cal. 2007)).

[25] *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP) (E.D.N.Y.).

[26] *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP), 2008 WL 5958061 at *7 (E.D.N.Y. Sept. 26, 2008).

[27] *Air Cargo Order* at 2-3.

[28] Civil defendants routinely request stays of discovery pending disposition of their motions to dismiss pursuant to *Twombly/Iqbal* motions.

[29] Posting of *Scott Dodson* to Civil Procedure Prof Blog, lawprofessors.typepad.com/civpro/ (May 18, 2009).