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Pleading in Federal Court after Ashcroft v. Iqbal, 556 U.S. 662 (2009)
by Paul Ferrer, Senior Attorney, Civil Procedure

The Supreme Court's Decision in Iqbal

Shortly after it was decided, we predicted that Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), a case widely reported in the news media for its effect on substantive antitrust law, would actually have a much more lasting impact in the procedural arena. In particular, we surmised that Twombly promised to eventually do for motions to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure what the now (in)famous 1986 "trilogy" of Matsushita, Liberty Lobby, and Celotex did for summary judgment motions under Rule 56. That promise was fulfilled with the United States Supreme Court's May 18, 2009 decision in Ashcroft v. Iqbal, 556 U.S. 662 (2009).

The plaintiff in Iqbal was a Pakistani citizen and a Muslim arrested in the wake of the September 11, 2001 terrorist attacks. Iqbal claimed that he was deprived of various constitutional protections while in federal custody. Iqbal sought to redress the alleged deprivations in a federal action against numerous officials, including John Ashcroft, former U.S. Attorney General, and FBI Director Robert Mueller. As to Ashcroft and Mueller, Iqbal alleged they adopted an unconstitutional policy that subjected him to harsh conditions of confinement on account of his race, religion, or national origin. The Supreme Court granted certiorari to consider the narrow question of whether Iqbal had "plead[ed] factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights." Id. at 666.

Building on Twombly, the Court held that Iqbal's complaint was insufficient under Rule 8(a)(2), pursuant to which a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The Court formulated a "two-pronged approach" for reviewing the legal sufficiency of a complaint. Id. at 679. First, the district court must "identify[] the allegations in the complaint that are not entitled to the assumption of truth." Id. at 680. The court does this by separating factual allegations from legal conclusions. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678; see also id. at 678-79 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). Thus, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. at 679; see also id. at 678 ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" (quoting Twombly, 550 U.S. at 555). In Iqbal itself, for example, the Court held that the plaintiff's allegations that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest," that Ashcroft was the "principal architect" of this invidious policy, and that Mueller was "instrumental" in adopting
and executing it, were "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," not factual allegations entitled to the presumption of truth. *Id.* at 680-81 (quoting *Twombly*, 550 U.S. at 555).

In the second part of the analysis, once the court has weeded out the legal conclusions, it should assume the veracity of any "well-pleaded factual allegations" and then determine "whether they plausibly give rise to an entitlement to relief." *Id.* at 679; see also *id.* at 678 ("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.'" (quoting *Twombly*, 550 U.S. at 570)). 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." *Id.* at 678. This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). To satisfy this test, the complaint must plead facts that are more than "'merely consistent with' a defendant's liability." *Id.* (quoting *Twombly*, 550 U.S. at 557). In other words, the plaintiff must allege enough by way of factual content to "nudge" his claim "'across the line from conceivable to plausible.'" *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

The second prong of the *Iqbal* test plainly contemplates a significant amount of discretion being exercised by the district court. The Supreme Court itself recognized that "[d]etermining 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." *Id.* at 679. It appears that it will be especially difficult to satisfy the plausibility standard in cases where the plaintiff must plead and prove that the defendant acted with a particular state of mind to be liable on the plaintiff's claim, since the plaintiff will rarely be in possession of any facts directly evidencing the defendant's intent, particularly at the pleading stage. See *id.* at 683 (the complaint "does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind"). In the absence of a smoking gun, such as a statement of intent by the defendant himself, the task may be nearly insurmountable when there is an "'obvious alternative explanation'" for the defendant's behavior, *id.* at 682 (quoting *Twombly*, 550 U.S. at 567), as the Court concluded was the case in both *Iqbal* and *Twombly*, see *id.* at 682-83 (there was nothing in the plaintiff's complaint to plausibly suggest that the petitioners adopted their confinement policy for impermissible reasons, rather than as a means of keeping suspected terrorists in the most secure conditions available until they could be cleared of terrorist activity), *Twombly*, 550 U.S. at 567 (allegations of defendants' parallel conduct did not plausibly suggest an illegal agreement under the federal antitrust laws because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior).

The Court made it quite clear in *Iqbal* that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions.'" 556 U.S. at 684 (quoting Fed. R. Civ. P. 1). As such, there can no longer be any doubt that the Court has rewritten the rules that must be followed by any plaintiff seeking to plead an action in federal court that will survive a motion to dismiss under Rule 12(b)(6). Accordingly, the plaintiff must now be careful to include sufficient factual
allegations, rather than legal conclusions, to make his claim seem plausible, rather than merely possible or conceivable, in the eyes of the reviewing court.

**Pleading Fraud in Federal Court after Iqbal**

As noted, *Iqbal* suggested that it might be especially difficult to satisfy the plausibility standard formulated in *Twombly* and *Iqbal* in cases where the plaintiff must plead, as an element of his claim, that the defendant acted with a particular state of mind, since the plaintiff will rarely be in possession of any facts directly evidencing the defendant’s intent, as in cases of fraud. Some relief from this problem might be thought to be available from the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure. The first sentence of Rule 9(b) sets forth the well-known requirement that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The second sentence is intended to temper the particularly requirement to some extent by providing that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." But the Supreme Court headed this argument off at the pass in *Iqbal*, where the Court indicated that the word "generally" in the second sentence of Rule 9(b) is "a relative term" that must be compared to the particularity requirement imposed in the first sentence. Thus, "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." 556 U.S. at 686-87. In other words, *Iqbal* seems to require the plaintiff to plead sufficient facts from which the district court can conclude that it is plausible that the defendant acted with the requisite state of mind. See, e.g., *SEC v. Fraser*, No. CV-09-00443, 2009 WL 2450508, at *12 (D. Ariz. Aug. 11, 2009) (the plaintiff must "provide a sufficient factual context to render a finding of scienter plausible").

The problem, as indicated, is that the district court is given a great deal of discretion in applying this plausibility standard, see *Iqbal*, 556 U.S. at 679 ("[d]etermining 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"), and this discretion can easily be misapplied in a fraud case to require pleading of facts sufficient to prove fraudulent intent rather than just pleading it. See, e.g., *Bonvillain v. La. Land & Exploration Co.*, 702 F. Supp. 2d 667, 680 (E.D. La. Mar. 29, 2010) (plaintiff’s allegations that the defendant submitted grossly inaccurate tax reports over a period of 10 years did not satisfy the *Twombly/Iqbal* standard and Rule 9(b) because the defendants "might have submitted th[e] tax forms inadvertently"), aff’d, 431 F. App’x 319 (5th Cir. 2011). Applied in this manner, the *Twombly/Iqbal* standard, combined with the particularity requirement of the first sentence in Rule 9(b), has the potential to do away with fraud actions in federal court, since it would be nearly impossible for a plaintiff to plead sufficient facts to rule out every possible explanation, no matter how unlikely, for the defendant’s behavior other than fraud.

Fortunately, at least some of the federal courts seem to have understood this tension in the Rules even after the dawn of the *Twombly/Iqbal* era. For example, the Seventh Circuit recognized in *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009), a
False Claims Act case involving alleged fraudulent requests for payment under a government contract, that "much knowledge is inferential—people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime[,]" As such, it is sufficient that the inference of fraud proposed by the plaintiff is "a plausible one." Id. at 854. While the district court in that case "thought it possible" that the government would have paid the defendant even if there was no fraud, "even a requirement of proof beyond a reasonable doubt need not exclude all possibility of innocence; nor need a pleading exclude all possibility of honesty in order to give the particulars of fraud." Id. Rather, "[i]t is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy." Id. at 854-55 (citing Twombly and Iqbal). The court rightly emphasized the difference between pleading and proving one's case: "To say that fraud has been pleaded with particularity is not to say that it has been proved (nor is proof part of the pleading requirement)." Id. at 855. But while the plaintiff's "complaint may be wrong[,] . . . [n]o complaint needs to rule out all possible defenses." Id. Accordingly, the relator's allegations of fraud in Lusby satisfied Twombly/Iqbal and the particularity requirement of Rule 9(b) because his "accusations are not vague," and the defendant "has been told exactly what the fraud entails," Id., even though the plaintiff's pleading had not excluded every possibility that the payment requests were submitted in error, rather than through fraud. Lusby gives some hope that persuasive advocacy will convince other federal courts that it is still permissible to draw a reasonable inference of fraud from well-pleaded factual allegations even under the Twombly/Iqbal regime.

Pleading a "Plausible" Claim in Federal Court After Iqbal: The Proper Application of the Plausibility Requirement

Despite the wide discretion afforded to district courts in determining whether a complaint states a plausible claim for relief under the Twombly/Iqbal standard, there are boundaries to the reviewing court's discretion, though it may not always seem so in reviewing the post-Iqbal case law. For example, the Second Circuit has decided that it is not the district court's task in reviewing a motion to dismiss to decide between two plausible inferences that may be drawn from the factual allegations in the complaint: "A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013). Thus, "[t]he question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." Id. at 189. The Second Circuit's formulation of the appropriate question recognizes that because the plausibility standard is lower than a probability standard, "there may therefore be more than one plausible interpretation of a defendant's words, gestures, or conduct. Consequently, although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." Id. at 189-90. Even after Twombly and Iqbal, "in determining whether a complaint states a claim that is plausible, the court is required to proceed 'on the assumption that all the [factual] allegations in the complaint are true[,]' even if their truth seems doubtful."
Id. at 185 (emphasis by Anderson News court) (quoting Twombly, 550 U.S. at 556). Because the plaintiff is entitled to the benefit of the doubt, "it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives"; rather, "the choice between or among plausible interpretations of the evidence will be a task for the factfinder," assuming that the plaintiff "can adduce sufficient evidence to support its factual allegations." Id. at 190.

The reasoning of the Anderson News case is subject to attack under Iqbal, which specifically seemed to contemplate that district courts could, in fact, choose among plausible alternatives in deciding a motion to dismiss. See Iqbal, 556 U.S. at 681 ("given more likely explanations, they do not plausibly establish this purpose"). Nevertheless, cases like Anderson News at least give the pleader some ammunition in seeking to fend off an early Rule 12(b)(6) motion to dismiss. Under the reasoning of the Second Circuit, the plaintiff can argue that his task in pleading a claim in federal court is to provide sufficient facts to create a plausible scenario for holding the defendant liable for the conduct alleged, not the most plausible scenario.

Pleading Affirmative Defenses in Federal Court after Iqbal

Twombly and Iqbal do not themselves indicate whether the heightened pleadings standards for stating plausible claims also apply to affirmative defenses asserted by the defendant against those claims. That issue has split the federal courts that have addressed it.

Part of the Supreme Court's rationale for adopting the more exacting "plausibility" standard for reviewing the sufficiency of a plaintiff's complaint was found in the language of Rule 8(a)(2), which requires "[a] pleading that states a claim for relief" to contain, among other things, "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2) (emphasis added); see Iqbal, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." (quoting Fed. R. Civ. P. 8(a)(2)). By contrast, the portion of Rule 8 dealing with defenses generally requires only that a party, in responding to a pleading, "state in short and plain terms its defenses to each claim asserted against it[.]" Fed. R. Civ. P. 8(b)(1). Likewise, Rule 8(c), which deals specifically with affirmative defenses, requires the party to "affirmatively state any avoidance or affirmative defense[.]" Fed. R. Civ. P. 8(c)(1).

Some of the district courts have relied, in part, on the differences in the language of these subsections in holding that the Twombly/Iqbal standard does not apply to the pleading of affirmative defenses. See, e.g., Falley v. Friends Univ., 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011) (finding these differences "significant," in that the "showing" requirement in subsection (a) does not appear in subsections (b) and (c) governing defenses). These courts have also considered that the issue arises in the context of a motion to strike an "insufficient defense" under Rule 12(f), see id. at 1257, and such motions are "highly disfavored" because they are often used by the movant "simply as a dilatory tactic," FTC v. Hope Now Modifications, LLC, No.
In addition, another one of the considerations underlying the adoption of a higher pleading standard for complaints—not subjecting a defendant to discovery in favor of "a plaintiff armed with nothing more than conclusions," *Iqbal*, 556 U.S. at 679—does not apply to a defendant who is "already subjected to discovery." *Hope Now*, 2011 WL 883202, at *3.

While this reasoning appears sound, the majority position currently favors applying the *Twombly/Iqbal* standard to the pleading of affirmative defenses. See, e.g., *EEOC v. LHC Group, Inc.*, No. 1:11CV355-LG-JMR, 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012); *Falley*, 787 F. Supp. 2d at 1256-57 (collecting cases). Courts in the majority have pointed out that "[p]leading requirements are intended to ensure that an opposing party receives fair notice of the factual basis for an assertion" whether it is contained in a claim or in a defense. *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010). Moreover, the application of the higher pleading standard will also "discourage defendants from asserting boilerplate affirmative defenses that are based upon nothing more than some conjecture that [they] may somehow apply." *Id.* (internal quotation marks omitted).

For now, there is no definitive resolution to this issue. As such, practitioners asserting affirmative defenses in federal court will have to research the question in the particular court in which they are appearing before pleading so as to determine how much factual detail will be required to withstand a potential Rule 12(f) motion to strike the defenses.