Debunking The Myth That Rule 12 Is The New (Misapplied) Rule 56: An Analysis Of How The Courts Have Actually Interpreted *Ashcroft v. Iqbal*

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Introduction[1]

The proclamation that Rule 8 is dead after *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) has proven to be overblown rhetoric. That the liberal notice-pleading standard still governs in civil cases should not be surprising given *Iqbal's* legal foundation, including the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

A. The Legal Underpinnings Of *Iqbal*

The scope of underlying claims before the Supreme Court in *Twombly* was sweeping because "plaintiffs represent[ed] a putative class of at least 90 percent of all subscribers... in an action against America's largest telecommunications firms... for unspecified instances (if any) of antitrust violations...."[2] Thus, the ruling in *Twombly* modified the pleading standard as applied to large anti-trust class cases involving highly complex claims and enormous discovery costs; the clarified standard in such cases requires pleadings to "state a claim to relief that is plausible on its face."[3]

Importantly, *Twombly* confirmed that it was "not requir[ing] heightened fact pleading of specifics...."[4] The Supreme Court underscored the liberal nature of the pleading standard under *Twombly* by reiterating as follows: Of course, a well-pleaded **complaint may proceed** even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a **recovery is very remote and unlikely.**"[5]

In short, a Rule 12 motion should be denied under *Twombly* when a plaintiff's factual allegations are "suggestive of illegal conduct."[6]

B. The Continuing Viability Of The Liberal Notice–Pleading Standard In Federal Court: From *Swierkiewicz* To *Erickson* And *Matrixx*

In a *per curiam* ruling two weeks after *Twombly*, the entire Supreme Court quoted *Twombly* to reiterate that the liberal notice-pleading standard still governs: Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." **Specific facts are <u>not</u> necessary**; the statement need only "give the defendant fair notice of what the... claim is and the grounds upon which it rests."[7]

The holding in that case, *Erickson v. Pardus*, echoes another unanimous ruling by the Supreme Court–which Justice Clarence Thomas authored in an employment discrimination matter: "Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. **A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."**[8]

Significantly, *Twombly* cited the case authored by Justice Thomas, *Swierkiewicz v. Sorema, N.A.*, with approval.[9]

Iqbal, which extended *Twombly* to other federal claims filed in federal court, did not purport to overrule or even to address the Supreme Court's unanimous decisions in *Erickson* and in *Swierkiewicz*. Notably, Judge Richard Posner–who provided the analytical underpinnings for *Iqbal*–cited *Erickson* and confirmed that *Iqbal* (like *Twombly*) was a highly unusual matter and, consequently, did not change the pleading standard in ordinary civil cases.[10]

In another unanimous deci-

sion—a rarity these days—the Supreme Court recently applied *Iqbal* in complex and costly securities fraud litigation. In that case, *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court held the plaintiffs adequately pled their claims: "Viewing the **allegations** of the complaint **as a whole**, the complaint alleges facts **suggesting** a [material misrepresentation to support a securities-fraud claim]."[11] By so ruling, the Supreme Court underscored yet again that a liberal pleading standard continues to govern.

As a practical matter, imposing a heightened pleading standard on plaintiffs would likely increase rather than decrease the demand for scarce judicial resources. For example, such an approach would prompt many plaintiffs to file lengthy complaints with numerous exhibits appended to minimize the risk of dismissal pursuant to Rule 12. Perhaps more importantly, imposing a heightened pleading standard would probably prompt defendants to bring Rule 12 motions far more frequently and put more strain on an already overextended federal bench.

In apparent recognition of such an undesirable outcome, Chief Judge Frank Easterbrook—who is not known for rendering decisions favorable to plaintiffs—reversed dismissal of claims based on the following reasoning: "Plaintiffs need not lard their complaints with facts; **the federal system uses notice pleading rather than fact pleading.**"[12]

Accordingly, both circuit courts and district courts—like the Supreme Court—have continued to apply the liberal notice-pleading standard after *Iqbal*:

- *Litwin v. Blackstone Group*, L.P., 634 F.3d 706, 718 (2nd Cir. 2011) (vacating the dismissal of Securities Act claims because "plaintiffs need only satisfy the basic notice pleading requirements of Rule 8");

- *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (reversing the dismissal of claims because, "[i]n the absence of further development of the facts, we have no basis for crediting one set of reasonable inferences over the other");

- *Sepulveda-Villarini v. Dept. of Educ.*, 628 F.3d 25, 30 (1st Cir. 2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (in vacating the dismissal of claims, retired Supreme Court Justice David Souter—the author of *Twombly*—explained that "*Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor. A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss...");

- *Speaker v. U.S. Dept. of Health and Human Servs. Ctrs. for Disease Control and Prevention*, 623 F.3d 1371, 1280 (11th Cir. 2010) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (reversing the dismissal of claims because "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely");

- *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (reversing the dismissal of claims and holding that Rule 8 does not require a plaintiff to plead facts rebutting all possible lawful explanations for a defendant's conduct);

- *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) ("Any doubt that *Twombly* had repudiated the general notice-pleading regime of Rule 8 was put to rest two weeks later, when the Court issued *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).");

- *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276 (10th Cir. 2009) (reversing the dismissal of claims because "[i]t is not necessary for the complaint to contain factual allegations so detailed that all possible defenses would be obviated");

- *Harman v. Unisys Corp.*, 356 Fed. Appx. 638, 640-42 (4th Cir. 2009) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) and vacating the dismissal of claims);

- *Morgan v. Hubert*, 335 Fed. Appx. 466, 470 (5th Cir. 2009) ("This standard simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements.");

- *Smith v. Local Union No. 110*, 681 F.Supp.2d 995, 1006 (D. Minn. 2010) (reaffirming that "there is no requirement that a plaintiff actually prove the merits of its case in its complaint" and allowing the plaintiff to file an amended complaint);

- *EEOC v. Universal Brixus, LLC*, 264 F.R.D. 514, 515 (E.D. Wis. 2009) (denying the motion to dismiss because "courts must be cautious so as not to interpret *Twombly* and *Iqbal* as requiring detailed factual recitations for all complaints simply

Debunking The Myth...continued from page 39

because more detailed factual allegations were required in those cases due to the nature of the claims alleged"); and

- *Chao v. Ballista*, 630 F.Supp.2d 170, 177 (D. Mass. 2009) (denying the motion to dismiss because "Rule 8 does not... require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful. Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior").

Given the Eighth Circuit continues to be one of the most difficult jurisdictions for plaintiffs, *Braden* is significant because the Eighth Circuit reiterated in that case as follows: "**the complaint should be read as a whole**, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."[13] In reversing the district court, the Eighth Circuit cited *Erickson* and explained as follows: The district court erred in two ways. It ignored reasonable inferences supported by the facts alleged. It also drew inferences in [the defendant's] favor, faulting [the plaintiff] for failing to plead facts tending to contradict those inferences. Each of these errors violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party. *Twombly* and *Iqbal* did not change this fundamental tenet of Rule 12(b)(6) practice.... **Rule 8 does not**, however, **require a plaintiff to plead "specific facts"** explaining precisely how the defendant's conduct was unlawful. Rather, **it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior**, so long as the facts pled give defendant fair notice of what the claim is and the grounds upon which it rests, and allow the court to draw the reasonable inference that the plaintiff is entitled to relief.[14]

The Eighth Circuit recently reaffirmed the essential ruling in *Braden*, which is also consistent with the plain language and manifest purpose of the governing Federal Rule.[15]

Blowback: The Attack On Affirmative Defenses In Response To The Aggressive Use Of *Iqbal*

Federal courts around the country have taken varying approaches to the application of *Iqbal* to affirmative defenses.[16] Regardless, the growing and prevailing body of precedent across the nation holds that affirmative defenses will be dismissed unless pled with the particularity that many defendants have argued should be required of plaintiff complaints filed in federal court.[17]

The majority view of how affirmative defenses should be analyzed under *Iqbal* find support in decades-old Supreme Court precedent. In citing Rule 8(c), the Supreme Court in that case reiterated the pleading of an affirmative defense must give the plaintiff "a chance to argue" why the imposition of the defense "would be inappropriate."[18]

Key Litigation Tactics In A Post-*Iqbal* World

Despite the various grounds for construing *Iqbal* narrowly, plaintiffs still face the risk that a particular district court judge will apply *Iqbal* broadly and impose "the catch-22 approach to civil litigation [wherein] plaintiffs are told they must include certain facts in the pleading that can be obtained only through discovery."[19] In addition to considering the pursuit of claims under state law in state court, plaintiff counsel should be prepared to employ the following tactics at the appropriate stage:

- Expeditiously identify the viable cause(s) of action and underlying elements to focus the pre-filing investigation on the key evidence needed to prevail at trial so that all pleadings will satisfy even a heightened pleading standard;

- Plead administrative claims with the same level of legal specificity and factual particularity as will be set forth in the subsequently filed complaint to avoid being foreclosed from pursuing any viable claims in court after the administrative process;

- Plead factual allegations, including the factual elements of any applicable *prima facie* case and the factual elements of any applicable legal claims, so the district court cannot disregard those parts of the complaint without flouting settled law;

- Plead the complaint as if the district court will review the complaint on a Rule 12 motion under a misapplied Rule 56 standard in which the district court weighs the pleadings as a jury would weigh the evidence at trial;

- Attach to the complaint as exhibits the key documents that support the claims asserted or, at a minimum, plead factual allegations with sufficient particularity that the key documents are expressly incorporated in the complaint by reference;

- Include key documents as exhibits to plaintiff counsel's affidavit filed in opposition to any Rule 12 motion because those documents are "necessarily embraced" by, and therefore incorporated in, the complaint pursuant to settled precedent in most jurisdictions; and

- Assert that the Rule 12 motion to dismiss is essentially a Rule 12 motion for a more definite statement and, further, that plaintiffs should have a reasonable opportunity to amend the complaint under the circumstances.

Conclusion

Plaintiffs should not take *Iqbal* lightly as that ruling poses potentially great risk—especially if lower courts misapply the precedent.[20] Indeed, commentators have highlighted how an activist approach to *Iqbal* has lead to oxymoronic analysis.[21] Nonetheless, ample legal authority exists to support plaintiffs in resisting a broad interpretation of *Iqbal*, and plaintiffs' counsel should devise legal strategy as well as litigation tactics accordingly. ■

[1]This article draws on research and analysis appearing in the *Employment Litigators' Update* materials found in the 2011 *Employment Law Institute* manual, and a similar version also appears in the Summer 2011 edition of *Minnesota Trial: The Journal of the Minnesota Association for Justice* The author would like to thank David Aaron and Adam Case, both law clerks at his firm, for their research assistance.

[2]*Twombly*, 550 U.S. at 559.

[3]*Twombly*, 550 U.S. at 570

[4]550 U.S. at 570

[5]550 U.S. at 556 (citation omitted) (emphasis added); see also *Neitzke v. Williams*, 490 U.S 319, 327 (1989) (affirming the reversal of the district court's dismissal of claims because "Rule 12(b)(6) does not countenance... dismissals based on a judge's disbelief of a complaint's factual allegations").

[6]550 U.S at 564, n. 8 (citations omitted).

[7]*Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (vacating the dismissal of claims).

[8]*Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514-15 (2002) (citing Supreme Court precedent and reversing the dismissal of claims).

[9]550 U.S. at 556.

[10]*Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009); see also *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008)

[11]131 S.Ct. 1309, 1323 (2011).

[12]*Burks v. Raemisch*, 555 F.3d 592, 594 (7th Cir. 2009) (citing *Erickson v. Pardus*, 551 U.S. 89 (2007) and holding that the plaintiff sufficiently stated claims).

[13]588 F.3d at 594 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U S 308, 322-23 (2007)).

[14]*Id.* at 594 (citations omitted).

[15]*Hamilton v. Palm*, 621 F.3d 816, 819 (8th Cir. 2010) (reversing the dismissal of claims even though the allegations were incomplete and inconclusive); Fed. R. Civ. P. 8(d)(1) ("Each allegation must be simple, concise, and direct. No technical form is required."); 8(e) ("Pleadings must be construed so as to do justice.").

[16]Compare *Ahle v. Veracity Research Co.*, 738 F.Supp.2d 896 (D. Minn. 2010) with *Wells Fargo & Co. v. U.S.*, 750 F.Supp.2d 1049 (D. Minn. 2010).

[17]*Ahle*, 738 F.Supp.2d at 924; *EEOC v. Hibbing Taconite Co.*, 266 F R.D. 260, 267-68 (D. Minn. 2009); see also *HCRI TRS Acquirer, LLC v. Iwer*, 708 F.Supp.2d 687, 691 (N.D. Ohio 2010).

[18]*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Fdtn.*, 402 U.S. 313, 350 (1971).

[19]David G. Savage, *Narrowing the Courthouse Door: High Court Makes It Tougher To Get Past the Pleading Stage*, ABA JOURNAL, July 2009, at 23.

[20]See, e.g , *Bailey ex rel. v. Border Foods, Inc*, 2009 WL 2348305, *3 (D. Minn. 2009).

[21]See generally Patricia W. Hatamyar, "The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?," 59 Am. U. L. Rev. 553, 583 (2010).

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