Dispositive Motions in Civil Rights Cases:

Supreme Court Addresses Overuse

By Justin D. Cummins

Since the U.S. Supreme Court's decision in Ashcroft v. Iqbal, 556 U.S. 662 (2009), a growing number of defendants in civil rights cases—including in employment discrimination matters—have pursued Fed. R. Civ. P. 12 motions to dismiss much like defendants have used Fed. R. Civ. P. 56 motions in the past two decades. These defendants have essentially asked federal judges to weigh allegations in federal court complaints like a jury weighs evidence at trial and, on that basis, to dismiss plaintiffs' claims in lieu of a trial.

In the last year, the U.S. Supreme Court has rejected the effort by defendants to dispose of civil rights cases before trial based on technical arguments about pleadings standards or the weight of the evidence in the record. Also in the past year, the Minnesota Supreme Court has reaffirmed that notice pleading still governs in Minnesota. In short, rulings by both the U.S. Supreme Court and the Minnesota Supreme Court indicate that civil rights claims generally should be decided on the merits rather than via technical motion practice.[1]

I. The Legal Underpinnings of *Iqbal* Confirm That Fed. R. Civ. P. 12 Should Not Be Construed as the New and Misapplied Fed. R. Civ. P. 56

The underlying claims before the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, the precursor of *Iqbal*, were 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 actions involving highly complex claims and enormous discovery costs; the clarified standard in such atypical 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 U.S. 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] (Emphasis added.)

In other words, a Fed. R. Civ. P. 12 motion should be denied under *Twombly* when a plaintiff's factual allegations are "*suggestive* of illegal conduct."[6]

II. The Continuing Viability of the Liberal Notice-Pleading Standard under U.S. Supreme Court Precedent: From *Swierkiewicz* and *Erickson* to *Matrixx* and *Johnson*

In a *per curiam* ruling two weeks after *Twombly*, the entire U.S. 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 not necessary;* the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[7] (Emphasis added.)

The holding in that case, *Erickson v. Pardus*, echoes another unanimous ruling by the U.S. 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] (Emphasis added.)

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 U.S. Supreme Court's unanimous decisions in *Erickson* or in *Swierkiewicz*. Notably, Judge Richard Posner, who provided the analytical underpinnings for *Iqbal* in a Court of Appeals decision, 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 decision—a rarity these days—the U.S. Supreme Court more recently applied *Iqbal* in complex and costly securities-fraud litigation. In that case, *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court held 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] (emphasis added) By so ruling, the U.S. Supreme Court underscored yet again that a liberal-pleading standard controls.

Most recently, and in yet another unanimous *per curiam* decision, the U.S. Supreme Court summarily reversed the dismissal of civil rights claims in *Johnson v. City of Shelby*.[12] While rejecting defendant's heightened-pleading-standard argument, the Supreme Court quoted settled legal authority as follows: "a basic objective of the rules is to *avoid civil cases turning on technicalities*."[13] (Emphasis added.) In *Johnson*, the specific issue was whether plaintiffs' civil rights claims failed because plaintiffs did not state the correct legal theory in their lawsuit. As to that question, the Supreme Court reiterated the rules of civil procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."[14]

Importantly, *Johnson* involved civil rights claims prosecuted under 42 U.S.C. § 1983 just as *Iqbal* did. This reversal of fortune in *Johnson*, at least in the eyes of defendants, evidently flowed from practical considerations as much as fidelity to the long-standing pleading standard and precedent.

If *Iqbal* had actually represented the change alleged by many defendants, the demand for scarce judicial resources would likely increase rather than decrease. Under the defense-oriented characterization of *Iqbal*, many plaintiffs would feel compelled to file voluminous complaints with numerous exhibits appended to minimize the risk of dismissal pursuant to Fed. R. Civ. P. 12. Perhaps more significantly, imposing a heightened pleading standard would probably prompt defendants to bring Fed. R. Civ. P. 12 motions far more frequently and put still more strain on an already overextended federal bench. According to legal commentators, moreover, the activist approach to *Iqbal* sought by defendants would lead to oxymoronic legal analysis that could contravene the rule of law.[15]

Even federal judges not known for rendering decisions favorable to plaintiffs have essentially acknowledged the practical and legal considerations when reversing the dismissal of claims under Fed. R. Civ. P. 12. Chief Judge Frank Easterbrook, for instance, reasoned as follows while reversing dismissal of plaintiff claims: "*Plaintiffs need not lard their complaints with facts; the federal system uses notice pleading* rather than fact pleading."[16] (emphasis added)

Although it should be clear that the federal court standard in employment discrimination and other civil rights cases is notice pleading, some defendants have persisted in alleging the federal court standard is somehow more stringent than the state court standard. Based on that legally erroneous argument, certain defendants have sought to create a heightened pleading standard for claims pursued under state law. In *Walsh v. U.S. Bank, N.A.*, however, the Minnesota Supreme Court decisively rejected that gambit and reinforced the applicability of the notice-pleading standard to state law claims.[17]

III. The Eighth Circuit Court of Appeals and the Federal District Court of Minnesota Have Rejected Defendants' Heightened-Pleading-Standard Arguments after *Iqbal*

The Eighth Circuit Court of Appeals reversed the dismissal of claims under Fed. R. Civ. P. 12 shortly after the *Iqbal* decision.[18] In that class action employment case, *Braden v. Wal-Mart Stores, Inc.*, the Eighth Circuit Court of Appeals reiterated, "the *complaint should be read as a whole*, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."[19] (Emphasis added.)

Citing *Erickson*, the Eighth Circuit Court of Appeals further explained the holding in *Braden* 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 ... 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.[20] (Emphasis added.)

The Eighth Circuit Court of Appeals subsequently reaffirmed the essential ruling in *Braden*, which is also consistent with the plain language and manifest purpose of the governing federal rule.[21]

Similarly, decisions of the federal district court of Minnesota have adhered to the U.S. Supreme Court's precedent that requires application of notice pleading in employment discrimination and other civil rights cases. In *Stepan v. Bloomington Burrito Group, LLC*, the court denied the Fed. R. Civ. P. 12 motion because "Plaintiffs are not required to plead the entirety of their case while toeing the starting blocks."[22]

IV. As in *Johnson* under Fed. R. Civ. P. 12, the U.S. Supreme Court Rejected the Attempt to Dispose of Civil Rights Claims in *Tolan* under Fed. R. Civ. P. 56

In *Tolan v. Cotton*, the U.S. Supreme Court vacated the Fifth Circuit Court of Appeals' affirmation of summary judgment for defendant and directed the Court of Appeals and the District Court on remand to credit plaintiff's evidence and to draw all inferences in favor of the plaintiff:

[T]he Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to [plaintiff] with respect to the central facts of this case. *By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party.*[23] (Emphasis added.)

Like *Johnson*, and *Iqbal* for that matter, *Tolan* involved civil rights claims prosecuted under Section 1983.

By so ruling in *Tolan*, the U.S. Supreme Court seemed to be pushing back against the explosion of summary judgment motions brought under Fed. R. Civ. P. 56. Indeed, some judges have suggested that the typical approach to summary judgment in employment discrimination and other civil rights cases has paradoxically increased district court workloads.[24] Summary judgment motions have essentially become trials with increasingly voluminous paper, often requiring as much or more judicial resources than trials on the merits.[25]

Conclusion

Notwithstanding the rhetoric from some quarters, both the U.S. Supreme Court and the Minnesota Supreme Court have indicated that civil rights plaintiffs should ordinarily be able to pursue their claims on the merits. Specifically, both courts have rejected the notion advanced by many defendants that plaintiffs must now satisfy a heightened pleading standard under Fed. R. Civ. P. 12 before plaintiffs can pursue their claims. Also, the U.S. Supreme Court has clarified the legal standard under Fed. R. Civ. P. 56 to the benefit of civil rights plaintiffs everywhere. Recent legal commentary suggests that this apparent shift in the application of Fed. R. Civ. P. 56 should promote judicial economy and better serve justice. In particular, the clarified summary judgment standard should enable more plaintiffs to have their proverbial day in court, as originally contemplated by Fed. R. Civ. P. 56 and, indeed, the Seventh Amendment to the U.S. Constitution.

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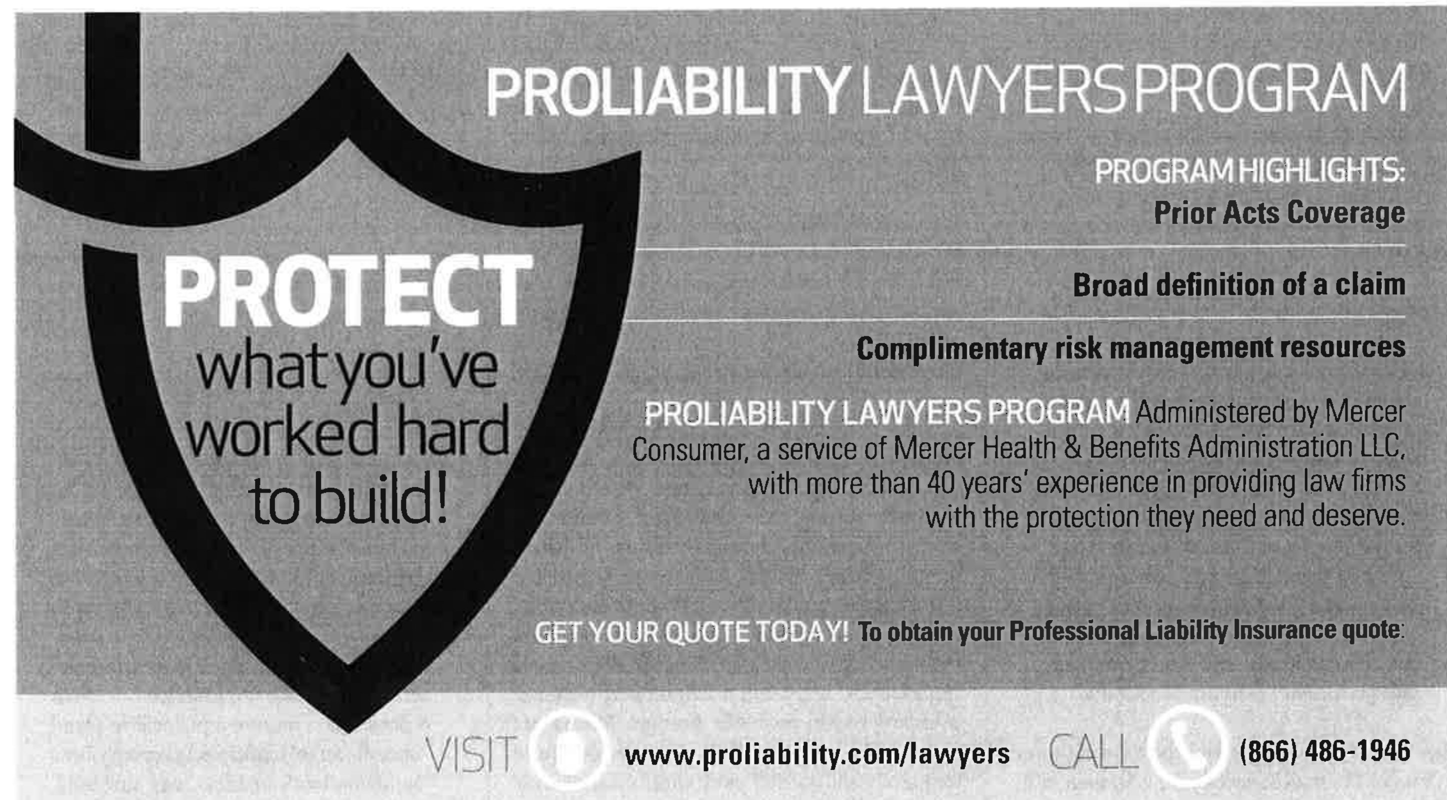
[1] This article draws on earlier research and analysis by the author appearing in the Employment Litigators' Update materials found in the 2011 Employment Law Institute manual and in "Debunking the Myth That Rule 12 Is the New (Misapplied) Rule 56: An Analysis of How the Courts Have Actually Interpreted *Ashcroft v. Iqbal*." *The Employee Advocate* (Fall 2011).

[2] 550 U.S. 544, 559 (2007).

[3] *Id.* at 570.

[4] *Id.*

[5] *Id.* at 556 (citation omitted) (emphasis added); *see also* Neitzke v. Williams, 490 U.S. 319, 327 (1989)



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(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) (emphasis added).

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

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

[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) (emphasis added).

[12] 135 S.Ct. 346, 346–47 (2014).

[13] *Id.* at 347 (emphasis added).

[14] *Id.* at 346.

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

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

[17] 851 N.W.2d 598, 604-06 (Minn. 2014).

[18] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).

[19] 588 F.3d at 595 citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322–23 (2007) (emphasis added).

[20] *Id.* at 595 (citations omitted) (emphasis added).

[21] 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.").

[22] 2014 WL 7338786, *3 (D. Minn. 2014).

[23] 134 S.Ct. 1861, 1867 (2014) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (emphasis added).

[24] Malin v. Hospira, Inc., 762 F.3d 552, 564 (7th Cir. 2014). ("[The defendant] seems to have based its litigation strategy on the hope that neither the district court nor this panel would take the time to check the record. Litigants who take this approach often (and we hope almost always) find that they have misjudged the court. We caution [the defendant] and other parties tempted to adopt this approach to summary judgment practice that it quickly destroys their credibility with the court. This approach to summary judgment is also both costly and wasteful. If a district court grants summary judgment in a party's favor based on its mischaracterizations of the record, the judgment will in all likelihood be appealed, overturned, and returned to the district court for settlement or trial. This course is much more expensive than simply pursuing a settlement or trying the case in the first instance."); Taylor v. eCoast Sales Sol., Ltd., 35 F. Supp. 3d 195, 203 (D.N.H. 2014) ("It is hardly an esoteric or difficult concept that summary judgment is appropriate only when the record—including the plaintiff's own competent testimony—fails to demonstrate a genuine issue of material fact. This court is hopeful that, someday, competent counsel's undoubted awareness of this principle will trump the insistence by certain segments of the bar (undoubtedly driven to some degree by client expectations) on moving for summary judgment in seemingly every case, regardless of the state of the record. For now, however, all the court can do is deny eCoast's motion for summary judgment ... ."); see also generally Mark W. Bennett, "From the 'No Spittin', No Cussin' and No Summary Judgment' Days of Employment Discrimination Litigation to the 'Defendant's Summary Judgment Affirmed Without Comment' Days: One Judge's Four-Decade Perspective," 57 N.Y.L. Sch. L. Rev. 685 (2012–2013).

[25] *Id.*

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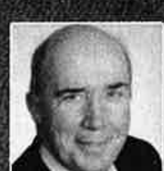

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