The Viability of Notice Pleading and the Right to Trial After The Supreme Court Decisions in *Iqbal* and *Gross*

By Justin D. Cummins

INTRODUCTION[1]

Many commentators and practitioners have suggested or even insisted that notice pleading no longer exists after *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*,[3] which extends *Twombly* to all federal claims filed in federal court. In addition, some legal scholars and litigators have argued that *Gross v. FBL Financial Servs., Inc.*,[4] makes it even more difficult for plaintiffs to survive summary judgment, let alone prevail at trial.

Although *Iqbal* poses added risk of dismissal for plaintiffs in legally complex and factually nuanced cases – such as massive anti-trust class actions and lawsuits against members of the United States President's Cabinet – ordinary civil actions should not be meaningfully affected if lower courts apply *Iqbal* correctly.

Similarly, *Gross* will not trigger a sea-change in the litigation of employment claims generally if lower courts follow the holding of that case. In any event, *Gross* is plainly limited to claims brought under the Age Discrimination in Employment Act (ADEA).[5]

Some lower courts, however, may be tempted to stray from the actual scope and meaning of the Supreme Court's rulings in *Iqbal* and *Gross*. In fact, some district court judges already have. Therefore, the discussion below outlines and briefly explains litigation tactics that may enhance plaintiffs' ability to prosecute their claims after *Iqbal* and *Gross*.

I. *IQBAL V. ASHCROFT* "MUST NOT BE OVERREAD" AND, MOREOVER, PLAINTIFFS MAY BE ABLE TO USE THE RULING TO THEIR ADVANTAGE

Iqbal has generated plenty of heated rhetoric and, in very short order, has become perhaps the most frequently cited case by federal courts and practitioners alike. An accurate understanding of the actual meaning of *Iqbal* requires a brief review of *Iqbal's* legal underpinnings, including the *Twombly* decision.

A. The Framers Of The Federal Rules Of Civil Procedure Intended Pleading Standards To Be Liberal

In framing the pleading standards under the Federal Rules of Civil Procedure (FRCP), the Advisory Committee "studiously avoided using the terms 'facts' and 'cause of action'" because those terms created so many problems in the code-pleading era predating the FRCP.[6] As the "principal draftsman" of the FRCP – and Rule 8 in particular – Judge Charles Clark "discouraged wasting time . . . 'trying to polish up the pleadings.'"[7]

In short, the Framers of the FRCP believed, "'it is not the function of the pleading to prove your case,' nor is it 'the function of the pleadings to supply the place of evidence.'"[8] The FRCP, then, has always contemplated the use of discovery – not a heightened pleading standard – as the means to obtain information for defending cases and guiding settlement negotiations.[9] Not surprisingly, only a few specifically enumerated causes of action have required pleading with particularity.[10]

B. The Supreme Court Has Long Enforced Fidelity To The Liberal Notice-Pleading Standard Established By The Federal Rules Of Civil Procedure

Since adoption of the FRCP in 1938, the Supreme Court has consistently followed the liberal notice-pleading standard. The Supreme Court perhaps most emphatically set forth the legal standard in *Conley v. Gibson*: "a complaint should not be dismissed for failure to state a claim unless it appears ***beyond a doubt*** that the plaintiff can prove ***no set of facts*** in support of his claim which would entitle him to relief."[11]

The "no-set-of-facts" or liberal notice-pleading standard repudiated the antiquated common law practice of code pleading.[12] Code pleading was a hyper-technical standard requiring a plaintiff to plead with particularity precise facts that constitute the specific cause of action asserted.[13]

In sum, under the Supreme Court's application of the FRCP in *Conley* and related precedent, "the idea was not to keep litigants out of court but rather to keep them in."[14] Notably, the Supreme Court repeatedly reaffirmed the robust holding of *Conley* regarding the liberal notice-pleading standard over the decades.[15]

C. In Deciding *Bell Atlantic Corp. v. Twombly*, The Supreme Court Provided A Limited Clarification Of The Liberal Notice-Pleading Standard

The scope of the underlying claims before the Supreme Court in *Twombly* were sweeping because "plaintiffs represent 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. . . ."[16] Thus, *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."[17]

In writing for the majority, Justice David Souter explicitly limited the reach of *Twombly* to the unique fact pattern of that case.[18] Indeed, the Supreme Court in *Twombly* quoted an opinion by Judge Richard Posner of the Seventh Circuit to explain the rationale for the decision: "some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase."[19]

Consequently, the Supreme Court in *Twombly* confirmed that it was "***not requir[ing] heightened fact pleading*** of specifics. . . ."[20] The Supreme Court underscored the liberal nature of the pleading standard going forward by reiterating that "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.'" [21] In short, a Rule 12 motion should be denied under *Twombly* when a plaintiff's factual allegations are "suggestive of illegal conduct."[22]

In a *per curiam* ruling two weeks after *Twombly*, the Supreme Court in *Erickson v. Pradus* 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.[23]

Given the *per curiam* decision in *Erickson*, the generally conservative Seventh Circuit explained why compelling a plaintiff to plead with heightened specificity would improperly interfere with the FRCP:

> Requiring a plaintiff to plead detailed facts interferes with [the goal of deciding claims on the merits] in multiple ways. First, and most importantly, the number of factual details potentially relevant to any case is astronomical, and requiring a plaintiff to plead facts that are not obviously important and easy to catalogue would result in "***needless controversies***" about what is required that could only ***serve to delay*** or prevent trial. Most details are more efficiently learned through the flexible discovery process. "Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving." Second, a plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; requiring the plaintiff to plead those unknown details before discovery would ***improperly deny*** the plaintiff the ***opportunity to prove*** his claim."[24]

Accordingly, the FRCP's requirements should be met under *Twombly* as long as plaintiffs' pleadings provide a "short and plain statement of the claim" and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[25] Notably, Judge Posner, who provided the analytical underpinnings for *Twombly*, cited *Erickson* and reiterated as follows: "[Twombly] ***must not be overread.*** The [Supreme] Court denied that it was 'requir[ing] heightened fact pleading of specifics, a Complaint . . . does not need detailed factual allegations.'"[26]

JUSTIN D. CUMMINS, of Miller O'Brien Cummins, PLLP, is past Chair of the MSBA's Labor & Employment Law Section and a current Officer of the National Employment Lawyers Association's Eighth Circuit Board. Justin teaches courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.

Nonetheless, some lower courts and commentators have argued that *Twombly* eliminated the notice-pleading standard altogether.[27] In effect, that view would conflate the distinction between a Rule 12 motion to dismiss and a Rule 56 motion for summary judgment.[28] While that

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characterization of the pleading standard contravenes both *Twombly* and *Erickson*, the view has gained more traction since the Supreme Court decided *Iqbal*.

D. Through *Ashcroft v. Iqbal*, The Supreme Court Has Required *Bell Atlantic Corp. v. Twombly* To Be Applied To All Federal Claims Pled In Federal Court

In *Ashcroft v. Iqbal*, the Supreme Court stated that *Twombly's* "plausibility" standard should apply to all federal claims, not just complex anti-trust class actions:

> 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." 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where 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.'"[29]

The ambiguity of *Iqbal's* language, which could be construed to invite weighing a plaintiff's pleadings before discovery – much like a jury weighs evidence at trial – and then dismissing the case on that basis, has prompted some district courts to be extremely aggressive in granting motions under Rule 12. Those district courts are essentially behaving as if Rule 8 and notice pleading have been abolished by *Iqbal*.

A recent case involving discrimination claims under the Americans with Disabilities Act (ADA)[30] illustrates how far some district courts have attempted to take *Iqbal*. In *Logan v. SecTek, Inc.*, the plaintiff pled arguably direct evidence of "regarded-as" discrimination, but the district court still dismissed the claims under *Iqbal*.[31] The plaintiff alleged that he missed substantial work because of a back injury, that he received medical permission to return to work, and that the employer nonetheless refused to allow him to return because "he had been out of work due to an injury. . . ."[32] The district court found that "it is merely possible, but not plausible, that [the employer] perceived [the plaintiff] to be disabled in accordance with the ADA definition."[33] Despite acknowledging that the plaintiff's allegations could enable the district court to infer that the defendant

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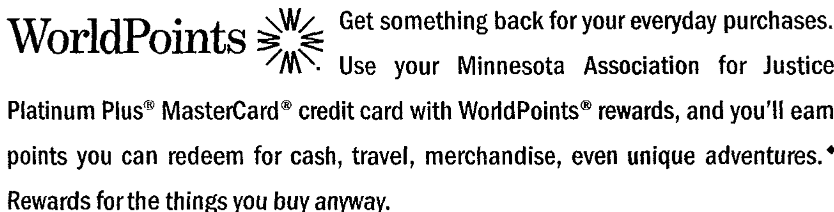

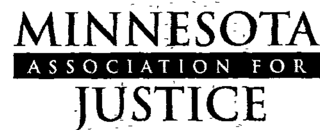

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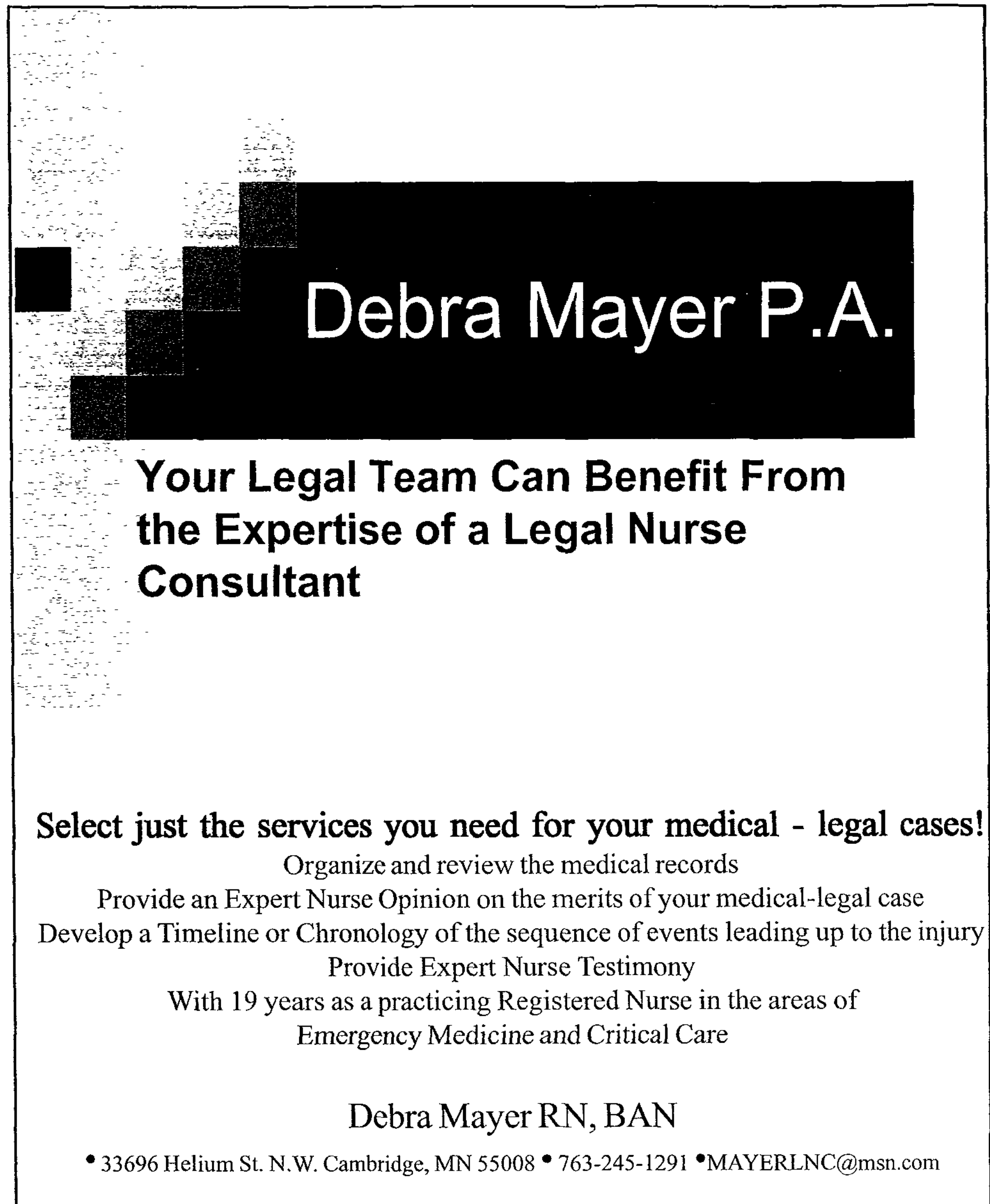
discriminated, the judge still dismissed the case because *Iqbal* mandates "'factual enhancement' so that a plausible claim can be stated."[34]

Opinions like *Logan*, however, appear to be on the margin. In truth, the pronouncements about the death of Rule 8 and the liberal notice-pleading standard are unwarranted for a number of reasons.

First, the judicial perspective underlying the opinion in *Logan* and similar cases conflicts with actual meaning and scope of *Twombly* and, therefore, *Iqbal* – which extended *Twombly* to all federal claims in federal court. The author of the decision in *Twombly*, Justice Souter, dissented in *Iqbal* because the majority disregarded factual allegations as "conclusory."[35] In explaining the dissent in *Iqbal*, Justice Souter reiterated the meaning and scope of the majority decision in *Twombly*:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. ***We made it clear***, on the contrary, ***that a court must take the allegations as true, no matter how skeptical the court may be.*** The ***sole exception*** to this rule ***lies with allegations that are sufficiently fantastic to defy reality*** as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.[36]



Second, in extending *Twombly* to all federal claims in federal court, *Iqbal* did not address the Supreme Court's *per curiam* and post-*Twombly* reaffirmation in *Erickson* that the liberal notice-pleading standard still governs.

Third, the holding in *Twombly* relied on Judge Posner's judicial reasoning, and Judge Posner has signaled that the holding of *Iqbal* is limited like that of *Twombly* because *Iqbal* falls within a unique category of cases just as *Twombly* does.[37] In particular, *Iqbal* involved the factually nuanced and legally complex doctrine of qualified immunity as applied to cabinet-level federal officials "who must neither be deterred nor detracted from the vigorous performance of their duties."[38] *Iqbal* is not a typical civil matter by any stretch of the imagination.

Fourth, if Rule 8 and notice pleading were truly dead, there would be no need for the current effort to abolish Rule 8.[39] The recent manifesto calling for the abolition of Rule 8 states, in pertinent part, as follows:

> Notice pleading should be replaced by fact-based pleading. * * * [S]ome pleading rules make an exception for pleading fraud and mistake, as to which the pleading party must state "with particularity" the circumstances constituting fraud or mistake. We believe that a rule with similar specificity requirements should be applied to all cases and throughout all pleadings.[40]

Therefore, both Circuit Court and district

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court rulings have continued to apply a liberal notice-pleading standard even after *Iqbal*.[41] *Chao v. Ballista* succinctly explained why the liberal notice-pleading standard continues to govern even after *Twombly* and *Iqbal*:

> ***Notice pleading***, however, ***remains the rule in federal courts***, requiring only "a short and plain statement of the claim." While a plaintiff's claim to relief must be supported by sufficient factual allegations to be "plausible" under *Twombly*, ***nothing requires a plaintiff to prove her case in the pleadings.*** Plausibility, as the Supreme Court's recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise – dependent on the particular claims asserted, their elements, and the overall actual picture alleged in the complaint.[42]

Chao reiterated that, after *Iqbal* and "in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible."[43] The district court in *Chao* denied the motion to dismiss because the judge could draw at least one plausible inference from the allegations pled.[44]

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E. Plaintiffs Should Consider An Array Of 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."[45]

In that context, Senator Arlen Specter, the former Republican Chair of the Judiciary Committee, introduced legislation that expressly seeks to replace *Iqbal* with *Conley* as governing precedent.[46]

Congress likely will not pass Senator Spector's proposed legislation, so plaintiff counsel should consider a number of litigation tactics to enhance the ability of plaintiffs to defeat Rule 12 motions and to prosecute cases effectively in federal court:

* 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 the Complaint as if the district court will review the Complaint on a Rule 12 motion under a 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;[47] and

* Consider using *Iqbal* as the basis for moving to strike or to dismiss affirmative defenses that a defendant pled by merely reciting in a formulaic fashion the legal elements without providing any factual support.[48]

Depending on the substantive claims and damages analysis, plaintiff counsel may also want to consider the alternative of filing in State court, which follows a highly liberal notice-pleading standard.[49]

II. *GROSS V. FBL FINANCIAL SERVS., INC.*, PROPERLY APPLIED, SHOULD NOT MATERIALLY DISADVANTAGE PLAINTIFFS AND MAY EVEN BENEFIT THEM

As with *Iqbal*, *Gross* has prompted pronouncements from many quarters that employment law has fundamentally shifted to the benefit of defendants. A careful analysis of *Gross* and employment law in general, however, confirms that *Gross* no more eviscerates employment claims than does *Iqbal* – provided that lower courts remain faithful to the Supreme Court's holding.

A. Don't Believe The Hype: *Gross v. FBL Financial Servs., Inc.* In Perspective

In *Gross*, the Supreme Court considered whether the burden of persuasion ever shifts to the party defending an employment discrimination claim brought under the ADEA.[50] The Supreme Court

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ruled that, because Congress did not amend the ADEA (as it did Title VII[51]) through the Civil Rights Act of 1991 to authorize pursuit of discrimination claims under a "mixed-motive" scheme, the "mixed-motive" burden-shifting analysis first outlined in *Price Waterhouse v. Hopkins*,[52] does not apply to ADEA claims.[53] In short, the Supreme Court in *Gross* held plaintiffs retain the burden of persuasion that age was the "but-for" cause of the challenged employment action(s).[54]

Importantly, *Gross* did not hold that plaintiffs must prove age was the sole factor or even the most significant factor in the employer's decision to take adverse action. In so ruling, *Gross* followed its well settled precedent under the ADEA about what it means to prove discrimination by an employer: "[w]hatever the employer's decisionmaking process . . . the employee's protected trait actually ***played a role*** in that process and had ***a determinative influence*** on the outcome."[55] To quote my National Employment Lawyers Association colleague, Alice Ballard, "even the straw that broke the camel's back is the 'but-for' cause."

In any event, *Gross's* prohibition of proving age discrimination claims through the "mixed-motive" scheme generally should have little adverse impact on plaintiffs at trial. In contrast to the alternative "pretext" method of proof, the "mixed-motive" scheme typically triggers an affirmative defense that is highly deleterious for plaintiff claims. In particular, the same-decision jury instruction accompanying the affirmative defense presents an array of problems for plaintiffs.

In a nutshell, the affirmative defense/same-decision jury instruction gives defendants two bites of the proverbial apple; first, defendants can win by poking holes in the liability case and second, defendants can essentially win by precluding the award of any damages. In addition to creating the general two-bites-of-the-apple problem, the "mixed-motive" scheme could disadvantage plaintiffs in several specific ways.

(1) The affirmative defense/same-decision jury instruction triggers a hypothetical inquiry – whether a defendant "would have" taken adverse action anyway – that shifts the focus from defendants to plaintiffs:

* The hypothetical nature of the inquiry invites jurors to speculate about whether a plaintiff "deserved" the treatment – potentially playing into possible juror bias;

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* The nature of the inquiry also obscures the fact that a defendant's story may have changed over time and that this shift in rationales is highly probative of discriminatory intent; and

* The hypothetical inquiry may open the door for greater use of after-acquired evidence of purported misconduct by a plaintiff, giving defendants incentive to be much more aggressive in discovery and at trial.

As to the last point, at least one federal judge has reconsidered a defendant's summary judgment motion, *sua sponte*, under the "mixed-motive" scheme, deeming after-acquired evidence admissible regarding the liability question and granting partial summary judgment based on that evidence.[56]

(2) Analysis of claims subject to the affirmative defense/same-decision jury instruction artificially restricts plaintiff recoveries:

* The affirmative defense/same-decision jury instruction may cause juries to split the proverbial baby, precluding the award of any damages and undermining a plaintiff's post-trial petition for an award of attorney's fees and litigation costs; and

* The resulting limit on recoveries at trial would reduce defendants' future legal exposure and, therefore, plaintiffs' leverage at the bargaining table – diluting the settlement value of cases in the future.

(3) The affirmative defense/same-decision jury instruction poses normative and practical challenges:

* Allowing defendants to escape paying damages, as long as they "would have" taken adverse action regardless of their discriminatory intent, sends the problematic message to jurors that discrimination is permissible as long as is it is not the "decisive" factor; and

* The applicability of "but-for" causation in the "mixed-motive" scheme is usually less readily ascertainable by jurors than the truthfulness of a defendant's stated rationale under the pretext approach.

Therefore, the adverse effect of *Gross* in practice should be limited to possibly taking away plaintiffs' argument at summary judgment that a question of fact exists about whether age was "a motivating factor" in the employer's action. Even that potential adverse impact, however, may not come to pass given how the Supreme Court has defined "but-for" cause.[57]

B. *Gross v. FBL Financial Servs., Inc.* Should Be Applied Narrowly by Lower Courts

The Supreme Court explicitly limited its holding in *Gross* to age-discrimination claims pursued under the ADEA.[58] In that case, the Supreme Court squarely decided the standard of proof under the ADEA, and the analysis and related ruling turned on the language of the ADEA.[59]

C. Plaintiffs Have Various Litigation Tactics Available In A Post-*Gross* World

The Eighth Circuit recently reversed summary judgment for the employer in a case brought under the ADEA, analyzing the "but-for" standard as practically the same as the pretext standard.[60] Thus, it is important to repeat that a plaintiff proves pretext "by showing that the employer's proffered explanation is unworthy of credence."[61]

Notwithstanding how the Supreme Court has defined "but-for" causation in ADEA cases and otherwise and the Eighth Circuit's recent ruling under the ADEA, some lower courts may now construe the "but-for" standard as a higher burden of proof than establishing pretext. Furthermore, regardless of the legal standard applied, federal courts around the country grant summary judgment, on average, approximately 75% of the time in employment discrimination cases.[62]

Therefore, plaintiff counsel should reiterate at every turn in ADEA cases that "but-for" causation does not mean age was the only factor or even the most important factor. Instead, "but-for" causation means age "***played a role*** in that process and had ***a determinative influence***. . . ."[63] Plaintiff counsel can also underscore the stringent standard repeatedly affirmed by the Supreme Court and the Eighth Circuit governing Rule 56 motions. Nearly 70 years ago, the Supreme Court forcefully articulated its well settled doctrine:

> ***The right of jury trial in civil cases*** at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right ***so fundamental and sacred*** to the citizen, whether guaranteed by the Constitution or provided by statute, should be ***jealously guarded by the courts***.[64]

The Supreme Court more recently reaffirmed the exceedingly high standard for defendants to succeed with a Rule 56 motion:

> [T]he court must draw ***all reasonable inferences in favor of the nonmoving party***, and it may ***not make credibility determinations or weigh the evidence***. * * * [The court] must disregard all evidence favorable to the moving party [that is contradicted].[65]

Similarly, the Eighth Circuit has long held that "[s]ummary judgment should seldom be granted in employment discrimination cases. . . ."[66]

In addition to the general points summarized above, plaintiff counsel should consider pursing the following additional tactics in ADEA cases to defeat Rule 56 motions and to prevail at trial:

* Investigate and plead administrative charges to uncover evidence that age was the "but-for" cause by, for example, ghost-writing plaintiffs' request for a written statement of the truthful reason

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for discharge (as Minnesota law requires employers to provide) before filing administrative charges and, further, by preparing the administrative Charges and the Reply to the employer's Response without making a formal appearance so that the employer may offer other rationales for the challenged conduct;

* Plead the Complaint and prepare discovery, among other things, to draw out whether the employer has yet more new rationales for the challenged conduct;

* Seek evidence, especially through requests for admissions and depositions, that demonstrates, for example, the employer treated others in the same protected class similarly and the numerous ways a plaintiff and others are virtually identical except for the protected class such that the protected class can readily be shown to be the "but-for" cause;

* Pursue motions *in limine* to exclude bogus rationales for the employer's conduct, improper comparator analysis, and other confusing or unfairly prejudicial information; and

* Focus trial on, in particular, cogently presenting the other-acts and comparator evidence as well as impeaching the credibility of defendants' key decision-makers and defendants' (shifting) rationale(s) for taking adverse action.

In non-ADEA cases, plaintiffs can still defeat summary judgment by showing that a protected class was "a motivating factor."[67] At trial in non-ADEA cases in federal court, plaintiffs should generally prove their claims under the pretext regime because of the problems created by the "mixed-motive" scheme outlined above. That is not an issue, however, for claims brought under the Minnesota Human Rights Act (MHRA):[68]

> [T]he Minnesota Supreme Court declined to adopt in MHRA cases the same-decision analysis that the federal appellate courts had been applying in mixed-motive cases under Title VII. The court reasoned that ***allowing employers to limit or avoid liability based on a same-decision analysis would "defeat the broad remedial purposes of the*** [***MHRA***] by permitting employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge."[69]

When proceeding under federal statutes besides the ADEA, recitation of the controlling precedent should make clear that the same-decision jury instruction is

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improper as a matter of law in pretext cases.[70] If defense counsel insists on the applicability of the affirmative defense and related same-decision jury instruction, plaintiff counsel could first argue that the defense has been waived if not asserted in the Answer. Moreover, Plaintiff counsel can assert that a defendant is not entitled to a same-decision jury instruction unless it proves that it would have taken the adverse action – not simply that it could have taken the action for a non-discriminatory, non-retaliatory reason.[71] In any event, plaintiff counsel should consider highlighting at trial any critical data about people comparable with a plaintiff to underscore the dubious veracity of an employer's stated reason(s) for taking adverse action. In other words, plaintiff counsel should try to integrate "mixed-motive" analysis – obviously, absent the same-decision defense – into the pretext framework (and "but-for" causation).

CONCLUSION

Plaintiffs should not take *Iqbal* and *Gross* lightly as those rulings pose potentially great risk – especially if lower courts misapply the precedent. On the other hand, plaintiffs should not be dismayed by the decisions either. In fact, savvy plaintiff counsel may be able to use both *Iqbal* and *Gross* to their clients' advantage.

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[1] A version of this article also appears in the 2009 Labor & Employment Law Institute manual. The author would like to thank Francis Rojas and Tim Louris for their research and analysis.
[2] 550 U.S. 544 (2007).
[3] 129 S.Ct. 1937 (2009).
[4] 129 S.Ct. 2343 (2009).
[5] 29 U.S.C. §§ 621, *et seq.*
[6] *See* Charles B. Campbell, A "Plausible" Showing After Bell Atlantic Corp. v. Twombly, 9 Nev. L. J. 1, 11-12 (2008) (quoting the Advisory Committee Reporter for Rule 8, Judge Charles Clark).
[7] *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting); Campbell, 9 Nev. L. J. at 13 (citing Am. Bar Ass'n, Federal Rules of Civil Procedure: Proceedings of the Institute at Washington D.C. and of the Symposium at New York City 41 (1939)).
[8] *See* Campbell, 9 Nev. L. J. at 13 (quoting Judge Charles Clark).
[9] *Id.*
[10] *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").
[11] 355 U.S. 41, 45-46 (1957) (emphasis added).
[12] *See* Campbell, 9 Nev. L. J. at 21.
[13] *Id.*
[14] *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting).
[15] *Twombly*, 550 U.S. at 578 (Stevens, J., dissenting) (citing *SEC v. Zandford*, 535 U.S. 813, 818 (2002); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Brower v. County of Inyo*, 489 U.S. 593, 598; *Hughes v. Rowe*, 449 U.S. 5, 10, (1980) *(per curiam)*; *McLain v. Real Estate Bd. of New Orleans*, Inc., 444 U.S. 232, 246 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) *(per curiam)*; *Haines v. Kerner*, 404 U.S. 519, 521 (1972) *(per curiam)*; *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969)).
[16] 550 U.S. at 559.
[17] *Twombly*, 550 U.S. at 570.
[18] 550 U.S. at 548-49 ("The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action."); *see also id.* at 554-55 ("This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.").
[19] 550 U.S. at 558 (quoting *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F.Supp.2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation).
[20] 550 U.S. at 570 (emphasis added).
[21] 550 U.S. at 556 (citation omitted) (emphasis added); *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations").
[22] *Twombly*, 550 U.S. at 564, n.8 (citations omitted).
[23] 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488-89 (6th Cir. 2009) (reversing the district court's dismissal of the plaintiffs' claims in light of *Erickson v. Pardus*, 551 U.S. 89 (2007)).
[24] *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 779-80 (7th Cir. 2007) (citations omitted) (emphasis added).
[25] *Erickson*, 551 U.S. at 93 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
[26] *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (Posner, J.) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
[27] *See* Jason Bartlett, Into the Wild: The Uneven and Self-Defeating Effects *of Bell Atlantic v. Twombly*, 24 St. John's J. Legal comment 73, 91-92 (2009).
[28] *Id.*
[29] *Iqbal*, 129 S.Ct. at 1949 (citations omitted).
[30] 42 U.S.C. §§ 12101, *et seq.*
[31] __ F.Supp.2d __, 2009 WL 1955441, *3-*5 (D. Conn. 2009).
[32] *Logan*, __ F.Supp.2d __, 2009 WL 1955441, *3.
[33] *Id.*
[34] *Id.*
[35] *Iqbal*, 129 S.Ct. at 1960 (Souter, J. dissenting).
[36] *Iqbal*, 129 S.Ct. at 1959 (Souter, J. dissenting) (citations omitted).
[37] *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.).[38] *Id.* (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1954 (2009)).
[39] *See* Inst. for the Adv. of the Amer. Legal Sys., Final Report 5-6 (March 11, 2009).
[40] *Id.*
[41] *See, e.g., Fowler v. UPMC Shadyside*, __ F.3d __, 2009 WL 2501662, *8 (3rd Cir. 2009) (vacating the dismissal of retaliation-in-employment claims); Brooks v. Ross, __ F.3d __, 2009 WL 2535731, *5 (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)."); *U.S. ex rel. Elms v. Accenture, LLP*, 2009 WL 2189795, *3-4 (4th Cir. 2009) (citing Fed. R.Civ. P. 8 and reaffirming that ordinary civil claims need only be pled with enough details to give the other side "notice" of the claim); *Peterec-Tolino v. Commercial Elec.*

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Contractors, Inc., 2009 WL 2591527, *2 (S.D.N.Y. 2009) (citation omitted) ("[T]he pleading requirements in discrimination cases are very lenient, even deminimis.").

[42] 630 F.Supp.2d 170, 177 (D. Mass. 2009) (citation omitted) (emphasis added).

[43] 630 F.Supp.2d at 177 (citation omitted).

[44] 630 F.Supp.2d at 178.

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

[46] See NOTICE PLEADING RESTORATION ACT (2009).

[47] *See, e g., Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (reaffirming that courts may consider materials that are "necessarily embraced by the pleadings"); *Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co.*, 967 F.Supp. 1148, 1152 (D. Minn. 1997) (ruling that "the Court may consider extra-pleading material necessarily embraced by the pleadings, such as copies of . . . all documents they incorporate by reference.").

[48] *See, e.g., Reis Robotics v. Concept Indus., Inc.*, 462 F.Supp.2d 897, 907 (N.D. Ill. 2006) (emphasis added) (granting the motion to strike affirmative defenses because "[i]t is unacceptable for a party's attorney simply to mouth [affirmative defenses] in a formula-like fashion. .. for that does not do the job of apprising opposing counsel and the Court of the predicate for the claimed defense. . . ."); *see also Shinew v. Wszola*, 2009 WL 1076279 (E.D. Mich. 2009) (ruling that the defendant could not assert certain affirmative defenses "[b]ecause Defendants' proposed affirmative defenses do not meet the standard of plausibility imposed under *Twombly*.").

[49] *See, e.g., Donnelly Bros. Constr. Co., Inc. v. State Auto Property and Casualty Ins. Co.*, 759 N.W.2d 651, 660 (Minn. Ct. App. 2009) (citing *Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400, 402 (Minn. 1954)) ("Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.").

[50] 129 S.Ct. at 2350-52.

[51] 42 U.S.C. §§ 2000e, *et seq.*[52] 490 U.S. 228 (1989)

[53] 129 S.Ct. at 2350-52.

[54] *Id.*

[55] *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (applying the ADEA) (emphasis added); *see also Safeco Ins. Co. of Amer. v. Burr*, 551 U.S. 47, 63 (2007) (emphasis added) (reiterating that the "but-for" cause is "***a*** necessary condition" of the challenged conduct).

[56] *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 993 (D. Minn. 2003).

[57] *Hazen*, 507 U.S. at 610; *see also Safeco*, 551 U.S. at 63.

[58] 129 S.Ct. at 2350-52.

[59] *Gross*, 129 S.Ct. at 2349-52.

[60] *Baker v. Silver Oak Senior Living Mgt. Co.*, __ F.3d __, 2009 WL 2914159, *4 (8th Cir. 2009).

[61] *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (citation omitted); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993).

[62] *See* Kevin Clermont & Steward J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARVARD LAW & POL'Y REV. 1 (2008) (documenting the difficulty for plaintiffs to prevail in employment cases filed in federal court).

[63] *Hazen*, 507 U.S. at 610.

[64] *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (emphasis added).

[65] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 151 (2000) (collecting Supreme Court cases).

[66] *Peterson v. Scott County*, 406 F.3d 515, 520 (8th Cir. 2005) (collecting Eighth Circuit cases).

[67] *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005) (citation omitted) (ruling that a plaintiff succeeds in opposing summary judgment "where the evidence . . . establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action . . . even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation."); *see also Peterson*, 406 F.3d at 521 (reaffirming that summary judgment is improper when there is a fact dispute about whether discrimination or retaliation "was a motivating factor in the defendant's action. . . .").

[68] Minn. Stat. §§ 363A.01, *et seq.*

[69] *Friend v. Gopher Co., Inc.*, __ N.W.2d __, 2009 WL 2595931, *5 (Minn. Ct. App. 2009) (citing *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 626-27 (Minn. 1988)) (emphasis added); *see also Ray v. Miller Meester Adver., Inc.*, 684 N.W.2d 404, 408-09 (Minn. 2004) (confirming that Minnesota courts reject federal precedent when inconsistent with the MHRA).

[70] *See, e.g., Desert Palace v. Costa*, 539 U.S. 90, 94 (2003); *Reeves*, 530 U.S. at 147; *Burdine*, 450 U.S. at 256; *Peterson*, 406 F.3d at 521.

[71] *See, e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636, 642 (8th Cir. 2002), abrogated on separate grounds, *Desert Palace v. Costa*, 539 U.S. 90 (2003) (reaffirming that a defendant must offer objective evidence of a non-discriminatory motivation for taking adverse action before that defendant can employ the affirmative defense); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 403 (7th Cir. 2001) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, n.14 (1989)) (ruling that the defendant's statement "that he would have fired the plaintiff solely for absenteeism is not sufficient objective proof for a mixed-motive defense.").

■

UPCOMING CLE PROGRAMS

Thursday, October 29, 2009
The No-Fault Toolbox (seminar registration includes the new "must have" No-Fault Toolbox Book)

Friday, November 13, 2009
No-Fault Arbitrations

Friday, December 4, 2009
Motions Seminar

Friday, December 11, 2009
Handling the Personal Injury Case

Wednesday, December 16, 2009
Governmental Immunities in PI Litigation Seminar