EMPLOYMENT LAW REPORT

Litigating Motions To Amend under rules 14 and 15 In Civil Rights and Employment Cases

By Justin D. Cummins

INTRODUCTION

As corporations and other potential defendants become more sophisticated at concealing the identity of the culpable entities and the nature of the actionable conduct, plaintiff counsel must promptly and persistently seek the data needed to ensure that all claims and parties have been pled.

Generally, the standard for amending pleadings is liberal, and both Federal and State courts typically grant motions to amend. The main exception to this is when the amended pleadings cannot be sustained. That exception could swallow the rule if courts were to apply *Ashcroft v. Iqbal*[1] the way defense counsel want. The other exception to the liberal standard concerns third-party practice pursued substantially after the litigation begins. Courts disfavor that approach because it can cause undue delay and cost.

I. A PLAINTIFF'S MOTION TO AMEND "SHALL BE FREELY GIVEN"

It is well settled that "Federal Rule of Civil Procedure 15(a) governs a party's right to amend its pleadings and the rule declares that ***leave to amend 'shall be freely given*** when justice so requires.'"[2] Consequently, the Eighth Circuit has consistently ruled, "[g]iven the courts' liberal viewpoint towards leave to amend, it should normally be granted absent good reason for a denial."[3]

State courts have adopted the same liberal standard under Minnesota law. The Minnesota Supreme Court has long viewed initial pleadings and amendments thereof as follows:

> One of the outstanding facts of modern litigation is the ***diminishing importance of initial pleadings in the light of the ease of amendment*** and the use of pretrial proceedings to lay the pleadings on the shelf.[4]

This should not be surprising because Minnesota Rule of Civil Procedure 15.01 tracks Federal Rule of Civil Procedure 15(a).[5]

Importantly, defendants have the burden of proving that they would be impermissibly prejudiced by the amendments sought.[6] Therefore, Federal and State courts grant leave even when the proposed amendment alters the theory of the case.[7] In addition, Federal and State courts allow amendments on the eve of trial or even after the entry of judgment.[8]

II. A MOTION TO ADD CLAIMS OR PARTIES, UNDER RULE 15 AND 14 RESPECTIVELY, WILL BE DENIED IF "FUTILE"

Although courts liberally grant motions to amend, courts do not permit amendments to pleadings when the additional claim(s) cannot be maintained. Both Federal and State courts have recognized this "futility" exception to the liberal amendment standard.[9] Some courts have gone so far as to deny motions to amend pleadings because the moving party failed to submit a proposed amended pleading with their motion papers.[10]

The futility exception takes on potentially greater meaning and scope in the wake of the United States Supreme Court's ruling in Iqbal. Some defense-minded commentators and certainly defense counsel have argued that Iqbal authorizes a Federal judge to weigh the allegations in a pleading like a jury weighs evidence at trial and, on that basis, dismiss the claims (or deny the motion to amend) if the particular Federal judge does not find the allegations to be "plausible."

Plaintiffs should be prepared for *Iqbal*-based arguments every time they move to amend pleadings going forward. As a threshold matter, the standard after *Iqbal* is not severe as some defense counsel have suggested. In truth, *Iqbal* extended the standard in *Bell Atlantic Corp. v. Twombly*[11] to all federal claims in Federal court, so the standard set forth in *Twombly* governs:

> 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.***"[12]

In a per curiam ruling in *Erickson v. Pardus* – decided two weeks after *Twombly* – the entire Supreme Court quoted *Twombly* to reiterate that the liberal notice-pleading standard still controls:

> 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."[13]

Iqbal did not purport to overrule or even address the Supreme Court's unanimous decision in *Erickson*.

Accordingly, the Eighth Circuit in *Braden v. Wal-Mart Stores, Inc.* recently explained its reversal of summary judgment for the employer 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]

Significantly, *Braden* also reaffirmed, post *Iqbal*, "the ***complaint should be read as a whole,*** not parsed piece by piece to determine whether each allegation, in isolation, is plausible."[15]

It warrants repeating that the pleading standard under State law remains extremely low:

> 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.[16]

Although plaintiffs are typically the parties seeking to amend, there are occasions where a plaintiff may need to oppose such a motion. In particular, a plaintiff may want to oppose a motion under Rule 14 that seeks to add a third-party defendant. Opposing that kind of motion will be necessary if defendant(s) are simply attempting to create costly and time-consuming sideshows that have little or nothing to do with the merits. Minnesota law takes an aggressive approach to precluding such "tactics" by defendants. To "avoid the assertion of third-party claims for which there is no sound basis," Minnesota Rule of Civil Procedure 14 permits the addition of third-parties after 90 days from service of the Summons "only under ***exceptional*** circumstances."[17] In fact, Rule 14.03 expressly provides for the courts to do as follows:

> make such orders to prevent . . . undue expense, or to prevent delay . . . by the assertion of a third-party claim, and may . . . make other orders to prevent delay and prejudice.[18]

CONCLUSION

Plaintiffs should be able to amend pleadings without difficulty, especially if they seek to do so early in the litigation because defendants will have much more difficulty proving they will be unduly prejudiced by the amendments. Nonetheless, plaintiffs should make sure that the amended pleadings can withstand the onslaught of *Iqbal*-based arguments from defendants. Plaintiffs also should be prepared to turn the tables on defendants, especially under Rule 14.

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[1] 129 S. Ct. 1937 (2009)

[2] *Popp Telcom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000) (quoting Fed.R.Civ.P. 15(a)) (emphasis added).

[3] *Popp Telcom*, 210 F.3d at 943 (citing *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989)); *see also Sanders v. Clemco Indus.*, 823 F.2d 214, 216-17 (8th Cir. 1987); *Chestnut v. St. Louis County*, 656 F.2d 343, 349 (8th Cir. 1981); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 694 (8th Cir. 1981).

[4] *Crum v. Anchor Cas. Co.*, 119 N.W.2d 703, 711 (Minn. 1963) (emphasis added); *see also Lumbermen's Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580, 584 (Minn. Ct. App. 1991) ("[T]he [added] claims present some degree of legal viability."); *see also Carlson v. Lesselyoung*, 204 N.W. 326, 326 (Minn. 1925) ("It is well settled that trial courts not only may, but should, freely permit such amendments in order that there

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may be an end to litigation without putting the parties to needless expense.").

[5] Minn.R.Civ.P. 15.01; *see also Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Nelson v. Glenwood Hills Hospitals*, 62 N.W.2d 73, 79 (Minn. 1953).

[6] *Dennis*, 207 F.3d at 525 (citing *Mercantile Trust Co. v. Inland Marine Prods. Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976)) ("[T]he party opposing the motion must show it will be unfairly prejudiced."); *see also Raspler v. Seng*, 11 N.W.2d 440, 441 (Minn. 1943); *Short v. Great Northern Life Ins.*, 228 N.W. 440, 441 (Minn. 1929).

[7] *Morlock v. W. Ctr. Educ. Dist.*, 46 F.Supp.2d 892, 912-13 (D. Minn. 1999); *LaSalle Cartage Co., Inc. v. Johnson Bros. Wholesale Liquor Co.*, 225 N.W.2d 233, 238 (Minn. 1974); *Colstad v. Levine*, 67 N.W.2d 648, 655 (Minn. 1954).

[8] *See, e.g., Dennis v. Dillard Dep't Stores, Inc.*, 207 F.3d 523, 525-26 (8th Cir. 2000); *Schroeder v. Jesco, Inc.*, 209 N.W.2d 414, 419 (Minn. 1973); *Crum*, 119 N.W.2d at 710-11; *Anderson v. Enfield*, 70 N.W.2d 409, 413 (Minn. 1955).

[9] *DeRoche v. All American Bottling Corp.*, 38 F.Supp.2d 1102, 1106 (D. Minn. 1998) (denying the motion to amend because "the claims . . . would not withstand a Motion to Dismiss. . . ."); *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 272 (Minn. 2008) (reaffirming that motions to amend will be denied when the amendment(s) would be futile); *M.H. v. Caritas Family Servs*, 488 N.W.2d 282, 290 (Minn. 1992) (upholding the denial of the motion to amend for lack of facts to support the new claims); *Stead-Bowers v. Langley*, 636 N.W.2d 334, 341 (Minn. Ct. App. 2001) (approving the denial of the motion to amend when the moving party provided no evidence supporting the new claims); *Bib Audio Video Prods. v. Herold Marketing Assocs.*, 517 N.W.2d 68, 73 (Minn. Ct. App. 1994) (affirming the denial of the defendant's motion to amend the answer because the defendant "fail[ed] to establish evidence to support the [the defendant's] claims."); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 95 (Minn. Ct. App. 1991) (upholding the denial of the motion to amend when the new claims lack support in the record).

[10] *See, e.g., Untiedt v. Schmidt*, 2001 WL 69482, *3 (Minn. Ct. App. 2001) ("The [moving parties] never submitted a proposed amended complaint for the district court's consideration. The district court did not abuse its discretion in denying their motion.").

[11] 550 U.S. 544 (2007).

[12] 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").

[13] 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[14] 588 F.3d 585, 594 (8th Cir. 2009) (citations omitted) (emphasis added); see also 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.").

[15] 588 F.3d at 594 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007)) (emphasis added).

[16] *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)).

[17] Minn.R.Civ.P. 14.01 and related Advisory Committee Note—1959 (emphasis added).

[18] Minn.R.Civ.P. 14.03 (emphasis added).