Controlling Legal Costs – Law Firms

Motions To Dismiss: Are *Twombly* And *Iqbal* Here To Stay?

Stephen M. Plotnick and Michael Dinger

STERN & KILCULLEN, LLC

Three years ago, in a shot that reverberated through both the plaintiffs' and defendants' bars (albeit for very different reasons), the United States Supreme Court effectively retired the 50-year old plaintiff-friendly standard that federal district courts previously applied to motions to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) in the seminal decision *Bell Atlantic Corp. v. Twombly*[1]. In its place, the Supreme Court adopted a heightened standard, which requires plaintiffs to plead claims that are "plausible," and not merely "conceivable." Less than two years later, in *Ashcroft v. Iqbal*[2], the Supreme Court confirmed both that this radical departure was intentional and that it was meant to apply to all civil cases. Since then, there has been an outcry from many commentators and practitioners, primarily on the plaintiffs' side, and a push to undo this change to the historical "business as usual," including through legislation. But the current outcry is not without precedent, and if past is prologue, it appears that the heightened standard is here to stay.

How We Got Here

In 1957, the United States Supreme Court decided *Conley v. Gibson*[3], which set the standard that would end up being applied to motions to dismiss for failure to state a claim for the next half a century. In *Conley*, the Court issued its now-familiar ruling that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." For the next 50 years, defendants seeking to dismiss complaints were forced to overcome this high hurdle, which effectively allowed plaintiffs to proceed with their cases, and potentially burdensome discovery, so long as any set of facts, no matter how implausible, could support the plaintiff's claim. Over the years, this standard came to be questioned and criticized by courts and commentators who believed that it did not accurately reflect the pleading requirements set forth in Fed. R. Civ. P. 8.

Then, in 2007, defense lawyers rejoiced when the Supreme Court issued its opinion in *Twombly* in which it rejected the standard set forth in *Conley* and held that although a complaint need not contain detailed factual allegations, i.e., "the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." In other words, factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level.

Stephen M. Plotnick

Michael Dinger

After *Twombly*, some argued that it applied narrowly and only in the context of an antitrust case. However, any doubts were quickly put to rest by the Supreme Court in *Iqbal*. There, the Court specifically rejected the argument that *Twombly* was only applicable to antitrust cases, finding that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions.'" The Court emphasized that a complaint must set forth a claim that is "plausible," not merely "conceivable," and set forth a two-pronged test to determine whether a complaint states a plausible claim for relief. First, a court must identify and disregard "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Second, if "there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." "[W]here 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.'"

Calls For Reversal

The "plausibility" standard has been a boon to defendants. Recent studies have even shown a significant increase in the success rate of motions to dismiss since *Twombly* and *Iqbal* were decided. Thus, it is not surprising that there has been a growing push to undo the new standard.

One proposed method of overruling *Twombly* and *Iqbal* is through legislation. On July 22, 2009, Senator Arlen Specter introduced the "Notice Pleading Restoration Act of 2009," which provides:

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).[4]

Shortly thereafter, the House of Representatives introduced a similar bill titled the "Open Access to Courts Act of 2009," which provides:

> A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.[5]

The obvious purpose of these bills is to require district courts to apply the "no set of facts" standard set forth in *Conley*. Both bills were referred to committees last year, but no further action has been taken.

Legal scholars have also proposed changes to the federal rules that would undo *Twombly* and *Iqbal*. For example, one law professor has proposed the following amendment to Fed. R. Civ. P. 12, which would allow plaintiffs to obtain limited discovery that they could then use to oppose a motion to dismiss:

> *Rule 12(j): Allegations Likely To Have Evidentiary Support After a Reasonable Opportunity for Discovery*
>
> If, on a motion under Rule 12(b)(6) or 12(c) that has not been deferred until trial, the claim sought to be dismissed includes an allegation specifically identified as provided in Rule 11(b)(3) as likely to have evidentiary support after a reasonable opportunity for discovery, the court must either (1) assume the truth of the allegation, or (2) decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery. In deciding whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery, the court must consider the parties' access to evidence in the absence of discovery and state on the record the reason for its decision.
>
> If the court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery, under the standards of Rule 26, and deny the motion to dismiss. If the court decides that the allegation is not likely to have evidentiary support after a reasonable opportunity for discovery, the court must treat the motion as one for summary judgment under Rule 56, and provide all parties a reasonable opportunity to present all the material that is pertinent to the motion.[6]

Others have proposed to amend Fed. R. Civ. P. 8(a)(2) to require only "a short and plain statement of the claim – regardless of its nonconclusory plausibility – showing that the pleader is entitled to relief."[7]

Historical Context

The clamor over *Twombly* and *Iqbal* is reminiscent of the reaction in the late 1980s when the Supreme Court adopted a new approach to summary judgment. Until that time, jurisprudence of summary judgment was rather uniform, with the Supreme Court warning against "trials by affidavits" and reversing many summary judgment awards. Then, in 1986, the Supreme Court upheld three summary judgment awards in a four-month period in the seminal cases *Anderson*[8], *Celotex*[9] and *Matsushita*[10]. Those decisions established a new standard that favored the use of summary judgment under Fed. R. Civ. P. 56 when the evidence is so one-sided that one party must prevail as a matter of law.

In response, many expressed the concern that this new standard grossly favored defendants and would encourage district courts to use summary judgment motions to dispose of otherwise meritorious cases. And, much like the current response to *Twombly* and *Iqbal*, there was a strong call to undo the new summary judgment standard, including by amendments to Fed. R. Civ. P. 56, but none were adopted. In fact, not only does that standard remain controlling federal law today, but many state courts have followed suit and adopted the same standard.

Conclusion

Only time will tell whether *Twombly* and *Iqbal* will be undone, but it certainly seems unlikely. Indeed, if the survival of the summary judgment standard is any indication, then *Twombly* and *Iqbal* are here to stay.

***Stephen M. Plotnick** is a Partner in the litigation department of the law firm of Stern & Kilcullen, LLC. His practice involves representing corporations and individuals in connection with litigation, arbitration, regulatory inquiries and enforcement proceedings, and internal investigations. **Michael Dinger** is an Associate in the litigation department of the law firm of Stern & Kilcullen, LLC. His practice involves representing corporations and individuals in connection with federal and state litigation.*

[1] *127 S.Ct. 1955 (2007).*

[2] *129 S.Ct. 1937 (2009).*

[3] *78 S.Ct. 99 (1957).*

[4] *S. 1504, 111th Cong. (2009).*

[5] *H.R. 4115, 111th Cong. (2009).*

[6] *Edward A. Hartnett,* Responding to *Twombly* and *Iqbal*: Where Do We Go From Here?, *95 Iowa L. Rev. (forthcoming).*

[7] *Kevin M. Clermont & Stephen C. Yeazell,* Inventing Tests, Destabilizing Systems, *95 Iowa L. Rev. (forthcoming).*

[8] Anderson v. Liberty Lobby, Inc., *106 S.Ct. 2505 (1986).*

[9] Celotex Corp. v. Catrett, *106 S.Ct. 2548 (1986).*

[10] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., *106 S.Ct. 1348 (1986).*

Please email the authors at splotnick@sgklaw.com or mdinger@sgklaw.com with questions about this article.