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Iqbal And The Twombly Pleading Standard

Law360, New York (June 15, 2009) -- Celebrating only its second anniversary last month, the Supreme Court's Bell Atlantic Corp. v. Twombly decision, 550 U.S. 544 (2007), which directly addressed the proper standard for pleading an antitrust conspiracy based on parallel conduct, has already become ubiquitous in federal civil litigation today.

Rare is the case where a defendant does not file the "Twombly motion" decrying the woeful inadequacies of a plaintiff's pleading. And thanks to Justice Souter, the word "plausibility" has entered into our everyday vernacular as members of the bar.

While Twombly clearly had consequences on the law regarding pleading an adequate claim, the decision left unanswered several questions.

To wit: (1) just how many facts need to be alleged to "nudge" a claim from conceivable to plausible? (2) does the holding apply to pleading claims outside of the antitrust conspiracy context? and (3) does the holding suggest (or even mandate) a heightened pleading standard?

These questions have been examined by the lower courts over the last two years, with varying and conflicting results.

Recently, the Supreme Court revisited the issue of the Twombly pleading standard in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and it appears to have resolved at least some of these open questions, while leaving uncertain the most important one.

Twombly was an antitrust class action alleging an unlawful conspiracy based on the parallel conduct of a number of competitors in the local telephone and Internet service markets.

The court reversed the Second Circuit decision and held that the complaint should be dismissed. The court ultimately found that the plaintiffs did not allege sufficient facts to support a "plausible" antitrust claim.

Three important determinations came from the decision with respect to the issue of adequately pleading a claim. First, the court interpreted Rule 8(a)(2)'s notice pleading standard to require that a complaint allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

It found that the factual allegations "must be enough to raise a right to relief above the speculative level." Id. at 555. The court reasoned that this standard "[did] not impose a probability requirement at the pleading stage." Id. at 556.

In short, it determined that a plaintiff must allege sufficient facts to "nudge their claims across the line from conceivable to plausible," else risk dismissal. Id. at 570.

Second, the court retired Justice Black's oft-quoted passage in Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (on its 50th anniversary) 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 that would entitle him to relief."

The court reasoned that a literal reading of Conley would permit a wholly conclusory statement of a claim to survive a dispositive motion if it left open the possibility that a plaintiff may later discover facts to support recovery.

Finally, the court stated that in reaching its conclusion, it "[did] not apply any 'heightened' pleading standard," nor did it "require heightened fact pleading of specifics." Twombly, 550 U.S. at 569, n.14, 570.

This was confirmed a week later in the court's decision in Erickson v. Pardus, 127 S. Ct. 2197 (2007), reaffirming the simplified pleading standard under Rule 8(a)(2).

Not surprisingly, in Twombly's aftermath, there was an onslaught of motions practice arguing that various claims should now be dismissed under Twombly because they did not meet the "new" plausibility pleading standard.

Many defendants argued that the new standard amounted to a heightened pleading standard, particularly in antitrust cases given Twombly dealt specifically with that area of law. Also, many defendants argued that the Twombly holding had a broader effect and extended outside the antitrust context.

And notably, many defendants filed Twombly motions to dismiss civil claims as implausible even though they had pleaded guilty to the same criminal conduct. This left the lower courts to interpret the specific language and inferences in Twombly involving general pleading standards.

The result was a hodgepodge of discrepant interpretations of the general pleading standard.

For example, the Second and Seventh Circuits adopted an approach whereby the plausibility standard would require a plaintiff to amplify certain claims with a fuller set of factual allegations (e.g., complex antitrust or RICO claims) in such contexts where such amplification would be needed, and presumably not others. See Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008); Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

The Sixth and Eighth Circuits focused their analyses more on the retirement of the Conley "no set of facts" standard and the rejection of conclusory allegations, determining that an entitlement to relief required more than labels, conclusions and formulaic recitations of the elements of a cause of action. See Sensations Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008); Benton v. Merrill Lynch & Co. Inc., 524 F.3d 866 (8th Cir. 2008).

And the Fifth and Ninth Circuits appeared to embrace the Twombly plausibility language that a plaintiff must plead sufficient facts to state a claim for relief that is plausible on its face and raise the right to relief above the speculative level. See In re Katrina Canal Breaches Litig., 495 F.3d 191 (5th Cir. 2007); Williams v. Gerber Prods. Co., 523 F.3d 934 (9th Cir. 2008).

Even though there is not a clear consensus as to the application of the new plausibility pleading standard articulated in Twombly, the courts have been far more consistent in applying Twombly outside of the antitrust context.

Nearly every circuit, save one, see Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8 (D.C. Cir. 2008), has applied the Twombly pleading standard to a case involving claims other than antitrust.

The Supreme Court revisited its Twombly decision in Ashcroft v. Iqbal. The case involved a citizen of Pakistan and a Muslim that was arrested on criminal charges and detained in the wake of the Sept. 11, 2001 terrorist attacks.

The plaintiff filed a complaint alleging certain federal officials adopted an unconstitutional policy that subjected detainees to harsh conditions of confinement based on race, religion or national origin.

Iqbal was an appeal from the Second Circuit, which had affirmed the district court's denial of defendants' motion to dismiss.

The Second Circuit, in considering whether the claims were sufficiently pleaded, held that Twombly called for a "flexible" plausibility standard which only required amplified factual allegations to render a claim plausible in certain contexts, the present claim not being one of them.

The Supreme Court reversed. In re-examining its reasoning in Twombly, the court reiterated that while the Rule 8 pleading standard does not require detailed factual allegations, conclusory and formulaic allegations will not suffice.

It also emphasized that a claim to relief must be plausible on its face, and that while the "plausibility standard is not akin to a 'probability requirement,' [ ] it asks for more than a sheer possibility that a defendant acted unlawfully." Iqbal, 129 S. Ct. at 1949.

The court found that its Twombly decision rested on two fundamental principles: (1) that a court must accept all plaintiff's allegations as true is inapplicable to legal conclusions; and (2) a complaint must state a plausible claim for relief to survive a motion to dismiss.

The court provided scant additional helpful language as to how to analyze the plausibility of a claim. It reasoned that such an analysis is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

It then suggested a two-pronged approach: (1) identify those pleadings that are mere conclusions, because those are not entitled to an assumption of truth; and (2) assume the veracity of the remaining well-pleaded factual allegations (if any), and then determine whether they plausibly give rise to an entitlement of relief.

In applying the two-pronged approach to the Iqbal complaint, the court first rejected those allegations that were mere recitations of the elements of a constitutional discrimination claim.

Next, in considering the factual allegations that the court was required to accept as true, it found that while the allegations were consistent with the defendants purposefully designating detainees "of high interest" because of their race, religion or national origin, it nevertheless concluded that they were not plausible because there were more likely explanations for such policies.

The court concluded that "[a]s between that 'obvious alternative explanation' for the arrests ... and the purposeful, invidious discrimination plaintiff asks us to infer, discrimination is not a plausible conclusion." Id. at 1951-52.

The court next held, in no uncertain terms, that its decision in Twombly was not limited to pleadings made in the context of an antitrust dispute.

It reasoned that the decision was based on its interpretation of Rule 8, which governs the pleading standard in all civil proceedings in federal courts. The court made clear that Twombly "expounded the pleading standard for all civil actions."

Finally, the court rejected plaintiffs' "careful-case-management approach" argument that the pleading standard under Rule 8 should be relaxed because of controls placed on the discovery process to make it minimally intrusive.

The court held that plaintiffs are not entitled to discovery, cabined or otherwise, if the complaint has not been adequately pleaded under Rule 8.

Iqbal provides scant additional guidance in interpreting the plausibility pleading standard, while leaving uncertain what it takes to nudge a claim from the conceivable (i.e., dismissable) to the plausible (i.e., viable).

For example, how will a plaintiff know when sufficient facts are pleaded when a particular judge is making that determination by drawing on her judicial experience and common sense?

Notwithstanding the inadequacies in clarifying the nuances of plausibility, the decision does provide useful guidance on how to approach analyzing the sufficiency of a pleading under the court's two-pronged inquiry.

Iqbal also resolves the issue of the scope of its applicability — indeed, the court makes clear that all civil claims are subject to the Twombly plausibility pleading standard. In addition, the court flatly refused to relax the standard based on possible limited discovery.

Thus, while the court's two-pronged approach might bring more consistency on how a pleading is analyzed, it remains to be seen with respect to innumerable claims as to how plausibility might be sufficiently pleaded.

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