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PLEADING STANDARDS IN THE FEDERAL AND STATE TRIAL COURTS: THE EVOLVING IMPACT OF U.S. SUPREME COURT PRECEDENT

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In the 2007 case *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court announced a new pleading standard for evaluating causes of action in federal court. According to the seven-member majority opinion authored by Justice Souter in *Twombly*, a complaint had to contain factual allegations sufficient to demonstrate a "plausible" claim for relief to survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). This new "plausibility" standard, in theory, raised the bar for obtaining discovery in federal cases because the previous standard, as articulated by the Court in *Conley v. Gibson*, 355 U.S. 41 (1957), had required that there be "no set of facts" on which plaintiffs could possibly prevail before a complaint could be dismissed pursuant to a 12(b)(6) motion.

Although the Supreme Court in *Twombly* did not limit the applicability of its new "plausibility" test to any particular kind of case, the facts in *Twombly* itself concerned antitrust allegations of concerted action on the part of competitors in the market for long distance telephone services. The Supreme Court ruled that these allegations were implausible – and therefore insufficient to state a claim under Section 1 of the Sherman Act – because the defendants' parallel behavior could be explained by the independent pursuit of their economic interests. *Twombly* arose in the fairly specific context of an antitrust conspiracy case.

The Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) elaborates on the federal pleading standard announced in *Twombly*. In *Iqbal*, the Supreme Court held that the allegations made by the plaintiff in support of his *Bivens* action were too implausible to overcome the assertion by the defendants' of qualified immunity. In *Iqbal* the plaintiff, who is a Pakistani citizen and a Muslim, claimed that former F.B.I. Director Robert Mueller and former Attorney General John Ashcroft had approved a program of incarcerating the plaintiff and other persons of "high interest" to the federal investigation of the 9/11 attacks in maximum security prisons around the country based solely on their race, religion, or national

origin.

The Supreme Court held that Iqbal had failed to state a sufficiently "plausible" claim that Mueller and Ashcroft had approved the program with the purpose to detain persons of a particular race, religion, or national origin – which, the Court concluded, was the standard for establishing liability for government personnel acting in a supervisory capacity. The Court reached this conclusion by analyzing the plaintiff's complaint and stripping from it any allegations that the Court considered to be merely legal conclusions (as opposed to factual recitations). In this manner, the Court dismissed as too conclusory the plaintiff's allegations that Mueller and Ashcroft "knew of, condoned, and willfully and maliciously agreed" to subject the plaintiff to harsh confinement on the basis of his religion, race, or national origin and that Ashcroft was the "architect" of this policy and that Mueller was "instrumental" in implementing it. According to the Court, the only non-conclusory factual allegations made by Iqbal were that the F.B.I. under Mueller detained thousands of Arab Muslim men as part of its 9/11 investigation and that the policy of detaining such men in highly restrictive conditions was approved by Mueller and Ashcroft. These allegations, according to the Court, were not enough to render Iqbal's claims "plausible" within the meaning of *Twombly* because the defendants' conduct was consistent with the lawful explanation that the defendants were trying to hold suspected terrorists in the most secure conditions possible.

The *Iqbal* case, which is the first time the Supreme Court itself has revisited *Twombly* since the original decision, has potentially important implications. By applying *Twombly* in another context, the Supreme Court has now given the federal courts a framework to apply *Twombly's* "plausibility" test. According to this framework, a court should ignore allegations that are mere legal conclusions and test the remaining factual allegations for plausibility.

Notably, *Twombly* was decided 7-2 and *Iqbal* was decided 5-4, a much closer decision. *Twombly*'s author, Justice Souter, wrote the dissent in *Iqbal* (Justice Breyer, who had been with the majority in *Twombly* also voted with the dissent in *Iqbal*). Justice Souter's dissent shows that the difference between an allegation that is merely a legal conclusion and one that contains factual information is not always clear. Justice Souter, in his *Iqbal* dissent, claimed to have found no principled distinction between the allegations stricken from the complaint by the Court (Mueller and Ashcroft approved the detainee policy on the basis of the suspects' race, religion, or national origin) and the ones allowed to remain for application of *Twombly* (Mueller and Ashcroft approved the policy).

The clash between the majority and the dissent illustrates how different judges might reach different results on the question whether a particular allegation is legal or factual, and the *Iqbal* majority's instruction that judges should be guided by "common sense" and "judicial experience" in

applying *Twombly* highlights the fact that the Court has not fashioned a "bright line" test that would lead to consistent results. *Iqbal* could therefore trigger the beginning of a period of uncertainty in assessing the likely outcome of motions to dismiss in federal court.

After *Iqbal*, for example, it is no longer clear whether even the model negligence complaint appended to the Federal Rules of Civil Procedure at Civil Form 11 would necessarily pass muster. The sum and substance of that model complaint's allegations are that the defendant "negligently drove a motor vehicle against the plaintiff" and that, as a result, "the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses . . . ." Fed. R. Civ. P. Civil Form 11. Justice Ginsburg herself recently underscored the potential for confusion, saying in a speech this summer that, in her view, the *Iqbal* majority had "messed up" the Federal Rules of Civil Procedure. *Iqbal* has also sparked interest on Capitol Hill, where the possible significance of the decision has led Senator Arlen Specter to introduce a proposed bill entitled the Notice Pleading Restoration Act that is designed to overrule both *Iqbal* and *Twombly* and restore the *Conley v. Gibson* "no set of facts" standard.

Given that *Iqbal* may result in greater scrutiny of complaints in federal court, counsel representing plaintiffs may begin to think more about forum selection. Significantly, not all states have embraced *Twombly*'s "plausibility" inquiry as the appropriate standard for surviving a motion to dismiss and obtaining discovery.Some states (for example, Arizona and West Virginia) have explicitly rejected *Twombly*. Other state courts (for example, Alabama and North Carolina) have declined to adopt *Twombly* prior to an official ruling on the matter from their respective highest state courts. Still others (for example, Massachusetts and South Dakota) have explicitly embraced *Twombly* and will presumably also follow Iqbal. If rulings on motions to dismiss in federal court become more unpredictable in the wake of *Iqbal*, counsel representing plaintiffs may increasingly consider filing actions in state courts that have not embraced the *Twombly/Iqbal* framework. For a breakdown of some states' approach to *Twombly*, we provide the following non-exhaustive sample compendium.

Compendium

I. States That Have Expressly Adopted *Twombly* (Or Similar Standard).

Delaware

BASF Corp. v. POSM II Properties Partnership, L.P., 2009 WL 522721, *6 (Del. Ch. Mar. 03, 2009) (NO. CIV. A. 3608-VCS).

Indicating that the Supreme Court's standard under *Twombly* now parallels Delaware's ("Recognizing the costs of modern litigation, the U.S. Supreme Court has adopted a similar standard [to ours]").

Maine

Bean v. Cummings, 939 A.2d 676, 680-81 (Me. Jan. 29, 2008).

Explaining that when a Maine Rule of Civil Procedure is identical to its federal counterpart, the state court will "value [Federal] constructions and comments . . . as aids in construing" its provision. This case cites *Twombly* for the general point that in "cases where there is a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity," and indicates that the claim at issue—civil perjury—is such a claim. Facing this heightened standard, the claim was dismissed.

Massachusetts

Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. Jun. 13, 2008).

Explicitly adopting the Supreme Court's analysis in *Twombly* ("We agree with the Supreme Court's analysis of the Conley language . . . and we follow the Court's lead in retiring its use. The clarified standard for Rule 12(b)(6) motions adopted here will apply to any amended complaint that the plaintiffs may file.").

South Dakota

Sisney v. State, 754 N.W.2d 639, 643 (S.D. Jul. 23, 2008). Applying *Twombly* even in a pro se case ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide 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. . . Ultimately, the complaint must allege facts, which, when taken as true, raise more than a speculative right to relief.") (citations omitted).

Gruhlke v. Sioux Empire Federal Credit Union, Inc., 756 N.W.2d 399, 408-10 (S.D. Sept. 10, 2008).

Dismissing a claim for intentional interference with an employment contract, citing *Twombly*, but remaining committed to notice pleading. What is interesting, however, is that the court applied *Twombly* while claiming to remain committed to notice pleading. ("Ultimately, the complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. . . . South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain '[a] short and plain statement of the claim showing that the pleader is entitled to relief.'")(citations omitted).

II. States That Have Rejected Twombly.

Arizona

Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345, 420 (Ariz. Jul. 25, 2008).

Rejecting adoption of *Twombly*'s plausibility standard and maintaining Conley's notice standard.

Vermont

Colby v. Umbrella, Inc., 955 A.2d 1082, 1087n.1, (Vt. Mar. 7, 2008).

Rejecting an argument by dissenting judges that *Twombly* created a new heightened pleading standard and noting that—even if it did—the state had followed Conley for over 20 years and was not prepared to abandon that tradition.

West Virginia

Highmark West Virginia, Inc. v. Jamie, 655 S.E.2d 509, 513n.4 (W.Va. Nov. 20, 2007).

Declining to adopt a heightened pleading standard and indicating the Court's continued adherence to a notice pleading standard in the wake of *Twombly*.

In re Flood Litigation Coal River Watershed, 668 S.E.2d 203, 216 (W.Va. Jun. 26, 2008).

Noting that West Virginia had not yet decided whether to adopt a heightened pleading standard, but indicating that even if it were to do so the complaint in question would pass muster under *Twombly* ("Although this Court has not considered whether such a standard should be adopted, the . . . plaintiffs' complaint clearly meets that standard.").

III. State Appellate Courts That Have Considered *Twombly* Pending Guidance from the State's Highest Court.

Alabama

Crum v. Johns Manville, Inc., 2009 WL 637260, *13n.2 (Ala. Civ. App. Mar. 13, 2009) (NO. 2070869).

Rejecting a defendant's argument that *Twombly*'s standard should replace Conley's within Alabama's system ("The United States Supreme Court's interpretation of the Federal Rules of Civil Procedure is not binding on this court's interpretation or application of the Alabama Rules of Civil Procedure. Instead, this court is bound by the Alabama Supreme Court's interpretation of our Rules of Civil Procedure. Until such time as our supreme court decides to alter or abrogate . . . [Conley's] standard, we are bound to apply it . . . .")

Colorado

Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1157-58 (Colo. App. May 15, 2008).

While ultimately granting summary judgment to the defendant, the court discussed its standard for motions to dismiss. In doing so, it cited *Twombly* and the 10th Circuit's adoption of that heightened standard for all civil claims in Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 n.2 (10th Cir. 2007).

Kentucky

Espinosa v. Jefferson/Louisville Metro Government, 2009 WL 277488, *1 (Ky. App. Feb. 6, 2009) (NO. 2008-CA-000944-MR).

Citing *Twombly* and dismissing a claim, but construing *Twombly*'s holding within the bounds of traditional notice pleading. ("The complaint is meant to 'give a defendant fair notice and identify the claim.' It identifies the disputed issues as to which a defendant must file an answer. The Supreme Court of the United States has recently discussed the threshold requirements of notice pleading, observing that even though the facts do not have to be detailed, they must be fundamentally adequate to provide at least a modicum of notice as to the cause of action . . .") (citations omitted).

Minnesota

Bahr v. Capella University, 2009 WL 1375181, *7 (Minn. App. May 19, 2009) (NO. A08-1367).

Adopting *Twombly*, though ultimately reversing the lower court's granting of a motion to dismiss ("The court demands that the complaint state 'enough factual matter' or 'factual enhancement' to suggest, short of 'probability,' 'plausible grounds' for a claim – a pleading with 'enough heft' to show entitlement.").

Nebraska

Holmstedt v. York County Jail Supervisor, 739 N.W.2d 449, (Neb. App. Aug. 28, 2007).

Citing *Twombly* to describe the state's pleading requirements in a civil rights complaint, and dismissing the claim. While the decision was ultimately reversed, it was reversed on other grounds.

North Carolina

Holleman v. Aiken, 668 S.E.2d 579, 584 (N.C. App. Nov. 4, 2008).

Noting that one party urged to court to apply *Twombly*'s heightened standard, but that the court declined to do so because the state's highest court had yet to adopt it ("Plaintiff argues that this court should apply the 'plausibility standard' . . . [and] has also correctly noted that '[t]o date, North Carolina has not adopted the 'plausibility standard . . . .' This Court does not have the authority to adopt a new standard of review for motions to dismiss. . . . Instead, we use . . . the correct standard of review as used by the North Carolina appellate courts . . . .") (citations omitted).

Ohio

Gallo v. Westfield Natl. Ins. Co., 2009 WL 625522, *1 (Ohio App. 8 Dist. Mar. 12, 2009) (NO. 91893).

Citing *Twombly* in connection with the pleading standard ("However, the claims set forth in the complaint must be plausible, rather than conceivable. While a complaint attacked by a Civ.R. 12(b)(6) motion to dismiss does not need detailed factual allegations, Gallo's obligation to provide the grounds of her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Factual allegations must be enough to raise a right to relief above the speculative level.") (citations omitted).

Tennessee

Hermosa Holdings, Inc. v. Mid Tennessee Bone and Joint Clinic, P.C., 2009 WL 711125, *3 (Tenn. Ct. App. Mar. 16, 2009) (NO. M200800597COAR3CV).

An Eastern Section case, noting that federal cases interpreting federal rules can be helpful guides to the Tennessee court's consideration of its own rules and applying *Twombly*'s standard ("Although the Tennessee Supreme Court has not adopted the standard announced in Twombly, we find it consistent with Tennessee law and therefore recognize its applicability.").

Indiana State Dist. Council of Laborers v. Brukardt, 2009 WL 426237, *7 (Tenn. Ct. App. Feb. 19, 2009) (NO. M200702271COAR3CV).

A Middle Section case, noting the parties argued about whether *Twombly* should apply, but holding that its standard had not been adopted by the Tennessee Supreme Court and that the appeals court was not in a position to adopt it ("While there are valid arguments in favor of this standard, it has not been adopted in Tennessee, and this Court is not in a position to adopt the stricter *Twombly* standard.").

Washington

McCurry v. Chevy Chase Bank, F.S.B., 144 Wash. App. 900, 904 (2008).

Declining to apply *Twombly* because state rule and Washington Supreme Court precedent, not the United States Supreme Court's interpretation of federal court rules, controls the Court's authority.

2 See Adam Liptak, "9/11 Case Could Bring Broad Shift on Civil Suits," N.Y. TIMES, July 20, 2009.

3 David Ingram, "Specter Proposes Return to Prior Pleading Standard," THE NATIONAL LAW JOURNAL, Jul. 24, 2009, available at http://www.law.com/jsp/article.jsp?id=1202432493166.

4 Jane and Turner express their thanks to Michael Packard for his research assistance. Michael will be joining the firm as an associate in 2010.

5 Two of Tennessee's appellate divisions considered Twombly's applicability around the same time and reached different results, as indicated by the citations here.

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