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Twombly's Seismic Disturbances

Edward D. Cavanagh

HEADNOTES

PLEADING

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EDWARD D. CAVANAGH

The author is a professor of law at St. John's University School of Law.

The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), has had a seismic impact on federal civil litigation. We all thought the notice pleading concept introduced under the Federal Rules of Civil Procedure had substantially eased the plaintiff's burden at the pleading stage. The Supreme Court in *Twombly* said "yes, but," and emphasized that notice pleading was never intended to dispense entirely with the need to plead facts demonstrating a right to relief. In short, facts matter: Rule 8 of the Federal Rules of Civil Procedure requires a statement of circumstances, events, and occurrences in support of the claim presented.

In dismissing the complaint, the Court laid waste to the 50-year-old rule established in *Conley v. Gibson*, 355 U.S. 41 (1957), which provided that a complaint should not be dismissed "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." Rather, to escape a motion to dismiss, a complaint now must state a claim that is plausible. However, the Court was fuzzy on precisely what it meant by "plausible." It told us that mere labels, conclusions, and formulaic recitations of the elements will not do. It also said that a complaint that establishes only the mere possibility of recovery will not pass muster. What emerges from the *Twombly* rubble is reminiscent of the story of Goldilocks: possible (too little); probable (too much); plausible (just right).

The Court undoubtedly intended to raise the bar for pleadings. How much higher the Court raised the bar is far from clear. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court confirmed that *Twombly* neither abandoned notice pleading nor imposed a particularity-in-pleading requirement. Instead, the trial court must separate conclusory allegations from well-pleaded allegations, ignoring the former. The court must then draw on judicial experience and common sense to determine whether the complaint states a plausible claim for relief.

The *Twombly* Court clearly was on a mission to rein in the cost of discovery and minimize its tactical use. It also was concerned that if these questionable antitrust cases were to proceed to trial, costly discovery would run amok, and generalist judges and juries might not reach the "right" results. Erroneous outcomes create the problem of false positives—condemnation of conduct that is lawful—which, in turn, chill pro-competitive behavior. The Court concluded—wrongly—that because the content of pleadings and

discovery requests was controlled by the parties, the courts were powerless to restrict their use. Its solution was to have the courts cut off these claims by granting motions to dismiss before significant discovery costs and judicial time had been invested in the cases.

The rulings in both *Twombly* and *Iqbal* are inextricably intertwined with the substantive natures of these cases. *Twombly*, as noted, involved potentially enormous discovery expenses. *Iqbal* involved complicated civil rights issues, which would force the attorney general and the FBI director to spend large blocks of time defending their actions in court. At the same time, the *Twombly* Court gave its imprimatur to the official Form 9 in the appendix to the Federal Rules for pleading in negligence actions.

The shockwaves of *Twombly* and *Iqbal* may give rise to unintended consequences that threaten to impair the operation of the federal civil justice system. The fact/conclusion distinction is unworkable. The line is often difficult to draw, especially when a court is asked to do so in the twinkling of an eye on a motion to dismiss. The distinction was a defining feature of code pleading, which led to a level of technicality and factual detail that in the end proved to be counterproductive—courts spent countless hours distinguishing "fact" from "conclusion" to determine whether a claim was properly pleaded, thereby missing the larger picture of whether the plaintiffs had a meritorious claim for trial. Dissenting in *Twombly*, Justice Stevens correctly pointed out that the fact/conclusion distinction, as an analytic tool, is a step backward.

Now, under the new precedent, once something is labeled a "conclusion," it can be ignored. Far from being useless and self-serving, conclusory statements in the pleadings can be very helpful to the courts and the parties in defining the nature of the claims and defenses. Equally troublesome is the Court's willingness in both *Twombly* and *Iqbal* to make probabilistic determinations at the pleading stage. Instead of fact-based outcomes, the courts may well yield outcome-based facts.

Another unintended consequence of *Twombly* is that it may lead to more—not less—discovery. Taking their cue from the Supreme Court, litigants have begun to add factual detail to their complaints. In the cases that survive motions to dismiss, the greater detail in the pleadings would call for more discovery, which in turn would necessitate more pre-trial supervision by the courts and increased litigation expenditures.

A motion to dismiss is simply too blunt an instrument to achieve discovery reform. The discovery rules allow the courts great leeway in fashioning programs to fit the needs of individual cases. Instead of directing courts to dismiss lawsuits, the Supreme Court should be directing trial judges to enforce existing rules designed to tailor discovery.

The Court has sent the wrong message to the lower courts—that if they perceive that existing rules are not working, they can ignore them and address the problem in another way. *Twombly* thus continues an unfortunate trend in the case law pushing the process of outcome determination to an ever-earlier point on the litigation time line. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), urged courts to carefully review the pre-trial record to determine whether there was a genuine issue of material fact for trial. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), directed the courts to screen expert opinions early in the process to ensure their reliability.

Courts must be vigilant to avoid the unintended consequences of *Twombly* and *Iqbal*. Judges may not be able to make the ground shake, but they can take case management seriously and limit discovery where appropriate, rather than reducing well-pleaded claims to piles of rejected rubble.

TRIAL TACTICS

A Judge's Answers on Evidence

HON. JEFFREY COLE

Jeffrey Cole is a magistrate judge in the Northern District of Illinois, Chicago.

Q: To be a successful trial lawyer, is it really necessary to understand the Federal Rules of Evidence or their state law counterparts?

A: Nothing could be more essential! Great trial lawyers become great in one way only—through painstaking preparation of every facet of the case, not the least important of which is a thorough knowledge of the relevant evidentiary issues in the case.

Q: How do you go about really understanding the rules of evidence?

A: Almost no one comes out of law school with the necessary feel for the rules. A first step is to read a treatise or manual on the Federal Rules of Evidence or their state law equivalents. You should also read the decisions of the court of appeals in your circuit or state. I think it's helpful to keep a database of the significant decisions dealing with evidentiary issues. You will have a ready source of precedent for briefs and memoranda, whether in the trial court or the court of appeals.

Q: Which evidentiary issues seem to give lawyers the most trouble?

A: Without a doubt, it's the hearsay rule. Yet, the rule is not particularly complicated. Think of it this way: When an out-of-court statement is offered to prove the truth of what is being asserted, it is the credibility of the person making the statement that counts. And if you can't cross-examine that