

Motions To Dismiss in the Wake of *Iqbal*: Law And Semantics In The Twenty-First Century

Last May, when the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,¹ we wrote that the greatest significance of the decision might not lie in the court's holding increasing pleading requirements for conspiracy in antitrust cases, but in its "retirement" of the 50-year-old general pleading requirement of *Conley v. Gibson*.² Indeed, although the opinion was based upon policy considerations attendant to modern antitrust litigation, we noted that similar policies were at work in other areas where defendants faced enormous and usually one-sided discovery burdens, including product liability, employment, *qui tam*, and securities law. In *Ashcroft v. Iqbal*,³ the Supreme Court has now confirmed that the *Conley* era has officially ended for all federal court litigation. Perhaps what is more important, the Court's application of *Twombly* to the complaint at issue portends an enormous shift in the way motions to dismiss must be argued. The decision emphasizes a sharp dichotomy between allegations of "fact" and of "law" and seems to consider the process of classification almost a mechanical one, reminiscent of the bright-line analyses of earlier eras. In its demonstration of that process, the Court also seems to embrace a classification that is decidedly defense-oriented, minimizing the allegations considered factual and thus capable of satisfying the *Twombly* standard. Inasmuch as the process is explicitly conducted by the Court as a primer to lower-court judges, it is reasonable to think that we will see a lot of it in the years to come.

Background

Iqbal was a *Bivens* action against several federal officials, including former Attorney General Ashcroft and FBI Director Mueller, seeking damages for alleged violations of Respondent Iqbal's constitutional rights.⁴ The case arose out of federal government efforts to track down the perpetrators of the September 11, 2001 terrorist attacks. Iqbal, an Arab Muslim man, was arrested and detained by federal officials. He was labeled a person of "high interest" and secured in a federal facility in Brooklyn at which he alleged he had essentially been tortured. Iqbal eventually pleaded guilty to fraud and conspiracy to defraud the United States, served a term of imprisonment in the United States, and was deported to Pakistan. After returning to Pakistan, Iqbal sued numerous federal officials and correction officers, claiming that he had been targeted because of his race, religion, or national origin in violation of his First and Fifth Amendment rights. He alleged that Attorney General Ashcroft and FBI Director Mueller had approved a general policy of discrimination against, and harsh treatment of, persons of Arab descent and the Muslim faith.⁵ Iqbal further alleged that Ashcroft was the "principal architect" of the policy and that Mueller "was instrumental in its adoption."⁶

The district court denied the petitioners' motion to dismiss, holding that Iqbal's complaint was sufficient to state a claim for relief under the *Conley* "no set of facts" standard. The Second Circuit heard the argument on interlocutory appeal and, despite disapproving of the use of the *Conley* standard,⁷ affirmed the denial of the motion to dismiss on a "flexible 'plausibility standard'" derived from *Twombly*. Judge Cabranes concurred, questioning the Court's application of *Twombly* to a *Bivens* case against senior government officials and inviting Supreme Court review to clarify the scope of the 2007 decision.⁸

The Majority Opinion

In a five-to-four decision, the Supreme Court reversed the Second Circuit and held that the complaint failed to state a claim under the "plausibility standard" articulated in *Twombly* for determining whether a pleading satisfies FRCP 8(a).⁹ After finding that the Second Circuit properly had jurisdiction over the appeal under the collateral-order doctrine, the Court analyzed the pleading issue

by applying the two “working principles” identified in *Twombly*: First, the established rule that only factual allegations and not legal conclusions must be accepted as true and, second, that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”¹⁰

Of particular interest here is the first step in the analysis, in which the Court determined which allegations of the complaint would be deemed “factual.” To leave no doubt that it was prescribing a *method of analysis* as well as a substantive test, the Court introduced its discussion by stating that “[i]n keeping with [the two “working principles” of *Twombly*] a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”¹¹ What followed was an allegation-by-allegation review in which the “fact or conclusion” test was applied to each in turn.

The result was that only two of Iqbal’s allegations were deemed to be factual in nature: That “the Federal Bureau of Investigation, under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,” and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants.”¹² In contrast, the majority determined that an allegation that Attorney General Ashcroft was the “principal architect” of the discriminatory policy and that FBI Director Mueller was “instrumental” in adopting and executing the discriminatory policy, and that both men “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to such harsh treatment as a matter of policy solely on account of his race and for no penological interest, were “bare assertions” and not entitled to a presumption of truth.¹³ Significantly, the Court made its decision by characterizing the allegations as mere “formulaic recitation[s]” of the elements of a violation, and that for this reason, they were merely “conclusory” and not entitled to be assumed true.¹⁴

The Court then took up the second step in the analysis, and concluded that the two factual allegations did not “plausibly suggest an entitlement to relief” because they failed to show more than a *possible* violation of Iqbal’s constitutional rights.¹⁵ In making this determination, the Court specifically rejected the argument that the *Twombly* standard should be limited to antitrust disputes. “Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8.”¹⁶ Because Rule 8 applies to civil actions in general, the “decision in *Twombly* expounded the pleading standard for ‘all civil actions.’”¹⁷

Justice Souter, author, ironically, of the *Twombly* decision, wrote a dissent in which Justices Stevens, Ginsburg, and Breyer joined. Justice Souter did not question the applicability of the flexible *Twombly* test to a *Bivens* case. Instead, he focused mainly on the majority’s categorization of most of Iqbal’s allegations as conclusory, arguing that they were made to appear so only by reviewing them in isolation. “Iqbal’s claim is not that Ashcroft and Mueller ‘knew of, condoned, and willfully and maliciously agreed to subject’ him to a discriminatory practice that is left undefined; his allegation is that ‘they knew of, condoned, and willfully and maliciously agreed to subject’ him to a particular, discrete, discriminatory policy detailed in the complaint.”¹⁸ Justice Souter also questioned the consistency of the majority’s analysis of the allegations, arguing that characterizing the statement that Defendants approved “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI” as factual and yet treating the allegation that the Defendants “knew of, condoned, and willfully and maliciously agreed” to the discriminatory designation of Arab Muslim men as “high interest” as merely conclusory could not be reconciled.¹⁹

Justice Souter also criticized the majority’s application of the second step of the *Twombly* analysis, arguing that the majority in fact had failed to assume as true well-pleaded facts, which if believed would indeed have made out a substantial claim of unconstitutional activity. For better or worse, though, his discussion may be remembered for identifying the “sole exception” to this rule: “allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men,

or the plaintiff's recent trip to Pluto, or experiences in time travel."²⁰

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Confirmation that the *Twombly* "plausible-not-merely-possible" standard applies to all litigation in federal court is significant, and will head off a fair amount of additional motions practice on that subject that erupted after the standard was enunciated in May 2007. At least for now, though, one must believe that the battleground will largely move to the kind of statement-by-statement, fact-or-law examination that the *Iqbal* Court may essentially have mandated be undertaken in assessing motions to dismiss. Some easy cases will remain easy. But the part of the analysis that discounts arguably factual allegations that seem to track the elements of a claim may be more difficult to apply in a consistent manner, especially after plaintiffs' counsel respond to the Court's decision by trying to reword allegations to avoid the impact of the holding. This part of the process at least — the upcoming debates over whether a statement that a defendant was a "principal architect" of an allegedly unlawful scheme, or that it "negligently failed to test a product in light of all expected uses" sound in fact or law — portend difficult if not metaphysical debates that not many of us will look forward to. While the Court made plain that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,"²¹ we will learn in the years to come how it treats one armed with a thesaurus.

The Court's prescribed analysis under Rule 8(a) allows of no gray areas: A court examines allegations one by one and puts them in the "fact" bin or the "law" bin, and the decision is fraught with consequences. The Court did not approach the exercise as a particularly difficult one, or as one admitting to close calls or balancing tests or the like. But clearly — at least if a 5 to 4 vote is any indication — choosing the right bin requires the exercise of some judgment indeed. That the majority seemed to have made many of these calls in favor of an allegation being merely one of law suggests the possible impact of the decision.

A final note on the effect of the *Iqbal* decision on state law claims. We wrote in May 2007 that the effect of *Twombly* on state laws that had embraced the Conley test was unclear. Would state courts choose to overturn fifty years of their own jurisprudence to follow a decision prompted by policy considerations applicable to the federal antitrust laws? Many in fact have, although the issue remains unresolved as a general matter. Now the ante has been raised yet again, and there is no doubt that the question whether the *Iqbal-Twombly* jurisprudence will extend to state law claims will be presented squarely. State supreme courts on the other side of the *Iqbal* majority may make for an interesting time.

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1. 550 U.S. 544 (2007).
 2. 355 U.S. 41 (1957). Our advisory discussing the *Twombly* case may be found at: <http://www.hugheshubbard.com/pen/pubdetail.aspx?pub=1793>.
 3. No. 07-1015, slip op. (Sup. Ct. May 18, 2009) ("Slip Op.).
 4. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388.
 5. Slip Op. at 4-5.
 6. *Id.* at 5.
 7. The Supreme Court decided *Twombly* while the appeal to the Second Circuit was pending.
 8. *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007).
 9. Both the majority and dissent began by addressing a threshold issue of whether the doctrine of *respondeat superior* applies in any degree to a *Bivens* action in order to make a government supervisor liable for the unconstitutional conduct of a subordinate. While admitting that strict application of the doctrine does not apply to *Bivens* actions, the majority and dissent disagreed as to whether petitioners could be liable under "supervisor liability" for knowledge and acquiescence in their subordinate's use of discriminatory criteria. The Court's holding was that, absent vicarious liability, each government official is responsible only for his or her own misconduct. Slip op. at 13.
 10. *Id.* at 14-15.

11. *Id.* at 15.
12. *Id.* at 17.
13. *Id.* at 16-17.
14. *Id.* at 17.
15. *Id.*
16. *Id.* at 20.
17. *Id.*
18. Souter dissent, Slip Op. at 12.
19. *Id.* at 13.
20. *Id.* at 10.
21. Slip op. at 14.

For information about Hughes Hubbard's Litigation practice, please contact:

Dennis S. Klein
(202) 721-4710
klein@hugheshubbard.com

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Hughes Hubbard & Reed LLP
One Battery Park Plaza | New York, New York 10004-1482 | 212-837-6000

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