

From *Twombly* to *Iqbal*

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Recent decisions give defendants a real opportunity to prevail early against groundless claims and avoid time-consuming and expensive discovery.



# The Rule 8 Revival of the Rule 12(b)(6) Motion

For years counsel have been advising clients not to bother with a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim because of the accepted standard that no complaint should be dismissed unless it appears

beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). This rule has allowed plaintiffs to use the prospect of expensive and complex discovery to force businesses into settlements for claims that were likely illegitimate and incapable of substantiation. However, two recent cases have

changed the rule and leveled the playing field, and defense and corporate counsel should take advantage of this new era by aggressively attacking an initial pleading with a Rule 12(b)(6) motion.

The Supreme Court abrogated the old standard outlined by *Conley* when it decided *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), which redefined



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the pleading standard under the federal rules, reestablished the plaintiff's burden to properly plead a claim, and reaffirmed the trial court's role as gatekeeper for the judicial system. The plausibility standard set forth in *Twombly* was later explained more fully in the more recent case of *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), where the Supreme Court further empowered the district courts to function as courthouse gatekeepers, to stomp out frivolous lawsuits early to avoid expensive and time-consuming discovery, and to undermine plaintiffs' ability to achieve settlement leverage.

### **Twombly and the Plausibility Standard**

In May 2007, the Supreme Court in *Twombly* held that a class action complaint alleging defendant cable and Internet providers violated Section 1 of the Sherman Anti-Trust Act was properly dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. *Twombly*, 550

U.S. at 570. The Court held that allegations must be facially plausible, which requires the plaintiff to plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. In *Twombly*, the Court's holding hinged on the interpretation of Rule 8, which obligates plaintiffs to provide the grounds that support the claim for relief. *Id.* at 555. To meet this obligation a plaintiff must allege facts sufficient to raise the claim beyond a mere possibility, and into the realm of plausibility. This requires more than a simple recitation of the elements of the cause of action but a factual basis that takes the allegations beyond merely conceivable to plausible. *Id.*

Liability under Section 1 of the Sherman Anti-Trust Act requires that defendants agree, contract or conspire to restrain trade or commerce, and a pleading asserting liability under the Act must provide factual content showing that such an agreement, contract or conspiracy occurred. *Id.* at 548. The Court found that the complaint left no doubt that the plaintiffs' claim relied upon defendants' "parallel conduct," in which they all acted similarly within the market place, rather than on any independent allegation of actual agreement. *Id.* at 564. The Court held that the complaint "concluded" that defendants entered into "a contract, combination or conspiracy to prevent competitive entry into their... markets and have agreed not to compete with one another." *Id.* at 565. This conclusory allegation was insufficient. The Court further noted that the complaint's other references to an agreement would also have been insufficient since the pleading mentioned no specific time, place or person involved in the alleged conspiracy. *Id.* at 565, n.10. Although the *Twombly* complaint alleged circumstantial facts that were consistent with a conspiracy, the Court noted that those facts were also consistent with an array of non-conspiratorial, rational and competitive business strategies unilaterally prompted by common perceptions of the market. There were no factual allegations that differentiated the alleged behavior from legitimate, market driven corporate behavior. *Id.* at 554. The facts alleged in the complaint did not convince the Court that entitlement to relief was plausible because they did not pro-

vide any reason to believe that defendants' allegedly conspiratorial actions were anything other than the result of each individual defendant's natural reaction to the market, intended to maintain dominance in their own geographical areas. *Id.* at 565-67. The factual allegations of the complaint failed to "nudge their claims across the line from conceivable to plausible..." according to the Court. *Id.* at 570.

Contrary to the prior interpretation of *Conley*, granting a motion to dismiss no longer requires a finding that the plaintiff is unable to prove any set of facts in support of the claim that could entitle him or her to relief. *Conley*, 355 U.S. at 45-46. The Court stated that the "no set of facts" language in *Conley* had incorrectly been "read in isolation," to imply that if a complaint reveals the plaintiff's theory, it would suffice. *Twombly*, 550 U.S. at 561. The Court noted that the *Conley* opinion summarized the complaint's concrete allegations, which were understood to state a claim for relief; however, that Court's understanding has been ignored for 50 years. *Id.* at 562-63. The isolated interpretation has led to the survival of complaints that consisted of mere recitation of elements with conclusory statements that allowed for the future possibility that the plaintiff would later be able to establish some "set of undisclosed facts to support recovery." *Id.* at 561. The Court held that the mere prospect of unearthing some set of facts that evidence a conspiracy is insufficient. *Id.*

In *Twombly* the Court grounded its holding in Rule 8 and the requirement that plaintiffs allege facts raising their claim beyond the level of mere possibility. The plausibility standard does not require that a plaintiff allege detailed factual allegations, but per Federal Rule of Civil Procedure 8(a)(2), it does require that the plaintiff provide the factual grounds "showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This requires more than a mere "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. The majority specifically refuted the argument that the federal rules somehow dispensed with the pleading of facts altogether. Rule 8(a)(2) still requires a showing rather than a blanket assertion of entitlement of relief. *Id.* at 556 n.3. Although the Court required more than mere blanket allegat-

tions, it made clear that the complaint is not where the plaintiff is expected to prove his or her claim. The Court specifically distinguished between a plausibility standard and a probability standard, stating that a properly pleaded complaint would survive a Rule 12(b)(6) motion even if actual proof of the alleged facts was improbable. Just because a claim is plausible, does not mean

communicating with anyone. Iqbal claimed that his First and Fifth Amendment rights were violated by the use of several prison practices implemented because he was designated a person of high interest, and that this designation was made on account of his race, religion, or national origin. As a result, he filed suit against the former Attorney General of the United States, John Ashcroft and the Director of the Federal Bureau of Investigation, Robert Mueller. *Iqbal*, 129 S. Ct. at 1942–44.

In the district court Ashcroft and Mueller moved to dismiss the case under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The District Court denied the motion. Accepting all of the allegations in the complaint as true, the District Court held that “it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against petitioners.” *Id.* at 1944. The District Court predictably relied on the *Conley* case. The petitioners appealed to the United States Court of Appeals for the Second Circuit, and while that appeal was pending the *Twombly* decision was rendered. The Second Circuit affirmed the trial court holding that the “flexible plausibility standard” set forth in *Twombly* obliges a pleader in certain cases to amplify a claim with some factual allegations. However, the Second Circuit found that the discrimination claims asserted in the case at bar did not require such amplification. *Id.* The petitioners appealed the Second Circuit’s decision limiting *Twombly* to the United States Supreme Court.

The Supreme Court reversed the Second Circuit holding that the bare assertions of the complaint in *Iqbal* were much like the pleading in *Twombly*. As in *Twombly*, the *Iqbal* complaint amounted “to nothing more than a formulaic recitation of the elements” of a claim and that the allegations were conclusory and “not entitled to be assumed true.” *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 554–555). In *Iqbal* the Supreme Court again rejected the notion that a pleading that offers only “‘labels and conclusions’” and “‘tenders naked assertion[s] devoid of further factual enhancement’” is sufficient to overcome a Rule 12(b)(6) motion. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555, 557). The Court held that *Twombly* should not be limited to

certain contexts, as that would be “incompatible with the Federal Rules of Civil Procedure.” *Id.* at 1953. The Court reiterated that *Twombly* was based on interpretation and application of Rule 8. It further held that Rule 8 governs the pleading standards for all civil actions and proceedings in the United States’ courts. In no uncertain terms, the United States Supreme Court held that *Twombly* expounds the pleading standard for “‘all civil actions.’” *Id.* (quoting FED. R. CIV. P. 1).

In *Iqbal* the Supreme Court explained further that there were two working principles that formed the foundation of its decision in *Twombly*. First, the district court must ask whether the allegations of the complaint are entitled to the assumption of truth. *Id.* at 1949–50. As initially stated in *Twombly*, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are not entitled to the assumption of truth. *Id.* (citing *Twombly*, 550 U.S. at 555). The Supreme Court reiterated its declaration in *Twombly* that although for the purposes of considering a motion to dismiss, a court must take all factual allegations as true, a court is not bound to accept mere legal conclusion as true. *Id.* The Court restated a common theme from *Twombly* that Rule 8 does not require a hyper-technical, code pleading format but “it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Id.* at 1950. To show that he or she is entitled to relief, the plaintiff is not required to provide detailed facts, but is required to provide more than a simple accusation that he or she was unlawfully harmed by the defendant. *Id.* While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. Only when there are well-pled factual allegations should a court assume their veracity.

In *Iqbal* the Court held that allegations that the defendants “knew of, condoned, and willfully... agreed to subject [him] to harsh conditions” based on impermissible criteria amounted to bare assertions without factual support. *Id.* at 1951. The Supreme Court held that such allegations were conclusory in nature and simply alleged the party was unlawfully harmed and nothing more. The Court found that such allegations were not entitled to a pre-

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that it is probable. *Twombly* requires that the plaintiff provide enough facts to create a “reasonable expectation” that discovery will reveal evidence to support the allegations of the complaint. *Id.* at 556.

The Court in *Twombly* further noted that Rule 8 requires not only “fair notice” of the nature of the claim, but also the grounds upon which the claim rests. *Id.* at 556 n.3. The requirements of Rule 8 comprise the teeth of a Rule 12(b)(6) motion, and in the *Twombly* decision the Court revived the efficacy of the Rule 12(b)(6) motion by holding the complaint to the standards of Rule 8.

### The *Iqbal* Affirmation, Clarification and Expansion

In the May 2009 case of *Ashcroft v. Iqbal*, the United States Supreme Court reiterated and clarified its holding in *Twombly*. Iqbal, a citizen of Pakistan and a Muslim, was arrested shortly after the September 11th attacks for fraud in relation to identification documents and conspiracy to defraud the United States. While detained and awaiting trial on those charges, he was identified as a person “of high interest” to the September 11th investigation. As a result of this classification, he was held in a maximum security special housing unit designed to prevent him from

sumption of truth. *Id.* Accordingly, counsel arguing a Rule 12(b)(6) motion can now assert that a court should not accept allegations as true simply because they are contained in a complaint. Assuming a complaint survives this first test, a court must move to the second step of the analysis.

Second, the district court must determine whether the complaint states a plausible claim for relief. In other words, do the factual allegations, if accepted as true, show the pleader would be entitled to relief? *Id.* at 1950. A complaint that simply permits a court to infer the “mere possibility of misconduct... has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting FED. R. CIV. P. 8(a)(2)). Again, the Court cited the specific language of Rule 8 in support of its analysis, with particular emphasis on the use of the word “showing.” *Id.* The Supreme Court advised lower courts to first find the allegations that can be accepted as true and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 1949–50.

In *Iqbal* the respondent did not challenge the constitutionality of his arrest or his initial detention, but rather the holding of detainees categorized as “of high interest,” claiming that this categorization was made based upon race, religion or national origin. *Id.* at 1952. The complaint did not allege the named defendants labeled him as a person of interest for impermissible reasons. Further, there was no factual allegation that the nature of his detention was due to his race, religion or national origin. The court held that to prevail, the complaint must allege the petitioners purposefully adopted a policy of classifying detainees as “of high interest” because of their race, religion or national origin, or purposefully adopted a policy of housing detainees in the most secure conditions due to their race, religion or national origin. *Id.* The court found that the complaint failed to make any such allegation. Accordingly, the Supreme Court held that the complaint needed to allege more factual content as to the named defendants’ individual actions in order to “nudge” the claim of purposeful discrimination across the line from conceivable to plausible. *Id.*

The *Iqbal* decision explained and affirmed the holding and policy enumerated in *Twombly*. However, it also arguably

expanded on *Twombly* by setting forth a two-pronged analysis that details the elements necessary for the success of a Rule 12(b)(6) motion. A critical premise of the two-pronged approach is the idea that a trial court is no longer bound by the concept that it must accept as true all allegations within a complaint without further analysis. The inability of plaintiffs in federal court to assert that any statement in the complaint is true is a radical departure from prior practices at the trial level. *Iqbal*’s focus on and analysis of the prior presumption of truth takes *Twombly* one step further and confirms the importance of revisiting Rule 12(b)(6) motions.

#### Protection from Frivolous and Expensive Discovery: A Common Theme

A critical consideration for the U.S. Supreme Court in both *Twombly* and *Iqbal* was the very stark reality that the failure to hold a complaint to the standards of Rule 8 results in an enormous waste of resources by a defendant in the discovery process. This has been a longstanding problem that has resulted in a steady undermining of corporate defendants’ trust in the system. The Supreme Court noted that the significance of the Rule 8 entitlement requirement is avoiding a scenario wherein a plaintiff with a largely groundless claim is allowed to engage in a discovery process that will expend an amount that represents an “in terrorem increment of the settlement value.” *Twombly*, 550 U.S. at 557–58 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005)). The Court stated that it is only by insuring that allegations meet the requirements of Rule 8 that it can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a claim. *Id.* at 558.

In both *Twombly* and *Iqbal*, the Court instructs the district courts, in no uncertain terms, to be cognizant that proceeding to discovery can be very expensive. *Id.* at 558–60; *Iqbal*, 129 S. Ct. at 1953–54. The Supreme Court notes with disapproval that the threat of discovery expense pushes cost-conscious defendants to settle even anemic cases before reaching the summary judgment or jury trial stage to avoid the

potentially enormous expense of discovery. *Twombly*, 550 U.S. at 557–58. In these decisions, the Supreme Court has enumerated a role for the trial courts to once again act as gatekeepers to insure that only well-pleaded and plausible cases move into the discovery phase.

In both decisions the Court specifically rejected the proposal that a complaint just



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shy of showing plausible entitlement could be weeded out with careful case management of the discovery process, thereby avoiding unnecessary costs. *Id.* at 559; *Iqbal*, 129 S. Ct. at 1953–54. In *Twombly* the Court addressed the argument that case management with a stated goal of avoiding discovery abuse somehow remedies the trial court’s refusal to dismiss a complaint that does not meet the requirements of Rule 8. The Court squashed, in a footnote, the reassurances of and proposals of plaintiffs’ counsel that discovery can be phased and controlled:

The dissent takes heart in the reassurances of plaintiffs’ counsel that discovery would be “phased” and “limited to the existence of the alleged conspiracy and class certification.”... Perhaps the best answer to the dissent’s optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim: “The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discour-

age fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or



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what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.”

*Twombly*, 550 U.S. at 560 n.6 (citing *Eastbrook, Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)). The appellate court’s promises in *Iqbal* of minimally intrusive discovery also failed to reassure the Supreme Court that it should relax the pleading requirements of Rule 8 in the context of a discrimination lawsuit. *Iqbal*, 129 S. Ct. at 1953. In response the Court stated:

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has “instructed the district court to cabin

discovery in such a way as to preserve” petitioners’ defense of qualified immunity “as much as possible in anticipation of a summary judgment motion.” We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed on the discovery process.

*Iqbal*, 129 S. Ct. at 1953 (citations omitted). In *Iqbal* the Supreme Court noted that litigation, although often necessary “exact[s] high costs in terms of efficiency and expenditure of valuable time and resources....” *Id.* It is important for trial courts to note the Supreme Court’s holding that the evaluation of a motion to dismiss an insufficient pleading does not turn on the level of controls placed upon the discovery process. *Id.* The Court went further, however, than merely refuting counsel’s attempt to sidestep the Rule by arguing that discovery costs could be controlled by a court’s close supervision of the process. The Court went on to clearly enunciate that Rule 8 applies to all civil cases, conveying the principle that an evaluation of the sufficiency of a complaint under any lesser standard would violate the Rule. Therefore, the requirements of the Rules of Civil Procedure cannot be avoided, period. The Court characterized counsel’s attempt to limit the application of Rule 8 to a particular type of case as “incompatible with the Federal Rules of Civil Procedure,” stating:

Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard “in all civil actions and proceedings in the United States district courts.” Our decision in *Twombly* expounded the pleading standard for “all civil actions....”

*Id.* (quoting FED. R. CIV. P. 1) (citations omitted). Although the Court was specifically addressing an argument to relax the provisions of the rule in the context of a discrimination case, the Court’s focus on the Rule’s application to “all civil action” seems to speak for itself—Rule 8 applies, regardless of the context.

The Supreme Court’s findings in the *Twombly* and *Iqbal* decisions concerning the discovery process in complex cases

may be a ground breaking opportunity for defendants. The Supreme Court in no uncertain terms refuted the idea that in complex cases, controlled discovery was an appropriate alternative to enforcement of the language and intent of a rule contained within the Federal Rules of Civil Procedure. The Supreme Court in both *Twombly* and *Iqbal* noted that the success of the judicial system in checking discovery abuse has been at best on the “modest side.” *Twombly*, 550 U.S. at 559; *Iqbal*, 129 S.Ct. at 1953. Although these findings were made in cases where the Court emphasized the complexity of discovery in the antitrust realm and the uniqueness of the governmental liability case, they were offered to support holdings that were expressly stated as being applicable to all civil cases governed by the Federal Rules of Civil Procedure. The refusal of the Supreme Court to buy into the notion that discovery in complex cases can be effectively controlled and reasonably apportioned, and the express repudiation of such a notion, is potentially a landmark statement. It could be argued that the Supreme Court’s expressed concerns relating to discovery abuse in complex cases was a declaration that tolerance for business as usual by plaintiffs’ counsel in such cases is at an end.

Although attorneys practicing only in state court may initially believe that *Twombly* and *Iqbal* are inapplicable, many state courts have cited *Conley* in the interpretation of their own Rules of Civil Procedure. See, e.g., *Hill v. Stowers*, 680 S.E.2d 66, 70 (W.Va. 2009); *O’Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 754–55 (Ohio 1975); *Cormier v. Dist. of Columbia Water and Sewer Auth.*, 959 A.2d 658, 666 (D.C. 2008); *O’Darling v. O’Darling*, 188 P.3d 137, 140 (Okla. 2008); *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn. 78); *J & S Serv., Inc. v. Tomter*, 139 P.3d 544, 547 n.5 (Alaska 2006); *Nader v. Citron*, 360 N.E.2d 870, 872 (Mass. 1977) (abrogated by *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 883 n.7 (Mass. 2008) based upon the retirement of *Conley*); *Sherwood v. Moxee Sch. Dist. No. 90*, 363 P.2d 138, 139 (Wash. 1961). Therefore, it is not surprising that some courts have already recognized the impact of *Twombly* and *Iqbal*, and are therefore, likely to modify their own **Pleading Standard**, continued on page 68

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tices as well. See also *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 883 n.7 (Mass. 2008); *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 756 N.W.2d 399, 409 n.14 (S.D. 2008); *Dube v. Likins*, 167 P.3d 93, 111 (Ariz. App. Div. 2, 2007). That said, the implications of *Twombly* and *Iqbal* could reach well beyond the federal courthouse.

### **Conclusion**

In a society in which alleging something often enough, and loud enough, makes it true in the court of public opinion, it is

refreshing to read Supreme Court decisions that refute that growing cultural norm. Corporate defendants are legitimately leery of a judicial system that allows and even encourages the leveraging of settlements of largely groundless disputes to avoid costs. The decisions in *Twombly* and *Iqbal* use Rule 8 to revive the efficacy of a Rule 12(b)(6) motion. They also restore some level of fairness to the system and advance its integrity by providing defendants a tool to avoid unnecessary and expensive discovery.

In the long run, both plaintiffs and defendants benefit from these decisions. The

decisions require that a plaintiff's claims are developed and researched before they are articulated in a filed complaint, arguably resulting in better thought out and theorized lawsuits. Defendants will arguably have a real opportunity to prevail early, if a claim is largely groundless, and avoid undertaking lengthy, time-consuming, and expensive discovery to defend unsubstantiated claims. The decisions dictate a more thorough and thoughtful analysis of complaints by defense counsel with an eye toward aggressively attacking a complaint with a Rule 12(b)(6) motion. **FD**

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