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BEST PRACTICES IN UNEMPLOYMENT COMPENSATION APPEALS

Pleading Standards After *Iqbal* and *Twombly*

Low-Income LGBT Clients

Health Care, Housing, and Estate Planning for LGBT Older Adults

Applying the Problem-Solving Practice Model in Legal Services

Assigned Consumer Debts

Right to Counsel in Civil Cases

Affirmatively Furthering Fair Housing

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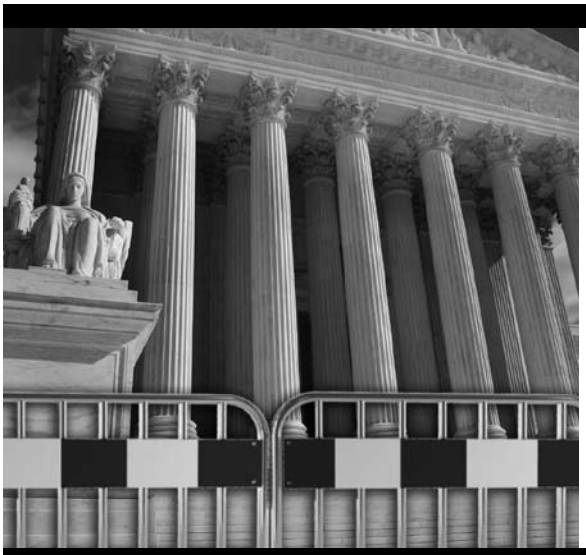

PLEADING STANDARDS *after* *Iqbal* and *Twombly*

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> Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to the courts.
>
> —*Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008)

With two opinions, *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*, the U.S. Supreme Court abandoned the long-standing notice pleading standards that applied when a motion to dismiss challenges the adequacy of a complaint.[1] These cases introduce heightened fact pleading standards, which will require more intensive prefiling fact development, necessarily making more difficult low-income people's assertion of their rights in court. Already the *Iqbal-Twombly* decisions are affecting discrimination and civil rights cases.

Below I summarize *Iqbal* and *Twombly* and discuss early case examples that illustrate how the decisions are being applied by lower courts. I then offer practical tips for preparing civil complaints in light of *Iqbal* and *Twombly*.

Background and Summary of *Iqbal* and *Twombly*

In 1938 the Federal Rules of Civil Procedure added Rule 8(a) and abandoned the practice of code pleading, which had required a complaint to allege specific and detailed facts to establish a cause of action. Rule 8(a)(2) substituted "notice pleading" that sets forth a "short and plain statement of the claim showing that the pleader is entitled to relief."[2] If the pleading is "so vague or ambiguous" that a party cannot reasonably prepare a response, then Rule 12(e) authorizes the party to move for a more definite statement.[3]

For more than fifty years, courts relied on the holding in *Conley v. Gibson* when applying Rule 8's notice pleading standard.[4] Under *Conley* a complaint would not be dismissed

[1] *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The cases are discussed in depth in Clearinghouse Review's annual federal courts access articles: Gary F. Smith, Matthew Diller, Jane Perkins & Gill Deford, *The Supreme Court's 2008–2009 Decisions on Court Access: The March to the Right Continues*, 43 Clearinghouse Review 324, 324–27 (Nov.–Dec. 2009) (discussing *Iqbal*); Jane Perkins, Gill Deford, Matthew Diller & Gary F. Smith, *The Supreme Court's 2006–2007 Term: The Shift to the Right Takes Shape*, 41 Clearinghouse Review 442, 442–45 (Nov.-Dec. 2007) (discussing *Twombly*).

[2] Fed. R. Civ. P. 8(a)(2).

[3] Fed. R. Civ. P. 12(e).

[4] *Conley v. Gibson*, 355 U.S. 41 (1957).

for failure to state a claim unless it appeared "beyond doubt" that the plaintiff could "prove no set of facts in support of his claim which would entitle him to relief."[5] Thus *Conley* recognized that a complaint would survive a motion to dismiss so long as it contains a "bare recitation of the claim's legal elements."[6] Indeed, the *Conley* standard was an ingrained feature of federal civil practice. On multiple occasions the Supreme Court unanimously reversed lower court decisions that had applied heightened pleading standards because such standards were inconsistent with Rule 8.[7] Notably, in such opinions, the Court acknowledged that it had "no power to rewrite the Rules by judicial interpretation" and that any rewriting needed to occur through statutory amendment or pursuant to the procedures set forth in the Rules Enabling Act of 1934.[8]

Nevertheless, the Supreme Court revisited the pleading standards two years ago in a complex antitrust case, *Bell Atlantic Corporation v. Twombly*. Writing for a seven-member majority, Justice Souter stated that the *Conley* "no set of facts" observation had "earned its retirement."[9] The Court did quote *Conley* to note that, under Rule 8, the complaint must "give the defendant fair notice of what the … claim is and the grounds upon which it rests."[10] However, according to the Court, such grounds require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[11] Likewise, "naked assertion" devoid of factual enhancement will not do.[12] Rather, to survive a motion to dismiss, *Twombly* requires the complaint to allege facts, accepted as true, that "state a claim to relief that is plausible on its face."[13]

After the *Twombly* plausibility standard was announced, questions arose as to whether the decision applied only to complex, discovery-intensive antitrust cases or whether it applied more broadly to other civil cases.[14] Last Term, *Ashcroft v. Iqbal* resolved the confusion by applying *Twombly* broadly. The Court also went further to adopt what can only be described as a judicially created heightened fact pleading standard for civil cases in federal court.

The *Iqbal* case arose when Javaid Iqbal, a Pakistani Muslim, filed a *Bivens* action against federal employees, including Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller.[15] The high-level government

[5] *Id.* at 45–46.

[6] *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

[7] See *Swierkiewicz v. Sorema National Association*, 534 U.S. 506 (2002) (regarding employment discrimination under Civil Rights and Age Discrimination in Employment Acts); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (regarding civil rights cases under 42 U.S.C. § 1983). Cf. *Francis v. Giacomelli*, 588 F.3d 186, 192 n.1 (4th Cir. 2009) (*Swierkiewicz* standard overruled in *Twombly*); *Fowler*, 578 F.3d at 211 (same, citing *Iqbal* and *Twombly*).

[8] *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (discussing Federal Rule 33). For further discussion, see *Whether the Supreme Court Has Limited Americans' Access to the Court: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania, at 7), http://bit.ly/7MOZ7r [hereinafter Burbank Testimony].

[9] *Twombly*, 550 U.S. 544.

[10] *Id.* at 555 (quoting *Conley,* 355 U.S. at 47).

[11] *Id.*

[12] *Id.* at 570.

[13] *Id.*

[14] Compare *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (applying *Twombly* narrowly), with *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008) (applying *Twombly* broadly).

[15] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), recognizes an implied private cause of action for damages against federal officials alleged to have violated the plaintiff's constitutional rights. The *Iqbal* majority notes that implied causes of action are disfavored and that it could have decided against Iqbal by refusing to extend *Bivens* to a claim sounding in the First Amendment. Clearly wanting to discuss other issues, the Supreme Court assumed without deciding that the First Amendment claim was actionable under *Bivens* (see *Iqbal*, 129 S. Ct. at 1948).

officials moved to discuss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court denied the motion. The Second Circuit affirmed, noting "conflicting signals" in *Twombly* and holding that *Twombly* did not introduce a "universal standard of heightened fact pleading" but rather required "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."[16] The circuit court relied, in part, on the Supreme Court's express rejection of heightened pleading standards in discrimination cases and pointed out that the Federal Rules gave the trial court sufficient discretion to control cases, including during discovery.[17] The defendants appealed to the Supreme Court.

Ruling 5 to 4, the Court decided that the complaint did not state a claim against Ashcroft and Mueller. Writing for the *Iqbal* majority, Justice Kennedy highlighted two principles that, he said, underlie *Twombly*. First, Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[18] According to the Court, the *Twombly* plausibility standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[19] The "sheer possibility that a defendant has acted unlawfully" is not enough, and a complaint that pleads facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[20] Winding the discussion back to Rule 8, the Court held that when well-pled facts do not permit the court to infer more than the possibility of misconduct, "the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief."[21] The Court decided that many of Iqbal's factual allegations were conclusory and, as a result, were not entitled to a presumption of truth. These allegations were disregarded.

Second, the Court considered the remaining factual allegations to determine whether they plausibly suggested an entitlement to relief. According to the Court, this review is "context-specific," requiring a court to "draw on its judicial experience and common sense."[22] Iqbal's complaint was insufficient because the Court decided that it did not "show, or even intimate" that Ashcroft and Mueller purposefully housed detainees in a maximum-security setting because of their race, color, or national origin.[23] What is most interesting about this aspect of the decision is that the Court goes outside the pleadings to find an "obvious alternative explanation" and draw its own conclusions about the defendants' state of mind.[24]

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[16] *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

[17] *Id*.

[18] *Iqbal*, 129 S. Ct. at 1949–50. Justice Breyer's separate dissent points out the result-oriented nature of the decision and notes that trial courts have historically employed numerous case management and discovery limitations to avoid unwarranted burdens on public officials (see *id.* at 1961–62 (Breyer, J., dissenting)).

[19] *Id*. at 1949.

[20] *Id.* (citing *Twombly*, 550 U.S. at 557).

[21] *Id.* at 1950 (citing Fed. R. Civ. P. 8(a)(2)).

[22] *Id.* at 1940.

[23] *Id.* at 1951–52.

[24] *Id.* at 1951 (discussing a nondiscriminatory intent to "detain aliens … who had potential connections to those who committed the terrorist attacks" of September 11, 2001). The majority also rejected Iqbal's allegations that the defendants were liable because of their "knowledge and acquiescence in their subordinates'" unlawful conduct, and the majority stated that the plaintiff must plead "sufficient factual matter to show" that the officials adopted and implemented the policies at issue for the purpose of discriminating, and each official "is only liable for his or her own misconduct" (*id.* at 1948–49). Justice Souter complained that this discussion was "especially inappropriate" because it had no bearing on the case and occurred *sua sponte* (*id.* at 1956–57 (Souter, J., dissenting)).

Notably two members of the *Twombly* majority, Justices Souter and Breyer, joined the dissent in *Iqbal*.[25] Justice Souter, who wrote the majority opinion in *Twombly*, challenged the *Iqbal* majority for its supercharged, merits-based application of *Twombly*; the majority argued that

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be .... The sole exception to this rule lies with 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. That is not what we have here.[26]

The Early Aftermath

The significance of these decisions, particularly *Iqbal*, cannot be overstated.[27] While Iqbal did set forth allegations that were consistent with the defendants' liability, the Court refused to accept all of them as true. Rather, the Court labeled some allegations that the officials had engaged in discrimination as legal "conclusions" and disregarded them. How, absent discovery or a well-placed mole, Iqbal could have alleged more is not clear. Moreover, even with well-pled facts, *Iqbal* introduces an unmistakable element of subjectivity by allowing the reviewing judge to disregard claims that he finds implausible. Courts can even go outside the pleadings to find alternative explanations for why defendants may have acted as they did; at this point in the case the judge is not constrained by an evidentiary record.[28]

The *Iqbal* decision is also noteworthy because in it the Court abandons its position that to impose a judge-made heightened pleading standard would be improper. As recently as 2002, Justice Thomas wrote unanimously for the Court in *Swierkiewicz v. Soreman National Association* that "[a] requirement of greater specificity for a particular claim is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[29]

While drawing generalized conclusions about the effects of *Iqbal* and *Twombly* is difficult at this early stage, the cases are clearly proving problematic to civil rights and discrimination claims.[30] A statistical analysis of more than a thousand post-*Iqbal*-*Twombly* cases found that the rate of granting Rule 12(b)(6) motions to dismiss increased from 46 percent of motions decided under *Conley* to 48 percent of motions decided under *Twombly* and 56 percent of motions decided under *Iqbal*.[31] Constitutional civil rights cases have been most affected; their rate of

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[25]*Id.* at 1954 (Souter, J. dissenting); *id.* at 1961 (Breyer, J., dissenting). As Professor Burbank points out, apparently these justices believed that the interpretation of the Federal Rules announced in *Twombly* "represented a relatively minor reorientation, appropriate for the specific substantive context and other cases in which the federal courts strictly police the inferences that are permissible under the substantive law and/or for cases portending massive discovery" (Burbank Testimony, *supra* note 8, at 8).

[26]*Iqbal*, 129 S. Ct. at 1959.

[27]See *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 226 n. 4 (D.P.R. 2009) (describing *Iqbal* as "draconianly harsh to say the least").

[28]Burbank Testimony, *supra* note 8, at 13 (questioning whether *Twombly* and *Iqbal* are compatible with the Seventh Amendment right to a jury trial).

[29]*Swierkiewicz*, 534 U.S. 515 (quoting *Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

[30]For in-depth discussion, see *The Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Prof. Joshua P. Davis, University of San Francisco School of Law, at 5), http://bit.ly/8xLoFm [hereinafter Davis Testimony]; *id.* (statement of Rep. Howard Coble, Member, House Committee on the Judiciary).

[31]Abstract: Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 American University Law Review 553 (2010) (abstract, http://bit.ly/7NtGPP).

dismissal has increased from 50 percent under *Conley* to 55 percent under *Twombly* and 60 percent under *Iqbal*.[32]

Some puzzling decisions have already been issued.[33] For example, in *Logan v. SecTek Incorporated*, the plaintiff filed an Americans with Disabilities Act claim, alleging that the defendant explicitly refused to hire him because of a previous back injury and asserting that the defendant regarded him as substantially limited in his ability to work.[34] Finding that an injury was not the same as a disability and that the employer had referred to the back injury in the past tense, the court dismissed the claim. That the employer had perceived Logan to be disabled was "merely possible, but not plausible," the court concluded.[35] The court further noted that Logan might have presented a plausible claim if he had alleged that the employer "made remarks that people with back injuries could not perform most jobs."[36] For Logan, as a job applicant, to have heard such remarks would have been difficult, if not impossible.

In another discrimination case, the Ninth Circuit rejected the plaintiffs' "unwarranted conclusion" that Wal-Mart was their employer.[37] The plaintiffs had alleged that Wal-Mart exercised control over their day-to-day employment; however, the court deemed the allegation to be a legal conclusion, "not a factual allegation stated with any specificity."[38] In *Golod v. Bank of America Corporation* the plaintiff alleged that based on her status as a "'Russian Jew' female" she was repeatedly denied job promotions.[39] The court dismissed the claims because the plaintiff failed to plead that "nonmembers of the protected class were treated more favorably," that "these 'other people' were not female, not Jewish, or not 'Russian Jews,'" or to plead "which promotion she was denied because of discrimination."[40]

To sum up, where the defendant's intentions are an element of the claim, simply alleging that the defendant acted with intent is apparently not enough after *Iqbal*; rather, specific factual allegations must support that allegation.[41] This can be difficult because the discrimination is often subtle rather than overt and the facts supporting the allegations of discrimination are frequently within the control of the discriminator. To complicate matters, judges could approach the allegations with skepticism. As Senate Judiciary Committee member Sheldon Whitehouse pointed out, the plausibility standard would necessarily be difficult to meet when government officials were defendants because to believe that a government official would engage in illegal conduct was "inherently implausible."[42]

Tips for Pleading Complaints

The parameters of the *Iqbal* decision are still being determined. Clearly the case

[32] *Id.*

[33] See Burbank Testimony, *supra* note 8, app. B (collecting cases); *The Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Prof. Eric Schnapper, University of Washington School of Law, at 10–28), http://bit.ly/759REZ (discussing cases) [hereinafter Schnapper Testimony].

[34] *Logan v. SecTek Incorporated*, 632 F. Supp. 2d 179 (D. Conn. 2009).

[35] *Id.* at 183–84.

[36] *Id.* at 184. Compare *Scott v. Clark County Social Services*, No. 2:07-cv-01340-LRH-LRL, 2009 WL 1940097 (D. Nev. July 7, 2009) (dismissing *pro se* Americans with Disabilities Act (ADA) complaint and granting leave to amend the complaint), and *Brenston v. Wal-Mart*, No. 2:09cv026, 2009 WL 1606935 (N.D. Ind. June 8, 2009) (dismissing ADA claim), with *Fowler*, 578 F.3d at 211–12 (Rehabilitation Act complaint met *Iqbal-Twombly* standards).

[37] *Doe v. Wal-Mart Stores Incorporated*, 572 F.3d 677, 683 (9th Cir. 2009).

[38] *Id.*

[39] *Golod v. Bank of America*, Civ. No. 08-746, 2009 WL 1605309 (D. Del. June 4, 2009).

[40] *Id.* at *3.

[41] See *Iqbal*, 129 S. Ct. at 1948–50.

[42] *Whether the Supreme Court Has Limited Americans' Access to the Court: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Sheldon Whitehouse).

will be used to extend extremely strong protection to government officials for the range of their responses to the September 11 attacks. The case will also affect civil proceedings in general. Advocates should do the following:

1. Understand that the "Iqbal/Twombly" Standard Applies in All Civil Cases in Federal Court. *Iqbal* specifically rejected the idea that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute."[43] Thus the heightened pleading standards apply in all federal court cases, including cases to enforce federal safety-net laws, such as Medicare, Medicaid, fair housing, and antidiscrimination provisions, such as the Americans with Disabilities Act.

2. Read "Iqbal" and "Twombly" Carefully when Considering Federal Court Litigation. Opinions from lower courts must also be consulted. Under these cases, the allegations of the complaint should still be accepted as true; however, a court may disregard some allegations because they are legal conclusions or so implausible that they do not give sufficient notice to the defendant.

3. Become Familiar with Your State's Public Records Act and the Freedom of Information Act. Public records and information act requests can be filed before a lawsuit is filed, and the responses can give evidence of which officials are involved in a questioned state action, along with their various roles, and explain the underlying rationales for a potential defendant's conduct. Public records act requests can be particularly helpful in cases where one suspects ongoing illegal practices or patterns of conduct by government officials.

4. Remember that "Iqbal" Applies to the Pleading of Each Element of Every Claim in a Federal Complaint. This aspect of *Iqbal* creates obvious tension with Federal Rule 9(b), which provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," except when the plaintiff is alleging fraud.[44] However, absent clarification to the contrary, all complaints should meet the heightened *Iqbal* standard by setting forth each claim being asserted and the specific facts that support each element of each claim. When pleading a claim, do not assume that a judge will fill a factual gap in your favor.

5. When Drafting a Federal Court Complaint, Avoid Broad and Sweeping Factual Statements. Set forth the facts in full—with clear explanation of each defendant's unlawful conduct. Avoid conclusory statements, or use them only after the particular facts have been amplified. When including allegations based on "information and belief," include the specific facts that support these allegations.[45] Consider using one- to two-sentence paragraphs that progress step by step through the specific facts. Accept that the new pleading standard will be "expensive and inefficient because it forces plaintiffs to write much longer complaints, often reciting evidence as if they were preparing to oppose summary judgment."[46]

6. When Setting Forth the Facts of the Case, Remember that the Judge Will Be Reviewing Them Against His Own Experience and Common Sense. At least one court notes that a complaint need not exclude all alternative possibilities to be plausible.[47] However, when necessary, account for alternative explanations that the court might find for a defendant's conduct. And if a motion to dismiss is filed, distinguish the context of your case from that of *Iqbal* and its repeated concern that Bush administration officials

[43] *Iqbal*, 129 S. Ct. at 1953.

[44] Fed. R. Civ. P. 9(b).

[45] See *Carpenters Health and Welfare Fund of Philadelphia v. Kia Enterprises*, No. 09-116, 2009 WL 2152276, at *3 (E.D. Pa. July 15, 2009) (dismissing civil rights act discrimination claim where allegations based on "information and belief" failed to nudge the allegations across the "line from conceivable to plausible").

[46] Davis Testimony, *supra* note 30, at 5–6.

[47] *United States ex rel. Lusby v. Rolls-Royce Corporation*, 570 F.3d 849, 854–55 (7th Cir. 2009).

faced "a national and international security emergency unprecedented in the history of the American Republic."[48]

7. Think Federal Rule 56. As written, Rule 8 was intended to place a party on notice of the claim, not to test the legal plausibility of the plaintiff's ultimate success at trial. That later determination typically has been made following the completion of discovery, pursuant to a motion for summary judgment under Rule 56. After *Iqbal*, however, the court will, at this earliest of stages in the case, be conducting an assessment of the legal plausibility of the complaint. Thus, when drafting the complaint, keep Rule 56 in mind and allege specific facts.

8. Once the Complaint Is Drafted, Review It by Using the "Iqbal" Two-Step. First, review the complaint conservatively, identifying all allegations that a judge might find to be conclusory. Omit those allegations because under *Iqbal* they will not be given a presumption of truth. Second, review the remaining factual allegations to ensure that they plausibly (i.e., reasonably) explain each element of the claim and thus suggest an entitlement to relief.

9. Take Care when Using the Federal Rules of Civil Procedure Form Pleadings. The Federal Rules include an Appendix of Forms, at least half of which contain the type of language that *Iqbal* and *Twombly* label conclusory. For example, Form 11, the Complaint for Negligence, is a single sentence, providing that the plaintiff states a claim by alleging liability as follows: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[49] Of course, "negligently drove" would appear to be the type of conclusory language that *Iqbal* abhors. At least one court has observed, after *Iqbal*, that the Forms "have been cast into doubt."[50] However, the Federal Rules explicitly state that "[t]he forms contained in the Appendix of Forms are sufficient under the rules."[51]

10. If You Have Concerns About the Facts that Support One of a Number of Claims, Consider Omitting that Claim. File the case with solid, fact-specific allegations establishing the remaining claims. You can develop additional evidence during discovery and, if the omitted claim is substantiated, amend the complaint to add that claim and the relevant facts. For example, in *Ibrahim v. Department of Homeland Security* the court relied on *Iqbal* to dismiss the plaintiff's claim that local officials had illegally detained her at the airport, but, noting that the plaintiff could amend the complaint if discovery revealed sufficient evidence, the court allowed the remainder of her Fourth Amendment discrimination claim to proceed.[52]

11. If You Cannot Meet the Heightened Pleading Standard for Federal Court, Consider Filing the Case in State Court. In making this assessment you will need to consider whether the state court is likely to apply the *Iqbal/Twombly* standards to any motion to dismiss filed under the state's pleading rules. Moreover, if the state-court complaint includes a federal claim, the case could be removed to federal court, where a defendant could argue for dismissal on the grounds that the complaint does not meet the *Iqbal* standard.

12. Consider Whether to File a Motion to Dismiss a Defendant's Affirmative Defenses Based on "Iqbal" and "Twombly." While there is dispute, the lower courts are generally applying *Iqbal/Twombly* to claims that a defendant asserts against a plaintiff, such as cross-claims or counterclaims.[53] Some courts

[48]*Iqbal*, 129 S. Ct. at 1954.

[49]Fed. R. Civ. P. Form 11.

[50]*Doe v. Butte Valley Unified School District*, No. Civ. 09-245 WBS CMK, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009).

[51]Fed. R. Civ. P. 84. For more discussion, see Schnapper Testimony, *supra* note 33, at 30.

[52]*Ibrahim v. Department of Homeland Security*, No. C 06-00545 WHA, 2009 WL 2246194 (N.D. Cal. July 27, 2009) (partially dismissing plaintiff's discrimination claims in case challenging placement on the federal no-fly list).

[53]See Schnapper Testimony, *supra* note 33, at 34–35.

have applied *Iqbal/Twombly* to affirmative defenses. As a federal court in Wisconsin reasoned, the standard "cannot be a pleading standard that applies only to plaintiffs .... Thus, a wholly conclusory affirmative defense is not sufficient."[54]

13. If a Motion to Dismiss Is Filed, Work to Keep the Proper Focus on the Review. On its face, Rule 8(a) still requires only notice pleading, a short and plain statement of the claim showing that the pleader is entitled to relief. However, *Iqbal* and *Twombly* interject notions of "plausibility" and "common sense" into the mix that could cause some judges to approach complaints with affirmative skepticism. Accordingly plaintiffs must strive to keep the proper focus on the review: even after *Iqbal*, "in keeping with Rule 8(a) ... a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible."[55] If a court should decide that a pending pleading fails to meet the standard, ask the court for permission to amend the complaint. This is the path suggested by the *Iqbal* majority.[56]

14. If the Complaint Is Challenged, Stress that the Supreme Court Is Using the "Plausibility" Standard to Decide Whether the Allegations of the Complaint Are "Reasonable." After announcing the plausibility standard, the *Iqbal* Court further explained that, under it, the plaintiff must plead facts that allow the court to draw the "reasonable inference" that the defendant is liable as alleged.[57] Unlike "plausibility," "reasonableness" is a concept that courts are used to applying, and reasonableness can introduce a great sense of objectivity into the review. With this in mind, the plaintiff can set forth the standard for evaluating a Rule 12(b)(6) motion to dismiss in light of *Iqbal/Twombly*, as follows: the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."[58]

15. Monitor Federal Legislative Developments. Members of Congress have responded quickly to the *Iqbal* decision, and congressional action could affect the pleading rules. Sen. Arlen Specter (D-Pa.) introduced S. 1504, The Notice Pleading Restoration Act of 2009, to reverse the pleading standards announced in *Iqbal* and *Twombly*. Rep. Jerrold Nadler (D-N.Y.) introduced a companion bill, H.R. 5144, The Open Access to Courts' Act of 2009. This legislation states that, unless Congress or the Federal Rules of Civil Procedure provide otherwise, federal courts will not dismiss complaints under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court in *Conley v. Gibson*.

■ ■ ■

Iqbal and *Twombly*, having changed the pleadings standards in federal civil cases, make it more difficult for civil rights and discrimination claims to be heard. Lower courts are being pressed hard to understand the decision. In the first seven months after it was decided, over 4,200 published cases cited *Iqbal*.[59] Before filing a complaint in a federal civil case, advocates must understand these Supreme Court cases and account for the heightened pleading standards these cases have introduced.

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

[54]*United States v. Quadrini*, No. 2:07-CV-13227. 2007, WL 4303213, at *4 (E. D. Mich. 2007) (applying *Twombly*); see *Holtzman v. B/E Aerospace Incorporated*, No. 07-80551-CIV, 2008 WL 2225668, at * 2 (S. D. Fla. May 29, 2008)(same).

[55]*Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009).

[56]*Iqbal*, 129 S. Ct. at 1954 (remanding to the circuit court to "decide in the first instance whether to remand to the District Court so that [Iqbal] can seek leave to amend his deficient complaint").

[57]*Id*. at 1948.

[58]See *Fowler*, 578 F.3d at 210 (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (Nygaard, J.)).

[59]I conducted, on December 23, 2009, an electronic search, using the search terms "Iqbal & da(aft 05/18/2009)," which produced 4,268 cases. For additional information, see Public Justice Iqbal Project, http://bit.ly/b8hg63.

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