Did You Know?

Ohio and *Twombly/Iqbal*: Plausible?

by Darcy Jalandoni and David Shouvlin

In 2007, the Supreme Court took a swat at a hornet's nest—the questioned validity of notice pleading—in *Bell Atlantic Corp. v. Twombly*, which caused considerable consternation in civil procedure circles.[1] The hornets are still circling, and nowhere more disjointedly than in Ohio. At issue is the meaning of the language of Rule 8 of the Federal and Ohio Rules of Civil Procedure requiring that a complaint need only provide "a short and plain statement of the claim showing that the pleader [party] is entitled to relief."

Twombly involved an antitrust claim. The plaintiffs were class claimants who alleged in their complaint that the defendants, all "Baby Bells," engaged in concerted action to inflate charges for telephone and high-speed Internet use, in violation of the Sherman Act. Specifically, the plaintiffs alleged that the Baby Bells' apparent parallel conduct reflected an illegal agreement between them to stifle competition. The federal court for the Southern District of New York dismissed the claim, agreeing with the defendants that circumstantial allegations of "conscious parallel action," without more, could not sustain a conspiracy claim.[2] The Second Circuit reversed the district court's ruling, concluding that the complaint was sufficient in that it gave the defendants "fair notice" of the claims against them.[3] The Supreme Court granted the defendants' position for certiorari to address the pleading issue. There, the Court sided with the district court and struck a preliminary but serious blow to notice pleading, holding that, at least in the antitrust arena, a plaintiff must allege sufficient facts to show a "plausible entitlement to relief."

Not long afterward, the Court substantially expanded the application of its plausibility requirement to non-complex cases in *Ashcroft v. Iqbal*.[4] In that case, the plaintiffs, all Muslims, claimed their constitutional rights were violated when they were arrested and detained after the events of Sept. 11. The plaintiffs essentially alleged that U.S. Attorney General John Ashcroft and others had been responsible for the plaintiffs' discriminatory treatment based on their ethnicity. The district court, ruling pre-*Twombly*, held that the plaintiffs' claims survived the defendants' motion to dismiss, explaining that Rule 8's pleading requirements reflected a "permissive standard," save for specific exceptions such as cases of fraud.[5] Two years later, the Second Circuit affirmed the district court's ruling, distinguishing the intervening *Twombly* opinion by suggesting that *Twombly*'s heightened pleading standard applied just to antitrust cases.[6] On appeal, the Supreme Court rehashed its earlier criticisms of bare notice pleadings, and echoed its position on *Twombly*: To proceed with a claim under Rule 8's "short and plain statement" requirement—regardless of the nature or basis of the claim—a plaintiff must allege facts sufficient to "state a claim to relief that is *plausible on its face*." (Emphasis supplied.)[7] The "mere possibility of misconduct" is not enough.[8] Because the plaintiffs had failed to assert facts showing a plausible entitlement to relief, the Court concluded that the case was properly dismissed and remanded it to the Second Circuit for further proceedings.

Since then, most federal courts have followed the Supreme Court's guidance, including the Sixth Circuit.[9] Interestingly, the Federal Circuit has shown a reluctance to eschew the bare notice pleading standard in patent cases in which the complaint is based on Form 18 of the Appendix of Forms to the Federal Rules of Civil Procedure.[10]

Inasmuch as *Twombly/Iqbal* dealt with procedural issues, state courts are not bound to follow their rulings under the Erie Doctrine, and most have not. By our recent count, of the 12 state supreme courts that have substantively examined *Twombly/Iqbal*, only three—Massachusetts, Nebraska and South Dakota—have adopted the plausibility standard or something akin to it. Nevada has declined to decide. The remaining states have declined to shift from established basic notice pleading principles to the plausibility requirement. They are Arizona, Iowa, Minnesota, Montana, Tennessee, Vermont, Washington and West Virginia.

What about Ohio?

On this issue, Ohio is an enigma. Hornets are buzzing every which way. Recent research reveals that Ohio courts have issued more than 35 published decisions mentioning *Twombly* or *Iqbal.* Half of those decisions emanate from Cuyahoga County, and those holdings in those cases are inopportunely inconsistent. By way of example, in *Snowville Subdivision Joint Venture Phase I v. Home S&L of Youngstown, Ohio*, a breach of contract case, the court favorably acknowledged *Twombly/Iqbal,* noting that those decisions guided Ohio practice given that Ohio Rule 8 is based on the corresponding federal rule.[11] More recently, another decision from the Eighth District, *Hendrickson v. Haven Place, Inc.*,[12] stated that Ohio had not adopted the plausibility standard, and thus Ohio courts were bound to continue to follow the broader and more liberal notice pleading rule.[13]

Other Ohio courts have weighed in without any apparent consistency. The Ninth, Fifth and Eleventh District Courts of Appeals have expressly or implicitly followed *Twombly/Iqbal*.[14] Other courts, however, such as the Second and Seventh Districts, in addition to the Eighth, have expressly declined to adopt the plausibility standard.[15]

This discordant recognition and application of *Twombly/Iqbal* is obviously undesirable. It cannot be sound or fair jurisprudence for a party to be able to proceed—or not—with a case in Ohio depending on what county functions as its forum. This situation cries out for the Ohio Supreme Court to accept an appeal of a case dismissed

for failure to plead sufficient facts under Rule 8; however, until the Ohio Supreme Court settles the matter, counsel should be mindful that courts in Ohio have evaluated pleading requirements differently. The best course is thus the conservative one: Draft complaints so they meet the plausibility standard, and defense counsel should not assume that the higher pleading requirements of *Twombly/Iqbal* will carry the day in Ohio state courts.

Endnotes

1 550 U.S. 544, 555 (2007).
2 *Twombly*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003).
3 See 425 F.3d 99, 118-119 (2nd Cir. 2005).
4 556 U.S. 662, 678 (2009).
5 *Elmaghraby v. Ashcroft*, Case No. 04CV 1809, 2005 U.S. Dist. LEXIS 21434, at *37-42 (E.D.N.Y. Sept. 27, 2005).
6 See *Iqbal v. Hasty*, 490 F.3d 143, 155-157 (2nd Cir. 2007).
7 Id. at 678, 684 (emphasis supplied).
8 Id. at 679.
9 See *Han v. Univ. of Dayton*, 541 F. App'x 622, 626–27 (6th Cir. 2013).
10 See, e.g., *In re Bill of Lading*, 681 F.3d 1323, 1333-34 (Fed. Cir. 2012).
11 2012-Ohio-1342 ¶10 (8th Dist.).
12 2014-Ohio-3726, ¶¶8–9 (8th Dist.), citing *Tuleta v. Med. Mutual of Ohio*, 2014-Ohio-396, ¶¶23–35 (8th Dist.).
13 See also *Dottore v. Vorys Sater Seymour & Pease*, 2014-Ohio-25 (8th Dist.) (acknowledging Ohio decisions following and rejecting authority of *Twombly/Iqbal* and declining to decide whether the plausibility standard applied).
14 See *Vagas v. City of Hudson*, 2009-Ohio-6794, ¶13 (9th Dist.); *Bumpas v. Lloyd Ward*, P.C., 2012-Ohio-4674, ¶18 (5th Dist.); *Hoffman v. Fraser*, 2011-Ohio-2200, ¶21 (11th Dist.) (citing *Twombly* in support of the standard for dismissal under Rule 12(b)(6)).
15 See *Sacksteader v. Senney*, 2012-Ohio-4452, ¶¶38–46 (2nd Dist.); *Bahen v. Diocese of Steubenville*, 2013-Ohio-2168, ¶¶10–14 (7th Dist.).

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