

Strafford

presents

Pleadings Standards Post-Iqbal: Litigation Trends

Meeting Tougher Plausibility Standards in Commercial Litigation

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Leo Rydzewski, Partner, **Holland & Knight**, Washington, D.C.
Maxwell S. Kennerly, Attorney, **The Beasley Firm**, Philadelphia
Thomas J. Lang, Partner, **Morgan Lewis**, Washington, D.C.

Thursday, July 15, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Holland & Knight

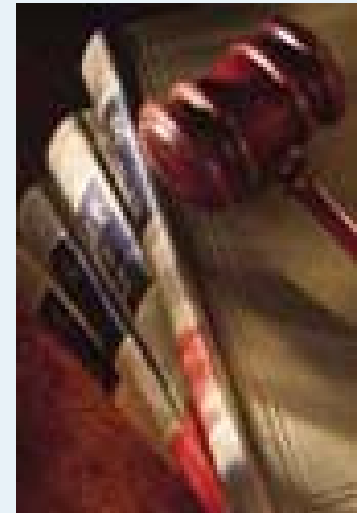
**Iqbal and Twombly: Meeting the
Tougher Plausibility Pleading Standards
in Commercial Litigation**

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The Federal Court Pleading Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure governs the filing of civil Complaints in federal court.

The Rule states that the Complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”



Conley v. Gibson, 355 U.S. 41 (1957)

- In *Conley*, the Supreme Court interpreted Rule 8 as precluding the dismissal of a complaint for failure to state a claim “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.”
- Under the *Conley* standard, courts permitted plaintiffs to proceed with complaints that contained legal conclusions – so long as some imagined facts (whether or not alleged in the complaint) could support the claim.



Bell Atlantic Corp. v. Twombly 550 U.S. 544 (2007)



The Supreme Court announced, in *Bell Atlantic Corp. v. Twombly*, that a new standard would govern the filing of civil complaints in federal court.

- A plaintiff must plead more than labels and conclusions. A "formulaic recitation of the elements of a cause of action" will not suffice.
- A complaint must allege "enough facts to state a claim to relief that is plausible on its face."
- To be plausible, the complaint must allege facts sufficient "to raise a reasonable expectation that discovery will reveal evidence" of illegality.
- The complaint must establish a plausible entitlement to relief, which is not akin to a *probability* requirement, but is more than a sheer *possibility* that a defendant has acted unlawfully. Indeed, facts that are "merely consistent with" a defendant's liability also are insufficient.

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)

- The announced *Twombly* standard applies in all federal cases.
- The Court establishes a two-pronged test. First, a Court must weed out conclusory allegations that are not entitled to the presumption of truth. Second, the Court must evaluate the plausibility of the remaining factual allegations.
- A court only will allow a plaintiff to proceed with the case only if the complaint states a plausible claim for relief. Determining whether a complaint states a plausible cause of action is context-specific, requiring the court to draw on its "judicial experience and common sense."

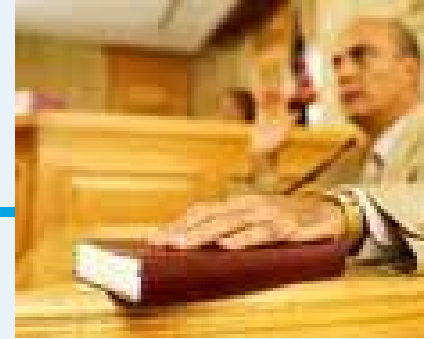


The Aftermath of *Iqbal*



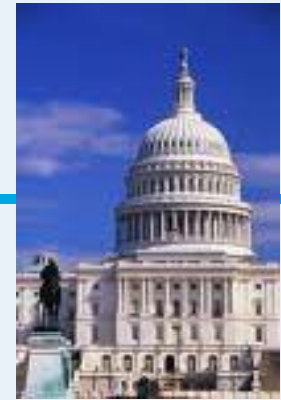
- *Twombly* and *Iqbal* are consequential and controversial.
- Whether allegations contained in a complaint are factual allegations that the court must evaluate to determine whether a cause of action is plausible, or mere conclusions that the court may disregard in assessing the complaint's sufficiency.
- Where complaints allege facts that present more than mere conclusions, courts will need to determine the circumstances in which an alternative explanation to the alleged wrongdoing is so “obvious” that a plaintiff should not be permitted to proceed with discovery.

What Kinds of Cases Are Most Impacted?



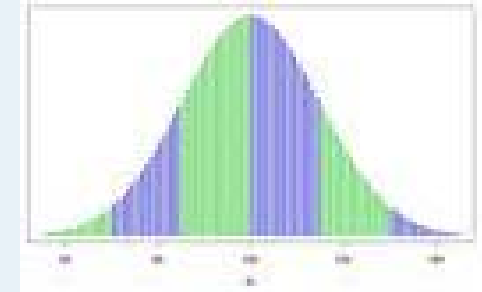
- Employment Cases
 - Percentage of motions to dismiss that were granted increases slightly
- Other Civil Rights Cases
 - Significant increase in orders granting motions to dismiss!
- Antitrust and other categories of cases where the costs of discovery are significant.
- All cases! More than 10,000 citations in published decisions since *Iqbal* was decided!

Will Congress Overturn *Iqbal*?



- The Notice Pleading Restoration Act of 2009 and the Open Access to Courts Act of 2009 would restore the pre-*Iqbal* pleading standard.
- Senator Arlen Specter (D-PA) introduced a bill (the Notice Pleading Restoration Act of 2009) to overturn *Twombly* and *Iqbal* by providing that “a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”
- A similar bill introduced in the House of Representatives (the Open Access to Courts Act of 2009) provides that no court may dismiss a lawsuit “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim.” The bill also mandates that a court may not dismiss a complaint “on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”

Wait a Minute . . . Has *Iqbal* Actually Had A Dramatic Impact on Motion to Dismiss Rulings?



- Let's look at the statistics!
- Huge increase in motion to dismiss filings after *Iqbal*, but this has tapered off in 2010.
- Percentage of motions to dismiss that were granted as a percentage of total cases filed has increased by approximately two percentage points in roughly three years.
- Little change in the percentage of motions to dismiss granted as a percentage of all motions to dismiss. Same is true for motions to dismiss denied.
- Does these statistics tell the complete story?

Discovery Orders



Does *Iqbal* apply to Affirmative Defenses?

- Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”
- Rule 8(b)(1)(A) requires a party responding to a pleading to “state in short and plain terms its defenses.”
- Rule 8(c)(1) requires a party responding to a pleading to “affirmatively state any avoidance or affirmative defense.”



Most Courts Say “Yes!”



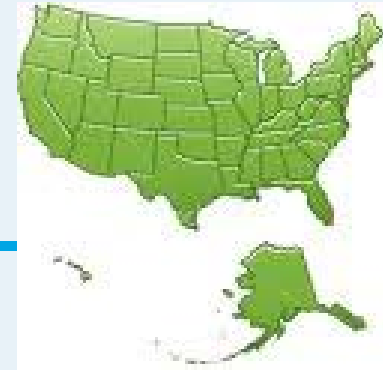
- Under *Conley*, notice pleading applied to pleading both claims and defenses.
- *Iqbal*'s interpretation of Rule 8(a) applies to claims and defenses. *Shinew v. Wszola*, 2009 WL 107627 (E.D. Mich. April 21, 2009).
- *Iqbal*'s interpretation of Rule 8(a) applies to defenses brought under Rule 8(b). *Hayne v. Green Ford Sales, Inc.*, 2009 WL 5171779 (D.Kan. Dec. 22, 2009).
- The rationale underlying *Iqbal* – to prevent unnecessary discovery costs – applies to affirmative defenses. *Burget v. Capital West Securities, Inc.*, 2009 WL 4807619 (W.D. Okla. Dec. 8, 2009).
- But is this “fair”? Does a defendant have as much time to learn the “facts” as a plaintiff?

Some say “No”



- Rule 8(c)(1) uses different language than Rule 8(a)(2)
- *Iqbal* exclusively interprets Rule 8(a)(2)
- Rule 8(a)(2) requires a pleader to “show” facts while Rule 8(c)(1) only requires a pleader to “state” affirmative defenses.
- *Charleswell v. Chase Manhattan Bank, N.A.*, 2009 WL 4981730 (D.V.I. Dec. 8, 2009).
- Some courts hold that a party responding to a pleading must allege a factual basis only for the affirmative defenses listed in Rule 8(c)(1). *Kaufmann v. Prudential Ins. Co. of America*, 2009 WL 2449872 (D. Mass. Aug. 6, 2009).

Have the States Followed?



A number of states have considered the new standard:

Arizona

Arkansas

District of Columbia

Indiana

Maryland

Massachusetts

Michigan

Minnesota

Montana

New York

Rhode Island

Tennessee

Texas

Washington

West Virginia

Pleadings Standards Post-Iqbal: Litigation Trends

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A Revisionist View of *Twombly* & *Iqbal*

What Should William Twombly Have Alleged?

What Twombly Did Allege:

[The complaint included] detailed, color maps of the Petitioners' configurations of contiguous territories, and specific factual assertions that competition by each of the Petitioners as CLECs in such contiguous territories would have been "an especially attractive business opportunity." The complaint alleges that competition by each of the Petitioners as CLECs in surrounded territories of the other Petitioners would have given the competing Petitioners "substantial competitive advantages," such that "[i]n the absence of an agreement not to compete, it is **especially unlikely** that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories."

From Twombly's SCOTUS brief, p. 47.

A Revisionist View of *Twombly* & *Iqbal*

What Should William Twombly Have Alleged?

What The Supreme Court Said Was Wrong:

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. ... [W]e agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the **natural, unilateral reaction** of each ILEC intent on keeping its regional dominance. ...

In fact, the complaint itself gives reasons to believe that the ILECs would see their **best interests** in keeping to their old turf. Although the complaint says generally that the ILECs passed up “especially attractive business opportunit[ies]” by declining to compete as CLECs against other ILECs, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period

The complaint did not allege properly *why* the reaction was “extremely unlikely” absent wrongful conduct.

A Revisionist View of *Twombly* & *Iqbal*

What Should Javaid Iqbal Have Alleged?

What Iqbal Did Allege:

- Petitioner Ashcroft was the “principal architect” of the policies challenged in this lawsuit.
- Petitioner Mueller was “instrumental in the adoption, promulgation, and implementation” of the challenged policies.
- Petitioners “approved” the policy of holding “high interest” detainees in highly restrictive conditions of **confinement** until “cleared” by the FBI.
- Petitioners “knew,” “condoned,” and “agreed” that respondent and others like him be subjected to these harsher conditions of **confinement** “as a matter of policy, solely on account of their religion, race, and/or national origin.”
- Petitioners “willfully . . . designed” a policy of **confining** individuals like respondent in the ADMAX SHU for these arbitrary reasons.
- Petitioners “adopt[ed],” “promulgat[ed],” and “implement[ed]” a policy and practice of imposing harsher conditions of **confinement** on respondent and others because of respondent’s religious beliefs.

From Iqbal’s SCOTUS brief, pp. 47–48.

A Revisionist View of *Twombly* & *Iqbal*

What Should Javaid Iqbal Have Alleged?

What The Supreme Court Said Was Wrong:

It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest **solely** on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." ...

[H]is only factual allegation against petitioners accuses them of **adopting a policy approving "restrictive conditions of confinement"** for post-September-11 detainees until they were " 'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU **due to their race, religion, or national origin.**

The complaint did not allege *why* worse confinement conditions appeared to be for discriminatory motive.

The Lesson of *Twombly* & *Iqbal*

Show, Don't Tell

Both the *Twombly* and *Iqbal* complaints required substantial inferences and ***neither adequately alleged why the court should infer the defendant's action or inaction was wrongful.***

Twombly inferred wrongful conduct by a failure to enter new markets, but businesses are usually timid.

Iqbal inferred wrongful conduct by way of a discriminatory investigation, but gave no reason to infer the conditions of confinement were for a discriminatory purpose.

The Lesson of *Twombly* & *Iqbal*

Plausibility Is A Nudge, Not A Smoking Gun

Twombly (paraphrased):

without some further factual enhancement conclusory allegations stop short of the line between possibility and plausibility of entitlement to relief. Plaintiffs here have not nudged their claims across the line from conceivable to plausible

Is there a difference between “plausible” and “conceivable” other than the former suggests a “probability” while the latter suggests a “possibility”?

Twombly and *Iqbal* specifically say it’s not “a probability requirement”!



The Lesson of *Twombly* & *Iqbal*

Plausibility Is A Yopp!

Twombly:

without some further factual enhancement conclusory allegations stops short of the line between possibility and plausibility of entitlement to relief. Plaintiffs here have not nudged their claims across the line from conceivable to plausible

Horton Hears A Who:

*“This,” cried the Mayor, “is your town’s darkest hour!
The time for all Whos who have blood that is red
To come to the aid of their country!” he said.
“We’ve GOT to make noises in greater amounts!
So, open your mouth, lad! For every voice counts!”
Thus he spoke as he climbed. When they got to the top,
The lad cleared his throat and he shouted out, “YOPP!”
And that Yopp . . .
That one small, extra Yopp put it over!*

Note: this joke stolen from *There's a Pennoyer in My Foyer: Civil Procedure According to Dr. Seuss*, Green Bag 2d, Vol. 13, p. 105, 2009.

The Lesson of *Twombly* & *Iqbal*

Putting More YOPP! In Your Complaint

John Ashcroft Isn't Off The Hook Yet:

Ashcroft **publically stated** that the material witness statute was an important tool in “taking suspected terrorists off the street,” and that “[a]ggressive detention of . . . material witnesses is vital to preventing, disrupting or delaying new attacks.” Again, unlike in *Iqbal*, these are not bare allegations that the Attorney General “knew of” the policy. Here, **the complaint contains allegations that plausibly suggest that Ashcroft purposely instructed** his subordinates to bypass the plain reading of the statute.

Al-Kidd v. Ashcroft, No. 06-36059 (9th Cir., September 4, 2009).

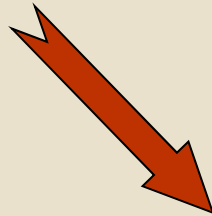
See also *Padilla v. Yoo*, No. C 08-00035 JSW (N.D. Cal., June 12, 2009) (“Padilla alleges with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla alleges were unlawful.”).

The Lesson of *Twombly* & *Iqbal*

The Transformation Of Plaintiff's Practice



Lionel Hutz — Famed Lawyer and Shoe Repairer. “Cases won in 30 minutes or your pizza is free.”



Perry Mason — No shoe repair, doesn't guarantee pizza.



The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 1: Investigate As If It Was A Criminal Case

Judge Easterbrook will draw plausible inferences for you:

[T]his complaint alleges the promise, the intent not to keep that promise, and the details of non-conformity. What else might be required to narrate, with particularity, the circumstances that violate 31 U.S.C. §3729(a)(1)?

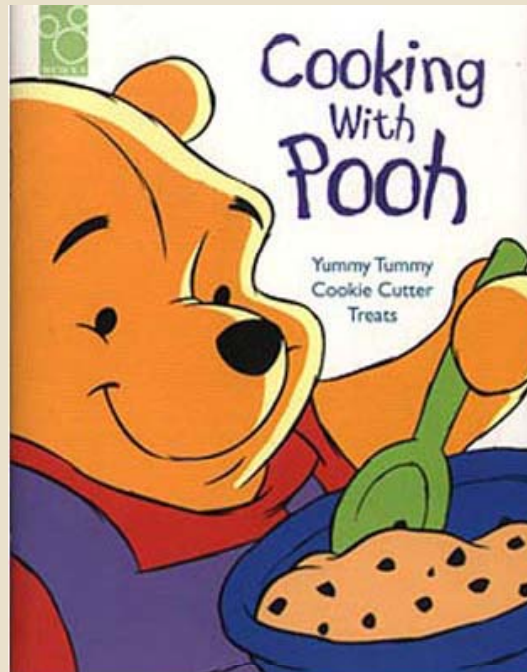
Rolls-Royce's answer is: the specific request for payment. Lusby has not seen any of the invoices and representations that Rolls-Royce submitted to its customers. He knows about shipments and payments, but he does not have access to the paperwork. The district court held that, unless Lusby has at least one of Rolls-Royce's billing packages, he lacks the required particularity. ...

We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit. True, it is essential to show a false statement. But **much knowledge is inferential**--people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime--and **the inference that Lusby proposes is a plausible one.**

United States ex rel. Lusby v. Rolls-Royce Corp., No. 08-3593 (7th Cir. Jun. 30, 2009) (Easterbrook, J.).

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 1: Investigate Thoroughly, But Don't Go Overboard



“... [Investigator] Sands [took] documents from multiple Disney locales (committing civil trespass in the process) ... [SSI] has tampered with the administration of justice and threatened the integrity of the judicial process. SSI's misconduct is so egregious that no remedy short of terminating sanctions can effectively remove the threat and adequately protect both the institution of justice and [Disney] from further SSI abuse.” *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736, 755, 66 Cal. Rptr. 3d 268, 283 (2007).

The Four-Step Process To Overcome *Twombly & Iqbal*

Step 2: If You Think It, Plead It

An easy victory in the Second Circuit, even under heightened pleading standards:

Specifically, the complaint pleads that, at the request of Lauer and Lancer Management, BAS placed false values of the Funds' holdings on the Position Reports, which contained BAS's name at the top of each page, without any disclaimer or other marking to suggest that they were anything other than official documents prepared by and bearing the imprimatur of BAS. **The complaint provided specific examples of BAS's role in the fraud**, involving BAS's participation in falsifying values for XtraCard warrants, Nu-D-Zine restricted shares, and a publicly traded stock (FFIRD).

Each of the above was described in detail, including the creation and use of the "Position Reports."

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, 568 F.3d 374, 382 (2d Cir. 2009).

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 2: If You Think It, Plead It, But Don't Go Overboard

A *sua sponte* order less than two weeks after I filed a complicated complaint with regulatory, contract, tort and constitutional claims:

ORDER

AND NOW, this 20th day of July, 2009, it is hereby ORDERED and DECREED that Plaintiffs' Complaint (Doc. No. 1) is hereby STRICKEN pursuant to Fed.R.Civ.P. 12(f)(1) for failure to comply with Fed.R.Civ.P. 8 (a). It is further ORDERED that Plaintiffs shall file an Amended Complaint on or before August 19, 2009.¹

BY THE COURT:

¹ Plaintiffs' 65-page, 172-paragraph, footnoted Complaint initially reads like a history primer and then progresses into a wholly overstated dissertation. Said Complaint contains inappropriately excessive verbiage regarding the historical, legislative and congressional intent behind and in support of their claims. As such, Plaintiffs' Complaint fails to comport with the "short and plain statement" pleading requirement of the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 8(a).

*"That's why
you're the
judge and
I'm the law-
talking guy"*



The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 3: Start Discovery Immediately

By the time *Ashcroft v. Iqbal* was decided, **114** depositions had been taken and the United States had already produced more than **75,000** pages of documents.

F.R.C.P. 26(d):

“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)”

F.R.C.P. 26(f):

- (1) “the parties **must** confer **as soon as practicable**”
- (2) “The attorneys ... are jointly responsible for arranging the conference [and] for attempting **in good faith** to agree on the proposed discovery plan”

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 3: Start Discovery Immediately

Judge Posner interprets *Twombly* & *Iqbal* as concern for the cost or burden of discovery, not as global pleading reform:

[W]e were reluctant to endorse the district court's citation of the Supreme Court's decision in *Twombly*, fast becoming the citation *du jour* in Rule 12(b)(6) cases, as authority for the dismissal of this suit. The Court held that in **complex litigation** (the case itself was an antitrust suit) the defendant is not to be put to the cost of pretrial discovery ... unless the complaint says enough about the case to permit an inference that it may well have real merit. The present case, however, is not complex. ...

***Iqbal* is special in its own way**, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery “provides especially cold comfort in **this** pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.”

So maybe neither *Bell Atlantic* nor *Iqbal* governs here.

Smith v. Duffey, No. 08-2804 (7th Cir. Aug. 3, 2009) (Posner, J.); see also *Cooney v. Rossiter*, 583 F.3d 967 (7th Cir. 2009) (“the height of the pleading requirement is relative to circumstances.”)

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 4: Stand Your Ground In Response To The 12(b)(6)

The better part of valor is discretion.

—*Henry The Fourth*, Part 1 Act 5, scene 4, 115–121.

F.R.C.P. 15(a)(1)(B):

“A party may amend its pleading once as a matter of course within ... if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.”

In other words:

You can have the defendant fix the problems in your complaint for you.

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 4: Stand Your Ground In Response To The 12(b)(6)

“Reasonable expectation” rule survives:

The Supreme Court recently settled the dispute by applying the *Twombly* standard--that a complaint must state a claim that is 'plausible on its face'--to all civil cases. *Iqbal*; see also *Twombly*. 'This standard **'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence'** of the necessary claims or elements.' *In re So. Scrap Material Co.* (5th Cir. 2008).

Morgan v. Hubert, No. 08-30388 (5th Cir. Jul. 1, 2009); see also *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009)(same).

“Totality” and “all favorable inferences” rules survive:

Our dissenting colleague would parse individual allegations that support a November 4 accrual date, rather than consider the allegations in their totality, and tweak Vila's allegations and the material distinctions with *Thompson*, while overlooking that at this stage of the proceedings **Vila is entitled to all favorable inferences** in determining when the enrichment became unjust. **Viewed in their totality**, and according Vila all favorable inferences, Vila's allegations 'plausibly give rise to an entitlement to relief,' *Ashcroft v. Iqbal*, and we conclude that the district court properly declined to dismiss the complaint ...

Vila v. Inter-American Inv. Corp., No. 08-7042 (D.C. Cir. Jun. 19, 2009); see also *Floyd v. City of Kenner, La.*, 351 F. App'x 890, No. 08-30637, (5th Cir. Oct. 29, 2009) (“viewed in their entirety, [plaintiff's] pleadings contain more”)

The Four-Step Process To Overcome *Twombly* & *Iqbal*

Step 4: Stand Your Ground In Response To The 12(b)(6)

Plaintiffs need not allege “specific facts”:

[Plaintiff was not] required to describe directly the ways in which appellees breached their fiduciary duties. Thus, for example, the district court faulted the complaint for making “no allegations regarding the fiduciaries’ conduct.” **Rule 8 does not, however, require a plaintiff to plead “specific facts” explaining precisely how the defendant’s conduct was unlawful.** Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled give the defendant fair notice of what the claim is and the grounds upon which it rests and allow the court to draw the reasonable inference” that the plaintiff is entitled to relief.

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. Nov. 25, 2009) (cites and quotes omitted); see also *Arista Records LLC v. Doe 3*, No. 09-0905, 2010 WL 1729107 (2d Cir. Apr. 29, 2010) (“[T]he notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself.”)

See also:

Arocho v. Nafziger, No. 09-1095, 2010 WL 681679 (10th Cir. Mar. 1, 2010) (“it is improper to decide a motion to dismiss on the basis of evidence submitted by the defendant—that is what summary judgment is for.”); *Chao v. Ballista*, 630 F. Supp. 2d 170 (D. Mass. 2009) (“nothing requires a plaintiff to prove her case in the pleadings”); *Young v. Speziale*, No. 07-03129 (D.N.J. 2009) (limiting *Iqbal* to supervisory § 1983 claims); *Boy Blue, Inc. v. Zomba Recording, L.L.C.*, No. 3:09-CV-483-HEH, 2009 WL 2970794 (E.D. Va. Sept. 16, 2009) (collecting cases recognizing that “information and belief” allegations are appropriate where facts are in possession of the opposing party).

Twombly For the Defense:
Strategic Considerations for Defendants
in the Wake of *Twombly* and *Iqbal*

Thomas J. Lang
July 15, 2010

Twombly For the Defense

Defense Strategies In the Wake of Twombly:

- *Like the Boy Scouts: Be Prepared*
- *To File or Not to File, That is The Question*
- *Know Where You Are Going*
- *It's the Discovery, Stupid*

Like the Boy Scouts: Be Prepared

- Twombly accelerates the litigation process
 - *Plausibility standard requires courts to consider the merits of the case at an earlier stage:*
 - *“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of an entitlement to relief.”*
Ashcroft v. Iqbal
 - *Offer an opportunity for defendants to begin developing themes*
 - *May accelerate discovery issues*
- Puts a premium on early preparation: facts, law, theories of the case

Like the Boy Scouts: Be Prepared

- Recognizing a bad complaint, i.e., are there factual allegations?
 - *Repeating a standard that you would find in jury instructions is not enough*
 - *Did the Plaintiff provide the juicy, specific facts that would convince a jury?*
 - *He said, she said / When / Where*
 - *Review plausibility as a whole, not the plausibility of each individual allegation.*
 - *Zoltek Corp. v. Structural Polymer Group, 592 F.3d 893 (8th Cir. 2010); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009)*

To File Or Not To File, That Is The Question

- Every defendant should consider a *Twombly* motion

“100% of the shots you don’t take, don’t go in.”

Wayne Gretzky

To File Or Not To File, That Is The Question

- Factors to consider: what type of claim?
 - *The more complex the claim, the higher the “plausibility” hurdle.*
 - *Iqbal*: plausibility is context specific
 - *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008): more facts required in antitrust and RICO cases than in cases involving simple negligence claims
 - *Robbins v. Oklahoma*, 519 F.3d 1242,1249 (10th Cir. 2008): “The *Twombly* standard may have greater bite” in cases involving “complex claims against multiple defendants.”

To File Or Not To File, That Is The Question

Factors to consider: are the allegations overbroad?

- *Twombly* motions can be used to narrow the scope of the case; not just dismiss entire claims.
- *In re Korean Air Lines Co., Ltd. Antitrust Litig. (C.D. Cal. 2008)*: court dismissed claims as they related to certain transactions but not others

Know Where You Are Going

“If you don’t know where you are going, you might end up someplace else.”

Yogi Berra

Know Where You Are Going

Twombly motions can:

1. *Force plaintiffs to identify their theories of the case.*
2. *Force plaintiffs to “show their hand” factually.*

Golden Gate Pharmacy Servs., Inc. v. Pfizer Inc. (N.D.Cal. 2009):
plaintiffs must plead “evidentiary facts.”

3. *Allow defendants to begin developing their “themes” with the court.*
4. *Narrow the scope of the case. Substantially limit discovery.*

It's The Discovery, Stupid

- *Twombly and Iqbal motivated by the heavy burden of discovery:*
 - *Twombly:* expressed concern about the “enormous cost of discovery” in antitrust cases
 - *Iqbal:* *plausibility standard necessary because “[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.”*
 - *Iqbal:* *“Rule 8 marks a notable and generous departure from the hyper-technical code pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”*

It's The Discovery, Stupid

- *In Re Urethane Antitrust Litigation, Case No. 04-MD-1616, slip op. at 10 (D. Kan. Aug. 11, 2009):*
 - “it is clear that under *Twombly* an antitrust plaintiff must be able to plead a plausible antitrust conspiracy claim prior to and without resort to discovery.”
- *DSM Desotech Inc. v. 3D Sys. Corp., Case No. 08 CV 1531, WL 4812440 at *3 (N.D. Ill. Oct. 28, 2008)*
 - “Find[ing]” that “the principles underlying *Twombly* required it,” the court granted a stay of discovery on all antitrust claims during pendency of a motion to dismiss.
- *Netflix Antitrust Litigation, 506 F. Supp. 2d 308 (N.D. Cal. 2007)*
 - Court granted defendant’s motion to dismiss and denied plaintiffs’ request to proceed with antitrust discovery except for a single “specific narrowly-tailored request” to the enforcement of a patent.