Litigation Update - Pleading After Twombly and Iqbal

November 19, 2009

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Recent holdings by the U.S. Supreme Court may raise the bar for stating a claim for relief that can survive a motion to dismiss brought pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. The Court's holdings in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), an antitrust case, and in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), a post-9/11 detention case, address the plaintiff's burden to state a plausible claim for relief that can withstand a defendant's motion to dismiss.

In general, a plaintiff does not bear a significant burden at the pleading stage of litigation. According to Rule 8 (a) of the Federal Rules of Civil Procedure, a complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." When confronted with a motion to dismiss, a court is required to accept as true all of the factual allegations contained in the complaint. While these premises remain true, Twombly and Iqbal appear to add some meat to the bone.

The plaintiff in Twombly, asserting a violation of the Sherman Antitrust Act, served a threadbare complaint alleging only that the defendants had engaged in parallel conduct. The complaint did not include any factual allegations of an actual illegal agreement between the defendants. The Supreme Court held that the complaint should have been dismissed. While the Supreme Court made clear that it was not imposing a heightened pleading standard beyond that required by Rule 8 (a), it clarified that it was "retiring" the standard it had articulated in Conley v. Gibson, 355 U.S. 41 (1957), a case that held that a motion to dismiss for failure to state a claim should not be granted unless it appeared "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." By contrast, in Twombly, the Court held that a plaintiff must set out "plausible grounds" for his or her claims. In other words, the plaintiff must plead "enough facts to raise a reasonable expectation that discovery will reveal evidence" of the plaintiff's claims.

In the wake of Twombly, the lower courts struggled to apply the pleading standard—whether heightened or simply clarified—by the Supreme Court, with a number of courts of appeals cautioning that Twombly should not be overread. To complicate things, two weeks after the Court decided Twombly, it decided Erickson v. Pardus, 551 U.S. 89 (2007), a pro-se prisoner rights case, in which the Court cited both Twombly and Conley but made no mention of a heightened or clarified pleading standard. In reversing a dismissal by the lower court, the Court held only that a "short and plain statement" of the plaintiff's claim was necessary.

The Supreme Court's ruling in Iqbal earlier this year made clear at least one point—whatever Twombly stands for with regard to the pleading standard, its holding applies to all federal cases, not just to antitrust cases. In Iqbal, the complaint alleged, in pertinent part, that then-Attorney General John Ashcroft and FBI Director Robert Mueller, pursuant to a policy based solely on race, religion or national origin, had wrongfully detained and confined the plaintiff following the 9/11 attacks. The complaint set forth no facts in support of these allegations, and the Supreme Court held that, while Iqbal's claims could proceed against other federal agents, his claims against Ashcroft and Mueller should be dismissed. The Court reasoned that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and that Iqbal had not "nudged his claims … across the line from conceivable to plausible."

While there may be cases decided in the future that completely clarify the pleading standard explicated by Twombly and Iqbal, there are some lessons that can be learned now from these cases. From a plaintiff's perspective, it is important to plead as many facts as possible that support the claims set out in the complaint. Conclusory statements of wrongdoing, now more than ever, will not be enough to withstand a Rule 12 (b) (6) motion to dismiss. In addition, a plaintiff should not expect a court to infer the reasons a defendant took the actions or inactions alleged in the complaint. Instead, the plaintiff should make the inferences for the court by including allegations as to why the defendant acted or did not act. In addition, a plaintiff may want to consider doing more due diligence prior to initiating suit, rather than waiting for discovery to ferret out facts. Particularly in large, complex cases like Twombly (where discovery will be expensive and time consuming), a court may be more inclined to grant a motion to dismiss on a bare bones complaint.

From a defendant's standpoint, the so-called "plausibility standard" of Twombly and Iqbal may make worthwhile an early motion to dismiss. Prompting the court to consider the merits of a case at an early stage —particularly in complex litigation with a complaint containing more conclusions than facts—may get a defendant out of a case before incurring the expenses of discovery. Even if the complaint is dismissed without prejudice, the plaintiff will be forced to re-plead and show her hand factually. In addition, even if some claims survive the motion to dismiss, the scope of the case will be narrowed, likely limiting the time and expense of discovery.