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Lawyer Insights

Adapting Defense Strategy To Twombly Plausibility Standard

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By now, it is old news that in its landmark decisions Bell Atlantic Corp. v. Twombly,[1] and Ashcroft v. Iqbal[2] the U.S. Supreme Court announced a new standard for determining whether a claim is plead sufficiently to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure: While, under the older, less stringent standard, dismissal was only appropriate if the plaintiff could "prove no set of facts in support of his claim that would entitle him to relief," now under Twombly and Iqbal, a claim should be dismissed if it does not plausibly suggest an entitlement to relief.

As the Supreme Court explained in Twombly and Iqbal, its objective in retiring the "no set of facts" standard and replacing it with the more robust "plausibility" threshold was to rout out frivolous actions in the early stages of litigation, in order to avoid squandering economic and judicial resources litigating claims which are plainly meritless.

While litigators are well aware of the Twiqbal "plausibility" standard and comprehend its underlying rational in theory, very few have accordingly altered the manner in which they practice.

The Twiqbal plausibility standard now permits a party moving under Rule 12(b)(6) to provide context to the pleadings, including from sources outside the complaint (e.g., from a claimant's own publications, and/or material subject to judicial notice), in order to demonstrate that a claimant's allegations are implausible (i.e., unreasonable or improbable), and therefore the claim(s) should not be allowed to proceed. Of course, if not done carefully, the movant can run afoul of Rule 12(d), and thereby cause the motion to be converted into a Rule 56 motion for summary judgment (which, ordinarily, is undesirable at the outset of litigation).

However, if done skillfully — and, admittedly, it's a fine line to walk — the added context may be just enough to persuade the judge that a plaintiff's allegations are simply implausible, and therefore his or her claims should be dismissed without further ado. This article explains this often overlooked subtlety in the law, and offers practical suggestions on how to utilize context to prevail on a Rule 12(b)(6) motion to dismiss.

Notice Pleading Standard

Under the former Rule 12(b)(6) standard — known as the "notice pleading" standard — the rule was that "a complaint should not be dismissed 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 that would entitle him to relief."[3] In this 1957 Conley v. Gibson decision, the Supreme Court specifically referred to this standard as "notice pleading,"

signifying its intent to merely provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[4]

In the wake of Conley, many states that had modeled their own rules of civil procedure after the Federal Rules adopted the "no set of facts" standard, including Massachusetts, in Nader v. Citron.[5]

This low threshold allowed for practically any plaintiff to survive a motion to dismiss, as he merely had to provide a recitation of the elements of a cause of action to proceed with his case, on the mere possibility that he might later establish some set of facts supporting recovery.[6] Under this standard, no assessment was made by the court as to whether it was actually likely that such a set of facts would or could ultimately be proven — only that it was theoretically possible.

Plausibility Standard

In 2007, the Supreme Court decided, in Bell Atlantic v. Twombly, that the notice pleading standard was not enough, and held for the first time that a plaintiff's factual allegations must plausibly suggest an entitlement to relief.[7] The court observed that Conley's "no set of facts" language had "been questioned, criticized, and explained away long enough," and that the standard had "earned its retirement."[8]

The court articulated a new standard and required that a plaintiff's complaint contain "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief."[9] The complaint needed to contain "more than labels and conclusions," and must "be enough to raise a right to relief above the speculative level."[10] The court, in analyzing the plaintiff's claim of conspiracy, noted that the plaintiff needed to allege enough of a "setting" suggesting that the agreement to conspire existed — that is to say, he could not merely allege the existence of the agreement to conspire.[11]

This makeover of the motion-to-dismiss standard was driven by the court's goal of promoting justice and limiting frivolous or highly speculative litigation, and its belief that the notice pleading standard was not having enough of a "gatekeeper" effect, resulting in expenditures of the court's time and the parties' money. Citing the cost of litigation, the court emphasized the need for this plausibility standard to "weed out" groundless claims.[12]

The Supreme Court clarified and affirmed the plausibility standard two years later in Ashcroft v. Iqbal, dismissing the plaintiff's complaint on the basis that it contained only "bare assertions" that amounted to only a "formulaic recitation of the elements of a constitutional discrimination claim."[13] The Iqbal court suggested a two-pronged approach for assessing the plausibility of a claim using the new standard articulated in Twombly.

First, the court should weed out those allegations in the complaint that are merely "conclusory," as the court is not required to accept such statements as truth.[14] Next, the court must "draw on its judicial experience and common sense" to determine the plausibility of the factual allegations.[15] The court dismissed the plaintiff's claim of discrimination because he failed to "nudge his claim of purposeful discrimination across the line from conceivable to plausible."[16]

These two cases signified a change in the tide of pleading requirements. Now, not only does a plaintiff have to sufficiently plead all elements of his claim, so as to give the defendant notice of the claims against him, but those allegations must actually be plausible. Since Twombly and Iqbal, numerous states have elected to embrace this heightened "plausibility pleading standard," including Massachusetts in 2008, in

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Iannacchino v. Ford Motor Co.[17]

Considering Context in Evaluating Plausibility

When evaluating plausibility (i.e., whether the pleaded factual content permits the reasonable or probable inference that the defendant is liable for the conduct alleged), the court must consider context, draw on its judicial experience and exercise common sense.[18] In considering context, the court can consider certain materials outside the four corners of the complaint, including "(a) implications from documents attached to or fairly incorporated into the complaint, (b) facts susceptible to judicial notice, and (c) concessions in plaintiff's response to the motion to dismiss."[19]

In evaluating the context of the allegations vis-à-vis their plausibility, numerous federal courts have looked to documents and information outside the complaint on the basis that such documents, which informed the plausibility of the allegations, were integral to the complaint.

For example, the U.S. District Court for the Eastern District of Virginia considered documents outside the pleadings proffered by the plaintiffs in opposition to a motion to dismiss, reasoning that they were "seeking to substantiate the plausibility of their claims."[20] The same court, in another case, considered an engagement letter in evaluating a motion to dismiss because the letter "serve[d] to further buttress the plausibility" of the complaint.[21]

The U.S. District Court for the District of Colorado has similarly observed that "in assessing [the complaint], [the court] consider[s] the various prospectuses and other offering statements integral to Plaintiffs' claims, even if those documents fall technically outside the pleadings."[22]

By way of further example, several jurisdictions permit the court to take judicial notice of certain information publicly available on a website, and thus properly consider that information in its evaluation of the plausibility of a claim.[23] Using this same logic, litigators should be able to successfully argue for the consideration of other independently verifiable, publically available material, such as books, articles, television appearances, and verifiable public statements.

Case Study: How to Use Plausibility to Your Advantage

Despite the marked change in pleading requirements articulated by the Supreme Court in Twombly and Iqbal (adopted by Massachusetts in Iannacchino), and reiterated in countless other federal and state judicial opinions since then, in a recent case in Massachusetts where we represented the defendants and were evaluating whether to serve a Rule 12(b)(6) motion to dismiss based on implausibility, we were unable to find a single reported decision that turned squarely on a plaintiff's failure to make "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief."

The dearth of such case law is curious, given that the "plausibility" standard was first announced in Twombly over 12 years ago. One possible explanation is that most active litigators, ourselves included, attended law school, and have spent a majority of our careers practicing, while Conley's "no set of facts" standard was still prevailing law, and perhaps we simply have not adapted our Rule 12(b)(6) strategies and skill sets to argue for dismissal based on implausibility.[24]

In our case, we were convinced that a traditional ("no set of facts") approach to Rule 12(b)(6) motion to dismiss would be unavailing for various reasons. In short, within the four corners of the complaint at

issue, the plaintiff could have arguably articulated the prima facie elements of his cornerstone claim, defamation, in a bare-bones fashion. Specifically, the plaintiff could have alleged that the defendant defamed him at by making a false statement about the plaintiff at a public event.

What actually happened, however, was that the defendant merely summarized and paraphrased the plaintiff's own statements, which were inflammatory and politically charged. The plaintiff had actually published the subject statements and opinions in various books and on his own self-promoting website previously, but it was only when the defendant reiterated them that they received attention — albeit very negative.

Accordingly, in our Rule 12(b)(6) motion to dismiss, we directed the court's attention to the plaintiff's website, books, and other independently verifiable materials in order to provide context to the pleadings (i.e., demonstrate that the subject statements were not maliciously manufactured by the defendant out of thin air, but actually taken from the plaintiff's own mouth), and argued that the plaintiff's defamation claim was not only legally untenable, but also factually implausible (and indeed outright ridiculous).

The plaintiff moved to strike our references to materials outside of the pleadings, however, the court was persuaded by our argument that this was precisely the type of groundless case that Twiqbal's "plausibility" standard was intended to "weed out." Moreover, in light of the context we provided, the court granted our motion to dismiss, holding that the statements at issue were nothing more than defendant's inactionable opinions of plaintiff's self-articulated beliefs that the plaintiff himself had already placed squarely within the public realm.

If there is a lesson to be learned from our experience, it is that had we not taken full advantage of the leeway afforded by the Twiqbal "plausibility" standard for Rule 12(b)(6) motions to dismiss — by bringing relevant, public, and independently verifiable material before the court so that it had the proper context within which to consider the plaintiff's claims — the court may have demurred and allowed the case to proceed.

If that had occurred, we would have needed to conduct written discovery, defend and conduct numerous depositions, and file a motion for summary judgment, only to (most certainly) arrive at the same result: a dismissal of the plaintiff's groundless claims. However, the difference in achieving that result would have been months (if not years) of the parties' time, and potentially hundreds of thousands of dollars in litigation expenses.

Conclusion

In adopting the plausibility standard, the Supreme Court hoped to create a more rigorous pleading requirement and balance the importance of access to the court system with the need to root out frivolous litigation. The more exacting standard has allowed courts to be more effective at weeding out baseless claims, and has required judges to enlist their own experience, logic, and perspective when analyzing whether a plaintiff's allegations are more than merely "conceivable," but are actually grounded in reality, and plausible.

So far, it seems that courts have been willing to acknowledge what this analysis actually requires — that is, looking sometimes beyond the allegations themselves to the context of the claims. Carefully done, litigators can (and should) now provide the court with materials that can shine light on the plausibility (or implausibility) of the purported "facts" in the complaint. If used appropriately, such a strategy empowers

the court to become a more effective gatekeepers against the mounting costs of frivolous litigation. We have tried it, and had success. Now, so should you.

Notes

1. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

2. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

3. Conley v. Gibson, 355 U.S. 41, 46 (1957).

4. Id. at 47.

5. 372 Mass. 96, 98 (1977).

6. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561 (2007).

7. Id. at 546.

8. Id. at 562-63.

9. Id. at 557.

10. Id. at 555.

11. Id. at 557.

12. Id. at 559.

13. 556 U.S. 662, 681 (2009).

14. Id. at 679.

15. Id.

16. Id. at 683 (internal citations and quotations omitted).

17. 451 Mass. 623, 635-36 (2008).

18. Garcia-Catalan v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

19. Schatz, supra at 55-56.

20. James River Mgmt. Co. v. Kehoe, No. CIV.A.3:09CV387, 2009 WL 3874167, at *9 (E.D. Va. Nov. 18, 2009).

21. Caruthers v. Thau, No. 3:13CV483-JAG, 2013 WL 6048799, at *3 (E.D. Va. Nov. 14, 2013).

22. In re Oppenheimer Rochester Funds Grp. Sec. Litig., 838 F. Supp. 2d 1148, 1156 (D. Colo. 2012).

23. See, e.g., Sarvis v. Polyvore, Inc., C.A. No. 12-12233-NMG, 2013 WL 4056208, at *3 (D. Mass. Aug. 9, 2013) (quoting Doron Precision Sys. v. FAAC, Inc., 423 F. Supp. 2d 173, 193 n.8 (S.D.N.Y. 2006) ("for purposes of a 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and 'it is capable of accurate and ready determination'") (citing Town of Southold v. Town of E. Hampton, 406 F. Supp. 2d 227, 245 n.2 (E.D.N.Y. 2005) ("this court may take judicial notice of the contents of a website assuming, as in this case, its authenticity has not been challenged and 'it is capable of accurate and ready determination'")).

24. According to the American Bar Association, as of 2018, there were approximately 1,335,963 active practicing attorneys in the United States, only 173,839 of whom were admitted after 2008. American Bar Association, ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Population by State (2018), available at: https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2008-2018.authcheckdam.pdf.

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