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Clarity or Chaos? *Ashcroft v. Iqbal* One Year Later

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One year after *Ashcroft v. Iqbal*, federal courts throughout the country are still struggling to deal with the ramifications of the U.S. Supreme Court's decision regarding the appropriate standard of review for motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] In light of *Iqbal*'s widespread impact, some issues are already leading to inconsistency within the federal system. This article will address two of the most prominent issues that have been implicated in recent lower court opinions. First, a disagreement among the circuits is beginning to emerge as to the proper definition of the plausibility standard. Second, a significant rift has already developed over whether the standard set forth in *Bell Atlantic Corp. v. Twombly*[3] and *Iqbal* applies to affirmative defenses.

Prior to the Court's shift in *Twombly*, the pleading standard was controlled by the Court's 1957 decision in *Conley v. Gibson*.[4] Under *Conley*, a pleading was considered sufficient to survive a motion to dismiss unless the plaintiff could prove "no set of facts" that would allow his claim to prevail.[5] For the next 50 years, *Conley* and the "no set of facts" standard reigned supreme over all civil actions.

In 2007, however, the Court departed from *Conley* by discarding the "no set of facts" standard and moving in an entirely new direction.[6] The Court in *Twombly* observed that "after puzzling the profession for 50 years, this famous observation has earned its retirement."[7] In moving away from the *Conley* standard, the Court held that a plaintiff must provide enough facts within a complaint to "state a claim to relief that is plausible on its face."[8] In *Twombly*, the Court concluded that factual allegations were not adequate to establish an antitrust conspiracy claim.[9] In the complaint, the plaintiff detailed parallel conduct between competitors but did not identify any agreement to conspire.[10] The Court found this to be insufficient because there was an "obvious alternative explanation" that provided a lawful reason for the defendant's actions.[11] After *Twombly*, commentators struggled to identify the new standard and questioned whether *Twombly* applied to all civil cases or was merely limited to antitrust actions.[12]

The Court addressed the pleading standard again in *Iqbal* in an attempt to address many of the questions that arose from the confusion over *Twombly*. In *Iqbal*, the Court reaffirmed the plausibility standard set out in *Twombly* and explicitly held that the plausibility standard applied to all civil cases.[13] To apply the standard, the Court outlined a two-part test intended to guide lower courts in their determinations of whether a pleading contains enough facts to become plausible. First, a court must determine which statements are "entitled to the assumption of truth."[14] Conclusory statements are not given the assumption of truth, but any factual statements are assumed to be true for purposes of a motion to dismiss.[15] Second, a court must take a context-

specific approach, drawing on its experience and common sense, to determine whether those factual allegations "plausibly suggest an entitlement to relief."[16]

In *Iqbal*, the Court concluded that the pleading did not plausibly establish a claim, in light of a "more likely explanation" that lawful purposes motivated the conduct.[17] The Court went on to hold that "[a]s between that 'obvious alternative explanation' for the arrests . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion."[18]

Interpreting the "Plausibility Standard"

In the year since *Iqbal*, circuit courts have interpreted the meaning of the phrases "more likely explanation" and "obvious alternative explanation" in different ways. Although no court has explicitly acknowledged the beginning of a circuit split, in various cases across the country, some courts seem to be focusing on one or the other of the two phrases.

Some courts have emphasized the "obvious alternative explanation" language in setting what appears to be a higher bar that defendants must meet in order to establish implausibility. The Eighth Circuit, for example, interpreted the *Iqbal* and *Twombly* "basic plausibility requirement" to require the plaintiff to plead additional facts "where there is a concrete, 'obvious alternative explanation.'"[19]

The Eleventh Circuit recently applied *Iqbal* and *Twombly* to dismiss a complaint when there was an obvious alternative explanation for a defendant's conduct that "suggests lawful, independent conduct."[20] The court went on, however, to interpret *Iqbal* to stand for the proposition that when there are equally compelling explanations for a defendant's action, then a court must dismiss the complaint.[21] The court concluded that the defendant's conduct was "equally indicative of rational independent action as it is concerted, illegitimate conduct and thus 'stays in neutral territory.'"[22] Therefore, while the Eleventh Circuit seems to have embraced the "obvious alternative explanation" language, that court may be taking a slightly different approach than some of the other circuits which have interpreted *Iqbal* and *Twombly*.

In contrast, other courts have highlighted the "more likely explanation" language from *Iqbal* when interpreting the plausibility standard. The Tenth Circuit characterized *Iqbal* and *Twombly* as holding that an allegation is sufficient when there is a "more likely or plausible explanation" for the alleged illegal conduct.[23] The Sixth Circuit reached a similar conclusion in affirming the trial court's decision to dismiss a complaint. The court held that the defendants had "offered a reasonable, alternative explanation" for the alleged illegal conduct and that this showing was sufficient to establish that the plaintiffs failed to allege sufficient facts to make the claim plausible.[24] Additionally, numerous district courts have applied the "more likely explanation" standard, while ignoring the "obvious alternative explanation" language entirely.[25]

It is too soon for any concrete trends to emerge; however, the initial signs point to a potential conflict between the circuits that may force the Court to revisit pleading standards for the third time in as many years. As stated earlier, no court has addressed the differences between the "obvious alternative explanation" and the "more likely explanation" language. Related to any distinction between the two phrases are several potentially important issues. First, did the Court in *Iqbal* intentionally alter the "plausibility standard" set out in *Twombly* by adding the "more likely explanation" phrase that some courts have focused upon? Second, what are the potential implications for adopting the more stringent "obvious alternative explanation" as compared to the easier to establish "more likely explanation?"

The origin of the two phrases may be significant whenever the potential differences are addressed, and courts must choose which standard to adopt. Both *Twombly*[26] and *Iqbal*[27] included the "obvious alternative explanation" language. In comparison, only *Iqbal* applied the "more likely explanation" reasoning.[28] Some believe that the use of the "more likely explanation" language in *Iqbal* may have

intentionally, albeit subtly, altered the plausibility standard.[29] One question that is likely to be raised is whether this was an intentional change from *Twombly* or whether the use of the "more likely explanation" was merely intended to maintain the status quo without changing the standard.

Additionally, the implications for selecting one standard over the other have the potential to be significant. A plain reading of the language implicates that the "obvious alternative" interpretation places a higher burden on defendants seeking to prevail on a motion to dismiss than a requirement that the defendant merely show that there is a "more likely explanation" for the allegedly illicit conduct. The "obvious alternative" interpretation suggests that a judge must find something compelling about the legal explanation that would necessitate disposition at that stage of the litigation. Case law from the Eighth Circuit supports the view that the "obvious alternative" standard requires that the defendant establish beyond a mere preponderance that the lawful explanation is valid to prevail on a motion to dismiss.[30] The "more likely explanation" standard, on the other hand, implies that so long as a judge were to conclude that a mere preponderance of the available facts suggests that the lawful alternative explanation was justified, then the pleading should be disposed of using a motion to dismiss. Additionally, the Eleventh Circuit may be taking a third approach that allows a court to dismiss a complaint if there is an equal likelihood that the defendant's conduct was unlawful or illegitimate.

At some point, it is likely that a court will address the differences between the language. As the circuits begin to see more cases, and the case law becomes more developed, courts will begin to have a clearer position on these questions.

Applying Twombly and Iqbal to Affirmative Defenses

A second issue that is already causing widespread disagreement within the courts is whether *Twombly* and *Iqbal* apply to affirmative defenses. Disagreement is so rampant that even courts within the same district are divided.[31]

Some courts have concluded that *Twombly* and *Iqbal* do not apply to affirmative defenses. For example, courts in Alabama,[32] Colorado,[33] Michigan,[34] Oklahoma,[35] Pennsylvania,[36] and the U.S. Virgin Islands[37] have reached this conclusion. These courts reason that there is a distinction between Rule 8(a) pleadings,[38] which are governed by the "plausibility standard" of *Twombly*, and affirmative defenses, which are governed by Rule 8(c).[39] The courts note that while Rule 8(a)(2) requires that a party include "a short and plain statement of the claim showing that the pleader is entitled to relief," Rule 8(c) contains no such requirement.[40] Instead, Rule 8(c) requires only that the defendant state any affirmative defense available.[41] Courts have interpreted this difference to mean that because there is no requirement that the defendant show any facts at all, then there can be no application of *Twombly*'s rule that a pleading include enough facts to make the claim plausible.[42]

The majority of courts, however, believe that *Twombly* and *Iqbal* apply to affirmative defenses. Thus far, district courts in California,[43] Florida,[44] Illinois,[45] Kansas,[46] Michigan,[47] New York,[48] Oklahoma,[49] Texas,[50] Vermont,[51] and Wisconsin[52] have all applied *Twombly* to affirmative defenses. These courts concluded that because *Twombly* and *Iqbal* apply to all pleadings, then they must also govern all affirmative defenses.[53] Proponents of *Twombly*'s application point to the reasoning underlying *Twombly* and *Iqbal* that all pleadings must contain enough facts for an opposing party to have sufficient knowledge to respond.[54] These courts have observed that this rationale applies equally to plaintiffs as well as defendants and thus should apply to both complaints and affirmative defenses.[55] Additionally, courts have noted that the desire to avoid unnecessary discovery applies with equal force as well, because plaintiffs should not be forced to respond to "boilerplate affirmative defense assertions" without any factual basis.[56]

Several opinions have also responded to the argument of those who refuse to apply *Twombly* by stressing that the requirements for pleading affirmative defenses are "essentially the same" as for claims of relief.[57] These courts point to the

language of Rule 8(b)(1)(a) requiring that a defendant "state in short and plain terms its defenses to each claim."[58] The reasoning is that defendants must meet the Rule 8(b) requirements for establishing defenses in general.[59] As affirmative defenses fall under the general umbrella of defenses in general, then the requirements of Rule 8(b) apply. These courts interpret Rule 8(c) as merely providing a "helpful laundry list of commonly asserted affirmative defenses" to highlight that these defenses must be pled or else they may be waived.[60] Advocates of this approach reason that the language in Rule 8(b) that governs affirmative defenses is sufficiently similar to the language of Rule 8(a) and that, therefore, *Twombly* should apply to the descriptions of affirmative defenses.[61]

Currently, no circuit courts have addressed this issue. As more cases begin to reach the circuit courts over the next year, the extent of *Twombly* and *Iqbal*'s reach will become clearer.

Moving Forward

Many issues remain unresolved after the Supreme Court's latest foray with Rule 8 pleading standards. What is certain is that as more courts confront issues related to the application of *Twombly* and *Iqbal*, the overall landscape will continue to develop. Courts have made significant progress in the past year because every circuit has handed down a case analyzing *Iqbal*.[62] There is little doubt that the next year will play an even more important role in defining the plausibility standard and in identifying the reach of *Twombly* and *Iqbal*.

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[2] 129 S. Ct. 1937 (2009).

[3] 550 U.S. 544, 570 (2007).

[4] 355 U.S. 41, 45-46 (1957).

[5] Id.

[6] *SeeTwombly*, 550 U.S. at 563.

[7] Id. (concluding that the "no set of facts" phrase "is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

[8] Id. at 570.

[9] Id. at 569.

[10] Id. at 567-68.

[11] Id.

[12] *See, e.g.*, *The Supreme Court, 2006 Term—Leading Cases—Pleading Standards*, 121 Harv. L. Rev. 305, 309-12 (2007) (noting that "it is at present hard to say how big of an effect *Twombly* will ultimately have on pleading practice"); *see also* Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 St. John's L. Rev. 893, 905-19 (2008) (discussing some of the "difficult questions" left to the lower courts by *Twombly* and examining a select number of cases analyzing *Twombly*).

[13] *SeeIqbal*, 129 S. Ct. at 1953 (reasoning that *Twombly* was grounded in an interpretation of the Federal Rules of Civil Procedure and thus applying the plausibility standard to all civil actions).

[14] Id. at 1950.

[15] Id.

[16] Id. at 1951.

[17] Id.

[18] Id. at 1951-52 (quoting *Twombly*, 550 U.S. at 567).

[19] *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 597 (8th Cir. 2009).

[20] *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290, 1295 (11th Cir. 2010) (stating that in *Iqbal*, the Court found that the defendants' conduct was "at least equally compelling").

[21] Id. at 1290 (citing *Iqbal*, 129 S. Ct. at 1954).

[22] Id. at 1295 (citing *Twombly*, 550 U.S. at 557).

[23] *Phillips v. Bell,* No. 08-1420, 2010 BL 30091 (10th Cir. Feb. 12, 2010) (reversing the district court and dismissing the plaintiff's claim because "more plausible reasons exist" for the defendants' conduct).

[24] *In re Travel Agent Comm'n Antitrust Litig.,*583 F.3d 896, 908 (6th Cir. 2009), *petition for cert. filed,* 78 U.S.L.W. 3566 (U.S. Mar. 18, 2010) (No. 09-1138).

[25] *SeeGrenier v. Jonas*, No. 09-cv-00121, 2010 BL 214266 (D. Vt. Mar. 5, 2010) (quoting *Iqbal* to establish

the "more likely explained by lawful conduct" standard, but rejecting defendant's argument because "the only alternative explanation" was sufficiently contradicted by plaintiff's complaint); *Hogan v. Provident Life & Accident Ins. Co.*, 665 F. Supp. 2d 1273, 1280 (M.D. Fla. 2009) (holding that "if the 'more likely explanations' involve lawful, non-actionable behavior, the court should find that the plaintiff's claim is not plausible") (citing *Iqbal*, 129 S. Ct. at 1950-51).

[26] *See**Twombly*, 550 U.S. at 567 (noting presence of "obvious alternative explanation" for alleged conspiracy).

[27] *See**Iqbal,*129 S. Ct. at 1951-52 (quoting *Twombly*, 550 U.S. at 567).

[28] *See*id. at 1950-52 (characterizing the *Twombly* holding as a conclusion that the alleged illegal behavior was "more likely" explained by lawful behavior, while applying *Twombly* to find that "given more likely explanations" the present allegations did not plausibly establish an unlawful purpose).

[29] *See The Supreme Court, 2008 Term—Leading Cases—Pleading Standards*, 123 Harv. L. Rev. 252, 253 (2009) (arguing that the Court effectively added a probably requirement when it "subtly strengthened" the plausibility standard with the added "more likely explanation" language).

[30] *See**Braden,*588 F.3d at 597.

[31] *See**Burget v. Capital West Sec.*, No. 09-cv-01015, 2009 BL 263572 (W.D. Okla. Dec. 8, 2009) (detailing split within the courts of the Western District of Oklahoma). *Compare**First Nat'l Ins. Co. of Am. v. Camps Servs.,* No. 08-cv-12805, 2009 BL 286757 (E.D. Mich. Jan. 5, 2009) (holding that *Twombly* is inapplicable to affirmative defenses because the requirement of Rule 8(a) of the Federal Rules of Civil Procedure is different than Rule 8(c)), *with Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-cv-10545, 2008 BL 136168 (E.D. Mich. June 25, 2008) (concluding that *Twombly* is applicable and striking defenses), *and**United States v. Quadrini*, No. 07-cv-13227, 2007 BL 173898 (E.D. Mich. Dec. 6, 2007) (holding that *Twombly* "cannot be a pleading standard that applies only to plaintiffs").

[32] *See**Westbrook v. Paragon Sys.*, No. 07-cv-00714, 2007 BL 165962 (S.D. Ala. Nov. 29, 2007).

[33] *See**Holdbrook v. SAIA Motor Freight Line,* No. 09-cv-02870, 2010 BL 49811 (D. Colo. Mar. 8, 2010).

[34] *See**First Nat'l Ins. Co.,*2009 BL 286757.

[35] *See**Henson v. Supplemental Health Care Staffing Specialists*, No. 09-cv-00397 (W.D. Okla. July 30, 2009).

[36] *Romantine v. CH2M Hill Eng'rs, Inc.*, No. 09-cv-00973, 2009 BL 229783 (W.D. Pa. Oct. 23, 2009) (declining to extend *Twombly* to defenses under Rule 8(b) or 8(c)).

[37] *See**Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-cv-00119, 2009 BL 270205 (D.V.I. Dec. 8, 2009) (noting split and concluding that *Twombly* does not extend to affirmative defenses).

[38] *See*Fed. R. Civ. P. 8(a) (requiring that a pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief).

[39] *See*Fed. R. Civ. P. 8(c) (outlining affirmative defenses that a party must state).

[40] *Compare*Fed. R. Civ. P. 8(a)(2) (a short and plain statement of the claim showing that the pleader is entitled to relief), *with*Fed. R. Civ. P. 8(c) (listing affirmative defenses that must be stated but not imposing any requirements as to type of factual statement required).

[41] *See*Fed. R. Civ. P. 8(c).

[42] *See Charleswell,*2009 BL 270205 (concluding that "[t]here is no requirement under Rule 8(c) that a defendant 'show' any facts at all").

[43] *See**CTF Dev., Inc v. Penta Hospitality, LLC*, No. 09-cv-02429 (N.D. Cal. Oct. 26, 2009).

[44] *See**FDIC v. Bristol Home Mortgage Lending, LLC*, No. 08-cv-81536 (S.D. Fla. Aug. 13, 2009) (striking defenses for failing to meet *Twombly* standard); *Holtzman v. B/E Aerospace, Inc.*, No. 07-cv-80551, 2008 BL 112232 (S.D. Fla. May 28, 2008) (concluding that the "same logic holds true for pleading affirmative defenses"—*i.e.,* that a plaintiff cannot respond to an affirmative defense without a sufficient factual allegation).

[45] *See**Fogel v. Linnemann (In re Mission Bay Ski & Bike, Inc.),* No. 07-B-20870, Adv. No. 08-A-55, 2009 BL 193012 (Bankr. N.D. Ill. Sept. 9, 2009) (holding that *Twombly* and *Iqbal* apply to affirmative defenses).

[46] *See**Hayne v. Green Ford Sales, Inc.,*263 F.R.D. 647, 649-50 (D. Kan. 2009) (pleading standard must apply to both plaintiffs and defendants).

[47] *See Safeco Ins. Co.,*2008 BL 136168 (concluding that *Twombly* is applicable and striking defenses); *Quadrini*, 2007 BL 173898 (reasoning that the logic underlying *Twombly* applies equally to complaints and affirmative defenses).

[48] *See**Tracy v. NVR, Inc.*, No. 04-cv-06541, 2009 BL 208909 (W.D.N.Y. Sept. 30, 2009) (observing that "the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense").

[49] *See**Burget*, 2009 BL 263572 (endorsing the application of the *Twombly* approach after weighing the arguments from other jurisdictions).

[50] *See**Teirstein v. AGA Med. Corp.*, No. 08-cv-00014 (E.D. Tex. Mar. 16, 2009) (concluding that *Twombly* is applicable); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.,*No. 05-cv-00233 (W.D. Tex. Sept. 22, 2008) (applying *Twombly* to affirmative defenses).

[51] *See**Bourdeau Bros. v. Montagne (In re Montagne),* No. 08-B-10916, Adv. No. 08-1024, 2010 BL 23874 (Bankr. D. Vt. Feb. 4, 2010) (following precedent from Second Circuit to conclude *Twombly* is applicable).

[52] *See**Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-00335 (W.D. Wis. Sept. 25, 2008) (reasoning that because affirmative defenses are pleadings, they are governed by Rule 8's requirements of a short and plain statement of the defense to conclude *Twombly* applies).

[53] *See**In re Mission Bay Ski & Bike, Inc.,*2009 BL 193012 (rejecting defenses pled as legal conclusions as failing *Twombly* standard).

[54] *See**Hayne,* 263 F.R.D. at 650 (concluding that "[i]t makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses").

[55] *See**Burget*, 2009 BL 263572 (advocating an even-handed approach).

[56] *See**id.*

[57] *See**Hayne,*263 F.R.D. at 650.

[58] *See*Fed. R. Civ. P. 8(b)(1)(a).

[59] *See**Hayne,*263 F.R.D. at 650.

[60] *See*id.

[61] *See*id.(concluding that standard must apply to both plaintiffs and defendants).

[62] As of July 14, 2010, *Iqbal* had been cited 28,166 times. Citing References Search, generated on July 14, 2010.