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Lawsuit Defendants Get Their Own "Stimulus Package"

Bankruptcy practitioners should be aware of the U.S. Supreme Court's recent decision in Ashcroft v. Iqbal, 129 S. Ct. 1937, (2009), which confirmed a new, more subjective standard for evaluating whether a complaint complies with Federal Rule of Civil Procedure 8(a)(2). That Rule, which applies to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7008(a)(2), states that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Since 1957, motions to dismiss for failure to state a claim have been assessed under Conley v. Gibson, 355 U.S. 41, in which the Supreme Court held that "a complaint should not be dismissed 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." The *Conley* approach made motions to dismiss a complaint for failure to state a claim very difficult to win. Two years ago, in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court held that *Conley's* 'no set of facts' standard should be retired, and opted instead for a "plausibility standard." The pleader now had to amplify a claim with sufficient factual statements so as to render the claim "plausible." In order to survive a motion to dismiss, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Because of apparent doubt among reviewing courts whether *Twombly* applies in all cases, or just anti-trust cases such as *Twombly*, the Supreme Court in *Iqbal* confirmed that the *Conley* standard no longer applies in any civil case.

Under *Twombly/Iqbal*, the court embarks on a two-part analysis in determining whether to dismiss a complaint for failure to state a claim. First, the court must accept as true all allegations contained in the complaint, although that tenet does not apply to legal conclusions. Second, the court should consider whether a complaint states a "facially plausible" claim for relief. In turn, determining if a complaint states a plausible claim for relief will be a "context-specific" task that requires the court to "draw on its judicial experience and common sense." Notably, if the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n] – "that the pleader is entitled to relief." Clearly, this new standard gives trial judges considerable discretion in determining whether a complaint satisfies Rule 8(a).

Bankruptcy courts already have dismissed preference and fraudulent conveyance complaints under the new Rule 8(a) standard. See, e.g., In re Caremerica, Inc., 2009 WL 2227212 (July 23, 2009) ("*Caremerica I*"), and 409 B.R. 346 (July 28, 2009) ("*Caremerica II*"). In *Caremerica I*,

after addressing each of the elements of a complaint under Section 547(b) of the Bankruptcy Code, the court found the Trustee's complaint did not plead sufficient factual allegations to establish a claim for relief that is plausible. Among other things, the trustee did not indicate which of the consolidated debtors initiated the transfers at issue, the complaint did not assert facts supporting the existence of an antecedent debt owed by the debtors to the defendants, the trustee did not allege sufficient facts that insolvency was plausible on the dates transfers to alleged insiders were made outside of the presumed 90-day insolvency period, and the allegations did not establish a reasonable inference of insider status. In *Caremerica II* the court dismissed the trustee's constructive fraudulent transfer complaint against a separate defendant under Section 548(a)(1)(B) for not describing the consideration received by each transferor or the debtors' insolvency at the time of the transfer. Without such factual content, the trustee could not show that his constructive fraud theory was plausible.

This new, more stringent pleadings standard suggests that motions to dismiss undoubtedly will become more prevalent and, to avoid the success of such motions, the factual allegations of a complaint should be drafted carefully and exactingly so as to make a claim for relief plausible.

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