

Client Alert.

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The Evolving *Twombly* and *Iqbal* Federal Pleading Standard

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One of the more interesting recent developments in federal procedural law has been the new “plausibility” pleading standard set forth in the twin Supreme Court decisions in *Twombly* and *Iqbal*. Over the past year, we have been successful in using this new pleading standard to win motions to dismiss in certain cases, and we have also watched the appellate courts reshape the pleading landscape in a few important ways.

APPLICATION OF THE NEW PLEADING STANDARD

After the U.S. Supreme Court announced in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) the new standard that a plaintiff must plead enough facts to “nudge[] their claims across the line from conceivable to plausible,” it subsequently decided *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), which reaffirmed this new standard and its applicability to all civil cases.

Since then, we have found that the “plausibility” pleading standard can be successfully employed at the outset of a case to clarify the pleadings and put a plaintiff to the test of stating a facially plausible basis for his or her claims. In pharmaceutical products liability litigation, for example, we have successfully used “*Twiqbal*” motions to force proper product identification before the action can continue on the merits.

Specifically, in cases where plaintiffs have sued a group of potentially liable defendants without first identifying which defendant is responsible for the drug at issue, courts have regularly granted our motions to dismiss, holding that plaintiffs’ generic pleading of the same allegations against all defendants is insufficient. For example, in *Timmons v. Linvatec Corp.*, 2010 U.S. Dist. LEXIS 14057 (C.D. Cal. Feb. 9, 2010), the court granted defendants’ motion to dismiss because plaintiffs failed to identify the pharmaceutical defendant responsible for the drug at issue, relying instead on allegations asserted against multiple pharmaceutical defendants.

Similarly, in *Adams v. I-Flow Corp.*, 2010 U.S. Dist. LEXIS 33066 (C.D. Cal. Mar. 30, 2010), we represented one of 22 named defendants in a case involving personal injury, negligence, and fraud claims brought by 141 individual plaintiffs. These 141 plaintiffs had undergone surgeries at different times, in different hospitals, in 37 states and in Canada, that were performed by different surgeons over a span of 10 years. We moved to dismiss plaintiffs’ complaint for failure to meet the federal pleading standards, and the court agreed with us, holding that “the Complaint never specifies that any one of the defendants, as opposed to the other 21 defendants, caused each plaintiff’s claimed injury. As such, plaintiffs plead nothing more than the sheer possibility that any particular defendant might have manufactured the product that allegedly injured each plaintiff.” Accordingly, the claims of all 141 plaintiffs were dismissed, and—to date—have not been re-filed against our client.

We have filed similar motions in similar cases in at least seven different states. While not all have been successful, the majority have resulted in dismissal, with courts telling plaintiffs to improve the specificity of their pleading before re-filing.

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In one instance, when plaintiffs failed to submit any opposition to our “*Twiqbal*” motion within the time provided by the court, the Arizona District Court judge promptly dismissed plaintiffs’ claims, without leave to amend.

While courts will typically grant these motions with leave for plaintiffs to amend their complaints, the practical effect for our clients is that they avoid having to respond to discovery or proceed beyond the pleading stage unless and until they are actually identified as a proper defendant. Moreover, in some instances, we have seen plaintiffs decide to drop their claims against entire groups of defendants where they decide the product identification effort is too difficult.

In evaluating whether to bring a motion to dismiss at the outset of the case, it is still important to keep in mind that the heightened pleading standard is not a “mini summary judgment” motion. The district courts will not find facts or weigh the credibility of factual allegations. Recent cases have shown that appellate courts are ready to remind district courts that plaintiffs’ allegations are assumed to be true if they are facially plausible and not merely legal conclusions. Judges are looking for well-pleaded facts, not deciding facts in a Rule 12(b)(6) motion. Accordingly, if a plaintiff has set out sufficiently “plausible” allegations, regardless of their veracity, a motion to dismiss is not likely to succeed.

RECENT PATTERNS IN JUDICIAL APPLICATION OF THE NEW PLEADING STANDARD

The appellate courts have reshaped the post-*Twombly* and *Iqbal* landscape in three important ways:

- (1) rather than developing a pleading standard specific to a particular area of law, the majority of the circuits have taken a context-specific approach to the evaluation of the sufficiency of pleadings, while also policing lower court decisions that have been too lenient or too aggressive in applying the new “plausibility” standard;
- (2) most appellate courts seem to apply the new pleading standards more leniently with pro se plaintiffs or when the claim at issue is deemed not to require detailed pleading; and
- (3) after initially being split on the issue, the recent trend is for courts to reject application of the *Twombly* and *Iqbal* standard to pleading of affirmative defenses.

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