CLEARY GOTTLIEB Alert Memo

NEW YORK JUNE 1, 2009

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Ashcroft v. Iqbal Provides Guidance On Heightened "Plausibility" Pleading Standard

In its recent decision in *Ashcroft v. Iqbal*,[1] the Supreme Court delivered its first interpretation of the new (and higher) "plausibility" pleading standard created in its landmark 2007 decision in *Bell Atlantic Corp. v. Twombly*,[2] which overturned the venerable *Conley v. Gibson*[3] "no set of facts" standard.

Iqbal confirmed that the plausibility standard requires factual allegations in a complaint that are more than "merely consistent" with wrongful conduct. It also confirmed that the plausibility standard applies to all federal litigation, not just the antitrust context in which it was announced in *Twombly*, and that it will apply with particular force in cases with policy reasons for limiting discovery, such as cases involving sprawling discovery or immunity. Perhaps most important, *Iqbal* provided a clear three-step framework for assessing Rule 12(b)(6) motions to dismiss. Thus, *Iqbal* has provided defendants with an important advantage at the motion to dismiss stage – and may force plaintiffs to think twice before bringing speculative litigation.

I. *Iqbal*: the facts

The defendants in this high-profile case included former Attorney General John Ashcroft and FBI Director Robert Mueller, who were sued for allegedly condoning the unconstitutional detention of Javaid Iqbal, a Pakistani detained on identity fraud charges following a sweeping investigation in the wake of the September 11, 2001 attacks. During his detention, Iqbal allegedly was subject to abuses such as beatings, unnecessary body-

[1] *Ashcroft v. Iqbal*, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009).

[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[3] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[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 which would entitle him to relief.").

cavity searches and denial of opportunities to pray.[4] Iqbal ultimately pled guilty to criminal charges, served a term of imprisonment and was removed to Pakistan.[5]

Once in Pakistan, Iqbal filed a *Bivens* action against numerous federal officials and corrections officers. With respect to Ashcroft and Mueller, Iqbal challenged the allegedly discriminatory policy of classifying certain post-September-11th detainees as "of high interest," and subjecting them as a result to abusive conditions of detention.[6] The complaint made five key allegations on which the case turned:[7]

- "[T]he [FBI], under the direction of defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."

- Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

- "The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001."

- Ashcroft was the "principal architect" of the policy.

- Mueller was "instrumental in [the policy's] adoption, promulgation, and implementation."

The complaint did not include any factual allegations connecting Ashcroft and Mueller to the specific abuse Iqbal suffered or indicating their actual purpose to discriminate.

Ashcroft and Mueller moved to dismiss on grounds of qualified immunity,[8] relying primarily on *Twombly*. They argued that top-level government executives are not ordinarily

[4] *Iqbal*, 2009 WL 1361536, at *6.

[5] *Id.* at *5.

[6] *Id.* at *6.

[7] *Id.*

[8] *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007) ("A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law.").

involved in the day-to-day interpretation and implementation of their broad policies, and without factual allegations that they personally and purposefully made discriminatory policies, they could not plausibly have violated Iqbal's "clearly established" rights.[9] The Second Circuit upheld the district court's denial of the motion to dismiss, and permitted Iqbal to "probe" his allegations against Ashcroft and Mueller through limited discovery from other, lower level defendants.[10]

The Supreme Court reversed, holding that Iqbal's complaint did not contain enough "factual content" to "plausibly suggest" that Ashcroft and Mueller adopted detention policies for the purpose of discrimination, and that discovery could not be used to cure a defective complaint.[11] In so holding, the Court confirmed that Federal Rule 8(a)(2) is an independent and important barrier to commencing litigation; it unambiguously rejected the "careful-case-management approach" as an alternative to weeding out meritless litigation; and it provided an analytical framework for courts and litigants considering Federal Rule 12(b)(6) motions to dismiss.[12]

II. *Twombly* sets the stage

To appreciate the significance of *Iqbal*, it is necessary to understand why *Twombly* reinterpreted Rule 8(a)(2) to make it more difficult for plaintiffs to state a claim for relief.

In *Twombly*, a putative class of subscribers brought an action under Section 1 of the Sherman Act[13] against local telephone and Internet line operators, claiming that they had conspired to restrain competition in each other's local markets. The complaint alleged facts suggesting that the operators engaged in "parallel conduct" (i.e., acted in a coordinated fashion), but it did not allege facts suggesting an actual agreement or conspiracy had taken place. Only agreements and conspiracies – not parallel conduct – are illegal under Section 1 of the Sherman Act.

The Supreme Court held that an allegation of parallel conduct, "without more," fails to state a claim because it is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the

[9] *Iqbal*, 2009 WL 1361536, at *11.

[10] *Iqbal*, 490 F.3d at 178 ("We are mindful too that, for high-level officials, this discovery might be either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations.").

[11] *Iqbal*, 2009 WL 1361536, at *15-16.

[12] *Id.*

[13] 15 U.S.C. § 1 (2004).

market."[14] The complaint had to include "enough factual matter (taken as true) to suggest that an agreement was made."[15] Summarizing, the Court stated that "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[16]

There were two stated motivations for *Twombly*'s plausibility standard, both of which were reiterated in *Iqbal*. First, the Court was concerned about "sprawling, costly, and hugely time-consuming" discovery.[17] The Court described its plausibility standard as requiring "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[18]

Second, the Court expressed doubt about the ability of district courts to identify and manage "false positives" (i.e., meritless litigation) after the motion to dismiss stage.[19] The Court found it "self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries'; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[20]

III. The Supreme Court's Decision in *Iqbal*

The Supreme Court's decision in *Iqbal* helps clarify the scope and meaning of *Twombly*'s "plausibility" pleading standard by providing a clear and generally applicable

[14] *Twombly*, 550 U.S. at 554.

[15] *Id.* at 556.

[16] *Id.* at 557.

[17] *Id.* at 560 n.6; *see also id.* at 559 ("[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim.").

[18] *Id.* at 556.

[19] *Id.* at 554; *see also id.* at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side") (internal citation omitted); *compare Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993) ("In the absence of such an amendment [to Rules 8 and 9], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

[20] *Twombly*, 550 U.S. at 559 (internal citation omitted).

three-step analysis for a court considering a Rule 12(b)(6) motion to dismiss for failure to state a claim.

First, a court must precisely identify each element of the cause of action.[21] This provides a framework for the rest of the inquiry. In the context of the *Bivens* action against Ashcroft and Mueller, the Court determined that Iqbal was required to sufficiently plead that they (a) violated the Constitution through their *own individual actions*, and (b) adopted and implemented a policy of classifying post-September-11 detainees as "of high interest" *for the purpose of* discriminating on account of race, religion, or national origin.

Second, a court must identify the allegations in the complaint that are *not* entitled to an "assumption of truth."[22] Such allegations include mere "legal conclusion couched as a factual allegation" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[23] Although conclusory allegations may help provide a "framework of a complaint," they are to be disregarded when assessing the sufficiency of the pleadings under Rules 8(a)(2) and 12(b)(6).[24] Applying these considerations to *Iqbal*, the Court found that the allegation that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to abuse "as a matter of policy" was no more than a "formulaic recitation of the elements" of a Constitutional discrimination claim.[25] Similarly, the Court disregarded Iqbal's allegations that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental" in adopting it.[26]

Third, a court must consider the remaining factual allegations to determine whether they "plausibly" suggest an entitlement to relief.[27] The Court acknowledged that determining whether allegations are plausible may be context specific and draw on "judicial experience and common sense."[28] However, it also attempted to provide some concrete guidance. The Court indicated that while the plausibility standard does not require factual

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[21] *Iqbal*, 2009 WL 1361536, at *10 (observing that as in *Twombly*, "we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity").

[22] *Id.* at *13.

[23] *Id.*

[24] *Id.*

[25] *Id.* at *14.

[26] *Id.*

[27] *Id.*

[28] *Id.* at *13.

allegations that *probably* will turn out to be true, it does require allegations that are more than "merely consistent with" wrongful conduct.[29] Applying these considerations to the complaint in *Iqbal*, the Court evaluated the two remaining factual allegations: (a) that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11"; and (b) that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001."[30] The Court held that although these allegations were consistent with unlawful discrimination, they were equally consistent with the legitimate policy of detaining illegal aliens who had potential connections to those responsible for the September 11 attacks.[31] Accordingly, unlawful discrimination was not a "plausible conclusion" from the allegations of the complaint, and dismissal was required.[32]

In addition to providing this analytical guidance, *Iqbal* also made two important clarifications about *Twombly*'s scope. First, the Court disavowed any notion that *Twombly* is limited to the antitrust context. *Iqbal* clearly held that *Twombly* interpreted and applied Rule 8(a)(2), which governs pleadings in "all civil actions."[33] Second, the Court confirmed that resolving a motion to dismiss "does not turn on the controls placed upon the discovery process,"[34] and that judicial management of the discovery process cannot substitute for a threshold evaluation of whether the complaint alleges facts that plausibly suggest a valid claim. In other words, a court may no longer permit a deficient complaint to proceed on the theory that limited discovery may help test conclusory allegations. Where a complaint is deficient under Rule 8, there is no entitlement to discovery, "cabined or otherwise."[35]

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[29] *Id.* at *12. The Court rather loosely tethered this guidance to the text of Federal Rule 8(a)(2). The court stated that "where 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.'" *Id.* at *13 (citing Fed. R. Civ. P. 8(a)(2)).

[30] *Id.* at *14 (quoting complaint).

[31] *Id.* at *15 ("On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the Untied States and who had potential connections to those who committed terrorist acts. As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.") (internal citation omitted).

[32] *Id.*

[33] *Id.* at *16.

[34] *Id.*

[35] *Id.* at *17.

IV. **Conclusion**

The Supreme Court's decision in *Iqbal* has significantly clarified *Twombly*'s plausibility pleading standard and provided important guidance to practitioners and courts. While a few important issues remain unanswered – such as the precise meaning of "plausibility" and when an allegation should be considered "conclusory" – *Iqbal* should undoubtedly force plaintiffs to think twice before bringing speculative litigation.

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Litigation and Arbitration" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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