

Plausible Allegations

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The significant tool provided by the Supreme Court for combating unsubstantiated actions is applicable in class action and mass torts contexts to challenge plausibility and shotgun pleadings.

Pleading Standards in Mass Tort Cases After *Iqbal*

The United States Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct.1937 (2009), has the potential to alter the standard for initial pleadings. As one wry commentator has stated, "Justice Kennedy's 5-4

opinion appears to be a groundbreaking procedural decision... think *Hamdi v. Rumsfeld* meets *Anderson v. Liberty Lobby*, yielding a perfect nerd storm that swept up both political junkies and law geeks." John P. Elwood, *What Were They Thinking: The Supreme Court In Revue, October Term 2008*, 12 Green Bag 2d 429 (Summer 2009). For decades the "notice pleading" standard for stating a cause of action—established with the Court's 1957 decision in *Conley v. Gibson*, 355 U.S. 41 (1957)—favored plaintiffs with its remarkable liberality, deeming minimal factual allegations in a complaint sufficient to subject defendants to expensive and time-consuming discovery. *Iqbal* reflects a notable step toward restoring balance in pleading standards by establishing a "plausibility" standard requiring sufficiently substantiated allegations in a complaint that lead to a reasonable inference of liability, defined as outlined further below.

This standard effectively requires a court

to weigh a claim's merits when a case commences, rather than only at the summary judgment stage. The decision likely will have direct and immediate impact on mass tort cases, class actions, and other complex litigation. This article will first survey the pre-*Iqbal* landscape of mass torts and class actions under *Conley*'s liberal pleading standards. The second section will examine the Court's holding in *Iqbal* and the cases leading up to it. The final section will discuss post-*Iqbal* decisions and the application of its new standard. Senator Specter has introduced a bill to restore *Conley* as the governing standard for federal pleading in civil cases, and a similar bill is expected to be introduced in the House. In the meantime, however, defense counsel must consider the implications of *Iqbal*.

Pre-*Iqbal* Pleading Standards in Mass Torts and Class Action

Federal Rule of Civil Procedure 8(a)(2)



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has always required a pleading to contain a “short and plain statement of the claim.” Under *Conley v. Gibson*, which involved a class action by African-American railroad clerks who alleged that their union had breached its duty of fair representation by discriminating against them, the Court held that any defendant that sought dismissal of a complaint faced the onerous burden of having to establish “beyond doubt” that the plaintiff could prove “no set of facts” entitling him/her to relief. As the *Conley* court wrote:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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 which would entitle him to relief.

Conley v. Gibson, 355 U.S. at 45–46. This meant that a plaintiff needed to plead only a general description of events sufficient to give the defendant “fair notice” of the basic nature of the claim. *Id.* at 47.

The traditional method of challenging a pleading’s sufficiency in federal court has been a motion under Federal Rule of Civil Procedure 12(b)(6). In assessing the merits of a rule 12(b)(6) motion, established precedent required a trial court to assume all factual allegations set forth in the complaint are true, *U.S. v. Gaubert*, 499 U.S. 315, 327 (1991), and to construe them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). These requirements, combined with the liberal pleading standard announced in *Conley*, severely limited a defendant’s ability to extricate itself from a potentially expensive action in the pleading stage.

For example, in *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268 (M.D. Ala. 1999), a group of property owners—individually and on behalf of a putative class—sued a group of oil companies alleging that underground storage tanks owned by the defendants had leaked and caused or threatened to cause damage to their properties. Their claims sounded in negligence, nuisance, trespass, and fraudulent concealment. The defendants moved to dismiss. The complaint was directed to the “defendants” generally and, among other things, the motion challenged the plaintiffs’ failure

to identify particular companies as having caused harm to a particular plaintiff. Citing the liberal pleading standards embodied in rule 8(a), the magistrate judge recommended denying the defendants’ dismissal motion. *Id.* at 1276. He also rejected the defendants’ contention that the pleading was defective because it contained little if any factual allegations regarding the plaintiffs and their property. *Id.* at 1277. Regarding the fraudulent concealment allegations of the complaint, the district court adopted the magistrate judge’s rationale, which was:

Defendants claim that Plaintiffs fail to state a valid claim for fraudulent concealment because the Complaint “does not allege that any named plaintiff was induced to take or forebear any specific action; it does not allege that any named plaintiff was prevented from discovering a claim, or even that any named plaintiff had a valid claim that was concealed; and it does not allege that the alleged concealment caused any named plaintiff any damages.” The court finds that the face of the Complaint demonstrates that these elements are sufficiently pleaded.

First, the Complaint states that “Plaintiff class members reasonably relied upon Defendants’ misrepresentations and upon Defendants’ active, fraudulent concealment of Plaintiffs’ injuries and claims to their detriment” and that “Defendants’ fraudulent concealment of the scope of contamination from Defendants’ UST sites, has caused and continues to cause Plaintiffs to be unaware of the scope of contamination from Defendants’ UST’s.” The Complaint further states that “the continuing and ongoing conspiracy between and amongst Defendants has prevented and continues to prevent Plaintiffs from knowing of, or understanding, the scope of contamination or potential contamination on their property.” Further, Plaintiffs allege that, because of Defendants’ fraudulent concealment, “Plaintiffs are unable to discover the scope or extent of contamination.” Based on these allegations, the court finds that Plaintiffs have sufficiently pleaded that they were induced to refrain from acting based on Defendants’ fraudulent concealment and that valid claims may have been concealed.

Peters v. Amoco Oil Co., 57 F. Supp. 2d at 1282–83 (internal citations omitted). The magistrate judge also rejected the defendant’s argument that plaintiffs’ pleading insufficiently pled the conspiracy allegations. *Id.* at 1285. (“It is apparent that Plaintiffs have pleaded with as much specificity as is possible at this early stage of the proceedings to satisfy the requirements of

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summary judgment typically follows discovery, meritless cases have enjoyed access to the court system and, therefore, acquired “value” to claimants.

the four relevant jurisdictions. The Plaintiffs have alleged an agreement between two or more Defendants. They have sufficiently stated causes of actions for the claims underlying the conspiracy claims, to wit, trespass, nuisance, and fraudulent concealment.”). On review, the district court judge agreed and affirmed the magistrate judge’s decision. Seven years later, however, the district court granted the defendants’ motion for summary judgment on the conspiracy allegations. *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175 (M.D. Ala. 2006).

In *United States v. Baxter Int’l, Inc.*, 345 F.3d 866 (11th Cir. Ala. 2003), the government attempted to intervene in a class action against manufacturers of silicone breast implants. As part of an earlier settlement, certain of those manufacturers had agreed to cover certain health-care expenses incurred by or on behalf of qualified members of the plaintiff class. The government sought to recover sums it paid on behalf of Medicare beneficiaries who received treatment related to silicone breast implants. The government did not identify the beneficiaries for whose care reimbursement was sought. The district court

dismissed the government's complaint in intervention for failure to state a claim. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 174 F. Supp. 2d 1242 (N.D. Ala. 2001). On appeal, the Eleventh Circuit reversed, citing *Conley*:

Because the Federal Rules embody the concept of liberalized "notice pleading," a complaint need contain only a statement calculated to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47, 78 S. Ct. at 103; see also *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1086 (D.C. Cir. 1998) ("[A] plaintiff need not allege all the facts necessary to prove its claim."). We have observed that the threshold of sufficiency to which a complaint is held at the motion-to-dismiss stage is "exceedingly low." See *In re Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995) (For better or for worse, the Federal Rules of Civil Procedure do not permit district courts to impose upon plaintiffs the burden to plead with the greatest specificity they can.).

Baxter Int'l, Inc., 345 F.3d at 881.

In addition, the Eleventh Circuit pointed out that the government's complaint in intervention to recover payments made on behalf of unnamed and unknown beneficiaries was similar to a class action in some respects, and it discussed class action pleading standards under the *Conley* regime:

The situation presented here—an intervenor bringing a claim on the basis of injury to a large group of others, the identities of whom the intervenor claims cannot be determined without discovery—is not unlike that commonly presented in a class action, such as the one that underlies our case. In a class action, it is sufficient that a complaint generally give the defendant notice of the nature and scope of the plaintiffs' claims; it is not necessary that the class representatives plead evidence or otherwise meet any burden beyond the minimal Rule 8 standard. See 7B Wright, Miller & Kane, *Federal Practice & Procedure* §1798 (2d ed. 1986) at 417–18 ("All of the pleading provisions of the federal rules are applicable in class actions and operate

in much the same fashion as they do in other litigation contexts.... No greater particularity is necessary in stating a claim for relief in a class action than in other contexts."); Alba Conte & Herbert B. Newberg, 6 *Newberg on Class Actions* §18:46 (4th ed. 2003) ("It is not necessary... that class members be specifically identified; the plaintiff need not name names. In addition, the complaint need not set forth the exact number of class members. It is sufficient to indicate the approximate size of the class and provide or describe facts making ultimate identification of class members possible when that identification becomes necessary.").

Baxter Int'l, Inc., 345 F.3d at 882.

In light of what it viewed as the applicable pleading standards, the Eleventh Circuit "readily" concluded that the district court erred in dismissing the government's complaint in intervention. *Baxter Int'l, Inc.*, 345 F.3d at 885.

Similarly in the mass tort context, defendants have faced complaints that made generic allegations against multiple defendants such as "Plaintiff has been exposed to Defendants' products resulting in harm." These complaints failed to identify a specific defendant or defendants or specific products, and so forth. Other complaints have been filed by multiple plaintiffs containing few if any allegations regarding plaintiff exposure and injuries. Yet under the *Conley* standard, these cases might survive a dismissal motion. See, e.g., *Duffin v. Honeywell Int'l, Inc.*, 312 F. Supp. 2d 869, 871 (N.D. Miss. 2004) (holding in a mass-joined asbestos action under Mississippi law, that "any suggestion that plaintiffs were required to set forth detailed allegations against the local retailers" lacked merit); *Miller v. American Heavy Lift Shipping*, 231 F.3d 242 (6th Cir. 2000) (holding that allegations the plaintiffs' decedents were injured as a result of exposure to "asbestos and hazardous substances other than asbestos," were sufficient to cover subsequent allegations of benzene-related claims); *In re Johns-Manville/Asbestos Cases*, 511 F. Supp. 1229, 1232 (N.D. Ill. 1981) ("a complaint stating a cause of action sounding in tort need contain nothing more than a short and plain statement of the basis for the suit"); c.f., *Aaberg*

v. ACandS Inc., 152 F.R.D. 498, 501 (D. Md. 1994) ("It is plain to this Court that the 1,000 plaintiffs' claims, set forth in this complaint simply as a skeleton claim of maritime exposure to asbestos, without any attempt at individualization or description of the particular circumstances and exposures of the individual plaintiffs, let alone the products and/or defendants alleged to have been responsible, do not satisfy the "same transaction or occurrence" test of FED. R. CIV. P. 20(a).").

Additionally, the *Manual for Complex Litigation* provides for the use of "master pleadings" in certain mass torts case. The sample "Mass Tort Case-Management Order" describes "a master complaint containing allegations that would be suitable for adoption by reference in individual cases." *Manual for Complex Litigation (Fourth Ed.)*, §40.52 at 778 (2005). It further proposes "a master class action complaint containing allegations that encompass the entire range of allegations and types of proposed class actions contained in individual cases filed in this Court or transferred to this court by the MDL panel." *Id.* As one court has noted:

Although the master complaint consolidates all claims, "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97, 53 S. Ct. 721, 77 L. Ed. 1331 (1933). "Consolidated actions retain their separate character." *In re TransTexas Gas Corp.*, 303 F.3d 571, 577 (5th Cir. 2002). The master complaint is a procedural device which is used to streamline pretrial motions and discovery; however, the master complaint does not supersede the underlying cases in such a way as to render them non-existent. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 964–65 (9th Cir. 2001). The master complaint merely becomes the operative pleading in the case, and does not dissolve the individual cases. *Id.* at 965. See also Diana E. Murphy, *Unified and Consolidated Complaints in Multi-District Litigation*, 132 F.R.D. 597, 597–98 (1991) (discussing the use and conse-

quences of master complaints in complex litigation).

Turner v. Murphy Oil USA, Inc., 2005 U.S. Dist. LEXIS 45123 (E.D. La. 2005).

Courts have, in the past, addressed motions to dismiss master complaints. For example, in *In re Bridgestone/Firestone Inc. v. Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), the master complaint combined “dozens of class action complaints involving Firestone tires that were filed in or removed to federal district courts throughout the country and transferred to this MDL proceeding.” 155 F. Supp. 2d at 1076–77. In denying a motion directed to the pleading deficiencies of the master complaint, Judge Parker relied on the liberal standard of rule 8(a) to hold that plaintiffs were not required even to make a factual allegation that would place their claims within the relevant statute. *Id.* at 1107. See also, *Turner*, 2005 U.S. Dist. LEXIS 45123 at *6–7 (applying *Conley* and holding that where appropriate, dismissal of a portion of the master complaint will apply equally to individual complaints).

Even in the pre-*Iqbal* era, defendants did have some successes. For example, in *Wajda v. R.J. Reynolds Tobacco Co.*, 103 F. Supp. 2d 29 (D. Mass. 2000), the court addressed the merits of the plaintiff’s pleading in a smoking and health case:

It is essentially a form complaint, one of many similar complaints filed in this Court by counsel who represent this plaintiff as well as others asserting claims related to tobacco use. This complaint, like the others, mounts a general attack on the tobacco industry, but, unlike a well-pleaded complaint, it reveals very little about the plaintiff’s individual case. The inadequacy of the pleading is addressed theory by theory below.

103 F. Supp. 2d at 32. The district court then analyzed each theory of liability in light of the limited allegations and found each lacking. *Id.* at 32–38. As such, it dismissed the complaint but granted the plaintiff additional time to file an amended complaint. *Id.* at 38.

Nonetheless, in effect *Conley* has precluded most trial courts from assessing the underlying merits of a case at the outset, pushing that responsibility to the summary judgment stage. Because in most cases summary judgment typically follows

discovery, meritless cases have enjoyed access to the court system and, therefore, acquired “value” to claimants and their counsel. Particularly in mass torts or class actions, defendants have faced a “Morton’s Fork”: either pay to settle a meritless case or pay potentially massive discovery costs only to face the vagaries of trial. This system engendered by the liberal “notice pleading” standard of *Conley* remained the rule for 50 years.

Twombly and Iqbal— Revisiting Conley

In 2007, the Court decided *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), a 7–2 decision that abrogated *Conley*’s “no set of facts” standard. In *Twombly*, a number of consumers brought a class action against the “incumbent local exchange carriers” (ILECs) of telephone and Internet services. *Id.* at 549–50. The complaint asserted that the ILECs had conspired to restrain trade by engaging in “parallel conduct” in their respective service areas designed to inhibit the growth of upstart “competitive local exchange carriers” (CLECs). *Id.* at 550. The ILECs allegedly made unfair agreements with the CLECs for access to the ILEC networks, provided inferior connections to the networks, overcharged the CLECs, and billed in ways designed to sabotage the CLEC’s relations with their customers. *Id.* The Court held that the plaintiffs’ complaint had failed to state a claim because it had not alleged facts sufficient to find that the ILECs had engaged in a conspiracy. The Court noted that the “parallel conduct” alleged by the plaintiffs did not indicate unlawful activity, as common perceptions of the market just as likely could explain the ILECs similar business actions. *Id.* at 555. As the Court wrote, proof of nothing more than “parallel conduct” was insufficient to prove antitrust conspiracy, as such evidence did not exclude the possibility of independent action. *Id.*

The Court continued that, although a complaint did not “need detailed factual allegations,” a “formulaic recitation of the elements of a cause of action” was not enough. *Id.* It then rejected a literal reading of *Conley*’s “no set of facts” standard, stating that such a rule would permit wholly conclusory statements of a claim to withstand a motion to dismiss. *Id.* at 561.

According to the Court, judicial application of such a literal reading would allow a claim to survive on nothing more than a mere possibility that a plaintiff would later develop some undisclosed set of facts in support of the claim. *Id.* As the Court wrote, “[*Conley*’s] “no set of facts” language can be read in isolation as saying that any statement revealing the theory of the

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claim will suffice unless its factual impossibility may be shown from the face of the pleadings;...” *Id.*

Noting that this “famous observation” had caused confusion for 50 years, the Court stated that the “no set of facts” language “[had] earned its retirement” and was a “phrase [that] is best forgotten as an incomplete, negative gloss on an accepted pleading standard...” *Id.* at 563.

In place of the “no set of facts” rule, the Court set forth a plausibility standard that required plaintiffs to provide facts in their complaints sufficient to support a judicial finding that the claim asserted was not merely possible but plausible. *Id.* at 569. The Court emphasized, however, that it was not instituting a heightened pleading of specific facts but only requiring sufficient facts to show that a claim was plausible, rather than merely possible, on its face. *Id.* at 570.

Twombly appeared to abrogate *Conley* and set a foundation for a new pleading standard, regardless of the Court’s proclamation reservation that the decision did not mandate a heightened pleading standard. But soon after the decision, its scope became unclear. Some courts and commentators began to wonder whether the Court intended to limit *Twombly*’s abrogation of *Conley* to the antitrust context for two reasons. See *discussion*, Robert G. Bone,

Twombly, *Pleading Rules*, and the *Regulation of Court Access*, 94 IOWA L.R. 873, 881 (Mar. 2009). First, a significant portion of *Twombly* addressed the specific requirements of proving an antitrust “parallel conduct” claim, as well as the attendant costs and burdens of antitrust discovery generally. *Twombly*, 550 U.S. at 556–58. Second, within a month of the ruling, the Court

The facts alleged must lead to the reasonable inference of a defendant’s culpability.

issued two additional opinions on initial pleading sufficiency that raised questions about *Twombly*’s scope.

Most notably, in *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197 (2007), the Court appeared to contradict *Twombly*’s interpretation of Rule 8(a)(2) pleading requirements. In *Erickson*, a *pro se* inmate had filed a §1983 action for unconstitutional denial of medical treatment against certain officials of the Colorado correctional facility in which he was incarcerated. *Id.* at 2198. As the Court summarized his complaint, he alleged that “a liver condition resulting from hepatitis C required a treatment program that [the] officials had commenced but then wrongfully terminated, with life-threatening consequences.” *Id.* at 2197–98. The district court dismissed his case, and the Tenth Circuit affirmed, noting that the inmate’s allegations were “conclusory.” *Id.* at 2198. The Supreme Court wrote that, as the Tenth Circuit’s holding departed “in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure,” it would grant review. *Id.* The Court then reversed the Tenth Circuit, noting that Rule 8(a)(2) required only a “short and plain statement of the claim.” *Id.* at 2200. The Court then quoted *Twombly*’s *Conley* quote, seemingly out of context, that “[s]pecific facts are not necessary,” and the “statement need only ‘give the defendant fair notice of what the... claim is and the grounds upon which it rests.’” *Id.*

Thus, in *Erickson* the Court made no mention of the “plausibility” standard it had seemed to articulate in *Twombly*, instead citing its previous decision for propositions it had appeared to abrogate. Taken together, the *Twombly* and *Erickson* decisions therefore created a significant question as to whether the Court had intended the former opinion to apply only in the antitrust context. See John H. Bogart, *Living With Twombly*, 22 UTAH B.J. 23 (Mar./Apr. 2009) (discussing confusion created by the two decisions). A couple of weeks after deciding *Erickson*, the Court issued a third pleadings opinion, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499 (2007). In this opinion, the Court addressed the standard for motions to dismiss in the context of a securities fraud class action. In determining whether the complaint had pleaded facts sufficient to give rise to a “‘strong’ inference of scienter,” which was required by the Private Securities Litigation Reform Act (PSLRA), the Court held that a comparative inquiry was necessary to properly take into account plausible, opposing inferences from the facts alleged. *Id.* at 2509. A trial court weighing a motion to dismiss, therefore, “must consider plausible nonculpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.” *Id.* at 2510.

Although the Court set forth a standard in *Tellabs* similar to that espoused in *Twombly*, it did not reference *Twombly*. Instead, in *Tellabs* the Court heavily referred to congressional intent, noting that the PSLRA expressly required plaintiffs to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.* at 2508 (citing 15 U.S.C. §78u-4(b)(2)). The *Tellabs* majority’s reliance on the PSLA statutory language likely explains why the decision has received little attention in the debate about whether *Twombly* altered the Rule 8(a)(2) pleading standard. Even though *Tellabs* may not have provided support for a new interpretation of Rule 8, the decision is nonetheless instructive, due to the difference between the majority opinion and Justice Scalia’s separate opinion on the strength of the inference of scienter that a complaint must have.

In holding that the plaintiffs’ complaint had failed to state a claim under the PSLRA,

the *Tellabs* majority stated that “[a] complaint will survive... only if a reasonable person would deem the inference of scienter cogent and *at least as compelling as any opposing inference* one could draw from the facts alleged.” *Id.* at 2510 (emphasis added). On the other hand, in a separate opinion concurring in the judgment, Justice Scalia criticized the majority’s standard. Justice Scalia wrote that the phrase “strong inference” in the statute suggested a higher test than the majority’s “at least as compelling” inference standard. *Id.* at 2513. Giving the phrase its normal meaning, Justice Scalia argued that “the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.” *Id.* (emphasis in original). As Justice Scalia continued, a mere *possibility* is not a *strong inference*, because an “inference” connotes a “belief” in that which is inferred. *Id.* Thus, the pleading should lead to an inference of scienter more plausible than the converse.

Although *Erickson* and *Tellabs* may have created confusion about whether the plausibility standard for assessing pleading sufficiency applied outside the antitrust and securities fields, in *Iqbal* the Court clarified that pursuant to Federal Rule of Civil Procedure 8, the “plausibility” standard is applicable in “all civil actions” proceeding in the federal district courts. *Iqbal*, 129 S. Ct. at 1953. The Court’s *Iqbal* decision notably solidifies the requirement that a court consider alternative explanations for a plaintiff’s allegations rather than presume that a plaintiff’s allegations are true. A plaintiff must do more than simply state unsubstantiated, “non-conclusory” facts to support a claim: the facts alleged must lead to the reasonable inference of a defendant’s culpability. If a plaintiff only offers an unsubstantiated, “non-conclusory” explanation to support allegations in a complaint, that plaintiff has failed to meet its pleading burden, and a court may properly dismiss the complaint.

Similar to the *Erickson* case, *Iqbal* concerned a §1983 action, though with a higher profile, for violation of constitutional rights arising from imprisonment. In *Iqbal*, the respondent, Javaid Iqbal, was a Muslim Pakistani who was arrested on criminal charges following the September 11, 2001 attacks. *Id.* at 1942. Following the 2001

attacks, the FBI and Department of Justice detained 184 persons categorized as of “high interest” to the federal government’s investigation of the attacks. *Id.* at 1943. These high-interest detainees were held under restrictive conditions designed to prohibit their communication with the outside world. *Id.* Iqbal was one of the high-interest detainees, and he had been arrested by agents of the FBI and INS on charges of fraud in relation to identification documents. *Id.* Iqbal pleaded guilty to the criminal charges, served a term of imprisonment, and subsequently was deported to his native Pakistan. *Id.* His lawsuit did not challenge the arrest or confinement but asserted unconstitutionally harsh treatment during his confinement. *Id.* at 1943–44. His complaint asserted that the government’s jailors had “kicked him in the stomach, punched him in the face, and dragged him across” his cell without justification, subjected him to strip and body cavity searches without justification, and refused to permit him to pray in accordance with his Islamic faith, in violation of his First and Fifth Amendment rights under the U.S. Constitution. *Id.* at 1944. Iqbal’s complaint further alleged that former Attorney General John Ashcroft and FBI Director Robert Mueller had approved the policy of holding post-September 11 detainees in highly restrictive conditions of confinement until they were cleared by the FBI. *Id.* Iqbal further asserted that the officials knew and agreed to subject the detainees to harsh conditions of confinement as a matter of policy based solely on account of race, religion, and/or national origin. *Id.*

In reviewing the complaint’s sufficiency, the Court reiterated the plausibility standard that it had articulated in *Twombly*. The Court stated that although Rule 8(a)(2) did not require “detailed factual allegations,”... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1949 (citing *Twombly*, *supra* at 555). To survive a motion to dismiss, a complaint must aver sufficient facts to “state a claim to relief that is plausible on its face.” *Id.* (quoting *Twombly*, *supra*, at 570). The Court elucidated the plausibility standard by writing:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw *the reasonable*

inference that the defendant is liable for the misconduct alleged. The plausibility standard is *not akin to a “probability requirement,”* but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Id. (emphasis added) (citations omitted).

Having set forth the legal standard, the Court offered guidance for the rule’s application in practice, writing that two working principles underpinned its decision. *Id.* First, the Court wrote, the principle that a court must accept all allegations of a complaint as true did not apply to legal conclusions. *Id.* Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [would] not suffice.” *Id.* (citing *Twombly*, at 555). Second, the Court emphasized that only a complaint that presented a plausible claim for relief would survive a motion to dismiss. *Id.* at 1950.

The Court next turned to the facts alleged by the respondent, Iqbal, of unconstitutional discrimination by Ashcroft and Mueller, to determine whether the allegations plausibly suggested entitlement to relief. *Id.* at 1951. As the Court summarized, the complaint asserted that the FBI, under the direction of Mueller, arrested and detained thousands of Arab Muslim men as part of the government’s investigation into the September 11 attacks. *Id.* The complaint further alleged that Mueller had approved the policy of detaining the men in highly restrictive conditions until the FBI could clear them of involvement with the attacks. *Id.* The Court then noted that, if presumed considered true, the allegations were consistent with Mueller and Ashcroft purposefully designating detainees of “high interest” because of their race, religion, or national origin. *Id.* The Court continued, however, by noting that the September 11 attacks were perpetuated by Arab Muslim men who counted themselves as members of Osama bin Laden’s Al Qaeda terrorist organization. *Id.* Therefore, the fact that the government’s investigation targeted Arab Muslim men for arrest and detention might constitute a legitimate law enforcement policy. *Id.* Thus, although the government’s policy might have a dispa-

rate impact on Arab Muslim men, the facts set forth in the plaintiff’s complaint would support an inference that the arrests were lawful and justified by nondiscriminatory intent. *Id.* As an “obvious alternative explanation” existed for the arrests that was lawful, Iqbal’s assertion of invidious discrimination was “not a plausible conclusion” from the facts alleged. *Id.* at 1951–52 (citing *Twombly*, at 567).

Even though *Iqbal* did not mandate a “strong inference” of wrongdoing as required by the PSLRA, the standard established by *Twombly* and *Iqbal* in practice requires more than a mere statement of facts from which a court could equally infer either liability or no liability. Although the Court wrote that it was not establishing a “probability requirement,” holding that a “mere possibility of misconduct” was insufficient to state a claim effectively established some requisite level of probability. Coupled with the further requirement that allegations must be sufficiently substantiated so that fact substantiation supports a reasonable inference of wrongdoing, the plausibility standard appears to mandate some judicial finding that a complaint more likely than not states facts which, if proven at trial, would result in a finding of liability.

In short, if two opposite conclusions are equally deducible from the same set of facts, then neither conclusion will rise to the level of a “reasonable inference.” Thus, a plaintiff risks dismissal if the initial pleading facts are insufficiently substantiated, failing to lead to a reasonable inference of liability, apparently establishing a “more-likely-than-not” standard. Defense counsel should analyze a plaintiff’s allegations from the following perspective when forming a strategy for motions to dismiss: would the facts alleged, if proven at trial, more likely than not result in a finding of liability against the defendant? If defense counsel can frame a solid argument that a plaintiff’s facts do not meet this level of inference, the chances of a successful motion to dismiss should increase. Notwithstanding some passing language to the contrary in *Iqbal*, the Supreme Court appears to have in practice established a new, “plausibility” standard in *Iqbal*. As a result, “upon information and belief” pleading, at least in complex cases, may be dead.

Mass Torts and Class Actions in a Post-*Iqbal* World

Since *Iqbal* came down, it has been cited thousands of times and has been the subject of commentary both in print and online. Because a pleading's adequacy is measured by the federal rules regardless of where a case was originally filed, *Iqbal*'s significance will be felt in cases originally filed in federal court and in cases removed from state court. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985). This section will discuss cases applying *Iqbal* in the mass torts and class action context.

A number of courts have already relied on *Iqbal* to support dismissing complaints under Rule 12(b)(6), and understanding the sort of allegations now deemed insufficient will help in assessing whether to seek dismissal in a particular case. For example, in *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1257 (11th Cir. 2009), the Eleventh Circuit reversed a denied dismissal motion in a case in which the defendants, employers who allegedly collaborated with Colombian paramilitary forces to murder and torture the plaintiffs, trade union leaders. The plaintiffs' allegations that the paramilitary forces had acted as arms of the state had been essential to their claim. In holding that these allegations had been insufficiently substantiated in the initial pleading, the Court stated:

[P]laintiffs allege the paramilitary are "permitted to exist" and are "assisted" by the Colombian government. Additionally, the plaintiffs allege "[i]t is universally acknowledged that the regular military and the civil government authorities in Colombia tolerate the paramilitaries, allow them to operate, and often cooperate, protect and/or work in concert with them." These plaintiffs also contend the paramilitaries are state actors who had a symbiotic relationship with the Colombian military and thus operated under color of law. The plaintiffs' conclusory allegation that the paramilitary security forces acted under color of law is not entitled to be assumed true and is insufficient to allege state-sponsored action. See *Iqbal*, 129 S. Ct. at 1951. Colombia's mere "registration and toleration of private security forces does not transform those forces' acts into state

acts." Allegations the Colombian government tolerated and permitted the paramilitary forces to exist are insufficient to plead the paramilitary forces were state actors. The plaintiffs make the naked allegation the paramilitaries were in a symbiotic relationship with the Colombian government and thus were state actors. Nevertheless, in testing the sufficiency of the plaintiff's allegations, we do not credit such conclusory allegations as true. See *Iqbal*, 129 S. Ct. at 1951. We demand allegations of a symbiotic relationship that "involves the torture or killing alleged in the complaint to satisfy the requirement of state action." There is no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints. The plaintiffs' "formulaic recitation," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965, that the paramilitary forces were in a symbiotic relationship and were assisted by the Colombian government, absent any factual allegations to support this legal conclusion, is insufficient to state to support an allegation of state action that is plausible on its face. See *Iqbal*, 129 S. Ct. at 1950.

Sinaltrainal, 578 F.3d at 1266 (some internal citations omitted).

In *Pa. Emples. Benefit Trust Fund v. Astrazeneca Pharms. LP*, 2009 U.S. Dist. LEXIS 76555 (M.D. Fla. 2009), the plaintiff had provided health insurance and prescription drug coverage to employees of the Commonwealth of Pennsylvania. Alleging that the defendant, a pharmaceutical manufacturer, improperly promoted and marketed Seroquel, the plaintiff sought to recoup funds it had expended on behalf of members who had been prescribed the medicine. In addressing the sufficiency of the complaint's allegations of breach of warranty, the Court stated:

As to any direct communication of express warranties from Defendant to Plaintiff, Defendant points out that the complaint is devoid of facts supporting even an inference that the terms of any alleged warranties were received by Plaintiff directly from the company. Plaintiff counters by referring to four paragraphs in the complaint containing allegations that AstraZeneca conveyed its alleged warranties "[t]hrough its labeling, as

well as its sales and marketing practices and documents given or shown to physicians treating PEBTF participants and/or the PEBTF itself...." Notably, however, the allegations of direct communication are entirely unsupported by facts contained elsewhere in the complaint. As the Supreme Court of the United States recently clarified, a federal complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949. Furthermore, even Plaintiff's "naked assertions" of direct contact with Defendant are vaguely stated; Plaintiff indicates that AstraZeneca's marketing materials and Seroquel labeling were "given or shown to physicians treating PEBTF participants and/or PEBTF itself." Such equivocal allegations suggest that PEBTF itself is unsure whether it received any direct marketing information from AstraZeneca regarding uses of Seroquel that were unapproved by the FDA. Indeed, a close reading of the complaint strongly suggests that AstraZeneca's alleged warranties reached PEBTF only by way of a treating physician's prescription pad, if at all. See Doc. 3 at 31 ("Pennsylvania physicians who treat, and prescribe medications for, PEBTF participants necessarily act as the intermediary between Defendant and the Plaintiff."); *id.* at 6 ("The PEBTF and its PBM ["pharmacy benefit manager"] rely on persons causing claims to be submitted for payment by the Plaintiff to recognize and honor the permissible scope of reimbursement and to obey the governing law and regulations in activities that cause such claims."); *id.* at 32 ("Defendant breached the express warranties it made to the PEBTF, through physicians participating in PEBTF....") (emphasis added). In sum, the Court need not credit Plaintiff's bald allegations of any direct communication of express warranties from Defendant for purposes of the motion to dismiss.

Pa. Emples. Benefit Trust Fund, 2009 U.S. Dist. LEXIS 76555, at *8-10. Note the difference between this holding and that of the magistrate judge's pre-*Iqbal* decision in *Peters v. Amoco*.

Of course, not everything has come up roses for defendants in the post-*Iqbal*

world. Recently, a district court held that Rule 12 motions could not be made against master complaints filed in multidistrict litigation (MDL) proceedings. *In re Nuvaring Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 70614 (E.D. Mo. 2009). In refusing even to consider the defendant's motion, the court stated that the "filing of the master consolidated complaint in this action was simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation. Neither Plaintiffs when they consented to filing a master complaint, nor I when I entered the order directing a master complaint to be filed, contemplated that Rule 12(b) motion practice would be pursued by [the defendant] against the master complaint." 2009 U.S. Dist. LEXIS 70614 at *18. The court further noted that the defendant "had already filed answers in the individual lawsuits which precluded any 12(b) motion practice." *Id.* The second point makes no sense, given that a defendant is permitted to raise the defense of failure to state a claim at various times, including at trial. FED. R. CIV. P. 12(h)(2).

As to the first point, the authors of the popular Drug and Device Law blog have noted the long history of defendants challenging master pleadings through dismissal motions. Jim Beck & Mark Hermann, *Reconsidering the Master Complaint*, Drug and Device Law, Aug. 20, 2009, <http://druganddevicelaw.blogspot.com/2009/08/reconsidering-master-complaint.html>.

Another district court, cited in *Nuvaring*, applied *Twombly* and still denied a dismissal motion:

The Court cannot envision the task of adequately pleading the consolidated master complaint in a manner which would satisfy Defendants, without completely removing the compromise and attempt at efficiency the Parties and I had in mind in allowing the filing of the Consolidated Master Complaint.

In re Trasyol Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 65481 (S.D. Fla. 2009). As the Drug and Medical Device authors stated:

With Rule 12 no longer defanged, MDL defendants cannot afford to allow such misunderstandings to exist—or to be manufactured by the other side. MDL defendants need to evaluate their litigation strategies ahead of time and decide exactly how they want motion prac-

tice to play out. Those decisions need to be put on the record in negotiations for case management orders. Doing so may result in mean fewer agreements to file master complaints, since plaintiffs don't have to agree to anything our side wants. But as we've discussed already, after *Twombly/Iqbal*, fewer master complaints and more Rule 12 motions may well be in the best interests of the defense in any event.

Beck & Hermann, <http://druganddevicelaw.blogspot.com/2009/08/reconsidering-master-complaint.html>. This is sound advice, as mass tort defendants must be able to seek relief under *Iqbal* when cases are sent to an MDL.

Effect of *Twombly* and *Iqbal* on Fraudulent Joinder

Another notable impact of the *Twombly* and *Iqbal* decisions is potentially in the area of countering plaintiffs' attempts to fraudulently join non-diverse defendants in order to defeat removal on the basis of diversity jurisdiction. "Fraudulent" in this context of course does not mean intent to deceive. *See, e.g., Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979), *aff'd* by 710 F.2d 549 (9th Cir. 1983). Rather, under the general law of most jurisdictions, the joinder of a non-diverse defendant is deemed fraudulent and its presence ignored for determination of diversity jurisdiction if the plaintiff fails to state a cause of action against a resident defendant and the failure is obvious under the substantive law of the state. *See, e.g., Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001); *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983). This is where the federal dismissal standard enunciated by *Twombly* and *Iqbal* becomes significant.

In assessing whether a non-diverse defendant has been fraudulently joined, a number of federal district courts appropriately have analyzed whether a claim has been stated by assessing a complaint's allegations to determine whether a plausible entitlement to relief has been set forth against the non-diverse defendants. This is due to the obvious parallel between the fraudulent joinder standard and the standard used in deciding Rule 12(b)(6) motions. *See Roland-Warren v. Sunrise Senior Living, Inc.*, 2009 WL 2406356, *6 (S.D. Cal.). As a result,

where a complaint sets forth conclusory allegations against a non-diverse defendant, which do not set forth sufficient factual content to state a claim, federal courts have begun to look beyond the ruse of naming such defendants and properly have retained subject matter jurisdiction. *Id.* at **6-8 (finding defamation claims against non-diverse defendants failed for failure to allege specif-

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If two opposite conclusions are equally deducible from the same set of facts, then neither conclusion will rise to the level of a "reasonable inference."

ics of the defamatory statements). *See also Crawford v. Charles Schwab & Co.*, 2009 U.S. Dist. LEXIS 101598 (N.D. Tex. Oct. 30, 2009) (applying *Iqbal* to fraudulent joinder analysis and denying remand where plaintiff failed to plead claims against non-diverse defendants); *Ansari v. NCS Pearson, Inc.*, 2009 WL 2337137 (D. Minn.).

Of course, not all courts have realized, or in some instances even assessed, the impact that *Twombly* and *Iqbal* will have on their fraudulent joinder analysis. *See, e.g., Martori v. Golden Rule Ins. Co.*, 2009 WL 1357389 (D. Ariz.). Defense counsel's obligation, therefore, is to conduct this analysis at the beginning of every case in which the addition of a non-diverse defendant facially would preclude removal and then educate the court in the appropriate circumstances. Utilized fully and properly, defendants will have greater access to the federal forum.

Notice Pleading Restoration Act of 2009

The other threat to *Iqbal* and *Twombly* is legislative. Senator Arlen Specter has introduced Senate Bill 1504, the "Notice Pleading Restoration Act of 2009," which provides:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

The Senate bill was referred to the Judiciary Committee in July of 2009. The House is expected to introduce similar legislation.

These measures are, not surprisingly, supported by the plaintiffs' bar.

Conclusion

For now, the Court's decision in *Iqbal* provides the defense practitioner with a significant tool in combating unsubstantiated actions. By focusing on the plausibility of a complaint's allegations, by following the Supreme Court's directive to separate factual allegations from legal conclusions, and by heeding its mandate to strip "naked assertions" from a pleading, defense counsel has the chance to eliminate or reduce cli-

ent exposure. In the class action context, *Iqbal* permits another method to challenge the sufficiency of plaintiffs' class allegations in the early stage of a case and to convince a court that they are implausible. Likewise, in the mass torts context, parties to a multi-defendant action will have the chance to challenge the shotgun pleading approach, which tries to lump all defendants together for pleading purposes. The threat that Congress will reverse *Iqbal* is real, returning to the *Conley v. Gibson* standard, but for now, defense counsel should concentrate on applying *Iqbal* as best they can. 