New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 238—NO. 23 THURSDAY, AUGUST 2, 2007 ALM

BY EDWARD M. SPIRO

The Supreme Court's Pleading Trilogy

In the closing weeks of its 2006-2007 term, the Supreme Court handed down a trio of decisions addressing the standards for assessing the sufficiency of various types of pleadings on a motion to dismiss. When read together, and against the backdrop of the Court's modern pleading jurisprudence, these decisions appear to reconfirm and reinforce certain long-standing assumptions about notice pleading in the run-of-the-mill civil action, while also calling, at least in more complex cases, for more specificity from the plaintiff and a greater degree of involvement from the reviewing court than in the past.

There are certain inconsistencies in these cases which the U.S. Court of Appeals for the Second Circuit has already recognized and which will likely result in considerable litigation as the lower courts flesh out the details of the new territory roughly charted by these recent Supreme Court decisions.

Plausibility

• ***A New Gloss on Notice Pleading Under Rule 8(a).*** The first, and most wide-reaching of the recent pleading decisions—*Bell Atlantic Corp. v. Twombly*[1]—concerns the requirements for stating an antitrust claim based on allegations of parallel conduct under §1 of the Sherman Act.[2] The plaintiffs, representatives of a putative class of local telephone and high-speed Internet subscribers, claimed that regional telephone companies created out of the 1984 break-up of AT&T had conspired to keep competing local telephone companies (CLECs) out of the market, thus driving up prices. Their complaint alleged that the defendant telephone companies (ILECs) provided inferior network connections and otherwise dealt unfairly with the CLECs in ways that were designed to sabotage the CLECs' relationships with their own customers. It also alleged that the ILECs had all refrained from competing in each others' markets. Because the alleged anticompetitive conduct would be illegal only if the ILECs had acted pursuant to an agreement,[3] the complaint alleged that the ILECs had

entered into a contract, combination or conspiracy to prevent competitive entry into their markets. It made this allegation upon information and belief, based on the "absence of any meaningful competition between the [ILECs]…and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local…markets…."[4]

The Supreme Court held that this allegation of parallel conduct, coupled with a conclusory allegation of conspiracy, was insufficient to state a claim under §1 of the Sherman Act. In a decision written by Justice David H. Souter, the majority reaffirmed that Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the…claim is and the grounds upon which it rests."[5] It went on to observe, however, that the requirement that the plaintiff identify the "grounds" that entitle him to relief requires more than labels and conclusions, or a formulaic recitation of the elements of a claim.

The Court explained that to pass muster under Rule 8(a)(2), the statement of claim must possess enough "heft" to show that the pleader is entitled to relief.

In a case under §1 of the Sherman Act, because parallel conduct, even conduct consciously undertaken, requires some setting suggesting that the defendants were acting pursuant to an agreement to take it from neutral territory into the realm of an antitrust violation, *Bell Atlantic* held that a §1 complaint must contain enough factual matter from which "plausible grounds" for an agreement could be inferred. The Court rejected the assumption that groundless claims falling just shy of the plausibility mark could be weeded out early in the discovery process by careful case management, observing that "the success of judicial supervision in checking discovery abuse has been on the modest side."[6] Along the same lines, the Court noted that neither summary judgment nor "lucid instructions to juries" offered a viable solution because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."

In holding that the allegations supporting an agreement must be plausible rather than merely possible, *Bell Atlantic* backed away from the Court's earlier and oft-quoted admonition in *Conley v. Gibson*, 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."[7] The *Bell Atlantic* majority held that *Conley* should be read not as setting a minimum standard regarding adequate pleading, but rather as describing the "breadth of opportunity" to support the allegations in an already adequately pleaded complaint. It concluded that *Conley's* "no set of facts" language had been "questioned, criticized, and explained away" for so long that "this famous observation has earned its retirement."[8]

The majority went on to hold that the complaint did not satisfy this new plausibility standard, noting that the allegations concerning the conspiracy were devoid of specifics and did not mention a time, place or person involved in the alleged agreement. It concluded that none of the allegations "invests either the action or inaction alleged with a plausible suggestion of conspiracy."

Mixed Signals

If *Bell Atlantic* appeared to raise the pleading bar, the Supreme Court, both within the *Bell Atlantic* decision and in its decision in *Erickson v. Pardus*[9] issued just two weeks later, simultaneously disclaimed any enhancement of the notice pleading requirements of Rule 8(a)(2). In *Bell Atlantic*, the Court reiterated its 2002 holding in *Swierkiewicz v. Sorema N.A.*[10] that a court may not imply a heightened pleading standard for claims governed by Rule 8(a)(2), rejecting the plaintiffs' argument that its decision in *Bell Atlantic* ran counter to *Swierkiewicz*. The Court also cited with approval the model form Complaint for Negligence contained in the Federal Rules of Civil Procedure, which after identifying the date and location of an accident, alleges in entirely conclusory fashion

Edward M. Spiro, *a principal of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer concentrating in commercial litigation, is the coauthor of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson-West 2006).* **Judith L. Mogul** *assisted in the preparation of this article.*

only that "defendant negligently drove a motor vehicle against plaintiff who was then crossing" the highway.[11]

Similarly, in *Erickson v. Pardus*, the Court relied both on its recent decision in *Bell Atlantic* as well as on *Conley v. Gibson* in vacating a decision of the U. S. Court of Appeals for the Tenth Circuit dismissing a pro se prisoner complaint for failure to state a claim.

The plaintiff in *Erickson* claimed that the defendant prison officials had violated his constitutional rights protecting him against cruel and unusual punishment by removing him from a hepatitis C treatment program, thus endangering his life. The Tenth Circuit had affirmed the district court dismissal of this complaint holding that the plaintiff's allegations of substantial harm were too conclusory.

The Supreme Court vacated that judgment, finding that it departed in a "stark" manner from the pleading standard mandated by Rule 8(a)(2) which requires that no specific facts be pleaded and only that a short and plain statement of the claim provide defendant with notice of the claim and the grounds upon which it rests. It concluded that the allegations that the defendants were endangering plaintiff's life by withholding treatment for hepatitis C were sufficient to satisfy the requirements of Rule 8(a)(2).

Obvious Tension

There is obvious tension between *Bell Atlantic's* holding that allegations of a §1 conspiracy require enough "heft" and "factual context" to make the agreement plausible, and the Court's insistence that this plausibility standard does not alter the traditional notice pleading requirements of Rule 8(a)(2). In its recent decision in *Iqbal v. Hasty*, the Second Circuit observed that *Bell Atlantic* has created "considerable uncertainty concerning the standard for assessing the adequacy of pleadings."[12] *Iqbal* seeks to harmonize the inconsistent signals sent by *Bell Atlantic*, concluding that the Supreme Court has not heightened the standard for pleading under Rule 8(a)(2), but has, instead, announced a "flexible 'plausibility standard,' which obligates a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[13]

The complaint in *Iqbal* alleged that in the aftermath of the Sept. 11, 2001 terrorist attacks, various government officials, including then-Attorney General John Ashcroft and FBI Director Robert Mueller, participated in or condoned unconstitutional actions taken in connection with holding the plaintiff, a Muslim Pakistani pretrial detainee, in administrative detention.

In affirming that portion of the district court's decision rejecting the government officials' arguments that the claims be dismissed based on their lack of personal involvement, the Second Circuit acknowledged that *Bell Atlantic's* plausibility standard might arguably require that some subsidiary facts be alleged to plead adequately that these defendants had condoned the plaintiff's unconstitutional confinement. The court concluded, however, that the claim of supervisory involvement in that case was sufficient even without such subsidiary facts, observing that "all of the Plaintiff's allegations respecting the personal involvement of these Defendants are entirely plausible." The court noted that, even as to Mssrs. Ashcroft and Mueller, it was "plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested…in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."[14]

Addressing *Bell Atlantic's* concern that the plausibility standard was necessary to avoid burdensome discovery, the *Iqbal* court noted that sustaining the complaint in that case would not run the risk that every prisoner complaint claiming a denial of constitutional rights would survive a motion to dismiss simply by alleging the attorney general knew of the alleged violation. The court further observed that the complaint informed all the defendants of the time frame and place of the alleged violations just as did the form negligence complaint approved in *Bell Atlantic*.

• ***A More Active Role for Courts Weighing Allegations of Scienter.*** It follows from the Supreme Court's introduction of a plausibility requirement for cases governed by Rule 8(a)(2) in *Bell Atlantic*, that complaints subject to the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLRA)[15] would have to be evaluated under an even more demanding test. And in fact, the third of the Court's recent pleading cases, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[16] requires that allegations of scienter in a securities fraud action under the PSLRA not just be plausible, but in fact be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Focusing on the PSLRA requirement that a plaintiff "state with particularity facts giving rise to a *strong* inference that the defendant acted with the required state of mind,"[17] *Tellabs* set out three basic principles to guide the courts in reviewing scienter allegations under the PSLRA. The court must (1) accept all the factual allegations in the complaint as true; (2) consider the complaint in its entirety, including any documents incorporated by reference and anything of which the court may take judicial notice; and (3) take into account plausible opposing inferences.

Positing that "[t]he strength of an inference cannot be decided in a vacuum," the Court observed that this last consideration is inherently comparative and requires the court to consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. It rejected the proposition, urged by the concurrence, that a strong inference of scienter be the most plausible of competing inferences, finding that a requirement that the inference of scienter be at least as compelling as competing inferences, coupled with other features of the PSLRA, was sufficient to screen out frivolous actions while permitting meritorious suits to proceed.[18]

Although *Tellabs* was specifically concerned with pleading scienter under the PSLRA, it is likely to have broader implications, as illustrated by a decision filed in late June by U.S. District Judge Naomi Reice Buchwald of the Southern District for New York in *In re Crude Oil Commodity Litig.*[19] The plaintiffs in that case alleged that the defendants had manipulated the price of certain crude oil futures. Judge Buchwald determined that the complaint sounded in fraud and was thus governed by Federal Rule of Civil Procedure 9(b) which requires that the circumstances constituting fraud be stated with particularity. She observed that despite the fact that Rule 9(b) also provides that allegations of intent and other conditions of mind "may be averred generally," a fraud plaintiff must allege facts that give rise to a "strong inference" of fraudulent intent. Judge Buchwald found that although *Tellabs* addressed pleading under the PSLRA, the concerns about the costs of abusive discovery expressed in both *Tellabs* and *Bell Atlantic* made it appropriate to adopt a heightened pleading standard in the context of the market manipulation claim presented in that case as well.[20]

Conclusion

Whatever questions the Supreme Court's recent pleading decisions leave unanswered, the Court has defined a continuum of specificity for pleading and has begun to identify where on that continuum pleadings in various types of cases should fall. By eschewing *Conley v. Gibson's* "no set of facts" language, articulating the plausibility standard for pleadings under Rule 8(a)(2), and requiring courts to weigh competing inferences of scienter in PSLRA cases, the Court clearly envisions a more robust role for lower courts reviewing the sufficiency of pleadings in complex cases. The Court appears to be encouraging district courts to test more aggressively the plausibility of complicated claims at the earliest stage, due in significant part to the substantial discovery burdens and costs presented by such claims.

1. 127 SCt 1955 (2007).
2. 15 USC §1.
3. See *Copperweld Corp. v. Independence Tube Corp.*, 467 US 752 (1984).
4. 127 SCt at 1962-63.
5. Id. at 1964 (quoting Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 US 41, 47 (1957)).
6. 127 SCt at 1967 (citing Easterbrook, "Discovery as Abuse," 69 B.U. L. Rev. 635, 638 (1989)).
7. 127 SCt at 1968 (quoting *Conley v. Gibson*, 355 US at 45-46).
8. Id. at 1969.
9. 127 SCt 2197 (2007).
10. 534 US 506 (2002).
11. Form 9, Complaint for Negligence, Forms App., Fed. R. Civ. P., 28 U.S.C. App., p. 829 (discussed at 127 S. Ct. 1971 n.10).
12. 2007 WL 1717803, at *8 (2d Cir. June 14, 2007).
13. Id., at *11 (emphasis in original).
14. 2007 WL 1717803, at *19. The Court of Appeals affirmed the bulk of the district court decision denying the defendants' motions to dismiss, but reversed the district court concerning the defendants' qualified immunity defense to the plaintiff's procedural due process claims, dismissing the claims on the grounds that plaintiff's right to avoid more than six months pretrial detention in administrative segregation without a hearing was not clearly established at the time this alleged violation occurred.
15. Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 USC §§77z-1 & 78u-4).
16. 127 SCt 2499 (2007).
17. 15 USC §78u-4(b)(2) (emphasis added).
18. 2007 WL 1773208, at *10.
19. 2007 WL 1946553 (SDNY June 28, 2007).
20. Id., at *7 n.5.