

May 20, 2009

## U.S. Supreme Court Elaborates on *Bell Atlantic* Pleading Standard

On May 18, 2009, the United States Supreme Court issued a decision confirming that the pleading standard articulated in *Bell Atlantic Corp. v. Twombly* applies generally in civil cases and providing further elaboration on the type of allegations a complaint must contain to survive a motion to dismiss in federal courts.

In *Ashcroft v. Iqbal*, No. 07-1015, the Court held by a 5-4 vote that a Pakistani Muslim arrested in the wake of the September 11, 2001, terrorist attacks had not adequately pled a damages claim against former Attorney General Ashcroft and FBI Director Mueller based on allegations that he had been unconstitutionally subjected to harsh conditions in a maximum-security section of the Metropolitan Detention Center in Brooklyn. Iqbal had been confined there upon being designated a person “of high interest” to the Government’s September 11 investigation. The alleged unconstitutional conditions included jailors who “kicked him in the stomach, punched him in the face, and dragged him across” his cell without justification; “subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others”; and “refused to let him and other Muslims pray because there would be ‘[n]o prayers for terrorists.’” Iqbal alleged that he had been designated a person “of high interest,” and therefore subjected to the alleged mistreatment, “on account of his race, religion, or national origin.”

The Court acknowledged that such allegations “could, if proved, demonstrate unconstitutional misconduct by some governmental actors.” With respect to Ashcroft and Mueller, however, Iqbal had conceded that Government officials “may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,” and the Court found that Iqbal therefore “must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” It was this element that the Court found inadequately pled under *Bell Atlantic*.

In reaching its conclusion, the Court applied “[t]wo working principles” that it found to underlie *Bell Atlantic*:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

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Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But 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."

Thus, the Court suggested that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Then, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." In making that assessment, courts are to draw upon "judicial experience and common sense," evaluating whether the facts alleged are "compatible with" and "more likely explained by, lawful . . . behavior."

Applying this two-step approach, the Court identified certain allegations that it considered "nothing more than a 'formulaic recitation of the elements,'" and therefore "not entitled to the assumption of truth": allegations that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him]" 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"; that Ashcroft was the "principal architect" of this invidious policy; and that Mueller was "instrumental" in adopting and executing it.

The Court next considered "the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief." These included allegations 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 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." The Court acknowledged that these allegations are "consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin" but concluded that, "given more likely explanations, they do not plausibly establish this purpose." Specifically, the Court noted that:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim -- Osama bin Laden -- and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.

Finally, the Court expressly rejected the respondent's argument that *Bell Atlantic* "should be limited to pleadings made in the context of an antitrust dispute," holding that *Bell Atlantic* "expounded the pleading standard for 'all civil actions.'"

It is not possible to predict with confidence exactly how cases following *Ashcroft v. Iqbal* will play out. It can be predicted, however, that counsel representing defendants – apart from being able to rely on *Bell Atlantic* in "all civil cases" -- will find in *Ashcroft v. Iqbal* a basis for arguing that:

- The scope of allegations that are deemed "conclusions" and therefore "not entitled to the assumption of truth" is broader than many have previously supposed.
- A court needs to determine separately whether a claim is "plausible" and, in doing so, may rely on widely known circumstances surrounding the alleged activity in question – such as the events of September 11, 2001, and their aftermath – whether or not appearing on the face of the complaint.
- In determining plausibility, courts may exercise their own judgment to evaluate whether the alleged facts are "compatible with" and "likely explained by" a lawful alternative to the plaintiff's theory.

Counsel representing plaintiffs will find little comfort in *Ashcroft v. Iqbal* and may be expected to argue that the decision was driven by the unique concerns raised by the September 11 terrorist attacks, the fear of further such attacks and the Court's general reluctance to subject high public officials to the burdens of litigation. Given the Court's broad language, however, plaintiffs' counsel would be well advised to avoid relying on generalized allegations that might be viewed as "conclusions" and to structure their allegations so as not to be deemed "compatible" with an innocent explanation for the conduct at issue.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions, or would like to discuss any of the foregoing in further detail, please feel free to call any of the following Paul, Weiss lawyers:

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