TWOMBLY/IQBAL PRIMER

1. Are there certain types of cases in which the *Twombly* and *Iqbal* decisions are more likely to have an impact?

Courts do indeed appear to be applying the "no conclusions/plausible claims requirements to certain types of cases and legal concepts more readily.

The "context" of the action changes the level of factual showing needed to establish plausibility. *Iqbal* underscored that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

As such, courts have consistently held that the "degree of specificity" required establishing plausibility "rises with the complexity of the claim." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011); *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) ("[t]he nature and specificity of the allegations required to state a plausible claim will vary based on context"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 320 (3d Cir. 2010); *see In re Semgroup Energy Partners, L.P., Sec. Litig.*, 729 F. Supp. 2d 1276, 1286 (N.D. Okla. 2010) ("[a] simple negligence action may require significantly less allegations to state a claim under Rule 8 than a case alleging anti-trust violations"); 2–8 Moore's Federal Practice—Civil § 8.04[1][d] (2015). TWG 17.331.

Below are some examples:

- **Contract claims**. "'Courts have generally recognized that relatively simple allegations will suffice to plead a breach of contract claim even post-*Twombly* and *Iqbal.*'" *Speedfit LLC v. Woodway USA, Inc.*, 53 F. Supp. 3d 561, 579 (E.D.N.Y. 2014).

- **Anti-trust claims**. "In the context of claims brought under § 1 of the Sherman Act, plausibility is evaluated with reference to well-settled antitrust jurisprudence that "limits the range of permissible inferences from ambiguous evidence." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 361 (3d Cir. 2010).

- **1983 claims**. The Seventh Circuit has stated that the "height of the pleading requirement is relative to circumstances" other than complexity. In a § 1983 conspiracy claim brought pro per by a mother who lost custody of her sons against several parties, the court noted while the case was not complex, "it may be paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy; and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009).

There is no readily understandable test to determine in all cases when an allegation is too conclusory to be factual.

The following is a sample of cases in which courts have been asked to determine if a particular statement or allegation is a fact or a mere conclusion. TWG 17.326.

- **Bad Faith.** Plaintiff's "allegations of bad faith are entirely conclusory and fail to state a facially plausible claim." *Milburn v. City of York*, 612 F. App'x. 119, 122 (3d Cir. 2015); *Herssein Law Grp. v. Reed Elsevier, Inc.*, 594 F. App'x 606, 608 (11th Cir. 2015) (same); *Yeftich v. Navistar*, Inc., 722 F.3d 911, 916 (7th Cir. 2013) ("plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels").

- **Causation.** In case against bank for mishandling of plaintiff's personal information, allegation that Bank "caused and did not take care to protect" plaintiff's information "is merely a conclusory allegation that does not suggest a plausible entitlement to relief." *Dorsey v. Enter. Leasing*, 78 F. Supp. 3d 353, 359 (D.D.C. 2015).

- **Color of law.** Plaintiff's allegation that defendant "acted with sufficient nexus to his police officer status to act under color of law is a conclusory allegation of law that is not entitled to an assumption of truth." *Magee v. Trustees of the Hamline Univ., Minn.*, 957 F. Supp. 2d 1047, 1071 (D. Minn. 2013).

- **Conspired or conspiracy.** In antitrust action, "[a]n allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). In a civil rights action, "[i]t is not enough to simply aver that a conspiracy existed . . . . A plaintiff must instead show that the parties reached an understanding to deny the plaintiff his rights." *Fulwood v. Fed. Bureau of Prisons*, 568 Fed. Appx. 753, 756 (11th Cir. 2014).

- **Injury.** Plaintiff's allegation that " '[a]s a result of Defendants' unlawful actions and/or inactions, Plaintiff suffered injuries and damages' is a conclusory recitation of an element of his claim that is not entitled to the presumption of truth." *Courtright v. City of Battle Creek*, 839 F.3d 513, 520 (6th Cir. 2016).

- **Knew or should have known.** Court refused to assume the truth of "conclusory allegations that [city official] knew about the discriminatory practice, without any allegation as to how he knew or should have known of it is not sufficient to establish a custom or policy." *Burgis v. N.Y. City Dep't of Sanitation*, 798 F.3d 63, 70 (2d Cir. 2015); *Ashcroft v. Iqbal,* 556 U.S. 662, 680–681 (2009) (declining to assume the truth of the conclusory allegation that petitioners " 'knew of, condoned, and willfully and maliciously agreed to subject [respondent]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin"); *see Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of*

Higher Educ., 616 F.3d 963, 969 (9th Cir. 2010) (declining to assume truth of conclusory allegation officers "knew, or should have known" allegations against plaintiff were false).

- **Negligence or Negligently.** In a defamation case, complaint did "not contain any facts suggesting that the defendant acted negligently in publishing the challenged statements." *Shay v. Walters*, 702 F.3d 76, 82 (1st Cir. 2012); *see In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 126 (2d Cir. 2013) (plaintiffs did not adequately alleged the existence of a duty as required for negligence); *compare Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (plaintiff's "negligent failure-to-warn claim is more than a mere recitation of the elements of the cause of action").

- **Reasonably believed.** Allegation in complaint that plaintiff " 'reasonably believed' the sales were unlawful is a 'conclusory allegation' not entitled to a presumption of truth unless supported by specific facts." *Levitt v. Sonardyne, Inc.*, 918 F. Supp. 2d 74, 79 (D. Me. 2013).

- **Reliance.** Allegation, without more, that plaintiff "justifiably relied" on alleged misrepresentations "wholly conclusory." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 834 F. Supp. 2d 566, 594 (S.D. Tex. 2011).

2. Are there any practice tips for attorneys representing plaintiffs and defendants as to motions to dismiss premised on the *Twombly* and *Iqbal* decisions?

Yes. These can be broken down into tips for plaintiffs resisting such motions and defendants seeking dismissals under Ruel 12(b)(6).

PRACTICE TIPS FOR PLAINTIFFS:

[TWG 23.3, 23.77]

- **Know your judge.** Once the case is assigned, review your judge's *Iqbal/Twombly* decisions to see if there are insights that may concern you. If you find your judge has case a harsh eye on cases pleaded in a similar manner as yours, seriously consider amending to preemptively meet any such concerns.

- **Overplead rather than underplead.** Given the variation in how courts have applied the "conclusory" and "plausibility" standards, it is suggested that rather than try to plead the bare minimum to nudge your claim over the line to plausibility, you make an effort to overshoot to make sure you clear this line with a healthy margin of error. Put another way, it will be far better to overplead than underplead.

- **Consider amending your complaint in response to a strong Rule 12(b)(6) motion.** In response to a Rule 12(b)(6), review carefully the challenge asserted. Particularly review the arguments made that specific allegations in your claim are conclusory and should be disregarded in deciding whether you have alleged a plausible claim. If valid points are made, concede them and either amend as a matter of right, ask the opposing party to stipulate to an amendment correcting the deficiencies, or ask that the court grant leave to amend. As to the latter, spell out for the court how the amendment you are proposing will fix the problem.

- **Avoid conclusory phrases and legal conclusions.** Look out for words and phrases that can easily be held conclusory. Ones that raise red flags include those addressing: (a) the defendant's mental state (intentionally, with malice, with defendant' knowledge); (b) undifferentiated collective behavior by a number of defendants; (c) legal interpretation of behavior (conspired, negligently, recklessly, illegally) and (d) legal status (fiduciary, alter ego, co-conspirator).

- **Focus on showing, not telling.** As a rule of thumb, start with the assumption that a conclusory allegation gives the reader the final, concluding thought whereas factual allegations

explains in real world terms how the final concluding thought is reached. Jack and Jill entered into a contract is a conclusory allegation. Factual allegations will show how they entered into a contract. Jack breached his contract with Jill is a conclusory allegation. A factual allegation would show how Jack breached the contract. Jack is Jill's alter ego is a conclusory allegation. A factual allegation would explain why Jack is Jill's alter ego. Focus less on the ultimate conclusions and more on your client's "real world" story. *See, e.g.*, *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (post-*Iqbal/Twombly* "give enough details about the subject-matter of the case to present a story that holds together").

If you lack key facts and have no other way to assert them either directly or by inference, then plead on information and belief with a "plausible" and convincing basis for why such information and belief should be allowed.

- **Research key phrases and terms in the pleading.** For now, the more practical approach is to review the complaint as either drafter or attacker and "stress test" it by pulling words and phrases out that seem conclusory and see if a story remains. Research the case law to see if courts have found whether particular words and phrases used on the complaint (i.e., contract, breach, alter ego, illegal) have been held conclusory and not presumed truthful.

- **Plead facts supporting the elements of each claim**: *Twombly* and *Iqbal* both made it clear that in reviewing a complaint, the court should start with the elements needed to establish a claim. As a practical matter, this is how the court will start its review of your complaint. As such, make it easy on it (and your opponent) by making sure you plead facts supporting each element of each cause of action.

- **Indicate underlying statute or legal theory:** Notwithstanding the rule that legal theories and legal arguments are not necessary in pleadings, under *Iqbal* the analysis of whether a claim is "plausible" begins with a consideration of the elements of the claim. *See Ashcroft v. Iqbal*, 556 US 662, 675 (2009). Accordingly, while neither required to state a claim or sufficient by itself to state a plausible claim, it may be advisable to indicate in the complaint the statute or legal theory underlying the claims to assist the court in making this analysis. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 ("legal conclusions can provide the framework of a complaint").

- **Points to emphasize.**
    - If you believe the motion is without merit and can be successfully opposed then do so. Point out to the court that the Federal Rules, even after *Iqbal/Twombly*, require only minimal pleading to survive a motion to dismiss. *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 589 (7th Cir. 2016) ("even with the heightened pleading requirements of Iqbal and Twombly, the pleading requirements to survive a challenge to a motion to dismiss remain low").
    - Emphasize that: (i) all well-pleaded facts and inferences from such facts are to be deemed true; (ii) all well-pleaded facts are read in favor of the pleader; and (c) the claim survives if based on the well-pleaded facts there is at least one plausible legal theory upon which relief can be granted.
    - Regardless of how strong you believe the pleading is, indicate your willingness, if necessary, to amend and add even more detail to your claims.

- Use the opportunity to emphasize to the court that regardless of any pleading issues, your case has significant merit and that you believe in it.
- If it is clear that you may be limited by lack of discovery to fully assert a plausible claim, ask that the court allow you to plead on information and belief by emphasizing that the gaps in your pleading, if they exist, are small, the information relating to them is limited and in sole possession of your opponent and that this is not a case in which the court should fear that discovery will be an unlimited "fishing expedition."

***PRACTICE TIPS FOR DEFENDANTS*:**

[TWG 23.3, 23.77]

- **Know your judge.** Before filing a Rule 12(b)(6) motion research the judge assigned to your case to determine not only how he or she approaches such motions but whether or not he or she favors or disfavors such motions.

- **Consider whether it is worthwhile to bring the motion.** Relevant considerations include:
  - ***Cost.*** The cost of bringing the motion.
  - ***Deficiencies easily corrected.*** Any deficiencies in the pleading may be easily corrected by amendment.
  - ***Motion may result in stronger claim.*** It may be obvious that the plaintiff has a valid claim, but it has simply not pled it correctly. Here, in light of the liberality with which federal courts allow repleading, consider whether any technical issues you raise could and would be easily corrected by allowing the plaintiff to replead. Consider that the court itself may tell the plaintiff exactly how to replead. *See, e.g., Weber v. Allergan, Inc.*, 621 F. App'x 401, 402 (9th Cir. 2015) (appellate court suggested four specific paragraphs that if added would meet the plausibility standard).
  - ***Whether the allegations are conclusory.*** A good rule of thumb in reviewing allegations to determine if they are merely legal conclusions is to determine the origin of the allegation. If the allegation arises from direct perception—something someone perceives through use of his or her five senses—it is more likely to be deemed factual and credible. For example, "plaintiff was passed over for a promotion he applied for with defendant" is something the plaintiff probably experienced directly. However, if the allegation: (a) involves something that is not perceived directly such as intent ("plaintiff was passed over for a promotion because of his sexual orientation"); (b) involves a pattern inferred from a set of data ("defendant systematically passes over employees because of their sexual orientation"); or (c) involves a judgment about the meaning of perceived information (defendant negligently operated his motor vehicle) it is more likely to be deemed conclusory and in need of further factual support.

- ***Plaintiff's need for discovery to state a claim.*** Courts have generally held that a claimant must first state a plausible claim before being allowed to conduct discovery. If in fact, the plaintiff either does not have a claim but wants to use the fear of burdensome discovery to force a settlement or is engaged in a "fishing expedition" in hopes of finding a claim this is a strong reason to bring a Rule 12(b)(6) motion, if you can, that will either terminate the case or sharply narrow it before discovery takes off. If, however, it is obvious that plaintiff has a claim of some merit but is simply lacking in one or two details (i.e., the name of a defendant, all of the parties to an agreement) the court may be willing to take the parties' asymmetrical access to information in deciding how strictly to read plaintiff's claim.
- ***Stipulating to an amended complaint.*** Before filing the motion to address what might be easily remedied defects, consider offering to stipulate to an amended complaint.
- ***Motion for improper purpose.*** An ill-advised motion made to "grind" the other side is not only improper under Rule 11 but rarely effective in the long run. Even if you have a colorable argument, the result will almost always be an unhappy judge, an angry opponent and either the denial of your motion or an amended complaint that better states the claim.

- **Provide a clear roadmap.** Provide the court with a clear roadmap that hues closely to the multi-part test suggested in *Iqbal*:
  - ***First,*** identify the claim you wish to attack and provide the court with the elements of all reasonable legal theories that be relied on as a basis of relief.
  - ***Second,*** identify the specific allegations you are claiming are conclusory and explain why, with appropriate citations.
  - ***Third,*** explain how the remaining factual allegations do not state a plausible claim under any applicable legal theory, with appropriate citation.