



Twombly and Iqbal:

The Effect of the “Plausibility” Pleading Standard on Alabama Litigators

By J. Thomas Richie and Anna Manasco Dionne

Introduction

Two Rule 8s currently apply in courts in Alabama. On the face of things, they are indistinguishable. *Federal Rule of Civil Procedure 8* and *Alabama Rule of Civil Procedure 8* contain identical language defining pleading standards in a complaint: both require “a short and plain statement of the claim showing that the pleader is entitled to relief.” Compare ALA. R. CIV. P. 8(a) with FED. R. CIV. P. 8(a)(2). Don’t let the identical language fool you.

The United States Supreme Court recently decided two cases that fundamentally changed the vocabulary, and the reality, of notice pleading. These cases—*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)—impose a higher burden on plaintiffs’ pleadings, a burden of “plausibility” instead of mere “possibility.” As a result, defendants in federal court have enjoyed increased success in having claims dismissed before discovery begins.

This change has not yet spread to Alabama’s state courts. Despite the identical language and Alabama’s established preference for construing its rules of procedure in line with the federal rules, the court of civil appeals has twice declined to adopt the *Twombly* standard, waiting for the authoritative word from the Alabama Supreme Court. For now, the Alabama and federal rules are diverging.

This article first examines *Twombly* and *Iqbal* to determine exactly what notice-pleading standard a plaintiff in federal court must satisfy. Second, it highlights how this new federal standard differs from the Alabama pleading standard. Third, it explores two important areas of law where the divergent notice pleading standards are particularly important for practitioners. Finally, it evaluates the prospects of *Twombly* and *Iqbal* reaching Alabama state courts.

Twombly and Iqbal

Federal Rule of Civil Procedure 8 requires that a complaint contain “a short and plain statement of the claim showing that the

pleader is entitled to relief.” For more than 50 years, *Conley v. Gibson* established the authoritative construction of Rule 8. 355 U.S. 41, 45–46 (1957). In an opinion by Justice Black, the Court described as “accepted” the “rule that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Id.* Although *Conley*’s complaint that his union breached its statutory duty to represent all its members “failed to set forth specific facts to support its general allegations,” the Court reversed the dismissal of the complaint because the *Federal Rules* “do not require a claimant to set out in detail the facts upon which he bases his claim[.]” and require only that the plaintiff “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Id.* at 47. Courts interpreted *Conley* to suggest that a plaintiff’s claim must be dismissed only when his inability to prove any set of facts to support it is apparent from the face of the pleading; in effect, *Conley* established a “possibility” standard.

The Court revisited this rule in *Twombly*, holding that a complaint cannot survive a motion to dismiss unless it contains “enough facts to state a claim to relief that is *plausible* on its face.” 550 U.S. 544, 570 (emphasis added). The Court made clear that a claim that is merely “conceivable” is insufficient. In an opinion joined by seven justices, the Court reiterated that Rule 8 does not require that “a claimant set out *in detail* the facts upon which he bases his claim,” but nevertheless requires some specificity: “[it] still requires a showing, rather than a blanket assertion, of entitlement to relief.” *Id.* at 556 n.3. The Court stated that “a formulaic recitation of the elements of a cause of action will not do” and that “a legal conclusion couched as a factual obligation” is not entitled to a presumption of truth against a motion to dismiss. *Id.* at 555. Because the complaint of the consumer class that the telephone service providers illegally conspired to restrain trade did not state enough factual matter to establish an unlawful agreement, the Court ruled that the complaint must be dismissed.

Although *Twombly* made waves when it was decided, its significance was not immediately certain. For one, *Twombly* involved allegations of a conspiracy under the Sherman Act: the Court's decision could have been cabined to similarly-complex statutory schemes far removed from the daily practice of many lawyers. Moreover, the syntactic complexity of the *Twombly* opinion—it is almost impossible to find a quotation that articulates a precise pleading standard—made the interpretive task more difficult. How can *Twombly* change notice pleading if we cannot be sure exactly what *Twombly* means?

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), put these questions to rest. In *Iqbal*, the Court stated that Rule 8 does not require “detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1949. “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.” *Id.* The Court clarified that its construction did not preclude “extravagantly fanciful” allegations by foreclosing “conclusory” ones. *Id.* at 1951. The Court articulated the plausibility standard this way: “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.” *Id.* at 1949 (emphasis added). *Iqbal* then goes one step further, allowing federal courts to consider alternative inferences that can be drawn from the factual allegations and determining the plausibility of the plaintiff's claims against the backdrop of these other inferences. *See id.* at 1951-52. Because *Iqbal*'s complaint stated a conclusory allegation that the former Attorney General was a “principal architect” of a policy decision to subject him to harsh conditions on the basis of discriminatory factors, and because *Iqbal* had not alleged facts that made his theory that the government harmed him plausible in light of the innocuous inferences that could be drawn from the same facts, the Court ruled that the complaint had to be dismissed. *See id.*

In short, *Iqbal* articulates a plausibility rule that applies in every case. It also made clear that federal courts can engage their “judicial experience and common sense” to weigh whether the non-conclusory facts alleged in the complaint establish a plausible claim for relief, given that more probable explanations may exist. *Id.* at 1950, 1951. (For good measure, the Eleventh Circuit's opinion in *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), lays out how the plausibility standard applies in the Eleventh Circuit, quoting heavily from *Twombly* and *Iqbal*). Although, as always, there remains room for the Court to clarify its decisions, this much is clear: the possibility rule is out. Only claims that contain factual allegations sufficient to make the claim for relief plausible will survive.

Alabama Supreme Court has not adopted Plausibility Standard

As of this writing, the Alabama Court of Civil Appeals has twice been asked to apply the plausibility standard. The court has twice declined. *See Crum v. Johns Manville, Inc.*—So. 2d—2009 WL 637260 at *2 n.2 (Ala. Civ. App. March 13, 2009); *Thomas v. Williams*—So. 2d—2008 WL 4952466 at *1 n.1 (Ala. Civ. App. Nov. 21, 2008). The court has stated that it lacks the authority to adopt the plausibility rule because “we are unable to overrule prior caselaw in order to alter [the] well-settled standard of review” that the Alabama Supreme Court has established. *Crum*, 2009 WL 637260 at *2 n.2.

The “well-settled” standard adopted by the Alabama Supreme Court comes from *Bowling v. Pow*, 301 So. 2d 55 (Ala. 1973), in which the court adopted the *Conley* “no set of facts” rule. So, as matters now stand, Alabama continues to apply the standard that the United States Supreme Court has rejected.

Alabama's standard is materially broader than the federal standard. Indeed, the Alabama Supreme Court has described the pleading standard it applies as “the overly broad non-requirement[] of Rule 8.” *Davis v. Marshall*, 404 So. 2d 642, 645 (Ala. 1981) (dismissing a claim that alleged that the plaintiff was harmed when the defendants committed an “indictable offense”). Not only does Alabama apply the “no-set-of-facts” test, but it also allows plaintiffs to plead legal conclusions. *See, e.g., Mitchell v. Mitchell*, 506 So. 2d 1009, 1010 (Ala. Civ. App. 1987) (allowing the pleading of legal conclusions so long as they put the defendant on notice of the claim). Pleading legal conclusions at a high level of abstraction is also acceptable. In *Knight v. Burns, Kirkley & Williams Constr. Co., Inc.*, 331 So. 2d 651 (Ala. 1976), the court held a complaint that alleged that the defendant negligently caused the plaintiff's death was sufficient to pass Rule 8 muster, even though the complaint did not allege what duty the defendant breached. *Id.* at 655.

The Alabama Supreme Court has observed that including too much detail in a complaint may make it easier for a court to dismiss the complaint. *See Fugazzoto v. Brookwood One*, 325 So. 2d 161, 162-63 (Ala. 1976). In *Fugazzoto*, the court affirmed the dismissal of a complaint where the plaintiff had not only alleged that the defendant's activity would cause a “substantial invasion” of the plaintiff's property rights, but also alleged exactly what form that substantial invasion would take. *See id.* Because the specific form of harm alleged—increased traffic—could not support a claim for relief, the court affirmed the dismissal. *Id.* The court's opinion leaves the distinct impression that the plaintiff might have prevailed had he limited his complaint to a general “the defendant will cause a substantial invasion of my property rights” allegation.

Therein lies the dilemma. Federal courts will dismiss a complaint that merely alleges “you harmed me,” but Alabama courts implicitly encourage such pleading. Not only do federal and state courts apply different standards, they encourage opposite strategies. State complaints should be short and should lean on legal conclusions to do the work of putting the defendant on notice without saying too much. Because federal complaints must pass plausibility muster, federal plaintiffs must make specific and numerous factual allegations to get to discovery.

Why the divergent pleading standards matter: two examples

Two recent developments in federal jurisdiction may make pleading standards an area of interest. These two areas are the federal preemption of state law relating to drugs and medical devices and the narrowing of removal jurisdiction brought about by *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

Preemption: Three recent decisions of the United States Supreme Court define when state law may apply to claims brought against drug or device manufacturers that are regulated by federal law. *See Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). These cases allow state-law claims to escape federal preemption in certain circumstances. As a result, defendants in drug

and device cases are less able to remove their cases to federal court based on the existence of a federal question.

The reduced ability to remove drug and device cases is doubly important in light of different pleading standards. Not only can plaintiffs take advantage of broader state liability rules and other advantages of litigating in state court, but state-court plaintiffs, at least for now, appear to enjoy a more lenient pleading standard. Plaintiffs enjoy both procedural and substantive advantages if they can tailor their claims to escape federal preemption.

Lowery: Although the preemption cases are important primarily to practitioners in the drug and device bar, the law of removal affects nearly all litigators. The Eleventh Circuit's opinion in *Lowery* has already received considerable attention for its impact on the removal of diversity cases. In *Lowery*, the court ruled that defendants must establish the jurisdictional amount in controversy at the time of removal based only on the pleadings and evidence obtained in the case at issue. 483 F.3d at 1208–11. Naturally, this makes it more difficult for defendants to carry their burden of proving that the amount in controversy exceeds the jurisdictional amount and avail themselves of the plausibility standard that exists in federal court. Together with *Twombly*, *Lowery* also portends a heightened scrutiny on the allegations in a plaintiff's complaint in federal court. In that sense, *Lowery* and *Twombly* indicate an emerging trend that federal courts will pay closer attention to the contents of a complaint, and that this scrutiny cuts both ways. Plaintiffs may have a more difficult task in drafting a complaint that passes plausibility muster, but defendants will have a more difficult time removing cases based on the face of the pleadings. Having abandoned code pleading in favor of notice pleading in the *Federal Rules of Civil Procedure*, it may be that the pendulum is beginning to swing back in the other direction.

What next?

Clearly, different pleading standards apply in Alabama, and the federal rule is meaningfully more stringent than the state rule. But will the divergence last? Our best guess is that, ultimately, Alabama will follow or adopt *Twombly* and *Iqbal*. The Alabama rules are modeled on the federal rules, and there is a longstanding tradition that “[f]ederal cases construing the *Federal Rules of Civil Procedure* are persuasive authority in construing the *Alabama Rules of Civil Procedure* because the *Alabama Rules of Civil Procedure* were patterned after the *Federal Rules of Civil Procedure*.” *White Sands Group, L.L.C. v. PRS II, LLC*, 998 So. 2d 1042, 1056 (Ala. 2008) (citation and quotation omitted); see also *Ex parte Scott*, 414 So. 2d 939, 941 (Ala. 1982) (“Due to the similarity of the *Alabama* and *Federal Rules of Civil Procedure*, a presumption arises that cases construing the *Federal Rules* are authority for construction of the *Alabama Rules*.”). The persuasive force of the federal interpretation is even stronger when the language of the Alabama rule mirrors the federal rule. See *White Sands*, 998 So. 2d at 1056. Here, as we noted at the outset, Federal Rule 8 and Alabama Rule 8 are identical.

Moreover, the *Conley v. Gibson* rule is, obviously, a rule Alabama adopted from the federal courts. When adopting that rule, the Alabama Supreme Court noted that the federal and state rules imposed identical requirements. See *Bowling*, 301 So. 2d at 186 (relying on “cases that have passed upon the point where governed by *Federal Rules of Civil Procedure*, the same in all material respects as to the mentioned requirement as the

Alabama Rules.”) (emphasis added). As matters now stand, the Alabama Supreme Court has already held that federal interpretations of Rule 8 are persuasive in interpreting Alabama's Rule 8. To reject *Twombly*, the court will have to devise an independent explanation that justifies keeping *Conley*.

Finally, the *Twombly* majority took pains to avoid overruling *Conley v. Gibson* outright. Rather, it stressed that the “no-set-of-facts” test should be “understood in light of the [*Conley*] opinion's preceding summary of the complaint's concrete allegations” and that “the phrase [“no set of facts”] is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Twombly*, 550 U.S. at 562–63. Likewise, the Court cited numerous post-*Conley* decisions that suggested that the “no-set-of-facts” test should not be applied literally. See *id.* at 562. The Court's efforts to reconcile the plausibility standard with existing doctrine make it possible for state courts to adopt *Twombly* without rejecting *Conley* outright. In sum, the Alabama Supreme Court's prior statements about federal rules in general and Rule 8 in particular make it likely that the court will adopt the plausibility standard at some point, especially if it can do so without having to reject all of the existing jurisprudence.

It would be a significant development for the Alabama Supreme Court to decouple its interpretation of Rule 8 from the federal interpretation of the identical standard. There is, however, a possible explanation for the Court of Civil Appeals' reluctance to get ahead of the Supreme Court in adopting the plausibility standard. Justice Stevens, dissenting in *Twombly*, opined that the rule announced in that case would have the effect of “rewrit[ing] the Nation's civil procedure textbooks and call[ing] into doubt the pleading rules of most of its States.” *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting). And it is hard to deny that *Twombly* and *Iqbal* have changed federal civil procedure in a significant way. Although there is no guarantee that Alabama Supreme Court will follow suit, our suspicion is that it will ultimately do so. ▲▼▲



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