Supreme Court Rewrites Pleading Requirements

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In 1957, the Supreme Court ruled that, under the Federal Rules of Civil Procedure, "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. 41, 45-46 (1957). On May 21, 2007, the Supreme Court decided that "this famous observation has earned its retirement." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In the process, the Court revolutionized pleading rules, introducing twin requirements of fact-based pleading and plausibility.

Bell Atlantic was an antitrust action alleging an illegal conspiracy among the Baby Bells to inhibit the growth of third-party competitors and to refrain from competing among themselves. The District Court dismissed the complaint, but Second Circuit reversed, citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), for the proposition that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions," and observing that "[a]ntitrust actions are not among those exceptions." *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 107 (2d Cir. 2005), *rev'd*, 2007 U.S. LEXIS 5901 (U.S. May 21, 2007).

In reversing the Second Circuit, the Supreme Court used sweeping language to impose a duty to plead facts pursuant to Rule 8(a)(2) — a duty that it did not, and logically could not, confine to the antitrust field:

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> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations..., a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level..., on the assumption that all the allegations in the complaint are true (even if doubtful in fact)....

127 S. Ct. at 1965 (citations omitted). The *Bell Atlantic* Court added that, while "detail[ed]" factual allegations are not required, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief," and this necessitates "some factual allegation in the complaint...." *Id.* at 1965 n.3.

In that light, consider a complaint that alleges, as its operative liability allegation, only that: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff." If one considers "negligently" to be a mere "label" or "conclusion," the complaint alleges nothing more than that there was a collision. That raises a possibility of relief, but nothing more. Is a mere possibility of relief sufficient? Given that the quoted allegation is taken verbatim from the restyled version of Form 11 to the Federal Rules of Civil Procedure (effective December 1, 2007), one would have thought it sufficient — particularly as restyled Rule 84 provides that "[t]he forms in the Appendix suffice under these rules." Certainly this allegation satisfied *Conley* because, if the possibility of a recovery exists, then by definition it does not "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

Under *Bell Atlantic*, however, merely pleading a possibility of recovery is not enough. The duty is to furnish factual "allegations plausibly suggesting (not merely consistent with)" an "entitlement to relief." 127 S. Ct. at 1966 (internal quotations omitted). *Bell Atlantic* calls this the "Rule 8 entitlement requirement" — the "threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'" *Id*.

The Second Circuit in *Bell Atlantic* had taken the view that: "The factual predicate that is pleaded does need to include conspiracy among the realm of *plausible possibilities*" (425 F.3d at 111 (emphasis added)). The Supreme Court held that a mere-possibility standard does not satisfy the Rule 8 entitlement requirement because a *possibility* of relief is something less than a *plausibility* of relief. *See* 127 S.Ct. at 1966 ("An allegation of parallel conduct ... 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 'entitlement to relief.'").

The context of the Supreme Court's opinion is important. *Bell Atlantic* was a complex antitrust class action — a very expensive case to litigate. The Supreme Court cited *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) — its decision in a similarly expensive securities class action — to illuminate the "practical significance of the Rule 8 entitlement requirement." The Court emphasized that, under *Dura*, "something beyond the mere possibility" of entitlement to relief (there, loss causation) must be alleged "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." 127 S.Ct. at 1966 (internal quotations omitted). *Bell Atlantic* reiterates that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1967 (citation and quotation omitted).

Bell Atlantic also rejected the notion "that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process." It quoted an article by Judge Frank Easterbrook for the proposition that "[t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands ... have been, and are doomed to be, hollow."

Id. at 1967 n.6. Therefore, the complexity and expense of the litigation, which motivated the Court's novel interpretation of Rule 8(a), may affect the level of factual detail required.

Bell Atlantic raises a variety of interesting issues.

Information-and-Belief Pleading. It is well-settled that "[p]leading 'upon information and belief' is sufficient to satisfy federal notice pleading under Fed.R.Civ.P. 8(a)." *Elektra Enter. Group v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *7 (S.D.N.Y. Nov. 28, 2005), quoting *Steinbrecher v. Oswego Police Officer Dickey*, 138 F.Supp.2d 1103, 1109-1110 (N.D. Ill. 2001). Among other things, this is evidenced by Rule 11(b) contemplates information-and-belief pleading, providing that the signature on a pleading (among other things) constitutes a "certif[ication] ... to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that there is a basis for the allegations. *See* 2 MOORE'S FEDERAL PRACTICE § 8.04[3] (3d ed. 2007).

Information-and-belief pleading is not the same after *Bell Atlantic*. The complaint before the Supreme Court contained the allegation that: "Plaintiffs allege upon information and belief that [the Defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." 127 S.Ct. at 1974 (Stevens, J., dissenting). This was rejected by the Supreme Court as inadequate because it did not satisfy the fact-based pleading and Rule 8 entitlement requirements. Therefore, invocation of the phrase "information and belief," without more, does not satisfy the fact-based pleading and Rule 8 entitlement requirements of *Bell Atlantic*.

In reconciling the tension between information-and-belief pleading and the Rule 8 entitlement requirement, it may be useful to look at the way information-and-belief pleading is

addressed in another context in which fact-based pleading is required — namely, decisions under Rule 9(b). In this setting, it is commonly held that, where allegations of fraud are based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief. *See, e.g., Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 878 (1st Cir. 1991) (pre-PSLRA). This case law developed to test whether the allegations furnishing the mandatory "particularity" had a basis in fact. That goal is not dissimilar to that facing a court now obligated to test whether the newly-mandated "plausible entitlement" standard *Bell Atlantic* has been satisfied. It presents an established approach toward determining whether mandatory allegations (be they "particularity" or "plausibility") are sufficiently rooted in fact.

This suggestion highlights the fact that *Bell Atlantic* can fairly be read as moving 8(a) jurisprudence closer to that of Rule 9(b). After *Bell Atlantic*, it is no longer accurate to say — as it was before — that "[s]uch supporting allegations seem to be unnecessary and inconsistent with the philosophy of the federal pleading rules" (5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1224 (Supp. 2006)). Arguably, *Bell Atlantic* is more stringent in its requirements than preexisting 9(b) case law, which relaxed the particularity rule when factual information is peculiarly within the defendant's knowledge or control (*see, e.g., Weiner v. Quaker Oats Co*., 129 F.3d 310, 319 (3d Cir. 1997)), even though the pleading standard stated in Rule 9(b) is more stringent than that stated in Rule 8(a). Case law will have to sort through the extent to which this eminently practical doctrine survives.

Conspiracy. The issue in *Bell Atlantic* was conspiracy, and the Court ordered dismissal because "nothing contained in the complaint invests either the action or inaction [of the defendants] with a plausible suggestion of conspiracy." 127 S.Ct. at 1971. Therefore, it is safe to conclude that any action alleging conspiracy — *e.g.*, RICO, civil rights, civil conspiracy —

requires allegations of fact sufficient to satisfy this standard. What would suffice? District Judge Gerard E. Lynch's underlying opinion in *Bell Atlantic*, 313 F.Supp.2d 174 (S.D.N.Y. 2003), dismissed the complaint because plaintiffs failed to plead a "plus factor" that tended to exclude independent self-interested conduct as an explanation for the defendants' behavior — for example, "that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 179. This is as good starting point as any for alleging a viable conspiracy claim.

Extent of Required Allegations of Fact. The *Bell Atlantic* Court focused on the expense of litigating a massive antitrust class action; relied on its *Dura* decision, which focused on the expense of litigating a massive securities class action; and emphasized the inadequacy of judicial oversight of discovery to rein in discovery costs. Less complicated cases, like the auto accident discussed above, do not present the same issues, either in terms of complexity, expense or the perceived inadequacy of managerial judging. There is little to be gained by requiring the auto accident plaintiff to plead — instead of that "the defendant negligently drove a motor vehicle against the plaintiff" — that "the defendant was speeding and across the center line when he drove a motor vehicle against the plaintiff." The former is as plausible as the latter — discovery will determine who was at fault. Given the new *Bell Atlantic* test, however, and notwithstanding Rule 84, erring on the side of including more rather than fewer facts is the safer course.

***Erickson v. Pardus*.** Just how extensively does *Bell Atlantic* change the law of notice pleading? In a second pleading opinion issued per curiam in a *pro se* prisoner case on June 4,

2007, *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), the Supreme Court sounded a permissive chord.

In his complaint, the prisoner plaintiff alleged that the physician provided by the prison had "removed [him] from [his] hepatitis C treatment" in violation of Corrections Department protocol, "thus endangering [his] life." He attached to the Complaint grievance forms in which he claimed that he was suffering from "continued damage to [his] liver" as a result of the failure to treat. The Complaint requested damages and an injunction requiring that the Corrections Department treat petitioner for hepatitis C "under the standards of the treatment [protocol] established by [the Department]."

The Tenth Circuit affirmed a magistrate judge's determination dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(2), holding that Complaint failed to set forth a factual showing of harm sufficiently to satisfy Rule 8(a)(2): "[I]n the proceedings before the district court and this court, plaintiff has made only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the Interferon/Ribavirin treatment program" (127 S.Ct. at 2199).

The Supreme Court summarily vacated the Tenth Circuit decision, observing:

> 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." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. ----, ----, 127 S.Ct. 1955, --- L.Ed.2d ----, ---- - ---- (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., supra*, at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

127 S.Ct. at 2200.

There appear to be three primary differences between *Bell Atlantic* and *Erickson*.

First, the Supreme Court stressed the *pro se* status of the plaintiff in *Erickson* — a far cry from the highly sophisticated antitrust counsel in *Bell Atlantic*:

> The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is " to be liberally construed," *Estelle [v. Gamble]*, 429 U.S. [97] at 106, 97 S.Ct. 285, and " a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) (" All pleadings shall be so construed as to do substantial justice").

Erickson, 127 S.Ct. at 2200.

It is possible that the Court is applying a more lenient (euphemism for "double") standard in *pro se* cases, even as it explains why it is not.

Second, the pleading issue in *Erickson* was harm, not liability. Under Rule 8(a)(2), only "a short and plain statement of the claim showing that the pleader is entitled to relief" is required:

> The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was " endangering [his] life." Petitioner's Complaint 2. It alleged this medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment. *Id.*, at 3, 4. This alone was enough to satisfy Rule 8(a)(2).

Id. at 2200.

In other words, "while "detail[ed]" factual allegations are not required, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief," and this necessitates "some factual allegation in the complaint...." Bell Atlantic, 127 S.Ct. at 1965 n.3.

Third, *Erickson* was a simple case, *Bell Atlantic* a complicated antitrust action. What more did the defendants in *Erickson* really need to know? Not much.

Conclusion. One could read *Twombly's* plausibility-in-pleading standard as requiring that the inference alleged in the complaint be *more persuasive* than alternate inferences (*see, e.g.*, 127 S.Ct. at 1966 (allegation insufficient where it "could just as well" give rise to inference of non-violative conduct) and at 1972 (allegation insufficient where "we have an obvious alternative explanation")). But, whatever Rule 8(a)(2) means, it cannot by any means require more than the strict scienter pleading requirement of the PSLRA, and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007), decided on June 21, 2007, teaches that the PSLRA is satisfied by an inference of *equal plausibility.*

Consider a securities case alleging § 11, 10b-5 and common law fraud claims (thus, not a class action). The § 11 claim is governed by Rule 8(a)(2) because it doesn't require fraudulent intent, the 10b-5 claim is governed by the strict statutory scienter requirement of the PSLRA, and the common law fraud claim is governed by Rule 9(b). What is the difference in the pleading standards among the three of them? It is not possible to articulate those differences with any assurance.

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