

The Plausibility Standard under *Twombly* and *Ashcroft*

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In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the U.S. Supreme Court put to rest any question about whether its decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), established a new pleading standard under the Federal Rules of Civil Procedure, Rule 8(a). When it was issued, the *Twombly* opinion raised eyebrows because of its dismissive discussion of the pleading standard in *Conley v. Gibson*, 355 U.S. 41 (1957), which had long controlled motions to dismiss brought under Rule 8(a). The decision suggested that *Conley* no longer governed 12(b)(6) motions. However, both the scope of application of the *Twombly* standard, and the precise meaning of the “plausibility” test it set forth were left uncertain in the opinion, not least of all because the Court identified the issue presented in *Twombly* as the “question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.” *Twombly*, 550 U.S. at 554. Many courts concluded that *Twombly* was only applicable to antitrust claims. In *Ashcroft*, the Court made clear that *Twombly* applies in “all civil actions,” and it revisited and arguably heightened the plausibility standard. *Ashcroft*, 129 S.Ct. at 1953.

In retiring the *Conley* test, the Supreme Court replaces an essentially negative test with an affirmative standard. The general ineffectiveness of motions to dismiss and the permissiveness of Rule 8(a) pleadings resulted, not from “notice pleading” but from *Conley*’s “negative gloss on an accepted pleading standard.” *Twombly*, 550 U.S. at 561-63. Under *Conley*, a district court could dismiss a complaint if it concluded there was

“no set of facts” that might prove an entitlement to relief. As the Supreme Court noted, this meant a court had to conclude there was no “possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” *Twombly*, 550 U.S. at 561. As a practical matter, under *Conley* district courts were tasked with proving a negative, and dismissal was proper only at the limits of the district court’s imagination. *Twombly* and *Ashcroft* renovate Rule 12(b)(6) primarily because for the first time in 50 years they put in place an affirmative pleading standard.

District courts now have significant tools for enforcing Rule 12(b)(6), and defense counsel have a basis to litigate motions to dismiss more aggressively. Indeed, the Supreme Court provides in *Ashcroft* something like a primer for arguing and deciding motions to dismiss under the new pleading regime. The Court identifies “two

working principles” that underlie the new standard: “[f]irst, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”; and “[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Ashcroft*, 129 S.Ct. at 1949-50. The Court then suggests 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.” *Id.* at 1950. This suggestion is, however, somewhat misleading. There is a third component of a Rule 12(b)(6) analysis under *Twombly* and *Ashcroft* that precedes the Court’s “two working principles.” Both the factuality of the allegations and the plausibility of the claim are assessed in the context of the elements that a plaintiff has to prove in order to be entitled to relief.

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Hence, the first step in analyzing the adequacy of a complaint is to explicate the elements of the cause of action. This step is prominent in *Twombly's* emphasis on the requirements to plead an antitrust violation. The same is true of *Ashcroft*, where the Court takes substantial time to clarify (over vigorous dissent) that *Bivens* action liability requires that a plaintiff “plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Ashcroft*, 129 S.Ct. at 1940. Hence, the respondent had to plead that each defendant evinced a discriminatory purpose, which required pleading that each defendant individually undertook a course of discriminatory action because of, not merely in spite of, that action’s adverse effect on the respondent. *Id.* In view of this requirement of the claim, the Court said it then “follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioner adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on the account of race, religion, or national origin.” *Id.*

Only after this explication of the requirements for obtaining relief did the Court turn to assessing the factuality of the allegations and the plausibility of the claim. With the requirements of the respondent’s claim directly in mind, the Court held that the following allegations were not genuinely factual on the grounds they were “bare assertions” that amounted to “nothing more than a ‘formulaic recitation of the elements’”:

- that petitioners ‘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;
- that Mueller was ‘instrumental’ in adopting and executing it.

Ashcroft, 129 S.Ct. at 1951.

The Court concluded that these ostensibly factual allegations were in fact conclusory. The stand-alone assertions that *Ashcroft* was the architect of an intentionally discriminatory policy, and that Mueller was instrumental in its adoption, were “legal

conclusion[s] couched as [] factual allegation[s]” that the Court need not accept as true. *Twombly*, 550 U.S. at 555. To count as genuinely factual, these allegations would have to have been corroborated by “further factual enhancement” in the complaint. *Id.* at 557.

Reasonable minds can disagree with the Court’s conclusion, and in dissent Justice Souter, who delivered the *Twombly* opinion, takes the majority to task precisely for “looking at the relevant assertions in isolation.” *Ashcroft*, 129 S.Ct. at 1960. Nonetheless, the roadmap presented by the majority is clear: The factuality of an allegation is not absolute but is assessed in the context of the elements of the relevant claim, and where a cause of action depends on a stand-alone assertion of the elements,

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unenanced by additional factual detail, a district court need not treat the allegation as true. It will be up to district courts to apply this principle in each case. But the clear message for litigants is that under *Twombly* and *Ashcroft* the genuine factuality of allegations in a complaint can be contested through consideration of the elements of a plaintiff's cause of action.

The plausibility analysis follows the same principle. The Court introduced the concept of plausibility in direct substitution for the "no set of facts" language in *Conley*. To pass muster under Rule 12(b)(6), it is no longer enough that a plaintiff makes "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft*, 129 S.Ct. at 1949. Rather, a district court must conclude that the claim is plausible in the context of the alleged cause of action.

But whereas in *Twombly* the Court had required that the factual allegations raise the right of relief beyond the "speculative level" or a mere "suspicion" of a right of action, the Court's guidance in *Ashcroft* suggests that plausibility requires a district court to do more than satisfy itself that a claim is not speculative. *Twombly*, 550 U.S. at 555. An affirmative showing is required. 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." *Ashcroft*, 129 S.Ct. at 1949. To survive a motion to dismiss the district court has to reach a positive inference of liability – albeit taking the genuinely factual allegations as true. Similarly, the Court states that an inference of

the "mere possibility of misconduct" is insufficient to survive a motion to dismiss; the complaint has to "show" that the plaintiff is entitled to relief. *Id.* at 1950. Moreover, factual allegations that are "merely consistent with" liability, while it would seem they show something more than a suspicion of a right of action, nonetheless fall short in *Ashcroft* of the showing needed to establish that the plaintiff's right to relief is plausible. *Id.* at 1949. Even well-pled factual allegations that show the plaintiff's right to

relief is "conceivable" do not support the reasonable inference of plausibility. In particular, plausibility is not established where liability is conceivable but "more likely explanations" of the conduct can be imagined. *Id.* at 1951.

A few conclusions can be drawn from this description of the plausibility standard. The most important in my view is that it is an affirmative standard that allows a district court to "draw on its judicial experience and

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common sense” to dismiss complaints unless the court can reasonably infer an entitlement to relief. *Ashcroft*, 129 S.Ct. at 1950. The district courts will have to determine how to apply this standard. But the Supreme Court provides some parameters. The Court discounts the sufficiency of a negative inference that a claim is “not speculative.” To infer that a claim is not speculative falls short of inferring it is plausible. The Court also discounts the sufficiency of a positive inference that a claim is possible or conceivable. To infer a claim is plausible, a court must reasonably conclude that the factual allegations, taken as true, show an entitlement to relief, however improbable the court may think the allegations are. It is not enough if the allegations show only that the plaintiff *may be* entitled to relief, such as in cases where the allegations can be interpreted as showing a right to relief but are more reasonably – persuasively – accounted for by a legitimate explanation. In each respect, the Court requires a determination that the plaintiff’s right to relief is a reasonable inference from the alleged facts, and apparently not just one possibility among others.

There can be little doubt that the Supreme Court intends *Twombly* and *Ashcroft* to invigorate motion to dismiss litigation, and to result in more cases being dismissed at the pleading stage. The cases set forth a standard for surviving motions to dismiss that presumes a degree of factual knowledge about a case that plaintiffs previously could hope to obtain through discovery. The new pleading standard requires plaintiffs to allege substantive factual detail with respect to each element of their claims prior to discovery and in order to be allowed to conduct discovery. As the Court put it, Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”

Ashcroft, 129 S.Ct. at 1950. *Twombly* and *Ashcroft* are thus consistent with several other recent Supreme Court decisions that sought to curb abusive discovery. However, the effect of these two cases will be far greater than the Court’s prior efforts to limit discovery abuses because *Twombly* and *Ashcroft* do not address specialized areas of law, but rather govern the determination of the viability of all civil cases at the commencement of a lawsuit.

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