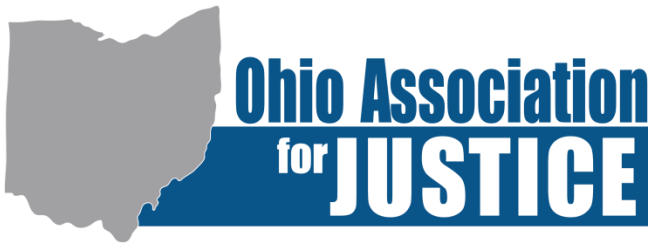

Iqbal Twombly Presentation

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SELECTED DECISIONS ON PLEADING STANDARDS AFTER *ASHCROFT V. IQBAL*

Since the Supreme Court's decision in *Ashcroft v. Iqbal*, in May 2009, the lower courts have struggled to figure out how to apply the Court's new standard for motions to dismiss to the cases before them. *Iqbal* has been cited more than 16,000 times in the short time since the case came down. As a result, it is impossible to offer a comprehensive survey of post-*Iqbal* case developments. Instead, this memorandum is intended to offer assistance to plaintiffs' attorneys. The first section includes helpful language from Supreme Court decisions, and the second section highlights several of the most important cases decided in favor of plaintiffs in the courts of appeals and district courts.

I. Key Language from the Supreme Court's Recent Pleading Decisions

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (internal quotation marks omitted).

"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*.

"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*.

"[W]here 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. *Id*. at 1950 (quoting FRCP 8(a)(2)).

"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." *Id*.

"In keeping with these principles 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. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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." *Id*.

***Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)**

"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)." *Twombly*, 550 U.S. at 555 (citations omitted).

"We hold that stating [an antitrust] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id*. at 556.

"Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*.

"And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id*. (internal quotation marks omitted).

"It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Id*. at 559 (internal quotation marks and citations omitted).

"[W]e do not apply any heightened pleading standard . . . ." *Id*. at 569 n.14.

"[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

***Matrixx Initiatives, Inc. v. Siracusano*, --- S.Ct. ----, 2011 WL 977060 (Mar. 22, 2011)**

In this securities fraud cause, the Court makes several general points about pleading, including that courts must "assum[e] the complaint's allegations to be true," that the test is whether the plaintiff's "allegations suffice to 'raise a reasonable expectation that discovery will reveal evidence'" satisfying the elements of the claim, and that even under the super-heightened pleading requirement of the PSLRA, it is enough if an inference favoring the plaintiff is "at least as compelling" as an opposing inference.

***Skinner v. Switzer*, --- S.Ct. ----, 2011 WL 767703 (Mar. 7, 2011)**

"[U]nder the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument. *See* 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219, pp. 277-278 (3d ed.2004 and Supp.2010).

***Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)**

"To qualify as 'strong' within the intendment of [the Private Securities Litigation Reform Act of 1995], we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314.

***Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam)**

"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.' 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." *Erickson*, 551 U.S. at 93–94 (internal quotation marks and citations omitted).

Holding that the Court of Appeals erred by "depart[ing] from the liberal pleading standards set forth by Rule 8(a)(2) . . . ." *Id*. at 94.

***Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002)**

"The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Id*. at 510.

"This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." *Id*. at 511.

"[U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case" and because "the precise requirements of a prima facie case can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic." *Id*. (internal quotation marks omitted).

"This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id*. at 512.

II. *Iqbal* Interpretation in the Courts of Appeals and District Courts

It is difficult to identify any one trend in post-*Iqbal* developments in the lower federal courts. The best one can say is that different courts have taken different approaches. Below is a non-scientific list summarizing some (but by no means all!) important post-*Iqbal* decisions in the courts of appeals (and one trial-court decision).

***Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009)**

In this *Bivens* case against John Ashcroft, among others, the Ninth Circuit holds that the plaintiff's allegations of unlawful motive are not conclusory and suggests that *Iqbal* changed

little with respect to conclusory allegations because even before the decision, conclusory allegations of motive were unlikely to survive a motion to dismiss. The court emphasizes that *Iqbal* did not impose a probability test and that all inferences must be drawn in the plaintiff's favor. The court also suggests (n.27) that an inference is plausible so long as it is not unreasonable.

The Supreme Court has now granted *certiorari* in this case.

***Arista Records, LLC v. Doe 3,* 604 F.3d 110 (2d Cir. 2010)**

In this copyright case, the Second Circuit rejects an argument that *Iqbal* or *Twombly* imposed a "heightened" pleading requirement and that they require the pleading of "specific evidence." The court also confirms that plaintiffs may allege facts on "information and belief."

***Bausch v. Stryker Corp.,* 630 F.3d 546 (7th Cir. 2010)**

In this product-liability medical-device case, the Seventh Circuit reversed a dismissal granted on preemption grounds. The decision is essential for anyone dealing with the issue of medical-device preemption, and it also includes useful language regarding *Iqbal*.

As a general matter, the court's description of the post-*Iqbal* pleading standard emphasized that "notice pleading" remains the rule, that the purpose of Rule 8 is to "focus litigation on the merits" rather than on "technicalities that might keep plaintiffs out of court," and that plaintiffs are entitled to "the benefit of imagination."

Throughout its opinion, the court emphasized the issue of information asymmetry, holding that the plaintiff could not be required to plead information contained only in confidential documents inaccessible until discovery. For example, the court said "in analyzing the sufficient of pleadings, a plaintiff's pleading burden should be commensurate with the amount of information available to them." (Internal quotation marks omitted). In rejecting the defendants' argument that the plaintiff had to allege a device-specific regulatory requirement that was violated, the court also explained that (a) product liability claims are not subject to Rule 9(b) or any heightened or specific pleading requirement; (b) many plaintiffs injured by a product will not know exactly what was wrong with it; and (c) information about device-specific requirements is usually in confidential government files.

In addition to these points, the court noted that many complaints combine legally valid and invalid claims, and that the mere existence of some invalid claims does not merit dismissal or require the plaintiff to amend. The court also explained that preemption is an affirmative defense, and that "pleadings need not anticipate or attempt to circumvent affirmative defenses."

Finally, the court discussed at length the issue of leave to amend, emphasizing that "[o]ne objective of Rule 8 is to decide cases fairly on their merits, not to debate finer points of pleading where opponents have fair notice of the claim or defense" and that "[g]enerally, if a district court dismisses for failure to state a claim, the court should give the party one opportunity to try to cure the problem, even if the court is skeptical about the prospects for success."

***Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009)**

In this very useful opinion, the Eighth Circuit court holds that the district court erred by failing to draw all reasonable inferences in favor of the plaintiff and by placing the burden on plaintiff to rebut defendant's alternative explanations. The court holds that not all alternative explanations require a rebuttal—an alternative explanation must be "obvious" in order to undermine the plausibility of plaintiff's claim. The court also holds that "[j]ust as a plaintiff cannot proceed if his allegations are merely consistent with a defendant's liability, so a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct." In addition, the court emphasizes that a plaintiff's complaint must be read as a whole, in context, and in this ERISA case, in light of the statute's remedial purpose. Finally, the court points out that many ERISA claims depend on facts peculiarly within the defendant's control and instructs district courts to take that into account.

***Casanova v. Ulibarri*, 595 F.3d 1120 (10th Cir. 2010)**

In this §1983 case, the Tenth Circuit holds that district court erred by considering defendant's answer and by taking allegations in the answer as true. The plaintiff's complaint did not allege specific dates, but the court holds that dates may not be necessary if a complaint contains sufficient detail about an event to identify it.

***Chao v. Ballista*, 630 F.Supp.2d 170 (D. Mass. 2009)**

In denying a motion to dismiss the prisoner-plaintiff's complaint, the court (J. Gertner) explains that notice pleading remains the rule post-*Iqbal* and that to make a claim implausible, defendants must offer an alternative explanation that is "a far more likely inference from the available facts" and is "so overwhelming . . . that the [plaintiff's] claims no longer appear plausible." The court also emphasizes that *Iqbal*'s plausibility inquiry is context specific.

***Diaz-Bernal v. Myers*, --- F.Supp.2d ----, 2010 WL 5211494 (D. Conn. Dec. 16, 2010)**

In this *Bivens* / constitutional case arising from an ICE immigration raid, the district court held that the plaintiffs alleged enough to state claims for supervisory liability against high- and mid-ranking ICE officials. The court held that (1) supervisory liability survives *Iqbal* at least to the extent it can be shown that the defendant was involved in creating a policy or custom under which unconstitutional practices occurred or in allowing the continuance of such a policy or custom; and (2) a failure to train allegation that is sufficient to state a claim under *City of Canton, Ohio v. Harris* also survives *Iqbal*. More generally, the court explained that the purpose of a motion to dismiss is stil to test the "legal feasability" of the complaint "not to assay the weight of evidence which might be offered in support thereof."

***Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278 (6th Cir. 2010)**

The plaintiff in this case alleged that the defendant manufacturer misrepresented the safety of its motorcycle helmets. The Sixth Circuit reversed dismissal of the plaintiff's complaint, emphasizing that the plaintiff's theory of the case represented one reasonable

inference, and that at the motion to dismiss stage, the court had to draw inferences in plaintiff's favor.

The plaintiff's complaint alleged that the defendant manufactured large and small helments. Its large helmet passed a government safety test in 2000, but the small helmet failed the test in 2002. The plaintiff used the large helmet. The district court dismissed the plaintiff's claim on the theory that because a large helmet passed the 2000 test, the defendant's large helmets could not be defective. But the Sixth Circuit rejecting the district court's reasoning:

The problem with this chain of reasoning is that it turns on potential inferences, not necessary ones. There are at least two legitimate ways to think about the significance of the NHTSA tests, and they point in opposite directions when it comes to the merits of this lawsuit. One is that the difference between the 2000 and 2002 test results turns on differences between the performance of the small and large AF-50 helmets. If so, that would support the district court's ruling that the disparity between the size of the helmet bought and the size of the helmet tested is fatal to Fabian's claims. The other reasonable inference, however, is that helmets of the same model, even if differently sized, perform the same. Two differently sized helmets, for example, may be no more distinct as a matter of performance than two differently sized pairs of shoes or two differently sized pairs of pants. If so, the failed 2002 test potentially exposed a defect in all AF-50 helmets, no matter their size.

In the absence of further development of the facts, we have no basis for crediting one set of reasonable inferences over the other. Because either assessment is plausible, the Rules of Civil Procedure entitle Fabian to pursue his claim (at least with respect to this theory) to the next stage-to summary judgment or, if appropriate, a trial after the parties have engaged in any relevant discovery to support one or the other interpretation. So long as we can "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S.Ct. at 1949, a plaintiff's claims must survive a motion to dismiss. That inference is reasonable here because "common sense," *id*. at 1950, tells us that a mass-manufactured consumer product, whether it is shoes, pants or helmets, may utilize the same design (and carry the same flaw) regardless of its size.

***Giardina v. Lawrence*, 354 F. App'x 914, 2009 WL 4572837 (5th Cir. Dec. 7, 2009)**

In this excessive force case, the Fifth Circuit affirmed denial of a motion for judgment on the pleadings, even though the plaintiff's complaint did not include allegations to address the likely defense of qualified immunity. "[A] plaintiff need not anticipate the defense in the complaint. Thus, [defendant's] argument that the complaint has not overcome qualified immunity is without merit."

***Gonzalez v. Corrections Corp. of America*, 344 F. App'x 984, 2009 WL 3054053 (5th Cir. Sept. 25, 2009)**

This Fifth Circuit decision emphasizes that district courts may not rely on alternative explanations for a defendant's conduct that conflict with the plaintiff's complaint. Here, the

district court improperly assumed that the plaintiff could be accommodated in a way that conflicted with plaintiff's allegations

***Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009)**

In this FDCPA case, the Fifth Circuit finds that the plaintiff's complaint states a claim even though "reasonable minds can differ" about whether the letter at issue violates the statute.

***Hamilton v. Palm*, 621 F.3d 816 (8th Cir. 2010)**

The plaintiff in this case alleged that he was injured on the job as the result of employer negligence. In reversing dismissal, the Eighth Circuit held that Form 13 at the end of the Federal Rule (incorporated via Rule 84) permits a bare allegation of employment status in a negligence case, *i.e.*, "an allegation . . . that the defendant acted as plaintiff's 'employer'" is sufficient. Alternatively, the court held that the plaintiff's allegations that the defendants provided unsafe tools and that the plaintiff performed his work "as directed by" the defendants were sufficient to permit an inference of employment status. The court noted that the plaintiff's complaint "raised plausible inferences of *both* employee and independent contractor status" (emphasis added) but at the motion-to-dismiss stage, the court had to draw the inference favoring the plaintiff.

***Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741 (7th Cir. 2010)**

Although this is a summary judgment opinion (and actually affirms judgment against the plaintiff on her Title VII claim), the opinion includes the following useful statements about pleading: "Although *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), require that a complaint in federal court allege facts sufficient to show that the case is plausible, *see, e.g.*, *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir.2008), they do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories. *See Aaron v. Mahl*, 550 F.3d 659, 665-66 (7th Cir.2008); *O'Grady v. Village of Libertyville*, 304 F.3d 719, 723 (7th Cir.2002). Even citing the wrong statute needn't be a fatal mistake, provided the error is corrected in response to the defendant's motion for summary judgment and the defendant is not harmed by the delay in correction. *Ryan v. Illinois Dept. of Children & Family Services*, 185 F.3d 751, 764 (7th Cir.1999)."

***In re Insurance Brokerage Antitrust Litigation*, --- F.3d ----, 2010 WL 3211147 (3d Cir. Aug. 16, 2010)**

In the course of upholding a complaint in part and rejecting it in part, the Third Circuit emphasizes that fair notice remains the principal purpose of Rule 8 and that complaints must be construed in the light most favorable to plaintiffs. The court also emphasizes that "context" matters and that because *Iqbal* does not impose a probability requirement, a plaintiff need not "plead facts supporting an inference of defendant's liability more compelling than the opposing inference."

***Lewis v. Taylor*, 2010 WL 3785109 (S.D. Ohio Sept. 21, 2010)**

Race discrimination case. The district court soundly rejects defendant's contention that Iqbal and Twombly require that "plaintiff must essentially present a fully developed factual record in his complaint. This is, indeed, an over-reading of the cases. The federal rules still provide for notice pleading, not fact pleading, and Iqbal and Twombly did not rewrite the rules. . . . Evidentiary support is simply not necessary at this stage in the proceedings."

***Morgan v. Hubert*, 335 F. App'x 466, 2009 WL 1884605 (5th Cir. July 1, 2009)**

This Fifth Circuit opinion in a §1983 case includes a good discussion of plaintiff's difficulty in trying to comply with Rule 11 with limited information: "Because key facts are unknown, and because these facts are solely within Hubert's possession," the court orders limited discovery on qualified immunity.

***Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 2009 WL 5126224 (4th Cir. Dec. 29, 2009)**

In this Fourth Circuit case, a car dealer sued a website for defamation and tortious interference on the basis of posted consumer reviews. To hold the defendant liable, the dealer would have to prove that the defendant produced some content for the site. The court holds an allegation that defendant "helped [consumer] draft or revise her complaint" to be conclusory. The majority also rejects an alternative theory offered by the plaintiff after listing several alternative explanations for what happened, without saying that the alternatives are either more likely than plaintiff's theory or even equally likely. The dissent accuses the majority of applying an incorrect "rule that the existence of any other plausible explanation that points away from liability bars the claim."

***Peñalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592 (1st Cir. 2011)**

The plaintiff in this case alleged that she was discharged from public employment in Puerto Rico because of her political party membership in violation of her First Amendment rights. The First Circuit held that she adequately alleged that she was improperly fired by *someone* but that she did not state a plausible claim against the named defendants, including Puerto Rico's governor, because there was "nothing in the complaint beyond raw speculation to suggest that *the named defendants* participated--either as perpetrators or accomplices--in the decision to dismiss Peñalbert."

The First Circuit remanded with instructions to allow the plaintiff to amend her complaint to proceed against a "John Doe" defendant. But the court also included troubling language in its opinion stating that even some "factual" allegations in a complaint need not be accepted as true. For this reason, *Penalbert-Rosa* should be used with care, if at all.

***Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, http://www.ca1.uscourts.gov/pdf.opinions/08-2283P-01A.pdf (1st Cir. 2010)** (Westlaw cite not yet available)

Public school teachers alleged failure to accommodate case their disabilities. In an opinion by Justice Souter reversing the lower court's dismissal of the claim, the court noted that the court must look to "the combined allegations" and "read[] the allegations with the required favor to the plaintiff." The court emphasized that "*Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor." Even if "it is possible that other, undisclosed facts may explain the sequence better[,] [s]uch a possibility does not negate plausibility . . . it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence." Making inferences in favor of the plaintiffs, it was sufficient that the complaints had alleged harm as a result of failure to accommodate, even without detailing the exact causal connection.

***Smith v. Duffey*, 576 F.3d 336 (7th Cir. 2009)**

At the end of this opinion affirming dismissal of a fraud claim, Judge Posner notes that both *Twombly* and *Iqbal* involved special types of cases—cases that raised particular concerns about intrusive discovery. *Twombly* (unlike *Smith*) was "complex litigation" where the cost of discovery "can be so steep as to coerce settlement" of a weak claim. *Iqbal* "is special in its own way" because the defense pleaded official immunity and "the Court said that the promise of minimally intrusive discovery 'provides especially cold comfort in *this* pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.'" (Emphasis added in *Smith*.) Judge Posner concludes that perhaps neither *Twombly* nor *Iqbal* governs but that it does not matter for purposes of resolving this case.

***Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control*, --- F.3d ---, 2010 WL 4136634 (11th Cir. Oct. 22, 2010)**

The plaintiff in this case alleged that the CDC disclosed his identity to the media in violation of the federal Privacy Act. Plaintiff could not prove at the pleading stage that CDC—as opposed to several state health agencies—had disclosed his name, but the 11th Circuit still held the claim plausible, emphasizing that "Speaker need not prove his case on the pleadings." The opinion also faults the defendant and district court for reading plaintiff's allegations very narrowly, for addressing one of his theories while ignoring another, and for reading allegations in isolation rather than as a whole.

***Starr v. Sony BMG Music Ent'mt*, 592 F.3d 314 (2d Cir. 2010)**

This Second Circuit decision is notable for J. Newman's concurrence, which includes an interesting discussion of the importance of context in *Twombly* and *Iqbal*. In J. Newman's view, the supporting facts required to state a plausible claim in those cases may not be necessary in many other cases, depending on the legal and factual context.

***Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010)**

This Seventh Circuit case involves a claim for race discrimination under the federal Fair Housing Act. The Seventh Circuit reverses a dismissal, taking the case as an opportunity to state some rules of the road for post-*Iqbal* pleading. The panel majority (J. Wood, J. Easterbrook) emphasizes that Rule 8 sets a low bar and that the principal purpose of Rule 8 is to provide "fair notice" to the defendant. According to the majority, *Iqbal* requires only that the plaintiff "present a story that holds together." The majority also explains that because *Iqbal* does *not* impose a probability requirement, district courts cannot require a plaintiff's theory of the case to be more-like-than-not true or more compelling than the defendant's theory. Finally, the majority emphasizes that pleading is a context-specific task: many straightforward cases will require no more than in the pre-*Iqbal* era; complex cases may require more.

Judge Posner dissented in this case, and Citibank petitioned unsuccessfully for rehearing en banc.

***In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010) (Posner, J.)**

In this antitrust, price-fixing case, the Seventh Circuit held that plaintiffs' allegation of "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion" was sufficient to state a plausible claim. The court described the scope of *Twombly* as "unsettled" and described pleadings standards as being in "ferment." The court also emphasized that direct evidence or a "smoking gun" cannot be required at the pleading stage, in advance of discovery.

On the other hand, the court included this somewhat confusing statement: "The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote."

***West Penn Allegheny Health Sys., Inc. v. UPMC*, --- F.3d ----, 2010 WL 4840093 (3d Cir. Nov. 29, 2010)**

In reversing dismissal of an antitrust complaint, the Third Circuit rejects the district court's suggestion that in complex antitrust cases, courts must act as "gatekeepers" and subject pleadings to heightened scrutiny. The Court emphasizes that the same pleading standard must be applied in all cases, and it rejects the notion that *Iqbal*'s reference to "context" permits courts to apply a heightened standard in complex cases.