**Gamesmanship in Defense Motion Practice:**

**Responding to a Motion to Dismiss for Lack of Product Specificity**

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Toxic exposure litigation can present many challenges in the form of general causation, specific causation and proving liability through expansive document reviews. However, before discovery occurs, a litigant may face challenges to the pleadings for a lack of product identification, despite Ohio being a notice pleading state. The Defense counsel representing the multinational oil, chemical and pharmaceutical companies are aggressive and will file motions simply to set the stage for a contentious piece of litigation.

In *Benzene litigation*, for example, the allegations often involve numerous products and numerous defendants where the exact product identification (e.g., model, lot, grade, formula) lies with the defendants and may be unavailable to the Plaintiff due to the time long passage of time between the exposure and the injury or otherwise. Defendants will routinely raise issues of product specificity in initial Motions to Dismiss under direction from national counsel. While plaintiff is often able to identify generic products (e.g., solvents, cleaning solutions, adhesives, raw benzene etc.) for all defendants, and Plaintiff may be able to identify some branded specific products for certain defendants (e.g, Turtle Wax, Safety Kleen Wash Machines etc.), Defendants nevertheless file Motions to Dismiss arguing the Plaintiff has not identified the "actual product" rendering the complaint deficient. Most practitioners have not been faced with Motions to Dismiss for lack of product identification, as the product is readily identifiable in most cases, and

most defendants do not file motions with little chance of success. Fortunately, if you encounter such gamesmanship, Ohio and Federal law are on your side in responding to such attacks on the pleadings.

### A. The "No Set of Facts Standard" is the proper standard under Ohio law.

The standard for a defendant to prevail is high in Ohio. "The motion to dismiss is viewed with disfavor and should rarely be granted."[1] Ohio has long held that a plaintiff is not required to plead operative facts with particularity. [2] The complaint need only contain "brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule." [3] With respect to Motions on Civ. Rule 12(B)(6), Ohio has adhered to the following standard:

> In construing a complaint upon a motion to dismiss for a failure to state a claim, we must presume that all factual allegations of the Complaint are true and make all reasonable inferences in favor of the non-moving party. Then, before we may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery. [4]

Very often, the evidence necessary for Plaintiff to prevail is not obtained until the Plaintiff is able to discover materials in the defendant's possession. Consequently, as long as there is a set of facts consistent with Plaintiff's complaint, which would allow the Plaintiff to recover, the court may not grant a defendant's motion to dismiss."[5]

### B. *Iqbal* has not been Adopted in Ohio

Some defendants may try to argue the heightened federal standard. This is improper and should hurt the defense counsel's credibility if they try to raise this argument. The Supreme

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[1] *Tuleta* at 401.
[2] *City of Cincinnati v Beretta U.S.A. Corp.*, 95 Ohio St.3d 416 (2002)
[3] *Vinicky v. Pristas*, 163 Ohio App. 508 (8th Dist. 2005)
[4] *Mitchel v. Lawson Milk Co*., 40 Ohio St, 3d 190, 192 (1988)
[5] *York v Highway Patrol*, 60 Ohio St. 3d 143, 145 (1991)

Court of Ohio has not adopted *Iqbal* and *Twombly*. Moreover, the *Second*[6], *Seventh*[7] and *Eighth*[8] Ohio Appellate Court Districts have expressly declined to adopt the "plausibility" standard. While it is true that Ohio Civil Procedure is based on the Federal Rules of Civil Procedure, the rules are not identical. [9] Finally, under the *Erie Doctrine* State Courts are not required to follow federal procedural pleading rules and most courts have not. [10] Therefore, until the Supreme Court expressly adopts the "plausibility" standard under *Iqbal/ Twombly*, the standard that has routinely been adopted by the Supreme Court of Ohio should be applied-- "Abandoning nearly 40 years of routine standards that have been applied in this state should be a matter for the Ohio Supreme Court."[11]

### C. Ohio Does not Require "Actual Product" Identification at the Pleading Phase.

While a motion to dismiss may appear daunting at first glance, keep in mind that the law is favorable to your client, and the plaintiff is not required to prove his or her case at the pleading stage-- Indeed, the Ohio Supreme Court has held that under Ohio Rule of Civil Procedure Rule 8(a) notice pleading standard the Plaintiff is not required to allege with specificity that a particular brand is defective at this level of the proceedings or caused particular injuries. [12]

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[6] *Sacksteder v Senney* 2012-Ohio-4452 (2nd Dist. 2012) [T]o the extent the trial court adopted a plausibility test based on *Twombly* and *Iqbal*, it erred.

[7] *Bahen v. Diocese of Steubenville*, 2013-Ohio-2168 (7th Dist. 2013)(Consistent with federalism it is the Ohio Supreme Court rather than the US Supreme Court, which has the sole authority to construe Ohio civil procedure.)

[8] *Tuleta v. Medical Mutual of Ohio,* 2014-Ohio-396 (8th Dist. 2014)(Few complaints fail to meet the liberal standards of Civ R. 8.)

[9] See e.g., Rule 26 Initial Disclosures and Rule 26 Expert Disclosures.

[10] http://www.porterwright.com/files/upload/OhioLawyer-Jalandoni-Shouvlin-May-June2015.pdf (of the 12 state Supreme Courts that have substantively examined Twombly/Iqbal, only three -MA, NE, SD- have adopted the plausibility standard.)

[11] *Tuleta* at 407 citing *Sacksteder* at 106.

[12] See, *Beretta U.S.A.*, 95 Ohio St. 3d 416 at 428 ("Appellant's complaint withstands this test of notice pleading since it alleged that appellees had manufactured or supplied defective guns without appropriate safety features.. Appellant was not required to allege with specificity that particular guns were defective and as a result caused particular injuries.")

While plaintiff will need to prove they were injured by Defendant's product to prevail under the Ohio Product Liability Act, generic identification is acceptable under the *Beretta USA* decision. There is little response to this case law, and, therefore, you can expect the Defendant to twist some local federal case law to argue something that the case does not hold. The most commonly cited case is *Germain v Teva Pharms, USA, Inc*, a 6th Circuit case, and the application here could not be more misplaced. First, the 6th circuit was applying the *Iqbal* standard that is not applicable in Ohio. More importantly, the facts and causes of action are not remotely in line. The Court in *Germain* was evaluating whether a brand drug manufacturer could be held responsible under a misrepresentation theory for generic drugs ingested by the plaintiffs. (This theory is known as "innovator liability" and only a minority of courts have adopted it.). In other words, the Plaintiffs were alleging a cause of action against a company that didn't actually make the product that hurt the Plaintiff. The product was identified, it simply was the generic form of the medication and not the brand that the named defendant manufactured. The Court dismissed the product liability claims because the plaintiffs did not allege that the defendants manufactured the product that injured the plaintiff. This decision has nothing to do with Defendants argument related to a lack of product specification. [13]

Plaintiffs in toxic exposure cases are not in most cases basing their theory on "innovator liability" theories, but on direct causes of action arising from manufacturing, sale and use of a product. Moreover, and contrary to Defendants assertion, Federal Courts addressing the level of product specificity have not found that higher levels of product specificity are required. For example, see, *Soucy v Briggs Stratton Corp*, where the Court disagreed that complaint need to

[13] *In re Darvocet, Darvon & Propoxyphene Product Liability Litig.*, 756 F. 3d 917, 950 (6th Cir. 2014).

state specific asbestos product. [14] See also, *Coleman v Boston Scientific Comp*, where the court denied motion to dismiss products liability complaint which alleged that defendant manufactured surgical "mesh product" but did not identify a particular product. The Court stated:

> **Imposing on plaintiffs the burden of specifically identifying a device by reference to a specific product line or model number, <u>without the benefit of discovery</u>, could create an insurmountable pleading burden in some cases.** [15]

Finally, see, *Bulanda v. A.W.* Chesterton Co, where the Court denied motion to dismiss in products liability action where complaint used generic word "wiring" with respect to electrical component of passenger jet. [16]

In summary, while a Motion to Dismiss is always a challenging way to start a case, the pleading standards case law are all on the Plaintiff's side. And getting a win on the first motion of a case is also the best way to fight against the gamesmanship.

[14] F. supp. 3d (U.S. Dist. Maine 2014) citing *Coene v 3M Co*. 2011 U.S. Dist. Lexis 89445(W.D. of New York) ,
[15] 2011 U.S. Dist Lexis 42826 (E.D. CA. 2011)
[16] 2011 U.S. Dist. Lexis 31920 (N.D. Ill. 2010)