TORT LAW

New Pleading Standard in Federal Courts

by Jeremy Robinson, Column Editor

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In the April 2007 issue of this magazine, I wrote a column discussing the differences between the pleading requirements in state and federal court. I noted that California state courts require "fact" pleading (see Code of Civil Procedure ["C.C.P."] §425.10(a)), whereas federal courts adhere to the "notice" pleading standard. Federal Rules of Civil Procedure ("F.R.C.P.") §8(a)(2). The "notice" pleading standard is considered to be more liberal than the "fact" pleading requirement because "notice" pleading only requires a statement that gives the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson* (1957) 355 U.S. 41, 47.

Little did I know when authoring my prior column that the United States Supreme Court was secretly (or perhaps not so secretly) plotting to make significant changes to the federal pleading standard. Clandestine scheming aside, the Court's plans came to light on May 21, 2007, when it published its decision in the case of *Bell Atlantic Corporation v. Twombly* (2007) 127 S.Ct. 1955. The *Bell Atlantic* decision passed under the radar of many plaintiffs' attorneys because the subject matter concerned antitrust claims, but buried in scintillating discussion of the Sherman Act was a renouncement by the Supreme Court of the notice pleading guidelines set forth in *Conley v. Gibson, supra*, that had stood for 50 years.

In *Conley v. Gibson, supra*, a case decided by the Supreme Court 11 years before I was born, the Court declared that "a complaint should not be dismissed for failure to state a claim [under FRCP §12(b)(6)] 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, supra*, 355 U.S. 41, 45-46. For 50 years, that legal standard was cited and relied upon by both practitioners and courts as being the standard applicable to a motion to dismiss.

In the *Bell Atlantic* decision, however, the Supreme Court revisited the *Conley* rule and decided the liberal standard had outlived its usefulness. In referring to *Conley's* "no set of facts" language, the Court determined that it "has earned retirement" and that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic, supra*, 127 S.Ct. 1955, 1969. The Court did not necessarily try to overrule Rule 8(a)'s limited notice pleading requirements, stating that "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," (*Id.*, 127 S.Ct. at 1964), but the Court did add the requirement that a plaintiff proffer "enough facts to state a claim to relief that is plausible on its face." *Id.* 127 S.Ct. at 1974.

Consequently, a Rule 12(b)(6) motion should be granted when the plaintiffs have failed to "nudge[ ] their claims across the line from conceivable to plausible." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* 127 S.Ct. at 1964-65 (citation omitted).

The Supreme Court's reluctance to continue the *Conley* standard was due, in part, to concern that the language in *Conley* could be read as essentially eliminating the need for a plaintiff to plead any specific facts at all. As the Court explained:

> **On such a focused and literal reading of *Conley's* "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery... It seems fair to say that this approach to pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case.**

Bell Atlantic Corp. v. Twombly, supra, 127 S.Ct. at 1968-1969.

The Court also rejected the idea that the problem could be rectified by way of dispositive motions or clear jury instructions, opining that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* 127 S.Ct. at 1967.

What remains to be seen at this point is the scope of *Bell Atlantic's* impact in the realm of general tort law. As I noted above, *Bell Atlantic* was an antitrust case and that fact played a significant role in the Court's decision to articulate a more stringent pleading standard. Antitrust cases are notoriously complex and involve seemingly endless rounds of discovery, and the Court was concerned about the tremendous consumption of time and resources at stake. It explained:

> **As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint").**

Bell Atlantic Corp. v. Twombly, supra, 127 S.Ct. at 1967.

Federal decisions after *Bell Atlantic* have struggled somewhat to determine the breadth of its holding as it relates to pleadings in general. Complicating the matter somewhat is the fact that just two weeks after issuing its opinion in *Bell Atlantic*, the Supreme Court cited that case for the traditional proposition that specific facts are not necessary for a pleading that satisfies Rule 8(a)(2); the statement need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *See, Erickson v. Pardus* (2007) --- U.S. ----, 127 S.Ct. 2197. These conflicting holdings create some uncertainty as to the intended scope of the Court's decision in *Bell Atlantic*.

In *Iqbal v. Hasty* (2d. Cir., 2007) 490 F.3d 143, the Court of Appeals for the Second Circuit pondered the matter and ultimately devised a hybrid "plausibility standard" for pleadings. The Second Circuit decided that the Supreme Court's decision in *Bell Atlantic* does not require a universal standard of heightened fact pleading, but instead demands a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts in which such amplification is needed to render the claim plausible. *Iqbal v. Hasty, supra,* 490 F.3d at 157-158.

The *Iqbal v. Hasty* decision involved a challenge to the terms of detention of a Muslim pretrial detainee post-9/11. The plaintiff alleged a number of civil rights violations by the federal government and various officials, including violations of the Fifth Amendment procedural and substantive due process rights and the Eighth Amendment right to be free from cruel and unusual punishment. *Id*. at 149, fn 3. The governmental defendants filed motions to dismiss, arguing, *inter alia*, that their actions were protected by qualified immunity. *Id.* at 150.

As a part of the defendants' appeal, the Second Circuit was required to consider the extent to which a plaintiff must plead specific facts in order to overcome the defense of qualified immunity at the motion to dismiss stage. The court examined prior Supreme Court precedent, including the 2007 decisions in *Bell Atlantic* and *Erickson*, and rejected the plaintiff's argument that the holding of *Bell Atlantic* was confined to antitrust cases or like business disputes. *Iqbal, supra,* at 157. The court also pointed out the difficulties in reconciling the various framings of the federal pleading standard by the Supreme Court in the pertinent cases and thus devised the "flexible plausibility standard" described above. *Id.* at 157-158.

Other recent decisions have also found that the standard articulated in *Bell Atlantic* applied to challenged pleadings outside the business litigation arena. *See, e.g., Mitan v. Feeney* (C.D.Cal. 2007) 2007 WL 2068106 [suit against credit card company for malicious prosecution and infliction of emotional distress]; *Butler v. City of Sacramento* (E.D.Cal.,2007) 2007 WL 2275218 [civil rights claim alleging violations of Fourth and Fifth Amendment rights].

In any event, regardless of how the particular issue of the scope of the *Bell Atlantic* decision plays out in the case law, it seems fairly clear that the Supreme Court is signaling a shift in the way pleadings are viewed in federal court. The practical ramifications of this shift are: (1) if you have any template oppositions to motions to dismiss that have *Conley's* "no set of facts" language in them, take it out, as it is no longer good law; and (2) as with California state law, federal courts are now going to be looking for **facts** in the pleadings, not conclusory allegations or a "formulaic recitation of the elements of the cause of action." *Bell Atlantic v. Twombly, supra,*127 S.Ct. at 1964-1965.