Comparing Standards for Dismissal under Fed. R. Civ. P. 12(b)(6) and N.J. Court Rule 4:6-2(e)

by Mark S. Olinsky and William R. Tellado

One of the first conversations between counsel and client after the client has been sued will usually involve whether to answer the complaint or instead file a pre-answer motion to dismiss in an attempt to knock out the plaintiff's claims at the inception of the litigation.

For many reasons, a pre-answer motion to dismiss can be an effective opening salvo in litigation. If the decision is made to answer the complaint, then counsel and client have to begin preparing for potentially expensive and time-consuming discovery. By contrast, a motion to dismiss may result in the dismissal of the plaintiff's entire lawsuit for the cost of preparing the motion, but avoiding the typically greater discovery costs. And even if the entire complaint is not dismissed, the motion to dismiss may have other benefits, including narrowing the claims at issue in the lawsuit, educating the court about the weaknesses in the plaintiff's case, and sending the message to the plaintiff and counsel that they are in for a long, hard fight.

Motions to dismiss in federal court are governed by Fed. R. Civ. P. 12(b), which lists seven permissible grounds upon which a party may move to dismiss a complaint: 1) lack of subject-matter jurisdiction; 2) lack of personal jurisdiction; 3) improper venue; 4) insufficient process; 5) insufficient service of process; 6) failure to state a claim upon which relief can be granted; and 7) failure to join a party under Fed. R. Civ. P. 19.[1] The New Jersey state analog to Fed. R. Civ. P. 12(b)(6), N.J. Ct. R. 4:6-2, sets forth six of the same defenses that can be raised via a motion to dismiss (omitting only the improper venue ground).[2]

Obviously, many factors must be considered when deciding whether to answer or move to dismiss, including the forum in which the lawsuit was commenced. While the Federal Rules of Civil Procedure and the New Jersey Court Rules provide the same basic frameworks and mechanisms for pre-answer motions to dismiss, there are critical differences in the standards the New Jersey District Court and New Jersey Superior Court use to analyze such motions. This is particularly true for motions to dismiss for failure to state a claim upon which relief can be granted. Of the six identical bases to dismiss a complaint in the federal and state rules, perhaps the most common is the motion to dismiss for failure to state a claim, which is also the ground with some of the more substantial differences.

For cases venued in New Jersey District Court, the general pleading requirements are set forth in Federal Rule of Civil Procedure 8(a)(2), which requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[3] If the plaintiff fails to satisfy this broad and amorphous requirement, the pleading may be attacked under Rule 12(b)(6). For 50 years, federal courts faced with a motion to dismiss under Rule 12(b)(6) applied, at least ostensibly, the United States Supreme Court's interpretation of the Rule 8(a)(2) pleading standard announced in *Conley v. Gibson*.[4] In *Conley*, the Supreme Court held that "[i]n appraising the sufficiency of the complaint...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."[5]

Then, in 2007 and 2009, the Supreme Court 'retired' the *Conley* 'no set of facts' test, with its decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[6] In *Twombly*, the Supreme Court reinterpreted the pleading standard under Rule 8(a)(2), shifting the analysis from one of 'possibility' under *Conley*, to one of 'plausibility' post *Twombly*.[7] In *Iqbal*, the Supreme Court made clear that the standard announced in *Twombly* applied to pleadings in all civil actions in district courts.[8]

Following *Twombly* and *Iqbal*, to survive a Fed. R. Civ. P. 12(b)(6) 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."[9] Facial plausibility exists when

the plaintiff pleads factual content that allows the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."[10] In a departure from the *Conley* standard, the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," and "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."[11] The 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."[12]

Thus, although courts post *Twombly* are still required to accept a complaint's well-pleaded allegations of fact as true, the courts are not required to accept as true "mere recitals of the elements of a cause of action, legal conclusions, and conclusory statements," which now are to be disregarded by district courts.[13]

New Jersey District Courts use a three-part analytical framework to help guide them in applying the *Twombly*/*Iqbal* standard to complaints challenged on motions to dismiss under Fed. R. Civ. P. 12(b)(6).[14] Under the first step, the court outlines the elements required to plead a viable claim.[15] The court then separates the factual and legal allegations of the complaint, accepting as true all of the well-pleaded facts, but disregarding legal conclusions.[16] Third, the court examines the well-pleaded facts to determine whether the facts alleged show the plaintiff has a plausible claim for relief.[17] Although legal conclusions are not entitled to the presumption of truthfulness, drawing the distinction between a well-pleaded factual allegation and a legal conclusion is not easy, and neither *Twombly* nor *Iqbal* sets forth "guidelines to help the lower courts discern the difference."[18]

The New Jersey counterpart to Federal Rule 8(a)(2) is New Jersey Court Rule 4:5-2, which provides that "a pleading which sets forth a claim for relief...shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement."[19] Motions to dismiss for failure to state a claim in New Jersey Superior Court are governed by New Jersey Court Rule 4:6-2(e). New Jersey case law contains language that sounds similar to *Twombly* and *Iqbal*, noting that a pleading containing only conclusory allegations with no factual support will not withstand a motion to dismiss.[20] However, because the Rule 4:6-2(e) standard "is rooted in the pre-*Twombly* and *Iqbal* jurisprudence[,]" the state standard differs fairly substantially from the federal one, and continues to be the less stringent of the two.[21]

Whereas the federal standard is now one of plausibility, the state standard continues to be one of possibility, both as a matter of law (*i.e.*, in express pronouncements by New Jersey courts on the standard) and in practice (*i.e.*, in the application of that standard by New Jersey courts). Similar to the standard under the federal rules, on a motion under Rule 4:6-2(e), the court is required to assume the allegations of the complaint are true and to draw all reasonable inferences in favor of the pleader.[22] However, the courts then examine the complaint to determine "whether a cause of action is 'suggested' by the facts."[23] Although the court is confined generally to examining the legal sufficiency of the facts alleged on the face of the complaint, the court is required to "search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary."[24] This differs markedly from the *Twombly*/*Iqbal* plausibility standard and harkens back to the now-retired *Conley* no set of facts standard.

New Jersey courts are instructed to grant dismissal "in only the rarest of instances."[25] Given these statements, it is no wonder the Rule 4:6-2(e) standard has been described as "generous," "hospitable," and "indulgent."[26]

The question many New Jersey practitioners pondered in the years immediately following *Twombly* and *Iqbal* was whether, and to what extent, New Jersey state courts would adopt the *Twombly*/*Iqbal* plausibility standard (or whether elements of the standard would begin creeping into superior court decisions, even if the standard was not formally adopted). The answer is that it has not happened. Almost six years after *Iqbal*, the authors did not find any New Jersey state court opinions adopting or even favorably citing the *Twombly*/*Iqbal* plausibility standard in adjudicating a motion to dismiss for failure to state a claim. Nor did the authors detect a stricter application of the New Jersey state standard by state courts in cases adjudicating motions to dismiss that would suggest that elements of the *Twombly*/*Iqbal* plausibility standard was being applied even absent formal adoption. Thus, it remains more difficult from a defense perspective to succeed on a motion to dismiss in New Jersey Superior Court than in New Jersey District Court. ⚖

Mark S. Olinsky *is a member of Sills Cummis & Gross P.C. in Newark, specializing in complex business litigation and business crimes defense.* ***William R. Tellado*** *is an associate at the firm. The views expressed are those of the authors and do not necessarily reflect those of the firm or its clients.*

ENDNOTES

1. Fed. R. Civ. P. 12(b).
2. N.J. Ct. R. 4:6-2.
3. Fed. R. Civ. P. 8(a)(2).
4. *Conley v. Gibson*, 355 U.S. 41 (1957).

5. *Id.* at 45-46.
6. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
7. *Iqbal*, 556 U.S. at 678 ("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.").
8. *Iqbal*, 556 U.S. at 684 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8...That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'") (citations omitted).
9. *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 570).
10. *Id.* (*citing Twombly*, 550 U.S. at 556).
11. *Id.*
12. *Twombly*, 550 U.S. at 555.
13. *See Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 555.
14. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011); *Levkovsky v. N.J. Advisory Comm. on Judicial Conduct*, 2012 U.S. Dist. LEXIS 121215, at *7 (D.N.J. Aug. 27, 2012) (citation omitted).
15. *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012); *Santiago v. Westminster Township*, 629 F.3d 121, 130 (3d Cir. 2010).
16. *Bistrian v. Levi*, 696 F.3d at 365.
17. *Id.*
18. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *Wade v. Morton Bldgs.*, 2009 U.S. Dist. LEXIS 124124, at *11 (C.D. Ill. Dec. 22, 2009) (noting difficulty of differentiating factual allegations from legal conclusions); *McCauley v. City of Chi.*, 671 F.3d 611, 624-25 (7th Cir. 2011).
19. N.J. Ct. R. 4:5-2.
20. *See, e.g., Glass v. Suburban Restoration Co.*, 317 N.J. Super. 574, 582 (App. Div. 1982).
21. *Crozier v. Johnson & Johnson Consumer Companies, Inc.*, 901 F. Supp. 2d 494, 500 (D.N.J. 2012); *Ocean City Express Co., Inc. v. Atlas Van Lines, Inc.*, 2013 U.S. Dist. LEXIS 104146, at *10 n. 3 ("federal pleading standards are generally more stringent than those in New Jersey state courts post-*Twombly*.").
22. *NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 365 (2006).
23. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989).
24. *Nostrame v. Santiago*, 213 N.J. 109, 127 (2013).
25. *Printing Mart*, 116 N.J. at 772.
26. *Nostrame*, 213 N.J. at 126-27.