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Trials&TRIBULATIONS

Enhanced pleading in Title VII claims

The U.S. Supreme Court heard oral argument on a case a little more than three years ago that ultimately changed the landscape for those seeking the dismissal — or to avoid the dismissal — of Title VII cases at the pleading stage.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (argued Nov. 27, 2006), the Supreme Court evaluated the degree of specificity necessary in alleging a federal antitrust claim. In the process, the court addressed the Rule 12(b)(6) standard that had been cited universally for 50 years in federal judicial opinions evaluating motions to dismiss — a motion to dismiss may be granted only when "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Rejecting that standard, the *Twombly* court held that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. Because the *Twombly* plaintiffs had not "nudged their claims across the line from conceivable to plausible," their complaint was dismissed. *Id.*

By SARAH MERKEL
Daily Record Columnist

Predictably, questions arose concerning whether the *Twombly* decision could or should be limited only to antitrust cases. See, e.g. *Goldstein v. Pataki*, 516 F3d 50, 56 (Second Cir. 2008) ("Because the disavowed language in *Conley* had been a part of our court's jurisprudence for decades, considerable uncertainty surrounds the breadth of the decision.")(citations and quotations omitted).

That uncertainly was laid to rest nearly two years later, in a case brought against former Attorney General John Ashcroft by a man arrested and detained following Sept. 11, 2001. In *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-1950 (2009), the application of the *Twombly* standard to all civil cases was affirmed. In language destined to become as ubiquitous as the *Conley* court's language from half a century earlier, the *Iqbal* court summarized *Twombly* succinctly: "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. 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. 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. Where 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." 129 S.Ct. at 1949, (citations and quotations omitted).

Given the Supreme Court's explicit rejection of conclusory pleadings, some speculated *Twombly* would lead to increased dismissals of Title VII claims. University of South Carolina School of Law Professor Joseph Seiner analyzed pre- and post-*Twombly* dismissal rates in employment discrimination cases, opining that the more rigorous pleading standard would create new hurdles for civil rights litigants. See "The Trouble with 'Twombly': A Pro-posed Pleading Standard for Employment Dis-crimination Cases," 2009, University of Illinois L. Rev. 1012. After analyzing more than 500 decisions, Seiner noted that when courts cited *Twombly*, there was a 2.6 percent increase in those claims being dismissed at the pleading stage.

The change most likely is not statistically significant, and it may be premature to surmise that *Twombly* has resulted in a sea change in the number of Title VII claims conclusively resolved at the pleading stage.

In the Western District of New York, nearly 20 cases have addressed Title VII claims — or other related civil rights claims — and made reference to *Twombly*. When cases involving *pro se* litigants (who are granted greater liberties with pleadings) and cases involving procedural irregularities (such as the failure to exhaust administrative remedies) are removed from the mix, only a handful of Western District cases have applied *Twombly* substantively.

In three of those cases, the court dismissed claims for failure to properly plead factual allegations. For example, in *Tiu-Malabanan v. University of Rochester*, 2008 WL 788637 (W.D.N.Y. March 21, 2008), Judge Charles J. Siragusa found that while the plaintiff's amended complaint sufficiently alleged certain aspects of her discrimination claim, she failed to articulate sufficient factual allegations with respect to all elements of a claim under 42 U.S.C. §1981. The plaintiff's federal claims were dismissed, and the court declined to exercise supplemental jurisdiction over the remaining state law claim. See also *Lundy v. Town of Brighton*, 521 FSupp2d 259 (W.D.N.Y. 2007) (J. Larimer) (dismissing claims brought pursuant to 42 U.S.C. §1983 related to alleged employment discrimination as insufficiently pleaded under *Twombly*).

The plaintiff in *Male v. Tops Friendly Markets*, 2008, WL 1836948 (W.D.N.Y. April 22, 2008) (J. Telesca), also found her

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initial complaint dismissed for failure to articulate factual allegations in support of her ADA claim. In an interesting procedural twist, despite counsel's attempts to submit an amended complaint that offered sufficient factual detail, the court refused to grant leave to amend her complaint. The court reasoned that the amended complaint was not filed until 136 days after the plaintiff received her right to sue notice from the EEOC, therefore it was untimely. The court found that the original complaint was a "sham document" filed "to circumvent the 90-day limitations period." *Id.* at *5. As such, the amended pleading did not relate back to the original complaint.

A plaintiff did survive a motion to dismiss in at least one instance. In *Aponte v. City of Buffalo*, 2009 WL 1956208 (W.D.N.Y. July 6, 2009) (J. Telesca), the court determined that basic allegations regarding the plaintiff's employment sufficiently alleged an employment relationship under Title VII, leaving for summary judgment the question of whether the defendant met the statutory definition of an employer.

Although the cases suggest that federal courts appear prepared to engage in a thorough examination of allegations at the pleading stage, it is difficult to predict whether *Twombly* will reduce the number of Title VII claims that survive motions to dismiss, or whether plaintiffs simply will learn to articulate their claims with greater detail.

Of course, the standard used in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) remains unchanged. Because state courts have concurrent jurisdiction over Title VII claims — see *Yellow Freight Sys. Inc. v. Donnelly*, 494 U.S. 820 (1990) — a loosely pleaded Title VII claim arguably has a greater chance of withstanding a motion to dismiss in state court. Reminiscent of the *Conley* standard, a New York State court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001).

Recent amendments to the Federal Rules of Civil Procedure limiting a party's ability to amend his or her pleadings as a matter of course may make the *Twombly* standard even more relevant, and may impact a plaintiff's ability to correct a defective initial pleading. Effective Dec. 1, 2009, a party may file an amended pleading without leave of court 21 days after serving a responsive pleading or a motion to dismiss. Since briefing schedules in the Western District often exceed that time period, plaintiffs should not delay a careful weighing of the sufficiency of the factual allegations contained in their pleadings.

Practically speaking, *Twombly* requires a plaintiff to be cognizant of the factual basis for his or her Title VII claim, and to plead plausible facts to satisfy the elements of the plaintiff's *prima facie* case. As the *Tops Friendly Markets* decision suggests, delays in properly pleading such a claim can be fatal.

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