A Judicial Response to the *Iqbal* Revolution

By Hon. Mark A. Goldsmith

The revolution in federal court treatment of civil pleadings—requiring plaintiffs to allege a "plausible" claim for relief—has both enhanced and complicated the role of trial judges as gatekeepers of the pleadings. While the revolution may weed out nonmeritorious claims, the process comes at a cost. Motions to dismiss challenging the plausibility of claims have now become a litigation staple, draining judicial resources and delaying progress in many cases. For trial judges—who must grapple with the real-world impact of Supreme Court doctrines—this presents a challenge.

There is a practice I have developed to handle these motions, building on a relatively recent change in Federal Rule of Civil Procedure 15(a)(1)(B). My practice promotes both fairness and efficiency, and has triggered no objection from counsel.

To put the pleading challenge and my response to it in context, we need to review the pleading revolution wrought by the Supreme Court's decisions in *Bell Atlantic Corporation v Twombly*[1] and *Ashcroft v Iqbal*.[2] These decisions announced that a pleader's obligation was not simply to put the opposing party on notice of a litigable transaction or occurrence. Instead, the pleader had to set forth allegations sufficient to establish a "plausible" claim for relief.[3]

Unfortunately, what the Supreme Court meant by plausibility was not clearly defined in either *Twombly* or *Iqbal*, and continues to provide fertile ground for legal jousting. The Court was careful to point out what plausibility did *not* mean—bare legal conclusions or a rote recitation of elements.[4] But the Court did not detail the kind, let alone the amount, of "meat" to put on the pleading "bones" to constitute a plausible claim sufficient to avoid dismissal.

The plausibility standard under *Twombly/Iqbal* has presented a challenge, both for practitioners and trial judges alike. Much like Rule 56 motions and *Daubert*[5] motions, motions to dismiss under Rule 12(b)(6) have now become de rigueur. No defense counsel wants to be accused of having overlooked a potential salvo that might have led to dismissal of an action. And because of the fluidity in the concept of plausibility, the salvo will be fired far more often than is systemically necessary or appropriate.

The obvious downside is greater litigation expense as these motions are briefed. They also thwart the progress of cases, delaying scheduling orders and postponing discovery—often for many months—until a decision on the motion is issued.

Of course, there is a systemic upside if the motion actually results in the dismissal of the case on a permanent basis. That is, if the defendant can demonstrate that no set of facts can plausibly give rise to a claim for relief, then the plaintiff's claim—and not just his pleading—will be ousted.[6]

The trouble is that many motions to dismiss are only fencing exercises, which seek to point out a missing element, such as a failure to allege scienter in a fraud case or to delineate damages. Moving counsel invariably knows, in such circumstances, that the opposing party will seek—and likely be granted—leave to amend if the court agrees there is a deficiency, and the nonmoving party will easily cure the missing element.[7] The parties will have spent precious time and money briefing the issues, and the court will have devoted its own limited resources addressing the motion. And at the end of the day—more likely, at the end of several months—if the court agrees with the defendant, an amendment will often cure the deficiency.

I have adopted a practice to avoid this waste of time and resources. When a motion to dismiss based on *Twombly* or *Iqbal* is filed, I issue an order—before any response is filed—giving the plaintiff leave to amend the challenged pleading within a specified period. The order recites that, if an amended complaint is timely filed, the motion to dismiss is denied without prejudice. If no amended pleading is filed, the court will then decide the motion.

Under this approach, the parties do not have to joust over the sufficiency of a

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pleading that the plaintiff concludes can be improved via an amendment. Unnecessary briefing and opinion preparation are avoided, as are delays in discovery and ultimate resolution.

After adopting this practice, I have noticed a marked decline in the number of *Iqbal* motions that I must decide. Proper amendments typically satisfy opposing counsel—or prompt a pathway to settlement. Either way, litigation costs are lowered and dockets avoid unnecessary clogging.

This strategy remains faithful to the *Iqbal* principle that the trial court act as a gatekeeper to ensure that only plausible claims proceed to litigation. At the same time, it provides a cost-effective way for judges to act as gatekeepers of the *Iqbal* motions themselves—to ensure that the parties and courts address only those motions that actually need to be decided.

This approach is also in harmony with the overall historic trend in civil procedure of focusing litigation on the merits of the parties' positions, rather than on the verbal formulas they may have tentatively adopted in their pleadings.[8] Initial pleadings may be clumsily drawn, inadvertently omitting key recitals. But no interest is served—and especially not the interest of justice—by focusing the court's energies on a verbal recitation that does not represent the best pleading a plaintiff can submit. The important pleading decision for a court should be based on whether facts can be marshaled to state a plausible claim—not whether the inartful drafter's out-of-the-chute paper passes muster.

Finally, this approach is in line with Federal Rule of Civil Procedure 15(a)(1)(B), amended in 2009, allowing a plaintiff to amend his or her complaint once, as a matter of course, for 21 days following the filing of either an answer or a Rule 12(b) motion, whichever is earlier.[9] My process builds on the amended rule, furnishing some additional benefits.

For one thing, Rule 15(a)(1)(B) creates a right to amend if a motion to dismiss has been filed only if the defendant has not answered. My practice operates even if the defendant has answered.

Moreover, unlike Rule 15(a)(1)(B), which does not require court involvement, my procedure actively inserts the court into the motion and amendment process. This is helpful in cases where counsel are simply not conversant with their right to amend after a motion to dismiss has been filed. However, even when counsel know of their right to amend under the rules, the court's effective invitation to amend makes it easier for the pleader to avoid appearing "weak," and enables the pleader to resist the temptation to defend the challenged pleading. Through the court's visible involvement in the process, counsel are encouraged to set forth the best pleading that can be framed at an early stage of the litigation.

In addition, the court's involvement puts counsel on notice that it may be risky to play out the motion-to-dismiss drama and attempt to defend a deficient pleading, with the expectation that, at worst, the court will likely allow leave to amend if the pleader cannot successfully defend the challenged pleading. By inviting the pleader to amend at the outset, the court signals that—if required to rule on a motion to dismiss—it may not be receptive to an amendment that could have easily been made many months earlier, without the expense and delay occasioned by resisting the motion to dismiss and the court's invitation.[10]

I believe the approach I have adopted creates the appropriate focus, striking the correct balance between the theory of *Iqbal* and its practical implications. Lawyers and clients can conserve their ammunition for a sensible battlefield on which to contest a claim's plausibility, because *Iqbal* motions become reserved only for pleadings that the plaintiff feels are the best that can be set forth in the absence of discovery. In this fashion, the practice fulfills the fundamental mandate of the federal rules—"to secure the just, speedy, and inexpensive determination of every action and proceeding."[11] ■

Mark A. Goldsmith is a judge in the U.S. District Court for the Eastern District of Michigan. *He gratefully acknowledges the research assistance of his law clerk, Andrew Winkler.*

ENDNOTES

1. *Bell Atlantic Corporation v Twombly*, 550 US 544; 127 S Ct 1955; 167 L Ed 2d 929 (2007).
2. *Ashcroft v Iqbal*, 556 US 662; 129 S Ct 1937; 173 L Ed 2d 868 (2009).
3. *Twombly*, 550 US at 570 (holding that a pleading must "state a claim that is plausible on its face"); *Iqbal*, 556 US at 678, 684 (holding that the pleading standard announced in *Twombly* governs "all civil actions" and, thus, "[t]o 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'"). For an in-depth critique of the pleading standards under *Twombly* and *Iqbal*, see generally Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L J 1 (2010).
4. *Iqbal*, 556 US at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (citations omitted)).
5. See *Daubert v Merrell Dow Pharms, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
6. See *Belizan v Hershon*, 369 US App DC 160, 164; 434 F3d 579 (2006) ("The standard for dismissing a complaint with prejudice is high: 'dismissal *with prejudice* is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" (citation omitted)); *Holmes v Air Line Pilots Ass'n, Int'l*, 745 F Supp 2d 176, 213 (ED NY, 2010) (dismissing the plaintiff's complaint with prejudice and denying leave to amend, given plaintiffs' inability "to articulate or identify any facts giving rise to a plausible inference of" actionable conduct).
7. See FR Civ P 15(a).
8. See *Swierkiewicz v Sorema NA*, 534 US 506, 514; 122 S Ct 992; 152 L Ed 2d 1 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.").
9. Before the 2009 amendment, a plaintiff could amend the complaint as of right until an answer was filed. FR Civ P 15(a) (2009) (amended 2009). This led to anomalies, such as (i) allowing amendment as of right, even though the complaint was dismissed; and (ii) prolonging the period for amendment as of right for months, or even years, after the initial complaint was filed. See Hauser, *The 2009 Amendment to Federal Rule 15(a)(1)-A Study in Ambiguity*, 33 NC Cent L R 10, 24 (2010). The 2009 amendment avoids these issues.
10. Of course, the court may still grant a party leave to amend following an *Iqbal* decision if the court believes that "justice so requires." FR Civ P 15(a)(2). However, undue delay is recognized as a factor counseling against granting leave to amend. *Seals v Gen Motors Corp*, 546 F3d 766, 770 (CA 6, 2008). My practice should prompt counsel to assess whether bypassing an opportunity to amend renders them vulnerable to a charge of undue delay.
11. FR Civ P 1.