

Fact Pleading After *Ashcroft v. Iqbal*: The Implications for Section 1 Cartel Cases

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Last term, the Supreme Court, in *Ashcroft v. Iqbal*,¹ offered guidance on upholding the pleading principles underlying the Court's earlier *Bell Atlantic Corp. v. Twombly*² decision. The Court proposed that, in examining a complaint on a motion to dismiss, district courts first distinguish allegations that are statements of fact from those that are conclusions of law, and then consider only the statements of fact in determining whether the complaint states a plausible claim for relief under Federal Rule of Civil Procedure 8(a)(2). The categorization and, in effect, per se condemnation of legal conclusions in a Rule 8(a)(2) analysis—something *Twombly* only hinted at—marks a return to fact pleading, a practice that prevailed before the 1938 adoption of the Federal Rules of Civil Procedure. This has implications for all cases, and in particular, antitrust cartel cases.

As a result of *Iqbal*, efforts by antitrust defendants to convince district courts to classify allegations as legal conclusions, and not statements of fact, will likely increase. In addition, district courts in cartel cases are now more likely to demand a degree of specificity that could preclude all purported direct claims of conspiracy unless the complaint sets forth facts showing the defendant's public admission of collusion or the plaintiff's special insight into the purportedly still-secret cartel. *Iqbal* no longer allows courts to exercise caution in deciding whether to dismiss cartel cases in advance of discovery, something the Supreme Court had previously urged district courts to do when the proof remained largely in the hands of the alleged conspirators.

The Code-Pleading Categories

Before 1938, state codes supplied the civil pleading rules in federal actions at law. Under these rules, the parties identified and developed the facts by which the district court might dispose of the case on the pleadings alone—and often did. A complaint could only state facts, not the evidence from which they derived, nor the conclusion of law they supported. The rules were technical and fostered gamesmanship. And the concepts of evidence, facts and legal conclusions as distinct categories animated code-pleading practice.³

But the pleading categories proved problematic. Evidence, facts and legal conclusions arguably lie on a continuum and differ only by the degree of particularity in the occurrence or event they describe. A conclusion of law, for example, is a generic statement that rests implicitly on the application of some legal rule to a group of operative facts, such as "A owes B \$500," or "she is a single woman." In the words of one commentator, "It is not the less a fact because the fact involves some knowledge or relation of law. There is hardly any fact which does not involve

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¹ 129 S. Ct. 1937 (2009).

² 550 U.S. 544 (2007).

³ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 91–92 (3d ed. 2004).

it.”⁴ In time, a lack of logic and consistency permeated the decisional law governing the application of the code-pleading categories. “Th[e] compartmentalization of pleading categories proved to be a chimera.”⁵

Simplified Pleading Under Rule 8(a)(2)

The Federal Rules of Civil Procedure brought reform. The development of facts would now come later in the case through other pre-trial procedures. Under Rule 8(a)(2), a complaint need only set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ Mainly, it would just give notice of the claim. And if it failed, the defendant could seek a more definite statement under Rule 12(e).

Notwithstanding the new emphasis on notice rather than fact development, district courts could still narrow or dispose of cases on the pleadings. By its terms, Rule 8(a)(2) required an entitlement-to-relief showing. If the pleading remained silent on an element of the claim, or disclosed facts barring relief, dismissal under Rule 12(b)(6) would follow. But, notably, Rule 8’s drafters omitted any reference to “facts” to avoid the code-pleading categories.⁷ So, although the Rule implicitly required some statement of the event or occurrence at issue to outline or sketch the claim for relief,⁸ whether any allegation (alone or with other allegations) succeeded in that regard would no longer depend on elusive distinctions among evidence, facts and legal conclusions. Indeed, Form 9 of the Federal Rules endorsed a conclusion-of-law level of generality: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”⁹

The Supreme Court’s Pre-*Twombly* Pleading Jurisprudence

Until *Twombly*, the Supreme Court’s pleading jurisprudence largely confirmed Rule 8’s break from the former code-pleading categories. In *United States v. Employing Plasters Association*,¹⁰ the government’s civil complaint accused the defendants of suppressing competition among Chicago plastering contractors in violation of the Sherman Act. The district court read the complaint as asserting only local restraints beyond the reach of the statute and dismissed the case. The Supreme Court disagreed, stating “[t]he complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called ‘allegations of fact’ or ‘mere conclusions of the pleader,’ we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.”¹¹

⁴ Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 420 (1921).

⁵ WRIGHT & MILLER, *supra* note 3, § 1218, at 265.

⁶ Fed. R. Civ. P. 8 (a)(2).

⁷ 5 WRIGHT & MILLER, *supra* note 3, § 1218, at 266–67.

⁸ See *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (stating “the nature of the claim need only be sketched”); *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953) (stating plaintiff need only “set out sufficient factual matter to outline the elements of the cause of action or claim”); see also *Caribe BMW v. Bayerische Motoren Werke*, 19 F.3d 745, 747–48 (1st Cir. 1994) (noting the “commendable simplicity” of a complaint that alleged “most of the essentials of a [Robinson-Patman Act] violation” and drawing inferences favorable to plaintiff to overcome gaps and ambiguities) (Breyer, J.).

⁹ Form 9, Complaint for Negligence, Appendix of Forms, Fed. R. Civ. Proc. (now revised Form 11).

¹⁰ 347 U.S. 186 (1945).

¹¹ *Id.* at 188.

In other pre-*Twombly* decisions, the Supreme Court stressed the level of generality tolerated, if not encouraged, by Rule 8. It noted the Rule does not require a “claimant to set out in detail the facts upon which he bases his claim.”¹² It rejected efforts by lower courts to impose particularized pleadings in cases other than those governed by Rule 9(b).¹³ It also reminded them of Rule 8’s simplified pleading regime, citing with approval Form 9’s “negligently drove” language as an example of the simplicity and brevity contemplated by the Rule.¹⁴ On one occasion, however, the Court itself avoided deciding whether a fundamental right to a minimally adequate education existed by rejecting, as a legal conclusion, plaintiffs’ bald assertion they were denied a minimally adequate education.¹⁵ The Court stated that a court need not accept the truth of a legal conclusion on a motion to dismiss.¹⁶ This concept, which lower federal courts often invoked to justify certain dismissals even after Rule 8, would later serve as a key pleading principle in *Iqbal*.

Antitrust Pleading in the Lower Courts

A Rule 12(b)(6) dismissal when the pleading itself demonstrates the absence of a claim for relief (by the facts included or the elements omitted) is generally not at odds with Rule 8, nor too controversial. But, beginning in the 1960s, as Professor Richard L. Marcus has observed, many lower federal courts, despite Rule 8, insisted on some heightened degree of factual detail in certain disfavored cases and, absent such detail, disposed of them on that ground.¹⁷ Deeming conclusions of law undeserving of the normal presumption of truth served that effort. Although most notably witnessed in civil rights litigation, the phenomenon also surfaced in antitrust cases, notably after the Supreme Court’s decision in *Associated General Contractors v. California State Council of Carpenters (AGC)*.¹⁸

The issue in *AGC* concerned whether the defendants’ alleged coercion of third parties injured the plaintiff within the meaning of the Clayton Act. To reach that issue, the Court, like the courts that decided the issue below, assumed the alleged coercion might violate the antitrust laws. But, in dicta, it criticized the district court’s failure to require, at the pleading stage, a more particularized description of the conduct because that description might have revealed the absence of a violation: “Certainly in a case of this magnitude, a district court must insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”¹⁹

AGC prompted some lower courts to demand greater factual detail in antitrust pleadings.²⁰ But later Supreme Court guidance insisting on a simplified pleading standard in all cases except those governed by Rule 9(b) tempered those efforts.²¹ Generally, and notwithstanding *AGC*, the call for

¹² *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

¹³ *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

¹⁴ *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002).

¹⁵ *See Papasan v. Allain*, 478 U.S. 265, 286 (1986).

¹⁶ *Id.*

¹⁷ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440–44 (1986).

¹⁸ 459 U.S. 519 (1983).

¹⁹ *Id.* at 528 n.17.

²⁰ *See, e.g., Future Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 771–72 (S.D. Miss. 1992).

²¹ *See, e.g., Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (noting how *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), “scotched” lower court efforts to impose heightened pleading requirements).

Twombly presaged a shift in the Court's disinclination to categorize allegations based on their level of generality. Most of the attention garnered by the 2007 decision centered on its new plausibility standard, i.e., Rule 8(a)(2) requires allegations plausibly suggesting (not merely consistent with) liability.

more specificity in pleadings as a matter of antitrust litigation reform has not been great.²² In cartel cases, in particular, a general sensitivity against demanding specificity can be observed. Indeed, the Supreme Court itself directed lower courts to proceed cautiously when dismissing antitrust cases where the proof rests in the hands of the alleged conspirators.²³ Commentators also observed that even the modest requirement then imposed by some courts that a complaint contain more than a bare-bones statement of conspiracy did not comport with the level of generality contemplated by Rule 8.²⁴

Twombly's Fact-and-Legal-Conclusion Dichotomy

Twombly presaged a shift in the Court's disinclination to categorize allegations based on their level of generality. Most of the attention garnered by the 2007 decision centered on its new plausibility standard, i.e., Rule 8(a)(2) requires allegations plausibly suggesting (not merely consistent with) liability. Under this standard and the limits on permissible inferences imposed by substantive antitrust law, mere allegations of conscious parallelism fail to state a Section 1 claim.²⁵

Less noticed were *Twombly's* various statements harkening back to the elusive code-pleading distinction between facts and conclusions of law. While not per se condemning the use of legal conclusions, the Court noted a "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."²⁶ It also observed that a naked assertion of "conspiracy" falls on the "borderline" between "the conclusory and the factual," and, as a result, "gets close to stating a claim, but without some further factual enhancement it stops short of the line."²⁷

The Court also found the plaintiff's direct statements of conspiracy, including that the defendants "entered into a contract . . . to prevent competitive entry in their respective local telephone and/or high speed internet service markets and have agreed not to compete with one another," to be, upon "fair reading," legal conclusions that merely summed up the complaint's prior allegations of parallelism—they did not serve as independent allegations of actual agreement. But the problem of distinguishing fact from legal conclusion did not arise because, in the Court's view, the pleading itself "explained" that the plaintiffs' Section 1 claim proceeded exclusively via a theory of parallelism, which the Court deemed the "nub" of the complaint.²⁸ The dissent in *Twombly*, however, found the direct allegation that the defendants "agreed not to compete with one another" to be nothing less than an "allegation describing unlawful conduct,"²⁹ and called the majority's no-agreement-has-been-alleged-at-all position "mind-boggling."³⁰

²² See National Commission for the Review of Antitrust Laws and Procedures, *The Early Narrowing and Resolution of Issues*, 48 ANTITRUST L.J. 1041, 1056 (1980) ("there has been little testimony or comment presented to the Commission favoring increased specificity in antitrust pleadings").

²³ See *Hosp. Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 746 (1976).

²⁴ See 5 WRIGHT & MILLER, *supra* note 3, § 1233, at 374.

²⁵ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). This aspect of the *Twombly* decision effectively authorized a district court to entertain, on a motion to dismiss, arguments ordinarily reserved for summary judgment.

²⁶ *Id.* at 557.

²⁷ *Id.*

²⁸ *Id.* at 564–65.

²⁹ *Id.* at 573 (Stevens, J., dissenting).

³⁰ *Id.* at 589. Two weeks after deciding *Twombly*, the Court created further uncertainty over the import of its decision by citing *Twombly* for the proposition that a complaint's primary role is to provide notice and "specific facts are not necessary." See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

Among the *Twombly* commentators, Professor Allan Ides agreed with the majority Court's reading of the *Twombly* complaint, and offered an interpretation of the majority decision that comported with earlier notions of simplified pleading under Rule 8.³¹ In his view, the plaintiffs, having based their Section 1 complaint solely on allegations of conscious parallelism, simply ran into substantive limitations on the allowable inferences that could be drawn to state a claim for relief. But he conceded that some of the majority's statements could also be read as condemning per se any use of generality in pleading that rises to the level of a so-called conclusion of law. According to Professor Ides, such a reading would operate as a "drastic revision" of Rule 8(a)(2) principles.³²

***Iqbal* and the Return of Code-Pleading Categorization**

In contrast to *Twombly*, the Court in *Iqbal* actually confronted the problem of distinguishing a statement of fact from a conclusion of law. The *Iqbal* plaintiff accused defendants John Ashcroft and Robert Mueller, acting as government officials following September 11, of adopting a discriminatory inmate-detention policy designed to deprive him of his constitutional rights. Whether the complaint stated a claim for relief was the issue before the Court.

The Court started with the substantive elements of the claim at issue. The plaintiff had to allege and prove that both Ashcroft and Mueller adopted the alleged policy with a discriminatory purpose, not just willfully or with awareness of the consequences. Turning to the pleading, the Court reiterated some of *Twombly*'s statements regarding the insufficiency of mere labels and formulaic recitations: Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation."³³ Acknowledging the lower courts' need for guidance, the Court then explained its *Twombly* decision. Among other things, it identified as a key "working principle[]" underlying *Twombly*,³⁴ the tenet that a court need not accept a legal conclusion as true. To test a complaint's sufficiency on a Rule 12(b)(6) motion to dismiss, the Court proposed a two-pronged approach that, first, identifies and disregards all allegations that fall within a conclusion-of-law category and, second, tests whether the remaining allegations plausibly suggest entitlement to relief.³⁵

Applying the first prong, the Court examined the direct allegations of Ashcroft and Mueller's discriminatory purpose. The complaint stated that Ashcroft and Mueller not only "knew of, condoned, and willfully and maliciously agreed" to subject the plaintiff to the detention policy "solely on account of [his] religion, race, and/or national origin," but that Ashcroft was the policy's "principal architect" and Mueller "instrumental" in its adoption and execution. The Court rejected these allegations out of hand and set them aside as nothing more than legal conclusions not entitled to the presumption of truth.³⁶ In making this determination, the Court did not articulate or apply any test. The Court then proceeded to analyze the remaining factual allegations regarding the cir-

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³¹ Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 629–32 (Nov. 2007).

³² *Id.* at 632.

³³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

³⁴ *Id.*

³⁵ *Id.* at 1950.

³⁶ *Id.* at 1951.

cumstances of the plaintiff's detention in the aftermath of September 11 under *Twombly*'s plausibility standard (the second prong) and found no plausible claim of purposeful discrimination.³⁷

Implications for Pleading a Cartel Claim Under *Iqbal*

Conclusions of law in an antitrust complaint have utility. At a minimum, they provide a framework and point the reader in the direction of the claim being asserted. But, under the approach outlined in *Iqbal*, once an allegation is labeled a legal conclusion, it plays no role in the complaint's entitlement-to-relief showing and, thus, is essentially divested of any probative or inferential value. In theory, and to the extent it is possible to identify a pure conclusion of law, this has logical appeal. The most generic expression of what the facts show would have little inferential power to show anything itself. Yet, even a bald statement, "A agreed with B," describes the fact of agreement. It is no more (and perhaps is less) a legal conclusion than Form 11's (previously, Form 9) "defendant negligently drove." The Court in *Iqbal* never ventures to offer a test to discern a legal conclusion from a factual statement. Is the Court chasing a chimera?

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In Section 1 cases, whether a statement of agreement is a fact or a legal conclusion could possibly rest on whether the "nub" of the complaint seeks to advance a direct or a circumstantial claim. That was the Court's approach in *Twombly*. But, there, the pleading itself allowed the court to conclude that the plaintiffs sought to advance a purely circumstantial claim, thereby allowing the Court to find the direct allegations operated only as legal conclusions (supported by allegations of parallelism), not as independent facts of agreement.³⁸ But a Section 1 complaint may not always be so clear. And no rule requires a Section 1 plaintiff to choose between pleading a direct or a circumstantial case.

In addition, the wide latitude that Rule 8 affords antitrust plaintiffs in choosing the mode and style of pleading arguably contemplates the use of allegations of varying specificity and generality that operate synergistically. But the first prong of *Iqbal*'s two-pronged test uses the conclusion-of-law label as a screen to remove certain allegations (those falling within the category "conclusion of law") from the plausibility calculus altogether. By design, this method does not take the complaint as a whole, which is ordinarily the approach when analyzing the sufficiency of pleadings. Certain implications necessarily follow. A complaint alleging a Section 1 violation using direct allegations of agreement will fail unless it discloses sufficient specific information about the purported secret agreement to escape the conclusion-of-law label. Likewise, absent such specific information, a Section 1 complaint seeking to state a claim through a mix of direct and indirect allegations of conspiracy will also fail unless the indirect allegations (statements of conscious parallelism and plus factors) plausibly suggest collusion.

Iqbal is silent on the level of specificity required to plead a direct agreement and trigger the presumption of truth under the first prong. But footnote 10 in *Twombly* may shed light. There, the Court states that had the plaintiffs sought to plead a direct case, it "doubted" the complaint would have provided adequate Rule 8 notice because the complaint identified no specific time, place,

³⁷ *Id.* at 1951–52. Shortly after *Iqbal*, a bill came before the U.S. Senate that is still pending and, if passed, would preclude Rule 12(b)(6) dismissals "except under the standards set forth . . . in *Conley v. Gibson*." Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). Those "standards" would include *Conley*'s statement that Rule 8 does not require a "claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

³⁸ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564–65 (2007); see also *In re Travel Agent Commission Antitrust Litig.*, No. 07-0464, 2009 U.S. App. LEXIS 21638, at *19 (6th Cir. Oct. 2, 2009) (affirming dismissal because allegations of meetings among defendants' executives responsible for pricing decisions set forth in section of complaint entitled "Opportunities for Defendants to Combine and Conspire" did not state a direct Section 1 claim).

or persons involved in the alleged collusion.³⁹ Although this dicta incorrectly speaks in terms of notice of claim (which was not at issue), it implies the Court would have viewed the direct agreement allegations (were they intended as such) as legal conclusions that failed to show entitlement to relief. The demand for specific dates, places, and names further suggests the Court wanted some indicia that the plaintiffs possessed privileged knowledge about the alleged secret cartel. This means the degree of specificity required under *Iqbal*'s first prong is likely the same that will assure the court that the pleadings have entered the realm of plausibility under *Iqbal*'s second prong. The border between the conclusory and the factual and between the possible and the plausible is the same, and the two-prong test collapses into one.

To be clear, a direct allegation of agreement technically does not require the drawing of any inference, plausible or otherwise, to show agreement. But what is apparently needed after *Iqbal* and *Twombly* are factual allegations that, by virtue of the degree of specificity they employ, give rise to a plausible inference that the plaintiff actually has some evidence in hand or a privileged vantage point into the alleged cartel, such as might be obtained from a public admission of guilt, an incriminating document disclosed to the plaintiff through discovery in another case, or a confidential source within the cartel. Conclusions, or pleading "on information and belief" without identifying the source of the information, will not suffice here.⁴⁰ Thus, *Iqbal*'s fact-pleading regime supplants entirely the caution the Supreme Court previously urged district courts to exercise before dismissing cartel complaints in advance of discovery.⁴¹

As they already do, wherever possible, Section 1 plaintiffs will want to plead in a manner that suggests privileged insight into the purported secret agreement. But, like the statements rejected as conclusions of law in *Iqbal* (i.e., Ashcroft was the "architect," and Mueller was "instrumental"), in many cartel cases, allegations of "secret meetings," "communications," "discussions," and "joint agreement" entered into in "the United States and Europe" by the defendants' representatives "at the highest levels" may now be viewed as *faux* details that merely restate the legal conclusion of agreement and that anyone could postulate without privileged insight. *Twombly* had already motivated some courts to scrutinize, allegation by allegation, Section 1 pleadings in this manner.⁴² *Iqbal* now fully endorses that approach.

Conclusion

Whether or not the drafters of Rule 8(a)(2) envisioned this type of pleading scrutiny on a motion to dismiss when they sought to escape the code-pleading categories, *Iqbal* has now fully formalized such scrutiny—and inevitably resulting allegation-by-allegation categorization—as a critical step in a district court's Rule 8(a)(2) entitlement-to-relief analysis. This presents an opportunity for defendants in cartel cases to seek dismissals by urging courts to carefully parse out and exclude from consideration statements that do not reveal actual factual insight into the alleged cartel but are mere conclusions of law masquerading as facts. ●

³⁹ *Twombly*, 550 U.S. at 565 n.10.

⁴⁰ See, e.g., *In re California Title Ins. Antitrust Litig.*, No. C 08-01341, 2009 U.S. Dist. LEXIS 43323, at *16 (N.D. Cal. May 21, 2009) (citing *Iqbal* and disregarding direct allegation of agreement to fix insurance premium rates at "meetings in New York, New Jersey, Pennsylvania, and Ohio" due to lack of "factual support").

⁴¹ See *Hosp. Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 746 (1976).

⁴² See, e.g., *In re Elevator Antitrust Litig.*, 502 F. 3d 47, 50–51 (2d Cir. 2007).