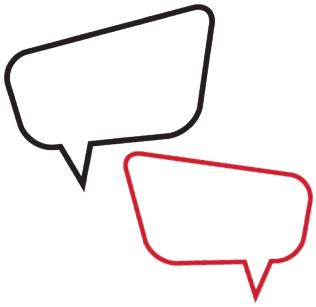

Plausibly a plus?

Two attorneys discuss the *Twiqbal* effect

IT has been more than five years since the Supreme Court set a new pleading standard with landmark decisions in *Bell Atlantic v. Twombly* in 2007 and *Ashcroft v. Iqbal* in 2009. Since *Twiqbal*, as the pair of cases is now known, judges have been able to dismiss complaints that do not offer "plausible," rather than simply "conceivable," claims. Some argue the new standard prevents frivolous lawsuits and curbs overzealous plaintiffs' lawyers. Others say it favors defendants and prevents viable claims from even being filed. Here, two Florida trial lawyers – DANIEL BEAN, of Holland & Knight in Jacksonville, who represents primarily defendants, and ROY ALTMAN, of Podhurst Orseck in Miami, who represents primarily plaintiffs – discuss how the changed pleadings standard has affected their clients and their practices.

ARE LAWYERS CONDUCTING MORE INVESTIGATION OF FACTS BEFORE FILING A COMPLAINT?

BEAN: They should be. Clearly that is one of the takeaways for lawyers from the *Twiqbal* decisions. Lawyers who conduct more investigation prior to filing a complaint increase their odds of defeating a motion to dismiss. A more detailed and structurally sound complaint that includes factual allegations along with the elements of the alleged violation expedites the judicial process because defendants are less inclined to challenge a well-pled complaint. Most will simply elect to file an answer, which closes pleadings and more quickly moves the case toward resolution. On the motions to dismiss that I have filed, I have not noticed any significant difference in the frequency of motions granted by the court before and after *Twiqbal*. In virtually all of the cases in which my motion to dismiss was granted, the court did so without prejudice and the plaintiff refiled an amended complaint.

ALTMAN: I cannot speak for the plaintiffs' bar as a whole, but I can say, anecdotally, that our firm has always prided itself on the thoroughness of its pleadings, which to a large extent have always relied on meticulous pre-filing investigations. For this reason, and with the caveat that I have not seen an empirical study on this question, I very much doubt that good plaintiffs' lawyers are investigating cases any more thoroughly – or, for that matter, any differently – than they did before *Twiqbal*. In this respect, I would be remiss if I did not point out that Rule 11 of the Federal Rules of Civil Procedure – and its state law equivalents – has long prohibited lawyers from filing frivolous lawsuits. I would assume that most plaintiffs' lawyers took this proscription seriously before *Twiqbal* and continue to take it seriously today.

This is not to say, of course, that *Twiqbal* has had no effect at the margins – that is, as to certain classes of cases filed by certain firms in certain districts. But at least with respect to how the lawyers in our firm investigate the plausibility of our cases before filing suit, I do not believe that our practice – and the practice of lawyers like us – has changed significantly, if at all, since *Twiqbal*.

ARE COMPLAINTS DRAFTED LONGER, WITH UNNECESSARY LANGUAGE INTENDED SOLELY FOR PROPHYLACTIC PURPOSES TO DEFEAT A MOTION TO DISMISS?

BEAN: No question. Lawyers are definitely utilizing the complaint as a platform to draw the court to their version of the case at its commencement. All too often complaints are crammed with unnecessary information that is more appropriately left to discovery and other aspects of the trial process. More investigation does not mean more words. Again, in my own experience, I have noticed complaints increasing in length, perhaps in an attempt to beef up their allegations or perhaps in an attempt to camouflage a weak lawsuit.

ALTMAN: I try not to use unnecessary language in my pleadings, and I think I can speak for the rest of my partners when I say that we do not, as a matter of practice, make allegations in our complaints that we do not believe are true – or that we cannot support with credible evidence. This is as true now as it ever was, and it has much more to do with our commitment to our ethical responsibilities than it does with the *Twiqbal* holdings.

I do, however, think our pleadings sometimes become too long and repetitive in jurisdictions that prohibit plaintiffs from incorporating in one count allegations made in other counts. This effort to force plaintiffs to spell it out results in the needless repetition of statements of fact and law – and a corresponding superfluity that weighs complaints down and renders them dull, duplicative, and difficult to read.

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HAVE YOU SEEN AN INCREASE IN THE FILING OF MOTIONS TO DISMISS, RESULTING IN HIGHER COSTS UP FRONT?

BEAN: Obviously spending more time on the investigation will increase up-front costs; however, it will decrease the likelihood of having to spend time (and money) rebutting a motion to dismiss. The more efficiently the pleadings can be closed and the case brought to issue, the cheaper the long-run costs to the parties and to the judiciary. After *Twiqbal*, I am slightly more emboldened to file a motion to dismiss, particularly if I believe I can shrink the complaint and consequently the discovery process. On the other hand, if I believe the complaint is well pled, impenetrable if you will, I will file an answer and move the lawsuit onward.

ALTMAN: I'm not sure that any study has been conducted on this question writ large. A 2011 Report to the Judicial Conference Advisory Committee on Civil Rules did show that a plaintiff after *Iqbal* is twice as likely as a plaintiff before *Twombly* to face a motion to dismiss for failure to state a claim. The time and expense of briefing and litigating these motions would be, I would suppose, worthwhile if the motions resulted in the widespread dismissal of supposedly meritless or frivolous claims that would otherwise have needlessly burdened defendants with discovery. But the same 2011 report found no statistically significant increase in the rate at which complaints are dismissed after *Iqbal* when compared with the rate at which complaints were dismissed for failure to state a claim before *Twombly*.

If this is true – and there are admittedly a number of studies and law review articles that vehemently disagree with the 2011 report – the result would be, as the question implies, an increase in the cost of pushing cases through the motion to dismiss phase without any concomitant decrease in the percentage of cases that make it to costly discovery. I'm not at all suggesting that this is the case. I am merely noting that, taken to their natural conclusion, the results of the 2011 report raise the possibility that, at least in some cases, *Twiqbal* has made litigation somewhat more expensive for both sides.

HAS THE NUMBER OF MOTIONS TO AMEND PLEADINGS DROPPED, BECAUSE COMPLAINTS ARE INITIALLY DRAFTED APPROPRIATELY?

BEAN: Yes. A properly pled complaint easily survives the motion to dismiss – assuming one is even filed – and thus obviates the possibility of a motion for leave to amend the complaint. It is extremely rare for a trial court to grant the initial motion to dismiss with prejudice. It is only appropriate that before an individual's day in court is extinguished he or she should be given at least one additional opportunity to draft an appropriate complaint and thus necessitate an amended pleading. But it bears repeating: A properly drafted complaint helps obviate the necessity for any amendments. While I am slightly more emboldened to file a motion to dismiss after *Twiqbal*, that does not mean I am filing more of them. My decision to file a motion to dismiss is solely dependent on the quality of the complaint. In every case in which my motion to dismiss was granted, it was without prejudice. The plaintiff was given an opportunity to amend the complaint and I rarely file a motion to dismiss an amended complaint.

ALTMAN: I generally disagree with the premise that complaints were drafted differently before *Twombly* than they are after *Iqbal*. If I'm right about this, I would guess that there has not been much of a change in the rate at which pleadings are amended, if only because in most jurisdictions the plaintiff is entitled to amend his or her complaint once as a matter of right before the defendants have answered. Thereafter, in most jurisdictions, amendments are freely given. In our practice, we take full advantage of our amendment rights, and we do so for a variety of reasons having nothing to do with *Twiqbal*.

As an example, much of our practice involves aviation accidents. In aviation cases, the asymmetry between the types and scale of information available to the various litigants is quite significant. This is because aviation investigations are almost always conducted, at least initially, by a government agency (in the United States, that agency is the National Transportation and Safety Board, the NTSB). NTSB investigations are, by law, confidential, and their conclusions are often not released until

many months, sometimes years, after the accident occurred. As a result, very little information about the causes of any given accident is publicly available to a plaintiff when he or she files suit. This asymmetry of information is exacerbated by the fact that the accident aircraft's manufacturers are often parties to the NTSB investigation, which means that, for all practical purposes, the putative defendants are the only litigants participating in the investigation of the accident their product may have caused. If this conflict of interest seems patent, its effects on the ability of plaintiffs to investigate the causes of a given accident (independent of the NTSB's investigation) are profound. Difficult though the task may be, our firm – and the relatively small number of firms who have traditionally handled these cases – has had to develop a network of experts who can quickly and effectively analyze these accidents while the NTSB investigation is pending. We did this before *Twiqbal*, and we continue to do it today.

But as a natural byproduct of this sometimes-protracted process, aviation plaintiffs are often placed in the uncomfortable position of having to file relatively sparse complaints in the hopes of amending those complaints later when the governmental investigations have become public.

HAVE MANY MERITORIOUS CASES NEVER BEEN FILED BECAUSE OF LACK OF DISCOVERY INFORMATION?

BEAN: I am sure that has unfortunately occurred; however, it is difficult for me to fathom that a "failure to launch" would be solely attributable to a lack of discovery information. There are undoubtedly multiple causes for a meritorious case never to be filed. Preparing a proper complaint is not something that every lawyer can do, and selecting the right lawyer, like selecting the right surgeon, is a critical decision.

ALTMAN: I do not know of many, if any, cases that our firm has rejected – or, for that matter, cases we have taken on and then not filed – solely due to a lack of discovery information. In many respects, it is precisely the ability to investigate and to "make" cases that has ever been the hallmark of a powerful and well-respected plaintiffs' firm.

HAVE JUDGES PERMITTED LIMITED DISCOVERY IN TOO-CLOSE-TO-CALL CASES?

BEAN: *Twiqbal* leaves in place the trial court's responsibility to draw upon its judicial experience and common sense when determining whether a complaint states a plausible claim for relief. If the trial court believes, in its judicial experience and common sense, that permitting limited discovery is necessary to help the trial court determine whether a complaint states a plausible claim for relief, it should be permitted. The trial court and interested parties should never lose sight of the fact that an individual's right to seek relief in court is paramount. Since *Twiqbal* I have seen a trial judge order limited discovery for pleading purposes only a couple of times.

ALTMAN: Judges often do allow limited discovery in cases that they view as too close to call, though I would guess – based on anecdotal evidence – that they do so more often in the context of personal jurisdiction disputes than they do on a motion to dismiss for failure to state a claim. In my experience, courts have permitted me limited discovery whenever I have requested it.

ON THE WHOLE, HAS *TWIQBAL* BEEN A PLUS OR MINUS FOR THE ADMINISTRATION OF JUSTICE?

BEAN: *Twiqbal* is a slight plus. While both decisions are particularly instructive for cases involving qualified immunity (*Iqbal*) and the Sherman Act (*Twombly*), the application of both decisions to other complaints does not tilt the playing field. Both cases are 5-4 decisions and both ultimately leave a trial court sufficient operating space to utilize both decisions to support either a grant or denial of a motion to dismiss. In my experience I have seen a slight increase in the number of motions to dismiss granted in the cases that I have handled after *Twiqbal*. In my view, those decisions resulted in a narrowing of real issues at the pleading stage, which reduces overall costs and facilitates quicker case resolution.

ALTMAN: I think it is relatively unhelpful to argue about whether *Twiqbal* has been "good" or "bad" for the administration of justice. They are decisions of the Supreme Court, and they are the law of the land. But I am not at all persuaded that judges – or justices – should be all that concerned with notional judgments of what may or may not be optimal for a given society at a given time. After all, we are, as John Adams famously said, "a government of laws, and not of men." To the extent that we agree with our second President – and I do – the administration of justice benefits whenever judges interpret, to the best of their abilities, the meaning of the laws and rules that are set before them. As I read *Twiqbal,* the justices in the majority did precisely that and concluded that the fairest reading of Rule 8 precluded judges from accepting as true all "legal conclusions," as opposed to factual averments, contained within the four corners of the complaint. The Court also found – again, based on its exegesis of the Rule itself – that "only a complaint that states a plausible claim for relief survives a motion to dismiss." Of course, because we are a "government of laws," Congress, as the elected representatives of the people, could have reversed the Court's decisions if it believed that they failed reasonably to extrapolate congressional intent. It has thus far elected not to do so. In sum, whether we agree with *Twiqbal* or not – and reasonable minds can differ about this – the process by which the Court arrived at its holdings and the sequence of events that followed, in my view, served, rather than detracted from, the administration of justice.

In the end, I have seen the courts look with greater scrutiny at my complaints, though I cannot recall any case that I have handled where the court denied me a full opportunity to make my case. That is, either the court awarded me a second chance to amend my complaint or else it permitted me to conduct some additional discovery.