CONVERGENCE OF FEDERAL RULES 8(A) AND 9(B): THE FIFTH CIRCUIT'S APPLICATION OF *TWOMBLY* AND *IQBAL*

DAVID S. COALE*

INTRODUCTION

Federal Rule of Civil Procedure 8(a) requires a plaintiff plead "a short and plain statement of the claim," while Rule 9(b) requires a plaintiff "state with particularity the circumstances constituting fraud or mistake." After 2007, the landmark Supreme Court cases of *Bell Atlantic Corporation v. Twombly*[1] and *Ashcroft v. Iqbal*[2] have clarified and augmented the requirements of Rule 8(a). The Fifth Circuit has applied those cases several times in its review of dismissals on the pleadings. This article surveys those opinions, and concludes that the Fifth Circuit's approach to *Twombly* and *Iqbal* may be converging on its approach to Rule 9(b).

I. FEDERAL COURT PLEADING RULES

A. Rule 8(a)

Federal Rule of Civil Procedure 8(a), enacted as part of the original rules in 1938, provides:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

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* Partner, Lynn Pinker Cox & Hurst, LLP, Dallas, Texas. A former chair of the State Bar of Texas Appellate Section, Mr. Coale publishes 600camp.com, a popular blog about commercial litigation in the Fifth Circuit.

[1] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[2] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

> (2) **a short and plain statement of the claim showing that the pleader is entitled to relief**; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[3]

As recently as 1957, the Supreme Court saw Rule 8 as implementing a system of "simplified 'notice pleading'" that "reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . ."[4] The Court noted "[t]he illustrative forms appended to the Rules plainly demonstrate this," and explained that notice pleading was "made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."[5]

Fifty years later, the Supreme Court took a very different view of Rule 8(a). In 2007, it reviewed the dismissal on the pleadings of a large-scale antitrust case in *Bell Atlantic Corporation v. Twombly*.[6] In concluding the action was properly dismissed, the Court wrote perhaps its most influential paragraph for modern civil litigation:

> Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a 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[.] Factual allegations must be enough to raise a right to relief above the speculative level . . . .[7]

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[3] FED. R. CIV. P. 8(a) (emphasis added).
[4] Conley v. Gibson, 355 U.S. 41, 47-48 (1957).
[5] *Id.*
[6] 550 U.S. 544, 127 S. Ct. 1955 (2007).
[7] 550 U.S. at 555.

Two years later, the Supreme Court further elaborated on this holding in *Ashcroft v. Iqbal*, a civil rights case:[8]

> Two working principles underlie our decision in *Twombly*. First, . . . [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.
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> . . .
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> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.[9]

The Court concluded: "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'"[10]

The Supreme Court set an outer bound on *Twombly* and *Iqbal* in its unanimous 2014 opinion of *Johnson v. City of Shelby*.[11] The plaintiff alleged civil rights violations in connection with his employment, but pleaded a somewhat garbled basis for legal relief that did not reference the correct statute, 42 U.S.C. § 1983. The Supreme Court reversed the Fifth Circuit's affirmance of the complaint's dismissal stating:

> Our decisions in [*Twombly* and *Iqbal*] are not in point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint

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[8] 556 U.S. 662 (2009).
[9] *Id.* at 678-9.
[10] *Id.* at 678.
[11] 135 S. Ct. 346 (2014).

> was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. [12]

Accordingly, "[h]aving informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."[13]

The *Twombly* and *Iqbal* opinions have "significantly changed pretrial practice"[14] in federal court, although their full effect remains to be seen,[15] and courts continue to develop procedures to manage cases in light of the opinions.[16] A good example of their influence is the Judicial Conference's recommendation (since accepted) to abandon the "illustrative forms" referred to in *Conley v. Gibson*, which were included in the original Federal Rules. The Conference observed that while the forms were promulgated in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate,' at the present time: The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[17]

B. Rule 9(b)

Federal Rule of Civil Procedure 9(b), also enacted as part of the original 1938 rules, provides: "In alleging fraud or mistake, a party must *state with particularity* the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[18] Courts have uniformly understood that this rule "requires the complaint to set forth 'the who, what, when, where, and how' of the events at issue."[19] Litigation about this rule has focused on

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[12] *Id.* at 347.
[13] *Id.*
[14] Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22*, ABA J. (Jan. 2011).
[15] *See, e.g.*, Ron Breaux & Chris Quinlan, *Have Iqbal/Twombly Impacted Federal Litigation in a Significant Way*, DALLAS BAR ASSOCIATION HEADNOTES (May 2014).
[16] *See, e.g.*, Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PENN. L. REV. 473 (2010).
[17] *See* Proposed Amendments to the Federal Rules of Civil Procedure, at 49 (available atwww.uscourts.gov/file/18905/download).
[18] FED. R. CIV. P. 9(b) (*emphasis added*); 28 U.S.C.A. § 9(b) (2008).
[19] *E.g.*, Dorsey v. Portfolio Equities, Inc., 540 F.3d 333 (5th Cir. 2008) (quoting

two main issues: the level of detail required to satisfy the above requirements,[20] and whether the rule extends to fraud-like claims such as negligent misrepresentation.[21]

II. FIFTH CIRCUIT CASES

The Fifth Circuit has addressed pleading standards several times since *Twombly* and *Iqbal*. When the Court affirms a dismissal on the pleadings, its language about Rule 8(a) often resembles language from its cases about the heightened pleading requirements of Rule 9(b). Conversely, when the Court reverses a pleading-based dismissal, it tends to focus on the allegations of the specific pleading rather than the particular requirements of Rule 8(a).[22]

A. Twombly *Not Satisfied*

During 2014, the Fifth Circuit thoroughly reviewed the Supreme Court's pleading requirements in *Merchants & Farmers Bank v. Coxwell.*[23] The plaintiff alleged that an attorney had unlawfully converted certain funds in violation of a court order. The Court noted that

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ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 350 (5th Cir.2002)). A detailed, recent discussion of these requirements, as further augmented by the Private Securities Litigation Reform Act of 1995, appears in Owens v. Jastrow, 789 F.3d 529 (5th Cir. 2015) ("Considered holistically, plaintiffs' allegations of knowledge of Guaranty's undercapitalization, a large misstatement, red flags, and ignorance of internal warnings, do not raise a strong inference of severe recklessness that is equally as likely as the competing inference that [Defendants] negligently relief on the AAA ratings and believed that Guaranty's internal models were accurate.")

[20] *See, e.g.*, United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 188-89 (5th Cir. 2009) (reasoning that in False Claims Act cases, Rule 9(b) is "context specific and flexible," and may be satisfied "without including all the details of any single court-articulated standard—it depends on the elements of the claim in hand").

[21] *See* General Electric Capital Corp. v. Posey, 415 F.3d 391 (5th Cir. 2005).

[22] The Court remains acutely aware of the limits to Fed. R. Civ. P. 12(b)(6) when the parties dispute material facts. *See, e.g.*, Breton Energy LLC v. Mariner Energy Resources Inc., 764 F.3d 394, 396 (5th Cir. 2014) ("Well-pleaded factual allegations may perfectly shield a complaint from dismissal under Rule 12(b)(6), and our inquiry's 'emphasis on the plausibility of a complaint's allegations does not give district courts license to look behind those allegations and independently assess the likelihood that the plaintiff will be able to prove them at trial.'" (quoting Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 804 n.44 (5th Cir. 2011)).

[23] Merchants & Farmers Bank v. Coxwell., 557 F. App'x 259. (Feb. 2014).

Mississippi law could potentially recognize such a claim,[24] and "[u]nder the older Rule 12(b)(6) standard from *Conley v. Gibson*, those allegations might be sufficient to state a claim."[25] Under *Twombly* and *Iqbal*, however:

> The complaint did not specify what court issued the order, when it was issued, or to whom it was directed; the complaint did not describe what the order required and therefore whether the allegation of a violation is plausible or merely fantastical. Further, merely alleging a perfected security interest is insufficient to establish ownership, and the complaint did not describe whether the court order established M&F's possessory interest in the funds by reducing its claim to judgment.[26]

This language strongly resembles the language of the Court's Rule 9(b) opinions. It faults the pleading for not adequately stating "who" ('did not specify what court issued the order . . . or to whom it was directed'); "when" ('when it was issued'); "what" ('what the order required'); or "how" ('the complaint did not describe whether the court order established M&F's possessory interest in the funds by reducing its claim to judgment').

Two other recent Fifth Circuit cases have found pleadings inadequate under *Twombly* using similar language and analysis. First, *Patrick v. Wal-Mart*[27] rejected this pleading about the alleged bad-faith handling of insurance claims:

> Defendants have engaged in a continuing pattern of bad faith . . . [and] have among other things, unreasonably delayed and/or denied authorization and/or payment of reasonable, necessary and worker's comp related medical treatment, as well as permanent indemnity benefits, as ordered by [the state agency].[28]

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[24] *See id.* at 4-5.
[25] *Id.* at 262.
[26] *Id.* at 263.
[27] Patrick v. Wal-Mart, 681 F.3d 614 (5th Cir. 2012).
[28] *Id.* at 622.

The court held, while this allegation "invokes three potentially cognizable theories of liability" under Louisiana law, it was inadequate because it "does not identify by date or amount or type of service, any of the alleged bad-faith denials and delays."[29] In other words, the pleading lacked "when" ('date') or "what" ('amount or type of service').

Similarly, in *Bowlby v. City of Aberdeen*,[30] the Fifth Circuit rejected an equal protection claim about the handling of a permit to operate a snow cone stand. The Court stated the plaintiff's "complaint simply states that no black-owned businesses have been closed, and that there are black-owned businesses operating despite their non-compliance with City laws and regulations. She then summarily concludes that this amounts to a denial of equal protection."[31] The Court concluded:

> Nowhere, however, does she allege that the Defendants-Appellees' treatment of her is the result of intentional discrimination. Furthermore, Bowlby pleads no facts to establish that she and the black business owners to whom she broadly refers are similarly situated. For instance, there are no allegations regarding the types of businesses owned by black individuals, the size of their businesses, where they are located, or what laws and regulations they have violated. Bowlby therefore provides mere 'labels and conclusions,' and consequently has failed to state a plausible claim for relief.[32]

Again, the Court found a lack of sufficient detail about matters that are familiar to case law about Rule 9(b)—"who" ('the black business owners to whom she broadly refers'); "what" and "how" ('what laws and regulations they have violated'); and "where" ('where they are located').[33]

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[29] *Id.*

[30] *See* 681 F.3d 215, 218 (5th Cir. 2012).

[31] *Id.* at 227.

[32] *Id.*

[33] In the frequently-visited context of lawsuits by borrowers against mortgage servicers, the Fifth Circuit has written several recent opinions that find fatal pleading deficiencies. *See, e.g.*, Trang v. Taylor Bean & Whitaker Mortgage Corp., 600 F. App'x 191, 192 (5th Cir. 2015) (allegation of intent did not satisfy *Twombly* when it "is, at most, a legal conclusion that [Defendant Law Firm] acted with the requisite intent; it lacks any 'factual content' that would 'allow[] the court to draw the reasonable inference that the intent element was met"); Estes v. JP Morgan

B. Twombly *Satisfied*

A counterpoint to those cases appears in the 2015 case of *Richardson v. Axion Logistics, L.L.C.*[34] Richardson alleged that his employer terminated him in violation of Louisiana's whistleblower statute, for revealing the employer's improper billing practices.[35] The district court dismissed, concluding as to a key element of the claim: "Richardson merely alleged that some of his co-workers engaged in unethical billing practices, only devoting one conclusory paragraph to stating that such illegal activity was authorized by [Axion]."[36] The Fifth Circuit disagreed and reversed,[37] taking a broader view of the relevant allegations:

> While paragraph 5 of the complaint did include an undetailed allegation that Axion authorized the fraudulent billing practices, other portions of the complaint provided the facts necessary to support the allegation. Namely, paragraph 13 alleged that Axion's president tried to fire one of the dishonest employees because of his fraud but the CEO refused to allow it, and paragraph 14 alleges that Axion's president expressly admitted knowledge of the fraud. In addition, paragraph 16 alleges that Axion's president, after the vice president of administration informed him of fraudulent billing, directed that the client be billed (and the dishonest employee be paid) for the extra time. Finally, paragraphs 18 and 18a allege that Richardson reported the

Chase Bank, N.A., 613 F. App'x 277 (5th Cir. 2015) (pleading failed to allege sufficient facts to allow the reasonable inference that the defendant was the holder of the relevant note); Guajardo v. JP Morgan Chase, 605 F. App'x 240 (5th Cir. 2015) (plaintiff omitted element of "grossly inadequate sales price" in wrongful foreclosure claim). While these opinions do not engage *Twombly* in detail, they do illustrate its practical application.

[34] 780 F.3d 304 (5th Cir. 2015).

[35] *Id.* at 305.

[36] *Id.* at 306.

[37] *Id.* at 304.

> fraudulent billing to the CEO and CFO, both of whom instructed him to keep quiet about the matter.[38]

Under *Twombly*'s "plausibility" standard, the Court concluded that "[t]aken together, these facts make plausible the allegation" made by the plaintiff about his employer's knowledge of the alleged misconduct.[39]

A similar analysis appears in *Wooten v. McDonald Transit Associates, Inc.*,[40] in the context of reviewing the record in support of a default judgment in an employment dispute. After first finding the plaintiff's pleading inadequate,[41] the Fifth Circuit issued a new opinion holding that the pleading complied with the Rules, and summarizing it as follows:

> Wooten's complaint contains the following factual allegations: (1) Wooten is a former employee of McDonald Transit; (2) Wooten was employed by McDonald Transit from 1999 until May 1, 2011; (3) at the time he was fired, Wooten was a Class B mechanic earning $19.50 per hour, plus benefits; (4) in October 2010, Wooten filed an age-discrimination claim with the EEOC, after which McDonald Transit "'discriminated and retaliated against [Wooten], and created a hostile work environment, until such time that [Wooten] was constructively discharged on or about May 1, 2011'"; and (5) McDonald Transit's unlawful conduct caused Wooten harm, including damages in the form of lost wages and benefits, mental anguish, and noneconomic damages.[42]

The court held "that these allegations, while perhaps less detailed than McDonald Transit would prefer, are nevertheless sufficient to satisfy the low threshold of Rule 8."[43]

In its analysis, *Wooten* acknowledged that the "complaint could have specified the nature of the discrimination and the retaliation [Wooten] experienced; but his allegations are not so vague that McDonald

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[38] *Id.* at 306-07.
[39] *Id.* at 307; *see also id.* at 306 (summarizing requirements of *Twombly*).
[40] Wooten v. McDonald Transit Associates, Inc., 788 F.3d 490 (5th Cir. 2015).
[41] Wooten v. McDonald Transit Associates, 775 F. 3d 689 (5th Cir. 2015).
[42] *Wooten II* at 498.
[43] *Id.*

Transit lacked notice of the contours of Wooten's claim." The court supported this conclusion by reference to the level of detail in the pattern form for negligence in the Federal Rules of Civil Procedure[44]—one of the forms the official Advisory Committee deemed irrelevant after *Twombly* and *Iqbal*.[45]

In the same vein, in *Highland Capital Mgmt. v. Bank of America*,[46] the plaintiff alleged the breach of an oral contract to sell a loan portfolio. The Fifth Circuit reversed the Rule 12 dismissal of that claim, noting the plaintiff's allegations about the role of industry custom in defining the terms used by the parties.[47] *Twombly* and *Iqbal* were cited, but only by way of introduction;[48] their effect on the requirements of Rule 8(a) did not factor into the court's analysis.

Two other recent cases also show how a pleading can withstand a Rule 12(b)(6) motion. In *Martin-Janson v. JP Morgan Chase*,[49] the plaintiff alleged promissory estoppel based on five specific representations by a mortgage servicer, and sought "discovery to reveal either the draft loan modification agreement that JPMorgan allegedly prepared, or the terms of her promised modification based on the lender's standard formulae."[50] While not directly relying on industry custom, the plaintiff's argument about "standard formulae" is reminiscent of the plaintiff's contention in *Highland Capital*.[51] The Fifth Circuit accepted that argument and reversed the dismissal of that claim.[52]

As to Rule 8(a), the Court cited *Iqbal* in its conclusion, but only to support its overall holding:

> Viewing Martin-Janson's factual allegations, and the reasonable inferences to be drawn therefrom, in the light most favorable to her, we conclude that she has pled a

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[44] *Id.* at 499 (citing Fed. R. Civ. P. Form 11).
[45] *See supra* note 17 and accompanying text.
[46] Highland Capital Mgmt. v. Bank of America, 698 F.3d 202 (5th Cir. 2012).
[47] *See id.* at 210. Interestingly, several months later, the court affirmed summary judgment for the defendant on that same claim, finding that the alleged customary usage did not in fact control the parties' dealings with each other. Highland Capital Management v. Bank of America, 574 F. App'x 486 (5th Cir. 2014).
[48] *Highland Capital*, 698 F.3d at 205.
[49] No. 12-50380, 536 F. App'x. 394 (5th Cir. 2013).
[50] *Id.* at 399.
[51] *See supra* notes 46-48 and accompanying text.
[52] *Id.* at 399.

> plausible promissory estoppel claim that potentially avoids JPMorgan's statute of frauds defense. *See Iqbal*, 556 U.S. at 678 (citation omitted) ("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.")[53]

While the Court did not go further into the specific requirements of Rule 8(a) in this section, it was clearly impressed favorably with the detailed pleading of the five alleged acts, quoting them verbatim earlier in its analysis.[54]

Finally, building on the substantive analysis of *Bowlby v. City of Aberdeen*,[55] the Fifth Circuit partially reversed a Rule 12(b)(6) dismissal in *Jabary v. City of Allen*.[56] The plaintiff claimed that a city had treated his "hookah shop" unfairly in the zoning process.[57] While affirming the dismissal of other defendants, the Court observed that the plaintiff had adequately alleged that the mayor had a motive to harm his store, as well as the specific opportunity to do so from his position in city government.[58] In other words, the Court credited the way in which the plaintiff alleged the "who," "what," and "how" of his alleged injury through the zoning process.

CONCLUSION

In its application of *Twombly* and *Iqbal* to allegations made under Fed. R. Civ. P. 8(a), the Fifth Circuit has maintained a distinct analytical framework from that required by Fed. R. Civ. P. 9(b). As a practical matter, however, there is considerable overlap. Deficiencies about the pleading of "who," "what," and other aspects of Rule 9(b) have been identified on more than one occasion as reasons to affirm a dismissal on

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[53] *Id.*

[54] *Id.* at 9; *see also* Peters v. JP Morgan Chase, 600 F. App'x 220 (5th Cir. 2015) (finding adequate pleading of the allegation that "the misapplication of [the borrower's] payments to an escrow account, resulting in default . . . constituted a material breach" that excused further performance).

[55] *See supra* notes 30-33 and accompanying text.

[56] Jabary v. City of Allen, 547 F. App'x 600 (5th Cir. 2013).

[57] *Id.* at 601.

[58] *See id.* at 608.

the pleadings.[59] On the other hand, when a Rule 12(b)(6) dismissal is reversed, the Court is clearly impressed when a pleading states a legally plausible theory in a detailed way.[60] Practitioners and judges should note this convergence in the Fifth Circuit's case law and consider it in their application of *Twombly* and *Iqbal* to specific pleadings.

[59] *See supra* Part II.A.
[60] *See supra* Part II.B.