HANDOUT ON ASHCROFT v. IQBAL. 129 S.Ct. 1937 (2009)

As noted on p. 195, note 4, of the casebook, the Supreme Court granted certiorari in the case described there, and it decided the case after the casebook was published. The Court's decision in *Iqbal* clarified certain things about the application of Bell Atlantic Corp. v. Twombly. Perhaps most basically, the Court made clear that the *Bell Atlantic* pleading standard is not limited to antitrust cases: "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." Id. at 1953 (quoting *Bell Atlantic*). It explained further (id. at 1950):

> 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. But where 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."
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> In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

The Court added that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. at 1949.

The majority held that plaintiff Iqbal failed this test with regard to his claims against Attorney General Ashcroft and FBI Director Mueller. Plaintiff, a Pakastini national and Muslim, was unquestionably taken into custody after Sept. 11. He claimed that he was subjected to what the majority called a "prison ordeal." He sued correctional officers who allegedly abused him directly, the wardens of the facility in which he was in custody, and "officials who were at the highest level of federal law enforcement" -- Ashcroft and Mueller. As to these high officials, plaintiff alleged that they designated him a "person of high interest" due to his religion and national origin, that they approved the policy of holding detainees like him in highly restrictive conditions, and that they "knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Id. at 1944. He thus asserted a *Bivens* claim against them.

The majority began with the assumption that, because respondeat superior liability could not be imposed on Ashcroft or Mueller for what the jailers did, Iqbal must "plead and prove that [they] acted with discriminatory purpose." Id. at 1948. Although plaintiff argued that a supervisor's "mere knowledge of his subordinate's discriminatory purpose" suffices for liability, the Court rejected that argument, saying that "purpose rather than knowledge is required to impose *Bivens* liability." Id. at 1949.

The majority held that plaintiff failed to make plausible allegations of purpose. It began by emphasizing the magnitude of the problem with which Ashcroft and Mueller were dealing; within a week of Sept. 11 the FBI had received more than 96,000 tips or leads from the public. Id. at 1943. Against this background, the majority found that plaintiff's allegations that they acted solely on account of religion or national origin in designing the government's response as a "formulaic recitation of the elements," adding that "we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth. . . . [G]iven more likely explanations, they do not plausibly establish that purpose." Id. at 1951. Noting that the Sept. 11 attacks were carried out by Arab Muslims who were part of an Islamic fundamentalist group provided important context (id. at 1951-51):

> It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Plaintiff urged that his allegation regarding defendants' intent should be accepted because even Rule 9(b) permits knowledge or intent to be averred generally, but the Court was not persuaded (id. at 1954):

> Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statement without reference

to its factual content.

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid -- though still operative -- strictures of Rule 8. And Rule 8 does not empower respondent to plead the bare elements of his cause o faction, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

How would this reasoning apply to the Seventh Circuit's decision in Bennett v. Schmidt (p. 195 n.3)?

Justice Souter, the author of *Bell Atlantic*, vehemently dissented, asserting that the majority's decision "does away with supervisory liability under *Bivens*." Id. at 1955. He argued that Ashcroft and Mueller conceded that a supervisor's knowledge and deliberate indifference to a subordinate's unconstitutional conduct would suffice for liability, but that the majority rejected it despite the concession. Accepting the concession, Justice Souter concluded that plaintiff's allegations supported the claim that Ashcroft and Mueller knew of and condoned the discriminatory policy, and noted that plaintiff also alleged that they affirmatively acted to create the discriminatory policy. He emphasized that "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it; claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here." Id. at 1959; compare Richards v. Duke University (p. 194 n.3). It is notable, however, that Justice Souter did not say that the standard spelled out in *Twombly* was wrong, but only that it was not correctly applied to the complaint before the Court.

On the relationship between the evolving standard under Rule 8(a)(2) and the standard under *Tellabs* (p. 196 n.5), consider Burbank, Pleading and the Dilemmas of General Rules, 2009 Wis. L. Rev. 535, 551-52:

> *Tellabs*'s distinction between plausible and strong (or cogent) inferences may also be helpful in divining the proper application of *Twombly* * * *. The problem here is that certain language in Twombly can be read to mean that the Court's standard * * * is more demanding than the standard under the PSLRA. The language in question can be read to require that inferences -- or to the extent that a

complaint does not rely on inferences, direct allegations -- grounding liability not just be plausible in the *Tellabs* sense (reasonable), and not just as strong (cogent or compelling) as any competing account, but stronger than any account of nonliability. Of course, that would be ridiculous.