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Chair's Message: Get in the Game

by Pat Weaver

I HAD AN OPPORTUNITY RECENTLY TO COUNSEL A FRIEND who is frankly discouraged and burned out with the practice of law. We talked at length about the options he had and his concerns. It was clear that my friend does not want to leave the practice. Deep down he loves the practice of law and the impact that it can and should have on one's clients and on himself. So after much kicking of the tires, he came up with a plan. It is not for everyone, but should work. The conclusion was not to disengage, but to get in the game.

O.K., sounds pithy, but what does that look like? Taking a hard look at what you do and don't like about your practice. Reaching out for help where you need it. Avail yourself of local groups and support. Reach out to your clients for feedback. Make sure you have the right boundaries between work and home. If your specific practice area is simply not working, what could you transition into? Get involved in what speaks to you in bar activities, either legislative issues, local pro bono, legal charities; whatever is meaningful to you. Try to weed out the things that are detracting from your practice and your quality of life.

This year the Litigation Section Council is adding a new committee to address "Transitions" and be a resource. We are in the initial stages, and look forward to reporting on our progress.

On behalf of the Litigation Section of the State Bar of Texas and the Litigation Council, I want to invite everyone to take advantage of all that the Section has to offer, from CLE, resources such as *The Advocate* and *News for the Bar*, to all our other programs. Our completely revamped web site provides more information on all the Section is doing and has to offer.

Looking forward to a great year. Hope it is a great year for you as well. The opening pitch is coming over the plate. ■

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Twombly in Recent Fifth Circuit Cases

by David S. Coale,
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In ***Bell Atlantic Corporation* v. *Twombly***, the Supreme Court wrote one of its most important paragraphs for 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 . . . .

127 S. Ct. 1955, 1964-65 (2007) (citations omitted). Two years later, the Supreme Court further elaborated on this holding in *Ashcroft v. Iqbal*:

> 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. 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."

129 S. Ct. 1937, 1949-50 (2009) (citations omitted).

The Fifth Circuit has addressed these pleading standards several times since those opinions. Two trends of interest have emerged. First, in affirming the dismissal of pleadings under *Twombly* and *Iqbal*, the Court at times uses language about Fed. R. Civ. P. 8(a) -- and its requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief" -- that resembles language from the Court's cases about Fed. R. Civ. P. 9(b) and heightened pleading in fraud cases. *See generally Dorsey v. Portfolio Equities*, 540 F.3d 333 (5th Cir. 2008) ("Put simply, Rule 9(b) requires the complaint to set forth 'the who, what, when, where, and how' of the events at issue.") Second, in reversing Rule 12(b)(6) dismissals, the Court places weight on the specific context of alleged representations, including the potential use of terms that have a customary industry meaning.

Twombly not satisfied

The Fifth Circuit provided its most thorough recent review of the Supreme Court's pleading requirements in *Merchants & Farmers Bank v. Coxwell*, No. 13-60368 (Feb. 7, 2014, unpublished). The issue was whether the plaintiff pleaded a conversion claim relating to an attorney's distribution of certain funds in alleged violation of a court order. The Court noted that such a claim was cognizable under Mississippi law, and that the plaintiff's pleading might have satisfied *Conley v. Gibson,* 355 U.S. 41 (1957). 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.

Slip op. at *5-6 (citing *Funk v. Stryker Corp.*, 631 F.3d 777, 782 (5th Cir. 2011)).

Two other recent cases have found pleadings inadequate under *Twombly*. *Patrick v. Wal-Mart* 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].

The court held that while this allegation "invokes three potentially cognizable theories of liability," it but "does not identify by date or amount or type of service, any of the alleged bad-faith denials and delays." 681 F.3d 614, 622 (5th Cir. 2012).

Similarly, in *Bowlby v. City of Aberdeen*, the Fifth Circuit rejected an equal protection claim about the handling of a permit to operate a snow cone stand. The Court said that the plaintiff's "complaint simply states that no black-owned businesses have been closed, and that there are black-owned business operating despite their non-compliance with City laws and regulations. She then summarily concludes that this amounts to a denial of equal protection." This pleading was not adequate:

> 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.

681 F.3d 215, 227 (5th Cir. 2012). Notably, each of these cases, in pointing out the flaws in the pleading, identifies matters that fall within the "who-what-where" requirements of Rule 9(b). While the Court is not conflating those two standards, these cases show that as a practical matter there is overlap between them.

Twombly satisfied

As a counterpoint to those cases, the Fifth Circuit reversed the Rule 12 dismissal of a claim on an oral contract, in large part because of the role that industry custom played in the plaintiff's allegations. *Highland Capital Mgmt. v. Bank of Am.*, 698 F.3d 202, 210 (5th Cir. 2012). Interestingly, the Court later affirmed summary judgment for the defendant on that claim, finding that the alleged customary usage was not in fact controlling in the parties' dealings with each other. *Highland Capital Mgmt. v. Bank of Am.*, No. 13-11026 (5th Cir. July 3, 2014).

Two other cases illustrate when a pleading withstands a Rule 12(b)(6) motion. In *Martin-Janson v. JP Morgan Chase*, the Fifth Circuit found that the five specific representations alleged by the plaintiff, from which she 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," could support a promissory estoppel claim that would survive the Statute of Frauds. No. 12-50380 (July 15, 2013, unpublished). And, building on the substantive analysis of *Bowlby v. City of Aberdeen*, the Court noted the importance of pleading the mayor's alleged motive and specific opportunity to affect land use decisions, helping to overcome a motion to dismiss on immunity grounds. *Jabaray v. City of Allen*, No. 12-41054 (Nov. 25, 2013, unpublished).

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 overlap, as deficiencies involving the pleading of "who" and "what" have been identified on more than one occasion. When a Rule 12(b)(6) dismissal is reversed, the specific context of the alleged events and representations has particular importance, and should play an important role in drafting a pleading in anticipation of a motion based on *Twombly* and *Iqbal*. ■

New Section on Legislative & Campaign Law

To Focus on Political Law and Serve as "Ethics" Resource to Other Sections

In April of this year, the State Bar Board of Directors authorized the creation of the Bar's 43rd Section, the Section on Legislative & Campaign Law. The genesis behind this new section was a desire to focus on a specialized and quickly changing, yet in some ways universal, area of the law. Though narrowly focused, the subject matter has potential consequences for a wide range of attorneys and their clients. This area of law touches on Constitutional issues of free speech and petitioning public officials, administrative issues governing professional advocacy, and the quickly shifting legal landscape of campaign finance law.

The realm of "political" law involves both the process of being a public policy advocate (the "legislative" component) and involvement in the electoral process (the "campaign" aspect). When engaged to influence policymakers, Texas attorneys should be informed on the various statutes and rules governing such professional advocacy. This means an awareness of the state lobby statute that governs interaction with both the legislative and administrative branches. It also includes rules governing interaction with public servants generally and those specific to particular agencies. A variety of matters serve as triggers for these rules, including legislative initiatives, agency advocacy, procurement and contract issues. Further, more local public entities are enacting their own restrictions on professional advocacy, both in the context of policymaking and contracting. While the new section will not engage in the act of lobbying, it is designed to educate attorneys about the *law of lobbying*, which involves the very nature of how a lawyer advocates on behalf of his or her clients.

The area of campaign finance law is equally fundamental, involving issues of free speech and association. However, since the *Citizens United* ruling in 2010, campaign finance has also been one of the fastest changing areas of the law. Legal challenges and changes are ongoing, both at the federal and state level, and within the legislative and executive branches. Our new section will monitor these changes and keep our members updated so that they may provide the most reliable advice to their clients. Involvement in the electoral process – from making a campaign contribution, offering an endorsement, coordinating with likeminded people or business interests – all warrant heightened scrutiny in the current legal environment. The previous four years of change in this area of the law are likely just a prelude to the changes to come in the near future.

This practice area is also notable for the fact that the regulations at issue almost always carry criminal consequences. Although practitioners of "political" law rarely specialize in criminal representation, every aspect – from interacting with policymakers to making political contributions – carries a