How Will Seventh Circuit Pleading Requirements and Dismissal Standards Change in the Wake of *Bell Atlantic*

By Joshua Yount [1]

This past May, in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court stepped away from the path of minimal notice pleading that it had been walking for 40 years. Now, dismissal can result from a failure to plead facts that both give notice of a claim's grounds and make a right to relief plausible. The consequences of the *Bell Atlantic* decision in the Seventh Circuit—where the law favoring minimal notice pleading had been particularly strong—are just beginning to unfold. Thus far, the Seventh Circuit has been hesitant to read *Bell Atlantic* too broadly, but much about the decision's implications remains unresolved.

Pleading In The Seventh Circuit Prior to *Bell Atlantic*

As recently as April 2007, the Seventh Circuit instructed litigants and district courts that "a judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life." *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007). Indeed, the court had taken the position that "[a]ny decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b)." *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006). In the Seventh Circuit, a complaint needed only "to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate." *Id.* at 714. "Silence" on other factual circumstances, even those necessary to prove an asserted cause of action, the court had explained, "is just silence and does not justify dismissal unless Rule 9(b) requires details." *Id.* at 715. In the court's view, "[a]rguments that rest on negative implications from silence are poorly disguised demands for fact pleading." *Id.*

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***Bell Atlantic's* Retrenchment On Pleading**

Now it seems the Seventh Circuit's *Vincent* decision may itself have "a short half-life." Within a month of *Vincent*, the Supreme Court handed down *Bell Atlantic*, a 7-2 decision authored by Justice Souter that appears to reject the minimalist notice pleading standards articulated by the Seventh Circuit. Most prominently, the Court repudiated the instruction of *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Court found the "no set of facts" rule—under which lower courts allowed "any statement revealing the theory of the claim [to] suffice unless its factual impossibility [could] be shown from the face of the pleadings"—to be inconsistent with the requirement of Fed. R. Civ. P. 8(a)(2) that a complaint contain a statement of the claim "showing that the pleader is entitled to relief." 127 S. Ct. at 1964, 1968-69.

The *Bell Atlantic* Court further explained that "a plaintiff's obligation to provide the grounds of his entitlement to relief" under Rule 8(a)(2) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65 (internal quotation marks omitted). Rather, the "[f]actual allegations" in a complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. Put differently, a complaint must plead "enough facts" to make a claim for relief "plausible on its face" (*id.* at 1974), must contain "allegations plausibly suggesting (not merely consistent with)" actionable conduct (*id.* at 1966), or must show "a reasonably founded hope" that discovery will support a claim (*id.* at 1967, 1969 (internal quotation marks omitted)). The Court emphasized, moreover, that the burdens of modern discovery imbue these pleading requirements with "practical significance" and favor empowering district courts "to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1966-67 (internal quotation marks omitted).[2]

Applying these standards, the *Bell Atlantic* Court reinstated the dismissal of an antitrust complaint claiming that the "Baby Bells" agreed among themselves to prevent entry into local telephone and internet service markets while avoiding competition with each other. 127 S. Ct. at 1970-74. Bare allegations of "agreement" were "merely legal conclusions" insufficient to state a claim, in the Court's view. *Id.* at 1970. And allegations of "parallel conduct" among the Baby Bells did not plausibly suggest conspiracy because there was a natural, non-conspiracy explanation for the conduct. *Id.* at 1971-73. The Court concluded, in short, that the plaintiffs had "not nudged their claims across the line from conceivable to plausible." *Id.* at 1974.

Notwithstanding the many indications that the Supreme Court intended to tighten pleading standards, the *Bell Atlantic* opinion also contains several pronouncements signaling continued fidelity to notice pleading. For instance, the Court made clear that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." 127 S. Ct. at 1964. The Court likewise noted that its understanding of Rule 8 does "not require heightened fact pleading of specifics." *Id.* at 1974.

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[2] Notably, the *Bell Atlantic* Court relied in part on an older Seventh Circuit opinion that predates the development of the Seventh Circuit's minimalist approach to pleading, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984). In particular, the Court quoted *Car Carriers* on the significance of wasteful litigation in judging a complaint's sufficiency and the need for allegations suggesting a right to relief. 127 S. Ct. at 1967 ("'[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.'"); *id.* at 1969 ("'[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory'").

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Moreover, two weeks after issuing the *Bell Atlantic* opinion, the Supreme Court summarily reversed a Rule 12(b)(6) dismissal, rejecting the Tenth Circuit's determination that allegations in an Eighth Amendment suit—namely, that a prison official's refusal to provide an inmate with medication for hepatitis endangered the inmate's life—were too conclusory on the question of harm. *Erickson v. Pardus,* 127 S. Ct. 2197 (2007). The per curiam *Erickson* opinion, citing *Bell Atlantic*, explains that under Rule 8(a)(2) "[s]pecific facts are not necessary; the [requisite short and plain] statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 2200 (internal quotation marks omitted).

***Bell Atlantic* In The Seventh Circuit**

In the months since the *Bell Atlantic* decision came down, the Seventh Circuit has tried to make sense of the decision's impact on its very liberal pleading jurisprudence. Thus far, the predominant tendency has been to minimize the changes worked by *Bell Atlantic*. The most thorough treatment of the subject occurs in *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773 (7th Cir. 2007), which affirmed the dismissal of Title VII retaliation action in which the EEOC amended its complaint to delete allegations suggesting that the claimed retaliation was for reporting favoritism toward a paramour rather than for reporting sex discrimination.

The *Concentra* court viewed *Bell Atlantic* as interpreting Rule 8(a)(2) "to impose two easy-to-clear hurdles": (1) "the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"; and (2) "its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level." *Id.* at 776 (internal quotation marks omitted). The court did recognize, however, that Seventh Circuit decisions like *Kolupa* "are no longer valid in light of" *Bell Atlantic's* "rejection" of *Conley's* "no set of facts" rule, explaining that "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief." *Id.* at 777. But that obligation, the *Concentra* court seemed to suggest, might be satisfied by a bare allegation of retaliation so long as any supporting allegations did not undermine the plausibility of the alleged illegal conduct. *Id.* at 777 n.1.

As for the fair notice requirement, the *Concentra* court opined that a complaint "must contain a minimal level of factual detail, although that level is indeed very minimal" (496 F.3d at 779), that, in close cases, a court should be guided by the liberality of notice pleading and prior decisions by the Seventh Circuit (id.), and that it "seems doubtful" that "*Bell Atlantic* changed the level of detail required by notice pleading" (*id.* at 782 n.4). The court nonetheless determined that the EEOC's complaint failed to give fair notice because the deletion of previously pleaded facts "critically important to the case" that "might facilitate a quick resolution on the merits" amounted to "obfuscation" that "does not intuitively comport with the purposes of notice pleading." *Id.* at 780-81. Such "easily provided, clearly important facts" must be pleaded. *Id.* at 782.

In a concurrence, Judge Flaum took issue with how the *Concentra* majority (Judges Cudahy and Bauer) read *Bell Atlantic*. He did not "share the majority's view that *Bell Atlantic* left our notice pleading jurisprudence intact." 496 F.3d at 784. Instead, he read *Bell Atlantic* to require a plaintiff to "plead enough facts to demonstrate a plausible claim." *Id.*

Aside from *Concentra*, nine published Seventh Circuit decisions have considered *Bell Atlantic*. Three merely quote from the opinion in describing what must be pleaded to avoid dismissal, without analyzing or applying its teachings. *Estate of Sims v. County of Bureau,* No. 01-2884, 2007 WL 3036752, at *3 (7th Cir. Oct. 19, 2007); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007); *Local 15, IBEW v. Exelon Corp.,* 495 F.3d 779, 782 (7th Cir. 2007).

Three others offer dicta on *Bell Atlantic's* meaning. In instructing the district court to ensure on remand that the complaint contain "'enough factual matter (taken as true)' to provide the minimum notice" owed a defendant under *Bell Atlantic*, *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation,* 491 F.3d 638, 648-49 (7th Cir. 2007), noted that the Supreme Court had rejected *Conley's* "no set of facts" rule out of concern that defendants would have to endure expensive pretrial discovery to demonstrate the

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groundlessness of a plaintiff's case. With a somewhat different emphasis, *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC,* 499 F.3d 663, 667 (7th Cir. 2007), opined, "Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." And in faulting a prisoner for failing to supply factual details at any time up through his summary judgment appeal, *George v. Smith*, No. 07-1325, 2007 WL 3307028, at *2 (7th Cir. Nov. 9, 2007), explained that under *Bell Atlantic* plaintiffs "must give enough detail to illuminate the nature of the claim and allow defendants to respond."

Two cases instructively apply *Bell Atlantic* without offering any special analysis of the decision. One, *Jennings v. Auto Meter Products, Inc.,* 495 F.3d 466 (7th Cir. 2007), affirms the dismissal of a RICO complaint. In relevant part, *Jennings* determines that the plaintiff failed to allege "a sufficient number and variety of predicate acts" and "reject[s]" the plaintiff's "characterization" of the number of injuries allegedly suffered. *Id.* at 475-76. The other, *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616 (7th Cir. 2007), affirms the dismissal of a number of challenges to O'Hare International Airport expansion plans. In doing so, the decision rejects "legal conclusions" and "unsupported conclusions of fact" alleged in support of the plaintiff church's claims that the City of Chicago and the State of Illinois impermissibly targeted religious rights in the law authorizing the expansion plans and finds that the motion to dismiss record contained "no facts" and "no plausible evidence" supporting the requested relief. *Id.* at 633, 635, 637, 639, 640.

The last case, *Killingsworth v. HSBC Bank Nevada, N.A.,* Nos. 06-1616, 06-2178, 2007 WL 3307084 (7th Cir. Nov. 9, 2007), reviews *Bell Atlantic's* holding and reinstates a dismissed Fair Credit Reporting Act ("FCRA") complaint. The *Killingsworth* court emphasized the need plead "enough facts to state a claim to relief that is plausible on its face" and "to raise a right to relief above the speculative level." *Id.* at *3 (quoting *Bell Atlantic*). But the court also restated the minimalist view of *Bell Atlantic* expressed in *Airborne Beepers*. *Id.* Without further specifying the level of factual detail necessary, the *Killingsworth* court found the plaintiffs' complaints adequately alleged willfulness by pleading specific, intentional acts by the defendants that would violate the FCRA. *Id.* at *8.

Litigating In The Seventh Circuit Under *Bell Atlantic*

Three-and-a-half months after *Bell Atlantic,* much remains uncertain about the decision's impact on pleading requirements and dismissal standards in the Seventh Circuit. Still, three teachings can be stated with some confidence. First, courts may no longer hypothesize allegations to save a complaint from dismissal. Only a complaint's actual allegations and reasonable inferences from those allegations count in assessing whether a complaint states a claim. Second, Rule 8 definitely does not require detailed fact pleading. Such pleading is necessary only for the matters identified in Rule 9(b) and similar statutory provisions requiring heightened pleading. Third, courts should disregard factual conclusions, labels, and characterizations in a complaint, at least in some circumstances. Usually, plausibility and notice turn on the underlying facts, not conclusory allegations.

In the coming months and years, the Seventh Circuit (and perhaps the Supreme Court, too) will have to grapple with the uncertain implications of *Bell Atlantic* on a host of other matters. The most significant matter is the level of detail a complaint must plead. Is it still true that only a few "tidbits" sufficient to allow the defendant to investigate will do? What about "easily provided, clearly important facts," do they have to be supplied even when not pleaded in a previous complaint? And to what extent does the plausibility inquiry demand factual details, as opposed to an abstract assessment of the type of claim asserted?

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That last question, of course, also relates to the separate, undecided matter of how to determine a pleaded claim's legal plausibility. Is it really sufficient, as the *Concentra* dicta suggests, that the type of claim asserted is plausible, as a general matter? Furthermore, what should a court consider in judging plausibility? The *Bell Atlantic* Court undertook a fairly sophisticated economic analysis of the claims before it. And the Supreme Court's contemporaneous decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S. Ct. 2499, 2509 (2007), approved consideration of "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Plausibility also might require a plaintiff to allege facts going to each element of the pleaded causes of action, if the *Bell Atlantic* Court's references to the Seventh Circuit's older *Car Carriers* decision are credited. Could an obligation to rebut obvious (or not so obvious) affirmative defenses in the complaint follow?

Also unresolved is when conclusory allegations must be ignored. Some conclusions, it would seem, will have to be ignored: conspiracy and discrimination, to name two. *Bell Atlantic*, 127 S. Ct. at 1970 n.10 (conspiracy); *Concentra,* 496 F.3d at 781-82 (discrimination). Others appear acceptable, with negligence being a prominent example. *See Bell Atlantic,* 127 S. Ct. at 1970 n.10 (speaking with seeming approval of the negligence complaint that is Form 9 to the federal rules). Developing general principles to separate the impermissibly conclusory from the sufficiently factual will be no easy task, and may be further complicated if the same conclusions receive different treatment in different areas of the law. *See Concentra,* 496 F.3d at 782 ("It is rarely proper to draw analogies between complaints alleging different sorts of claims; the type of facts that must be alleged depend upon the legal contours of the claim.").

Finally, what should courts make of *Bell Atlantic's* emphasis on the importance of fuller pleading to prevent massive discovery in groundless cases? Should courts be more forgiving of sketchy pleading and marginal claims in cases with limited discovery? Distinguishing among types of cases in such a pragmatic manner certainly has not found favor in the past. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513 (2002). But even prior to *Bell Atlantic,* some decisions treated the prospect of costly discovery as a factor relevant to a dismissal motion. *See Bell Atlantic,* 127 S. Ct. at 1966-67 (citing, among other cases, *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 347 (2005); *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 528 n.17 (1983); and *Car Carriers,* 745 F.2d at 1106).

While the courts work out these issues, litigants must be alert to raise and preserve them. Indeed, litigants have a unique opportunity to shape pleading and dismissal standards as courts consider *Bell Atlantic's* implications. In the immediate future, therefore, new and careful attention should be paid to those standards in briefing dismissal motions and appeals from dismissals.

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