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Evolving With Affirmative Defense Pleading Standard

Law360, New York (March 04, 2010) -- By now the U.S. Supreme Court's decisions in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. ____, 129 S. Ct. 1937 (2009), are relatively old news. Defendants nationwide are wielding the "Twiqbal" standard as an effective weapon against insufficient pleadings.

Indeed, the new pleading standard defined by Twiqbal has been a true game changer for the plaintiff's bar. Plaintiffs are now trying to turn the turn the tables and have Twiqbal applied to the defense's pleading of affirmative defenses.

While the issue is still unsettled, several federal district courts have determined that the Twiqbal standard applies to pleading affirmative defenses as well as claims. This article assesses the current state of the pleading standard post-Twiqbal and looks at how defendants can respond to the changing standard for pleading affirmative defenses.

Present State of the Pleading Standard

Before discussing the ramifications of a potential extension of Twiqbal to affirmative defenses, a brief overview of Twiqbal as currently applied is in order.

The Twombly decision abrogated the bare notice pleading allowed under Fed. R. Civ. P. 8(a) by the Conley decision.[1] Twombly delineates a higher standard for pleading a claim for which relief may be granted.

In order to state a claim, Twombly holds that the pleader must make some factual allegations, at least enough to "raise a right to relief above the speculative level."[2] Pleading just the bare elements of a cause of action without factual enhancement is no longer sufficient.[3]

And so the pleading revolution began, although some plaintiffs initially argued that Twombly only applied in the antitrust context from which it arose.

Iqbal, decided in 2009, left no doubt as to the expansive reach of Twombly. In Iqbal, the Supreme Court clarified that the Twombly interpretation of Rule 8 is the pleading standard for all federal civil actions and is not confined to antitrust matters like Twombly.[4] Now, pleadings in all federal matters are evaluated under the Twiqbal standard.

Thankfully, Iqbal is also instructive on the application of the Twiqbal standard, setting out a two-part analysis. Following this road map, a court should first identify conclusory pleadings. Any pleading that is factually or legally conclusory is not entitled to a presumption of truth unless it is supported by well-pled factual allegations.[5]

After sifting the wheat from the chaff, the court should then determine whether the properly supported allegations are sufficient to make the pleader's claim "plausible" not just "possible."[6] "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."[7]

The Twiqbal standard has caused a dramatic shift in litigation. The Supreme Court's reluctance to "unlock the doors of discovery ... [to plaintiffs] armed with nothing more than conclusions" has turned the once relatively quiet pleading stage of a case into a battle ground.[8]

Plaintiffs have been hit hardest by the pleading standard shift and are scrambling to conduct intensive and detailed pre-filing investigations of their cases. But, having seemingly recovered from the initial shock of the change, plaintiffs are also beginning to demand a level Twiqbal playing field.

Indeed, it has not escaped the notice of plaintiff's counsel that defendants continued to assert affirmative defenses devoid of factual content while demanding more factually detailed claims from plaintiffs.

Twiqbal on Affirmative Defenses

Traditionally, defendant's draft answers to complaints that include the full spectrum of affirmative defenses from accord and satisfaction to res judicata. The theory is to plead as many affirmative defenses as possible in the initial responsive pleading to avoid waiving applicable defenses by omission.

In a foreseeable twist, plaintiffs are now claiming that Twiqbal should apply with equal force to pleading affirmative defenses as it does to pleading claims. Several courts have agreed[9] most notably Hayne v. Green Ford Sales Inc., ___ F.Supp.2d ____, 2009 WL 5171779 (D.Kan. 2009).

The Hayne court, in the first published decision on the issue, determined that "[i]t makes no sense to find that a heightened pleading standard applies to claims but not affirmative defenses.[10] Applying the Twiqbal standard to the affirmative defenses asserted, the court found that it was insufficient to:

- Plead a statute of limitations defense with no reference to dates or time period;

- Assert the comparative negligence of others without any indication of who they might be;

- Refer to a failure to mitigate damages but not suggest what plaintiff failed to do;

- Claim plaintiff assumed the risk without stating what plaintiff did if anything to assume the risk;

- Plead an intervening cause with no description of the cause; and

- Plead misuse with no statement of what constituted misuse.[11]

What is most disconcerting about the Hayne decision for the defense bar is that it found that affirmative defenses as traditionally pled were insufficient. Post-Conley, affirmative defenses have always been pled the same way. For example, in many cases defendants traditionally plead the defense of affirmative estoppel as follows:

Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel.[12] Under Twiqbal, as applied to affirmative defenses by Hayne et al., however, such pleading is insufficient and merits dismissal.[13] Granted, the cases making this finding are limited to a few jurisdictions and are usually unreported, but they still represent a growing trend that reinforces the old adage what's sauce for the goose is equally tasty when dressing the gander.

It's time to change the defense game plan. With the Hayne court hurling lemons at traditionally pled affirmative defenses, it is indeed difficult to find a silver lining. But one does exist. This is an important opportunity for the defense bar to retool its approach to affirmative defenses and more effectively defend clients against plaintiff's allegations.

Defendants now have more incentive to investigate and evaluate their cases early in order to gather the facts necessary to conform their affirmative defenses to the new pleading standard. Defendants should take the opportunity to move away from the "kitchen sink" approach and be selective in the affirmative defenses pled.

Furthermore, some courts have held that Twiqbal only applies to pleading claims and not affirmative defenses. Defendants should seek to further these rulings and shape this area of the law as it develops.

Early Evaluation and Investigation

With some courts no longer willing to allow a "kitchen sink" approach to affirmative defenses, the need for early evaluation and investigation of claims is even more apparent. Early evaluation should begin at service of the complaint or where a pre-suit claim appears bound for litigation.

Early in a case, defendants should begin to interview witnesses, seek information from the client and client's documents, and request informal discovery from plaintiff. With this base of information, a defendant can be selective about the affirmative defenses it will plead and set its "game plan."

The "game plan" or overall strategy should be revised along with the case evaluation throughout discovery. If new facts lead to new defenses, then Rule 15(a) allows the defendant to amend the pleadings up to trial. Early evaluation of this variety is generally more economical than formal discovery and creates tremendous value for the client.

Rule 15 is an underutilized tool that will become much more valuable if Twiqbal's hold on affirmative defenses is extended in more jurisdictions. Historically, the "kitchen sink" approach was driven by a desire not to waive any applicable defenses by omission. But, under Twiqbal, a defendant may not be able to muster support for its defenses in time for the responsive pleading date.

To account for affirmative defenses that may arise, the courts allow a defendant to amend its answer to add to the defenses initially listed. Rule 15(a)(2) requires courts to grant leave to amend "when justice so requires." Applying this standard, courts have granted leave to amend at every stage of a proceeding from discovery to remand post-appeal.[14]

Thus a defendant should not feel compelled to plead every affirmative defense possible in its initial answer for fear of waiver, but may wait to plead affirmative defenses until it determines the defense is plausible.

That said, the more effective the early evaluation and investigation process can become, the more affirmative defenses a defendant can plead under the Twiqbal standard in its first answer. It is then incumbent upon defense counsel to analyze affirmative defenses throughout the life of a case so that affirmative defenses that arise in the course of discovery are not overlooked.

Defense counsel may also seek to have courts provide an extended date for amendment of the pleadings to add affirmative defenses. Since plaintiffs generally know more about their case at the beginning of an action than defendants, it seems equitable that a court would allow an extended date for amending to add the defenses that commonly arise during discovery.

Conforming Affirmative Defenses to Twiqbal

Even if the application of Twiqbal to affirmative defenses becomes a more widespread phenomenon, such defenses are easily conformable to the new standard. Twiqbal after all is still only a pleading standard. It requires fair notice of the defense and a statement of the grounds on which the defense rests, nothing more. The defenses need not be supported by detailed factual allegations, but they must be supported by more than a conclusory statement.[15]

Finally, this is not a probability standard. Extrapolating Twiqbal to affirmative defenses, a defendant only has to plead enough facts so as to make a defense plausible, meaning that taking all of the allegations as true, the court could come to the reasonable inference that the defense bars a plaintiff's claims in whole or in part.

Traditional pleading of affirmative defenses can be converted to meet the Twiqbal standard with minimal effort based on the facts of each case. For instance, the traditional pleading: "Plaintiff's claims are barred by the applicable statute of limitations" becomes "Plaintiff's claims are barred in whole or in part by the statute of limitations because they arose on or about _____ more than _____ years before it commenced this action."

Likewise, the traditional pleading: "Plaintiff's claims are barred by the doctrine of assumption of risk" transitions to "Plaintiff assumed the risk of _____ when Plaintiff _____."

Defendants should use early case evaluation, investigation and informal discovery requests as described above to fill in the necessary factual allegations. Pleading affirmative defenses to meet the Twiqbal standard is more time consuming, but it will also allow a defendant to take a more focused approach and detailed game plan into the discovery stage.

Challenge the Application of Twiqbal to Affirmative Defenses

While it is not insurmountably difficult to meet the Twiqbal pleading burden and while that burden may have hidden benefits for defendants as they improve their game plans through early evaluation and investigations, change can be challenging.

To maintain the status quo, in jurisdictions that have not yet applied Twiqbal to affirmative defenses, defendants can and should argue for a narrow interpretation of the Twiqbal rulings.

At least two courts have held that Twiqbal only applies to the Rule 8(a)(2) standard for pleading claims and does not apply to the Rule 8(c) standard for pleading affirmative defenses. Romantine v. CH2M Hill Eng. Inc., No. 09-973, 2009 WL 3417469 (W.D.Pa. Oct. 23, 2009) and First Nat'l Ins. Co. of America v. Camps Services Ltd, No. 08-cv-12805, 2009 WL 22861 (E.D.Mich. Jan. 5, 2009).

The argument is that Rule 8(c) does not require "a short and plain statement of the claim" for an affirmative defense and only requires the pleader to "affirmatively state any avoidance or affirmative defense." No statement of the basis for an avoidance or affirmative defense is required, therefore, the Twiqbal standard which interprets the sufficiency of the "short and plain statement" is inapplicable.

Although this argument has only found traction in a minority of the jurisdictions addressing the issue, it is important to remember that the application of Twiqbal to affirmative defenses is not well-settled law and is still susceptible to influence from the defense bar.

Conclusion

"It is not the strongest of species that survive, nor the most intelligent, but the one most responsive to change."[16] Change has already come to the affirmative defense pleading standard in some jurisdictions and may be coming to others.

The defense bar would be wise to get out in front of this wave as it is gathering rather than be crushed by it as is happening currently to plaintiff's counsel that came late to the Twiqbal party. It is time to re-evaluate the traditional defense approach to pleading affirmative defenses and time to institute or expand early evaluation and investigation programs.

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[1] Conley v. Gibson, 355 U.S. 41, 47 (1957). Between 1957 and 2007 federal courts had followed the Conley standard which interpreted Fed. R. Civ. P. 8 to only require plaintiffs "to give the defendant fair notice of what the claim is and the grounds upon which it rests."

[2] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[3] Id. at 557.

[4] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)

[5] Id. at 1953.

[6] Id. at 1949.

[7] Id.

[8] Id. at 1950.

[9] No federal circuit has addressed this issue as of publication. But see CTF Dev. Inc. v. Penta Hospitality LLC, No. C 09-02429 WHA, 2009 WL 3517617, at *7-8 (N.D.Cal. Oct. 26, 2009) ("Under the Iqbal standard, the burden is on the defendant to proffer sufficient facts and law to support an affirmative defense"); Tracy ex rel. v. NVR Inc., No. 04-CV-6541L, 2009 WL 3153150, at *7-8 (W.D.N.Y. Sept. 30, 2009) (striking affirmative defenses pled in simply conclusory terms, unsupported by any factual allegations, as "plainly deficient under the Iqbal standard"); FDIC v. Bristol Home Mortg. Lending LLC, No. 08-81536-CIV, 2009 WL 2488302, at *2-4 (S.D.Fla. Aug. 13, 2009) (applying Twombly to affirmative defenses); Teirstein v. AGA Medical Corp., No. 6:08cv 14, 2009 WL 704138, at *6 (E.D.Tex. Mar. 16, 2009) (affirmative defenses subject to same pleading standards as complaints and counterclaims); Greenheck Fan Corp. v. Loren Cook Co., No. 08-cv-335-jps, 2008 WL 4443805, at *1-2 (W.D.Wis. Sept. 25, 2008) (defendant's affirmative defenses, characterized as legal theories with implied elements, failed to comply with Rule 8 and failed to provide sufficient notice of the grounds for them); Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D.Tex. Sept. 22, 2008) (applying Twombly pleading specificity standard to affirmative defenses); Safeco Ins. Co. of Am. v. O'Hara Corp., 2008 WL 2558015, at *1 (E.D.Mich. June 25, 2008) (holding that the Twombly plausiblity standard applies in the context of a defendant asserting an affirmative defense); Holtzman v. B/E Aerospace Inc., No. 07-80551-CIV, 2008 WL 2225668, at *2,

(S.D.Fla. May 28, 2008) (citing Twombly as support for the proposition that a defendant must "alleg[e] facts as part of the affirmative defenses" and granting plaintiff's motion for a more definite statement); United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213, at *3-4 (E.D.Mich. Dec.06, 2007) (applying heightened pleading standard to defendants in pleading affirmative defenses).

[10] Hayne v. Green Ford Sales Inc., ___ F.Supp.2d ____, 2009 WL 5171779, *3 (D.Kan. 2009).

[11] Id. at *4.

[12] Id.

[13] See FN 9.

[14] See Granus v. North Am. Philips Lighting Corp., 821 F.2d 1253 (6th Cir. 1987)(granting leave to amend to add a defense four days before pretrial conference); Saper v. Long, 131 F.Supp. 795 (D.C.N.Y. 1955)(granting leave to amend to add a defense after the pretrial conference); Thomas v. American Cystoscope Makers Inc., 414 F.Supp. 255 (D.C.Pa. 1976)(allowing amendment at the beginning of trial); Zatina v. Greyhound Lines Inc., 442 F.2d 238 (8th Cir. 1971)(allowing amendment of pleading at the close of testimony).

[15] Iqbal, 129 S. Ct. at 1949.

[16] Author unknown, commonly attributed to Charles Darwin.