Liberalizing Rule 27 in the Twombly/Iqbal Era

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If legislative efforts to limit the reach of Twombly/Iqbal and reintroduce Conley's "no set of facts" standard are not enacted, basic notions of fairness and justice require that Rule 27 be liberally interpreted to allow plaintiffs to seek limited pre-suit discovery.

For fifty years, the accepted pleading standard, set forth in the 1957 decision of Conley v. Gibson, was that no complaint should be dismissed for failing to properly 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.'"

Conley was premised on Rule 8's requirement that a plaintiff plead a "short and plain statement of the claim showing that the pleader is entitled to relief..."

However, in 2007, the Supreme Court, in Bell Atlantic Corp. v. Twombly, "retired" Conley's "no set of facts" standard in favor of a stringent test requiring that plaintiffs plead a detailed set of facts presenting a "plausible," as opposed to simply possible, ground for relief in order to successfully plead a cause of action and survive a motion to dismiss.

Any doubts as to the scope of Twombly were erased when the Court, in Iqbal v. Ashcroft, announced that the plausibility standard applied to all civil actions — not just antitrust matters. Moreover, the Court reemphasized that "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "

The impact of this heightened plausibility standard has been seismic. Only six months after Twombly was decided, it was cited in more than 2,000 district court opinions and 150 circuit court opinions.

More importantly, the twin opinions of Twombly and Iqbal have created an ominous barrier for plaintiffs by "impos[ing] on litigants a pleading obligation that approaches the particularity requirement of Rule 9(b) fraud." To overcome a motion to dismiss, district courts are now requiring plaintiffs to plead detailed facts, including specific times, places, and persons involved in the alleged unlawful conduct.

Requiring plaintiffs to provide substantial factual evidence in a complaint without any discovery is seldom realistic and will bar many meritorious claims. This is particularly unjust in scenarios where a defendant is capable of concealing its illegal behavior.

Ultimately, Congress or the Supreme Court must recognize the frequent injustices caused by this heightened pleading standard and take action to return to a more relaxed standard. However, absent such reform, federal courts should follow a liberal interpretation of Rule 27 and allow plaintiffs to conduct limited pre-suit discovery to obtain the evidence necessary to meet the burden of showing a plausible claim to overcome a Rule 12(b)(6) motion to dismiss.

Pre-Suit Discovery Under the Federal Rules

Under Rule 26(d) of the Federal Rules of Civil Procedure, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Rule 27 provides a limited exception to Rule 26, however, and allows a plaintiff to file a petition to take depositions to "perpetuate testimony" before an action is filed.

Under Rule 27(a), a petitioner must show: (1) that it "expects to be a party to an action cognizable in a court of the United States, but is presently unable to bring it or cause it to be brought," and (2) that allowing the deposition "may prevent a failure or delay of justice."

The Rule 27 petitioner must also specify the facts he desires to establish by the deposition and show how they will be material to the expected action.

A plain reading of the statute suggests that Rule 27 is broad in scope. Some courts agree. In Reints v. Sheppard, the court recognized that the information required to satisfy a pleading burden often rests in the hands of a defendant. There, the plaintiff argued that he should be permitted to conduct discovery under Rule 27 before submitting an amended complaint. While ultimately denying the request, the court acknowledged that it "would be willing to grant such a request in a situation where a plaintiff truly did not have knowledge of sufficient facts to plead his case."

Similarly, the Sixth Circuit has indicated that a court should allow Rule 27 pre-suit discovery, under certain circumstances, when it may "prevent a failure or delay of justice . . . and [is] likely to provide material distinctly useful to a finder of fact."

The majority of courts, however, have rejected the view that Rule 27 can be used as a device to assist a plaintiff in framing a complaint. Instead, these courts have constricted Rule 27 to be used only for the perpetuation of evidence — a narrow situation in which limited, pre-suit discovery is allowed where testimony might be lost to a prospective litigant unless taken immediately such as, for example, in the case of an impending death.

The justifications for a limited interpretation of Rule 27, however, are no longer valid. Courts have aptly noted that a key rationalization for narrowly construing Rule 27 is a presumption that "[t]he liberal pleading requirements of federal practice demand only that the complaint contain a statement of jurisdiction and a brief statement of the claim and relief sought."

Likewise, in drafting Rule 27, the Advisory Committee did not specifically adopt a rule permitting pre-filing discovery under Rule 27 because "under the Federal Rules the method of pleading has been so simplified that there are few situations wherein a prospective litigant, who has a meritorious cause of action, would not be in possession of sufficient facts upon which to frame a complaint."

As evidenced above, these presumptions underlying a narrow interpretation of Rule 27 have now been eviscerated. Plaintiffs are no longer able to satisfy the pleading standard by making a "short and plain" statement of their claim for relief.

Instead, Twombly and Iqbal require plaintiffs to prove the plausibility of their claim through detailed factual pleading — a standard that has lead to the dismissal of many meritorious claims. Such unacceptable outcomes highlight the need to expand the scope of Rule 27.

Pre-Suit Discovery Under State Rules

In contrast to the federal system, broad pre-suit discovery rules have been adopted in several states. While differing in scope and application, several states allow plaintiffs to conduct pre-suit discovery to confirm that they are suing the proper defendant, identify unknown defendants, verify factual allegations, and investigate potential claims.

For example, in New York, plaintiffs are allowed to conduct discovery "to aid in bringing an action." In order to protect defendants, however, the state of New York has limited pre-suit discovery to those matters in which the plaintiff can demonstrate that he already has a cause of action.

Illinois allows pre-suit discovery beyond preservation of evidence to determine "the identity of one who may be responsible for damages." Likewise, defendants are provided protection. Illinois provides that "where the petitioner is apprised of a sufficient connection to the injury by an individual or entity... within the universe of potential defendants, the petitioner may not seek further discovery of facts pertaining to any actual wrongdoing."

Texas has the broadest pre-suit discovery rules — allowing a prospective plaintiff to "investigate a potential claim or suit." The general rationale behind allowing these broader pre-suit discovery rules is that "prohibitions or severe restrictions on a private party's ability to undertake pre-suit discovery are inconsistent with pleading and certification requirements and other front-end obligations imposed on plaintiffs in civil litigation."

Liberalization of Rule 27 Discovery Provides Benefits to Litigants

Liberalizing interpretations of Federal Rule 27 would provide efficiencies to both plaintiffs and defendants. First, Rule 27 requires a petitioner to include detailed information in a petition, such as the subject matter of the expected action and the petitioner's interest, the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it, and the names of the persons who the petitioner expects to be adverse parties in the dispute.

By requiring a potential plaintiff to provide the court with a written account of the information sought, the court may properly decide the scope of the pre-suit discovery and put appropriate limits on the discovery, if necessary, to protect a defendant. While providing adequate protections for a defendant, Rule 27 should allow potential plaintiffs with meritorious claims to discover sufficient facts necessary to satisfy the higher pleading standard set forth in Twombly and Iqbal.

In addition to giving the plaintiff a fair opportunity to have a meritorious claim heard, pre-suit discovery can accomplish numerous other efficiencies. For example, when pre-suit discovery is allowed, a litigant is more likely to put together a compelling case earlier on in the litigation process. This puts the parties in a better position to reach a favorable settlement and to achieve a resolution without resorting to time-consuming or expensive judicial or administrative adjudication.

As applied to all types of cases, pre-suit discovery may aid to facilitate communication between two potentially adverse parties to achieve a resolution. As such, a broad interpretation of Rule 27 would provide an efficient way for plaintiffs to narrow down defendants to ensure they are suing the correct parties. This eliminates expense for those would-be defendants who the plaintiff may later discover should not have been named.

Pre-suit discovery can also assist lawyers in deciding whether their case is worth bringing, thus avoiding expensive and time-consuming motions to dismiss.

Empirical studies suggest this is true. One Texas study found that, upon denial of a pre-suit discovery petition (possibly indicating that there was no basis for bringing suit), "lawsuits were filed somewhere between 17 to 34 percent of the time, suggest[ing] that one ameliorative effect of the pre-suit deposition rule is to reduce the incidence of non-meritorious litigation."

This finding supports the argument that allowing broader pre-suit discovery under Rule 27 will not open the floodgates to increased litigation.

Conclusion

If legislative efforts to limit the reach of Twombly/Iqbal and reintroduce Conley's "no set of facts" standard are not enacted, basic notions of fairness and justice require that Rule 27 be liberally interpreted to allow plaintiffs to seek limited pre-suit discovery to uncover relevant facts to meet the heightened plausibility pleading standard. Moreover, courts and defendants should recognize the efficiency benefits of narrowly crafted, pre-filing discovery. Otherwise, meritorious claims will continue to be dismissed and questionable litigation will continue to be filed.

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