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A Furor In The Federal Courts

In six months, Supreme Court ruling has altered litigation landscape

By THOMAS B. SCHEFFEY

Lee Sims sure had it nailed.

Part of his role as the University of Connecticut School of Law's head reference librarian is to track trends in court decisions. He writes about such things in his "Librarian At Law" blog. Over the summer, he noted a case that, on the surface was about a civil rights lawsuit brought by a terrorist suspect. But language in the U.S. Supreme Court decision seemed to change the pleading standards for civil cases in federal court, making it easier for defendants to get lawsuits dismissed before discovery.

At the time, Sims blogged that *Ashcroft v. Iqbal* was the most important case of the past term for the high court. Now that prediction seems to be coming true. A quick search of Sims' computer research banks shows that *Iqbal* has been invoked in 2,798 cases nationwide in the past six months, mostly in defense motions to dismiss and judges' responses. Already, 111 law reviews and journals have weighed in.

In Connecticut, a Westlaw search revealed 12 U.S. District Court decisions in which *Iqbal* was discussed (sometimes just briefly), with another 37 opinions in which the case was at least cited. Many of the cases involved employees suing employers for discriminatory behavior. Other cases involved inmates suing over prison conditions.

"This thing is a big deal," said Sims, a former Idaho trial lawyer, prosecutor and public defender. "Look at the numbers. I mean, my goodness!...I can't recall a time when a Supreme Court [decision] has been cited with such frequency; it's just six and a half months."

Sims is hardly alone in noting the impact. *Iqbal* has been a one-word rallying cry nationwide for trial lawyers, many of whom have pressed Congress to pass legislation neutering the Supreme Court ruling. Connecticut attorneys who practice in federal courts also have had cases affected by the ruling. Some are watching closely to see how it influences decisions made by the Second Circuit Court of Appeals.

Thomas B. Scheffey

Shipman & Goodwin lawyers Jill O'Toole and Charles L. Howard have seen a dramatic increase in the use of the Supreme Court's new 'plausibility' standard to challenge federal court actions at the earliest stage.

But, for now, one thing is clear. The *Iqbal* decision "stands traditional notice pleading on its head," said Erika L. Amarante, an associate of New Haven-based Wiggin and Dana, who has studied hundreds of cases that invoked the new pleading standard. Her research, to be published in the American Bar Association's "Franchise Law Journal," concludes *Iqbal* has breathed new life into defendants' motions to dismiss, and she predicts its impact will take "many years of litigation to appreciate."

'Common Sense'

Federal courts have long held that a plaintiff, when filing a lawsuit, only has to give the defendant fair notice of the legal claim at issue, and not plead the specific facts of the case in detail.

Over 50 years, this "notice pleading" rule has meant that the case could go forward unless the defendant could show that "no set of facts" could give it life as a valid claim.

Then, in 2007, the U.S. Supreme Court raised the idea, in the antitrust conspiracy case of *Bell Atlantic Corp. v. Twombley*, that enough factual allegations needed to be pled to convince the trial judge that the case had a "plausible" chance of winning.

To clarify *Twombley,* the high court revisited the threshold pleading standard in a civil rights case brought by a man detained in the wake of the Sept. 11 terrorist attacks. Javaid Iqbal was a cable television installer from upstate New York who was apprehended and placed in a maximum security holding center in Brooklyn in November 2001.

Iqbal was charged with conspiracy and

fraud, as a result of his allegedly questionable identification papers. He claimed that he was no terrorist, but that he had been targeted by U.S. officials because of his ethnic background. He also claims to have been beaten while in custody. He filed a civil rights complaint against top U.S law enforcement officials, including then Attorney General John Ashcroft, who in turn claimed he had qualified immunity against such claims.

When *Ashcroft v. Iqbal* reached the Supreme Court, the court majority ruled in favor of the government officials. The justices said that federal trial judges could rely on their own "judicial experience and common sense" to decide in a motion to dismiss whether a case should be tossed even before discovery could begin.

Justice Anthony Kennedy, writing for the majority, found that Iqbal's claims didn't meet the plausibility test, showing only that "the nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available."

Justice David Souter, in dissent, contended the majority misapplied *Twombley* in dismissing Iqbal's claims against the highest officials. Souter wrote that motions to dismiss should only be granted for cases that are not credible, even when viewed in the light most favorable to the plaintiff.

In just six months, the majority decision has gained considerable traction. To some lawyers, that's not a bad thing. At Hartford-based Shipman & Goodwin, appellate defense lawyer Charles Howard speaks of how onerous it is for corporate and individual defendants to respond to lawsuits. In an era when defendants are subject to electronic discovery of e-mail and computer data, the basic cost of compliance with discovery can be punishingly high.

"Extortionate is too strong a term," said Howard. But he has had recent cases in which defendants chose to settle, not on the merits of cases or a perceived weakness, but simply because the cost of discovery was unbearable.

And so Howard is not opposed to making it easier to get frivolous lawsuits dismissed at the outset. The *Iqbal* decision, he said, is "part of a continuing struggle to determine what should be the threshold necessary for the parties to invoke federal jurisdiction and the right to discovery and all the procedural apparatus that comes with it. That's the essence of the problem."

Plaintiffs Alarmed

Attorney David Scott, of Colchester's Scott + Scott, concentrates on class action matters and securities suits on a national basis. The federal Private Securites Litigation Reform Act has its own higher level of pleading standards, but he said he's now encountering *Iqbal* defenses "all the time" in potential class actions that aren't based on securities.

Scott said he's troubled by the subjective nature of the new standard.

Justice "Kennedy says it's 'a context specific task' for a court to draw on its judicial experience and common sense" in order to decide whether a lawsuit has a chance of being successful, said Scott. He anticipates that the result of "a motion to dismiss will depend more on the ideology of the judge, as opposed to an objective standard."

At Hartford's RisCassi and Davis, partner Andrew Groher recently settled a case against Bauch & Lomb in a multi-state pharmaceutical litigation case in federal court. He said he finds *Iqbal* troubling for two reasons. "First of all, it eviscerates the notice pleading requirement," he said.

Secondly, he said that when judges conclude that a plaintiff could not, under any scenario, plead sufficient facts to win a case, they "seem to be drawing on what they know about this case, based on the history of events leading up to it." Groher continued: "At this stage of the game, for the court to dismiss your case, is almost like a summary judgment ruling — before you've even had discovery."

Groher practices primarily in state court, where plaintiffs have always been required to plead specific facts of their case, as opposed to the, until recently, less specific federal notice pleading. But in actual practice, Groher said, it's less likely now for a state judge than a federal judge to grant a motion to dismiss.

"In state court, we have to plead the basic facts of the case, but our courts don't say, 'We don't like the facts you've pled so we're going to throw your case out.'"

Tipping Point

Most of Jill O'Toole's work has been in U.S. District Court.

She has clerked for two federal judges in 13 years of practice, and now, as a Shipman & Goodwin associate, O'Toole has seen the effects of *Twombley* and *Iqbal* from the front lines. In a case she's defending in the Northern District of New York, she filed a motion to dismiss in the fall of 2008, citing *Twombley.* "At that time, a lot of courts didn't seem to be quoting *Twombley*, and even if they were, it seemed like they were giving it lip service," she said.

Not so with *Iqbal,* which made waves from the start. In July, U.S. Senator Arlen Specter, D-Pa., proposed a bill to undo the effects of *Iqbal.* This month, U.S. Rep. Jerrold Nadler, D-N.Y., held hearings and introduced his own bill to restore the notice pleading requirements to pre-*Twombley* standards.

O'Toole has been skeptical that *Iqbal* and *Twombley* are poised to have the revolutionary effect that others predict. But she has observed that "the Second Circuit is now coming out and saying that there has been a substantial shift."

In an unpublished case in September, she said, the Second Circuit, "is now giving trial courts the understanding that [the appellate judges] will look seriously at the issue." In *Panther Partners v. Ikanos Communications,* it said, "We recognize that *Iqbal* and *Twombley* raised the pleading requirements substantially [and] after *Twombley* was decided, we proceed cautiously in light of the rapidly-changing contours of the pleading standards, in order to insure justice."

Ultimately, O'Toole said, the influential Second Circuit upheld dismissal of multiple claims, using *Iqbal* grounds. "I think it is going to take statements like that," O'Toole concluded, "for *Iqbal* to really make a change." ■