New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

Litigation

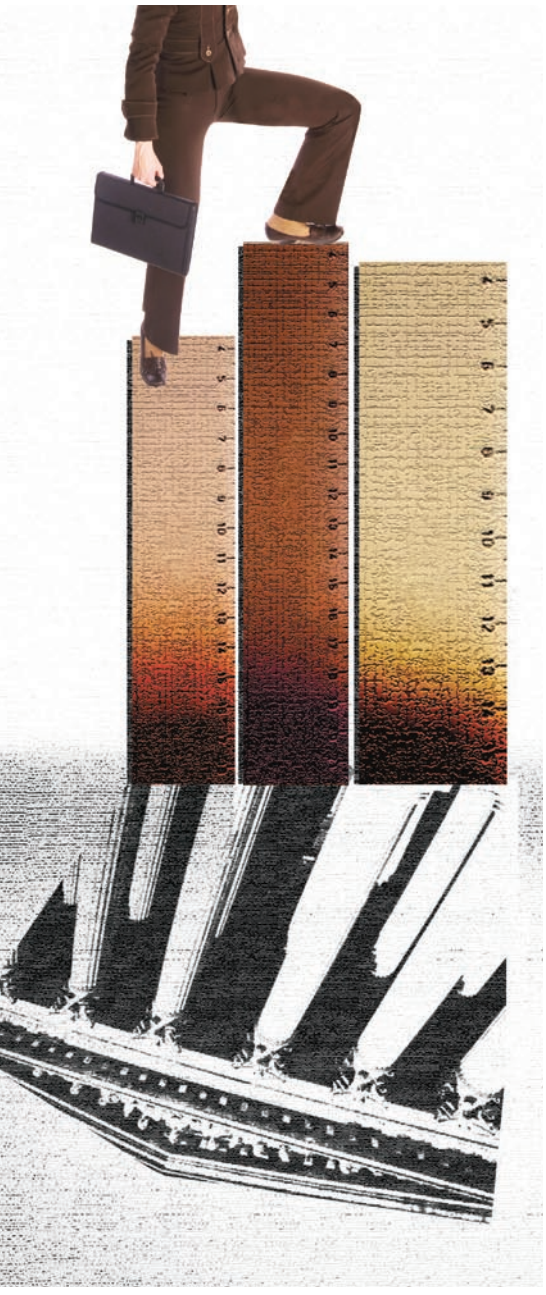
An ALM Publication

WWW.NYLJ.COM

MONDAY, NOVEMBER 16, 2009

Unlikely Source May Be **Raising** Summary Judgment **Bar**

High Court's three pleadings rulings begin to impact.



BY STEVEN G. BRODY AND GARY K. CHOW

DURING THE PAST three years, the U.S. Supreme Court has raised the standards for the specificity of pleadings in *Ashcroft v. Iqbal*,[1] *Tellabs Inc. v. Makor Issues & Rights, Ltd.*,[2] and *Bell Atlantic Corp. v. Twombly*.[3] Courts and commentators have focused generally on the implications of those decisions for motions to dismiss, rather than motions for summary judgment.

But the reasoning underlying *Iqbal*, *Tellabs* and *Twombly* also has affected summary judgment analysis, notwithstanding that courts traditionally have deemed the standards for these two motions to be separate and distinct.

While the full impact of the decisions has yet to be realized, it appears that *Iqbal* and *Twombly* will make it more difficult for plaintiffs to rely on conclusory allegations when confronted with summary judgment motions. *Tellabs*, if taken to its logical conclusion, should have a profound impact on summary judgment motions in the federal securities law context, with plaintiffs being required to show that the inference of scienter that they attempt to draw from the evidence is at least as compelling as any opposing inference.

Important procedural differences exist between motions to dismiss and motions for summary judgment. Federal Rule of Civil Procedure 12(b)(6) permits a court to grant a motion to dismiss for "failure to state a claim" where a plaintiff has failed to allege facts sufficient to sustain a claim under applicable law.[4]

In contrast, summary judgment may be rendered only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[5]

Unlike Rule 12(b)(6) motions, summary judgment motions are typically brought after the conclusion of discovery and involve a review of evidence. Where the non-movant bears the burden of proof at trial, the movant may discharge its initial responsibility by showing that "there is an absence of evidence to support the non-moving party's case"[6] or by identifying evidence that would negate the non-movant's claims.[7] The non-moving party may defeat the motion by raising a triable issue of material fact.[8]

STEVEN G. BRODY *is a financial institutions litigation partner in the New York office of Bingham McCutchen.* GARY K. CHOW *is an associate at the firm.*

Implications of 'Twombly' and 'Iqbal'

In *Twombly*, an antitrust case, the Supreme Court altered the notice pleading requirements of Rule 8(a)(2) by establishing a more stringent standard for the specificity of pleadings (and thereby more stringent standards for motions to dismiss under Rule 12(b)(6)).[9]

Previously, the Court in *Conley v. Gibson* permitted motions to dismiss for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[10] In other words, courts only required factual allegations to render claims "conceivable" for plaintiff to avoid dismissal.[11] *Twombly* overruled *Conley* and instituted a stricter, "plausibility" standard, which requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[12]

Subsequently, in *Iqbal*, the Supreme Court clarified that *Twombly*'s "plausibility" standard applies beyond the antitrust context.[13] *Iqbal* also emphasized the insufficiency of conclusory allegations, noting that they are not "entitled to the assumption of truth."[14] Moreover, *Iqbal* extended both these principles to allegations of malice, intent, knowledge and other states of mind, notwithstanding Rule 9(b)'s provision that such elements can be pled "generally."[15]

Commentators have suggested that the heightened pleading standards articulated in *Twombly* and *Iqbal* have blurred the procedural distinction between motions to dismiss and summary judgment.[16] While the focus typically has been on the increased rigor of the motion to dismiss standard, those two decisions also have been used to enhance a plaintiff's burden on summary judgment, particularly where a moving defendant challenges the sufficiency of the pleadings. Because conclusory allegations are insufficient at the motion to dismiss stage under *Iqbal* and *Twombly*, they certainly are insufficient at the summary judgment stage.[17]

In *Webb v. United States*, the court considered on a summary judgment motion the sufficiency of factual allegations supporting a plaintiff's claims for violations of constitutional rights.[18] In finding plaintiff's pleadings and evidence insufficient to sustain these claims, the court relied on *Iqbal* and *Twombly*, reasoning that "[a]lthough the Court is cognizant that the arguments before it are brought via motions for summary judgment, the rationale of *Iqbal* and *Twombly* militate strongly in favor of summary judgment."[19] Similarly, the court in *Coleman v. Kirk* relied on *Iqbal* for the proposition that "conclusory allegations alone cannot survive a motion for summary judgment."[20]

Other courts have recognized that *Iqbal* and *Twombly*'s plausibility analysis may be applicable at summary judgment. For example, in *Sherick v. Battelle Energy Alliance, LLC*, the court granted summary judgment in favor of defendant on a constructive discharge cause of action, finding the "claim is not a plausible reading of the Complaint."[21]

Further, the court in *Cox v. True North Energy, LLC* stated on a motion to dismiss that a *Twombly* plausibility argument may be raised on summary judgment after discovery.[22] Clearly, *Iqbal* and *Twombly* have not been cabined to the motion to dismiss context.

'Tellabs' May Have Greater Impact

The Supreme Court's holding in *Tellabs* may have a more significant impact on summary judgment than *Iqbal* and *Twombly*, specifically with respect to the Court's interpretation of the requirement in the Private Securities Litigation Reform Act (PSLRA) that plaintiffs plead facts supporting a "strong inference" of scienter.

Like *Iqbal* and *Twombly*, *Tellabs* focuses on the plausibility of factual allegations. But unlike those decisions, *Tellabs* explicitly requires that courts engage in a "comparative evaluation," "tak[ing] into account plausible opposing inferences" in determining whether plaintiff has sufficiently pled such an inference.[23] In other words, "[a] complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[24] Under the comparative evaluation required by *Tellabs*, even where competing versions of events are both plausible, dismissal is proper where a defendant's version is more plausible.[25]

The Supreme Court has not addressed whether the comparative evaluation required by *Tellabs* should be applied in the summary judgment context. But logic, and the public policies identified in *Tellabs*, suggest that it should be. It would be incongruous for plaintiffs in securities cases to have less of a burden to demonstrate scienter on summary judgment than they do on a motion to dismiss.

This incongruity was highlighted by the Eleventh Circuit in *Mizzaro v. Home Depot Inc.*[26] The court observed that "this [*Tellabs*] test is not the same as the standard we employ for summary judgment under Rule 56, because [the *Tellabs* test] asks what a reasonable person *would* think, not what a reasonable person *could* think," as required by Rule 56.[27] Specifically, the *Mizzaro* court referred to the holding in *Tellabs* that "[a] complaint will survive, we hold, only if a reasonable person *would* deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[28]

In contrast, under the Supreme Court's decision in *Anderson v. Liberty Lobby Inc.*, a court's inquiry at summary judgment "asks whether reasonable jurors *could* find by a preponderance of the evidence that the plaintiff is entitled to a verdict."[29]

If *Liberty Lobby* and *Tellabs* were not harmonized by extending use of the comparative evaluation to summary judgment motions, the results would be difficult to justify. A plaintiff whose factual allegations were insufficient to withstand that evaluation on a motion to dismiss could survive a summary judgment motion based upon the same facts. Similarly, a plaintiff's burden to demonstrate scienter theoretically would ease even as that plaintiff gains access to additional evidentiary materials through discovery.

Perhaps in response to this incongruous result, some courts have applied *Tellabs* to summary judgment motions, thereby raising the showing required to sustain a securities claim at that stage of the litigation.[30]

For example, in *Nolfi v. Ohio Kentucky Oil Corp.*, the court relied on *Tellabs* in rejecting defendant's summary judgment argument that the evidence was insufficient to demonstrate the required scienter.[31] The *Nolfi* court noted that "the above cases [including *Tellabs*] deal with the pleading standard required for these claims, but [found] that the underlying rationale is applicable to the summary judgment setting as well."[32]

Similarly, in *Feinberg v. Benton*, the court relied on *Tellabs* in determining on summary judgment whether a material issue of fact existed with respect to scienter, indicating that "this Court believes the *Tellabs* analysis is at least instructive in the summary judgment context."[33]

In *SEC v. Northshore Asset Management*, the court cited to the comparative evaluation established in *Tellabs* in determining on a motion for summary judgment whether a material issue of fact existed with respect to scienter.[34]

As demonstrated by these decisions, the judicial dialogue has started as to whether the comparative evaluation requirement of *Tellabs* should be extended to summary judgment motions.

Second Circuit Case Law Trends

There has been a subtle, and still uncertain, development in summary judgment law in the Second Circuit.

In *Miner v. Clinton County*, the Circuit held that "[a] lthough the burden of demonstrating that no material fact exists lies with the moving party, '[u]nless the nonmoving party offers some hard evidence showing that its version of the events is not wholly fanciful, summary judgment is granted to the moving party.'"[35] Lower courts in the Second Circuit have increasingly cited to this "wholly fanciful" language in ruling on summary judgment motions,[36] particularly where a plaintiff has failed to provide evidence to support a claim.

For example, in *Bender v. Alvarez*, a §1983 case, plaintiff brought suit against defendant law enforcement officers for false arrest, alleging that defendants planted evidence.[37] In granting summary judgment, the court cited the "wholly fanciful" language and found that "[p] laintiff fails to provide any evidence demonstrating that the evidence was planted in his residence except for his unsupported statement."[38]

It is too early to tell whether the "wholly fanciful" language will have a significant impact on summary judgment decisions in the Second Circuit. Regardless, no court has applied that language in a PSLRA scienter determination, and there is no indication that any court would do so. Indeed, if the comparative evaluation requirement articulated in *Tellabs* were extended to summary judgment motions in the PSLRA context, that evaluation would be incompatible with the "wholly fanciful" language.

Conclusion

The general trend in the law has been to make pretrial dispositive motions a more useful tool for disposal of weak or frivolous lawsuits. That trend dates back at least to the Supreme Court's 1986 triumvirate of summary judgment decisions (*Celotex*, *Liberty Lobby* and *Matsushita*), and has been advanced recently by the Court's decisions in *Twombly*, *Tellabs* and *Iqbal*, as well as by statutes such as the PSLRA.

Future decisions will tell whether the recent enhancements in Rule 12(b)(6) law will have a lasting impact on summary judgment law.

1. 129 S. Ct. 1937 (2009).
2. 551 U.S. 308 (2007).
3. 550 U.S. 544 (2006).
4. FED. R. CIV. P. 12(b)(6).
5. FED. R. CIV. P. 56(c).
6. 477 U.S. 317, 325 (1986).
7. See *Salahuddin v. Goord*, 467 F.3d 263, 273 (2nd Cir. 2006).
8. See id.
9. 550 U.S. at 564-65.
10. 355 U.S. 41, 45-46 (1957).
11. See id.
12. *Twombly*, 550 U.S. at 556, 564-65.
13. 129 S. Ct. at 1953.
14. Id. at 1950.
15. Id. at 1954.
16. See A. Benjamin Spencer, "Plausibility Pleading," 49 B.C. L. REV. 431, 486 (2008) ("the *Twombly* Court effectively has moved the summary judgment evaluation up to the pleading stage."); Richard A. Epstein, "*Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments," 25 Wash U. J.L. & Pol'y 61, 82 (2007) (observing that the *Twombly* court "treated the defendant's motion to dismiss as though it set up a 'mini-summary judgment'"). Recently, Senator Arlen Spector (D–Pa.) has proposed legislation that would restore the *Conley* standard.
17. See *Meade v. Berghuis*, No. 08cv517, 2009 WL 2524747, at *9 (W.D. Mich. Aug. 13, 2009) (citing *Iqbal* for its holding on summary judgment that "Plaintiff's bald assertion of retaliation is insufficient to state a cause of action").
18. No. 07CV3290, 2009 WL 3012055, at **6-8 (N.D. Ohio Sept. 15, 2009).
19. Id.; see also *Walker v. Prince George's County*, 575 F.3d 426, 431 (4th Cir. 2009) (citing to *Iqbal* in granting summary judgment); *Brown v. Kepiec*, No. 06-CV-1126, 2009 WL 818959, at *7 (N.D.N.Y. March 25, 2009) (same).
20. No. 07 C 1941, 2009 WL 1657426, at *4 (N.D. Ill. June 10, 2009).
21. No. CV-07-307, 2009 WL 453768, at *3 (D. Idaho Feb. 20, 2009).
22. 524 F. Supp. 2d 927, 947 (N.D. Ohio 2007).
23. *Tellabs*, 551 U.S. at 314, 323.
24. Id. at 324.
25. See *W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp.*, No. 08-3867-cv, 2009 WL 2779119, at *3 (2d Cir. Sept. 3, 2009) (granting motion to dismiss federal securities claim because, although plaintiff's allegations were arguably plausible, the competing inference in favor of defendant was stronger).
26. 544 F.3d 1230, 1239 (11th Cir. 2008).
27. Id. (emphasis in original).
28. Id. (quoting *Tellabs*, 551 U.S. at 324) (emphasis added).
29. 477 U.S. 242, 252 (1986) (cited in *Mizzaro*, 544 F.3d at 1239) (emphasis added).
30. Some pre-*Tellabs* case law suggests that because the PSLRA did not alter the substantive requirements of scienter for federal securities claims, interpretations of the statute should not affect summary judgment standards. See, e.g., *Howard v. Everex Sys. Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000).
31. 562 F. Supp 2d 904, 909-12 (N.D. Ohio May 12, 2008) (finding the "inference of scienter is at least as strong as any competing inference" and denying summary judgment on federal securities claim).
32. Id. at 910.
33. No. 05-4847, 2007 WL 4355408, *6 n.1 (E.D. Pa. Dec. 13, 2007) (finding "a strong inference—at least as strong as any opposing inference—of scienter" and denying summary judgment).
34. No. 05 Civ. 2192, 2008 WL 1968299, at *7 (S.D.N.Y. May 5, 2008) (granting in part summary judgment on federal securities claims); see also *Pennmont Sec. v. Wallace*, No. 06-1646, 2008 WL 834379, at *6 n.5 (E.D. Pa. March 26, 2008) (granting summary judgment where no evidence of scienter existed and citing to the standard for scienter articulated in *Tellabs*).
35. 541 F.3d 464, 471 (2d Cir. 2008) (citation omitted); see also *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998).
36. See, e.g., *Rockland Vending Corp. v. Creen*, No. 07-CV-6268, 2009 WL 2407658, at *26 (S.D.N.Y. Aug. 4, 2009); *Steinbeck v. McIntosh & Otis Inc.*, No. 04 CV 5497, 2009 WL 928189, at *4 (S.D.N.Y. March 31, 2009).
37. No. 06-CV-3378, 2009 WL 112716, at **2, 7-9 (E.D.N.Y. Jan. 16, 2009).
38. Id. at *9.