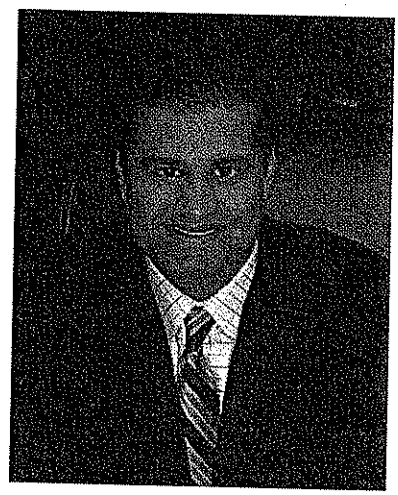
The Stealth Attack – Pleading Standards

By Aashish Y. Desai



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Some believe that personal animus and feelings should not have a place in judicial rulings. Indeed, the confirmation hearings of Justice Sonia Sotomayor prove, if nothing else, that some people expect judges to keep their personal impressions about a case to themselves and rule solely "on the law." Of course, the real world is different. Judges interpret the facts through the prism of their particular backgrounds – for better or worse.

This truism, while muted in practice, however, never truly affects the pleading stage of litigation. Plaintiffs are free to plead facts, which, however implausible, are subject to a presumption of truth. This is otherwise known as "notice pleading" in federal courts. In other words, there is no need to describe the legal dispute in painstaking, and often unnecessary, detail; just explain the bare minimum to allow the other side to know what you're complaining about. The parties can work through the details utilizing the discovery process – and possibly a motion to dismiss – after everyone has had a fair chance to gather evidence as to their respective positions. And so it went for about 50 years.

But the U.S. Supreme Court's conservative majority, not content with pro-business summary judgment standards, apparently now wants federal courts to inject their opinions, feelings, and personal thoughts at the *front-end* of lawsuits. In *Ashcroft v. Iqbal* (May 18, 2009) 129 S.Ct. 1937, one of the term's many 5-4 decisions, the high court resurrected archaic pleading standards, thereby turning the federal rules of civil procedure, and traditional notions of civil practice, on their collective heads. In *Iqbal,* an immigrant alleged that the U.S. discriminated against Muslim prisoners based upon their ethnicity. He sued. But the case, which made its way to the U.S. Supreme Court, has nothing to do with constitutional law or discrimination. Instead, it set a completely new standard for pleading requirements. Holding that *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, was not limited to antitrust suits, the court held that a federal complaint must set forth "facially plausible" claims for relief. And that a failure to do so is grounds for dismissal. This is a game-changer and perhaps the most important case to come out of the Supreme Court's 2009 term, notwithstanding the media circus surrounding a group of white firefighters' case of reverse discrimination.

Of course, what one federal court deems as "plausible" will most certainly differ from its peers. And that is the problem. Moreover, how does anyone know if something is "plausible" at the pleading stage? Did the securities and accounting fraud at the highest levels at Enron, the world's leading energy and natural gas company with purported revenues exceeding $100 billion, seem plausible? Is it plausible that the major telephone companies could work together to restrict discounts and artificially inflate prices to the detriment of the American public? Is it plausible to believe that a federal court judge could sexually harass his female courtroom staffers, deny the civil claims, abruptly retire and refuse to give-up his mandatory pension – daring the Senate to impeach him? Is it plausible that a sitting U.S. President would be involved in a scandal to break into the Democratic National Committee's headquarters at the Watergate Office complex? None of that seems plausible, but all happened. If these cases were "thrown out" at the pleading stage because, in the opinion of one federal court, they did not seem plausible, what does that say about our legal system?

More to the point, what will become of federal Rule 8, establishing, in 1938, the notice pleading standard for federal complaints? While the Judicial Conference could institute a new rule that would limit, or reverse, *Iqbal* (and for that matter *Twombly*), any change to the rules must obtain approval from the Supreme Court! There you have it – a perfect storm of hypocrisy. So the next time someone tells you that judges merely "interpret the rules, they don't make them," point them squarely to *Iqbal* where the conservative block of the U.S. Supreme Court, in essence, rewrote the pleading standards in civil litigation. In other words, they actively made new law. ■