PRODUCT LIABILITY

New pleading standards, articulated by the U.S. Supreme Court in *Twombly* and *Iqbal*, remain an oft-used, potentially potent weapon in the courtroom, say attorneys Anand Agneshwar and Paige Sharpe in this BNA Insight. The authors offer practical advice on when litigators should file a “Twiqbal” motion in product liability cases, as well as best practices for drafting the motion.

Making the Most of *Twombly/Iqbal* in Product Liability Cases

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Five years have elapsed since the U.S. Supreme Court articulated a new iteration of the pleading standard under Federal Rule of Civil Procedure 8(a) in *Bell Atlantic Corp. v. Twombly*, and three years have passed since the Court clarified the scope and application of *Twombly* in *Ashcroft v. Iqbal*. Those cases generated immediate buzz among academics, practitioners, and legislators. While the torrent of commentary appears to be slowing in the academic and legislative spheres, *Twombly* and *Iqbal* remain an oft-used, potentially potent weapon in the courtroom. In the products realm in particular, defense attorneys repeatedly have employed Twiqbal motions to win dismissals of complaints or to force plaintiffs to say in their complaints—and not after discovery—precisely what they seek to prove. This article discusses the analysis in which counsel should engage in deciding whether to file a Twiqbal motion as well as best practices for drafting the motion.

The *Twiqbal* Two-Step

First, a refresher. Under Rule 8(a), a complaint must contain “a short and plain statement of the claim show-
ing that the pleader is entitled to relief.'" For more than
50 years before Twombly, the oft-quoted language of
Conley v. Gibson provided the standard for evaluating a
motion to dismiss: "a complaint should not be dis-
missed for failure to state a claim unless it appears be-
yond doubt that the plaintiff can prove no set of facts in
support of his claim which would entitle him to relief."2
Twombly retired the "no set of facts" language of Con-
ley, and in its place issued a plausibility standard under
which plaintiffs must provide "more than labels and
conclusions, and a formulaic recitation of the elements
of a cause of action will not do."3 In order to "nudge[]
their claims across the line from conceivable to plau-
sible," plaintiffs must provide a complaint with
"enough heft to show that the pleader is entitled to re-
lieff.7 As justification for its holding, the Court cited the
need "to avoid the potentially enormous expense of dis-
covery in cases with no reasonably founded hope that
the discovery process will reveal relevant evidence."

Twombly involved antitrust claims, raising questions
about whether its pleading directives applied in all civil
cases in federal court.8 The Court answered in the affir-
mative in Iqbal,9 and further reiterated that "the tenet
that a court must accept as true all of the allegations
contained in a complaint is inapplicable to legal conclu-
sions."10 As a result, "[t]hreadbare recitals of the ele-
mments of a cause of action, supported by mere conclu-
sory statements, do not suffice."11 Based on these prin-
ciples, Iqbal set forth a two-step process for assessing
the sufficiency of a complaint. The analysis begins "by
identifying pleadings that, because they are no more
than conclusions, are not entitled to the assumption of
truth."12 After weeding out conclusory assertions, a
court should consider whether the remaining "well-
pleaded factual allegations . . . plausibly give rise to an
entitlement to relief."13

**Twiqbal Motions in Products Cases**

The sheer number of cases applying Twombly and Iqbal
makes it a challenge to keep abreast of develop-
ments in the case law, even in a discrete practice area
such as product liability litigation. Empirical analyses
chiefly have looked at the impact of Twombly and Iqbal
across federal civil litigation as a whole,14 and their
conflicting methodologies and interpretive frameworks
have generated mixed reviews of trends in the case
law.15 A 2011 law review article, for example, which fo-
cused on pharmaceutical and medical device litigation,
concluded that "Iqbal is not having a dramatic impact
on this cohort, although its impact cannot be conclu-
sively dismissed as inconsequential either."16 The
author found that the deciding court relied on Iqbal in
granting a dismissal in about 21 percent of the 264
cases studied,17 but noted a pattern of reducing inci-
dence, no obviously explainable geographic concen-
trations, and a frequent grant of amendment opportuni-
ties.20

There are suggestions, however, that products litiga-
tors are successfully capitalizing on the Twiqbal stan-
dard. The Drug & Device Law blog reviewed 354
Twiqbal motions in August 2009 and concluded both
that "there's precedent out there for dismissing virtu-
ally any product liability-related claim under Iqbal/ Twiqbal—provided the complaint is vague enough," and
that "the pace and scope of Iqbal/Twombly dismiss-
als in product liability cases is increasing."21 The blog
keeps a "Twiqbal cheat sheet" with a running tab of
outcomes covering a range of claims, from negligence
to warranty to strict products liability, and listed more
than 90 wins as of the end of April 2012.22

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6 Twombly, 550 U.S. at 555.
7 Id. at 557, 570 (internal quotation and alteration omitted).
8 Id. at 559 (internal quotation and alteration omitted).
9 The circuit courts split in their response. The Sixth Cir-
cuit, for example, applied Twombly to all civil claims. See To-
tal Benefits Planning Agency, Inc. v. Anthem Blue Cross and
Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008) ("This Court
has cited the heightened pleading standard of Twombly in a
wide variety of cases, not simply limiting its applicability to an-
titrust actions."). The majority of circuits, however, adopted a
"flexible" standard or "sliding scale," whereby more facts
were needed to support complex causes of action such as
RICO and antitrust claims. See, e.g., Iqbal v. Hasty, 490 F.3d
143, 157-58 (2d Cir. 2007), overruled by Iqbal, 556 U.S. 662.
10 See Iqbal, 556 U.S. at 684 ("Our decision in Twombly ex-
ounded the pleading standard for ‘all civil actions.’ ‘’ (citing Fed.
R. Civ. P. 1)).
11 Id. at 678.
12 Id. (citing Twombly, 550 U.S. at 555).
13 Id. at 679.
14 Id.
15 As of May 1, 2012, Westlaw reported 60,817 cases citing
Twombly and 38,804 cases citing Iqbal.
16 See, e.g., Joe S. Cecil et al., Fed. Judicial Ctr., Motions to
Dismiss for Failure to State a Claim After Iqbal: Report to the
Judicial Conference Advisory Committee on Civil Rules (2011);
Patricia Hatamyar Moore, An Updated Quantitative Study of
Iqbal’s Impact on 12(b)(6) Motions, 46 U. Rich. L. Rev. 603
(2012); Patricia W. Hatamyar, The Tao of Pleading: Do Twom-
by and Iqbal Matter Empirically?, 59 Am. U. L. Rev. 553
(2010); Kendall W. Hannon, Note, Much Ado About Twombly?
A Study on the Impact of Bell Atlantic Corp. v. Twombly on
17 For example, Professor Hatamyar Moore finds a statisti-
cally significant increase in the chances of a 12(b)(6) motion
being granted under Iqbal versus Conley, while a report to the
Judicial Conference Advisory Committee on Civil Rules finds
such an increase only in cases involving financial instruments.
Compare Hatamayer Moore, supra note 16, at 604, with Cecil,
supra note 16, at 5.
18 William M. Jansen, Iqbal “Plausibility” in Pharmaceuti-
cal and Medical Device Litigation, 71 La. L. Rev. 541, 645
(2011).
19 Id.
20 Id. at 643.
21 Such empirical analyses cannot account for more subtle
impacts that Twombly and Iqbal may be having in the products
field. For example, plaintiff’s counsel presumably are aware of
the new pleading standard and may be drafting complaints de-
signed to withstand Twombly motions. Whether or not the suc-
cess rate has changed, defense counsel may be filing more
motions to dismiss than in the past and challenging complaints
that would easily have met the prior “no set of facts” standard,
resulting in more net wins as a whole. It is, moreover, not un-
common for a defendant to agree to withdraw such a motion
and give the plaintiff an opportunity to amend; such circum-
stances may not be captured by studies that examine the out-
come of motions to dismiss.
22 James M. Beck & Mark Herrmann, Twombly/Iqbal And
Product Liability: How Much Progress Is There?, Drug & De-
vice L. Blog (Aug. 9, 2009, 4:50 PM), http://
druganddevicelaw.blogspot.com/2009/08/twomblyiqbal-and-
product-liability-how.html.
23 James M. Beck, Twiqbal Cheat Sheet, Drug & Device L.
To File or Not to File

Evaluate the Judge

Although it may be difficult to spot clear trends in the litigation, any given federal judge—unless new to the bench—almost certainly has applied Twiqbal more than a handful of times. The first step in evaluating a complaint is thus assessing your assigned judge’s inclinations. Whether your judge has ruled on a Twiqbal motion in another products case in particular is, of course, valuable information in deciding whether to file such a motion.

Beyond simply running a search for citations to Twombly and Iqbal by your judge, you may have other resources at your disposal to determine whether the judge would likely grant your motion. To the extent one of your goals may be to educate the judge about the underlying facts, see discussion infra, it would be useful to know whether the judge is likely to embrace the opportunity to learn about the case or to disregard background information. Even if your judge has not ruled on a Twiqbal motion in the products arena, other district judges in the jurisdiction—or even the appellate court—may have issued such rulings.

Evaluate the Complaint

In order to assess the strength of a potential Twiqbal motion—and as a pre-drafting exercise—you should assess the strength of the individual claims of the complaint. Pre-Iqbal case law typically provides that a complaint must adequately allege the individual elements of the claim on which the plaintiff’s theory of liability is based. After Iqbal, a court must conduct a close comparison between the essential elements of proof and the factual allegations in a complaint to determine whether the plaintiff has adequately stated a claim. Dismissals of products cases under the Twiqbal regime typically are based on the plaintiff’s failure to allege facts to support an essential element of a claim, such as how a product is defectively designed (design defect claim) or what about the product labeling is insufficient (failure to warn claim). A complaint that is missing essential elements of a claim—or that contains only conclusory allegations regarding those elements—is vulnerable to attack. This assessment requires casting a critical eye on the complaint. Disregard its length: A 100-paragraph pleading replete with boilerplate language is as subject to a Twiqbal motion as a skimpy 10-paragraph complaint. Resist relying on your familiarity with the facts behind an allegation. For example, a generic citation to promotional materials in a failure to warn case should be insufficient if the plaintiff never identifies specific advertisements and how they are relevant to his or her claims, e.g., because he or she viewed them and relied on them in using the product. A blanket statement that the risk of the product outweighs its benefits is a conclusory allegation that does not advance a design defect claim.

On the other hand, if the motion does not seem strong in light of a well-crafted complaint, opening the case with a losing pleading motion is not helpful, so choose your battles carefully.

Evaluate Your Goals

A Twiqbal motion can have ancillary benefits beyond the grant or denial of the motion, and these should go into the analysis of whether to file. First, a plaintiff may offer to amend if the motion is withdrawn or the court may grant leave to amend rather than dismiss with prejudice. In either circumstance, the net result is a
complaint with facts on the table. Second, a motion might limit a case by resulting in partial dismissal; for example, design defect claims may be dismissed because the plaintiff has not cited a feasible alternative design, but failure to warn claims may proceed because the plaintiff has specifically alleged a purported deficiency in the product labeling. Third, the motion can allow you to preview coming arguments and develop themes, thereby educating the judge on the substance of the case and creating opportunities to emphasize your position. Note that this opportunity also puts a premium on early preparation; counsel must get up to speed quickly on the underlying facts, the applicable law, and the defense theory of the case.

A Twiqlbal motion conversely can have unintended negative effects, which you should also consider. Just as the motion can educate the judge, it can tip your hand to the plaintiff, giving him or her an early opportunity to begin developing an opposing strategy to your specific arguments. The motion also may provide the plaintiff with a roadmap for how to amend the complaint in a way that makes it more substantive and focused, resulting in a pleading that is more difficult to defeat. Moreover, an adverse decision risks unfavorable law of the case that could weaken a later summary judgment motion. Finally, you should limit the motion to matters contained in the complaint, with perhaps some citation to matters of public record,27 or you risk having it converted prematurely into a motion for summary judgment.

The Motion

Once you have decided to draft the motion, but before putting pen to paper, check and double-check the local rules and the judge’s standing orders. Such guides not only provide technical requirements such as page limits and margin settings, but also may impose rules on how motions to dismiss are filed.28 Judges may require that the moving party first meet and confer with opposing counsel, or may obligate the moving party to seek permission of the court to file the motion. Local rules and standing orders thus may inform decisions about when to file and whether, for example, to allow the plaintiff a shot at amendment in advance of the motion.

The background section of the motion provides an ideal opportunity to educate the judge about the product involved and associated qualities, such as the breadth of its use and the adequacy of its warnings. You may consider attaching the product label to the motion or citing, in a prescription drug case, to the drug approval history by FDA.29 If other courts have considered and dismissed similar claims, especially claims involving your product, those cases deserve a citation here.

In regard to the legal standard and argument, Iqbal itself provides the two-step roadmap for a Twiqlbal motion. Explain which allegations the judge should disregard as conclusory, and how the remaining factual allegation fails to address essential elements of the plaintiff’s claim.

You may want to preview the plaintiff’s likely arguments in order to draw the sting, or you may prefer to see whether the plaintiff in fact raises such points and then address them, if need be, in the reply. Consider whether to seek dismissal with prejudice in your opening brief or, upon the plaintiff’s failure to address the complaint’s defects in the opposition, make the case for dismissal with prejudice in the reply.

Finally, you should strategically order multiple arguments, especially to the extent that you are seeking dismissal of multiple claims. Does it make sense to attack the claims in the order in which they are presented in the complaint, or do you lead with your strongest position? Do you leave your weakest argument for last, or do you bury it in the middle? Can you group claims because they all are subject to the same attack? For example, in a state that abrogates common law products liability claims,30 you may want to address any and all non-statutory claims by simply stating that they are not viable. Also consider whether and when to raise arguments in the alternative, e.g., your motion may address both the plaintiff’s standing to bring a claim and his or her failure to plead the claim adequately. You will need to decide which to argue first and whether your points may dovetail.

The Reply

A few words regarding the reply. Given the rapid pace of Twiqlbal decisions, case law developments may well have occurred since the time that you filed your opening brief. It is especially important in the Twiqlbal context, therefore, that you recheck the cases you cited in the opening and run a search for any new opinions.

Your strategic considerations should focus on which opposition points to rebut and which of your arguments the opposition concedes or does not address. If the opposition fails to explain how the plaintiff would cure any defects, consider arguing futility as the basis for dismissal with prejudice.31 If the opposition requests

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27 Federal courts may consider publicly available information in ruling on a motion to dismiss. See, e.g., Lee v. City of Los Angeles, 250 F.3d 688, 699 (9th Cir. 2001) (“A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment.”) (internal quotation omitted); United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991) (“A district court may take judicial notice of matters of public record,27 or you risk having it converted prematurely into a motion for summary judgment.

28 For example, the Louisiana Products Liability Act (the “LPLA”) “expressly provides ‘the exclusive theories of liability for manufacturers for damage caused by their products.’ . . . Thus, Louisiana law eschews all theories of recovery in this case except those explicitly set forth in the LPLA.” Jefferson v. Lead Indus. Ass’n, Inc., 106 F.3d 1245, 1248 (5th Cir. 1997) (quoting La. R.S. 9:2800.52).

29 For example, FDA has a dedicated website that provides drug labels and approval histories. See http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm.

30 See, e.g., Individual Practices of United States District Judge Victor Marrero, Southern District of New York (Sept. 1, 2010), available at http://www.nysd.uscourts.gov/judge/Marrero (requiring a pre-motion conference and a letter from the defendant to the plaintiff setting forth the pleading deficiencies and providing that the plaintiff may seek leave to amend).

31 See, e.g., Rollins, 802 F. Supp. 2d at 125 n.10 (denying leave to amend as futile when the plaintiff failed to file a mo-
leave to amend, check the local rules to see whether the
plaintiff complied with any applicable requirements and
whether case law allows dismissal with prejudice for
non-compliance.32

If the opposition suggests that the plaintiff needs dis-
covery in order to allege claims adequately, return to
Twombly and Iqbal: They require adequate pleading be-
fore exposing a defendant to the burden and expense of
discovery.33

59, 68 (D.D.C. 2003) (denying leave to amend when the motion
was unaccompanied by a proposed amended complaint as re-
quired under Local Civil Rule 15.1).

33 See Twombly, 550 U.S. at 557-60 (discussing at length
the importance of weeding out deficient complaints prior to
discovery); Iqbal, 556 U.S. at 678-79 (Rule § “does not unlock
the doors of discovery for a plaintiff armed with nothing more
than conclusions.”).