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Potash Potash Potash!!!!! En Banc Review Is in the Hizz-ouse, Y'all!

Christopher Sagers (Cleveland-Marshall College of Law) · Friday, December 2nd, 2011

Something striking occurred in the Seventh Circuit this year. In two different, massive antitrust class actions, in the space of about nine months, panels of that court applied the *Twombly-Iqbal* pleading formula to reach opposite conclusions, even though both cases involved very similar fact allegations and the same procedural posture. Both cases also involved the quite rare interlocutory review of *denial* of motions to dismiss—such review is almost never granted except where defendant claims some special immunity from suit [*Mitchell v. Forsyth*, 472 U.S. 511 (1985)]. Granting two such orders so close in time is no doubt a demonstration of just how grave the appellate courts consider the persistent confusion that has followed in the wake of *Twombly* and *Iqbal.*

The cases were *In re Text Messaging Antitrust Litigation,* 630 F.3d 622 (7th Cir. 2010), decided in December of 2010, and *Minn-Chem, Inc. v. Agrium, Inc.*, ___ F.3d ___, 2011 WL 4424789, 2011-2 (CCH) Trade Cases ¶77,611 (7th Cir. 2011) ("*Potash*"), decided in September of 2011. The fact allegations were basically the same, in my view, even though *Text Messaging* was a proof-of-conspiracy case, while *Potash* was largely about extraterritorial reach under the Foreign Trade Antitrust Improvement Act. They were the same because in one critical passage the *Potash* opinion made scope under FTAIA depend on whether plaintiffs adequately plead a foreign conspiracy that "directed" harm at the United States, and it judged those allegations under *Twombly-Iqbal*. Both cases were therefore about conspiracy, and both plaintiff classes alleged very similar circumstantial proof of it. And yet *Text Messaging* affirmed a denial of dismissal, while *Potash* reversed a denial of dismissal.

By growing (if not yet unanimous) consensus, the *Twombly-Iqbal* standard—or as a civ-pro-teaching colleague of mine calls it, *Twiqbal*—is a mess. Two leading procedure scholars recently said that *Twiqbal* "destabilized our entire system of civil litigation," adopting a pleading system "hitherto foreign to our fundamental procedural principles . . . ." [Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems,* 95 Iowa Law Review 821] Sitting federal judges have openly criticized it, [Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41SUFFOLK U. L. REV. 851 (2008)] sometimes in published opinions [*Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010) (Ryskamp, J., dissenting)] and sometimes almost brazenly,

[*McCauley v. Chicago*, ___ F.3d ___. 2011 WL 4975644, *7-*17 (7th Cir. 2010) (Hamilton, J., dissenting in part)], and there have been dozens of legislative and academic proposals for reform or repeal. The criticism focuses mainly on the fact that the *Twiqbal* "test" boils down pretty much to a bunch of poetry, and in practice has proven chaotic and highly subjective. Such guidance as *Twombly* and *Iqbal* give as to how one decides whether fact allegations are "plausible" reads like a series of mystic incantations, and it was only too telling when *Iqbal* summarized the standard as simply calling on courts to "draw on [their] judicial experience and common sense." 120 S. Ct. at 1950.

Well, I had just written about the contrast between *Text Messaging* and *Potash* ["*A Tale of Two Panels: The Size of the Chancellor's Foot in* Text Messaging *and* Potash, CPI Antitrust Chronicle, November 2011(1)], and how it showed that under *Twiqbal* even the most massively harmful antisocial conduct is now subjected to the rule of law only when the two judges it takes to make a panel majority think it should be, using their "common sense." And then today the Seventh Circuit entered yet another rare order, an order for *en banc* review of *Potash*. The order [Pacer account required] says nothing substantive; it merely grants review and vacates the prior judgment and opinion.

Though I might prefer it were otherwise, the rehearing may not focus on the *Twiqbal* standard itself, since both the *Potash* opinion and the parties seem to have focused on the case mainly as concerning FTAIA and not pleading standards. (See, for example, the American Antitrust Institute's amicus brief supporting *en banc* review.) But hopefully this court, which in *Text Messaging* already set out a significant clarifying gloss on *Twiqbal*, will take this case as another opportunity to address this troubled, damaging, and currently chaotic standard.

But even if they don't, the *en banc* order is still very welcome. The *Potash* panel opinion rendered a conspiracy exempt from antitrust challenge that was alleged to have caused billions of dollars in consumer injury, even while acknowledging plaintiffs had adequately alleged a worldwide conspiracy to inflate potash prices, had supported their claims with elaborate plus-factors pleading, and had alleged that contemporaneously with the conspiracy potash prices in the United States increased by *six hundred percent.*

Do we really want a system in which a complaint like that is dismissed, on the basis of two or three judges' "experience and common sense," without any discovery whatsoever?

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