



Civil Procedure—Pleadings

***Iqbal*, *Twombly* Enmesh Seventh Circuit, Yielding Split Decision in Loan Bias Case**

A homeowner alleged sufficient facts to satisfy the “plausibility” pleading test and avoid dismissal of her Fair Housing Act race bias claims arising from the defendants’ denial of her home-equity loan application, a divided U.S. Court of Appeals for the Seventh Circuit held July 30, reinstating the claims (*Swanson v. Citibank N.A.*, 7th Cir., No. 10-1122, 7/30/10).

The U.S. Supreme Court, in revamping federal pleading standards in *Ashcroft v. Iqbal*, 77 U.S.L.W. 4387 (U.S. 2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 75 U.S.L.W. 4337 (2007), was saying that the “plaintiff must give enough details about the subject-matter of the case to present a story that holds together,” Judge Diane P. Wood said.

The plaintiff here did that by identifying the type of discrimination (racial), the alleged perpetrators (the defendant bank, its employee, and a home appraiser and its employee), and the time of its occurrence (when she applied for a home-equity loan), Wood said. “This is all that she needed to put in the complaint,” she said, citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), an employment discrimination case that emphasized the “short and plain statement of the claim showing that the pleader is entitled to relief” required under Fed. R. Civ. P. 8(a)(2). But the complaint fell short in pleading fraud claims without the specificity required under Rule 9(b), Wood added.

Although Chief Judge Frank H. Easterbrook joined Wood’s opinion, Judge Richard A. Posner dissented with respect to the race discrimination claims. He cited “language in my colleagues’ opinion to suggest that discrimination cases are outside the scope of *Iqbal*, itself a discrimination case.” But he said that *Swierkiewicz* does not exempt discrimination cases from *Iqbal*, which “establishes a general requirement of ‘plausibility’ applicable to all civil cases in federal courts.”

Thus courts continue to struggle with, in Woods’ words, “how much higher the Supreme Court meant to set the bar” in *Iqbal* and *Twombly*. An expert told BNA that the ruling is “emblematic” of courts’ efforts to deal with the instability in federal pleading standards wrought by those two decisions.

Skewed Appraisal Alleged. Here the African American plaintiff responded to a Citibank announcement of its plan to make loans from the federal government’s

Troubled Assets Relief Program by applying for a home-equity loan. She disclosed to Citibank than another bank had already turned her down. The Citibank branch manager warned her that its loan criteria were more stringent than those of other banks.

The plaintiff nonetheless submitted her application. The bank representative who received it, Skertich, allegedly pointed to a photo on his desk and commented that his wife and son were part African American.

Citibank conditionally approved the plaintiff for a \$50,000 loan. But after its contractor appraised her house at \$170,000, Citibank denied the loan, explaining that its conditional approval was based on the plaintiff’s estimated appraisal of \$270,000 in her loan application.

Two months later, the plaintiff paid for and obtained an independent appraisal, which came in at \$240,000. The plaintiff then filed this suit, alleging that Citibank, the appraisal contractor, and its employee disfavor making home-equity loans to African Americans, so they deliberately reduced the appraised value of her home far below its actual market value to have an excuse to deny her loan. She alleged in part violation of the FHA, 42 U.S.C. § 3605, which bars race discrimination in making home mortgage loans. She also asserted a state law fraud claim.

The district court dismissed the suit for failure to state a claim.

Plausibility, Not Probability. The Seventh Circuit reversed as to the FHA claims, but affirmed as to the fraud claims. It noted that *Twombly* disapproved the venerable test of *Conley v. Gibson*, 355 U.S. 41 (1957). Under that pleading standard, a “complaint could go forward if any set of facts at all could be imagined, consistent with the statements in the complaint, that would permit the pleader to obtain relief,” the appeals court said. *Twombly* required instead that the pleader “state a claim to relief that is plausible on its face.”

But *Iqbal* clarified that the “plausibility standard is not akin to a probability requirement.” The Seventh Circuit inferred from this that a court “will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences,” the court said, contrasting the pleading requirements of the Private Securities Litigation Reform Act, which have been construed to require just that.

Twombly was an antitrust case, and *Iqbal* involved high government officials’ immunity from discrimination claims. A major concern about pleading standards

in those cases was the costs of discovery, which “are often asymmetric.” The court thus made it “more difficult to earn the right to engage in discovery,” the appeals court said.

‘Straightforward’ Case. But *Twombly*’s reaffirmation of *Swierkiewicz* “indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court’s recent decisions,” the court said.

Here, with respect to her FHA claims against Citibank, the plaintiff’s complaint “identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home equity loan),” the court said. Under *Swierkiewicz*, that sufficed, it ruled. The extra facts alleged did not “undermine the soundness of her pleading,” it added.

The FHA claims against the appraiser were also adequate in alleging that it skewed the assessment of her home because of her race, the court said. She will have to show more than the difference in the appraisal amounts to avoid summary judgment, but she is “entitled to take the next step in this litigation,” it said.

The fraud claims, however, failed to comply with Rule 9(b), which requires a party to “state with particularity the circumstances constituting fraud or mistake.” The plaintiff fell short in specifying the actual damages she incurred in relying on the alleged fraud, such as loan application fees or appraisal costs, the court said.

In his dissent, Posner said that it “seems (no stronger word is possible)” that what *Iqbal* was “driving at” was that as long as a plaintiff’s case “is substantially justified that’s enough to avert dismissal.” Here, the plaintiff was turned down for a home equity loan by two lenders, and, as in *Iqbal*, an inference of a mistake by Citibank is plausible, but an inference of discrimination is not, he contended, contrasting employment discrimination cases, in which female or minority plaintiffs compete with male or white candidates for jobs, with loan discrimination cases, in which such competition is lacking. But despite the plaintiff’s “implausible case of discrimination,” Citibank officials must respond to disruptive discovery and consider settling the suit even if it “has no merit at all”—precisely the pattern that *Iqbal* and *Twombly* “are aimed at disrupting,” Posner said.

‘Unstable’ Pleading Standards. Elizabeth M. Schneider, a professor at Brooklyn Law School, Brooklyn, N.Y., told BNA in an Aug. 20 e-mail that Swanson “is a

fascinating decision which is emblematic of current judicial efforts to grapple with the unstable state of federal pleading standards in light of *Twombly* and *Iqbal*. First, it is significant to note that it is a pro se case. Second, Judge Wood’s decision analyzes *Twombly* and *Iqbal* in light of the stability of Rule 8. She states: ‘Critically, in none of the recent decisions . . . did the Court cast any doubt on the validity of Rule 8. . . . To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window.’ She attempts to identify the issues that underlie the Supreme Court’s concerns:

what exactly does it take to give the opposing party ‘fair notice’; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the Court.

Third, Judge Wood’s opinion does a very context-specific analysis of the plaintiff’s various claims”

Posner’s proposed solution to what he calls *Iqbal*’s “opaque” language “appears, not surprisingly, to use statistics,” Schneider observed. He said that a district court apparently should not dismiss a case if it achieves a 0.5 in the statistical range of probabilities from 0 to 1, i.e., if it is “substantially justified.”

Wood’s majority opinion and Posner’s dissent “are examples of the range of differing judicial views on *Iqbal*,” Schneider said. “They suggest the substantial difficulty that lower court judges face in interpreting pleadings in the federal courts today. Judge Wood’s majority opinion interprets *Twombly* and *Iqbal* as consistent with Rule 8 in this fair housing pro se case, which is very important. However, I am concerned that other courts will not do so, that they are more likely to dismiss these claims, and that plaintiffs in civil rights and employment cases will be deterred from filing in the federal courts, the historic place of protection for civil rights,” Schneider said, citing her article, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2010).

The case was decided on the briefs and record. Plaintiff Gloria E. Swanson, Chicago, represented herself. Abram I. Moore, K&L Gates, Chicago, represented Citibank. Robert M. Chemers, Pretzel & Stouffer, Chicago, represented the appraiser.

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