

Chicago Daily Law Bulletin®

Volume 155, No. 83

Tuesday, April 28, 2009

'Sufficient facts' standard for civil pleadings not too stringent: judges

By Jerry Crimmins
Law Bulletin staff writer

Although lawyers continue to worry about the impact of a 2007 U.S. Supreme Court decision requiring that a complaint in a civil case state a set of "plausible" facts in order to proceed, the worries may be overblown, three federal judges said here Monday.

"There is a tendency to become over-frightened by what the Supreme Court has done in *Bell Atlantic v. Twombly*," U.S. District Judge Milton I. Shadur said during a panel discussion at DePaul University College of Law.

Two of the judges said that, if they dismiss a complaint based on the *Twombly* decision, they often do so without prejudice and allow the plaintiff to refile.

Shadur spoke along with James F. Holderman, the chief judge of U.S. District Court here, and U.S. District Judge Virginia M. Kendall during a "Conversation with the Judiciary."

The event, attended by more than 100 lawyers and law students, was sponsored by DePaul's Center for Intellectual Property Law and Information Technology.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court said a complaint in a civil case must put forth "enough facts to state a claim to relief that is plausible on its face." That case involved an alleged antitrust conspiracy.

The high court added that if the facts alleged in a complaint do not show a plausible claim to relief, "this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court."

The decision has since been applied in at

least 17 patent cases and 24 non-patent cases, according to DePaul.

Edward D. Manzo, one of the moderators and a founder of the law firm of Cook, Alex Ltd., asked the judges in Thursday's discussion:

"Is *Bell Atlantic v. Twombly* the civil defendant's new friend? How do you know how much pleading is enough [in a complaint] and how much is too much? How do you know when you have crossed the line from conceivable to plausible?"

Holderman told the audience he thought the decision was "a movement but not a substantial movement" toward a new standard of pleading. Shadur agreed.

Until *Twombly*, courts had been allowing some civil complaints "with no set of facts," Holderman said. Such complaints required judges "to speculate about what the plaintiff believed the facts were."

Twombly, Holderman continued, "now puts the onus on the plaintiff to allege a plausible series of facts."

But Holderman said how extensive the facts should be in a complaint depends upon the complexity of the case.

"A simple tort may not be complex," he said.

A case based on the U.S. Racketeer Influenced and Corrupt Organizations Act or on U.S. antitrust law "is complex and you need more facts," Holderman added.

Kendall noted there seems to be "a furor of concern" about what judges will be looking at in civil complaints due to the decision. She said this may be "much ado about nothing."

The majority of cases in which judges will be citing *Twombly*, Kendall said, come under three areas: civil actions for depriva-

tion of rights filed under Title 42 of the Code of Federal Regulations, section 1983; civil rights cases, such as claims that one was fired from a job due to a disability, and, rarely, RICO cases.

Sometimes, Kendall said, a complaint in a lawsuit that alleges the plaintiff was fired from a job for a disability "fails to make the connection between the disability and the dismissal."

Typically, Kendall said, if she dismisses complaints of the first two types for insufficient facts, she does so without prejudice and allows the plaintiff to refile.

The judges also said the *Twombly* case can be invoked regarding affirmative defenses and counterclaims in civil suits if those defenses or counterclaims lack sufficient facts.

Shadur said, for instance, that for a defendant in a patent infringement case "to make the statement that the patent is invalid ... the pleader has an obligation to specify" how the patent is invalid.

Holderman said that to plead that a patent is invalid because of "prior art," or a prior invention, is not a sufficient defense in itself without some facts.

"Why not have more disclosure up front so there can be an earlier determination of what the case is about?" Holderman asked.

Manzo told the audience, "The task of applying *Bell Atlantic* to different types of cases continues. The specificity requirement depends on the type of case. How much you have to plead is a function of the kind of case you have."

DePaul law Professor Katherine J. Strandburg also moderated Thursday's discussion.