Iqbal & Twobly: Will Plausibility Requirements Influence The Supreme Court's Analysis of Affirmative Action?

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Iqbal, Twobly, Plausibility, & Affirmative Action

By Colin W. Maguire

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹ Legal minds have been divided on what the exact effect of Ashcroft v. Iqbal and Bell Atlantic Corp. v. Twobly, but seem to agree this recent case law epiphany lends new weight to Federal Rule 12(b)(6) motions.² I am not sure that it is a novel thought, but I have often wondered if the plausibility standard now imposed upon civil claims should, inversely, be imposed upon the constantly-evolving case law which governs these claims.³ Though discussed in the context of Noerr-Pennington doctrine, I theorized the plausibility standard’s inverse effect in the following way:

Admittedly, this is an evolving area of the law that requires a particularized analysis, but it rationally follows a general discussion of the plausibility standard’s application to this hypothetical analysis because plausibility requires a rational and mutually exclusive connection between applicable law and a rational claim; See Gifford, 2011 WL 4343815, at *2; quoting (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))); See, e.g., Tymokzko, supra note 113 at 511 (“Determining whether a claim is plausible is a ‘context-specific task’ requiring the exercise of ‘judicial experience and common sense’”’ (quoting Iqbal, 129 S.Ct. at 1950)).⁴

⁴ Id. at note 116.
We could easily see plausibility as a new factor in all pleadings and we can probably accept that the trier of fact and the advocate must consider the same facts and the same legal principles.\textsuperscript{5}

Therefore, if we can see the left side of an equation as the trier of fact interpreting case law based on facts and the right side of an equation as the advocate applying case law based on facts, then the addition of a plausibility requirement to the right side is an automatic addition of plausibility to the left side – the entirety of the applied case law, not limited to the pleading stage.\textsuperscript{6}

Before you try to stab yourself with a rusty spoon because you went to law school to avoid a career involving math, please be aware that this principle could creep into the discussion of a hot-topic legal issue coming back in front of the Supreme Court: higher education affirmative action.\textsuperscript{7} The case, \textit{Fisher v. University of Texas}, figures to reexamine the 5-4 decision in 2003, \textit{Grutter v. Bollinger}, which affirmed public colleges and universities’ ability to use race as a factor in determining admissions; so long as no actual numbered quotas existed.\textsuperscript{8} The plausibility of the case law announced in \textit{Grutter} will, likely, be under serious attack if the dissent in \textit{Grutter} is any indication.\textsuperscript{9} After all, how can one maintain a “critical mass” of minority students through “meaningful numbers” in an admitted class while simultaneously

\textsuperscript{5} \textit{Iqbal}, supra, note 1.

\textsuperscript{6} See, \textit{e.g.}, Inverse Relationship of Addition and Subtraction, AAA MATH, \url{http://www.aaamath.com/g210a_x1.htm} (last visited May 2, 2012).


\textsuperscript{8} Id.

\textsuperscript{9} \textit{Id.}
stating that race is not a “predominant factor” in admission? Still, this is not the first time the plausibility of case law has affected an affirmative action case.

In *City of Richmond v. J.A. Cronson*, a 1989 decision, the Supreme Court examined the plausibility of applying their previous 1986 holding in *Wygant v. Jackson Board of Education*. This prior holding required a local government which planned to use an affirmative action construction contracting program to first identify “prior discrimination by the government unit involved.” Though not explicitly stating that requiring a government unit to stand in open court and list the ways it had violated the Equal Protection Clause was both highly-implausible and malpractice for its Attorney, the Court did reason that local governments could instead claim previously functioned as “passive participants” in a system of racial exclusion in the local construction industry.

Therefore, it is appears that the Supreme Court factored the plausibility of case law, as applied, into an affirmative action decision prior to 2003. It remains to be seen whether a plausibility analysis will burden or benefit either the plaintiff’s claim or the defendant’s anticipated reliance on *Grutter* when *Fisher* is argued in front of the Supreme Court. Still, taking the principal reasoning *Iqbal* and *Twombly* to its logical end should mean that every aspect of the claims and case law in *Fisher* will be subject to a rational, common-sense inquiry. In this

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10 *Id.*


12 *Id.*

13 *Id.* (quoting Wygant v. Jackson Brd. of Ed., 476 U.S. 267, 274 (1986)).


15 *Id.*


spirit, Chief Justice Roberts clearly voiced his version of common-sense rationale and plausibility on this issue when he stated that “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest by relabeling it ‘racial diversity’”. If that view holds a majority of the court, then Justice O’Connor’s prediction that *Grutter* would be effective and relevant for 25 years proved 14 years too long.

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19 *Id.*