

IS NOTICE PLEADING IN FEDERAL COURT NO LONGER PLAUSIBLE?

By Lin J. Karpel

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The days of federal court serving as a haven for those attempting to avoid the fact-pleading requirements of state court may be over. Within the past year, the United States Supreme Court confirmed, in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), that a new standard will be applied to evaluate the sufficiency of a federal court complaint. That new standard takes a harder line on the “notice pleading” permitted under the federal rules, for the first time examining the “plausibility” of a plaintiff’s allegations. In considering a motion to dismiss, the federal courts will no longer look merely at whether “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Instead, courts will consider whether the plaintiff has alleged “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S.Ct. at 1949 (quotation omitted).

What is “plausibility?” According to the Supreme Court,

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Id. (citations, quotations omitted).

An insurance coverage decision rendered recently by the Fifth Circuit illustrates the possible effect of *Iqbal*. In *Hibbets v. Lexington Insurance Co.*, No. 09-30830, 2010 WL 1778953 (5th Cir. May 4, 2010), the court affirmed the dismissal of an insurance coverage class action complaint filed on behalf of two homeowner-insureds, as well as a class of similarly situated insureds, whose properties were rendered a total loss from Hurricane Katrina.

In affirming dismissal of the plaintiffs’ claim under the Louisiana Valued Policy Law (which requires insurers to pay face value when property is rendered a total loss by a covered peril), the Fifth Circuit held, among other things, that the class members, who alleged that they “sustained damage to their property . . . from a covered peril . . .” had pled inadequately and without sufficient supporting facts, since “[a] mere legal label such as ‘covered peril’ does not raise the right to relief under the [Valued Policy Law] above the speculative level . . .” *Id.* at *2.

In affirming dismissal of the plaintiffs' bad faith claims, the Fifth Circuit recognized that Louisiana's bad faith statutes require that a plaintiff establish a viable claim for breach of an insurance policy. The court held that the plaintiffs had pled no viable breach of contract claim because they alleged only that their insurer had failed "to tender an appropriate amount" and "misrepresented pertinent policy provisions." *Id.* at * 3. According to the court, the plaintiffs' complaint lacked facts concerning when they submitted their claims to their insurer; when they were contacted by a claims adjuster; the precise nature of the damage to their property; and what amount the insurer should have paid and on what basis. *Id.* The facts pled by the plaintiffs--their names, insurance policy numbers, addresses of the insured properties, and a "conclusory" statement that their insurer had underpaid them--were characterized by the court as "insufficient to state a plausible breach of contract claim." *Id.*

Even if the plaintiffs had a viable breach of contract claim, the Fifth Circuit held that their complaint lacked factual allegations that would lead to a "plausible" conclusion that their insurer had violated Louisiana's bad faith statutes. Among other things, the plaintiffs alleged that the insurer breached and continued to breach its duty to timely adjust claims, once class members submitted satisfactory proof of loss from covered perils, and misrepresented pertinent policy provisions, conduct that the plaintiffs characterized as "arbitrary, capricious and unsupported by evidence." The court found these allegations to be "nothing more than labels and conclusions and a recitation of the language of the statutes."

Hibbets may prove to be an atypical case. However, in light of *Iqbal* and the harder look at the sufficiency of complaints that may be the norm in the future, insureds commencing coverage cases in federal court would be well served to not only plead each element necessary to establish their claims but to incorporate facts, rather than conclusions, supporting each of those elements.

[Editor's Note: Lin Karpel is an associate at the Philadelphia office of Fried & Epstein LLP, which regularly represents policyholders in insurance coverage disputes. Information concerning Fried & Epstein's Insurance Coverage Practice Group may be obtained by visiting the firm's website at www.fried-epstein.com. Responses to this article are welcome. Copyright 2010 Lin J. Karpel.]