

Is There a New Sheriff in Town Named “A.H. Tingler?”

by Juli M. Porto

Twiqbal – the twin United States Supreme Court decisions *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² – took the federal legal system by storm. The decisions that heightened the federal pleading standard established decades earlier in *Conley v. Gibson*^{3, 4} “sent shockwaves through the legal community”⁵ and were met with “furor”⁶ and criticism that they “unfairly impede[d] court access for meritorious suits.”⁷

Under the previous *Conley* standard, a complaint should “not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁸ *Twiqbal*, however, held that a complaint would only survive a motion to dismiss if it pled nonconclusory facts that “state[d] a claim to relief that [was] plausible on its face.”⁹

Twiqbal instructed courts to take a “two-pronged approach” when deciding a motion to dismiss.¹⁰ First, they should weed out legal conclusions “couched” as factual allegations.¹¹ Second, they should determine whether the remaining, well-pled factual allegations “plausibly” supported a valid claim. Judges were to use their “judicial experience and common-sense” to assess whether a claim was plausible, rather than simply possible.¹²

The New York Times described *Iqbal* as “may be the most consequential ruling in Chief Justice John G. Roberts Jr.’s 10-year tenure,”¹³ and Congress introduced bills to overturn the decisions.¹⁴ As the federal Western District of Pennsylvania court bluntly put it: “There is a ‘new sheriff in town’ now policing Fed. R. Civ. P. [12(b)(6)], and his name is ‘*Twiqbal*.’”¹⁵



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But what I brand *A.H. Tingler* – the twin Virginia Supreme Court decisions *A.H. v. Church of God in Christ, Inc.*¹⁶ and *Tingler v. Graystone Homes, Inc.*¹⁷ – did not cause nearly the stir in Virginia. Why should they have, why did they not, and why does it matter?

Why They Should Have

As the *Twombly* dissent pointed out, Virginia’s dismissal standard at that time was the same as the *Conley* standard, even though the Supreme Court of Virginia had never cited that case.¹⁸ Twenty-five other states and the District Columbia also followed *Conley*,¹⁹ and many wondered whether these states would leave that standard behind to jump on the *Twiqbal* bandwagon.²⁰

Just as *Twiqbal* had upended federal pleading standards, if adopted, it would have done the same to Virginia standards. While legal conclusions, unlike factual allegations, were never deemed true at the demurrer stage, Virginia had never suggested that trial courts should cull through a complaint’s factual allegations to uncover those masquerading as legal conclusions. More fundamentally, *Twiqbal*’s charge to trial courts to assess the strength of a claim on a motion to dismiss was contrary to Virginia’s principle that a demurrer “does not allow the court to evaluate and decide the merits of a claim.”²¹

But Virginia ignored *Twiqbal* and continued with business as usual. The Supreme Court made no changes to its liberal, decades-long formulation. In a case decided only a month after *Iqbal*, the Court repeated a complaint that it was “increasingly confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial.”²² Some

catastrophized an end to the demurrer, fearing that it was becoming “a dinosaur, outdated and disfavored, and no longer viable as a means of challenging the legal sufficiency of a claim.”²³

And like *Conley*, *Twiqbal* did not earn a single mention in any Supreme Court opinion...until over a decade later in *A.H. v. Church of God in Christ, Inc.*

To be fair, *Twiqbal*’s appearance in Virginia caselaw did not come completely out of thin air, though close to it. The Court began laying the groundwork in *AGCS Mar. Ins. Co. v. Arlington Cnty.*²⁴ While describing the standard of review for a demurrer, the Court dropped this sentence: “[W]e do not accept the veracity of conclusions of law camouflaged as factual allegations or inferences.”²⁵ It is a seemingly benign sentence in a case where the Court reversed the trial judge’s decision to sustain a demurrer,²⁶ but this was the first time that the Court alluded to the first prong of the *Twiqbal* analysis.

Less than a year later, the Court quoted *AGCS*’s sentence in *Coward v. Wellmont Health Sys.*²⁷ This time, however, rather than simply alluding to *Twiqbal*’s first prong, the Court explicitly stated that judges must “distinguish allegations of historical fact from conclusions of law.”²⁸ It also ever so slightly changed the language that defined the framework for deciding a demurrer. Instead of accepting as true pleaded facts—the phrase that the Court had, for well over a century, apparently believed sufficed²⁹—it stated that only “expressly” pleaded facts were assumed true.³⁰

Months later, *Coward*’s formulation turned up in *Parker v. Carilion Clinic*,³¹ then *Sweely Holdings, LLC v. SunTrust Bank*,³² and then *Anderson v. Dillman*.³³ So, by the time *A.H.* came down, the first prong

of *Twiqbal* had already been woven into Virginia’s caselaw.

But what did come completely out of thin air was a quotation from *Twiqbal*’s second prong: that deciding a demurrer was a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³⁴ Oddly, while *Twiqbal* told judges to use this standard to assess the plausibility of a complaint,³⁵ *A.H.* told judges to use it to distinguish between reasonable and unreasonable inferences and never used the term “plausibility.”³⁶

The Court also repeated the familiar requirement that factual allegations be made with “sufficient definiteness,” but felt the need to include a long footnote to prove that this requirement was “anchored” in notice-pleading principles.³⁷ The Court cites the fourth edition of Martin P. Burks’ *COMMON LAW PLEADING AND PRACTICE*—published in 1952 and a leading Virginia treatise at that time—to begin its string-cite of authorities.³⁸ Notably, however, that same passage also reminds judges to “indulge” with “liberality” the allegations in a complaint.³⁹

Why They Did Not

Admittedly, *A.H.*’s citation to *Twiqbal* did not go unnoticed. Plaintiffs’ and eminent domain attorneys, who were primarily affected by this development, certainly saw the writing on the wall. Others probably noticed but were not particularly concerned since *A.H.* only briefly cited *Twiqbal* and did not outright embrace its heightened pleading standard.

But here is where the second part of the *A.H. Tingler* portmanteau comes in. After openly citing *Twiqbal*, the Court quickly and stealthily baked that authority into Virginia caselaw with the often-used convention for

brevity: “citations omitted.” Compare the text reciting the standard of review for a demurrer in *Tingler* with that of *A.H. Tingler* repeats *A.H.* verbatim, down to its footnote.⁴⁰ Now compare the authorities cited. *Tingler* reduces ten different authorities cited by *A.H.*—including *Twiqbal*—to one: “*A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613, 831 S.E.2d 460, 465 (2019) (citation omitted).”⁴¹ *A.H.* may have opened the door for *Twiqbal* to enter Virginia caselaw, but *Tingler* gave it a quiet home.

Why It Matters

Is this such a big deal? The changes that the Court has slowly made to the language describing the standard of review for a demurrer are fairly innocuous and do little, if anything in some cases, to change the substance of it. Yes, the Court invoked the first prong of *Twiqbal*, but this is not antithetical to Virginia’s standard. And yes, the Court quoted a passage from the second prong of *Twiqbal*, but it far from endorsed a plausibility standard. And only months ago, the Court confirmed that “it is not the function of the trial court to decide the merits of the allegations set forth in a complaint,” when deciding a demurrer.⁴²

At the same time, it seems odd that with a plethora of Virginia caselaw on the topic, the Justices decided to overlook this cornucopia and instead invite two controversial federal cases into the fold. It also seems odd that the Court repeatedly decides to unnecessarily change fundamental and decades-old passages. When the Court makes these slight changes, it rightly introduces the authority for its broader proposition with the introductory signal “*see.*” This signal indicates that a cited authority “clearly supports” the proposition it cites, but it also indicates that “an inferential step” is

necessary to get there.⁴³ One “inferential step” is one thing. But continually stacking them can lead to an outcome that the game of “Telephone” often does: A statement very different from the original.

And that’s why it matters. With *A.H. Tingler*, the Court may have signaled its willingness to continue to make incremental changes in Virginia’s pleading standard that will slowly but steadily bring us closer to the federal standard. Plaintiffs’ attorneys must therefore be aware of *A.H. Tingler* when drafting complaints. Factual allegations that not so long ago would have breezed past a demurrer may not be so deft today. Where possible, beef up complaints with as many facts as possible. If you don’t, you may find yourself on the bad side of a Supreme Court opinion for failing to “nudge[]” your claim “across the line” of plausibility.⁴⁴

Endnotes

1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
2. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
3. *Conley v. Gibson*, 355 U.S. 41 (1957).
4. See, e.g., Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2125-29 (December 2015) (comparing the pleading requirements of *Conley* and *Twombly*).
5. Benjamin A. Spencer, *Pleading in State courts after Twombly and Iqbal*, 2010 Pound Civil Justice Institute for State Appellate Court Judges (July 1, 2010).
6. David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1203 (June 2013).
7. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 850 (2010).
8. *Conley*, 355 U.S. at 45-46.
9. *Iqbal*, 556 U.S. at 678-680 (citing *Twombly*, 550 U.S. at 555-57).
10. *Id.* at 679.
11. *Id.* at 678-79 (citing 550 U.S. at 556).
12. *Id.* at 679.
13. Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES, May 18, 2015, at A15.
14. “Notice Pleading Restoration Act,” S. 1504, 111th Congress (2009) and “Open Access to Courts Act,” H.R. 4115, 111th Congress (2009).
15. *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010). The court was considering a Fed. R. Civ. P. 12(c) motion, however that motion is analyzed under the same standards as a 12(b)(6) motion. *Id.*
16. *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604 (2019).
17. *Tingler v. Graystone Homes, Inc.*, 298 Va. 63 (2019).
18. *Twombly*, 550 U.S. at 578 n.5 (Stevens and Ginsburg, J.J., dissenting) (“The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it.”) (quoting *NRC Management Servs. Corp. v. First Va. Bank-Southwest*, 63 Va. Cir. 68, 70 (2003)) (brackets in original); accord. Thomas Keister

- Greer, *Virginia and the Federal Rules*, 47 VA. L. REV. 906, 909 and n.15 (June 1961) (there is “no discernable difference” between Virginia and federal pleading requirements).
19. *Twombly*, 550 U.S. at 578 n.5 (Stevens and Ginsburg, J.J., dissenting).
 20. See, e.g., Spencer, *Pleading in State courts after Twombly and Iqbal, supra*, n.5; Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 141 (July 2007).
 21. *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993).
 22. *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88 (2009) (citing *Renner v. Stafford*, 245 Va. 351, 352 (1993) and *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993)). *Fultz* and *Renner* involved summary judgment motions; *CaterCorp* involved a demurrer.
 23. W. Bradford Stallard and P. Danielle Stone, *The Demurrer: A Pleading in Search of a New Identity in Virginia Courts*, LITIGATION NEWS, at 5, Vol. XVII, No. VII (March 2016).
 24. *AGCS Mar. Ins. Co. v. Arlington Cnty.*, 293 Va. 469 (2017).
 25. *Id.* at 473.
 26. More specifically, the Court affirmed in part and reversed in part the trial court’s decision. It found a demurrer to the original complaint was properly sustained, but should not have been so with prejudice because the plaintiff’s proffered amended complaint did state a cause of action. *Id.* at 475.
 27. *Coward v. Wellmont Health, Sys.*, 295 Va. 351 (2018).
 28. *Id.* at 359.
 29. See, e.g., *Norfolk & W.R. Co. v. Mills*, 91 Va. 613, 624 (1895) (to decide a demurrer, the Court must decide whether “the facts alleged” state a cause of action); *Supers. of Nottoway Cnty. v. Powell*, 95 Va. 635, 637 (1898) (same); *Steinman v. Jessee*, 108 Va. 567, 573 (1908) (a demurrer takes as true “the facts alleged”).
 30. *Coward*, 295 Va. at 358.
 31. *Parker v. Carilion Clinic*, 296 Va. 319, 330 (2018).
 32. *Sweely Holdings, LLC v. SunTrust Bank*, 2916 Va. 367, 371 (2018).
 33. *Anderson v. Dillman*, 297 Va. 191, 194 (2019).
 34. *A.H.*, 297 Va. at 613.
 35. *Iqbal*, 556 U.S. at 679.
 36. *A.H.*, 297 Va. at 613.
 37. *Id.* at 613 n.1.
 38. Martin P. Burks, COMMON LAW PLEADING AND PRACTICE §182, at 295 (T. Munford Boy ed., 4th ed. 1952).
 39. *Ibid.*
 40. *Tingler*, 298 Va. at 72-73 and n.2 and *A.H.*, 297 Va. at 613 and n.1.
 41. *Ibid.*
 42. *Young-Allen v. Bank of Am., N.A.*, 839 S.E.2d 897, 900 (Va. 2020) (quoting *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514 (2014) (quoting *Friends of the Rappahannock v. Caroline Cty. Bd. of Supers.*, 286 Va. 38, 44 (2013))).
 43. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION §1.2(a) (Columbia Law Review Ass’n et al. ed., 18th ed. 2005).
 44. *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 570).