Courts Extend *Twombly* and *Iqbal* Standard to Actual Malice Pleading

By Chad R. Bowman and Shaina D. Jones

Recent court decisions signal that stricter federal pleading standards might permit early resolution of more defamation and related tort claims for media defendants. By applying the Supreme Court’s now-familiar formulation from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the First and Fourth Circuits both affirmed dismissal of public-figure defamation claims for failure to plead the constitutionally required “actual malice” standard of fault.

These rulings follow a handful of recent district court decisions that take a hard look at actual malice allegations. This emerging line of authority represents a promising trend toward the disposition of infirm speech claims on preliminary motions—a trend that bears close attention by First Amendment and media litigators.

**First and Fourth Circuit Decisions**

In *Schatz v. Republican State Leadership Committee*, 669 F.3d 50 (1st Cir. 2012), the First Circuit became the first federal appellate court to consider the pleading requirements for actual malice under *Iqbal* and *Twombly*. In that case, James Schatz, a former Democratic candidate for the Maine senate, claimed that statements in opponents’ campaign flyers, brochures, and radio and television advertisements, including flyers criticizing Schatz for prior spending decisions as a town official, were false and defamatory.

The First Circuit affirmed dismissal of Schatz’s claims for defamation, false light invasion of privacy, and intentional infliction of emotional distress. It held that the former candidate was a public figure and thus required to plead facts plausibly supporting actual malice in order to state a viable claim. Although Schatz’s complaint “used actual-malice buzzwords,” such as claiming that the defendants knew their statements were false and acted with reckless disregard to their falsity, the appellate panel noted that “these are merely legal conclusions, which must be backed by well-pled facts” under *Twombly* and *Iqbal*. The court disregarded plaintiff’s allegations that defendants failed to double-check the articles or do “additional legwork” and concluded that the political statements at issue were, in fact, fair and defamatory.

The court also rejected Schatz’s reliance on Rule 9(b) of the Federal Rules of Civil Procedure, which provides that state of mind “may be alleged generally.” Citing *Iqbal’s* discussion of Rule 9(b), the First Circuit concluded that the provision only excuses state-of-mind pleading from a heightened pleading standard, but that a plaintiff “must still lay out enough facts from which malice might reasonably be inferred.”

Meanwhile, in *Mayfield v. National Association for Stock Car Auto Racing, Inc.*, the Fourth Circuit considered a defamation claim brought by professional race car driver Jeremy Mayfield against NASCAR, which announced that Mayfield had tested positively for recreational or
performance-enhancing drug use, 674 F.3d 369 (4th Cir. 2012). Mayfield, however, claimed that the test was a false positive due to a combination of two prescribed medications.

Mayfield’s core argument was that, because he had alleged that the drug test was in error from the beginning, the defendants’ statements at a press conference announcing the results were knowingly false. The Fourth Circuit rejected that contention, finding that “conclusory” allegations of malice ran contrary to Mayfield’s pleaded facts, which demonstrated that an investigation and separate drug tests yielded no reason for the defendants to doubt the truth of their statements. Like the First Circuit, the Fourth Circuit also found an argument for a lenient fault pleading standard under Rule 9(b) to be unavailing in light of Iqbal’s clear discussion of that rule.

Notably, both Schatz and Mayfield affirmed dismissals with prejudice—essentially concluding not only that the plaintiffs had failed to allege actual malice, but also that they could not do so.

Fault Pleading in Varying Contexts
More than a half-dozen other federal judges have ruled on the sufficiency of fault allegations in speech actions under the standards of Twombly and Iqbal. They have done so in a variety of circumstances, yet they tend to reach similar results. This trend likely previews adherence to Twombly and Iqbal, even in different factual contexts.

Diario El Pais, S.L. v. Nielsen Company (US), Inc., 2008 WL 4833012 (S.D.N.Y. Nov. 6, 2008), one of the earliest decisions, anticipated the analytical framework of Schatz and Mayfield. The lead plaintiff, a Spanish newspaper, alleged trade libel that arose from apparently inaccurate website audience estimates by the Nielsen Company. Judge Harold Baer concluded on the pleadings that “as owners and operators of media outlets, [plaintiffs] qualify as ‘public figures’ and consequently must allege that Nielsen, also a media company, acted with actual malice.”

Like Schatz and Mayfield, the court held that the complaint’s allegations of actual malice failed on two grounds. First, the allegations were merely “conclusory and unsupported,” and therefore “insufficient to meet the pleading requirements for actual malice.” Moreover, the court found that the plaintiff’s own allegations affirmatively demonstrated a lack of actual malice, thus supporting an outright dismissal of the action. Indeed, the court noted that “even plaintiffs’ own allegations show that [defendants] took actions to ensure that the revised audience estimates . . . were accurately computed” in accordance with their methodology. “Contentions that a different methodology would have produced a more accurate result do not amount to allegations that the defendants acted with actual malice when it published estimates that it had confirmed were consistent with its own methodology.”

More recently, the Southern District of New York dismissed certain defamation claims by another public figure plaintiff, who was a Russian businessman and member of Russia’s lower house of parliament. Egiazaryan v. Zalmayev, 2011 WL 6097136 (S.D.N.Y. Dec. 7, 2011). The
plaintiff alleged “hostility” by the defendant, but provided no facts indicating an “attempt to inflict harm through falsehood.”

Other decisions have considered actual malice pleading in nonpublic-figure contexts. In Hanks v. Wavy Broadcasting, LLC, for example, a plaintiff sought presumed damages in a claim arising from a television news report. No. 2:11-cv-439, 2012 WL 405065 (E.D. Va. Feb. 8, 2012). Such damages can be recovered against a news-media defendant reporting on an issue of public concern under Virginia law where there is a showing of actual malice. Because the plaintiff alleged “boilerplate language,” but no facts supporting that fault standard, the court dismissed the claim. The Northern District of California, meanwhile, dismissed a slander of title claim, which, under state law, requires plaintiff to plead knowing or reckless falsity. Carrasco v. HSBC Bank USA Nat’l Ass’n, No. C-11-2711 EMC, 2011 WL 6012944 (N.D. Cal. Dec. 1, 2011).

In one of the most interesting analyses, in April the Eastern District of Virginia dismissed a defamation claim on actual malice pleading grounds after concluding that a plaintiff qualified, on the basis of his pleadings and admissions, as a limited purpose public figure. Besen v. Parents & Friends of Ex-Gays, Inc., No. 3:12-cv-204-HEH, 2012 WL 1440183 (E.D. Va. Apr. 25, 2012).

The plaintiff, Wayne Besen, sued the Parents and Friends of Ex-Gays, Inc. and its president for an allegedly defamatory statement made during a television interview about Besen, the executive director of Truth Wins Out, a pro-LGBT organization. Although Besen denied that he was a public figure, he admitted to publishing books, participating in public interviews, and serving as the spokesman of an advocacy organization, including participating in a controversy regarding “whether one’s ‘sexual orientation can be changed.’” However, Besen alleged that “most individuals on the street in the metropolitan Washington, D.C. area’ would not recognize his name.” Based on the pleadings and undisputed facts, the court held Besen was a limited-purpose public figure with regard to the identified controversy. Its consideration of the sufficiency of the plaintiff’s “unadorned” and “scant” actual malice allegations was then straightforward, and the court dismissed the complaint.


Potential Consequences for Negligence Pleading
While these decisions generally consider whether a plaintiff asserting defamation or related claims plausibly alleges facts sufficient to meet the high constitutional threshold of actual malice in circumstances where that standard applies as a matter of law, a bare-bones complaint might even fail to allege an adequate claim for negligence. That was the holding in a claim against The Washington Post in the Middle District of Florida. Hakky v. Washington Post Co., No. 8:09-cv-2406-T-30MAP, 2010 WL 2573902 (M.D. Fla. June 24, 2010). In that case, though, the judge dismissed the plaintiff’s complaint with leave to amend within 20 days—which the plaintiff did.
Contrary Authority?

Despite these recent breakthroughs, three caveats indicate media defendants should wait to celebrate.

First, denials of preliminary motions to dismiss—which are not immediately appealable in federal court—may be less likely to result in published or reported opinions than dismissals. As a result, it is difficult to evaluate the extent to which federal courts around the country are in fact consistently applying a strict pleading standard to tort claims governed by the actual malice standard. See, e.g., Pacquiao v. Mayweather, 803 F. Supp. 2d 1208 (D. Nev. 2011) (relying on a pre-Iqbal decision that state of mind may be averred generally “without corroborating evidence” and finding that conclusory allegations sufficiently pled actual malice).

Second, if Schatz and Mayfield become the rule, sophisticated counsel for defamation plaintiffs will likely adapt by pleading more extensive allegations in support of actual malice, forcing courts to confront more nuanced complaints on preliminary motions.

Finally, Iqbal and Twombly may be a double-edged sword for media defendants, applicable not only to claims but also to affirmative defenses.

Application to Affirmative Defenses

There is a split among federal district courts as to whether affirmative defenses are also subject to the heightened pleading standards, although the majority have held that they are. Carla R. Walworth et al., Do Twombly and Iqbal Apply to Affirmative Defenses?, American Bar Association (June 13, 2012). No federal appellate court has yet ruled on the issue, and the U.S. Supreme Court did not mention affirmative defenses in either Iqbal or Twombly. Yet the trend is a significant issue for media entities that may now be under an obligation within a short answer period to investigate and plead facts supporting potentially applicable affirmative defenses such as the fair report privilege and statute of limitations.

Because cases that have considered affirmative defenses have done so without much discussion, it is difficult to conclude how to plead a defense sufficiently. However, as one district court has noted,

unless the factual basis for an affirmative defense is clear from the face of the complaint, e.g., where the claim asserted is clearly barred by the applicable statute of limitations, in which case the mere statement that the claim is barred by that statute is sufficient, a defendant must allege a sufficient factual basis or bases for his or its affirmative defense to show that the defense is plausibly viable on its face or sufficient factual matter from which a court can infer potential viability.


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Another court has similarly stated that the answer should “contain[] a brief narrative stating facts sufficient to give the plaintiff ‘fair notice of what the . . . [defense] is and the grounds upon which it rests,’” and the stated facts plausibly suggest “cognizable defenses under applicable law.” *Piontek v. Serv. Ctrs. Corp.*, No. PJM 10-1202, 2010 WL 4449419 (D. Md. Nov. 5, 2010).

Until the issue is resolved, prudent media defendants may wish to consider two strategies. First, they can avoid boilerplate pleading of all defenses as affirmative defenses, including truth, opinion, or lack of fault—all of which are part of the plaintiff’s burden and not technically affirmative defenses—to avoid unnecessary motion to strike practice. Second, media defendants may want to consider pleading affirmative defenses such as the fair report privilege in a more detailed manner under the *Iqbal* and *Twombly* standards, providing at least “minimal facts establishing plausibility, a standard that [at least one court presumes] most litigants would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event.” *Francisco v. Verizon S., Inc.*, 2010 WL 2990159 (E.D. Va. July 29, 2010).

It is also worth noting that a defendant may seek leave to amend its answers at any time to assert defenses based on facts that become known during discovery under Rule 15(a) of the Federal Rules of Civil Procedure. Thus, as one court has asserted, defendants will not necessarily be put in “an unfair ‘use-it-or-lose-it’ situation.” *Dion v. Fulton Friedman & Gullace LLP*, No. 11-2727 SC, 2012 WL 160221 (N.D. Cal. Jan. 17, 2012).

**Conclusion**

Five years after *Iqbal*, two federal courts of appeal within a recent six-week span affirmed the dismissal of defamation actions for failing to plead plausible allegations of actual malice. In the coming months and years, the *Schatz* and *Mayfield* decisions and their progeny are likely to have a lasting influence on pleading and preliminary motion practice in media litigation.

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