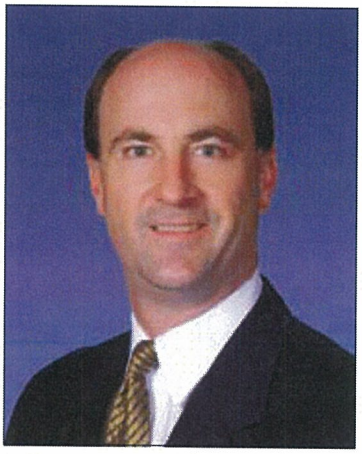
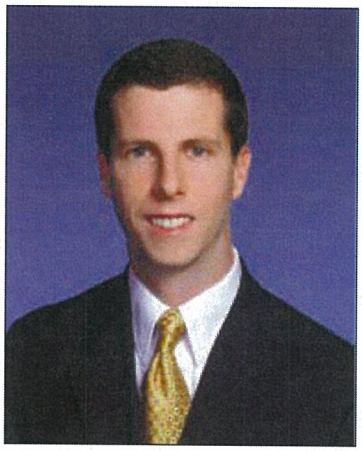
"Plausibility" Pleading After *Twombly* And *Iqbal*

David N. Anthony and Timothy J. St. George

The evolving standard for pleading under Fed. R. Civ. P. 8(a)(2) requires that litigants account for a number of legal and practical considerations.



David N. Anthony
is a partner in the Richmond, Virginia office of Troutman Sanders LLP. He regularly handles business disputes in federal and state courts, including class actions. Mr. Anthony is a past Chair of the Civil Litigation Section of the Virginia Bar Association.



Timothy J. St. George
is an associate in the Richmond office of Troutman Sanders LLP. Before joining Troutman Sanders, Mr. St. George served as a judicial law clerk to the Hon. Robert E. Payne, United States District Court for the Eastern District of Virginia.

UNDER THE well-known standard Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the Supreme Court famously interpreted this language as preventing the dismissal of a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Equally well known, Rule 9(b) imposes a heightened pleading standard for fraud claims, requiring that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Id.* For decades, the standard announced in *Conley* was straightforwardly applied; then came the decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

BELL ATLANTIC CORPORATION v. TWOMBLY

• In *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court announced that a heightened pleading standard would govern the filing of civil complaints in federal courts, at least in the antitrust context. In *Twombly*, the Court reinterpreted the substance of Rule 8(a), holding that plaintiffs must plead "enough facts to state a claim to

relief that is *plausible* on its face" to avoid dismissal under Rule 12(b)(6).

The Court in *Twombly* set forth a multitude of broad pronouncements to guide lower courts in enforcing this heightened standard. First, the Court stated that the Rule 8(a) pleading standard does not require "detailed factual allegations," but demands more than an "unadorned accusation." *Twombly*, supra, 550 U.S. at 555. Moreover, the Court held that a complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor does a complaint suffice if it tenders only "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

Additionally, the Supreme Court instructed that a claim has facial "plausibility" only when a plaintiff pleads sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 556. Thus, the Court held that 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. *Id.* Hence, in *Twombly*, the Supreme Court upheld the dismissal of a complaint where the plaintiffs did not "nudge… their claims across the line from conceivable to plausible." *Id.* at 570.[1]

ASHCROFT v. IQBAL • Two years later, in *Ashcroft v. Iqbal*, the Supreme Court overruled the Second Circuit's decision in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), and held that the standard announced in *Twombly* governs "all civil actions and proceedings in the United States district courts." *Iqbal*, supra, 129 S. Ct at 1953. Thereafter, the Court made clear that the pleading standard announced in *Twombly* governs all civil actions in federal court.

The substance of this "plausibility" pleading standard remains the subject of much academic debate. *See, e.g.,* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008). For civil litigators, however, the present concern is not so much whether the theoretical underpinnings of the decision and *Twombly* and *Iqbal* were justified, or whether the rhetoric of the decisions can be properly squared with the permissive language contained in Rule 8(a). Rather, the concern is with persuasive advocacy. Accordingly, this article will attempt to set forth practical guideposts for navigating the uncertainties of plausibility pleading.

KNOW THE JUDGE'S PHILOSOPHY ON *TWOMBLY* AND *IQBAL* • Given the potentially far-reaching ramifications of the decisions in *Iqbal* and *Twombly*, most (if not all) federal judges are being forced to define the parameters of "plausibility." Perhaps unsurprisingly, the definition of "plausibility" can greatly vary depending on the judge.

For instance, in *Pac. Marine Ctr., Inc. v. Silva*, the Eastern District of California held that "[c]ontrary to plaintiffs' argument, the minimal notice pleading requirements have changed. Since *Twombly*, the requirement for fact pleading has been significantly raised." 2009 U.S. Dist. LEXIS 93731, at *20 (E.D. Cal. Oct. 7, 2009) (citing *Moss v. United States Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009)). That same day, however, the Western District of Pennsylvania ruled that: "The United States Supreme Court did not impose a new heightened pleading requirement, but reaffirmed that Rule 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief, not 'detailed factual allegations.'" *Helkowski v. Sewickley Sav. Bank*, 2009 U.S. Dist. LEXIS 96134, at *6 (W.D. Pa. Oct. 15, 2009).

Other judges have fallen somewhere toward the midpoint of this analytical spectrum, with most courts recognizing that a somewhat heightened pleading standard now applies under Rule 8(a)(2). *CSX Transp., Inc. v. Meserole St. Recycling, Inc.*, 570 F. Supp. 2d 966, 969 (W.D. Mich. 2008) ("*Twombly* did not change did not change the notice-pleading

standard; 'detailed factual allegations' are still not necessary, but the Supreme Court did hold that a plaintiff's complaint must contain 'more than labels and conclusions.'"). Unfortunately, not all judges have issued such revealing holdings. Accordingly, prior research and careful preparation of pleadings are that much more essential.

RECOGNIZE EMERGING TRENDS • In *Iqbal*, the Supreme Court made clear that "[d]etermining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, supra, 129 S. Ct. at 1950. The "contextual" nature of this inquiry has given rise to certain nascent trends.

Trend: Leniency In Disputes Involving Confidential Information

First, in disputes where confidential information is at issue, courts have permitted a certain degree of tolerance for less detailed pleading. For instance, in *Orthovita, Inc. v. Erbe*, 2008 U.S. Dist. LEXIS 11088, at *27 (E.D. Pa. Feb. 14, 2008), the court held that "a plaintiff alleging misappropriation of trade secrets need not plead the details of its trade secrets in a publicly filed complaint, inasmuch as such disclosure would destroy the essential 'secrecy' of the claimed trade secret." In such cases, courts have balanced the competing interest of plaintiffs in maintaining the secrecy of their information with the Supreme Court's underlying policy concerns in *Twombly* and *Iqbal*.

Trend: Cost-Avoidance Considerations Are Relevant

Second, certain courts have been less inclined to find certain allegations deficient when the dismissal of those discrete allegations would not end the litigation. For instance, in *Shames v. Hertz Corp.* 2008 U.S. Dist. LEXIS 56952, at *18-19 (S.D. Cal. July 24, 2008), the court held that "the cost avoidance purposes of *Twombly* would not be served in any significant way by precluding only part of Plaintiffs' theory." Hence, a complaint which is plausible "on the whole" may serve to vindicate the interrelated portions of the complaint that would otherwise be prone to dismissal.

Trend: Scrutiny In The Antitrust And Conspiracy Context

Third, certain courts appear to be developing a more stringent plausibility jurisprudence with respect to the particular types of claims that were at issue in *Twombly*, *i.e.*, conspiracy and antitrust claims. *See, e.g., William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (dismissal of alleged violation of Section 1 of the Sherman Act); *Transhorn, Ltd. v. United Techs. Corp.*, 502 F.3d 47, 50 (2d Cir. 2007) (dismissal of alleged violation of Sections 1 and 2 of the Sherman Act).[2] Because of the Supreme Court's specific admonitions with respect to these claims, some courts understandably have applied the language contained in *Twombly* with particular force in these contexts.

Trend: Pro Se Accommodation Persists

Fourth, even after the decisions in *Twombly* and *Iqbal*, the general spirit of accommodation for pro se litigants has survived. As the Second Circuit recently held, "[e]ven after *Twombly*,…we remain obligated to construe a pro se complaint liberally." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009). Nevertheless, a pro se plaintiff must now generally plead "more than the mere possibility of misconduct" to survive a motion to dismiss. *See, e.g., Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 681-82 (D.C. Cir. 2009).

Trend: Possible State Court Revision Of Pleading Standards

Finally, it bears noting that these trends may, or may not, take hold in state court. Before the Court's decision in *Twombly*, 26 states and the District of

Columbia patterned their dismissal standards on the now-repudiated "no set of facts" language from *Conley v. Gibson*. Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 Va. L. Rev. In Brief 135 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf. *Twombly* and *Iqbal*, however, leave the viability of those pleading standards in an uncertain posture. Not being constrained by the Federal Rules of Civil Procedure, states are free, of course, to refuse to follow the Supreme Court's interpretation of federal law in state court. *Id.* Nevertheless, states may rethink pleading standards that were premised upon a now-repudiated federal standard. Thus, litigants must determine to what extent, if any, the decisions in *Twombly* and *Iqbal* have influenced such pleading standards before asserting a motion to dismiss in state court.

AVOID THE CITATION OF CASES DECIDED ON SUMMARY JUDGMENT • In light of *Twombly*'s requirement that a plaintiff plead sufficient "factual content" to state a "plausible" claim against the defendant, it has become increasingly common for defense counsel to harness precedent from the summary judgment stage in arguing against the plausibility of a plaintiff's averments. This strategy is understandable, as cases at the summary judgment stage often cast aspersions on the factual underpinnings of a party's case. Yet, the citation of cases from the summary judgment stage still generally should be avoided.

Fundamentally, the citation of precedent from the summary judgment stage provides opposing counsel with an off-the-rack way by which to distinguish the precedent cited by a defendant. As one federal district court recently admonished: "It is undoubtedly true that *Bell Atlantic v. Twombly* altered the pleading standard to survive a motion to dismiss. However, the Court in *Twombly* did not elevate the pleading standard applicable to a motion to dismiss to something akin to the standard which applies at the summary judgment stage. Nevertheless, [moving party's] argument on this issue conflates these two standards. This is evident from the fact that the vast majority of cases cited by [the moving party] specifically address the validity of long-term agreements on a motion for summary judgment, after the factual record had been fully developed." *E.I. Dupont De Nemours & Co. v. Kolon Indus.*, 2009 U.S. Dist. LEXIS 76795, at *37 (E.D. Va. Aug. 27, 2009). Hence, framing one's arguments in the context of cases that were decided on summary judgment can undermine defense counsel's credibility and may undercut what may otherwise have been a persuasive argument against the facial plausibility of the plaintiff's case.

HARNESS THE FAVORABLE RHETORIC OF THE DECISIONS • The Supreme Court's decisions in *Iqbal* and *Twombly* represent an attempt to reign in frivolous litigation by plaintiffs. This motivation revealed itself in language that clearly favors defendants. For instance, the Supreme Court stressed that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). In practice, therefore, "a complaint... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Id.* at 562. Since the issuance of these decisions, defendants have consistently used this language to their advantage.

Nevertheless, the decisions also contain language that can be used to mitigate their impact. In *Twombly*, for example, the Supreme Court stressed that Rule 8(a) only requires a short and plain statement of the claim and that detailed factual allegations are not required. *Id.* at 555. Furthermore, the Supreme Court repeatedly emphasized that alleging plausible grounds for a claim "simply calls for

enough facts to raise a reasonable expectation *that discovery* will reveal evidence" to prove the alleged claim." *Id.* at 556 (emphasis added).

Moreover, through the Supreme Court's citation of precedent decided under the *Conley v. Gibson* standard, the Court appeared to signal that *Twombly* should not be read as affecting a "sea change" in the law of pleadings. In fact, *Twombly* cited the Supreme Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), for the proposition that a pleading should not be found deficient even if it is apparent "that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. Similarly, in *Erickson v. Pardus*, a case which was decided by the Supreme Court shortly after *Twombly*, the Court (citing *Twombly*) stated that "[s]pecific facts are not necessary [for pleadings to satisfy Rule 8(a)(2)]." 551 U.S. 89, 93. Litigants should be cognizant of this precedent when responding to a motion attacking the "plausibility" of their claims.

DETERMINE WHETHER A MOTION TO DISMISS IS WORTH THE COST • Although the decisions of *Twombly* and *Iqbal* seemingly have provided defendants with a formidable means by which to challenge the legal sufficiency of a complaint, litigants still should consider whether the benefits of filing such a motion outweigh the potential costs of doing so. Fundamentally, the decisions in *Twombly* and *Iqbal* did nothing to alter the established principle that the general remedy for a factually deficient complaint is granting the plaintiff leave to amend. *See, e.g., Sound Appraisal & Savage Appraisal Servs. v. Wells Fargo Bank, N.A.*, 2009 U.S. Dist. LEXIS 96006, at *8-9 (N.D. Cal. Oct. 15, 2009); *see also* Fed. R. Civ. P. 15(a). This undisturbed principle requires that a number of factors be considered before challenging the factual sufficiency of a complaint.

As an initial matter, motions practice can generate significant pecuniary cost to a client, particularly when the outcome of the motion likely will not be dispositive. Also, the filing of an amended complaint will have the inevitable result of delaying the ultimate resolution of the matter. These client-focused concerns should be considered before filing a motion to dismiss under *Twombly* and *Iqbal*.

Furthermore, defendants should account for the possibility that a plaintiff who is granted leave to amend may produce a complaint that is *stronger* than that which was originally filed. Indeed, the court's opinion on a motion to dismiss likely will provide a plaintiff with valuable insight into the mindset of the judge respecting the weaknesses of the case, and a savvy plaintiff can use this insight to his strategic advantage upon the filing of an amended complaint. Thus, motions asserted under *Twombly* and *Iqbal* could produce a Pyrrhic victory for defendants by providing a roadmap for a new complaint.

AVOID PLEADING "CONCLUSORY" AFFIRMATIVE DEFENSES • As a common litigation strategy, defense lawyers frequently plead the existence of a large number of boilerplate affirmative defenses to a pending complaint or counterclaim. Since *Iqbal*, however, certain courts are displaying an increasing tendency to scrutinize such "bare-boned" averments on the basis that such pleading does not comport with the standards articulated in *Twombly* and *Iqbal*.

For instance, due to the principle that "[a]ffirmative defenses are governed by the same pleading standard as complaints," *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979), "[t]he majority of courts addressing the issue…have applied the heightened pleading standard announced in *Twombly*, and further clarified in *Iqbal*, to affirmative defenses." *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009).[3] Other courts, however, have rejected such an application of the plausibility pleading standard to affirmative defenses given the nature of the Supreme Court's holding in *Twom-*

bly, which interpreted Rule 8(a). *See Charleswell v. Chase Manhattan Bank, N.A.*, 2009 U.S. Dist. LEXIS 116358, at *14 (D.V.I. Dec. 8, 2009) ("[T]he heightened pleading standard of *Twombly* does not apply to affirmative defenses."); *see also Romantine v. CH2M Hill Eng'rs*, 2009 U.S. Dist. LEXIS 98699 (W.D. Pa. Oct. 23, 2009) ("The Supreme Court in *Twombly* was interpreting pleading requirements of Rule 8(a)(2). This court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c), or general defenses under Rule 8(b), and declines to so extend the Supreme Court ruling as requested by Plaintiff.").[4] Therefore, depending on the jurisdiction, defendants may be required to use greater specificity in pleading affirmative defenses in this new era of plausibility pleading.

PRACTICE CHECKLIST FOR "Plausibility" Pleading After *Twombly* And *Iqbal*

The following key principles should be considered by litigants who confront the implications of the decisions in *Twombly* and *Iqbal*:

- Research judicial precedent from the relevant circuit and/or district courts, and become familiar with the trial judge's view on the impact of the decisions in *Twombly* and *Iqbal* on pleading standards generally;
- Determine whether the particular subject matter or circumstances of the case may implicate certain emerging trends within the relevant circuit and/or district courts;
- Carefully review the factual (as opposed to conclusory) allegations in the complaint to ascertain whether they have nudged the plaintiff's claim to a plausible claim for relief, in contrast to a "formulaic recitation" of the necessary elements for such a claim;
- Avoid the citation of cases that were decided on summary judgment in advancing the arguments in a motion to dismiss;
- Avoid pleading "conclusory" allegations or affirmative defenses in a complaint or counterclaim, and consider moving to strike such allegations or affirmative defenses when they are encountered;
- Harness the favorable rhetoric of the decisions in *Twombly* and *Iqbal* to either advance a motion to dismiss or to oppose such a motion;
- Recognize that the outcome of a motion to dismiss may be leave to amend, and determine whether the motion is cost-effective or wise from a practical standpoint;
- Continue to monitor decisions in the relevant circuit and district courts that substantively consider the requirements of *Twombly* and *Iqbal*.

(Endnotes)

1 Although unaddressed by the Supreme Court, it is a fair inference that the standard announced by the Court in *Twombly*, which was based on the more permissive general pleading standard set forth in Rule 8(a), must still be "lower" than the standard announced in Rule 9(b).

2 *See also E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 2009 U.S. Dist. LEXIS 118212, at *8 (E.D. Va. Dec. 17, 2009) ("the standard's genesis in an antitrust case is significant here"); *Hinds County, Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) ("when plaintiffs sprinkle[ ] the words 'conspired,' 'concerted,' and 'concertedly' throughout the complaint, that complaint is insufficient to state a [Sherman Act] § 1 claim."); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2008 U.S. Dist. LEXIS 107882, at *81 (E.D.N.Y. Sept. 26, 2008) ("[T]he plaintiffs allege that there were 'meetings,' 'secret meetings,' 'communications,' or 'joint agreements.' Sometimes they alleged that these 'secret meetings' and 'communications' were entered into by defendants' representative 'at the highest levels' in 'various venues including Europe, the United States, and Africa' or 'Europe, the United States, South America and Asia.' These allegations are so broad and so vague that they fail to stand for anything, much less raise a plausible inference of an agreement."); *Solomon v. Blue Cross & Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008) ("The *Twombly* decision…adds new bite to the RICO requirement that the Plaintiffs describe the agreement to conspire in the complaint."); *but see Starr v. Sony BMG Music Entm't*, 2010 U.S. App. LEXIS 768, at *24 (2d Cir. Jan. 13, 2010) ("plaintiffs need only enough factual matter (taken as true) to suggest that an agreement was made").

3 *Safeco Ins. Co. of Am. v. O'Hara Corp.*, 2008 U.S. Dist. LEXIS 48399, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008) (*Twombly* standards apply to affirmative defenses); *Holtzman v. B/E Aerospace, Inc.*, 2008 U.S. Dist. LEXIS 42630, at *6 (S.D. Fla. May 28, 2008) (same). Additionally notwithstanding the general proposition that "striking a party's pleadings is an extreme measure," *Stanbury Law Firm v. IRS*, 221 F.3d 1059, 1063 (9th Cir. 2000), at least four separate decisions within the Ninth Circuit in the past year alone have dismissed a defendant's affirmative defenses on the basis that the identified defenses failed to provide the plaintiff with "fair notice of the defense," as required by *Iqbal*. *See CTF Dev., Inc. v. Penta Hospitality, LLC*, 2009 U.S. Dist. LEXIS 99538, at *23 (N.D. Cal. Oct. 26, 2009) ("[A]ffirmative defenses that are mere statements of legal conclusions with no supporting facts" are insufficient under *Iqbal.*); *Facebook, Inc. v. Power Ventures, Inc.*, 2009 U.S. Dist. LEXIS 103662, at *6 (N.D. Cal. Oct. 22, 2009) ("Power's affirmative defenses contain no factual allegations."); *Solis v. Zenith Capital, LLC*, 2009 U.S. Dist. LEXIS 43350, at *8-19 (N.D. Cal. May 8, 2009) (striking affirmative defenses because no factual bases for the defenses were provided); *Monster Cable Prods. v. Avalanche Corp.*, 2009 U.S. Dist. LEXIS 23747, at *5-6 (N.D. Cal. Mar. 11, 2009) (striking the affirmative defense based on the statue of limitations due to the fact that the applicable limitations period was not specified in the defense). Other jurisdictions have reached similar conclusions. *See, e.g., Tracy ex rel. v. NVR, Inc.*, 2009 U.S. Dist. LEXIS 90778, at *30 (W.D.N.Y. Sept. 30, 2009) (striking affirmative defenses pled in simply conclusory terms, unsupported by any factual allegations, as "plainly deficient under the *Iqbal* standard"); *FDIC v. Bristol Home Mortg. Lending, LLC*, 2009 U.S. Dist. LEXIS 74683, at *5-6 (S.D. Fla. Aug. 13, 2009) (applying *Twombly* to affirmative defenses); *Teirstein v. AGA Medical Corp.*, 2009 U.S. Dist. LEXIS 125002, at *9 (E.D. Tex. Feb 13, 2009) (affirmative defenses subject to same pleading standards as complaints and counterclaims); *Greenheck Fan Corp. v. Loren Cook Co.*, 2008 U.S. Dist. LEXIS 75147, at *4-5 (W.D. Wis. Sept. 25, 2008) (defendant's affirmative defenses, characterized as legal theories with implied elements, failed to comply with Rule 8 and failed to provide sufficient notice of the grounds for them).

4 *See also First Nat'l Ins. Co. of Am. v. Camps Servs., Ltd.*, 2009 U.S. Dist. LEXIS 149, at *2 (E.D. Mich. Jan. 5, 2009) (holding that *Twombly* plausibility standard does not apply to affirmative defenses); *Westbrook v. Paragon Sys., Inc.*, 2007 U.S. Dist. LEXIS 88490, at *2-3 (S.D. Ala. Nov. 29, 2007) (same).