ILLINOIS STATE BAR ASSOCIATION

MARCH 2022 VOL 20 NO. 2

Federal Civil Practice

The newsletter of the Illinois State Bar Association's Section on Federal Civil Practice

The Case for Drawing Reasonable—and Only Reasonable—Factual Inferences in Analyzing Rule 12(b)(6) Motions to Dismiss

BY JUDGE IAIN JOHNSTON

Introduction

Carl Sandburg's saw about pounding the facts, law, or table teaches that the two most important elements of litigation are facts and law, because without those a party's position is nothing but bluster. Certainly, the facts and law are the cornerstones of litigation. But just as important are the inferences drawn from facts. How do we know this? Well, for one thing, judges tell juries this in every federal trial in the Seventh Circuit. See Federal Civil Jury Instructions for the Seventh Circuit 1.11 (2017) ("In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this 'inference.'"); The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, Preliminary Instructions for Use at the Beginning of Trial (2020 ed.) ("People sometimes look at one fact and conclude from it that another fact exists. This is called an inference."). Typically, it is the inferences drawn from facts that drives a court or jury to a decision. Attorneys know this. For example, attorneys often engage in mortal combat of the Thunderdome variety in their summary judgment statements of material fact. They do so not because an actual dispute about a given fact exists but, instead, because of the inference a party attempts to draw from that fact.

In the context of summary judgment, factual inferences are drawn in the light most favorable to the non-moving party. *Cole v. Board of Trustees of Norhern Illinois University,* 838 F.3d 888, 895 (7th Cir. 2106). But, critically, those factual inferences must be *reasonable. Rand v. CF Industries,* 42 F.3d 1139, 1146 (7th Cir. 1994); *Bank Leumi Le-Israel, MM v. Lee,* 928 F.2d 232, 236 (7th Cir. 1991). Courts do not draw any *conceivable* factual inference in the non-movant's favor, only *reasonable* inferences. *MAO-MSO Recovery II, LLC v. State Farm Mutual Automobile Insurance Co.,* 994 F.3d 869, 876 (7th Cir. 2021); *Skiba v. Illinois Central Railroad Co.,* 884 F.3d 708, 721 (7th Cir. 2018); *Argyropolous v. City of Alton,* 539 F.3d 724, 732 (7th Cir. 2008). Indeed, it is hornbook law that a court can only draw *reasonable* factual inferences when determining summary judgment motions. William W. Schwarzer, Alan Hirsch & David Barrons, *The Analysis and Decision of Summary Judgment Motions,* 139 F.R.D. 441, 493 (1992).

Unfortunately, and quizzically, in the context of Rule 12(b)(6) motions to dismiss, the standard for drawing factual inferences is painfully confused, at least in the Seventh Circuit. And tracing the case law back to determine the source of the confusion only results in more confusion. Because the Supreme Court has never specifically and explicitly articulated the standard with respect to a complaint under Federal Rule of Civil Procedure 8, appellate court decisions must provide the standard. But the Seventh Circuit has articulated several different standards for drawing factual inferences, including (a) "all favorable inferences," (b) "all inferences," (c) "all possible inferences," (d) "all permissible inferences," and (e) "all reasonable inferences."

Types of Inferences That Can Be Drawn

'All Favorable Inferences'

In *Killingsworth v. HSBC Bank Nevada, N.A.,* 507 F.3d 614, 618 (7th Cir. 2007), the Seventh Circuit stated that "all favorable inferences" were to be drawn in favor of the non-movant. But in doing so, the *Killingsworth* court cited *Savory v. Lyons,* 469 F.3d 667, 670 (7th Cir. 2006), which held that "all reasonable inferences" should be drawn in favor of the non-movant. The

Savory decision was based on and cited to a long line of cases using the reasonable inference standard. *See Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000) *citing to Porter v. DiBlasio,* 93 F.3d 301, 305 (7th Cir. 1996) *citing to Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996) *citing to City National Bank of Florida v. Checkers, Simon & Rosner,* 32 F.3d 277, 281 (7th Cir. 1994) (each stating that "all reasonable inferences" should be drawn in favor of the non-movant). So, the premise for the "all favorable inferences" standard is flawed. Moreover, to the extent that "all favorable inferences" were to include any conceivable favorable inference, that standard is not compatible with Supreme Court precedent. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

'All Inferences'

In *Bielanski v. County of Kane,* 550 F.3d 632, 633 (7th Cir. 2008), the Seventh Circuit stated that "all inferences" (without any other adjective as a qualification) were to be drawn in favor of the non-movant. For those who—for some reason—need a definition of "all," it means "every." https://www.merriam-webster.com/dictionarv/all. Strangely, in support of the "all inferences" standard, the *Bielanski* court cited to both *Baker v. Kingsley,* 387 F.3d 649, 660 (7th Cir. 2004) and *Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000). But both those cases explicitly stated that "all *reasonable* inferences" were to be drawn in favor of the non-movant. *Baker,* 387 F.3d at 660; *Marshall-Mosby,* 205 F.3d at 326 (emphasis added). So, the word "reasonable" was removed for some reason. Whether the removal was an oversight or intentional is unknown. Certainly, however, the word "reasonable" and the concept it encompasses is a big deal in the context reviewing a pleading being challenged by a motion to dismiss. "All inferences," without the modifier "reasonable," would include implausible and even impossible inferences. As explained later, that certainly can't be the standard after *Iqbal/Twombly.* Indeed, relying on *Twombly,* the Seventh Circuit itself stated as much in *EEOC v. Concentra Health Services, Inc.,* 496 F.3d 773 (7th Cir. 2007) when it articulated the "two-easy-to-clear hurdles" of notice pleading:

> First, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests. Second, its allegations must *plausibly* suggest that the plaintiff has a right to relief, raising that *possibility* above a 'speculative level'; if they do not, the plaintiff pleads itself out of court.

Id. at 776 (emphasis added).

So, the "all inferences" standard is likewise based on at least two faulty premises: (1) the case law upon which it was based required the inferences to be reasonable, and (2) the notice pleading standard does not allow for speculative pleadings, which would be included under an "all inferences" standard. *Holman v. Indiana,* 211 F.3d 399, 407 (7th Cir. 2000); *see also Yasak v. Retirement Board,* 357 F.3d 677, 679 (7th Cir. 2004) (courts must draw *reasonable* factual inferences in favor of a non-movant, not inferences that while theoretically plausible are inconsistent with the pleadings).

'All Possible Inferences'

In the past, the Seventh Circuit has articulated the "all possible inferences" standard, which allows the court to draw any possible inference in favor of the non-movant. *See Cole v. Milwaukee Area Technical College Distroct,* 634 F.3d 901, 903 (7th Cir. 2011). This standard originates from *Tamayo v. Blagojevich,* 526 F.3d 1074, 1081 (7th Cir. 2008). *See Cole,* 634 F.3d at 903 *citing to Justice,* 577 F.3d at 771 *citing to Tamayo,* 526 F.3d at 1081; *see also Foxxxy Ladyz Adult World, Inc. v. Village of Dix,* 779 F.3d 706, 711 (7th Cir. 2015) *citing to Hecker v. Deere & Co.,* 556 F.3d 575, 580 (7th Cir. 2009) *citing to Tamayo,* 526 F.3d at 1081. But the *Tamayo* decision rests on a faulty foundation. *Tamayo* relies on two cases: *Killingsworth* and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). However, as noted previously, *Killingsworth* relies on *Savory,* which states that courts can only draw "all *reasonable* inferences" in favor of the non-movant. *Savory,* 469 F.3d at 670 (emphasis added). More importantly, nothing in the citation to *Twombly* supports the "all possible inferences" standard. Indeed, *Twombly's* holding is contrary to such an expansive standard. *Twombly,* 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). *Twombly* held that complaints must meet a plausibility standard, not a possibility standard. *Twombly,* 550 U.S. at 570 (a complaint need "only enough facts to state a claim to relief that is plausible on its face"). And "possible" and "plausible" have very different meanings. *Twombly,* 550 U.S. at 557 (distinguishing between possibility and plausibility); *see also Ashcroft v. Iqbal,* 556 U.S. U.S. 662, 678 (2009) ("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."). "Possible" means "something that may or may not be true or actual "orb . . having an indicated potential." https://www.merriam-webster.com/dictionary/possible. In contrast, "plausible" means "appearing worthy of belief'. https://www.merriam-webster.com/dictionary/plausible. Synonyms for "plausible" include "believable," "credible," "likely," and "probable." *Id.* Plausible means more than possible. *Carrero-Ojeda v. Autoridad DeEnergia Electrica,* 755 F.3d 711, 717 (1st Cir. 2014). Nearly anything is "possible," but "plausible" is a much narrower subset of outcomes. For example, when I purchase a single Powerball ticket, it's *possible* that I might become a multi-millionaire. But it's not *plausible.*

'All Permissible Inferences'

In another line of cases, the Seventh Circuit has stated that "all permissible inferences" must be drawn in favor of the non-movant. See, *e.g., Community Bank of Trenton u. Schnuck Markets Inc.,* 887 F.3d 803, 811 (7th Cir. 2018). This line of cases can be traced back to *Fortres Grand Corp. v. Warner Bros. Entertainment.,* 763 F.3d 696, 700 (7th Cir. 2014). For example, *Burton v. Ghosh,* 961 F.3d 960, 962 (7th Cir. 2020) relies on *Fortres.* Moreover, the only other "all permissible inferences" line of cases likewise leads back to *Fortres.* See *Bank of Trenton,* 887 F.3d at 811 *citing to West Bend Mutual Insurance Co. v. Schumacher,* 844 F.3d 670, 675 (7th Cir. 2016) *citing to Bible v. United Standard Aid Funds, Inc.,* 799 F.3d

633, 639 (7th Cir. 2015) *citing to Fortres,* 763 F.3d at 700. So, *Fortres* is the Typhoid Mary of the "all permissible inferences" standard. But tracing back from *Fortres* leads to a different standard; namely, the "all possible inferences" standard. See *Fortres,* 763 F.3d at 700 *citing to Active Disposal, Inc. v. City of Darien,* 635 F.3d 883, 886 (7th Cir. 2011) *citing to Justice v. Town of Cicero,* 577 F.3d 768, 771 (7th Cir. 2009) *citing to Tamayo v. Blagojevich,* 526 F.3d 1074, 1081 (7th Cir. 2008) ("We construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and *drawing all possible inferences* in her favor.") (emphasis added). So, the "all permissible inferences" standard rests on a different standard, which is problematic—assuming that one were to understand that "possible" and "permissible" are very different, which they are. Just as "possible" and "plausible" are different so too are "permissible" and "possible." "Permissible" means "allowable." https://www.merriam-webster.com/dictionarv/permissible. Again, "possible" means "something that may or may not be true or actual [or]. . . having an indicated potential." https://www.merriam-webster.com/dictionary/possible. In fact, the "all permissible inferences" standard is particularly unhelpful because "permissible" just means what's allowable, without stating what *kind* of inferences the district court can draw in favor of the non-movant. The "all permissible inferences standard" merely begs the question of what inferences may be drawn in favor of the non-movant. The "all permissible inferences" limits inferences based upon the substantive law at issue, which makes sense. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986) (in summary judgment context substantive law limited the range of permissible inferences to be drawn from ambiguous evidence). In this context, "permissible" goes to the type of substantive evidence that can be considered, not the kind of inference that can be drawn.

'All Reasonable Inferences'

For at least the last 40 years, the Seventh Circuit has continually stated that "all reasonable inferences" were to be drawn in the non-movant's favor when determining a Rule 12(b)(6) motion to dismiss. *See, e.g., Calderone v. City of Chicago,* 979 F.3d 1156, 1161 (7th Cir. 2020); *Shipley v. Chicago Board of Election Commissioners,* 947 F.3d 1056, 1060 (7th Cir. 2020); *Alarm Detection Systems v. Village of Schaumburg,* 930 F.3d 812, 821 (7th Cir. 2019); *Powe v. City of Chicago,* 664 F.2d 639, 642 (7th Cir. 1981); *see also Roberts v. City of Chicago,* 817 F.3d 561, 564 (7th Cir. 2016); *Chaney v. Suburban Bus Division of the Regional Transportation Authority,* 52 F.3d 623, 626-27 (7th Cir. 1995); *Dawson v. General Motors Corp.,* 977 F.2d 369, 372 (7th Cir. 1992). Allowing district courts to draw "all reasonable inferences" in favor of the non-movant is the prevailing standard in the Seventh Circuit. For example, through the late 1990s into the early 2000s, the "all reasonable inferences" standard appears to be the only standard articulated by the Seventh Circuit. See, *e.g., Baker v. Kingsley,* 387 F.3d 649, 660 (7th Cir. 2004); *McCullah v. Gadert,* 344 F.3d 655, 657 (7th Cir. 2003); *Albany Bank & Trust Co. v. Exxon Mobil Corp.,* 310 F.3d 969, 971 (7th Cir. 2002); *Vorhees v. Naper Aero Club, Inc.,* 272 F.3d 398, 401 (7th Cir. 2001); *Jones v. Simek,* 193 F.3d 485, 489 (7th Cir. 1999).

The Reasonable Inference Standard is the Correct Standard

As already shown, the other standards rely upon faulty premises, are inconsistent with *Twombly/Iqbal,* and are contrary to the rule applied during summary judgment. That should be sufficient to reject those standards. But the "all reasonable inference" standard is the correct standard when drawing factual inferences in deciding a Rule 12(b)(6) motion to dismiss for four other reasons, too.

First, although not dispositive, the research establishes that the "all reasonable inferences" standard is by far the most prominent standard used by the Seventh Circuit for decades. This is not surprising. Although history does not necessarily control, it certainly helps guide the determination absent a good reason to abandon the precedent. Holmes, *The Common Law,* 1 (1881) ("The life of the law has not been logic: it has been experience.")

Second, other courts agree that in determining a motion to dismiss, the court must draw all *reasonable* factual inferences, not all *conceivable* inferences, in favor of the non-moving party. *See, e.g., Centre-Point Merchant Bank v. American Express Bank,* 913 F. Supp. 202, 205 (S.D.N.Y. 1996) *(citing Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 58-59 (1st Cir. 1990). In fact, the "all reasonable inferences" standard is used by every other circuit. *See Santiago v. Puerto Rico,* 655 F.3d 61, 72 (1st Cir. 2011); *Taylor v. Vt. Department of Education,* 313 F.3d 768, 776 (2d Cir. 2002); *DeBenedictis v. Merrill Lynch & Co.,* 492 F.3d 209, 215 (3d Cir. 2007); *Mays v. Sprinkle,* 992 F.3d 295, 305 (4th Cir. 2021); *Lorrnand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir. 2009); *Lipman v. Budish,* 974 F.3d 726, 746 (6th Cir. 2020); *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir. 1986); *Brown v. Medtronic, Inc.,* 628 F.3d 451, 461 (8th Cir. 2010) (court not required to draw unreasonable inferences); *Doe v. United States,* 419 F.3d 1058, 1062 (9th Cir. 2005); *Doe v. Woodard,* 912 F.3d 1278, 1285 (10th Cir. 2019); *Randall v. Scott,* 610 F.3d 701, 705 (11th Cir. 2010); *In re Harman,* 791 F.3d 90, 99-100 (D.C. Cir. 2015); *CODA Dev. s.r.o. v. Goodyear Tire & Rubber,* 916 F.3d 1350, 1361 (Fed. Cir. 2019).

Third, the Seventh Circuit and district courts seem to instinctively recognize that the "all reasonable inferences" standard is the proper standard even when citing to Seventh Circuit precedent articulating one of the other standards. For example, numerous Seventh Circuit cases cite to *Bielanski* (which allows for "all inferences") but add the word "reasonable" to create the "all reasonable inferences" standard. *See, e.g., Tobey v. Chibucos,* 890 F.3d 634, 645 (7th Cir. 2018); *Ray v. City of Chicago,* 629 F.3d 660, 662 (7th Cir. 2011); *Brooks v. City of Chicago,* 564 F.3d 830, 832 (7th Cir. 2009). Similarly, despite citing to cases using a different standard, district courts nevertheless state and use the "all reasonable inferences" standard. *See, e.g., Stough Associates, L.P. v. Hage,* 2020 U.S. Dist. LEXIS 19044, *11 (S.D. Ind. Feb. 4, 2020) *(citing to Bielanski* but using "all reasonable inferences" standard); *In re Dealer Management Systems Antitrust Litigation,* 362 F. Supp. 3d 510, 536 n.11 (N.D. Ill. 2019) *(citing to Killingworth* but using "all reasonable inferences" standard); *Johnson v. Paul,* 2019 U.S. Dist. LEXIS 129432, *2-3 (N.D. Ind. Aug. 1,2019) *(citing to Bielanksi*

but using "all reasonable inferences" standard); *Doe v. Purdue University,* 281 F. Supp. 3d 754, 764 (N.D. Ind. 2017) *(citing to Tamayo* but using "all reasonable inferences" standard); *Johnson v. Melton Truck Lines, Inc.,* 2016 U.S. Dist. LEXIS 136451, *2 n.2 (N.D. Ill. Sept. 30, 2016) *(citing to Fortres* but using "all reasonable inferences" standard); *Evergreen Square of Cudahy v. Wisconsin Housing & Econonimic Development Authority,* 105 F. Supp. 3d 907, 910 (E.D. Wisc. 2015) *(citing to Foxxxy Ladyz* but using "all reasonable inferences" standard); *Service By Air, Inc. v. Phoenix*

Cartage & Air Freight, LLC, 78 F. Supp. 3d 852, 860 (N.D. Ill. 2015) *(citing to Killingsworth* but using "all reasonable inferences" standard). The most likely explanation for this happening is that courts intuitively understand that reasonableness is the correct standard.

Finally, the "all reasonable inferences" standard is consistent with American jurisprudence. The term "reasonable" is the bedrock of American law. The Constitution protects against "unreasonable searches and seizures." U.S. Const. Amend. IV. Criminal defendants cannot be convicted unless the government establishes guilt beyond a reasonable doubt. *Leland v. Oregon,* 343 U.S. 790, 80203 (1952); *Bartlett v. Battaglia,* 453 F.3d 796, 800 (7th Cir. 2006). The term is used in determining whether Constitutional rights have been violated. See *U.S. v. Bagley,* 473 U.S. 667, 682 (1985) *(Brady* and *Giglio* violated if failure to disclose had a "reasonable probability" of a different outcome). In tort law, reasonableness is the focus of parties' actions. *See, e.g., Kennedy v. Venrock Associates,* 348 F.3d 584, 592 (7th Cir. 2003) (reasonable reliance required for fraud). And, not surprisingly, the concept of reasonableness is strewn throughout the Federal Rules of Civil Procedure. *See, e.g.,* Fed. R. Civ. P. 11(b); 15(d); 16(c)(1); 23(c)(2)(B), (h); 26(g)(1), (3); 30(b), (d)(g); 34(a)(1)(B), (b)(2)(E)(ii); 36(a)(4); 37; 50(a). Reasonableness is the go-to standard in the law. *See* Michael D. Maurer Jr., *Desperate Times, Desperate Measures: The Need for Consistent Standards in the Treatment of U.S. Citizens Designated Enemy Combatants,* 5 Barry L. Rev. 153, 239 (2005) ("After all, `reasonable' is probably the most commonly used word in American jurisprudence."); David W. Cunis, California v. Greenwood: *Discarding the Traditional Approach to the Search and Seizure of Garbage,* 28 Cath. U. L. Rev. 543 n. 4 (1989)

("'Reasonable' is one of the most indefinite but commonly used words in legal language.").

Conclusion

Federal district courts in the Seventh Circuit decide Rule 12(b)(6) motions on a nearly weekly basis, if not more often. The motions are filed constantly—probably much more often than district court judges would like. See *Turner v. Pleasant*, 663 F.3d 770, 775 (5h Cir. 2011) (motions to dismiss rarely granted). It is critical that the Seventh Circuit uses a consistent standard to guide the district courts in these determinations. And it is likewise critical that the consistent standard be correct. The correct standard is the "all reasonable inferences" standard.■