

JAN 29 2008

*Grabinski v. National Union*  
No. 05-16987

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent. We have “consistently emphasized . . . that conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper motion to dismiss.” *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007) (citation and internal quotation marks omitted).

The majority disposition faults the esteemed district court judge for relying on language from *Crackel v. Allstate Ins. Co.*, 92 P.3d 882 (Ariz. App. 2004) requiring a showing that “the defendant’s improper purpose was the *primary* motivation for its actions . . .” *Id.* at 889 (citations omitted) (emphasis added). *Crackel* also held that the plaintiff asserting an abuse-of-process claim “must establish that the defendant used a court process in a fashion inconsistent with legitimate litigation goals.” *Id.*

The elements that must be established to support a claim must necessarily be alleged in the Complaint. *See Jones v. Cmty. Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (“[A] pleading must give fair notice and state the elements of the claim plainly and succinctly.”) (citation, internal quotation marks, and alterations omitted). I disagree with the majority’s

conclusion that general averments in the Complaint were adequate to survive a motion to dismiss. Indeed, in *Crackel*, the Arizona Court of Appeals “reject[ed] [Plaintiffs’] contention that a generalized allegation that a defendant has misused the litigation process as a whole can support a claim of abuse of process.” *Crackel*, 92 P.3d at 888. Rather, “[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the course of the process, is required . . .” *Morn v. City of Phoenix*, 730 P.2d 873, 877 (Ariz. App. 1986).

The majority disposition unfairly characterizes the district court’s ruling as one that “brushed aside the Grabinskis’ allegations of improper purpose.” Far from brushing the allegations aside, the district court judge explicitly discussed the allegations and concluded that they were speculative and insufficient to support an abuse-of-process claim. District Court Order pp. 9-10.

The majority disposition also finds fault with the district court’s use of the terms “show” and “establish” in discussing the pleading requirements. However, the United States Supreme Court has expressly approved the notion that the Plaintiff must make a *showing* of entitlement to relief. See *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 n.3 (2007) (“Rule 8(a)(2) still requires a ‘*showing*,’ rather than a blanket assertion, of entitlement to relief.” (emphasis added)).

Because the district court correctly concluded that the Complaint was insufficient to state a claim under Arizona law, I would AFFIRM.