Civil Pleading Requirements After *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*

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Summary

In 2007 and 2009 decisions, *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*, the U.S. Supreme Court heightened the standard governing whether a civil complaint filed in federal court will survive a motion to dismiss for failure to state a claim. After those rulings, it appears that federal courts must evaluate the "plausibility" of claims made at the pleading stage. Previously, complaints typically survived a motion to dismiss as long as they stated a claim for which some set of facts could be assembled to warrant legal relief. The change makes it less likely for plaintiffs' claims to survive past the initial pleadings stage, particularly in cases in which plaintiffs may need to rely on the discovery of evidence once litigation begins in order to bolster their claims. Bills pending in the House and Senate Judiciary Committees, the Open Access to Courts Act of 2009 (H.R. 4115) and the Notice Pleading Restoration Act of 2009 (S. 1504), aim to reverse the effects of the *Twombly* and *Iqbal* decisions.

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Introduction

To initiate a civil suit in federal court, a litigant submits a complaint "pleading" entitlement to legal relief. In a 2007 decision, *Bell Atlantic Corp. v. Twombly*,[1] and more forcefully in a 2009 decision, *Ashcroft v. Iqbal*,[2] the U.S. Supreme Court heightened the standard for evaluating such pleadings. Although the extent of its impact has yet to be determined, the change appears to reduce the likelihood that plaintiffs' claims will survive the pleadings stage in federal courts, particularly in cases in which plaintiffs plan to rely on evidence discovered during litigation to bolster their claims. Bills pending in the House and Senate Judiciary Committees, the Open Access to Courts Act of 2009 (H.R. 4115) and the Notice Pleading Restoration Act of 2009 (S. 1504), aim to reverse the effects of the rulings. This report discusses the context and implications of the *Twombly* and *Iqbal* decisions and the pending bills.

Pleading Rules in Civil Cases

Standards and procedures governing complaints in federal civil suits are governed by the Federal Rules of Civil Procedure. Although the Rules are promulgated by the U.S. Supreme Court pursuant to the Rules Enabling Act,[3] Congress has ultimate authority over amendment of the Rules.[4]

Under Federal Rule of Civil Procedure 8(a)(2), a complaint in a civil case must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[5] A related rule, Rule 12(b)(6), enables a defendant to bring a motion to dismiss a plaintiff's claim for failure to satisfy the 8(a)(2) requirement—that is, failure to state a claim upon which relief can be granted.[6] If a court grants a defendant's Rule 12(b)(6) motion, the case will be dismissed and thus will not proceed.[7] If a complaint survives the Rule 12(b)(6) motion to dismiss, then the process of

[1] 550 U.S. 544 (2007).

[2] 129 S.Ct. 1937 (2009).

[3] 28 U.S.C. § 2072. Congress enacted the Rules Enabling Act in 1934, and the Federal Rules of Civil Procedure were first promulgated pursuant to that act in 1938.

[4] Changes to the rules are typically developed by the Judicial Conference, an annual meeting of selected federal judges, and its committees. *See* 28 U.S.C. § 331 (delineating membership and activities of the Judicial Conference); 28 U.S.C. § 2703 (requiring the Judicial Conference to "prescribe and publish ... procedures for the consideration of proposed rules" and authorizing it to form committees for that purpose). The Supreme Court must submit any proposed rules changes to Congress by May 1 of each year. The proposed changes then take effect on December 1 unless Congress acts affirmatively to prevent a change. 28 U.S.C. § 2074. Congress has amended the rules or blocked a proposed change on several occasions, typically making relatively minor modifications. *See, e.g.*, Equal Access to Justice Act, P.L. 96-481, tit. II, § 205(a) (repealing former subsection (f) of Rule 37, regarding the awarding of fees against the United States); Federal Rules of Civil Procedure Amendments Act of 1982, P.L. 97-462 (rejecting amendments promulgated by the Court and enacting substitute amendments for Rule 4, regarding procedures governing delivery of a summons); Anti-Drug Abuse Act of 1988, P.L. 100-690, tit. VII, § 7047(b) (amending Rule 35, regarding physical and mental examinations); Judicial Improvements and Access to Justice Act, P.L. 100-702, tit. IX (amending rules to allow arbitration on a experimental basis); An Act to make certain technical corrections in the Judicial Improvements Act of 1990, P.L. 102-198, § 11 (declining to approve a proposed waiver of service of summons form promulgated by the Supreme Court).

[5] Fed. R. Civ. P. 8(a)(2).

[6] Fed. R. Civ. P. 12(b)(6).

[7] However, such cases are typically dismissed "without prejudice," meaning that the plaintiff is not barred from filing a new complaint in federal court.

discovery and pre-trial motions begin. During the discovery phase, litigants may petition the court for subpoenas to access evidence from the other parties.[8]

With some exceptions, federal courts historically interpreted the Rule 8(a)(2) pleading requirement broadly and the corresponding Rule 12(b)(b) standard narrowly, meaning that complaints had to satisfy a relatively low bar in order to survive a motion to dismiss.[9] The prevailing approach was articulated by the Supreme Court in *Conley v. Gibson*,[10] a 1957 case: "[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."[11]

The *Conley* "no set of facts" approach is described as "notice pleading" or the "access principle." It requires that a complaint "give the defendant fair notice of what the ... claim is and the grounds upon which it rests" rather than requiring that allegations be fully developed at the pleading stage.[12] It is contrasted with a "heightened pleading standard," under which a complaint must allege a minimum number or type of facts. In practice, the notice pleading approach meant that civil complaints were sufficient as long as they asserted a claim which, if proved, could lead to a winning legal judgment. No evaluation was made regarding whether the allegations were *likely* to be proven in the case.

After the enactment of the Federal Rules of Civil Procedure in 1938, Rule 8(a)(2) and Rule 12(b)(6) were interpreted as having adopted a notice pleading approach to remove barriers to civil litigation in federal courts. The Supreme Court summarized the notice pleading rationale in a case decided shortly after the enactment of the Rules: "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants" and thus "should not raise barriers which prevent the achievement of that end."[13] In *Conley*, the Court likewise explained that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[14]

Although some lower federal courts departed from the notice pleading approach during the past few decades,[15] the Supreme Court reaffirmed the approach in *Leatherman v. Tarrant County*

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[8] *See* Fed. Rule Civ. P. 26.

[9] An exception applies to claims of fraud, for which the Federal Rules of Civil Procedure require that facts be alleged with "particularity." Fed. R. Civ. P. 9(b). Other exceptions have been created by lower federal courts in specified types of claims. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003) (discussing lower federal court requirements of more than a "short and plain statement" in copyright, antitrust, negligence, and other complex types of cases).

[10] 355 U.S. 41 (1957).

[11] *Id.* at 45-46 (emphasis added).

[12] *Id.* at 47.

[13] Maty v. Grasselli Chemical Co., 303 U.S. 197, 200 (1938).

[14] *Conley*, 355 U.S. at 48.

[15] *See, e.g.*, In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003) (in a bankruptcy case, stating that "we assume the truth of all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability.... We are not bound, however, to credit 'bald assertions, unsupportable conclusions, and opprobrious epithets' woven into the fabric of the complaint.") (citations omitted). *See also* House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, *Federal Pleading Standards Under* Twombly *and* Iqbal, 111th Cong., Oct. 27, 2009 (written testimony of Gregory G. Katsas, Partner, Jones Day), at 10 (asserting that "*Twombly* and *Iqbal* are ... consistent with decades of settled lower-court precedent.").

Narcotics Intelligence & Coordination, a 1993 case, and again in *Swierkiewicz v. Sorema N.A.*, a 2002 case.[16] In *Swierkiewicz*, a unanimous Court declined to apply a heightened pleading standard to an employment discrimination suit. It stated that such a heightened pleading standard would be "a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[17] Adhering to the *Conley* interpretation of Rule 8(a)(2) as having no "regard to whether a claim will succeed on the merits," the Court stated that "'[i]ndeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."[18]

As mentioned, despite the *Leatherman* and *Swierkiewicz* rulings, some lower court opinions scaled back the "notice pleading" approach in recent decades, particularly in complex areas such as bankruptcy, antitrust, and civil rights. The shift has been described as a response to concerns regarding the cost and delay of litigation resulting from an increased number and complexity of federal civil cases.[19] By carving out exceptions for allegations characterized as "mere conclusions"[20] or "bare bones,"[21] and by declaring in some instances that the "no set of facts" language from *Conley* "has never been taken literally,"[22] lower courts arguably set the stage for the changes made in *Twombly* and *Iqbal*.

Bell Atlantic Corporation v. Twombly

In *Bell Atlantic Corporation. v. Twombly*,[23] a 7-2 decision, the Supreme Court appeared to depart from the notice pleading approach for the first time in a decision that arguably applied to all federal civil cases. The plaintiffs in *Twombly* were a group of television and Internet subscribers. Filing a complaint in the U.S. District Court for the Southern District of New York, they sued four "Incumbent Local Exchange Carriers," also known as "Baby Bells," alleging that the defendants had engaged in a conspiracy in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. That section prohibits "a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]" To support their conspiracy allegation, the plaintiffs principally alleged facts intended to show that the defendants had engaged in "parallel conduct," that is, adjusted prices and taken other actions in a similar timeframe and manner.

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[16] Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) (declining to apply a heightened pleading standard in an employment discrimination case); Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 507 U.S. 163 (1993) (rejecting a heightened pleading standard in a civil rights case alleging municipal liability). Both cases have been interpreted as having been overruled by *Twombly* or *Iqbal*. *See, e.g.*, Rutter v. Picerne Dev. Corp., 2007 U.S. Dist. LEXIS 90690 (S.D.Tex. Dec. 10, 2007), at *4.

[17] *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

[18] *Id.* (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

[19] *See, e.g.*, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Access to Justice Denied—Ashcroft v. Iqbal*, 111th Cong., Oct. 27, 2009 (written statement of Arthur R. Miller, Professor, New York University School of Law).

[20] *See, e.g.*, Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir. 1987) ("... allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim.").

[21] *See, e.g.*, Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d. Cir. 1972) (stating that in antitrust cases, a "bare bones statement of conspiracy or of injury" does not suffice to survive a Rule 12(b)(6) motion to dismiss).

[22] *See, e.g.*, Kyle v. Morton High School, 144 F.3d 448, 455 (7th Cir. 1998).

[23] 550 U.S. 544 (2007).

The defendants brought a Rule 12(b)(6) motion to dismiss the plaintiffs' complaint for failure to state a claim, and the district court granted the motion.[24] It held that even if true, the facts alleging parallel conduct would constitute only one piece of evidence in the antitrust case, and would not, alone, constitute a sufficient basis on which to prove that the defendant companies had engaged in a conspiracy in violation of 15 U.S.C. § 1.[25]

The U.S. Court of Appeals for the Second Circuit reversed,[26] but the U.S. Supreme Court reversed again. Echoing the district court's reasoning, Justice Souter's opinion for the Court emphasized that the plaintiffs alleged no facts other than parallel conduct that would point to the existence of an unlawful conspiracy. The opinion states that "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [a violation of section 1 of the Sherman Antitrust Act] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[27] Thus, the Court held that to survive a Rule 12(b)(6) motion to dismiss, an antitrust complaint must provide "enough factual matter (taken as true) to suggest that an agreement was made."[28] Mirroring language rulings in which lower courts had similarly adopted narrow interpretations of the Rule 8(a)(2) pleading standard in antitrust cases,[29] the Court also suggested that a "naked" allegation of conspiracy, without sufficient accompanying facts, would not survive a Rule 12(b)(6) motion to dismiss.[30] Thus, the Supreme Court appeared to require a heightened pleading standard for the Rule 12(b)(6) motion, at least as applied to the antitrust claims. Speaking more broadly, the Court rejected the literal reading of the "no set of facts" language from *Conley*, holding that the phrase had "earned its retirement."[31]

Other language in the opinion created doubt as to whether the Court intended a heightened pleading standard or appeared at least to limit the scope of the holding. For example, the Court clarified that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[32] Likewise, in a footnote, the Court cited the 1993 and 2002 cases in which the Court explicitly reaffirmed *Conley* and rejected a

[24] Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

[25] *See id.* at 179.

[26] Twombly v. Bell Atl. Corp., 425 F.3d 99 (2d Cir. 2005).

[27] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[28] *Id.* at 556.

[29] For more information on ways that lower courts have narrowed the scope of the *Conley*, notice pleading approach in various areas, including in antitrust, see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003).

[30] *See Twombly*, 550 U.S. at 557 ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'").

[31] *Id.* at 563. The opinion then characterized the "no set of facts" phrase as an "incomplete, negative gloss on an accepted pleading standard," which must be read not as a "minimum standard" for granting a motion to dismiss but as a "breadth of opportunity to prove what an adequate complaint claims," *Id.*, suggesting that the Court might have intended to circumscribe the notice pleading approach without overruling it.

[32] *Id.* at 556.

"heightened pleading standard."[33] In addition, shortly after *Twombly*, the Court issued an opinion in which it appeared to adopt a narrow view of the decision.[34]

In dissent in *Twombly*, Justice Stevens argued against what he perceived as the Court's decision to upend the long-standing notice pleading approach.[35] "If *Conley*'s 'no set of facts' language is to be interred," he wrote, "let it not be without a eulogy."[36] He then discussed the historical importance of notice pleading, for example as a vehicle by which litigants enforced civil rights laws. Justice Stevens also disputed the majority's practical arguments regarding the increasing cost of litigation. He argued that cases have long been allowed to proceed until "at least some sort of response" was obtained from defendants, with relatively little cost or delay.[37]

Interpretations of *Twombly* differed among the lower federal courts.[38] Some interpreted the decision as having introduced a general heightened pleading standard, while others viewed the holding as more limited. Several courts interpreted it as having established a "flexible" heightened pleading standard, which would apply to complaints brought in antitrust and other types of cases requiring factual specificity.[39] Among legal commentators, a consensus seemed to emerge that despite containing some language to the contrary, the ruling creates a general heightened pleading standard.[40]

Ashcroft v. Iqbal

In *Ashcroft v. Iqbal*,[41] a 5-4 decision, the Supreme Court clarified, and arguably extended, the "plausibility" standard introduced in *Twombly*.[42] *Iqbal* involved a suit brought against various federal officials by a Pakistani citizen, Javaid Iqbal, who had been detained in a detention facility in New York following an arrest on fraud and immigration charges. Iqbal was one of 184

[33] *Id.* at 569 n.14 ("we do not apply any 'heightened' pleading standard"; citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 507 U.S. 163 (1993)).

[34] In addition, shortly after *Twombly*, the Supreme Court issued an opinion in which it appeared to adopt a narrow view of *Twombly*. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (without mentioning any need to determine "plausibility," citing *Twombly* for the rule that a "short and plain statement of the claim" is all that is necessary, and "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint").

[35] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (Stevens, J., dissenting).

[36] *Id.* at 577.

[37] *Id.* at 573.

[38] *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1 (2009) (examining the "confusion" among the lower courts as a result of the "mixed signals" in *Twombly*).

[39] *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007) ("After careful consideration of the Court's opinion [in *Twombly*] and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.")

[40] *See* Michael C. Dorf, *The End of Notice Pleading?*, Dorf on Law (May 24, 2007), http://michaeldorf.org/2007/05/end-of-notice-pleading.html ("The rough consensus coalescing among proceduralists seems to be ... that there's no way to understand the decision if it doesn't apply a heightened pleading standard.").

[41] 129 S.Ct. 1937 (2009).

[42] In addition to the interpretation of the standards governing federal pleading rules in civil cases, the *Iqbal* case involved questions related to the qualified immunity of federal officials and other legal issues. This report discusses only the part of the holding that is relevant to the federal pleading rules.

individuals designated by the Federal Bureau of Investigation to be of "high interest" with regard to the government's investigation of the 9/11 terrorist attacks. On the basis of that designation, he was placed in a special unit within the detention facility, wherein he alleged that he endured beatings and slurs and was denied access to medical care and opportunities to practice his religion.

Iqbal eventually pled guilty on a fraud charge and served a prison sentence. His civil action did not contest the sentence or resulting imprisonment. Rather, it focused on alleged mistreatment during his pre-trial detention. Naming as defendants individuals ranging from prison guards to high-level federal officials in the Department of Justice, Iqbal brought an action for civil damages pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*,[43] under which federal officers may be subject to civil liability for violating individuals' constitutional rights. In his complaint, Iqbal alleged that his designation and subsequent mistreatment resulted from unconstitutional discrimination on the basis of his race and religion.

The U.S. District Court for the Southern District of New York considered the defendants' Rule 12(b)(6) motion to dismiss the case prior to the Supreme Court's 2007 *Twombly* decision. Applying *Conley*, it denied the motion to dismiss. *Twombly*, however, was handed down before the U.S. Court of Appeals for the Second Circuit considered the case on appeal. The Second Circuit interpreted *Twombly* as requiring an evaluation of the "plausibility" of facts alleged in Iqbal's *Bivens* claim, but it held that Iqbal's complaint satisfied that standard.[44] In particular, it held that Iqbal had alleged more specific facts, and more facts drawn from personal experience, than were alleged in *Twombly*. Thus, it upheld the district court's denial of the motion to dismiss.

The Supreme Court reversed.[45] Writing for the majority, Justice Kennedy clarified "two working principles" that follow from *Twombly*. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[46] As discussed *infra*, this statement arguably reintroduces a distinction between factual and legal elements in a complaint that existed prior to the enactment of the Federal Rules of Civil Procedure and the notice pleading approach. The opinion continues: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice...." Taken together, these two principles preserve the rule that facts alleged in a complaint are not to be scrutinized for their veracity. However, they appear to require courts to identify components of a claim which may masquerade as fact, but are instead assertions of legal conclusions.

In addition, the Court reasserted the heightened "plausibility" pleading standard introduced in *Twombly.* Multiple lower courts have quoted the following words from the *Iqbal* opinion: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'"[47] In other words, the inquiry appears to require courts to evaluate facts asserted to determine whether they are likely to result in a judgment in the claimant's favor.

[43] 403 U.S. 388 (1971).

[44] Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

[45] However, it remanded the case to the U.S. Court of Appeals for the Second Circuit for a determination regarding whether Iqbal should be given leave to file an amended complaint.

[46] *Iqbal*, 129 S.Ct. at 1949.

[47] Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, (2007)).

The *Iqbal* decision seems to give lower courts greater latitude to make such determinations. The Court states:

> Determining 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. ... In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[48]

Thus, the opinion appears to require federal courts to engage in a "common sense" inquiry to assess whether facts alleged in a complaint provide "plausible" support for a claim.

Applying this approach, the Court granted defendants' 12(b)(6) motion to dismiss. On appeal, claims against the high-ranking Justice Department officials were particularly at issue. The Court rejected Iqbal's assertions—for example, that Attorney General Ashcroft and other officials "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions as a matter of policy"—as "bare assertions" which "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and therefore did not satisfy the plausibility test.[49]

Justice Souter, who had written the majority opinion in *Twombly*, wrote a dissenting opinion in *Iqbal*. He did not dispute the majority's general characterization of the *Twombly* holding, but argued that Iqbal's particular complaint should not have been dismissed under the *Twombly* principles.[50] In particular, he viewed the Court as having chosen the most vague of Iqbal's allegations against the high-ranking officials, while ignoring more specific allegations, such as an assertion that Attorney General Ashcroft served as the "principal architect" of the allegedly discriminatory policy.[51] He concluded that the "allegations singled out by the majority as 'conclusory' are no such thing."[52]

Legal Implications

Although their impact has not been fully realized, it can be said that the *Twombly* and *Iqbal* rulings signal a departure from the notice pleading approach and establish a heightened pleading standard. The decisions are being interpreted in that manner by the lower federal courts.[53] In addition, it is assumed that the rulings apply in all federal civil cases.[54]

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[48] *Id.* at 1949-50 (citations omitted).

[49] *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555).

[50] Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (Souter, J., dissenting).

[51] Although the Court had acknowledged the "principal architect" allegation and other allegations noted by Justice Souter in dissent, the Court characterized those allegations as presenting legal conclusions and thus as "not entitled to the assumption of truth." *See Iqbal*, 129 S.Ct. at 1951.

[52] *Id.* at 1961 (Souter, J., dissenting).

[53] *See, e.g.*, Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009) ("Beginning with the Supreme Court's opinion in [*Twombly*] ... and culminating recently with the Supreme Court's decision in [*Iqbal*], pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead (continued...)

The potentially significant outcome of the rulings is that fewer cases will survive to the discovery phase in federal courts than would otherwise proceed to that stage. Commentators debate the practical likelihood of that result.[55] Multiple federal courts, including many of the federal courts of appeals, have cited the decision when granting a Rule 12(b)(6) motion to dismiss.[56] In many such cases, it is possible that a motion to dismiss would have been granted even in the absence of the *Twombly* and *Iqbal* precedents. In at least some such cases, however, language from majority or dissenting opinions suggests that a dismissal might not have been warranted prior to those rulings.[57] Thus, it seems probable that at least to some extent, the decisions will decrease the quantity of civil complaints which survive a motion to dismiss.[58] Moreover, while this decrease may not be perceivable from statistics on the total number of motions to dismiss granted, its effect may be meaningful for particular subsets of claims.[59]

(...continued)

more than the possibility of relief to survive a motion to dismiss"); Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629-630 (6th Cir. 2009) ("Indeed, while this new *Iqbal*/*Twombly* standard screens out the 'little green men' cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are 'implausible'" (quoting Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 887-90 (2009)); McTernan v. City of York, 577 F.3d 521, 530 (3d Cir. 2009) (stating that in *Iqbal*, the Supreme Court "forcefully held that *Twombly* was not limited to antitrust complaints but instead enunciated the standard applicable to review of all complaints.").

[54] *See, e.g.*, McTernan v. City of York, 577 F.3d 521, 530 (3d Cir. 2009) (stating that in *Iqbal*, the Supreme Court "forcefully held that *Twombly* was not limited to antitrust complaints but instead enunciated the standard applicable to review of all complaints.").

[55] *Compare* testimony of Gregory G. Garre, Partner, Latham & Watkins LLP) (arguing that it is too soon to draw conclusions regarding any potential impact on civil cases) *with* testimony of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (arguing that the *Twombly* and *Iqbal* decisions have already influenced the outcome in numerous civil cases), Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009.

[56] *See, e.g.*, McTernan v. City of York, 577 F.3d 521, 530-32 (3d Cir. 2009) (affirming the district court's dismissal of a complaint brought by individuals who had been blocked from protesting abortion procedures on a wheelchair-accessible entrance ramp outside a Planned Parenthood facility); Lopez v. Beard, 333 Fed. Appx. 685, 687 (3d Cir. 2009) (affirming the district court's dismissal of claims brought by a prisoner who alleged that he had been discriminated against because he had HIV/AIDS); Monroe v. City of Charlottesville, 579 F.3d 380, 389-90 (4th Cir. 2009) (affirming the district court's dismissal of a 42 U.S.C. § 1983 claim against the city of Charlottesville, Virginia and several individual police officers, in which the plaintiff alleged that the defendants had violated the equal protection clause by collecting DNA samples from African American men); Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629-33 (6th Cir. 2009) (affirming the district court's dismissal of claims alleging that plaintiff's former employer and union had "discriminated against him by settling his union grievance via an agreement that branded him a racist"); Brown v. JP Morgan Chase Bank, 334 Fed. Appx. 758, 759-60 (7th Cir. 2009) (affirming the district court's dismissal of plaintiff debtor's civil rights claims against a bank and bank executives); Lipari v. US Bancorp NA, 2009 U.S. App. LEXIS 15851 (10th Cir. July 16, 2009) (affirming the district court's grant of defendant banks' motion to dismiss claims brought by an individual in relation to a failed business relationship with the banks).

[57] *See, e.g.*, Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009 (written testimony of Professor Stephen Burbank), at Appendix B (listing cases in which federal judicial opinions appeared to signal that *Iqbal* required dismissal that might not have been warranted prior to the *Iqbal* ruling).

[58] One counterargument which has been raised notes that any practical effect of a heightened pleading standard is mitigated by federal district courts' authority to allow a claimant leave to amend an original complaint by adding additional allegations to satisfy the heightened pleading standard. However, leave to amend a complaint would not be likely to change the result for a complainant whose case relied heavily on the discovery process to identify specific facts to support a claim.

[59] *See* Jones Day, C. Kevin Marshall, and Warren Postman, Pleading Facts and Arguing Plausibility: Federal Pleading Standards a Year after Iqbal (2010), http://www.jonesday.com/pleading_facts/ (last visited June 30, 2010). For statistics on the number of motions to dismiss that were granted before *Twombly*, after *Twombly* but before *Iqbal*, and after *Iqbal*, see the 2010 report from the Judicial Conference of the United States' Standing Committee on Rules of Practice (continued...)

Whether decreases will continue or are a negative result is a subject for debate. Commentators who view the *Iqbal* ruling as a positive development note that an increase in both the quantity and complexity of federal civil cases in recent decades produced delay and increased the costs of civil litigation. They may argue that the *Iqbal* ruling will aid federal courts to weed out the weakest cases in a system in which delays and expense restrict litigants' access to the federal courts.[60] Practically, they may also argue that plaintiffs' attorneys will respond to the *Twombly* and *Iqbal* decisions by crafting more detailed complaints. In addition, some commentators have asserted that the heightened pleading standard protects government officials from intrusions during the discovery stage, which may otherwise cause unneeded expense and inefficiency.[61]

One counter argument suggests that discovery can be limited so as to minimize delay, cost, and unnecessary intrusion once a case survives the pleading stage. In his dissenting opinion in *Twombly*, Justice Stevens asserted that a characterization of discovery as inevitably costly "vastly underestimates a district court's case-management arsenal."[62] Justice Breyer echoed that argument in a dissent in *Iqbal*, noting that federal courts "can structure discovery in ways that diminish the risk of imposing unwarranted burdens on public officials."[63] However, it is unclear whether the reforms giving courts greater control over the discovery process have led to significant practical changes in the extent to which federal courts manage or control discovery in civil cases.

Another argument made by opponents of a heightened pleading standard emphasizes the potential for unintended consequences as a result of the *types* of complaints that might be dismissed as a result of *Twombly* and *Iqbal*. In particular, it has been asserted that the heightened pleading standard will weed out not the weakest cases but rather those which, by their nature, rely on access to the discovery process in order to build a case. Commentators suggest that cases will be particularly affected in areas in which civil litigation has an important "investigatory function." Civil rights, antitrust, environmental regulation, and other areas in which a federal statutory scheme relies on civil litigation, including the discovery process it entails, as a means of enforcement might be particularly affected.[64] To illustrate the point, at least one commentator asserts that major twentieth century civil rights cases would have been unable to proceed under the *Iqbal* pleading standard.[65]

(...continued)

and Procedure and the Advisory Committee on Civil Rules at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_060110.pdf (last visited June 30, 2010).

[60] *See, e.g.*, Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009 (testimony of Gregory G. Garre, Partner, Latham & Watkins LLP); House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, *Federal Pleading Standards Under* Twombly *and* Iqbal, 111th Cong., Oct. 27, 2009 (testimony of Gregory G. Katsas, Partner, Jones Day).

[61] *See, e.g.*, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, Federal Pleading Standards Under Twombly and Iqbal, 111th Cong., Oct. 27, 2009 (written testimony of Gregory G. Katsas, Partner, Jones Day), at 18-21.

[62] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (Stevens, J., dissenting).

[63] Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (Breyer, J., dissenting).

[64] *See, e.g.*, House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Access to Justice Denied—Ashcroft v. Iqbal*, 111th Cong., Oct. 27, 2009 (statement of Arthur R. Miller, Professor, New York University School of Law).

[65] Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009 (testimony of John Payton, President, NAACP Legal Defense and Education Fund).

Another concern suggests that *Twombly* and *Iqbal* reintroduce problems which prompted the enactment of the Rule 8(a)(2) notice pleading approach in 1938. For example, some commentators note that the *Iqbal* opinion appears to require federal courts to distinguish between factual assertions, which are entitled to a presumption of truth, and legal assertions, which are not. For example, in *Iqbal*, the majority opinion characterized the allegation that Attorney General Ashcroft served as the "principal architect" of a discriminatory policy as a legal conclusion subject to a plausibility test.[66] In contrast, in his dissenting opinion in *Iqbal*, Justice Souter appeared to construe that allegation as a factual allegation which bolstered the plaintiff's legal claims.[67] A similar distinction existed prior to the enactment of the Federal Rules of Civil Procedure in 1938 and was viewed as problematic, specifically because it resulted in arbitrary line-drawing between legal and factual assertions.

Similarly, to the extent that the *Iqbal* approach requires courts to take at least an initial look at the case's chance for success on the merits, it might become increasingly hard to draw a clear line between decisions made at the pleading stage and decisions which should wait for a later stage of litigation. For example, motions for summary judgment, which are submitted after at least some discovery of evidence has been conducted but before trial, had typically been a court's first opportunity to make a decision evaluating the plausibility of a case. One issue to be resolved is how the heightened pleading standard might affect decisions regarding summary judgment motions or other decisions.

Finally, some commentators who characterize the *Twombly* and *Iqbal* opinions as making a substantial change in the procedural rules argue that it is troubling that the Court effected such a change without formally amending the Federal Rules of Civil Procedure or obtaining congressional approval.[68] Those who view the change as a more modest shift in interpretation are less likely to view the Court's approach as problematic.

Bills Pending in the House and Senate Judiciary Committees

Experts have testified as to *Iqbal*'s legal and practical effects in hearings held by the respective judiciary committees.[69] In addition, as mentioned, two bills pending in the committees would require that the civil pleading standard be interpreted as it was prior to the Supreme Court's decisions in *Twombly* and *Iqbal*.

[66] *Iqbal*, 129 S.Ct. at 1951.

[67] *Id.* at 1960 (Souter, J., dissenting).

[68] Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009 (written testimony of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) at 13-16 (arguing in part that Congress is better situated than the Court to change policies regarding who may access the federal courts). Changes to the Federal Rules of Civil Procedure are typically developed by the Judicial Conference and its committees before being promulgated by the Supreme Court and approved by Congress. *See* notes 3-4 and accompanying text.

[69] Senate Judiciary Committee, *Has the Supreme Court Limited Americans' Access to Courts?*, 111th Cong., Dec. 2, 2009; House Judiciary Committee, Subcommittee on Subcommittee on Courts and Competition Policy, *H.R. 4115, the "Open Access to the Courts Act of 2009,"* 111th Cong., Dec. 16, 2009; House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Access to Justice Denied—Ashcroft v. Iqbal*, 111th Cong., Oct. 27, 2009.

A bill pending in the House Judiciary Committee, the Open Access to Courts Act of 2009 (H.R. 4115), would codify the "no set of facts" standard as articulated in *Conley*. It would expressly prohibit the dismissal of a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief."

A bill pending in the Senate Judiciary Committee, the Notice Pleading Restoration Act of 2009 (S. 1504), would prohibit the dismissal of a complaint for failure to state a claim "except under the standards set forth ... in *Conley v. Gibson*."[70] The extent to which a reinstatement of the notice pleading approach adopted in *Conley* is intended to be tempered by refinements made to the interpretation of *Conley* since it was decided in 1957 is unclear. For example, although the Supreme Court in *Twombly* criticized the *Conley* decision, and in particular rejected the "no set of facts" language, the Court did not expressly overrule *Conley*. Thus, the *Twombly* and *Iqbal* opinions may be characterized as having overruled *Conley* only in part, or as having refined rather than overruled the *Conley* decision. Various Supreme Court decisions from the intervening years likewise cite *Conley* as the controlling precedent but might nevertheless be interpreted as having refined the *Conley* approach, albeit to a smaller degree than in *Twombly*.[71]

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[70] The bill would apply the *Conley* standard both to Rule 12(b)(6) motions to dismiss and to Rule 12(e) motions "for a more definite statement," which is a type of pretrial motion brought to compel a claimant to clarify statements made in a pleading in order that a responsive pleading may be prepared. It is unclear how the *Conley* decision would apply to Rule 12(e) motions. The *Conley* decision mentions Rule 12(e) motions only as one of several examples of pretrial procedures which counterbalance the notice pleading approach.

[71] *See, e.g.*, Papasan v. Allain, 478 U.S. 265, 286 (1986).