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PLEADING FACTS AND ARGUING PLAUSIBILITY: FEDERAL PLEADING STANDARDS A YEAR AFTER *IQBAL*

Few issues are more important in federal litigation than determining whether a case will be dismissed for failure to state a claim or instead slog on into discovery, potential fights over class certification, and beyond. And following the Supreme Court's decisions in *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), few issues have generated as many questions.

In *Twombly*, a seven-justice majority held that a complaint failed to state a claim of antitrust conspiracy when it alleged only parallel conduct, which was at least as consistent with legitimate business activity as with an antitrust violation. In so holding, the Court put into "retirement" the oft-quoted line from its 1957 decision in *Conley v. Gibson* that "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." The *Twombly* Court instead explained that Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include facts (as distinct from legal "labels" and "conclusions") giving rise to a "plausible" (rather than merely "conceivable") entitlement to relief. Two years later in *Iqbal*, the Court confirmed that *Twombly* applies to all civil suits, not just antitrust cases or other complex cases, and by a 5–4 vote rejected a complaint under *Bivens* alleging that, following the 9/11 terrorist attacks, former Attorney General John Ashcroft and FBI Director Robert Mueller unconstitutionally ordered restrictive and harsh detention of certain Arab Muslims.

According to some commentators, *Twombly* and *Iqbal* upended 70 years of federal pleading standards and have dramatically burdened plaintiffs. According to others, the decisions changed little if anything. Academic questions aside, the practical effect of *Twombly* and *Iqbal* is a crucial consideration for litigators drafting complaints or contemplating motions to dismiss. Adding to their uncertainty, practitioners could face another set of questions if Congress acts on deceptively simple bills introduced following *Iqbal* to overturn the decisions.

One year after *Iqbal* apparently solidified the new regime, this *Commentary* examines the real-world effect of *Twombly* and *Iqbal* on dismissals in federal civil cases; analyzes, in light of this effect and indications so far from the lower courts, what factors practitioners should consider at the Rule 12(b)(6) stage; and explains the proposed congressional responses.

UNDERSTANDING THE RESULTS OF *IQBAL* AND *TWOMBLY* SO FAR

The broadest available statistics indicate that, overall, motions to dismiss are not dramatically more likely to be filed or succeed now than before *Twombly* and *Iqbal*. The Judicial Conference of the United States, through the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules, has compiled detailed statistics showing the prevalence and success rate of motions to dismiss in all federal courts dating back to January 2007.[1]

During the four months before *Twombly*, litigants each month filed an average of 17,980 new cases and 6,180 motions to dismiss, and saw 2,360 motions to dismiss granted. Thus, motions to dismiss were filed in about 34 percent of all cases, and (roughly speaking) courts granted 38 percent of the motions filed.

In comparison, during the nine months after *Iqbal*, there was an average of 19,760 new cases filed, 7,340 motions to dismiss filed, and 2,760 motions to dismiss granted each month. Thus, motions to dismiss were filed in about 37 percent of all cases (up 3 percent), and courts granted 37 percent of the motions filed (down 1 percent). Ultimately, defendants won dismissals in about 13 percent of the cases filed during the four months preceding *Twombly* and about 14 percent of the cases filed during the nine months following *Iqbal*, and the slight upward trend for this number has been steady rather than showing a jump immediately after either decision.[2]

It thus seems unlikely that *Twombly* and *Iqbal* have in practice substantially heightened federal pleading standards across the board. On the other hand, the slight increase in the number of motions to dismiss filed, together with a constant rate of success, appears to result in the dismissal of modestly more cases.

There is room for debate and further analysis as to why the numbers show no dramatic change. Perhaps plaintiffs' counsel have made their complaints more detailed or been more selective in the claims they include, or the decisions have not fully "sunk in." But a likely explanation is that *Twombly* and *Iqbal* largely codified the longstanding practice of the U.S. Courts of Appeals.

For example, as *Twombly* itself recognized (quoting, among others, Judge Posner in a 1984 decision of the Seventh Circuit), the Courts of Appeals long refused to take *Conley*'s "no set of facts" language "literally." They also commonly required complaints to "'contain either direct or inferential allegations regarding all the material elements,'" and required those allegations to "constitute 'more than bare assertions of legal conclusions.'" *Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). And they refused to accept "unwarranted inferences" from those allegations. *E.g.*, *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998). The Supreme Court itself had endorsed such practices to some extent, beginning with *Associated General Contractors v. Carpenters*, 459 U.S. 519, 526-28 (1983), as long as lower courts did not adopt specific requirements of heightened pleading for particular kinds of cases.

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1 *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss__042710.pdf.

2 Another study concludes that *Twombly* and *Iqbal* have had a more robust effect. *See* Patricia W. Hatamyar, "The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?," 59 Am. U.L. Rev. 553 (2010). The study was based on a smaller subset of cases, however, and the author coded these based on the authority they cited, which may not be a reliable metric.

Correspondingly, a regularly updated memorandum commissioned by the Judicial Conference, which surveys circuit-by-circuit cases providing analysis since *Iqbal*, both concludes and indicates from the cases themselves that *Twombly* and *Iqbal* worked at most an incremental change in pleading standards.[3] (The memorandum is also a helpful and free resource for parties litigating a motion to dismiss.)

Moreover, well before *Twombly*, some state courts had read their rules of civil procedure to impose pleading requirements strikingly similar to those the U.S. Supreme Court has set out. *See, e.g.*, *Kopelman & Assoc., L.C. v. Collins*, 196 W.Va. 489, 493 (1996) (citing *Conley* but explaining that, "although the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted"); *Read Drug v. Colwill Constr.*, 243 A.2d 548, 553-54 (Md. 1968) (explaining that a complaint must "have sufficient specificity in its allegations to provide facts … to apprise the opposite party of what is meant to be proved" and that "the necessary allegations of fact … in a simple factual situation vary from those in more complex factual situations") (internal quotation marks omitted). Thus, the key principles animating *Twombly* and *Iqbal* appear hardly novel.

But that does not mean that *Twombly* and *Iqbal* changed nothing. Rather, they have clarified and focused for the lower courts the standard governing motions to dismiss, particularly by emphasizing and providing terms for applying the second half of Rule 8's requirement of "a short and plain statement of the claim *showing that the pleader is entitled to relief*." As explained below, these changes not only impact litigants' general approach to motions to dismiss, but also may significantly affect particular cases and issues. Thus, the Judicial Conference's statistics for all cases filed and even various broad subcategories of cases may mask a change that, while only partial, is quite real for practitioners who encounter claims that are complex or otherwise at the margins.

3 *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal%20memo__041510.pdf.

LESSONS FROM A YEAR UNDER *IQBAL* AND *TWOMBLY*

Understanding and Using *Iqbal*'s Formal Framework. *Iqbal* articulates a clear framework for analyzing a motion to dismiss that begins with a threshold inquiry and is followed by a two-step analysis. Lower courts have begun to flesh out the details of this approach.

1. *Confirm or argue the elements of the cause of action.* As a threshold matter, where there is any doubt regarding the scope of an underlying cause of action, *Iqbal* indicates that it is important to "begin by taking note of the elements a plaintiff must plead to state a claim." 129 S. Ct. at 1947. In some cases, a motion to dismiss will focus on the elements, making this point obvious; but where the motion focuses on the facts alleged and their adequacy, parties should not be so distracted by these disputes that they overlook the importance of advocacy regarding the cause of action.

Iqbal's procedural history illustrates this. In its petition for certiorari, the government had conceded that Ashcroft and Mueller "would be liable if they had 'actual knowledge' of discrimination by their subordinates and exhibited 'deliberate indifference' to that discrimination." *Id.* at 1956 (Souter J., dissenting). The Court, however, disregarded this concession, deciding that Ashcroft and Mueller would be liable only if they themselves had "adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 1949 (opinion of the Court). It was under this more stringent standard that the Court held Iqbal's complaint to be inadequate. The Court could well have accepted the government's concession—as the four dissenting justices would have—and disposed of the case without deciding the underlying elements of the *Bivens* cause of action at issue. Had it done so, Iqbal's complaint could well have survived.

2. *Determine the facts that warrant an assumption of truth.* After establishing the legal baseline against which to measure the complaint, a defendant should identify all allegations that it can argue are not "entitled to the assumption

of truth." *Id.* at 1950. Two types of allegations will not warrant such an assumption.

First, courts will sometimes encounter allegations that are simply too unbelievable to be accepted. In such instances, for example where the plaintiff's allegations involve "little green men," *id.* at 1959 (dissent), the defendant may ask the court to disregard the implausible factual allegation. Such cases, usually *pro se*, are not unheard of since *Iqbal*. *E.g.*, *Deyerberg v. Holder*, 2010 WL 2131834 (D. D.C.). (The principle that a court may disregard patently implausible factual claims is distinct from the principle that a complaint will be inadequate if, accepting well-pleaded factual allegations as true, it fails to give rise to a plausible inference of liability.)

More commonly, and as *Iqbal* emphasized, courts should not accept the truth of factual allegations that are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." 129 S. Ct. at 1949. Thus, at the very least, a motion to dismiss should note the areas in which a complaint relies on legal labels instead of subsidiary facts. The first step should be to highlight all allegations containing any legalese (for example, "negligently"), employing or paraphrasing the elements of the cause of action, or otherwise by their terms alleging points of law. Beyond that, the courts have not developed any mechanical analysis to distinguish between well-pleaded factual allegations and "mere conclusory statements." To allege that a defendant "drove negligently" may be a legal label, and to allege that he "drove without looking at the road" may be a well-pleaded fact, but—in between—courts may differ on the status of an allegation that the defendant "drove without paying due attention to the road." Ultimately, however, the task for a defendant at this first stage is to convince the court that as much of the complaint as possible is parroting legal standards rather than referring to case-specific acts or omissions within the plaintiff's knowledge.

A particular issue that arises is how to treat facts alleged based on "information and belief." The Second Circuit has set out what appears to be the developing consensus: "The *Twombly* plausibility standard … does not prevent a plaintiff from pleading facts alleged 'upon information and belief' [1] where the facts are peculiarly within the possession and control of the defendant, or [2] where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, ___ F.3d ___, 2010 WL 1729107, *8 (2d Cir.). Thus, the "information and belief" label is a signal to consider whether the plaintiff has met one of these requirements. A paradigm for the first is when a case turns on the content of records of the defendant. Where a fact is truly within the defendant's exclusive possession, a court may be less likely to find a claim implausible for not alleging that fact. When the second requirement is at issue, it is worthwhile to consider whether the plaintiff has pleaded any of the factual information on which it purports to base its "information and belief" allegation. In either case, plaintiffs still must allege enough underlying facts to allow a plausible inference of liability in the context of their particular claim. *Twombly* itself confirms this, given that the complaint alleged an antitrust conspiracy based on information and belief, but failed because it did not support that allegation with sufficient subsidiary factual allegations.

3. *Assess plausibility.* After identifying the allegations not entitled to an assumption of truth, a defendant must show that the real factual allegations that remain have "nudged [the] claims … across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951. *Iqbal*, following *Twombly*, adds that assessing the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Although the phrase "judicial experience and common sense" has provoked much speculation and criticism, it so far has not proven elusive for the lower courts. They have understandably rejected claims that this phrase authorizes them to recognize additional case-specific facts in ways they could not on a motion to dismiss before *Twombly* and *Iqbal*. *See, e.g.*, *Barkes v. First Correctional Medical*, 2010 WL 1418347, *3 (D. Del.) ("[T]he court may only consider matters incorporated by reference or relied upon in the claims, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits of unquestioned authenticity attached to the complaint."). *Twombly* and *Iqbal* do not suspend Rule 12(d)'s requirement that motions to dismiss relying on facts outside the pleadings be treated as motions for summary judgment.

On the other hand, courts do rely on *Twombly* and *Iqbal* to draw on more general understandings in assessing the plausibility of liability. For example, one district court opined that "common sense and judicial experience … suggest that in ordinary business circumstances, when a service is performed, it is typically accompanied by an itemized bill, particularly when one is requested." *Shinn v. Champion Mortg. Co., Inc.*, 2010 WL 500410, *3 (D. N.J.). Another reasoned that "common sense counsels against inferring that a substantial international bank, bearing an historic name and presumably wishing to maintain a global reputation for integrity and honorable dealing, would, with no stake in the criminal securities fraud itself, and no financial incentive other than to maintain the patronage of a fee-generating client, enter into a conspiracy with two … depositors to defraud investors in the United States." *U.S. v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 326, 342 (S.D.N.Y. 2009).

One particularly common use of "judicial experience and common sense" is to justify courts' imagining obvious, alternative, lawful explanations for the alleged conduct that it considers at least as plausible as an explanation involving illegality. Where such alternative explanations exist, it is less likely that the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1950. *Twombly* directly endorsed this practice by discounting the likelihood of an antitrust conspiracy because, in light of industry history and "the considered view of leading commentators," the parallel conduct alleged had an "obvious alternative explanation." The Supreme Court reasoned that the parallel conduct was "consistent with … a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Iqbal* employed a similar approach (without reliance on commentators) with regard to the nature of the 9/11 attacks. Thus, while a defendant in opposing a motion to dismiss still may not introduce its own facts to support its theory of the case, it may challenge the plaintiff's theory by invoking "obvious" alternative explanations for the alleged facts that rest on broader background knowledge and understandings.

Informal Considerations Under *Iqbal* and *Twombly*. Beneath the formal analysis described above are a set of informal considerations, which after *Twombly* and *Iqbal* have become increasingly important in litigating a motion to dismiss. While *Twombly* and *Iqbal* have formalized the analysis of 12(b)(6) motions significantly, they have by no means eliminated the discretion inherent in deciding one. To the contrary, a court will rely on substantial judgment and intuition in distinguishing between facts and conclusions as well as in determining whether the facts alleged create a plausible inference of liability.

Most generally, and as already suggested, lower courts applying *Twombly* and *Iqbal* exercise this discretion differently depending on the circumstances, dismissing as conclusory a greater number of factual allegations or taking a more stringent view of the facts required to create plausibility where the case raises special concerns. The Seventh Circuit, for example, has said so explicitly since *Iqbal*: "This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid *pro se* litigation, … and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility." *Cooney v. Rossiter*, 583 F.3d 967, 971 (2009) (Posner, J.). The Third Circuit similarly has observed that "[c]ontext matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case…." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (2008).

Again, the Courts of Appeals are credibly drawing on the Supreme Court's decisions. In *Twombly,* the Court explicitly noted the difficulty of inferring a conspiracy based on mere allegations of parallel conduct and also pointed to the costs and risk of abuse associated with antitrust discovery. Similarly, in *Iqbal*, the Court emphasized the hazards of subjecting high-ranking governmental officials to the distraction and invasiveness of civil litigation based on minimal allegations.

This "sliding scale" phenomenon helps explain the apparent contradiction some have noted between the pleading requirements described in *Twombly* and *Iqbal*, on the one hand, and the pleading forms adopted pursuant to Federal

Rule of Civil Procedure 84, on the other. Treating *Twombly* and *Iqbal* as imposing a uniform requirement of heightened factual pleading, some courts have suggested that the decisions are inconsistent with the standardized forms. *See, e.g.*, *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, *2 (N.D. Cal.) ("It is not easy to reconcile Form 18 [for patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a 'short and plain statement,' it offers little to 'show' that the pleader is entitled to relief.").

The forms, however, address relatively straightforward allegations such as claims for money owed, the routine negligence of a car crash, or direct patent infringement. *See, e.g.,* Fed. R. Civ. P., Appx., Form 10 ("The defendant owes plaintiff $____ according to the account set out in Exhibit A"); Form 11 ("On date at place defendant negligently drove a motor vehicle against plaintiff"); Form 18 (alleging that plaintiff owned a particular patent and that defendant infringed the patent by making, selling, and using a particular product). Because such claims lack the attributes that would call for a more stringent plausibility analysis, the minimal factual allegations included in a genuinely applicable form would likely suffice under the context-specific approach of *Twombly* and *Iqbal*.

Indeed, *Twombly* itself suggested that pleadings based on what is now Model Form 11 would be adequate because the form "alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time." 550 U.S. at 565 n.10. Likewise, courts continue to hold that a complaint of direct patent infringement properly alleged on Form 18 states a claim, while also concluding that more complex claims of indirect patent infringement fall outside the scope of Form 18 and require additional factual allegations. *See, e.g., Eolas Tech., Inc. v. Adobe Systems, Inc.*, 2010 WL 2026627, *2-3 (E.D. Tex.) (holding that a patent infringement properly alleged on Form 18 will state a claim); *Halton Co. v. Streivor, Inc.*, 2010 WL 2077203, *3 (N.D. Cal.) (suggesting that claims for direct patent infringement may be brought under Form 18, but that claims for indirect patent infringement, which require intent, may not). Thus, the level of factual support required increases as proof of the claim grows more difficult and complex.

Under this view, a key task for a defendant, in addition to marshaling complaint-specific arguments under *Iqbal*'s formal framework, will be to emphasize every facet of the case that would warrant a more stringent application of the plausibility standard. A defendant could accomplish this task in several ways.

First, a defendant might suggest, where appropriate given the nature of the case, that the plaintiff's claim is meritless or abusive. *Cf. Cooney*, 583 F.3d at 971 ("This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid *pro se* litigation, arising out of a bitter custody fight.…").

Second, *Twombly* and *Iqbal* invite defendants to support their motions to dismiss by highlighting the difficulty of inferring liability in the type of case at issue, the costs of discovery, and the risks of abusive lawsuits associated with the type of case. Such arguments may be particularly promising in antitrust, employment discrimination, securities litigation, and indirect patent infringement cases, as well as in cases involving class actions and allegations of conspiracy or, under RICO, of an "enterprise-in-fact," a predicate act that requires a mental state and does not involve fraud, or a "pattern." *See*, *e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010) (in RICO case, holding two types of predicate acts adequately pleaded and two others—one requiring knowledge, and another involving a conspiracy—not); *McCullough v. Zimmer, Inc.*, 2010 WL 2178554, *4, n.8 (3d Cir.) (questioning viability of pre-*Twombly* circuit precedent allowing plaintiff merely to allege existence of enterprise, rather than pleading its essential attributes); *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179, 183-84 (D. Conn. 2009) (dismissing disability-discrimination complaint because the facts alleged made it "possible, but not plausible" that the employer knew the plaintiff was disabled as opposed to merely injured).

Finally, while many of the above arguments can be made indirectly by carefully crafting the factual section of a motion to dismiss, parties in certain jurisdictions may consider arguing explicitly that the relevant context should call for a heightened degree of factual specificity. *See, e.g., Cooney*, 583 F.3d at 971 ("In other words, the height of the pleading requirement is relative to circumstances").

Secondary Implications of *Twombly* and *Iqbal*. While commentators have understandably focused on the implications of *Twombly* and *Iqbal* for motions to dismiss, the cases and early indications from lower courts also support two related arguments.

First, defendants should have greater success in obtaining a stay (or at least a limitation) of discovery pending adjudication of a motion to dismiss, given that a central rationale of *Twombly* and *Iqbal* is that dismissal, rather than a mere "careful-case-management approach," *Iqbal*, 129 S. Ct. at 1953, is the proper approach to containing the cost of discovery on implausible claims. This should be particularly true in complex cases. *See, e.g.*, *Wagner v. Mastiffs*, 2009 WL 5195862, *1 (S.D. Ohio) ("[G]iven the nature of antitrust allegations as noted by *Twombly* and numerous other decisions, the Court cannot find that the burden faced by the defendants in proceeding with discovery on the antitrust claims set forth in the amended complaint would be insignificant"); *Coss v. Playtex Prods., LLC*, 2009 WL 1455358, *2 (N.D. Ill.) (citing *Twombly* and *Iqbal*, allowing only two interrogatories that defendant admitted it could answer without much difficulty, and noting that "the policy against burdensome discovery in complex cases during the pendency of a motion to dismiss holds fast").

Some courts may be reluctant to stay discovery where they believe a case will inevitably proceed beyond the 12(b)(6) stage, whether because of an amended complaint (which courts are more likely to allow) or a mere partial dismissal. Even in this situation, however, a defendant may argue that a stay would avoid the wasteful discovery described in *Twombly* and *Iqbal* by delaying factual development until it is governed by a more focused and particularized complaint. Such arguments will necessarily depend on the defendant's promptness in bringing its 12(b)(6) motion, notwithstanding that Rule 12(h) allows a defendant to do so even at trial.

Second, while *Twombly* and *Iqbal* both noted that cautious case management was not sufficient to justify discovery on implausible claims, they hardly discouraged such management for claims that were adequately pleaded. To the contrary, the costs of discovery remain at least as relevant as before those decisions, if not more so. These costs can be cited as support for narrower discovery rulings, and the more specific complaints that *Twombly* and *Iqbal* should encourage may assist in such arguments.

LOOKING AHEAD: RUMBLINGS FROM CONGRESS

In response to objections that *Twombly* and especially *Iqbal* have closed the federal courts to worthy plaintiffs, legislators have introduced bills in both the House of Representatives and the Senate with the stated goal of reinstating the pleading standards in effect before the decisions. Although the bills purport merely to undo *Twombly* and *Iqbal*, whether they would simply do this is a serious question, one that highlights the extent to which, as discussed above, *Twombly* and *Iqbal* built on existing judicial practice.

The House Bill, the Open Access to Courts Act (H.R. 4115), would impose a literal reading of *Conley* by providing that "[a] court shall not dismiss a complaint under [Rules 12(b)(6), 12(c), or 12(e)] 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." The bill would also bar dismissal based on implausibility or lack of facts sufficient "to warrant a reasonable inference that the defendant is liable for the misconduct alleged." By its terms, the bill would allow a plaintiff to proceed to discovery simply by naming a cause of action and alleging that a defendant is liable under it. Moreover, a court would be prohibited from dismissing even the most incredible and unsubstantiated claims under Rule 12—including those involving "little green men" or conspiracies among high-ranking government officials. Given that lower courts never took *Conley* literally, H.R. 4115 could relax pleading standards to a level not previously seen. Moreover, its broad terms apply unless "otherwise expressly provided" by *subsequent* statute or amendment of the Federal Rules of Civil Procedure, which calls into question such specialized pleading standards as Rule 9(b)'s requirement of particularized pleading for fraud, the Private Securities Litigation Reform Act, and the Prisoner Litigation Reform Act.

The House bill was introduced in November 2009 and had 33 cosponsors as of the end of May 2010. But the subcommittee to which it was referred has taken no action on it, apart from holding hearings in late 2009.

While more ambiguous than the text of H.R. 4115, the language of the Senate Bill, the Notice Pleading Restoration Act (S. 1504), could have a similar effect. It provides more simply that "the Federal Courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." Courts might interpret S. 1504 against the reality that *Conley*'s "no set of facts" language has never been taken "literally," and thus continue to dismiss claims lacking sufficient factual allegations to create a plausible inference of liability. But given that that is precisely the approach of *Twombly* and *Iqbal*, and that S. 1504, if read as allowing for the approach of those cases, would have no obvious purpose, courts might interpret S. 1504 as equivalent to H.R. 4115. Thus, the Senate bill too might produce a pleading standard not previously known in practice. And it too could well repeal longstanding specialized pleading requirements.

The Senate bill was introduced in July 2009 by outgoing Senator Specter. It has only two cosponsors, and the Senate Judiciary Committee has taken no action on it.

CONCLUSION

Despite the common impression of *Twombly* and *Iqbal* as revolutionizing federal pleading standards, the evidence one year after *Iqbal* suggests that the cases are best seen as codifying and focusing longstanding practice. Based on indications so far from the lower courts, many motions to dismiss in routine cases will continue to fail. But where the context of a case suggests a particular burden on the courts or defendants, or particular reasons to doubt a claim, *Twombly* and *Iqbal* provide a clear framework and litany of concerns that should assist a defendant in obtaining dismissal.

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