



Iqbal and Settlement

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I. INTRODUCTION

The Supreme Court’s decision in *Iqbal*¹ was good news for defendants. By increasing the scrutiny with which a plaintiff’s complaint is to be examined, the “plausibility” standard articulated by the Court makes motions to dismiss a more potent tool.

A nearly implausible amount of scholarly ink has already been spilled in an endeavor to answer descriptive, predictive, and normative

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1. In an entire symposium issue devoted to the opinion, I am not positive that I need to provide a citation to the case. Nevertheless, as insurance against the prospect that I might be stricken down by the Bluebook gods, here it is: *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

questions about *Iqbal*.² What does the plausibility standard really mean? How much of a change does this represent? Who will be most affected? And are those changes wonderful, awful, or something else? The sky either is or is not falling on some or all of us, according to *Iqbal* analysts.

Much of what has been written about *Iqbal* has been written from the perspective of litigation, and that is perfectly sensible. After all, *Iqbal* is a decision about Federal Rule of Civil Procedure 8, at its heart. Questions of access to the court and defenses like immunity are bread and butter Civil Procedure topics. Of course many of those who have commented on the case do so from a litigation perspective.

As Nancy Welsh suggests, however, the realities of modern litigation present another frame through which to assess *Iqbal*—that of settlement dynamics.³ My question is not whether *Iqbal* will have this or that effect on litigation. My question is whether *Iqbal* will create a change in disputants' conversations about settlement.

We live in an age of settlement.⁴ I do not suggest that private settlement is the only, or even the most important, forum in which changes to pleadings rules might have effects. But an enormous percentage of litigated cases are resolved through consensual processes.⁵

2. As of April 2010, less than one year after the Supreme Court announced the *Iqbal* decision, Westlaw is already reporting several dozen journal and law review articles with *Iqbal* in the title, and 199 articles in which the case is discussed. This symposium's contributions are not included in that count.

3. Nancy Welsh, *I Could Have Been A Contender: The Potential Effects of Twombly and Iqbal on Pre-Litigation Negotiation and Other Forms of Early, Consensual Dispute Resolution*, 114 Penn St. L. R. 1149 (2010).

4. For other examples of scholars describing fluctuations in procedural tendencies as though they were geologic eras, see Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1774 (1997) ("There is little doubt that the Age of Litigation is in the process of being succeeded by the Age of Mediation, or at least the Age of Settlement."); Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L. J. 727, 747 (2005).

5. Trial rates have undoubtedly declined. See ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 12 (2001) (citing a decline in trial rates from 20% in 1938 to 3% in 1995); Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 LAW & SOC. INQUIRY 789, 797 (2000) (showing that fewer than 3% of state court cases involving at least one business even reached the beginning of trial in 1987–88); Marc S. Galanter & Mia L. Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–42 (1994). Although it is relatively easy to study the rates at which legal complaints are resolved by trial, settlement rates are comparatively less easy to study. Not all cases that terminate before trial are examples of settlement. Mr. *Iqbal*'s complaint provides a vivid illustration of this point.

Much of the negotiation dynamic between litigants is shaped by each party's expectations about the risks and opportunities litigation presents. *Iqbal*, therefore, affects settlements.

This brief essay explores the impacts *Iqbal* might have on settlement. It builds on the observations of Nancy Welsh, many of which I would say I "share," except that to do so would imply that I am inappropriately claiming partial credit for her good ideas. Instead, I will raise three questions related to those she articulates:

Will *Iqbal* cause a change in the likelihood that lawsuits will settle?

Will *Iqbal* cause a change in the timing of settlements?

Will *Iqbal* affect the quality of settlements?

For those inclined not to read through the rest of even this uncharacteristically brief essay, my tentative conclusions are Not Much, Yes, and Probably.

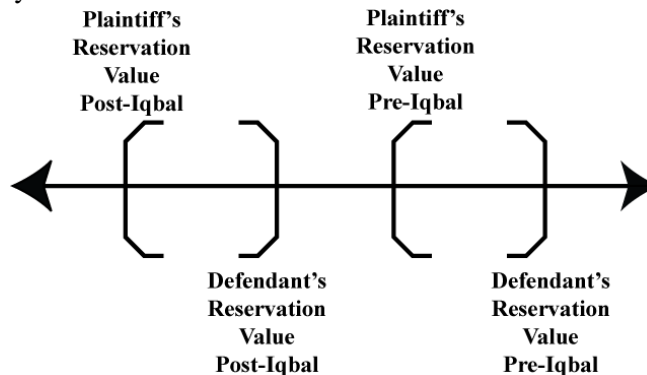
II. IQBAL AND SETTLEMENT RATES

The most conspicuous question about settlement is typically one about rates of settlement. The mechanism by which a case ends is important, and settlement rates are relatively easy to measure. So perhaps the most basic settlement-related question one might ask about *Iqbal* is whether the decision will change the frequency with which litigants (or disputants⁶) settle cases.

A simple (and probably unhelpfully simplistic) economic model of litigant decision-making would suggest that *Iqbal* will have no impact on settlement rates. According to this view, the change in pleading standards resulting from *Iqbal* represents shared information. Plaintiffs know and understand the case and its implications in the same way defendants know and understand it. Each will adjust its litigation expectations equally. That is, both will recognize that the expected value of a plaintiff's claim is decreased by some factor as a result in *Iqbal*. The

6. Professor Welsh draws our attention to the work of Bill Felstiner and his colleagues, correctly pointing out that not all wrongs "ripen" into legal claims. Welsh, *supra* note 3 (citing Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC'Y REV. 631 (1981)). I know of no empirical examinations of settlement trends in which the population is people who have been wronged, or even people who have blamed some identifiable "other" for the harm in question. Every study of which I am aware studies those who have already taken the step of filing a claim. For purposes of this article, therefore, I speak in terms of "litigants," with recognition that the universe of "disputants" is almost certainly larger.

result is that although each side's settlement reservation values (at the time before any motion to dismiss has been filed) will shift following *Iqbal*, they will shift in unison.



As a result, according to this view, even though settlement amounts may shift, settlement itself will be no more or less likely than it was pre-*Iqbal*. Either a zone of possible agreement exists, or it does not.

This simplistic economic model of settlement suffers from at least two shortcomings,⁷ each of which leads me to suspect that *Iqbal* may cause at least a modest decrease in settlement rates.

First, this analysis incorrectly assumes that litigants believe dollars are dollars, in a linear and undifferentiated sense. Instead, at least up to a certain point, most people value incremental dollars differently. For example, I am confident (and am perfectly willing to volunteer for a real-life test to demonstrate) that I would value an incremental million dollars more than Bill Gates would. Or, more plausibly, if I need \$X to cover my medical treatment, I am pretty sure that I would attach greater weight to getting those first dollars, from \$0 to \$X, than I would to getting an equal number of dollars after \$X. If *Iqbal* were to reduce my expected return from litigation to something below \$X, on average, there is at least a reasonable chance that I would be *less* likely to settle my case for some “reasonable” probability-adjusted amount. If settling for a discounted amount would yield less than \$X, I might rationally decide to go ahead and litigate because litigation at least gives me a chance of getting what I

7. A third potential shortcoming of this model is its assumption of rationality on the part of disputants. Given our propensity to suffer from the psychological phenomenon known as optimistic overconfidence, plaintiffs and defendants will probably ascribe different probabilities to a 12(b)(6) motion's likelihood of success. As a result, the zone of possible agreement may actually shrink, because of the added chance factor.

need (something equal to or greater than \$X). This is a long-winded way of illustrating at least part of what Nancy Welsh describes as the likelihood of *Iqbal*'s differential impacts on populations based on socioeconomic disparities.⁸ In brief, *Iqbal* might make settlement less likely in cases involving litigants with considerably disparate resources.⁹

The second problem with the basic economic model above is that it ignores the variables buried in the calculation of settlement rates. Some percentage of the cases filed today would have survived a motion to dismiss in a pre-*Iqbal* world but will no longer survive a motion to dismiss. I do not know how many such cases exist. I suppose that Mr. Iqbal's case makes one, although in his defense, he did not know about the *Iqbal* pleading standard when he chose to file his lawsuit. Perhaps today he would not even file the case, or perhaps he would file it differently. I do not have enough creativity or enough sophistication in research design to know how to figure out how many cases will be directly affected by the *Iqbal* decision. My strong suspicion, however, is that Mr. Iqbal will not be alone in being dismissed under this standard. It seems almost certain that at least *some* of the cases that will today be filtered at the pleadings stage under an *Iqbal* standard would have been resolved by settlement in a pre-*Iqbal* world. I see no reason to assume that the cases *Iqbal* will filter were all destined to be resolved by adjudication later in the course of litigation.¹⁰ Post-*Iqbal*, these would-have-been settled cases are all dismissed, rather than settled. That means that the settlement rate numerator is lower, without any decrease to the denominator. As a result, the settlement rate goes down.

Nevertheless, two things dampen my enthusiasm for my own conclusion that settlement rates will decrease:

8. See Welsh, *supra* note 3.

9. I leave the prospect of legal shenanigans out of this equation. Some defendants with greater resources may, Rule 11 notwithstanding, challenge the sufficiency of pleadings merely because doing so will create increasingly unbearable burdens (in the form of litigation costs) on comparatively less rich plaintiffs. This is the corollary to the idea of settling nuisance suits merely in order to avoid the threatened costs of litigation—a vision articulated by Justice Souter in the *Twombly* opinion that preceded *Iqbal*. See *Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007).

10. Supporting this assertion is the fact that Mr. Iqbal had a co-plaintiff at the time he filed his original complaint. After the trial court ruled on the defendants' motion to dismiss, the government settled Mr. Ehab Elmaghraby's claims for \$300,000. See *Petition for Writ of Certiorari, Hasty v. Iqbal*, 2007 WL 4466875, at *6 n. 6 (No. 07-827); *Brief in Opposition to Certiorari*, 2008 WL 1803446, at *3 n.4 (No. 07-827).

First, predictions against the wave of settlement have been fools' bets over the last half century. Trial rates have decreased consistently for at least the past several decades, and perhaps even longer.¹¹ Our court procedures and structures aim to encourage settlement in a number of ways. We now have robust Rule 16 conferences, court-administered ADR programs, offer of judgment statutes, and ethical obligations for attorneys to advise clients about settlement.¹² Contingent attorney fee arrangements on the plaintiff side create an incentive for early settlement, and the increasingly high costs of litigation create an incentive for defendants paying an hourly attorney fee to settle. Much in the current system suggests that the settlement barge will be slow to turn, if it turns at all.

Second, *Iqbal* may have an effect on the number of cases *filed*. That is, anticipating the difficulty of surviving a 12(b)(6), some parties may simply not bother.¹³ Might *Iqbal*'s effects be most pronounced at the pre-complaint stage? Might some number of would-be plaintiffs decide not to pursue an action because they believe they would be immediately dismissed? Some cases are plainly going to survive any reasonable pleading standard. Such cases will be filed at the same rate post-*Iqbal* as pre-*Iqbal*. They will *always* be filed. Some cases are plainly going to be so meritless and unarticulable that they would fail under any pleading standard. Pleadings standards are irrelevant to these cases as well. It is the cases in the grey area that might be affected. And if we see more of these *not filed* post-*Iqbal*, even though they would have been filed pre-*Iqbal*, then the denominator will shrink. And as a result, the rate of settlement would actually increase even if we had the same absolute number of settlements.

Some years from now, I suspect that we will see formal studies of settlement rates in the post-*Iqbal* era. I cannot currently easily imagine how the study authors will isolate the effects of *Iqbal*, as opposed to the myriad other influences on settlement decisions. If the study authors are able to isolate the effects of *Iqbal*, however, I suspect that the study will indicate that *Iqbal* caused settlement rates to decrease modestly.

11. See *supra* note 5.

12. For a concise and helpful summary of the formal relationships between courts, attorneys, and dispute resolution, see MICHAEL L. MOFFITT & ANDREA K. SCHNEIDER, DISPUTE RESOLUTION: EXAMPLES AND EXPLANATIONS 201-246 (2008). For an example of a self-congratulatory law review footnote, see *supra* note 12.

13. See Welsh, *supra* note 3.

I do not, however, think that settlement rates are the place where *Iqbal* is likely to have its greatest impact on settlement. Instead, I think *Iqbal*'s lasting impacts will be visible in the timing and the quality of litigants' settlements.

III. IQBAL AND THE TIMING OF SETTLEMENTS

Iqbal matters, in part, because it governs the treatment of a dispositive motion at the earliest possible time during a lawsuit. Prior to *Iqbal*, many defendants had begun to view early settlement opportunities as attractive. By expanding the availability of 12(b)(6) dismissals, the Court may change defendants' calculations regarding not only the attractiveness of settlement, but also the attractiveness of even engaging in settlement discussions early in the life of a case.

Nancy Welsh makes this point vividly in her article in this symposium:

Imagine now, though, that you are in a different role. You are an institutional defendant, who faces a potential suit brought by just the sort of plaintiff who must access the courts in order to achieve vindication. What if you know that you can find out very quickly whether you must deal with this plaintiff's threats of discovery and public trial, *even before you are required to file an answer, make the initial disclosures required by Rule 26(a) of the Federal Rules of Civil Procedure, or permit wideranging discovery?* And what if you also know that the court is likely to share your worldview and thus will likely dismiss this plaintiff's action before she has a chance to tell her (possibly dramatic and heartwrenching) story? *Now*, would you offer to engage in pre-litigation negotiation or mediation with such a plaintiff?

. . . I fear that a coldly rational institutional defendant would *not* make the offer to negotiate and would not respond favorably to such a request from this sort of plaintiff¹⁴

Our emerging understanding of disputants' decision-making processes supports the fear Professor Welsh articulates. The

14. Welsh, *supra* note 3.

psychological phenomenon of “loss aversion” is common among those of us who are not Vulcans.¹⁵ Because of loss aversion, most of us are reluctant to accept a certain loss or to relinquish a certain gain. When I illustrate this with my classes, I ask them to choose one of the two following options:

A. You win \$200.

B. You have a 1/3 chance of winning \$600.

Most students choose A. The remainder of the class population typically tries to fight the hypothetical by improperly choosing “both of the above” or something similar. I then ask them to choose one of the following two options:

C. You lose \$200.

D. You have a 1/3 chance of losing \$600.

Once forced to choose, most students opt to roll the dice with choice D. In each case, the expected payouts are identical, but my overwhelming experience is that the popular choices are A and D. Loss aversion provides at least one explanation for those outcomes. Most of us prefer not to relinquish a certain gain (choice A) or accept a certain loss (choice C). In fact, when I run this exercise, I sometimes fiddle with the payouts so that there is a “correct” economic choice. Even if I make choice A “You win \$150,” or choice D “You have a 1/3 chance of losing \$800” the vote choices and distributions remain largely the same.¹⁶

The combination of *Iqbal* and loss aversion makes it easy to see why Professor Welsh may be right in articulating a fear that defendants will delay settlement. From the defendant’s perspective, settling looks very much like choice C. Unless the defendant (or the defendant’s attorney or a mediator) has done a really good job of reframing the defendant’s choice, settlement typically looks like a certain loss. Defendants might easily conceive of their choice immediately upon receiving a complaint as:

E. You pay the plaintiff \$X.

F. You have a Y% chance of succeeding on a motion to dismiss and therefore owing the plaintiff nothing, and you have a chance of owing the plaintiff more than \$X down the road.

Assuming defendants have a psychology roughly like that of most human beings, it will be difficult for them to accept a certain loss (in the form of

15. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

16. Law students’ “math aversion” may provide an alternative explanation to that of “loss aversion.”

settlement) when they are faced with at least a chance of owing nothing (through the vehicle of a motion to dismiss).

We do not even need to assume that defendants are as non-rational as the rest of us to see that *Iqbal* is likely to cause a delay in the average defendant's decision to engage in settlement talks. Filing a motion to dismiss is quite inexpensive. Drafting the motion itself takes very little time and requires very little research. The motion does not depend on extensive discovery. Indeed, because it is theoretically a challenge to the sufficiency of the pleading, rather than to the sufficiency of the evidence, there is often no extraneous information involved in a motion under 12(b)(6).¹⁷ Furthermore, filing a motion to dismiss extends the timeline under which a defendant must engage in more costly activities like drafting a responsive pleading or providing initial disclosures under Rule 26(a). And as an added bonus to at least some defendants, it creates another cost or barrier to the plaintiff.¹⁸ Even if *Iqbal* does not significantly increase the likelihood that motions to dismiss will be granted, any incremental increase in the likelihood of success would cause an even greater percentage in the likelihood that such motions will be filed.

Of course, defendants do not necessarily need to make a binary choice between filing a motion to dismiss and engaging in settlement talks. Like my clever law students who want it both ways, a defendant could simultaneously pursue settlement conversations and dispositive motions. I suspect strongly, however, that defendants would be reluctant to engage in settlement talks in any meaningful way until they have received a preliminary decision from the court. Intuitively, it makes sense that a defendant would fear agreeing to settle for \$Z before knowing whether the court would have granted the 12(b)(6). "If only I had waited . . ." one can imagine the anguished defendant thinking to herself late at night, staring up at the ceiling, contemplating the settlement she just approved.

17. In fact, the incentives to pursue a 12(b)(6) motion are so strong under the *Iqbal* standard that I almost wonder how a defense attorney could justify *not* filing one in a case.

18. Again, I am not making any empirical claim about the frequency with which attorneys violate Rule 11's admonition against presenting motions in order to "needlessly increase the cost of litigation." FED. R. CIV. P. 11. Modern litigation is such that resource disparities and the prospect of "outlasting" the other side are sometimes considerations.

Professor Welsh suggests that *Iqbal* may cause defendants to delay settlement talks, and I think she is probably right. I can imagine three possible effects from delaying settlement talks:

(1) Delayed talks may delay settlement. This one seems the most intuitive. If parties do not start talking until later on, they are likely not to settle quite as quickly. Now, perhaps there is some Zen sense in which parties need to go slowly in order to go quickly. My experience is that settlement takes time. Starting later seems likely to mean settling later.

(2) Delayed talks may decrease the likelihood of reaching a settlement. Nothing in the litigation process endears parties to one another. It is more likely that by delaying settlement talks, defendants would be making plaintiffs less amenable to settlement. An offer a plaintiff would have accepted at the outset of litigation may be unacceptable for emotional or psychological reasons later on, even if nothing during the course of litigation changed the plaintiff's expectations about litigation risks and opportunities.

(3) Delayed talks may change the *nature* of the settlement the parties reach. It is this third possibility about which I am most concerned and to which I turn in the final section of this essay.

IV. *IQBAL* AND THE QUALITY OF SETTLEMENTS

My real concern is not about settlement rates or even really about timing. My real concern is about the *quality* of settlements. I could be perfectly happy with lower settlement rates and with settlements occurring later in the cadence of litigation—but only if those two effects were accompanied by a corresponding increase in the quality of the settlements themselves. Instead, I fear that *Iqbal* will make settlements worse.

Settlement can provide an opportunity for disputants to arrive at outcomes that capture greater value than any zero-sum outcome would provide. The modern litigation system, however, makes the search for such value-creating outcomes more difficult. The challenges begin with our pleading system. As I have written elsewhere,

Negotiation best practices counsel disputants away from virtually every one of the effects of pleadings. Problem-solving theorists advise jointly constructing a multi-factored, complex vision of the past. Pleadings demand the opposite. Emotional and non-rational aspects of bargaining take center stage in much negotiation literature. Pleadings

suggest scrubbing problems of all such considerations. Theorists argue that complex, systematic problems are best addressed when every affected party gains a fuller understanding of the contribution systems at play, so that a long-term solution can be crafted. Pleadings focus the inquiry on blame allocation, with “contribution” treated as merely a matter of proportional blame. Negotiation advice consistently recommends maintaining a focus on the future, rather than on the past. Pleadings speak only of the past, with the exception of assertions of entitlement going forward. Classic negotiation theory advises considering underlying interests, ongoing relationships, and multiple possible options, as a means of jointly creating an efficient resolution to the problem. Pleadings limit considerations according to legal relevancy, making integrative adjudicated outcomes virtually impossible. A negotiation specialist charged with designing a difficult-to-resolve problem could scarcely do better than to impose the problem-definition conditions created by pleadings.¹⁹

In making these observations, I urged that we reconsider the assumption that pleadings need to occur at the very outset of litigation. What if parties’ first steps involved something else, like talking to each other? Might we see more (and better) solutions than those that are crafted only after disputants experience the effects of pleadings?

Not all settlements contain value-creating trades. Instead, they are zero-sum in the sense that the dollars go either to you or to me, and everything you get is something I lose. However, even in one of the rare²⁰ circumstances in which a piece of litigation is all about the money, the timing of a settlement still makes a difference. Delayed settlements are value-destroying when compared with settlements that occur earlier in the process, even if the terms of the settlement are identical, because of opportunity costs and transaction costs. A plaintiff would prefer to receive a \$1M settlement today, rather than a \$1M settlement a year from today. A defendant would prefer to pay \$1M today, rather than pay \$1M plus all of the unrecoverable litigation costs it would incur over the next year.²¹ Preventing transaction costs and capitalizing on the time value of

19. Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L. J. 727, 747 (2005).

20. I know of no empirical studies measuring the frequency with which settlements contain only monetary, zero-sum terms. For a practitioner’s anecdotal assessment of the infrequency of such settlements, see Steven L. Schwartz, *The Mediated Settlement: Is It Always Just About the Money? Rarely!*, 4 PEPP. DISP. RESOL. J. 309 (2004).

21. This assumes that the defendant is not engaged in an abnormally lucrative ponzi scheme that would produce an extravagant return on its money over the course of that year.

money represent important, and common, mechanisms by which negotiators find value even in those disputes that present conspicuously distributive issues.

Many settlements include non-zero-sum components by capitalizing on the possibility of value-creating trades. The plaintiff and defendant recognize that they have different time horizons and structure payments over time. They realize they have different predictions or risk tolerances and craft contingent agreements. They have different priorities and trade one issue for another in ways that make each happier than would be possible with split-the-difference outcomes. They discover that they have different resources or capabilities and create deals that contemplate even more complex exchanges. They identify shared expenses and find ways to take advantage of economies of scale. The economic and negotiation literature is filled with analysis of such exchanges,²² and they happen in the real world every day.

Researchers have documented our psychological bias toward mistakenly assuming too frequently that negotiations are about dividing a fixed pie.²³ In some ways, this view is self-fulfilling and so we are not likely to learn that our assumption was wrong. If I go into a negotiation assuming it is zero-sum (and it was not necessarily so), I am quite likely to act in ways that will *cause* it to be zero-sum.²⁴ And after the negotiation, I am likely to be proud of myself for having done such a good job of getting a big slice of the fixed pie. (“See, the deal was just about money. I *told* you there were no opportunities to make the pie bigger.”) Most aspects of litigation exacerbate this tendency toward assuming a fixed pie. Litigation is designed to produce a winner and a loser. It is designed to focus attention on a singular possible remedy

22. See, e.g., DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986); ROBERT H. MNOOKIN, ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Michael Moffitt, *Disputes as Opportunities to Create Value*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 173-188 (Michael L. Moffitt & Robert C. Bordone eds., 2005); Robert C. Bordone & Michael L. Moffitt, *Create Value Out of Conflict*, 9 *NEGOT. NEWSL. HARV. PROGRAM NEGOT.* 1 (2006).

23. See, e.g., Max Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 52, 54-55 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing “the mythical fixed-pie” phenomenon in psychology).

24. Value creation almost always depends on one or both of the parties disclosing information. Trades occur precisely because one or both of the parties recognizes an opportunity. If I believe the negotiations are zero-sum, I am likely not to disclose any information, out of a fear of being exploited. And as a result, value-creating trades are less likely to emerge. It may not take two to tango, when it comes to value creation. But if only one side is engaged in the enterprise, they will need to be very skillful, very strong, or both.

(injunction) or remedial currency (almost always dollars). I would expect that the longer litigants are engaged in litigation, the more they view their circumstances in zero-sum terms.

By extending the time before which parties engage in meaningful settlement conversations *and* by increasing the attention paid to pleadings, the *Iqbal* decision risks making it even harder for disputants to arrive at wise, efficient, or creative settlements.

V. CONCLUSION

None of us can yet be certain about the nature and scope of *Iqbal*'s impacts. Most of us in the legal academy are likely to look for impacts in judicial decisions and scholarly examinations thereof. Nowhere in the Supreme Court's *Iqbal* decision did any member of the court mention anything about settlement negotiations. The question of settlement did not come up during oral argument at the Supreme Court. None of the lower court opinions opined about the impacts of pleadings rules on settlement. With the exception of passages acknowledging that the government reached a settlement with Mr. Iqbal's co-plaintiff, none of the amicus briefs even talked about settlement. Nevertheless, I wonder whether *Iqbal*'s greatest impacts will be relatively less visible to outside observers—particularly those who focus on judicial applications of the pleading standards.

In this age of settlement, *Iqbal*'s impacts on settlement could be profound. *Iqbal* may reduce the percentage of cases that are resolved consensually. *Iqbal* is likely to mean that settlement conversations will happen later in the course of litigation. And most disturbingly, *Iqbal* may mean that the quality of settlements will diminish. I hope none of those developments comes to pass. I think each is at least plausible.