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IQBAL, TWOMBLY, AND WHAT COMES NEXT: A SUGGESTED EMPIRICAL APPROACH

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The Supreme Court's opinions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] have triggered a lively and heated debate over the federal threshold pleading standard. This debate is far from new. Distilled to its essence, the fundamental issue presented by this debate—the ease with which a claimant may nudge open the doors of a federal court—is the same issue that has been debated since well before the adoption of the Federal Rules of Civil Procedure.[3] And we think it is safe to say that this issue will continue to be debated long after the dust settles on the current eruption.

As is typical of many policy debates, the debate over the merits and demerits of *Iqbal* and *Twombly* has been characterized by almost as much heat as light. Opponents of the decisions contend the decisions have the effect of closing federal courthouse doors to claimants with meritorious claims; they decry this assault

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1. 550 U.S. 544 (2007).
2. 129 S. Ct. 1937 (2009).
3. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437–38 (1986) (reviewing pre-Federal Rules history of pleading standards).

on fair access to the courts. No less dramatic is proponents' contention that the decisions are a necessary safeguard against an onslaught of frivolous claims cooked up by plaintiffs' lawyers to pry open courthouse doors so they can use discovery as a weapon to extort settlements. Both sides' contentions do little to advance the debate. No one disagrees with the contention that there should be fair access to the courts and that claimants with meritorious claims should not be denied this access. Similarly, no one denies that there should be proper safeguards to prevent claimants from using meritless claims merely to arm themselves with the weapons of discovery. These two contentions do not advance the debate for they assume the questions at issue, namely whether *Iqbal* and *Twombly*, contrary to their authors' intent, have resulted in closing courthouse doors to meritorious claims or whether those opinions, consistent with their authors' intent, have served to shut courthouse doors only to meritless claims asserted in the hope of coercing a settlement.

This Essay's very modest objective is to move the debate toward a source of light (rather than heat) by focusing on the following questions:

1. What, if anything, has changed in the nature and volume of litigation to warrant the move from the pleading standard enunciated in *Conley v. Gibson*[4] to the one prescribed by *Iqbal* and *Twombly*?

2. What, if any, are the effects of *Iqbal* and *Twombly*?

3. Should *Iqbal* and *Twombly* be modified or changed—and if so, how?

These questions are an easily recognizable application of the sensible principle that one needs to know where one has been and where one is now before one can decide in which direction to head in the future. And the limited purpose of this Essay is to suggest that we cannot answer the third question with any confidence unless we have a reasonably accurate understanding of the answer to the first question and unless we have valid empirical data pertinent to the second question.

4. 355 U.S. 41 (1957).

I. How We Got Here

A core premise of *Iqbal* and *Twombly*, implicitly and at times explicitly, is that the litigation landscape has changed markedly since *Conley* was decided in 1957. The opinions are based, at least in part, on this perception and the belief that a change in federal court pleading standards is warranted by the increase in the caseload of the federal courts and in the spiraling cost of modern discovery.[5] Accordingly, *Twombly* holds that *Conley*'s "questioned, criticized, and explained away" rule "has earned its retirement."[6] In its place, *Twombly* imposes a requirement of factual allegations creating a "plausible" entitlement to relief, a requirement that "serves the practical purpose of preventing a plaintiff with 'a largely groundless claim' from 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[7] And while *Twombly* lamented the high cost of antitrust discovery,[8] *Iqbal* extended the point to qualified immunity cases specifically and to modern civil litigation more generally.[9] The decisions, therefore, are inseparable from their underlying supposition that dramatic increases in the cost of litigation—and especially discovery—justified the judicial imposition of more rigorous pleading requirements.

There is no disputing that the federal civil litigation landscape changed profoundly in the fifty years between *Conley* and *Twombly*. It is well documented that the sheer volume of annual filings in federal court has surged dramatically since the 1950s.[10] But the number of filings does not begin to tell the story, as the cases filed today do not resemble their 1957 counterparts in nature, scope, or expense. In particular, the length and cost of

5. *See Twombly*, 550 U.S. at 558–59 (citing cases and articles concerning increases in judicial caseload and antitrust discovery costs); *see also Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.") (citing *Twombly*).

6. *Twombly*, 550 U.S. at 546.

7. *Id.* (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337 (2005)).

8. *Id.* ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.").

9. *See* 129 S. Ct. at 1953 (arguing that judicial supervision and case management are inadequate to contain "heavy costs in terms of efficiency and expenditure of valuable time and resources").

10. *See, e.g.*, TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990); ADMINISTRATIVE OFFICE OF U.S. COURTS, 2006 FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2006), *available at* http://www.uscourts.gov/caseload2009/contents.html.

discovery has exploded, a product, at least in part, of the rise of electronic discovery,[11] but also due to the increase in complex high-value commercial disputes that, by their nature, involve extensive document discovery. Reason and experience further suggest that the escalating costs of litigation generally, and especially the explosion in the amount of time and money required to respond to requests for electronic discovery, lead parties to settle cases today that may previously have been litigated.[12] Of course, settlement, insofar as it conserves judicial resources and benefits the parties, should be applauded. But as the *Twombly* majority noted, litigation by extortion, on the other hand, should not.[13] Thus, to the extent that more rigorous pleading standards will provide civil defendants with a relatively inexpensive pre-discovery procedure by which to avoid settlements coerced by the threat of discovery and litigation, *Iqbal* and *Twombly* could well play a useful role.

But while *Iqbal* and *Twombly* were predicated on a basically accurate *perception* of changes in the nature of litigation, they were not based on any empirical data, even though the Court has not been afraid to rely on quantitative research in other contexts.[14] And indeed, there is a severe paucity of research on the real increase in litigation costs over time and the degree to which this change could have been ameliorated by more rigorous pleading standards. Ideally, a change as significant as that which *Iqbal* and *Twombly* represents from the preceding fifty years of case law would be made in the same way that new statutes and new rules are ideally made: only after careful empirical research and thorough

11. A recent Federal Judicial Center study suggests that the median cost of discovery for cases including any electronic discovery is nearly three times the cost in cases in which there is no electronic discovery. *See* EMERY G. LEE & THOMAS E. WILLGING, NATIONAL, CASE-BASED CIVIL RULES SURVEY 37 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf. The same study found that discovery-related expenses comprise twenty-seven percent of total litigation costs for defendants, and twenty percent for plaintiffs. *Id.* at 38–39.

12. This is not to suggest that the dire financial consequences of litigation—irrespective of who ultimately prevails—is an entirely novel concept. In this regard, one is reminded of the (perhaps apocryphal) quotation typically attributed to Voltaire: "I was never ruined but twice: once when I lost a lawsuit, and once when I won one."

13. 550 U.S. at 546 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337 (2005)).

14. *See, e.g.,* Dist. Atty's Office for 3d Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2337 n.9 (Stevens, J., dissenting) (citing empirical work on use of postconviction DNA testing); Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (citing empirical data for proposition that public schools remain racially segregated); Williams v. Florida, 399 U.S. 78, 101–02 (1970) (considering empirical research in determining constitutional minima for criminal jury size); *see generally* Shawn Kolitch, Comment, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673 (2006).

evaluation of alternatives, including the (appealing, yet often overlooked) option of doing nothing. That, of course, is not what happened. But, even if by accident, *Iqbal* and *Twombly* have provided us with an unparalleled opportunity to measure the effects of changes in pleading standards in order to ensure that the next step—if, indeed, there is one—is carefully considered and thoroughly analyzed.

II. Where We Are

Despite the rather dire forecasts from many camps, little empirical research has been performed to prove or disprove the predictions of the impact of *Iqbal* and *Twombly*. Of course, one possibility that must be considered is that *Iqbal* and *Twombly* will have very little effect on dismissal rates. If this is the case, it will be readily discernable from empirical research, but early results indicate that *Iqbal* has, in fact, significantly increased dismissal rates.[15] In the event that further studies confirm this effect, we must undertake to study the nature of the cases being dismissed in order to assess the benefits and costs of *Iqbal* and *Twombly*. The benefits to be measured include changes in settlement value that reflect an increased likelihood that meritless claims will not "unlock the doors of discovery."[16] There are also three potential costs to consider. First, and perhaps most importantly, we should evaluate whether any meritorious claims are actually being shut out of federal court under the new pleading rules or if, on the other hand, most *Iqbal* dismissals are accompanied by leave to amend the complaint to cure any pleading defects. Second, we should measure any increase in private litigation costs effected by a more stringent pleading requirement. Third, we should consider the increased public cost, if any, of requiring district courts to adjudicate the plausibility of the plaintiff's claim at the threshold.

15. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). Professor Hatamyar randomly selected 1200 cases—500 from the two years before *Twombly*, 500 from the two years immediately following *Twombly*, and 200 from the four months following *Iqbal*—and found that the 12(b)(6) dismissal rate did not change markedly in the pre- and post-*Twombly* periods, but the data did show a sizeable increase in dismissals after *Iqbal* was decided. Professor Hatamyar does, however, urge caution in interpreting these data because of the small sample and the short time range of the post-*Iqbal* cases. *Id.* Additional data provided by the Administrative Office of U.S. Courts indicates that this pattern of increased dismissals continued through the end of 2009. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, CASES AND MOTIONS TO DISMISS FILED FROM JANUARY 2007 THROUGH DECEMBER 2009, http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf.

16. *Iqbal*, 129 S. Ct. at 1950.

To begin with, there have not yet been significant efforts to measure the types of cases on which *Iqbal* and *Twombly* have had the greatest effect. While Rule 8 plainly applies to all civil cases, and thus so do *Iqbal* and *Twombly*, it seems clear that a plaintiff would more readily be able to plead facts creating a plausible entitlement to relief in, for example, an employment discrimination case[17] or a breach of contract case[18] than in an antitrust suit or conspiracy claim. Thus, *Iqbal* and *Twombly* may represent a more significant obstacle for some categories of claims than for others. Before we can make the policy judgment whether this differential impact is warranted or desirable, perhaps by virtue of differences in the cost of discovery or the volume of frivolous claims, we must measure the impact of *Iqbal* and *Twombly* across various categories of claims to determine whether we are being unduly harsh—or unfairly easy—on certain types of plaintiffs.

Perhaps even more critical, but also more difficult, is closer study of whether the new pleading standards are resulting in prejudicial dismissal of potentially meritorious claims. This research will be a daunting undertaking, for it will require compilation and aggregation of dismissals and some subjective analysis of the chances that a dismissed case could ultimately have proven to be a winner. Such research, however, is essential to determining whether *Iqbal* and *Twombly* do more than we would like for them to do. After all, it would be a high cost indeed if the new pleading standard were to result in threshold prejudicial dismissal of meritorious claims. Fortunately, there is good reason to doubt that meritorious claims are being dismissed with prejudice. This is true because nothing in *Iqbal* or *Twombly* modifies Rule 15's broad grant of leave to amend a complaint where doing so would not be futile.[19] And likewise, nothing in either decision

17. In accordance with the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Title VII plaintiff would only have to plead factual allegations sufficient to create a plausible inference that the requirements of a *prima facie* case are met. Yet, it is worth noting that a simple Westlaw search of federal cases using the terms "Title VII" and "Iqbal" yields 872 results. Thus, the new pleading standard regime clearly has some effect on the course of employment discrimination litigation.

18. A breach of contract claimant would only have to plead factual allegations that give rise to a plausible inference that (i) there was a contract, (ii) it was breached, and (iii) this breach caused damages.

19. *See* Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323 (2d Cir. 2010) (reversing district court's *Twombly* dismissal of antitrust complaint because proposed amendment would have cured any pleading defects); *see also* Travelers Indem. Co. v. Dammann & Co., Inc., 594 F.3d 238, 243 (3d Cir. 2010) (finding no abuse of discretion in denial of leave to amend complaint after *Iqbal* dismissal because amendment would have been futile); Foster v. Wintergreen Real Estate Co., 363 Fed. Appx 269, 275-76 (4th Cir. 2010)

changes Rule 11's fairly low threshold requirement of a *reasonable* basis to conclude that the allegations "will *likely* have evidentiary support after a reasonable opportunity" for discovery.[20] Plaintiffs may, therefore, allege facts in a complaint even if they do not have the evidence in hand, so long as they have a good faith basis to believe (reasonably) that the factual allegations will become provable through discovery. And, in the event that the complaint fails, in the first instance, to allege a sufficient factual basis under *Iqbal* and *Twombly*, then courts should freely grant leave to amend as long as doing so would not be futile.[21]

Consistent with this approach, early empirical research indicates that the percentage of dismissals in which leave to amend is granted has increased significantly under *Iqbal*.[22] If this trend holds, *Iqbal* and *Twombly* will result in prejudicial dismissal only of claims for which the plaintiff lacks any reasonable basis to conclude that discovery will result in evidence sufficient to support his claim, and these claims would, in any event, be extremely unlikely to survive summary judgment. Such a pleading regime—namely one that freely allows leave to amend—may result in allowing some claims to proceed that ultimately lack merit, but it will nonetheless require plaintiffs to frame their complaints with greater specificity and detail. This, in turn, will narrow the scope of discovery and more sharply focus argument in the summary judgment stage of the proceeding.[23] In any event, closer scrutiny of Rule 12 dismissals under *Iqbal* and *Twombly* is required before we can conclude that the new pleading standard is not excluding cases from adjudication that ought to be included.

Another significant effect requiring careful measurement is the added expense—to parties and to the courts—of threshold

(same); William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 669 n.8 (9th Cir. 2009) (same); Jebaco, Inc. v. Harrah's Operating Co., Inc., 587 F.3d 314, 322 (5th Cir. 2009) (same).

20. FED. R. CIV. P. 11(b)(3) (emphasis added).

21. For an example of this approach, see *In re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (Ellis, J.) (dismissing all Alien Tort Statute and RICO claims arising out of alleged Iraq shooting under *Iqbal* but granting leave to re-plead all but one claim, which claim was legally insufficient and thus amendment would have been futile).

22. An empirical study examining the first set of 12(b)(6) dismissals after *Iqbal* suggests that the rate in which leave to amend is granted has increased dramatically, from only nine percent of dismissals under *Conley* to nineteen percent in post-*Iqbal* cases. *See* Hatamyar, *supra* note 17, at 600.

23. It is, of course, possible that courts will take a different approach and refuse to allow re-pleading or decline to assume the truth of factual allegations that are qualified with the Rule 11(b)(3)'s "further investigation will show" language. If this is the case, then significant reevaluation of the costs of *Iqbal* and *Twombly* will be required.

litigation that will undoubtedly result from *Iqbal*'s more robust application of Rule 8. Plaintiffs will be required to spend more time and money in the course of (i) conducting a reasonable pre-filing investigation into the factual allegations, (ii) drafting a complaint with more detailed allegations, and (iii) responding to motions to dismiss and possibly amending the complaint in order to satisfy rulings on 12(b)(6) motions. Of course, defendants will likely spend more time and money litigating the sufficiency of the complaint, but only if their own cost-benefit analysis indicates that it is to their advantage to do so instead of proceeding through discovery to summary judgment. Thus, the incremental additional private costs of *Iqbal* and *Twombly* will fall squarely on plaintiffs. Whether this additional cost to plaintiffs is justified by the savings to defendants of a heightened pleading regime is partly a normative question—but it is a normative question best answered with fuller empirical data on the additional burden imposed on plaintiffs under *Iqbal* and *Twombly*.

Finally, it is not clear what impact, if any, heightened pleading standards will have on judicial workload. One the one hand, increased threshold adjudication will clearly require increased judicial involvement in the early stages of litigation. On the other hand, it is less clear—once the dust settles and the applicable standard is further elucidated—whether this additional workload will be balanced out by a reduction in the number of cases that proceed to summary judgment, or by a reduction in the number of cases that are ultimately filed because plaintiffs will not file suit if they lack a reasonable basis to allege facts sufficient to state a plausible entitlement to relief. To answer this question, it will be necessary to compile data concerning filing-to-disposition intervals accounting for the disposition of 12(b)(6) motions, if any, that were filed in the case.[24] Compiling this data will at least ensure that, in its effort to recalibrate the playing field between plaintiffs and defendants, the Supreme Court did not significantly overburden the referee.

III. Where Do We Go From Here?

The short answer to the question posed by this section's title is that we cannot yet say. Equally unclear is *who* should make the

24. Anecdotal evidence from the Eastern District of Virginia suggests that the new regime may have little effect on judicial workload, for *Iqbal* and *Twombly* have only changed the framework of the analysis and not the volume of threshold motions. But thorough empirical analysis may yield a different result.

next step. Since the Supreme Court has already spoken on the matter, common law development would most likely be a circuit-by-circuit evolutionary elucidation of *Iqbal*'s and *Twombly*'s meaning—a gradual process that may be useful if guided by empirical research such as that which we have prescribed here. Rulemaking through the Judicial Conference would be quicker, but a modification of Rule 8 would arguably "abridge, enlarge, or modify a[] substantive right" in violation of the Rules Enabling Act.[25] This leaves Congress, which may be an appropriate vehicle for changing the applicable standard—that is, if Congress is willing to be as careful and deliberate as we hope it can be. For we believe that those who think that *Iqbal* and *Twombly* were mistakes would compound those mistakes to urge an immediate lurch back to *Conley*'s "no set of facts" rule without first measuring the impact of the new pleading standard on federal court litigation in the manner that we have proposed herein. And, further, those who believe that *Iqbal* and *Twombly* were welcome and overdue changes to help combat escalating discovery costs will not know for sure whether the new standard actually accomplishes that goal without additional study. Only once we are armed with a clearer picture of how we got here, and where we are today, will we be equipped to chart a course toward a pleading rule that best maintains the interest in keeping open the courthouse doors to plaintiffs with worthy claims, while withholding the keys to discovery from plaintiffs who bring frivolous or baseless suits.

25. 28 U.S.C. § 2072(b).