



PENN STATE LAW REVIEW

Pleading, for the Future: Conversations After *Iqbal*

Lee H. Rosenthal*

One of the themes at this Symposium has been the remarkable volume and intensity of the response to the Supreme Court's decision in *Ashcroft v. Iqbal*.¹ Some of the papers presented at this Symposium present the view that *Bell Atlantic Corp. v. Twombly*,² as applied in *Iqbal*, drastically altered the interpretation and application of the iconic words of Rule 8(a). But that understanding is far from monolithic, in the bench, the bar, or the academy. Some judges, lawyers, and scholars question the extent to which the pleading standards have changed, pointing out that *Twombly* and *Iqbal* are but the latest in a series of cases interpreting Rule 8; reminding us that many of the basic premises of

* United States District Judge, Southern District of Texas. Judge Rosenthal served as a member, then Chair, of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure ("Civil Rules Committee"), and is currently Chair of the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee"). Andrea Kuperman, J.D., University of Texas School of Law, 2004, Judge Rosenthal's Rules Law Clerk, assisted in writing these comments. The views expressed in this article are entirely Judge Rosenthal's.

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
2. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Twombly and *Iqbal*—such as requiring more than a recitation of the elements of the claim and not assuming the truth of conclusory allegations in analyzing a motion to dismiss—have been commonly applied in courts for years; and reminding us that *Twombly* denied imposing a heightened or fact pleading standard and that *Iqbal* stated that it was applying the *Twombly* standard.³ The common-law process has continued; a body of appellate court cases has emerged interpreting

3. See, e.g., *Al-Kidd v. Ashcroft*, 580 F.3d 949, 963 (9th Cir. 2009) (“Even before the Supreme Court’s decision in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to dismiss.”); *Harrison v. Downey Sav. & Loan Assoc., F.A.*, No. 09-CV-1391, 2009 WL 2524526, at *3 (S.D. Cal. Aug. 14, 2009) (“Even before *Twombly*, it was improper for a court to assume that a plaintiff could prove facts it had not alleged, or that a defendant had violated the law in ways that had not been alleged.”); *Soukup v. Garvin*, No. 09-cv-146-JL, 2009 WL 2461687, at *3 (D.N.H. Aug. 11, 2009) (“[E]ven before *Twombly* and *Iqbal*, the court of appeals had repeatedly held that a complaint needs more than ‘bald assertions . . . [or] unsubstantiated conclusions’; nor may a plaintiff ‘rest on subjective characterizations or conclusory descriptions of a general scenario.’”); *Argeropoulos v. Exide Techs.*, No. 08-CV-3760(JS), 2009 WL 2132443, at *6 (E.D.N.Y. Jul. 8, 2009) (“Even before *Iqbal*, the federal rules required a plaintiff to do more than just plead ‘labels and conclusions, and a formulaic recitation of the elements of a cause of action.’” (quoting *Twombly*, 550 U.S. at 555)); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010) (“[T]he plausibility standard of *Twombly* can be understood as equivalent to the traditional insistence that a factual inference be reasonable.”); *id.* at 481 (noting that reading *Twombly* to empower “judges to refuse to believe factual allegations that they find implausible” should be rejected, “not only because of its radical inconsistency with the entire structure of the Federal Rules of Civil Procedure and the Seventh Amendment, but also because the *Twombly* opinion rather frankly and properly disowns any such approach.”); *id.* at 483 (“[N]o Justice interprets *Twombly* to empower a judge to disregard factual allegations simply because the judge finds them implausible.”); *id.* at 484 (“Courts have long held that legal conclusions need not be accepted as true on 12(b)(6) motions, have long insisted that pleaders are not entitled to unreasonable factual inferences, and have long treated ‘legal conclusions,’ ‘unwarranted deductions,’ ‘unwarranted inferences,’ ‘unsupported conclusions,’ and ‘sweeping legal conclusions cast in the form of factual allegations’ as ‘more or less synonymous’ terms.”); *id.* at 498 (“The need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming May 2010) (Jan. 20, 2010 draft) (noting that “the most significant pre-*Twombly* authorities on federal pleading standard are still good law in the post-*Iqbal* era,” and that “[a]lthough *Twombly* and *Iqbal* recognize a judge’s power to disregard ‘conclusory’ allegations at the pleadings phase, this does not necessarily constitute a drastic shift from notice pleading.”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1089-90, 1090 n.175, 1098 (2009) (noting that “the requirement that a plaintiff state more than mere conclusions” “was a longstanding requirement under Rule 8 even before *Twombly*,” and explaining that in “overrul[ing] a heavily criticized and poorly worded formulation of the Rule 8(a) standard in *Conley v. Gibson*, 355 U.S. 41 (1957), . . . the [*Twombly*] Court was merely enforcing the directive in the Federal Rules and ratifying the reality within the federal courts, which had eschewed the hyper-literal reading of the *Conley* language”).

Twombly and *Iqbal*.⁴ And since *Iqbal*, bills have been introduced in Congress to address the pleading standard in the federal courts.⁵

This is an important—indeed, necessary—national conversation we are having. We are really continuing a very long conversation. One commentator noted that the preeminent rulemaker, Judge Charles Clark, stated in 1947:

[O]ne of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favor one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves. In view of this dilemma, pleading at best must be and should be a compromise.

4. See, e.g., *Laffey v. Plouisis*, No. 08-1936, 2010 WL 489473 (3d Cir. Feb. 12, 2010); *Phillips v. Bell*, No. 08-1420, 2010 WL 517629 (10th Cir. Feb. 12, 2010); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Rhodes v. Prince*, No. 08-10794, 2010 WL 114203 (5th Cir. Jan. 12, 2010); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009); *Sanchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009); *Waters Edge Living LLC v. RSUI Indem. Co.*, No. 08-16847, 2009 WL 4366031 (11th Cir. Dec. 3, 2009) (per curiam); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Floyd v. City of Kenner, La.*, 351 F. App'x 890 (5th Cir. 2009) (per curiam); *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896 (6th Cir. 2009); *Monroe v. City of Charlottesville, Va.*, 579 F.3d 380 (4th Cir. 2009); *McTernan v. City of York, Pa.*, 577 F.3d 521 (3d Cir. 2009); *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009); *Brown v. JP Morgan Chase Bank*, 334 F. App'x 758 (7th Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009); *Atherton v. D.C. Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009).

5. See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009) (“A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure 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 court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint 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).”).

It is a compromise, however, which should be continually re-examined in order that the proper balance may not be lost.⁶

This national conversation is welcome in important ways. Although there have been frequent adjustments to the discovery rules to respond to changes in the way litigation is conducted, including changes in 1983, 1991, 2000, and 2006, the pleading rules have remained substantively unchanged since 1938. It is fitting that we reexamine whether we are achieving the proper balance. And this conversation is even more fitting now because it comes at a time when civil litigation has been recently and significantly changed. There have, of course, been periods of great change in the past that impacted civil litigation. The changes in the 1960s that created new causes of action and changed the meaning of access to the courts was one such period. In the last ten years, the changes in information technology have given us another period of change that has affected almost every aspect of activity—business, government, medicine, education, and industry, to name but a few—and has altered litigation about those activities as well as how that litigation is conducted. The fact of this national conversation about the entry point into litigation, the pleading standard, is a very good thing. The passion that reflects the conversation's importance and the recognition of the need to emerge with the right balance and the right answers is a very good thing. The involvement of the academy, Congress, the judiciary, and the bar—these are all good.

There are really several conversations going on at once. It is useful to identify the different conversations and how they interconnect.

1. *The Conversation About What the Pleading Standard Should Be*

Most of the discussion has *not* been about changing the words of Rule 8.⁷ Some of the proposals for a legislative response have focused on going back to earlier case-law statements about the Rule 8 words as a short-term measure while the Judicial Conference Rules Committees engage in the lengthy, multistep Rules Enabling Act process to craft a more lasting approach.⁸ Some proposals for long-term revisions through the Rules Enabling Act to Rule 8(a) or Rule 12 have focused on explicitly requiring limited and targeted court-supervised discovery before a court can require a response to, or rule on, a motion to dismiss,

6. Hartnett, *supra* note 3, at 476 n.19 (quoting CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING vii-viii (2d ed. 1947)).

7. The discussion has similarly avoided proposals to abolish Rule 8 or Rules 12(b)(6), 12(c), or 12(e). The need for a pleading filter, a standard that must be met before a case can proceed, is widely recognized.

8. See 28 U.S.C. §§ 2072-2074.

if the case is one in which the information necessary to plead more precisely or fully is exclusively in the defendant's possession. This type of proposal does not change the Rule 8 pleading standard, but could affect the procedure for ruling on a Rule 12 motion to dismiss in some cases. Other proposals have examined adding to the list of claims subject to heightened pleading under Rule 9. There is a wide recognition that if the words of Rule 8 or Rule 12 are to be revised for the long run, this requires careful and thorough study and a transparent, inclusive, and lengthy discussion. The specific bills that have been introduced recognize that the mechanism Congress itself created for the careful, transparent, and inclusive process of amending the rules is the Rules Enabling Act process.⁹ The conversation about what the pleading standard should be is a conversation about rulemaking as well as a conversation about what the rules should say.

2. *The Conversation About Rulemaking*

The words of Rule 8 have not changed since 1938. That does not mean they have not been examined by the rulemakers. The Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure require the Advisory Committees of the Judicial Conference to "carry on 'a continuous study of the operation and

9. The Rules Enabling Act sets out the specific procedure for amending rules of procedure and evidence. See 28 U.S.C. § 2072(a) (giving the Supreme Court the "power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals"); *id.* § 2073 (requiring the Judicial Conference to prescribe procedures for consideration of proposed rules; authorizing the Judicial Conference to establish committees consisting of members of the bench and the professional bar, and trial and appellate judges, to assist with the rulemaking process; authorizing the Judicial Conference to establish a standing committee to review proposals of other committees and to make recommendations to the Judicial Conference; requiring that business meetings of the committees be open to the public unless the committee openly finds that it is in the public interest for the remainder of the meeting to be closed and states the reason for closing; requiring each committee to keep minutes and make the minutes available to the public; requiring advance notice to interested persons of any business meetings of the committees; and requiring recommendations to be accompanied by a proposed rule, an explanatory note, and a written report explaining the action, including any minority or other separate views); *id.* § 2074(a) (requiring the Supreme Court to transmit proposed rule amendments to Congress by May 1 of the year in which the amendment is to become effective, and providing that the rule proposal will take effect no earlier than December 1 of that year unless otherwise provided by law); see also U.S. Courts, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, <http://www.uscourts.gov/rules/procedurejc.htm> (last visited April 6, 2010) [hereinafter *Judicial Conference Procedures*] (describing procedures for amending rules, and requiring: open meetings; publication and circulation of proposals to the bench, the bar, and the public; a period of at least six months for public comment on proposals; and public hearings).

effect of the general rules of practice and procedure now or hereafter in use.’ . . .”¹⁰ As soon as *Twombly* was issued, the Civil Rules Committee and the Standing Committee began what has turned into a long-term and intensive study of pleading. The Committees are looking very hard at whether *Twombly* and *Iqbal* have created problems for judges, lawyers, or litigants, in the different kinds of cases that are in our federal courts. Here is a brief description of some of what the Civil Rules Committee and the Standing Committee did and are doing to understand the impact of these Supreme Court cases on federal civil litigation:

1. The Committees have sought out people who have extensive and varied experience with *Twombly* and *Iqbal*, from both the academy and the bar, to share their insights. The presenters have included academics such as Professor Stephen B. Burbank¹¹ and Professor Robert G. Bone,¹² and practitioners such as Gregory P. Joseph (former chair of the American Bar Association Section of Litigation and current president of the American College of Trial Lawyers), Douglas Richards (who litigated *Twombly* in the Supreme Court), and Joseph Garrison (president of the National Employment Lawyers Association). The Standing Committee and the Civil Rules Committee continue to reach out to lawyers representing affected parties for their views on how the decisions have actually affected their cases.

2. The Civil Rules Committee had prepared for its careful review a memorandum that sets out many of the cases that examine and discuss *Twombly* and *Iqbal*. This memo is available on the Rules Committee’s website.¹³ The memo focuses on describing what appellate courts are telling the district courts about how to apply *Twombly* and *Iqbal*. The appellate cases exemplify the common-law process of taking the words of a Supreme Court case and creating a body of law that fleshes out,

10. Judicial Conference Procedures, *supra* note 9, pt. 1.

11. Professor Burbank has been actively involved in the debate about pleadings after *Twombly* and *Iqbal*. See Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535 (2009); “Has the Supreme Court Limited Americans’ Access to Courts?”: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) (statement of Stephen B. Burbank), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>.

12. Professor Bone has written articles discussing the impact of *Twombly* and *Iqbal*. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal* (Boston Univ. Sch. of Law, Working Paper No. 09-41, 2009), available at http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BoneR090309_ashcroftREV.pdf; Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009).

13. Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee (Apr. 15, 2010), available at http://www.uscourts.gov/rules/Iqbal%20memo_041510.pdf.

smooths out, and gives boundaries to their application. This case law continues to develop, answering questions that *Twombly* and *Iqbal* could not: How will this articulation of the pleading rules actually be applied in different kinds of cases? What does the context-specific term “plausibility” mean when it is applied to different contexts? A number of appellate court cases have reversed district court dismissals and emphasized that *Twombly* and *Iqbal* are to be applied with caution and nuance. And the district courts continue to provide new examples that appellate courts will use to amplify, clarify, and manage the articulation we are here to discuss. Careful review of the case law is vital to understanding how *Twombly* and *Iqbal* may have affected the standard applied under Rule 8, whether problems have arisen in applying the standard, and whether there are types of cases or litigants that are being disadvantaged or treated unfairly. This case-law study is ongoing. Updated versions of the memo will continue to be publicly available.

3. The Federal Judicial Center (“FJC”) is conducting a detailed and thorough empirical analysis of the grants and denials of motions to dismiss in the district courts, comparing pre-*Twombly* and post-*Iqbal* periods, and comparing different types of cases. The study will involve individual analysis of cases. As a result, this study will not only be able to tell whether a case or claim or party was dismissed but also whether the dismissal was with or without leave to amend. The cases are from some of the busiest district courts in circuits across the country. The data this FJC study will produce is vital to understanding the impact of *Twombly* and *Iqbal*. The FJC study will be publicly available. Because the FJC study will take some time, given its thoroughness, the Standing Committee and the Civil Rules Committee asked the Administrative Office for preliminary data comparing motions to dismiss pre-*Twombly* and post-*Iqbal*. That data has significant limits. It does not, for example, distinguish between dismissals with or without prejudice. The preliminary data is just that, but the results so far are consistent with the appellate cases insisting on a careful application of *Twombly* and *Iqbal*. The more detailed data from the FJC will help us to understand fully the impact of the cases.

4. The Rules Committees have not stopped with these steps. It is also useful to try to determine whether people who would have filed a civil case in federal court before *Twombly* or *Iqbal* are not doing so now, and if there is a significant increase in the cost of bringing federal court cases because of an increase in the filing of motions to dismiss. And it is important to understand how courts are approaching motions to dismiss in cases involving “information asymmetry,” in which the defendant has exclusive possession of information necessary to plead more fully. The Rules Committees asked the FJC to reach out to the bar to ask some of

these questions. The FJC conducted a closed-case survey of lawyers who had handled federal court cases that closed in the last quarter of 2008, asking about different aspects of the litigation.¹⁴ The response level was very high. The FJC's staff conducted follow-up interviews with lawyers who responded to the surveys. "Most interviewees indicated that they had not seen any impact of [*Twombly* and *Iqbal*] in their practice."¹⁵ Most plaintiffs' lawyers said they do not use bare-bones notice pleading in their practice and that they already satisfy the standards set out in *Twombly* and *Iqbal*.¹⁶ "Almost all [interviewees] indicated that their practice is to plead enough facts to tell a coherent and persuasive story."¹⁷ The FJC also worked with the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the National Employment Lawyers Association ("NELA"), to compile the results of surveys of the members of each organization.¹⁸ The NELA survey included specific questions about the impact of *Twombly* and *Iqbal* on the interviewees' practices.¹⁹ The responses from the NELA lawyers showed that of the 67.1% who had filed an employment discrimination case in federal court after *Twombly*, 29.9% said there was no impact on their cases and 70.1% said there was an effect; and of the 70.1%, 94.2% said that the effect was to include more factual allegations in the complaint, and 74.6% had the impression that they were responding to motions to dismiss that might not have been filed before *Twombly/Iqbal*.²⁰ The more detailed FJC study will provide more information. Interestingly, fewer than 15% of the NELA attorneys responding selected any one of the following options: that they conducted more factual investigation before filing a complaint than they would have before *Twombly/Iqbal*, that they screened cases more carefully than they did before *Twombly/Iqbal*, or that they raised different claims than they did before *Twombly/Iqbal*.²¹ These surveys are

14. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf).

15. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf).

16. *Id.*

17. *Id.*

18. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

19. *Id.* at 11.

20. See *id.* at 11-12.

21. *Id.* at 12.

far from the end of the story. There needs to be more investigation, and there will be. But the results are consistent with the appellate case law and with the preliminary data. Taken together, they underscore the importance of understanding the effects of the Supreme Court decisions.

5. The Civil Rules Committee and the Standing Committee were planning—even before *Iqbal* was decided—to step back and take a hard look at civil litigation in the federal courts and to ask the bench and the bar how well it is working and how it might be improved. The Civil Rules Committee had decided to conduct a major conference and invite a broad, representative group of lawyers, litigants, law professors, and judges. Pleading was always an important aspect of this conference. Since *Iqbal*, its importance has become even greater. A central part of the May 2010 Conference is a panel on pleading moderated by Professor Arthur Miller, with Judge Jon Newman of the Second Circuit (who wrote the Second Circuit’s panel opinion in *Iqbal*), Professor Adam Pritchard, Professor Geoffrey Hazard, Daniel Girard (a lawyer focusing on plaintiffs’ consumer, securities, and antitrust cases), Sheila Birnbaum (a lawyer focusing on defense of product liability cases), and Jocelyn Larkin (a public interest lawyer).²²

Because pleading is only part of the intertwined structure of the Federal Rules of Civil Procedure, the 2010 Conference is also looking hard at discovery, including e-discovery, judicial case management, summary judgment, trials, and settlements. The Conference will rely heavily on new empirical research and data to provide an accurate picture of what is happening in federal courts, and will present the practical insights of the bar. The research is being conducted by such diverse groups as the FJC, the American Bar Association, the American College of Trial Lawyers, the Institute for the Advancement of the American Legal System, RAND Corporation, Cornell University, and others. We hope to obtain data about how much it actually costs to respond to and engage in various litigation tasks, especially electronic discovery. All these studies will give the Rules Committees much-needed information on discovery costs and burdens, in more detail than has previously been available. That in turn will be important to inform decisions on how best to achieve the proportionality standard that has been part of the discovery rules since 1983. It will also shed light on one of the concerns expressed in both *Twombly* and *Iqbal*, that discovery costs are excessive and cannot effectively be controlled by judges managing cases. The 2010 Conference will present reactions to this data from corporate general counsel, outside lawyers, lawyers representing

22. Agenda, 2010 Litigation Review Conference, http://www.uscourts.gov/Press_Releases/2010/AgendaFor2010CivilLitigationConference.pdf.

the government, and lawyers representing public interest groups. The Conference will also examine the experience from state courts that have used different approaches ranging from fact pleading to limits on discovery and on summary judgment motions. The Conference will also examine proposals developed by bar associations to work toward proportional discovery in different kinds of cases.

In short, the 2010 Conference will bring together previously unavailable empirical data, examined by thoughtful academics, judges, lawyers, and litigants from different perspectives and interests. The results could be quite important, ranging from shaping the Civil Rules Committee's agenda for some time, to providing best practices for training judges and lawyers, to proposing larger changes that may require legislation to implement. The Rules Committees expect to learn a great deal.

In these different methods, the Rules Committees are gathering information in a disciplined and thorough way. The Committees are dedicated to taking a hard and transparent look at what the information reveals. The information will be publicly available. It will let the Rules Committees identify whether there are problems in the pleading standard as it is now articulated. That understanding of what problems exist, and what kinds of cases they affect and in what ways, is needed to craft the right response. If the problem is that the courts are not providing a means for discovery before ruling on motions to dismiss in cases of information asymmetry, that may call for a rule approach that requires such discovery, linked to Rule 11(b)(3). If the problem is the application of the standard in certain kinds of cases or to certain kinds of litigants, that may call for a rule approach that is similar to Rule 9, using different pleading standards for certain kinds of cases. Rules are always difficult to draft. Rules about pleading are the hardest; no part of the rule book is as fundamental or as delicate. Information, understanding, and wide input from a variety of the people and entities the courts serve is needed to do it right.

The conversation about the rulemaking process has been going on for a long time; the Rules Enabling Act has been with us for 75 years. Congress and the courts are committed to its basic framework, but that requires an ongoing conversation about specific applications. We are in the midst of such a conversation now. That conversation is very much about the Committees' transparent, inclusive, and honest assessment of what the studies and the case law show. If the Rules Committees conclude that the *Twombly* and *Iqbal* decisions are unfair or unworkable, or that there is an effect on particular categories or types of cases or litigants, and that changes in the rules are appropriate, they will say so. The Committees will recommend changes needed to address problems

that are found. And given the process and the careful basis that will be established for making recommendations, the Committees' proposals will be taken seriously by all the entities that are part of the Rules Enabling Act process.

3. *The Conversation About Judging*

Some of the reaction to *Twombly*, and particularly to *Iqbal*, is hard for me to read as a judge because it reveals a somewhat cynical view of what judges do and how they do it. That view is that judges, either intent on advancing a personal ideological agenda or helpless to prevent the influence of that agenda, will use the *Twombly* and *Iqbal* decisions to dismiss "disfavored" cases. Some of the discussion of *Iqbal* has focused on the use of the words "judicial experience and common sense" in describing how judges rule on motions to dismiss as reinforcing this cynical view of judging. These are not new words: Rule 501 of the Federal Rules of Evidence, to use just one example, states that privilege determinations "shall be governed by the principle of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."²³ But it is interesting to reflect on whether it would have changed the tone of some of the post-*Iqbal* conversations if the words used had been the ones Justice Kennedy chose in *Boumediene v. Bush*²⁴ when he discussed the district court's ability to handle issues in the habeas cases brought by Guantanamo detainees. In that case, Justice Kennedy used the words "expertise" and "competence" to describe what a district judge would rely on in handling the habeas cases.²⁵ These words describe how judges work in objective, not subjective terms. These words describe the work of professionals. They convey the kinds of constraints that judges operate under, internal and external, in deciding cases, including motions to dismiss. These constraints are an essential part of what conscientious judges do every day, in every court, in discharging the oaths that every one of us took. These constraints are reflected in many of the cases in which courts are carefully and narrowly reading *Twombly* and *Iqbal* and are not applying them as any kind of license to dismiss certain kinds of cases.

4. *The Conversations Continue*

What are all these conversations? They are about what the standard for pleading should be in the future. They are about working to ensure

23. FED. R. EVID. 501.

24. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008).

25. *See Boumediene*, 128 S. Ct. at 2276.

that the pleading balance is right and is stated so that it can reliably and consistently be rightly applied. They are also about pleading for a future that includes an informed, transparent, inclusive, balanced, and disinterested process for continuing to ensure that the rules are fair and effective. That process has been the Rules Enabling Act and it has worked well for 75 years. All these conversations are based on, and support, the future of an independent judiciary working with the bar, the academy, and Congress to ensure that the rules that let the civil justice system work for all it serves continue to do just that.