"Has the Supreme Court Limited Americans' Access to Courts?"
Hearing before the U.S. Senate Committee on the Judiciary
December 9, 2009

Professor Stephen Burbank's Answers to the Written Questions of Senator Tom Coburn, M.D.

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1. In your testimony, you acknowledged that it is too early to determine the real impact of *Iqbal* and *Twombly* on "litigation behavior or the results of litigation." This is consistent with the findings of the Advisory Committee on Civil Rules, which has found no evidence of a "drastic change" in pleading practice to date.[1] You have also previously written that changes in the Rules too often prompt "Congress to initiate its own half-baked reforms" and that you would favor a "moratorium on procedural law reform" until "empirical evidence" tells us "what we are doing."[2] You nonetheless advocate congressional reform here based on the conclusory statement that the "usual victims of procedural reform" should not have to bear the risk of "irreparable injury." Why would it not be more prudent to delay any legislative action until everyone can better understand what, if any, impact *Iqbal* and *Twombly* have had on the lower courts' approach to pleading standards?

   Answer: First, the Advisory Committee made no such findings in the cited memorandum, and the evidence, although limited, prompts concern both that a substantial number of people are being denied access to court as a result of *Twombly* and *Iqbal*, and that those I called "the usual victims of "procedural' form" are suffering that fate disproportionately. As I stated in an answer to a post-hearing question from Senator Specter:

   > Alas for those anxious to make Ms. Kuperman, the author of the memorandum in question, not only the most famous law clerk in the country but the youngest member of the Advisory Committee, (1) she is just a law clerk (although a very nice and bright one), (2) her memorandum is not a study but rather a summary of post-*Iqbal* appellate decisions and a non-random sample of district court decisions, (3) the unsupported characterizations in the brief prefatory section of the memorandum are her opinions, and (4) they are highly contestable.
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   > Indeed, Ms. Kuperman's memorandum led me to many of the cases that are cited in Appendix B to my prepared statement. These are cases that either suggest or explicitly state that *Iqbal* has caused the dismissal of complaints that would not have been dismissed in the pre-*Twombly* era. They thus answer the only question about dismissed cases discussed at the hearing that makes sense (once Senator Leahy pointed out that, without discovery, one cannot determine whether

[1] *See* November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the "Application of Pleading Standards Post-*Ashcroft v. Iqbal* " at 2.
[2] Stephen B. Burbank, *Symposium: Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brooklyn L. Rev. 841, 842 (1993).

complaints that have been dismissed under *Twombly* and *Iqbal*, but that would have survived under prior law, had merit, which was, of course, an animating insight of those who framed the Federal Rules). In sum, even if the cases in Appendix B and other similar cases do not signal what Mr. Garre referred to as "wholesale dismissal of complaints" (pg. 22, without defining that term), they do signal a loss of access for a substantial number of people.

It is convenient for supporters of *Twombly* and *Iqbal* to conflate Ms. Kuperman's memorandum with the broader effort to reconsider pleading, motions to dismiss and discovery that the Advisory Committee has undertaken, an ambitious effort that includes original empirical investigations by the Federal Judicial Center. That work, which involves a number of quantitative and qualitative projects that merit the term "study," will take time. Moreover, as to pleading and motions to dismiss, it will be of limited inferential value, at least if the goal is, as it should be, to compare the costs and benefits of the system of notice pleading and broad discovery with the costs and benefits of systems proposed to replace it. See my answer to Question 6 below.

In the meanwhile, we have very limited data. A few law review articles include analyses of slices of post-*Twombly* and/or post-*Iqbal* experience based on published opinions. *See, e.g.*, Joseph A. Seiner, *The Trouble with* Twombly: *A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011. Contrary to Mr. Garre's assertion (pg. 34), "the most comprehensive study to date" is not the Kuperman memorandum but rather a study (using econometric techniques) of some 1200 cases by Professor Patricia Hatamyar that is cited at page 7 note 3 of my prepared statement. This study also suffers from the biases that afflict work based on published decisions (even after the advent of computerized data bases). But it is probably the best we have for now, and it suggests that what I have called "the usual victims of 'procedural' reform" are being differentially and adversely affected by *Twombly* and especially *Iqbal*. Thus, Professor Hatamyar concluded that "the largest category of cases in which 12(b)(6) motions are filed was constitutional civil rights. Motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in cases overall (49%), and the rate of granting 12(b)(6) motions in constitutional civil rights cases increased in the cases selected from Conley (50%) to Twombly (55%) to Iqbal (60%)."

Second, I do not advocate "congressional reform" at this time. Rather, I advocate respect for the Rules Enabling Process and a return to the status quo ante pending a thorough, open, inclusive and evidence-based study by the rules committees of the Judicial Conference. As stated in an answer to one of Senator Specter's post-hearing questions:

> [Any] plea for respect of the Enabling Act process should have been addressed to the Supreme Court. Since, however, it is too late for that, it falls to Congress to insist on the exclusivity of that process for judicial amendments to the Federal Rules. That is the first goal of the substitute amendment proposed in Appendix A

> [to my prepared statement]. The second is to ensure that Congress does not repeat the Court's mistakes and thus that it waits for the results of the informed, thorough and open process upon which the rules committees have embarked before deciding whether legislation prescribing different pleading standards is required. The third goal is to ensure that, pending the results of the Enabling Act process, the Court's improvident decisions do not cause irreparable injury either to those without the ability to satisfy their requirements or to federal statutory provisions designed for private enforcement.

2. Your temporary legislative proposal would require pleading standards to be governed by judicial interpretations of the Federal Rules of Civil Procedure that existed on May 20, 2007. Won't this require federal courts to basically guess the meaning of the standards they should apply? Under your proposal, would it be inappropriate for them to apply the pleading standard articulated in *Twombly* and *Iqbal*? If so, if the courts do not have a clear standard (like that laid out in *Twombly* and *Iqba,*), how will lower courts avoid employing varying legal standards?

   a. What was the standard – as you understand it – on May 20, 2007?

   Answer: Under the proposed substitute amendment in Appendix A to my prepared statement, the federal courts would simply return to applying the law governing dismissal or striking of pleadings on the stated grounds (and judgment on the pleadings) that they applied before *Twombly* was decided, with the added congressional direction to ensure that such law was consistent with pre-*Twombly* decisions of the Supreme Court. This should not prove difficult. Lower federal courts had no difficulty understanding and applying the provision of the 1991 Civil Rights Act that was the model for my proposal. Any uncertainty and/or inconsistency – and there would be some – would be no greater than (and I doubt that it would be as great as) the uncertainty and inconsistency that have followed *Twombly* and *Iqbal*. The notion that *Twombly* and *Iqbal* lay out a "clear standard" is preposterous. As stated on page 18 of my prepared statement:

> Most risible of all the arguments I have heard against the status quo approach I favor is that it will "guarantee inconsistency." As if *Twombly* and *Iqbal* -- with the latter's paean to "judicial experience and common sense" leading the way -- will bring about consistency. I prefer the devil I know to the devil I do not know, at least until such time as there has been a thorough, open, and democratically accountable lawmaking process that justifies installing a new king of the nether regions.

Apart from, and antecedent to, the variousness of "judicial experience and common sense," *Iqbal* in particular is notably unclear about how courts should parse complaints, separating the factual allegations that are entitled to a presumption of truth from the conclusory allegations that are not. As I observed in an answer to one of Senator Specter's post-hearing questions:

> Following *Twombly* and *Iqbal*, a great deal turns on the trial court's determination whether an allegation is "conclusory" in nature. That determination will dictate

whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, "conclusory". Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be "conclusory" basically took the form of a pure recitation of an element of the plaintiff's claim, suggesting that the Court's holding on this point would be limited to allegations fitting that description and/or not providing "fair notice" to defendants. In *Iqbal*, however, the majority dismissed as "conclusory" two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the "principal architect" of the specific policies challenged, and another claiming that the FBI Director was "instrumental in [their] adoption, promulgation, and implementation." By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless "conclusory" in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are "conclusory," instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority that these allegations were "conclusory" and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness.

a. A return to pre-*Twombly* standards for dismissing or striking pleadings on the stated grounds would reinstate "the "notice pleading" regime of *Conley v. Gibson*, with such refinements as the Court had made, chiefly in (or prompted by) antitrust and securities cases and cases involving the defense of official immunity – *see Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983)*, Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), and *Crawford-El v. Britton,* 523 U.S. 574 (1998) – together with any refinements made by the courts of appeals that were consistent with the Court's decisions. It is to be hoped that this process would again untangle the distinctive roles that, as the *Conley* Court recognized, those who wrote the Federal Rules intended for the motion to dismiss under Rule 12(b)(6) and the motion for a more definite statement under Rule 12(e). As discussed in my answer to Question 8 of Senator Specter's post-hearing questions, the confusion about *Conley's* "no set of facts" language was largely self-induced by lower courts intent on covertly smuggling fact pleading back into federal law. In any event, under my proposal it quite clearly would be inappropriate for the federal courts to apply either the aggressive and arbitrary complaint-parsing of *Iqbal* (compare *Papasan v. Allain*, 478 U.S. 265, 283-92 (1986)), or *Twombly's* plausibility standard as generalized in *Iqbal,* It would also be improper for the federal courts to follow the *Iqbal* Court's absurd interpretation of Rule 9(b). As stated in my answer to Question 2 of Senator Specter's post-hearing questions:

> Finally as to Supreme Court precedent, the *Iqbal* Court's maiming of Rule 9(b) – which is so critically important in discrimination cases -- was both without precedent in the Court's decisions and demonstrably inconsistent with the intent

of the drafters of the Federal Rules (and hence presumably with the Court's original understanding). The Advisory Committee Note accompanying Rule 9 in 1938 listed Order 19, Rule 22 of the English Rules as the source or inspiration for Rule 9(b). That source provided: "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, *it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred*" (emphasis added). Determined to reverse the Second Circuit notwithstanding that court's measured and thoughtful opinion, the five justice majority in *Iqbal* found it necessary not only to disregard the petitioners' concession about supervisory liability and change the law of official immunity, but also to rewrite Rule 9(b). In that respect, *Iqbal* is without any grounding or foundation at all.

3. If courts are not empowered to dismiss conclusory and implausible claims, won't that be an invitation to exploit liberalized pleading standards and launch costly discovery fishing expeditions?

   a. How do you propose addressing this concern?

Answer: In its 1947 decision in *Hickman v. Taylor*, 329 U.S. 495, the Supreme Court observed that "[t]he new rules … restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial." *Id.* at 501. The Court also stated "that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts of his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* at 507 (footnote omitted). Thus, my first response is that the question suggests the extent of the revolution created by *Twombly* and *Iqbal* – without using the Enabling Act process and thus without giving Congress an opportunity to review, and if necessary to block, the profoundly important policy choices the Court made before they became effective. My second response is the same I gave to a post-hearing question from Senator Specter regarding Gregory Garre's "contention in his prepared statement that a statute overruling *Twombly* and *Iqbal* would "exact enormous costs" (p. 24) …. for civil defendants and society (pp. 29-33)." [I dealt separately with a similar contention about government officials].

I do not understand the predicate for Mr. Garre's assertion (pg. 24) that the alternative to *Twombly* and *Iqba*l is "a system in which courts permitted conclusory and implausible claims to go forward." I thought he believed that the pre-*Twombly* landscape (which is what the proposed substitute bill in Appendix A would restore) was one in which appellate courts, in dialogue with the Supreme Court, were moving seamlessly toward the point staked out in those decisions. (But see my answer to Question 2 above).

I agree, however, that rational public policy in this area must reflect a comparative evaluation of the costs of alternative pleading (and discovery) regimes. Rational public policy must also attend, however, to the benefits of the alternatives – a dimension simply absent from Mr. Garre's prepared statement and testimony. Moreover, in a system like ours that has depended heavily on private civil litigation to enforce public law, rational public policy must consider what would replace litigation (and how it would be funded) if one or more of the alternatives portended a substantial decrease in enforcement through litigation. Thus, for instance, do Americans really want the SEC or FTC sufficiently well-funded (through taxpayer dollars) and powerful to pick up the slack? Or is the real goal here, at the end of the day, no enforcement?

Contentions about the "enormous costs" of the system of notice pleading and broad discovery are not just a talking point for defenders of *Twombly* and *Iqbal*. They are a talking point that the business community and others intent on dismantling private civil litigation as a means of securing compensation for injury and enforcing public laws have been repeating for decades, hoping (alas, not without reason) that constant repetition of myths will weaken any inclination to doubt them. For thoughtful, empirically based responses to this and other similar litigation myths, I refer the Committee to the submissions of Professors Theodore Eisenberg and Steven Croley.

Mr. Garre also ignores, for purposes of comparison, the burdensome costs associated with administering the Court's newly expanded definition of a "conclusory" allegation. Following *Twombly* and *Iqbal*, a great deal turns on the trial court's determination whether an allegation is "conclusory" in nature. That determination will dictate whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, "conclusory". Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be "conclusory" basically took the form of a pure recitation of an element of the plaintiff's claim, suggesting that the Court's holding on this point would be limited to allegations fitting that description and/or not providing "fair notice" to defendants. In *Iqbal*, however, the majority dismissed as "conclusory" two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the "principal architect" of the specific policies challenged, and another claiming that the FBI Director was "instrumental in [their] adoption, promulgation, and implementation." By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless "conclusory" in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are "conclusory," instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority that these

allegations were "conclusory" and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness. Allowing such an unguided and arbitrary standard to define the capacity of litigants to obtain remedies for their injuries will impose heavy transaction and social costs.

Like his predecessors in this campaign, Mr. Garre ignores decades of systematic empirical research showing that discovery is not a ubiquitous problem but rather that it is a problem in only a small slice of litigation—typically, high stakes, complex cases. A recent preliminary report of the Federal Judicial Center is to the same effect. *See* Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report (Oct. 2009).

At least, however, all the talk about costs should focus attention on the fact that the perceived problem is not pleading, but rather discovery. Moreover, even if attention were paid only to costs, denying court access to civil rights plaintiffs so that large business corporations engaged in high stakes, complex commercial cases could be spared what Judge Easterbrook called "impositional discovery," would seem doubly feckless: first, because it targeted the wrong part of the litigation process, and second, because it did so in all cases, when only a small proportion of cases posed the problem to be addressed. The latter is a major cost of insisting upon the same rules of procedure across the landscape of substantive law, so-called trans-substantive procedure. In that regard, it may be that Congress should amend the Rules Enabling Act to authorize the proposal of substance-specific rules when necessary to avoid such costs. If it were to do so, however, Congress should prescribe that proposed substance-specific rules would become effective only if adopted by legislation (rather than under the normal report-and-wait provision of the Enabling Act).

Finally and again, if one is to examine the costs of discovery, the quest for wise public policy requires that one also consider the benefits of discovery. In that regard, it is no coincidence that the chief architect of the 1938 Federal Rules on discovery, Professor Edson Sunderland, was a progressive well acquainted with that movement's emphasis on "legibility" (transparency) as a necessary condition for effective regulation. As Judge Patrick Higginbotham put it:

> Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. *Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress*.

Patrick Higginbotham, *Foreword*, 49 ALA. L. REV.1, 4-5 (1997) (emphasis added). *See also* Statement of Stephen N. Subrin.

I would only add, for Senator Coburn's benefit, that another important source of factual information, as opposed to cosmic anecdotes, about litigation, is my colleague, Tom Baker's book, *The Medical Malpractice* Myth (2005).

4. Are you concerned about how the legislation proposed in the House and Senate will affect Federal Rule of Civil Procedure 9(b), which imposes heightened pleading requirements for fraud claims?

   a. Should a plaintiff be allowed to bring a suit in federal court accusing someone else of fraud without presenting real facts to support that claim?

   Answer: This is one reason why I do not support the legislation proposed in the House. It is not clear that S. 1504 would affect Rule 9(b), since *Conley v. Gibson* did not involve a complaint that was subject to that Rule. It is quite clear that the proposed substitute amendment in Appendix A to my prepared statement would not affect the correct understanding of that Rule's treatment of complaints alleging fraud or mistake. As discussed above, it would also restore the original understanding of the rest of Rule 9(b), the egregious misinterpretation of which by the *Iqbal* Court is one of the most striking illustrations of the majority's contempt for the Enabling Act process and of the selective nature of some justices' attachment to originalism. In sum, I support what those who wrote Rule 9(b) intended as to both matters treated there -- greater particularity in pleading fraud (or mistake) and no requirement of pleading facts as to conditions of mind.