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A Proceduralist's Perspective on Court Access After *Twombly*

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I. INTRODUCTION

Many judges, lawyers, and academics worry that the federal courts are in serious trouble, plagued by high litigation costs, huge delays and case backlogs, and unacceptable risks of frivolous litigation. These complaints are not new; they began in a strong way about three decades ago and have remained intense ever since. Whether the situation is as serious as the critics claim—and there are certainly those who believe the concerns are overblown—the widely shared perception that there are problems has led to major changes in federal civil procedure over the past three decades.

The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*² is one of the most controversial developments along these lines. *Twombly* was a nationwide antitrust class action brought under Section 1 of the Sherman Act alleging an anti-competitive conspiracy among the four largest telecommunications companies in the United States. The Court held that the plaintiffs failed to allege sufficient facts to support a plausible inference of agreement and that as a result the district judge properly dismissed the complaint. On a more general level, the decision increases the pleading burden and in so doing makes it more difficult for plaintiffs to gain access to federal courts.

I have written about *Twombly* in a published article, and this short commentary draws on the analysis I develop there.³ I will first briefly explain the decision's impact and then sketch the outlines of a policy critique.

II. TWOMBLY'S IMPACT

Twombly provoked sharp criticism almost as soon as the opinion was published. Its opponents—and there are many—argue that the decision overturns fifty years of pleading precedent and denies relief to plaintiffs with meritorious claims. The case has been cited thousands of times by lower courts and has spurred a keen interest in the pleading stage. Those involved in making and evaluating federal procedure have taken note. The Advisory Committee on Civil Rules, the body responsible for recommending amendments to the Federal Rules, has already discussed *Twombly* and may well consider rule amendments in the near future. The Federal Judicial Center is

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² 550 U.S. 544 (2007).

³ Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 874 (2009), available at http://www.law.uiowa.edu/journals/ilr/Issue%20PDFs/IowaLRev94-3_March2009_Bone_873-936.pdf.

contemplating an empirical study of *Twombly's* impact. And on July 22, as I write this commentary, Senator Arlen Specter filed a proposed bill with Congress seeking to reinstate the pre-*Twombly* pleading standard.⁴

In May, 2009, the Supreme Court added more fuel to the *Twombly* fire with its decision in *Ashcroft v. Iqbal*.⁵ The Court in *Iqbal* held that a civil rights complaint against John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation, was deficient for failing to allege sufficient facts to support a plausible inference of a discriminatory purpose. In so doing, the Court made clear that *Twombly's* plausibility standard is here to stay.

To appreciate how *Twombly* and *Iqbal* alter pleading law, we must take a step backward and briefly review federal pleading practice. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires the plaintiff to furnish "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." As originally adopted in 1938, this Rule aimed to free pleading from the rather strict and technical rules imposed by the nineteenth century procedure codes.

In its famous *Conley v. Gibson* opinion handed down in 1957, the United States Supreme Court interpreted Rule 8(a)(2) very broadly. The Court adopted a generous notice pleading standard, which requires only a brief and general description of the dispute and leaves the job of uncovering the facts to discovery. In *Conley's* famous language, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This notice pleading standard is unusual compared to the standards used in most other countries. The more typical rule requires allegations of specific facts supporting all the legal elements of a claim (and in some countries a summary of supporting evidence as well).

Although it gives notice, a liberal pleading standard does little to frame the legal issues or screen frivolous suits at the pleading stage. The latter shortcoming became more salient as concerns about frivolous litigation mounted in the 1980s and 1990s. Some federal courts responded by creating stricter pleading rules for particular types of cases, such as antitrust and civil rights suits. The Supreme Court responded in 1993 and again in 2002 by reminding federal judges that they lack the power to create common law pleading rules inconsistent with the notice pleading standard of the Federal Rules of Civil Procedure.⁶ But the Supreme Court's admonition had only a limited effect on the lower courts. Congress entered the fray in 1995 with passage of the Private Securities

⁴ For a copy of the bill, see http://legaltimes.typepad.com/files/coe09974_xml.pdf.

⁵ 129 S.Ct. 1937 (2009).

⁶ See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Litigation Reform Act, which imposes stricter pleading to screen frivolous securities fraud suits.

The Court decided *Bell Atlantic v. Twombly* against this background of relatively unsettled pleading law. *Twombly* made three important changes. First, it rejected the most liberal interpretation of *Conley* and held that plaintiffs must allege facts sufficient to support a “plausible,” not just a possible, inference. Second, it held that pleading rules should be used not only to give notice, but also to screen meritless suits. Third, for the first time the Court openly and frankly questioned the ability of trial judges to address frivolous litigation problems and high litigation costs through discretionary use of discovery controls, summary judgment, and other case management tools.

Any lingering doubts that the Court meant business in *Twombly* were put to rest by the recent *Ashcroft v. Iqbal* decision. *Iqbal* reiterates the plausibility standard, notes the screening benefits for qualified immunity cases, and repeats *Twombly*’s concern about the limits of judicial case management. It also makes clear that the plausibility standard applies to all lawsuits governed by Rule 8(a)(2) (which are most suits), and not just to antitrust class actions like *Twombly*.

At the same time, there are indications that the *Twombly* Court did not mean to impose a particularly tough pleading requirement with its plausibility standard. The *Twombly* case itself was relatively easy. The plaintiffs relied on allegations of parallel conduct, but the parallel conduct was perfectly consistent with vigorous competition, given the distinctive history and structure of the telecommunications market. And the Court took the trouble to mention that parallel conduct allegations might be enough to avoid dismissal in a case where the conduct is harder to explain in competitive terms.⁷

Still, the concept of plausibility is vague enough that lower court judges concerned about frivolous suits can interpret it strictly if they wish. Although it is too soon to tell, the Court’s *Iqbal* decision might encourage them to do so. The plaintiff in *Iqbal* included statements in his complaint sufficient to make discriminatory intent plausible, but the Court treated those statements as legal conclusions rather than factual allegations—and chose to ignore them. The Court’s analysis provoked a sharp dissent from, among others, Justice Souter, who wrote the Court’s opinion in *Twombly*, and Justice Breyer, who had joined the *Twombly* majority. The reaction of these two Justices in particular confirms that *Iqbal* takes a tougher approach. Thus, depending on how lower courts construe the *Iqbal* opinion, and in particular how they interpret the Court’s distinction between facts and legal conclusions, it is possible that *Iqbal* will inspire applications of *Twombly* at the stricter end of the plausibility spectrum.

III. TWOMBLY AND LITIGATION POLICY

⁷ *Twombly*, 550 U.S., at 556 n.4. There are other indications that the Court did not mean to be terribly strict, such as its endorsement of the skeletal negligence complaint in Form 9 (now Form 11) and its decision two weeks later in *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam).

With a stricter approach than very liberal notice pleading clearly established, the normative question that must be addressed is whether pleading standards are the best way to screen frivolous suits. Any such inquiry must begin with a definition of a “frivolous suit.” Although the category is difficult to define, frivolous litigation surely includes meritless suits filed intentionally or with a grossly inadequate pre-filing investigation.

Strict pleading, of course, is not the only way to screen these suits. The original Federal Rules of Civil Procedure, for example, relied primarily on summary judgment after discovery. Rule 11 of the Federal Rules uses penalties to deter. And commentators have suggested other approaches, such as fee-shifting, mandatory summary judgment review as a condition to enforceable settlements, and a preliminary assessment of the merits before certification of class actions.

Given these and other alternatives, it is a difficult question whether stricter pleading is an optimal approach, and I can do no more than sketch the outlines of an answer in this brief commentary. As I have argued elsewhere, a liberal notice pleading standard that forces an individual into court on the basis of allegations that describe perfectly lawful activity, just because those allegations do not exclude the possibility of wrongdoing, arguably raises fairness concerns.⁸ However, these concerns do not call for a substantial increase in the pleading standard. The more difficult question is whether a stronger form of strict pleading is desirable as a way to screen frivolous suits.

To answer this question, we must examine the benefits and costs of a strict pleading rule. Benefits and costs can be measured in terms of a rule’s effect on expected error costs and expected process costs. There are two types of procedural error: false positives (Type I error) and false negatives (Type II error). Let us define a false positive as a frivolous suit that gets past the pleading stage and a false negative as a meritorious suit that does not. In these terms, the social benefit of a stricter pleading standard consists in a lower expected cost of false positive error. There are two components to the social cost of a stricter standard. A stricter standard increases the expected cost of false negative error by screening meritorious suits, and it also increases expected process costs by adding expenses necessary to litigate dismissal motions.⁹

The critics of *Twombly* focus on false negative error. They argue that a stricter pleading standard will screen meritorious suits, especially in asymmetric information cases where private information (such as about the existence of an agreement in *Twombly*) is in the hands of the defendant. Because plaintiffs must pass the pleading stage before they get full access to discovery, a strict pleading rule creates a Catch-22.

⁸ Bone, *supra* note 3, at 901-09.

⁹ The *expected* cost of an error is the cost of the error (false positive or false negative) discounted by (i.e., multiplied by) the probability that the error will occur. *Expected* process cost is the cost of filing, hearing, and deciding a motion discounted by the probability a motion will be filed and litigated.

Plaintiffs must know facts before they can plead, but they cannot learn those facts until they successfully plead. The result is meritorious plaintiffs unable to sue and antitrust laws under-enforced.

There are many problems with the argument in this simple form. First, plaintiffs in asymmetric information cases are not always in the dark. A pre-filing investigation will sometimes uncover circumstantial evidence sufficient to meet a stricter pleading standard, at least one that does not require too strong an inference. To be sure, a stricter standard is likely to screen more meritorious suits than a weaker standard, but the question is how many more and at what cost.

Second, the adverse effect on meritorious suits must be compared to the beneficial effect in screening frivolous suits. This is particularly important because if there is a serious frivolous suit problem, the most compelling game-theoretic models point to asymmetric information as a principal cause. Thus, screening frivolous suits might be most needed in precisely those cases that create the greatest risk for meritorious suits.

The critics assume, however, that screening a meritorious suit is a much more serious event than allowing a frivolous suit to go forward. If this were true, then the expected cost of a false negative might well exceed the expected cost of a false positive, suggesting the superiority of a more liberal pleading standard. But the critics do not explain why the cost of a false negative is so much greater than the cost of a false positive. To be sure, there are cases, such as civil rights suits, where the plaintiff's right is so highly valued that the relative costs of error might strongly favor the plaintiff. But there are many cases that do not fit this profile.

For example, in small-claim antitrust class actions like *Twombly*, the cost of a false negative consists mainly of weaker private enforcement of the antitrust laws and weaker market competition. However, this adverse result is tempered to some extent by the availability of public enforcement, and perhaps also by market forces that tend to break down monopolies and cartels over time. Moreover, weaker competition can result from false positives too, especially when frivolous suits settle for large amounts that chill competitors from using efficient methods of competition. Therefore, it is not at all obvious that false negatives create higher social costs than false positives for antitrust cases. Indeed, the opposite could be true.

Fourth, any evaluation of a screening device must compare it to the feasible alternatives, so even a flawed device might be superior to other options. The original Federal Rules, for example, relied on summary judgment rather than strict pleading, but as the *Twombly* Court itself notes, summary judgment is a poor screening device when the high costs of discovery pressure cases to settle before the summary judgment stage. Critics of strict pleading suggest that trial judges can reduce this settlement pressure by

limiting discovery, but there are reasons to doubt the ability of trial judges to choose limits optimally for large and complex cases—a point the *Twombly* Court also emphasizes.

The penalty alternative has potential problems too. For one thing, a defendant must be able to identify a frivolous filing before the case settles; otherwise he will never be in a position to seek penalties. In addition, a defendant who believes suit is frivolous must be willing to pay the costs necessary to file and litigate a motion. This means that judicial error at the penalty stage cannot be too high and the average penalty cannot be too small. Moreover, the larger the judicial error, the greater the incentive to file frivolous suits and the greater the chilling effect on meritorious suits, especially for risk-averse plaintiffs and lawyers. Finally, expected process costs might be higher in a penalty system than in a strict pleading system because judges must verify frivolousness before they can sanction and plaintiffs' lawyers are likely to contest penalty motions vigorously to avoid reputation harms.

To do a comparative analysis properly, we need much more empirical information about the incidence of frivolous litigation, the costs of error, and other factors. In the end, however, it is unlikely that strict pleading is the optimal approach for all types of cases, although it might be for some. If strict pleading is desirable for some cases, moreover, it should be coupled with limited access to discovery before dismissal, such as one deposition of each defendant and perhaps a request for a fixed number of specifically identified documents. There is no guarantee, of course, that limited pleading-stage discovery will reveal critical private information, especially if the defendants respond strategically. But when used skillfully by the plaintiff's attorney, the approach could substantially reduce the risk of false negatives without increasing false positive error or process costs by too much.

It would be a mistake then if *Twombly* and *Iqbal* resulted in a strong form of strict pleading for all cases governed by Rule 8(a)(2). The problem of determining the optimal role for strict pleading in a screening system is too empirically-contingent and the cases too heterogeneous to be confident that a one-size-fits-all rule, like Rule 8(a)(2), is optimal. Moreover, the problem is too complex to resolve through case-specific decision making like that in *Twombly* and *Iqbal*. The task of choosing optimal pleading standards is better left to the Advisory Committee on Civil Rules or maybe to Congress. Whatever is done, one thing is certain. Regulating court access is a controversial and critically important social issue that deserves a more rigorous analysis than it has received to date.