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Dynamism in U.S. Pleading Standards: Rules, Interpretation, and Implementation

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Abstract

This chapter looks at the U.S. Supreme Court's adoption of a radical new pleading standard as an example of dynamism in U.S. law. The Federal Rules of Civil Procedure provide for notice pleading and were liberally construed for nearly seventy years after initial adoption. Even though a rule-making procedure supervised by the U.S. Supreme Court was available to make direct changes to the pleading rule, the U.S. Supreme Court took a common law approach and adopted a new standard judicially rather than administratively. This shows a substantial role for the U.S. Supreme Court in directly making procedural law for the Federal courts. The lower courts, however, have moderated the new standard through the exercise of their independence and judicial powers of interpretation. Thus, dynamism is reflected by the U.S. Supreme Court's judicial adoption of a new standard and by the lower courts reaction to that standard.

Introduction

In the United States, a common law jurisdiction with a long-standing and robust doctrine of judicial review, the courts are powerful and have significant independence. Notwithstanding the proliferation of legal codes adopted by Federal and State legislatures, the power of the courts to interpret (or construct or construe) statutes and rules gives the courts a major role. This role is substantial even when rules are clear and adopted through legitimate means. The power and independence of U.S. court creates dynamism in U.S. law. By "dynamism" I mean rapid, and sometimes unpredictable, changes. My focus here is on the courts, which can create rapid and radical changes to what otherwise appears to be a static and established rule. Somewhat ironically, however, the very same judicial power and independence that creates change operates to moderate it. Courts at different levels use their own power and independence in response to judicial changes and thereby may moderate radical changes. Some of this moderation comes through adherence to stare decisis, but U.S. courts may aggressively interpret judicial decisions so as to avoid or modify precedential effects.

This chapter explores the dynamic nature of U.S. law in the context of the rule for pleading a complaint in Federal court. The rule was adopted through legitimate means and was construed consistently for many years, but in a last few years the Supreme Court adopted a radical interpretation of the rule to substantially alter pleading requirements. It did so in a pair of cases through a common law technique rather than through the rule-making process it overseas for modification of the rules of civil procedure.

Rule 8 (a) of the Federal Rules of Civil Procedure (FRCP) provides:

> CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
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> 1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> 2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

This rule represents "notice pleading," whereby the defendant is put on notice of the general nature of the claim with the understanding that a defendant can learn the particulars of the claim through pre-trial discovery.[1] For well over fifty years, this requirement has been liberally construed. The classic statement of the standard for what constituted enough for notice was from the case of *Conley v. Gibson*:[2] "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."[3]

In 2009, the U.S. Supreme Court adopted a much stricter standard for pleading. In the case of *Ashcroft v. Iqbal*,[4] the court explicitly adopted the standard of "plausibility" for pleadings. To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is **plausible** on its face.'"[5] (emphasis added) To be "plausible" the complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6] In assessing the plausibility of the complaint, a court is to take a two-pronged approach. First, the court should identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[7] The conclusions, while they cannot be the basis for the complaint, may provide a "framework."[8] Second, after stripping the complaint of its conclusions, the court is to assess the "well-pleaded factual allegations" to "determine whether they plausibly give rise to an entitlement to relief."[9]

This radical shift in the pleading standards illustrates the Supreme Court's role in the dynamism of U.S. Civil Procedure law. [again: is a single shift after 50 years evidence of dynamism?) The Court, in interpreting and apply Rule 8, radically altered the standard to be applied to a motion to dismiss.[10] This shift was made by judicial fiat, without following the various rule-making procedures normally required to amend the Federal Rules of Civil Procedure. The dynamism in U.S. procedure law is also reflected by the lower courts' reaction to this new pleading standard. The power of the courts allowed the Supreme Court to adopt this new standard in response to individual cases without going through the rule-making procedure required to alter the text of the Federal rule. At the same time, the power of the lower courts

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[1] *See* Wright, Charles Alan and Mary Kay Kane. 2011. Law of Federal Courts, § 68, at 467.
[2] 355 U.S. 41 (1957).
[3] 355 U.S. at 45-46.
[4] 556 U.S. 662 (2009).
[5] 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[6] 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[7] 556 U.S. at 679.
[8] 556 U.S. at 679.
[9] 556 U.S. at 679.
[10] Although there has been some debate about this point, the radical departure from the Rule and precedent seems to be the better view. *See*, *e.g*. Carrington, Paul. 2010. Politics and Civil Procedure Rulemaking: Reflections on Experience. *Duke Law Journal* 60:597-667, at 651 (finding a "drastic disregard of the text of Rule 8); Note (2007). The Supreme Court, 2006 Term: Leading Cases: Federal Jurisdiction and Procedure – Civil Procedure – Pleading Standards. *Harvard Law Review* 121:305-315, at 311 (arguing conflict with text, precedent and historical sources).

to interpret the new standard allowed them to moderate the impact of the new standard. Some courts adopted abroad interpretation, some a narrow interpretation, and some courts took a middle ground approach.

This chapter will start with a brief historical background on the Federal Rules of Civil Procedure and the statute that authorized the rules, the Rules Enabling Act. It will then provide a more detailed description of the Court's decision in *Iqbal* and the immediate genealogy and policy purposes behind that opinion. The third part of this chapter will analyze the reaction of the lower federal courts and the dynamism reflected in the different ways that the courts reacted.

I. Setting the Stage: Background and History of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure were originally adopted in 1937 under the authority of the Rules Enabling Act, which was passed in 1934.[11] Prior to the Rules Enabling Act, the Federal courts relied on the pleading practices from the common law for legal actions. Although the Federal courts had authority to use more standardized State procedural rules that began to be adopted in the mid-nineteenth Century, the Supreme Court ridiculed those new procedures and continued to use common law pleading rules.[12] The common law system of pleading combined with the selective use of State law for issues raised in Federal court created such a complex system of pleading that practitioners had "to rely on the clerk of the court for guidance," and felt "'no more certainty as to the proper procedure than if [they] were before a tribunal of a foreign country.'"[13]

The Rules Enabling Act was a paradigm shift that was the culmination of a twenty year campaign to bring uniformity to Federal procedure.[14] While the act promoted uniformity, it rejected the approach in some statues, such as New York, where the rules of procedure were adopted by statute (known as "code" pleading). The first bill introduced in 1912 simply gave the power to the Supreme Court to prescribe Rules of procedure.[15] This raised concerns, however, about the relationship between the rules and existing Federal statutes.[16] A second bill introduced in 1917, and supported by the American Bar Association from 1919 to 1924, addressed this concern by providing that the rules adopted under the act would supersede all conflicting laws.[17] This would have given very broad authority to the courts to supersede substantive law. A later iteration proposed by Chief Justice Taft added the use of a commission of judges and lawyers to propose rules and amendments to be approved by the Supreme Court and then submitted to Congress for its review to become effective in six months if the Congress took no action.[18] The next version of the bill was introduced in 1924, and was identical to the version

[11] Burbank, Stephen V. 1982. The Rules Enabling Act of 1934. *University of Pennsylvania Law Review* 130:1015-1197, at 1097-1098.
[12] Burbank, *supra* note 11, at 1036-1039.
[13] Burbank, *supra* note 11, at 1041 (quoting American Bar Association (1896) *American Bar Association Reporter* 19:411, 410).
[14] Burbank, *supra* note 11, at 1024.
[15] H.R. 26,462, 62nd Congress, 3d Session (1912); S.8454, 62nd Congress, 3d Session (1912).
[16] Burbank, *supra* note 11, at 1052-1053.
[17] Burbank, *supra* note 11, at 1066 and n.228.
[18] Burbank, *supra* note 11, at 1069-1070.

that was ultimately passed in 1934 (except for one word).[19] The bill enacted gave the U.S. Supreme Court the power to prescribe rules of procedure, but limited that power by declaring that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[20] Although this version did not explicitly include the use of a commission, it provided that rules would "take effect six months after promulgation" and that they would not take effect "until they shall have been reported to Congress by the Attorney General at the beginning of a regular session and thereof and until after the close of such session."[21]

While not explicitly required by the Rules Enabling Act when adopted, consultation with expert committees "has been the cornerstone of civil rulemaking in the Federal courts since the adoption of the Rules Enabling Act."[22] The Judicial Conference, which was created by statute and to which all Federal judges belong,[23] has authority to recommend changes to the rules.[24] It oversees a Standing Committee on Rules of Practice and Procedure whose members are appointed by the Chief Justice of the Supreme Court.[25] Various advisory committees are accountable to the Standing Committee, including an Advisory Committee on Civil Rules.[26] The members of that advisory committee are judges, lawyers and law professors.[27] Before a proposed rule change is adopted by the Supreme Court, it is considered by the Advisory Committee, the Standing Committee, and the Judicial Conference.[28] Once a rule change has been adopted by the Supreme Court, it must be reported to Congress which has about seven months to reject it.[29] If it is not rejected by Congress, the change takes effect.

Over time, the process for adopting and amending the Federal rules of civil procedure has become more formalized and more like procedures use to adopt or modify administrative rules. For about the first 40 years under the Rules Enabling Act, until 1973, the judiciary made and modified civil rules without interference from Congress, which did not exercise its veto power.[30] Around this same time, various challenges were being made to judicial rulemaking on ideological, theoretical and practical grounds.[31] As political challenges to the rules increased, the rulemaking procedure became more formal. In 1988, as part of the Judicial Improvements and Access to Justice Act, Congress amended the Rules Enabling Act to mandate open meetings, minutes to be maintained and made available to the public, advance notice of meetings to be given, explanatory notes for proposed change along with a written report explaining

[19] Burbank, *supra* note 11, at 1097. The word that was added was "civil" in the first section to make it consistent with the second section. *See ibid*. at 1097 n.375
[20] Public Law No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072).
[21] Public Law No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072).
[22] Bone, Robert G. 1999. The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy. *Georgetown Law Journal* 87:887-955, at 888.
[23] 28 U.S.C. § 331.
[24] 28 U.S.C. § 2073.
[25] 28 U.S.C. § 331.
[26] 28 U.S.C. § 2073.
[27] Bone, *supra* note 22, at 892.
[28] 28 U.S.C. § 2073.
[29] 28 U.S.C. § 2074(a).
[30] Bone, *supra* note 22, at 893. Congress exercised its veto power to block the proposed Federal Rules of Evidence and adopted a statutory version instead. *See ibid.* at 902.
[31] *See* Bone, *supra* note 22, at 900-902.

the committees' actions and including any minority or separate views.[32] Thus, by 2009, when the *Iqbal* opinion was issued, there was a fairly elaborate system in place for amendment of the Federal Rules of Civil Procedure.

The notice pleading requirement in FRCP 8 was adopted with the original federal rules according to the rule-making procedures in 1938, and have not be substantively amended. The federal courts, prior to *Iqbal*, "the courts agreed that a claimant did not need to set out in detail the facts on which the claim for relief was based, but only needed to provide a statement sufficient to put the opposing party on notice for the claim."[33] The most commonly cited judicial authority in support of notice pleading was *Conley v. Gibson*,[34] decided in 1957 and confirmed unanimously by the U.S. Supreme Court in cases in 1993[35] and 2002.[36]

II. Dynamism at the Supreme Court: The Pleading Revolution

Rather than using the elaborate, statutorily mandated system to change the standard for pleadings in the federal courts, the Supreme Court in *Ashcroft v. Iqbal*[37] adopted radically new pleading requirements by judicial fiat.[38] That case involved a so-called "*Bivens*" claim (a claim brought directly under the U.S. Constitution rather than under a statute or common law claim) made by Javaid Iqbal, a Pakistani Muslim who has been arrested and detained after the September 11, 2001, terrorist attacks. Iqbal alleged that he was the victim of racial and religious profiling and that he was detained and treated in ways that violated his rights. He alleged that Attorney General Ashcroft was the "principle architect" of the policy, and that FBI Director Mueller was "instrumental" in its adoption.[39]

The Supreme Court held that Iqbal's complaint was not sufficient to state a legal claim. Although the trial court and Court of Appeals found that the complaint was sufficient, the Supreme Court found that the complaint was not plausible after stripping it of improper conclusions. The Court concluded that that the bare allegations that Ashcroft was the "principle architect" and that Mueller was "instrumental" were "conclusory" and therefore were "not entitled to be assumed true."[40] The remaining allegations did not establish that Ashcroft and Muller acted with discriminatory intent. Because the September 11

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[32] Public Law No. 100-707, 102 Stat. 4642 (1988), codified at 27 U.S.C. § 2073(c)-(d). Although the Advisory had customarily "circulated drafts to bench and bar and invited input," it "never seemed to treat participation as a requirement of legitimacy." Bone, *supra* note 22, at 903 n. 86.

[33] Parness, Jeffrey A. Moore's Federal Practice – Civil. 2015. 2-8:8.04.

[34] 355 U.S. 41 (1957).

[35] *Leatherman v. Tarrant County*, 507 U.S. 163 (1997).

[36] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

[37] 556 U.S. 662 (2009).

[38] Although many commentators agree that *Iqbal* adopted a new pleading standard, *see*, *e.g.* Bone, Robert G. (2010). Plausibility Pleading Revisited and Revised: A comment on *Ashcroft v. Iqbal*. *Notre Dame Law Review* 85:849-885; Clermont, Kevin M. and Stephen C. Yeazell (2010). Inventing Tests, Destabilizing Systems. *Iowa Law Review* 95:821-861; Gressette, Thomas P., Jr. (2010). The Heightened Pleading Standard of Bell Atlantic v. Twombly and Ashcroft v. Iqbal. *Drake Law Review* 58: 401-455; Miller, Arthur R. (2010). From Conley to Twombly to Iqbal: A Double Plan on the Federal Rules of Civil Procedure. *Duke Law Journal* 60:1-130, some do not, *see*, *e.g.*, Steinman, Adam N. (2010). The Pleading Problem. *Stanford Law Review* 62: 1293-1360.

[39] 556 U.S. at 669.

[40] 556 U.S. at 681.

attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves as members in good standing of al Qaeda . . . it should come as no surprise that a legitimate policy . . . would produce disparate, incidental impact on Arab Muslims."[41] The only allegation of intent against Ashcroft and Mueller were that they adopted "a policy approving 'restrictive conditions of confinement' for post-September 11 detainees until they were 'cleared' by the FBI."[42] But such an allegation did not establish that the policy was "purposefully adopted" because of the detainees' "race, religion or national origin."[43] Because of the "'obvious alternative explanation' for the arrests," an inference of discrimination was "not a plausible conclusion."[44]

The restriction on "conclusions" was a creation of *Iqbal*, but the plausibility standard came from a previous Supreme Court case, *Bell Atlantic Corp. v. Twombly*, decided two years earlier.[45] That case involved a putative class action alleging that incumbent telephone companies violated the Sherman Antitrust Act by conspiring to restrain trade. The complaint alleged that the companies "engaged in parallel conduct" to inhibit the growth of upstart competitors and that the incumbent companies refrained from competing with each other.[46] The trial court dismissed the complaint for failure to state a claim, but the Court of Appeals reversed. The Supreme Court agreed with the trial court and held that the complaint was not sufficient because its allegations stopped "short of the line between possibility and plausibility."[47] The allegations of parallel conduct and refraining from competitive behavior were not enough to establish a conspiracy; there was "an obvious alternative explanation" that the incumbents were acting in their individual interests to "sit tight, expecting their neighbors to do the same thing."[48]

Although the Supreme Court described issue in *Twombly* as "the proper standard for pleading an antitrust conspiracy,"[49] in *Iqbal* the Court held that "the decision was based on [the] interpretation and application of Rule 8" and applied to "'all civil actions.'"[50] Moreover, the Court in *Twombly* specifically rejected the applicability of the "no set of facts" standard from *Conley.* The plaintiff in *Twombly* argued that it met the *Conley* requirements, but the Court reasoned that "many judges and commentators" had "balked at taking the literal terms of the *Conley* passage as a pleading standard."[51] The Court suggested that the "no set of facts" language "should be understood in light of the [*Conley*] opinion's preceding summary of the complaint's concrete allegations, which the court quite reasonably understood as amply stating a claim for relief." To the extent that lower courts might be tempted to continue to use the "no

[41] 556 U.S. at 682.
[42] 556 U.S. at 683.
[43] 556 U.S. at 682.
[44] 556 U.S. at 682.
[45] 550 U.S. 544, 570 (2007).
[46] 550 U.S. at 550-551.
[47] 550 U.S. at 557.
[48] 660 U.S. at 566-568.
[49] 550 U.S. at 553.
[50] *Iqbal*, 556 U.S. at 684.
[51] *Twombly*, 550 U.S. at 561-562.

set of facts" language from *Conley*, the Court concluded that the phrase had "earned its retirement" to be "best forgotten as an incomplete, negative gloss on an accepted pleading standard."[52]

These Supreme Court cases show dynamism in Federal civil procedure that reflects the common law tradition and the strength and independence of the judiciary. The Court, while citing to Federal Rule 8, made little effort to tie the new standards to the particular text of the rule. Instead, it simply stated the new standard as it would a common law rule. Remarkably, the Court used this common law approach instead of its explicit administrative authority to amend the text of Rule 8.[53] This may have been instrumental (i.e. more effective and quicker), ideological (i.e. the majority may not have had sufficient influence through the administrative process), or perhaps both. For years prior to *Iqbal* and *Twombly*, the administrative process had considered changes to the pleading rules, but "rulemakers repeatedly expressed the view that more rigorous pleading requirements were unwarranted and would be unsound as a matter of policy."[54] The majority of the Supreme Court did not agree; it wanted to tighten up pleading standards "to filter out hypothesized excesses of meritless litigation, to deter allegedly abusive practices, and to contain costs."[55]

III. Dynamism in the Lower Courts: the reaction to *Iqbal* and *Twombly*

The dynamism in the U.S. system of civil procedure is not limited to the Supreme Court. Lower courts also enjoy significant power and independence, and are fully immersed in the common law tradition. While the legal hierarchy makes the decision of the U.S. Supreme Court binding on all lower Federal courts, those lower courts are adept at limiting, distinguishing or interpreting Supreme Court opinions. The lower Federal courts consist of trial courts in 94 districts in the U.S. and appellate courts in thirteen circuits. Judges in these courts have life-tenure appointment, resulting in substantial independence, and are adept at interpreting the law to meet their policy objectives. Splits between the circuits and the districts are common. In the exercise of their independence and their common law powers, the lower courts have the power to choose how closely to follow *Iqbal* and *Twombly*, or, to the extent they disagree, may find ways to avoid doing so. This is precisely what has happened in the wake of *Iqbal* and *Twombly.* Some courts have followed in letter and spirit and have applied a heightened pleading standard that has made it more difficult for plaintiffs to get past the motion to dismiss. On the other hand, some courts have limited the application of the standard, or have applied it in a way that has not significantly increased the pleading burden for the plaintiff.

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[52] 550 U.S. at 563.

[53] The Supreme Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district court (including proceedings before magistrates thereof) and courts of appeals." 28 U.S.C. § 2072. These rules must go through the administrative procedures outline above.

[54] Hoffman, Lonny. 2013. Rulemaking in the Age of Twombly and Iqbal. *U.C. Davis Law Review* 46: 1483-1558, at 1511.

[55] Miller, *supra* note 38, at 53. *See Twombly*, 550 U.S. at 557-560 (discussing the use of pleading standards to screen out meritless cases and to avoid *in terrorem* effect of expensive discovery); *see also Iqbal*, 556 U.S. at 685-686 (rejecting case management techniques as insufficient to avoid the consequences of discovery).

There has been a remarkable amount of empirical research about the consequences of *Iqbal* and *Twombly* on motions to dismiss, but the data has been interpreted in a variety of ways.[56] One thing that everyone can agree on is that the lower courts have recognized their significance by citing to them. *Iqbal* has been cited by the lower courts more than 30,000 times.[57] That being said, there is significant disagreement about the extent to which *Iqbal* and *Twombly* have affected outcomes in the lower courts. The most comprehensive study was conducted by researchers for the Federal Judicial Center.[58] It showed that defendants moved to dismiss 50% more often after *Iqbal*.[59] However, after efforts to control for different dismissal practices among different courts, variations based on type of case, and whether the motion involved an amended complaint, the study "found that there was no 'statistically significant' increase in the likelihood that a motion to dismiss would be grated after *Iqbal*."[60] This suggests that lower courts have resisted the Supreme Court's directive to use motions to dismiss filter out meritless cases and to reduce the cost of litigation and discovery.

The Federal Judicial Center study has been criticized as focusing too much on judicial outcomes, and for failing to account for party selection effects.[61] Measuring the success rate on motions to dismiss fails to account for other negative affects based on party behavior. Faced with heightened pleading standard, defendants will be more likely to make a motion to dismiss rather than filing an answer, requiring the plaintiff to respond to the motion before moving to the discovery phase. On the other side, plaintiffs faced with the heightened pleading standard will be less likely to file a complaint or may drop the complaint, and will be more likely to settle to avoid the risk of dismissal. Using the Federal Judicial Center data, Jonah Gelbach calculated the lower bound of negative effects of the change pleading standard and found negative effects in at least 21.5% of cases other than those involving financial instruments, civil rights and employment discrimination, and negative effects in 15.4% of employment discrimination claims and 18.1% of civil rights cases.[62]

These estimates suggest that the parties perceive that at least some of the lower courts will apply a heightened pleading standard after *Iqbal* and *Twombly*, but these estimates do not establish actual

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[56] For a summary of the literature, see Glelbach, Jonah. 2012. Selection in Motion: A Formal Model of Rule 12(b)(6) and the *Twombly-Iqbal* Shift in Pleading Policy at 5-8. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138428. Accessed 20 November 2014.

[57] Kuperman, Andrea. 2011. Memorandum to Civil Rules Committee and Standing Rules Committee on Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* at 1 n. 2. http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/iqbalmemo_112311.pdf. Accessed 5 September 2014.

[58] Cecil, Joe S., George W. Cort, Margaret S. Williams and Jared J. Bataillon. 2011. Motion to Dismiss for Failure to State a Claim after *Iqbal*: *Report to the Judicial Conference Advisory Committee on Civil Rules*. http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf. Accessed 31 January 2015. This study considered cases from 23 Federal distinction courts that collectively accounted for 51% of litigation for two nine-month periods, one before *Iqbal* and one afterwards. *See ibid*. at 5.

[59] Hoffman, *supra* note 54, at 1533-1534 (relying on data from the Federal Judicial Center report).

[60] Hoffman, *supra* note 54, at 1535 (financial instrument cases were an exception to this but were considered an outlier because of the financial crisis near that time).

[61] Gelbach, Jonah B. (2012). Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery. *Yale Law Journal* 121:2270-2345.

[62] Gelbach, *supra* note 61, at 2338. Cases involving financial instruments were excluded because of a sharp rise in such cases after the 2008-09 financial crisis.

judicial behavior or show a perception that all courts will apply a heightened standard. Anecdotal information suggests that lower courts may not be applying a heightened standard as the Supreme Court intended. The committees involved with recommending changes in the rules of civil procedure have failed to act in part because they believe that "the lower courts are adapting" to the changed doctrine.[63] A review of lower court opinions by the Chief Council to the rules committees concluded that "case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency."[64] Consistent with a common law customs, the review found that lower courts "are taking a context-specific approach," and "that *Twombly* and *Iqbal* are providing a new framework in which to analyze familiar pleading concepts, rather than an entirely new pleading standard."[65] The appellate courts "have reversed dismissals where district courts failed to presume the facts to be true or the plaintiff to plead with too much particularity," and "appear to apply the analysis more leniently in cases where pleading with more detail may be difficult."[66] Another commentator found that some "courts insist that the ordinary pleading standard continues to be a liberal one focused on notice, with some courts even going so far as to apply the repudiated 'no set of facts" test to scrutinize the sufficiency of claims."[67]

Decisions from the Seventh Circuit provide examples of lower courts that have substantially limited the scope of the *Iqbal* and *Twombly* pleading standard. When considering the plausibility standard articulated in *Twombly*, the Seventh Circuit, while recognizing that the Supreme Court had "retooled federal pleading standards," noted that *Twombly* "made it clear that it did not, in fact, supplant the basic notice-pleading standard."[68] It then reversed the trial court's dismissal of plaintiff's claim of sexual discrimination because the allegations that she was paid less than similarly situated male employees because she was a woman and would not cooperate with the governor's office were sufficient to state a claim.

A subsequent Seventh Circuit opinion conceded that the Supreme Court had "set the bar" higher, but it suggested that it was an open question about how much higher.[69] The Court noted that this did not require "fact pleading" and that pleading still only required "fair notice."[70] The Seventh Circuit interpreted the *Iqbal* standard to require "that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together."[71] Applying this interpretation, the Court found that the trial court had erred in dismissing fair housing claims based on allegations that defendants' actions prevented her from getting a loan and were motivated by her race. While this standard may be slightly more demanding than the "no set of facts" standard prior to *Iqbal*, it is still

[63] Hoffman, *supra* note 54, at 1531.
[64] Kuperman, *supra* note 57, at 4.
[65] Kuperman, *supra* note 57, at 4-5.
[66] Kuperman, *supra* note 57, at 5.
[67] Spencer, A. Benjamin. 2009. Understanding Pleading Doctrine. *Michigan Law Review* 94:873-935, at 7 (citations omitted).
[68] Tamayo v. Blagojevich, 526 F.3d 1074, 1082-1083 (7th Cir. 2008).
[69] Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010).
[70] Swanson, 614 F.3d at 404-405.
[71] Swanson, 614 F.3d at 405.

sufficiently liberal reach the opposite result in *Iqbal*. A court could find the allegation that immediately after the September 11 terrorist attacks Attorney General Ashcroft was the architect of a program to detain and mistreat Arab Muslims was a "story that holds together."

The approach of the Tenth Circuit represents a kind of compromise interpretation of the *Iqbal* standard. Unlike the Seventh Circuit, which began with the premise that the Court had not abandoned traditional notice pleading, the Tenth Circuit started from the premise that court did not mean to impose "heightened fact pleading" but instead sought a "middle ground" between that and a complaint that contained only a 'formulaic recitation of the elements of cause of action."[72] In finding that middle ground, the Tenth Circuit noted that the standard should "weed out claims that do not (in the absence of additional allegations) have a reasonable prospect for success" and should "inform defendants of the actual grounds of the claim against them."[73] Applying this standard in light of the identified purpose, the Tenth Circuit held that the district court should have dismissed the complaint. The plaintiff had alleged that the Department of Human Services personnel had directed them to use a childcare provider where their daughter was killed. This allegation was insufficient because the government employees were protected by qualified immunity, and the allegations failed to "isolate the allegedly unconstitutional acts of each defendant, and thereby [did] not provide adequate notice of the nature of the claims against each."[74]

The Ninth Circuit's approach was one of the most aggressive in favor of dismissals. Its analysis started from the premise that *Twombly* held that a plaintiff "must plead a set of facts 'plausibly suggesting (not merely consistent with)' a Sherman Act violation to survive a motion to dismiss."[75] After describing the *Twombly* and *Iqbal* opinions, the court's interpreted the standard to emphasize this factual element: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."[76] In applying this interpretation, the court found that the allegations did not contain enough facts. Plaintiffs, anti-Bush protestors, alleged that the Secret Service had violated their First Amendment rights by forcing them to relocate away from President when pro-Bush protestors were allowed to stay. In order to state a claim, the "critical question" was whether the relocation was "*because of*" their anti-Bush viewpoint.[77] The court found that the "bald allegation of impermissible motive" was not entitled to any weight because it was conclusory, and that the remaining facts did not provide any basis for impermissible motive. The complaint alleged that after allowing the protestors to be close enough to be heard, when the President was ready to leave that "all persons" at the location occupied by the anti-Bush protestors were to be moved out of handgun or explosive range. Because the protestors were in

[72] Robbins v. Oklahoma ex rel. Department of Human Services, 519 F.3d 1242, 1247 (10th Cir. 2008).
[73] Robbins, 519 F.3d at 1248.
[74] Robbins, 519 F.3d at 1250.
[75] Moss v. United States Secret Service, 572 F.3d 962, 968 (9th Cir. 2009).
[76] Moss, 572 F.3d at 969 (quoting *Iqbal*, 129 S. Ct. at 1949).
[77] Moss, 572 F.3d at 970.

hearing distance of the President before being moved, the court found the assertion that the Secret Service was motivated by their point of view to be not plausible.[78]

These different approaches taken by the Federal circuits show dynamism in reaction to the Supreme Court decisions in *Iqbal* and *Twombly*. While the Supreme Court sought to impose a significantly more stringent pleading standard to screen out non-meritorious claims and to reduce the burden of discovery, the lower courts, using their independence and interpretive powers within the common law tradition, have adopted their own versions of the new pleading standard. The Seventh Circuit's interpretation resulted in a liberal pleading standard focused on the importance of notice similar to the pre-*Iqbal* and pre-*Twombly* standard. The Ninth Circuit's interpretation was a stricter standard focusing on the need of the plaintiff to plead facts in support of a claim. The Tenth Circuit's interpretation sought the middle ground between heightened pleading and mere notice. The Supreme Court will likely take up future cases to resolve conflicts between the circuits, which will trigger another round of dynamic interpretation in the lower courts.

Conclusion

The Federal Rules of Civil Procedure were promulgated in 1937 by the U.S. Supreme Court though and administrative-like procedure. Rule 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." This requirement, known as notice pleading, made it substantially easier than it had been to bring a claim in the Federal courts. In 2007 and 2009, in the landmark cases of *Twombly* and *Iqbal*, the U.S. Supreme Court adopted a more stringent pleading standard that discounts conclusions and requires plausibility. This paradigmatic shift was not undertaken through the robust and representative rule-making process over which the Supreme Court had authority, but instead was done with two case holdings. This illustrates dynamism in the U.S. system for civil procedure and reflects the powerful common law tradition in the U.S. courts. The lower courts, who also have substantial independence and embrace the common law tradition, are making their own interpretations of the new pleading standard, which illustrates additional dynamism at both the appellate and trial court levels.

[78] Moss, 572 F.3d at 971.