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Access v. Efficiency: Reflections on the Consequences of *Twombly* and *Iqbal*

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Access v. Efficiency: Reflections on the Consequences of *Twombly* and *Iqbal*

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I. INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*,[3] the Supreme Court discarded a half century's worth of settled doctrine regarding pleading—the key to access to the federal courts—starting anew with a heightened standard that threatens to leave many plaintiffs out in the cold. *Twombly* and *Iqbal* ushered in "plausibility" pleading and effectively retired "notice" pleading as the operable standard of Federal Rule of Civil Procedure 8(a)(2).[4] No longer is the role of the complaint merely to give notice of the plaintiff's claim to enable the defendant to answer; rather, the complaint now must present sufficient factual allegations to give rise to a plausible inference of wrongdoing. This change bodes poorly for plaintiffs' access to the federal courts and may have a ripple effect on the entire civil justice system.

The debate over the proper role of pleading in contemporary litigation has exploded since *Twombly* and *Iqbal*, with motions to dismiss based on those cases now the procedural device *du jour*. On one side, the defense bar and major corporations praise the advent of plausibility pleading, claiming that it is long overdue and necessary to protect defendants from alleged widespread frivolous and abusive litigation, conserve judicial resources, and protect American industry and governmental entities from the high costs of discovery and trial. Arrayed against that view are the plaintiffs' bar and civil rights and consumer groups who argue that plausibility pleading not only will weed out frivolous claims but also will terminate meritorious cases prematurely, further erode the right to a meaningful day in court and the right to jury trial, and increase the burden on small plaintiffs asserting claims against well-funded defendants. Although *Twombly* and *Iqbal* have provided new fuel for a long simmering fire, the current controversy is merely the most recent manifestation of a decades-old ideological debate

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[2] 550 U.S. 544 (2007).

[3] __ U.S. __, 129 S. Ct. 1937 (2009).

[4] "All the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

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over what is the higher litigation value: access to the federal courts or efficiency and economy in disposing of claims.

II. THE TREND TOWARD PRETRIAL DISPOSITION

The ideological debate between access and early termination has been spurred by changes in society, legal culture, substantive law, and the legal profession itself. The Federal Rules were designed in the 1930's to fit the paradigm of a community of lawyers litigating relatively small numbers of what today would be regarded as relatively simple disputes—a plaintiff, a defendant, and an issue or two. Today, the number of lawsuits has skyrocketed, but judicial resources have not kept pace. Federal dockets are heavily weighted by complex disputes involving difficult scientific, technical, and economic matters, often between corporate entities or large groups of citizens against manufacturers, service providers, or employers, battling over stakes that would have been unimaginable when the rules were promulgated in 1938. Court calendars have become clogged by massive litigation on behalf of immense numbers of people pursuing legal theories under detailed—often poorly drafted—statutes or administrative regulations undreamt of when the Federal Rules were introduced. The philosophy underlying much civil litigation fundamentally has changed, with many cases pursuing ideological or public policy objectives of extraordinary magnitude. Opposing counsel compete on a national and international scale, armed with an array of litigation tactics often meant to batter their opponents, foregoing the former sense of communal courtesies. As is true of much of legal practice, litigation has become a business and lost many of its moorings as a professional activity. What some would call cults of judicial management and alternative dispute resolution have arisen. In short, the assumption that federal lawsuits involve an individual plaintiff against an individual defendant has become illusory.

Concomitant with these changes and effective interest group campaigns in the past few decades decrying the "litigation explosion" and "abusive" and "frivolous" lawsuits—images neither defined nor quantified—courts and rulemakers have embarked on a trend toward pretrial disposition in the name of efficiency, economy, and the war against the alleged litigation evils. But this early termination mentality has come at the expense of access to the courts and promoting adjudication on the merits. Today, many bemoan the vanishing trial and especially the disappearance of jury trials.

Examples abound. The Supreme Court's 1986 trilogy of summary judgment cases[5] broke with the Court's prior jurisprudence that urged caution in the use of the

[5] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574 (1986). I have written on this subject at length. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion, Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and July Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

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motion, lest important constitutional values be compromised.[6] The decisions sent a clear signal to the bar and the federal judiciary that summary judgment would be a welcome tool to dispose of cases short of trial. Not surprisingly, the motion has moved front and center in defense strategy. In 1995, Congress enacted the Private Securities Litigation Reform Act, which created a super-heightened pleading standard for certain aspects of securities claims, ostensibly to reduce frivolous suits.[7] Throughout the last few decades, lower federal courts repeatedly have pushed heightened pleading standards in other types of cases without rule or legislative authorization.[8] Finally, for more than a quarter of a century, amendments to the Federal Rules have been designed to limit or control discovery and enhance the power of judges to control cases.[9]

III. THE REDUCTION IN PLAINTIFFS' ACCESS TO THE FEDERAL COURTS

It is the most recent step in the trend toward pretrial adjudication—*Twombly* and *Iqbal*—that may have struck the deadliest blow against plaintiffs and the access value. Until then, it had been relatively easy for plaintiffs to survive the motion to dismiss, although it had become increasingly difficult for them to navigate between discovery and summary judgment to reach trial; after *Twombly-Iqbal*, plaintiffs will struggle to surmount the dismissal motion in order to reach discovery. Although, in reality, fact pleading—something supposedly discarded by the Federal Rules—already was being required by the lower courts in complex cases, *Iqbal* has exponentially expanded the reach of fact pleading by declaring the *Twombly* plausibility standard applicable to all civil actions. What was once a trial-oriented system appears to be slipping back into the all-but-forgotten and discarded common law system, with its heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint.

The weight of the new pleading regime will fall heavily on plaintiffs across the board. Because informed determinations of a claim's merits are nearly impossible from the limited information provided in the complaint, it is inevitable that, under the plausibility pleading standard the Court has mandated, potentially meritorious cases will be thrown out with cases unworthy of further attention. As a result, plaintiffs will be obliged to invest in pre-institution investigations as a surrogate for post-institution discovery in order to survive dismissal—if they can afford it. Potential plaintiffs and contingent fee lawyers will be deterred from filing even meritorious claims because they

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[6] "We believe that summary procedures should be used sparingly in complex antitrust litigation . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). *See also* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970).

[7] Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

[8] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L REV. 433 (1986); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002).

[9] FED. R. CIV. P. 16, 26. Rule 16 was amended in 1983 and 1993, and Rule 26 was amended in 1993 and 2000. See the Advisory Committee's notes for more information about these revisions.

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do not have the resources to gain access to the facts they now must allege at the outset without the illumination of discovery, especially when faced with the daunting quantities of e-mail and paper generated by corporate or government defendants.

Moreover, plaintiffs bringing claims in which states of mind, such as intent and knowledge, must be alleged are more likely to have their complaints dismissed than those asserting simpler factually objective claims, like negligence. These state of mind-based actions, including antitrust conspiracies, securities frauds, and discrimination claims, face an information asymmetry problem—the critical evidence typically is in the hands of the defendant alone, which makes alleging sufficient facts at the pleading stage a near impossibility. Justice should not depend on who can best hide evidence of their wrongdoing.

IV. *TWOMBLY*'S INCOMPLETE ANALYSIS OF DISCOVERY COSTS

Motivating the Court's tectonic doctrinal shift apparently are concerns about the perceived costs of discovery, with its opinions discussing abusive requests and the inability (or unwillingness) of judges to limit and control the process. However, this premise is thought faulty and dangerous by those who value access to the courts. In *Twombly*, the Court based its belief that federal judges are unable to control discovery on one, rather dated theoretical law review article.[10] It may be true that there are some excesses and abuses that case management and discovery limitations have not sufficiently contained, but, in fact, there is very little data available to show the nature and extent of these problems. More often, claims on the subject are advanced on both sides of the issue based more on rhetorical flourishes, ideology, and self-interest than on any hard evidence. Certainly the Court offered next to nothing to support its conclusions that other softer, gentler techniques than dismissal were unavailable.

The legitimacy of claims of dissatisfaction with case management must be analyzed and understood if it is to be addressed properly. Without further empirical study, it is impossible to know exactly what discovery problems exist and what the best solutions may be. Until that is available, it is inappropriate to rely on the blunt instrument of plausibility pleading and dismissal to screen out a wide swath of possibly meritorious claims at the point of initiation. With the knowledge provided by further research, finer procedural tools may be found, such as more highly refined judicial case management methodologies, greater control over lawyer behavior, or a preliminary controlled discovery phase in order to determine whether claims are in fact "plausible" and entitled to go forward. Access to civil justice is too important an American value to be sacrificed on the basis of conclusory epithets or flimsy guesswork.

Not only was the *Twombly* Court's focus on abusive discovery not fact-based, but it also was unduly limited in perspective. By seemingly reacting to those on the right

[10] 550 U.S. at 559.

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side of the litigation "v." and ignoring those who appear on the left, the Court has accepted a partial picture of the costs of litigation in its quest for efficiency. Whereas the defendants' costs are commonly lamented—often with claims of extortion by plaintiffs in the form of heightened settlement values based on the threat of expensive discovery and trial—the plaintiffs' costs rarely are acknowledged and indeed are ignored in *Twombly* and *Iqbal*. Also, unacknowledged are the costs of harassing resistance to legitimate discovery requests.

The current myopia regarding costs leads to a concept of efficiency that favors defendants and discounts plaintiffs, as can be seen in the long-running trend toward accelerating pretrial disposition. The efforts of contingent-fee lawyers are not free goods; the rational ones evaluate proposed cases and make their own judgment of "plausibility" before taking on clients and expending considerable sums of their own money on cases doomed to be terminated. This screening practice has become increasingly important as summary judgment has been invoked and granted more and more freely; it undoubtedly will become even more prevalent, making it harder for worthy plaintiffs to find representation, with the added burden of plausibility pleading. Moreover, raising the pleading barrier may skew plaintiffs' valuations of their claims downward, forcing them to settle earlier and for less than a case's merits otherwise would dictate out of fear of early termination. The possibility of coercive settlements is a bilateral phenomenon. These costs remain unknown, since they are largely unstudied. I do not argue that these costs necessarily outweigh the expenses defendants incur in defending lawsuits. The point is that if efficiency is to be trumpeted by the Court and rulemakers as a justification for enhanced dismissal of complaints despite the risk of prematurity, all of the costs to the system—including those incurred by plaintiffs—must be considered.

V. THE SYSTEMIC IMPLICATIONS OF *TWOMBLY* AND *IQBAL*

The consequences emanating from the Court's *Twombly-Iqbal* decisions extend far beyond their impact on plaintiffs' access to the courtroom. In 1934, the enactment of the Rules Enabling Act transferred the power to create "general rules of practice and procedure" from Congress to the Supreme Court, which, in turn, vested the initiating and drafting powers in a rulemaking structure.[11] The Rules Enabling Act has been understood to mean that (1) only the rulemaking process or an act of Congress can change the Federal Rules, and (2) the Rules must be general—they must apply in the same way to all types of actions brought in the district courts. *Twombly* and *Iqbal* cast a shadow on both of these foundational assumptions.

In *Twombly*, the Court suddenly departed from its prior stance that only the rulemaking process and Congress can change the Federal Rules. Although *Twombly* did

[11] 28 U.S.C. § 2072 (1934).

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not alter the words of Federal Rule 8(a)(2) itself, it substantially changed the Rule's understood meaning, something the Court had refused to do on its own in previous decisions.[12] Amendment by judicial fiat is a piecemeal process of revision that threatens to undermine the overall coherence of the Federal Rules and create inconsistencies of application. Commentators already have raised questions about how plausibility pleading will work alongside the current interpretations and language of Rules 8(f), 9(b), 11(b), 12(e), and 15.[13] I fear that in many respects, the federal pretrial process as we have known it has been destabilized, and fixing such an endemic problem will take more than judicial tinkering rule-by-rule.

Moreover, amendment through the rulemaking structure provides an opportunity for democratic participation and has the necessary resources for empirical study, allowing any Rule changes to be based on information, not merely ideological rhetoric and guesswork. The Court's legislative decisions in *Twombly* and *Iqbal* demonstrate a dangerous disregard for these virtues. What has happened, not surprisingly, has generated some support for congressional restoration of the notice pleading system. Senator Arlen Specter already has introduced legislation that would reinstate the former practice, which might be a sound way to enable the rulemaking process to study and propose a solution.[14]

In addition to creating an uncertain future for rulemaking as we have known it, the Court also has placed the fundamental assumption of transsubstantivity—the principle that demands consistent application of the Rules across all types of substantive claims—in jeopardy.[15] In *Iqbal*, the Court asserted that the plausibility pleading standard announced in *Twombly* will apply to all federal civil actions.[16] This attempt to preserve uniformity, however, may prove to be somewhat unrealistic in execution, especially if applied to relatively simple or formulary cases.

The Federal Rules may remain transsubstantive in name, with plausibility pleading as the verbalized standard for all cases, but judges may apply the standard disparately in practice. Courts may continue to apply something akin to a notice pleading standard to relatively uncluttered cases that do not provide as significant a threat of abusive discovery and other nefarious litigation practices as more complex cases, which, in reality, represent only a fraction of what is on the federal dockets. Conversely, transsubstantivity may be formally abandoned. The rising chorus of concern about citizen access to the courts may lead to the development of a formal tracking system—dividing cases into categories and designing different sets of

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

[13] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

[14] There is the concern that the present rulemaking process has become polarized.

[15] *See generally* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil, 3d § 1221.

[16] 129 S. Ct. at 1953.

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procedural rules that are custom tailored for each track. This approach may be the best way to address the perceived problems of modern litigation while permitting maximum continued access to the civil justice system. Formulating such a system probably would be a difficult and contentious process, but it can be done. Indeed, the English have.[17]

VI. CONCLUSION

With *Twombly* and *Iqbal*, the Supreme Court has pushed pretrial disposition to the very genesis of a case—the complaint. The defendant need not even answer. Today's relentless focus on the avoidance of abusive litigation behavior, efficiency, and economy, both for defendants and for judicial resources, has come at the price of access to the federal courts, a principle central to the Rules' original vision.

Although modern litigation realities may warrant a greater concern for efficiency, the Court's move to plausibility pleading was not the process-wide, wide-angle solution that is needed. Additional information and full consideration of all potential solutions to the system's current problems are required if we are to maintain our past commitment to citizen access and various procedural and constitutional values. The rulemaking process—wholly abandoned by the Court—is far from perfect, but it is better suited to effect Rule revision, allowing coherent changes that take account of their potentially holistic character. If changes are debated in light of full, intelligent, and dispassionate information as to the costs and challenges facing the civil justice system, perhaps efficiency and access would not be seen to be mutually exclusive, and the Federal Rules might be made stronger.

[17] *See* ADRIAN A.S. ZUCKERMAN, CIVIL PROCEDURE 422-40 (2003) (describing English tracking system).

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