

Why the *Iqbal* and *Twombly* Decisions Are Steps in the Right Direction

By Richard J. Pocker

In the late 1980s, American businesses and professionals betrayed an almost perverse fascination with all things “Japanese.” Japanese management techniques, “just in time” inventory procedures, the secrets of the samurai warriors, and the tao of consensus decision making all had their day in the sun. Fortunately, that fascination faded almost as fast as did the threat to the American economy from the Japanese economic juggernaut. Nonetheless, one small example of the allegedly superior aspects of Japanese society has continued to fascinate me, especially after I entered the private practice of law.

Over beer nuts and draft Anchor Steam in a San Francisco bar in 1988, a self-styled “Pacific Rim litigator” lectured me on the superiority of the Japanese litigation system, confidently insisting that this superiority was rooted in the fact that, according to him, there was “no discovery” in Japan. I challenged him on the wisdom of such a framework for resolving disputes, noting that it would be difficult—if not impossible—to build one’s legal case without discovery. Dramatically locking eyes with me, he solemnly declared that, as far as the Japanese were concerned, if you didn’t know or couldn’t tell whether you had a good lawsuit, you shouldn’t even be able to file it.

To this day, I have never researched Japanese law or otherwise independently ascertained if his description of Japanese practice was accurate, but he said that he had attended Stanford University Law School and it was early in the happy hour festivities, so I assume part of what he said is true. True or not, the idea of not requiring discovery in litigation has always been for me the most influential and pragmatic contribution from the “all things Japanese craze”—except for sushi and Sapporo beer.

The practical and commonsense appeal of the concept that plaintiffs ought to at least know what their case was about before filing it is self-evident to anyone who is not a lawyer. And slightly more lenient axiom is even more attractive—that is, even if you haven’t been able to lay your hands on all the evidence to prove your case, you should at least be able to write and file a coherent and plausible description of a course of events that demonstrates your right to a remedy from our courts. Otherwise, taxpayers who are not lawyers might justifiably tell you to stop wasting the court’s time.

Requiring a litigant to meet a threshold standard of coherence and plausibility in his or her claims and pleadings is consistent with our time-honored tradition of ensuring access to justice for our citizens. To the extent that applying this standard may restrict access to the courts beyond the pleading stage, this requirement is also consistent with the higher goal of access to justice. Our citizens are not just plaintiffs in the civil justice system; they are also the defendants on the other side of the litigation dynamic. Making sure that these citizens are not subjected to the burden and expense of the discovery process on the basis of half-baked or speculative allegations is just as much a question of access to justice.

These ideas bring me, in a characteristically roundabout

fashion, to the controversy surrounding the *Iqbal* and *Twombly* standards and the future of Rule 12(b)(6) motions to dismiss. Many of our colleagues in the legal profession appear to be worried that the High Court has accepted “Japanese-style” litigation. As is by now readily apparent, scholarly analysis is not the purpose of this essay. Others are far more interested in analysis than I am, and, frankly, they do it much better. Nonetheless, ruminations about the dramatic effects and dire consequences of the “new” *Iqbal/Twombly* standard are commonplace and need to be put to rest.

The frequent observation that the new standard is a significant departure from the 50-year-old *Conley v. Gibson* standard is, of course, true. It is undeniable that a different, less deferential analysis is now required when it comes to the exposition of facts and law in federal pleadings. The magnitude of the change is evident when one considers the impact the new standard would have had if it had been in effect just 16 years ago. It is entirely conceivable that the complaint filed against President Clinton in the case brought by Paula Jones could have been dismissed based on the implausibility of its factual claims; and history might have unfolded in an entirely different fashion—possibly with a Gore presidency or Kenneth Starr as a justice on the U.S. Supreme Court.

The significant change in how our courts will analyze allegations notwithstanding, the impact is no more dramatic on the daily practice of law than was the pronouncement of the *Conley v. Gibson* decision. Our courts have been interpreting (and sometimes reinterpreting) the Federal Rules of Civil Procedure for 70 years in a constant process of ensuring that their application furthers the sound and speedy administration of justice. The adjustments in our system that will result from adoption of the new standard constitute just such an improvement as well as an effort to avoid wasting society’s resources on weak claims.

Critics of the *Iqbal/Twombly* formulation often point to the uncertainty in the new standard—they are suspicious of the reliability and consistency of a process in which a judge must weigh the “plausibility” or “probability” of an allegation. Too much flexibility and uncertainty in that arguably subjective process is feared to be a precursor to yet more uncertain litigation regarding the sufficiency of pleadings, further delaying the progress of the case. Yet it is hard to see how the analysis now required is any more subjective or capable of prolonging dubious litigation than was the *Conley v. Gibson* process, in which a court was required to determine whether it appeared “beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Conley v. Gibson*, 129 S. Ct. 1937 (1957). That process resembled an “issue spotting” exam question, by which the court (rather than the filing attorney) was responsible for crafting a plaintiff’s claim. Our federal judges are generally selected for their

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intellectual capabilities, valuable experience in the legal profession, and sound reasoning abilities. The judiciary has adjusted to changing rules and standards quite remarkably over time, and there is no reason to believe that they will not diligently do so again.

Perhaps the strongest argument made against the adoption of the *Iqbal/Twombly* standard is the contention that it is an unwisely extreme remedy for eliminating the expense and burden of discovery in cases that ultimately turn out to be without merit. Improvements in discovery management are often suggested as a less radical solution. Although there is no question that the discovery process—both the rules and the practice—needs significant modifications and study, the unfair expense and burden associated with questionable claims cannot be eliminated simply by greater judicial control or management.

As a threshold matter, the federal courts have shown little appetite for becoming involved in the nuts and bolts of discovery management—and they have good reason for their reluctance to do so. Courts' caseloads throughout the country remain daunting, with precious little time for judges to micro-manage the scheduling of depositions or the parsing of objections to interrogatories. In fact, the observable trend has been for the court to become *less* involved in the management of discovery, both in practice and through the imposition of additional “meet-and-confer” obligations on counsel. Moreover, as long as the standard for relevance remains generous and the scope of discoverable material stays so broad, there is little prospect for containing the cost and aggravation of discovery,

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the arguments of counsel—present no reasonably founded hope of revealing evidence to support a claim for relief. Probably the best way to reduce discovery costs in such cases would be for the trial court to impose strict deadlines for completing discovery in phases and to require a plaintiff to use the early phases to develop the seemingly weakest part of his or her case. In *Iqbal*, the Second Circuit had suggested that the district court should manage discovery in a similar manner, but the Supreme Court reversed the Second Circuit's decision upholding the sufficiency of the complaint because, said the Court, it was “reject[ing]” what it called “the careful-case-management approach” to applying pleading standard set forth in Rule 8.¹⁰

That approach, held the Court, was not enough to protect the government's interest in assuring that qualified immunity defenses—like the defenses raised by the former government officials in the *Iqbal* case—succeed in preserving government resources that would otherwise be spent in litigation. Yet, careful case management under Rule 16(b) as well as Rule 26(c), (d), and (f) is still available in cases that *do* contain plausible—albeit improbable—allegations of unlawful conduct. The Supreme Court has not expressly rejected using careful case management in those cases. In seeking to advance the Court's stated goals of controlling the cost of discovery, members of the Judicial Council should look seriously at making fundamental changes to the way discovery

no matter how dubious or implausible the basis for the lawsuit might be. Eliminating unmeritorious and poorly pleaded claims at the motion to dismiss stage is far less expensive and intrusive—and far more effective.

By emphasizing the cost of the discovery process, I don't mean to suggest that the issue is based solely on money. It is not—well, not entirely. The issue also involves the intangible value of ensuring that, in the proper circumstances, citizens who are unlucky enough to have been named as defendants in a baseless lawsuit receive meaningful vindication by making the plaintiff bear the *cost* of that vindication. Too many weak or unwarranted lawsuits end in ambiguous settlements that leave the false impression that there must have been some merit in the claims. Reputations can be damaged by the mere filing of a lawsuit, regardless of the outcome. A positive and just by-product of the *Iqbal/Twombly* standard will be the prospect that baseless lawsuits will die an early death as a result of a decision that can play no small part in restoring the “honor” of the defendant. At the risk of sounding too Japanese, there are far worse objectives in litigation than the preservation of honor. **TFL**

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is currently supervised in most districts. The Judicial Council could start by examining the balkanized division of authority between magistrate judges and district judges. **TFL**

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Endnotes

¹Under Rule 8(a), “[a] pleading that states a claim for relief must contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief. ...”

²*Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

³*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁴*Id.* at 563.

⁵*Id.* at 570.

⁶William Langewiesche, *The Lessons of Valujet 592*, ATLANTIC MONTHLY (Mar. 1998) available at www.theatlantic.com/past/docs/issues/98mar/valujet1.htm.

⁷*Ashcroft v. Iqbal*, 173 L. Ed. 2d 869, 887 (2009).

⁸*Id.* at 897 (Souter, J., dissenting).

⁹550 U.S. at 559.

¹⁰173 L. Ed. 2d at 888.