

Why Iqbal and Twombly Won't Fix the Real Disaster

By Robert E. Kohn

The new pleading standard reinterprets Rule 8(a)(2) of the Federal Rules of Civil Procedure in ways that do not reduce the burden of litigation.¹ Instead, the standard makes outcomes less predictable, thereby raising the burden of litigation, without addressing the underlying problem that the U.S. Supreme Court identified as the principal reason for changing the standard. Nothing in the *Twombly* and *Iqbal* cases heralding the new standard attempts to fix the apparent problem: namely, that district judges and magistrate judges currently are failing to control the conduct of litigants in discovery effectively. Instead of tinkering with legal standards, the Judicial Conference of the United States and the Supreme Court ought to consider changing the way discovery is supervised.

The new pleading standard makes outcomes less predictable, because the new standard is unintelligibly vague. In fact, the only aspect of the new standard that is clear is that it is new and that the old standard has been eliminated. Under the old standard, as articulated in the 1957 decision in *Conley v. Gibson*, “we follow the accepted rule that 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 that would entitle him to relief.”² The Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly* very clearly rejected that rule, stating that *Conley*’s “famous observation” about following that previously accepted rule had now “earned its retirement.”³ The new standard, however, is actually standardless: it lacks a usable standard, because the Court’s various statements about the standard make it unintelligible.

On the one hand, *Twombly* observed that “... of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’”⁴ On the other hand, judges applying the new standard are required to decide whether the complaint alleges “enough facts to state a claim to relief that is plausible on its face.”⁵ Asking judges to divine the difference between “implausible” and “improbable” is not unlike asking an airline worker to understand the difference between an “unexpended” oxygen canister and an “unexpired” one: in both instances, the risk of making a wrong judgment is unacceptably high. As William Langewiesche concluded in his article about the ValuJet 592 disaster in 1996, serious accidents may become inevitable if safety devices—such as canisters designed to deliver oxygen to passengers in the event of cabin depressurization—create an even greater hazard when the organizations responsible for handling the canisters cannot provide their own people with the language and resources to do so safely.⁶ In the court system, tinkering with the terminology of pleading standards adds little reason for believing that hopeless cases will be dispatched without raising the overall costs of litigating other cases.

To be sure, the subsequent gloss applied by the Court

in *Ashcroft v. Iqbal* in 2009 does clarify the new *Twombly* standard in one way: *Iqbal* makes clear that Rule 9(b) of the Federal Rules of Civil Procedure is effectively repealed in cases involving unlawful discrimination, insofar as that rule provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Under *Iqbal*, which does not actually mention Rule 9(b), a complaint alleging intentional discrimination must now be dismissed if it “does not contain any factual allegation sufficient to plausibly suggest [a defendant’s] discriminatory state of mind.”⁷ Merely alleging in general terms that the defendants intended to discriminate on the basis of the plaintiff’s nationality or religion, therefore, is no longer enough to survive dismissal of the case. Something more is required that raises a factual inference of unlawful intent—an inference that must not be implausible, though it may be improbable. Nevertheless, it is difficult to predict whether any such inference of intent will actually be plausible in a judge’s eyes. Reviewing the dissent of Justice Souter and four other justices in *Iqbal* illustrates that reasonable minds may disagree about whether a complaint contains plausible allegations of intent: “By my lights,” Justice Souter wrote, “there is no principled basis for the majority’s disregard of the allegations linking [defendants] Ashcroft and Mueller to their subordinates’ discrimination.”⁸ Justice Souter himself had authored the majority opinion in *Twombly* that retired the old *Conley* standard of pleading, and his dissent in *Iqbal* contains no retreat from the *Twombly* decision. The four dissenters simply disagreed with the five-member majority over whether the complaint’s allegation of Ashcroft and Mueller’s discriminatory intent was plausible.

By making outcomes less predictable, the *Twombly* and *Iqbal* decisions are likely to raise the cost of litigation rather than lower it. Defendants are more likely to file motions to dismiss under Rule 12(b)(6), and parties are less likely to resolve such motions by consensus through meet-and-confer discussions leading to amending the pleadings rather than filing the motions. But there is a more important defect in the new pleading standard than an increase in motions under Rule 12(b)(6). The new standard is defective because it does not meaningfully address the real problem that the Supreme Court has identified as the reason for changing the standard in the first place. In *Twombly*, the Court explained that it was retiring the old *Conley* standard, because “Probably, ... it is only by taking care to require allegations that reach the level of suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal evidence to support a [Sherman Antitrust Act] § 1 claim.”⁹

To the contrary, there probably are other ways of avoiding enormous discovery expenses in cases that a judge believes—based on the allegations of the complaint and

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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.