Yeshiva University, Cardozo School of Law
LARC @ Cardozo Law

Articles | Faculty Scholarship

7-2015

The Supreme Court's Civil Assault on Civil Procedure

Alexander A. Reinert

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

 Part of the Civil Law Commons, Civil Procedure Commons, Human Rights Law Commons, and the Legal History Commons

The Supreme Court's Civil Assault on Civil Procedure

By Alexander A. Reinert

Must one wait some appropriate period of time before advocating for the Supreme Court to overrule a prior precedent? Is the answer to this question a matter of both proper legal etiquette and pragmatism? These are the questions that pop into my head as I consider how to write about *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and its predecessor, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and their impact on civil rights and access to justice.

Iqbal and *Twombly* introduced a new pleading regime—I will call it "plausibility pleading" for what will become immediately obvious reasons—that many academics, including me, have criticized. In *Twombly*, the Supreme Court found that an antitrust complaint must be dismissed because it did not allege a "plausible" claim, in part because the Court believed that the defendants' conduct could potentially be explained by innocent motivations and not the conspiracy required to be established for the plaintiffs to prevail at trial. In so doing, the Court overruled in part *Conley v. Gibson*, 355 U.S. 41 (1957), the case that ratified the notice pleading regime adopted by the Federal Rules of Civil Procedure. In *Iqbal*, a case that challenged the treatment of Arab, Muslim, and South Asian detainees held in federal custody after September 11, 2001, the Court extended *Twombly* to all civil actions and applied an even more rigorous pleading standard to the claims that had been filed against high-level federal officials. I should note, in the interest of full disclosure, that I was one of the lawyers intimately involved in the *Iqbal* case, having represented the plaintiff in the Eastern District of New York and the Second Circuit, and arguing on his behalf in a losing effort before the Supreme Court.

In the notice pleading world that many lawyers and academics grew accustomed to over many decades, embodied in the Supreme Court's *Conley* decision, complaints satisfied Rule 8(a)(2) without providing detailed facts so long as they provided notice to the defendant of the nature of suit. (Unless otherwise noted, all references to Rules are to the Federal Rules of Civil Procedure.) And a motion to dismiss pursuant to Rule 12(b)(6) would not be granted "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." *Conley*, 355 U.S. at 45–46. Rule 12(b)(6) was to be invoked in those rare cases in which the plaintiff's claim was legally insufficient. Plausibility pleading, introduced by *Iqbal* and *Twombly*, brought factual sufficiency to the Rule 12 regime and altered the legal sufficiency test by requiring that claims for relief be "plausible." Equally troubling, in both decisions, the Court appeared to go beyond the four corners of the plaintiffs' complaints to assume the existence of facts that, if true, undermined the strength of the plaintiffs' claims. Under notice pleading, by contrast, drawing inferences against the pleader was strictly forbidden.

The transition from notice to plausibility pleading was fitful—even during the *Conley* era, lower courts and sometimes the Supreme Court

hinted at higher pleading standards, at least for certain kinds of cases, and in between *Twombly* and *Iqbal*, the Supreme Court issued a decision in *Erickson v. Pardus*, 551 U.S. 89 (2007), that seemed more consistent with notice pleading principles. But whatever detours we took along the way, the transition to plausibility pleading is real and significant, even as lower courts struggle with its meaning. *See*, *e.g.*, *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard."); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (courts are "still struggling" with how to apply federal pleading standards after *Twombly* and *Iqbal*); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (noting that *Iqbal* had created tension with prior Circuit cases involving pleading of equal protection claims).

But plausibility pleading has not only been confusing for lower courts—it also has been costly. It has been costly to the Court, which has faced criticism from academics on many grounds. Some have accused the Court of altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act. *See, e.g.*, Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 Akron L. Rev. 1189, 1190 (2010); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Coauthors*, 78 Geo. Wash. L. Rev. 9, 28–29 (2009); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 84–89 (2010); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Lit. 313, 334 (2012) (noting that *Twombly* "short-circuited a preliminary discussion of notice pleading by the Advisory Committee"). *Cf.* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. Pa. L. Rev. 493, 538–39 (2011) (suggesting that the Court's decisions in *Iqbal* and *Twombly* might reflect its own frustration with the rulemaking process). Others have lamented the vague and ill-defined standard for its variance with history and its difficulty of application. *See generally* Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. Pitt. L. Rev. 215 (2011); Alexander A. Reinert, *Pleading as Information-Forcing*, 75 L. & Contemp. Probs. 1, 22–28 (2012). And some have argued that plausibility pleading crosses a constitutional line. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 Minn. L. Rev. 1851 (2008); Kenneth Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 Neb. L. Rev. 467, 471–72 (2010).

More importantly, however, it also has been costly to plaintiffs, and in particular, civil rights plaintiffs. As I describe in a forthcoming paper in the *Virginia Law Review*, *Measuring the Impact of Plausibility Pleading*, application of *Iqbal* and *Twombly* has made it much more difficult for civil rights and employment discrimination plaintiffs to survive a motion to dismiss. And it also has tilted the scales in favor of corporate and governmental litigants, at the expense of individual litigants, to make the playing field even less balanced than one would expect given the relative disparities in access to resources that already exist between these groups. And, surprising to some observers, it has imposed this cost without any corresponding benefit in the quality or merit of the underlying cases. In other words, plausibility pleading has led to an increase in the rate of dismissals, but there is no evidence that it has been an effective filter for the merit of a case.

Why should this be the case? First, as Scott Dodson (in a book entitled *New Pleading*) and others have argued, plausibility pleading might screen out plaintiffs who are at an informational disadvantage compared to defendants, but there is no inherent reason to think that plaintiffs with better access to information are plaintiffs with higher quality claims. Second, as I have argued before, one of the principal justifications for new pleading—that federal judges are incapable of rationally managing discovery—calls into question one of the underlying assumptions of the plausibility regime, namely, that federal judges are capable of accurately assessing merits at the pleading stage when, by definition, there is no evidence before the court. *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. Pa. L. Rev. 1767 (2014). Recall that in *Twombly*, countering the dissent's claim that the fear of discovery was overblown and could be mitigated by careful judicial management, the Court responded that the "hope of effective judicial supervision is slim." 550 U.S. at 560 n.6. The source of the Court's pessimism was a 1989 article by Judge Easterbrook, from which it quoted extensively and which argued that judges, knowing so little about the cases before them, cannot hope to effectively prevent abusive discovery. *Id.* (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638–639 (1989)).

Thus, plausibility pleading, founded in part on the inability of judges to manage cases through discovery, counter-intuitively trusts judges to do even more with less information at the pleading stage. And not only must judges apply a new factual and legal sufficiency standard, but the consequences of their failure to do so correctly are much more consequential than their failure to effectively mitigate the risks of abusive discovery.

Granting a motion to dismiss ends the plaintiff's case; denying the motion will leave the defendant exposed to the same *in terrorem* fear of costly discovery that concerned the Court in *Twombly*. It is an understatement to describe this as confounding.

So plausibility pleading is both wrong and wrong-headed. And the Court, in some ways, seems to be sending a signal that it agrees. In several cases, the Court has declined opportunities to solidify plausibility pleading's grip. First, *Iqbal* and *Twombly* themselves never disclaimed *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), which adopted an extremely liberal pleading standard for employment discrimination claims. Second, in between *Twombly* and *Iqbal*, in its per curiam decision in *Erickson v. Pardus*, 551 U.S. 89 (2007), the Court held that a prisoner alleging deliberate indifference had satisfied pleading standards, despite the presence of conclusory allegations of harm to the plaintiff.

Finally, and perhaps most significantly, the post-*Iqbal* Court has taken many cases that offered opportunities to amplify the break between notice and plausibility pleading, but it so far has declined to do so. For instance, in *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289 (2011), the Court cited to *Swierkiewicz*, rather than *Iqbal* or *Twombly,* when it described the federal pleading standard. 131 S. Ct. at 1296. And *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) reaffirmed *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), a *Conley*-era pleading case that confirmed that there is no heightened pleading requirement for civil rights claims against municipalities. *Johnson*, 135 S. Ct. at 347 (citing *Leatherman*). Perhaps most significantly, the *Johnson* Court stated that the complaint reviewed there was sufficient under plausibility pleading because it "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city," thereby accomplishing the purpose of "inform[ing] the city of the factual basis for their complaint." *Id.* at 347. The *Johnson* complaint reveals little about the allegations made against the City, suggesting that the Court's understanding of the change wrought by plausibility pleading may be limited indeed. Similarly, in a case involving the sufficiency of a notice of removal, the Court, applying the plausibility standard, stated that pleading evidence is not necessary for a removing defendant to establish sufficiency of the notice of removal. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014).

Which brings me back to the question I began with: At what point is it no longer impolite to suggest that a Supreme Court decision be overruled? As a practical matter, asking the current Court to overrule *Iqbal* and *Twombly* seems doomed to fail. The relatively new Justices Sonia Sotomayor and Elena Kagan are unlikely to change the dynamic, given that *Iqbal*'s five-justice majority remains. Justice Sotomayor can at least educate her colleagues on district court judges' competence at managing complex discovery, but optimism is required to conclude that this will change the vote.

But even if it is impractical, at some point one might conclude that it is the only fight worth the candle. We are told that overruling a prior decision is at least on the table when (1) it has proved difficult to apply, (2) overruling will not interfere with reliance interests, and (3) there have been substantial changes in doctrine or facts such that the original decision has been undermined. The first factor is easily met with plausibility pleading. Even *Iqbal* and *Twombly* had difficulty applying plausibility pleading in a consistent manner. Lower courts have routinely expressed their inability to resolve the decisions with prior precedent, and applying the decisions on their own terms has created inconsistency throughout the federal system.

As to the second factor, it is hard to take seriously any reliance interests that one could have formed based on the decisions. By definition, pleading decisions do not regulate primary conduct, but instead simply regulate the rules for adjudicating disputes. A defendant would be hard-pressed to argue that, because of the new pleading regime, she engaged in conduct she knew to be illegal but that she assumed would not be discovered with sufficient specificity by a putative plaintiff.

And finally, as to the third factor, to the extent that *Iqbal* and *Twombly* were based on assumptions about the conduct of litigation and discovery, those assumptions were wrong at the time of the decisions and with time have only become more questionable. To the extent that plausibility pleading is founded on judges' ability to engage in merit-based screening at the pleading stage, all the available empirical evidence indicates otherwise.

The Court should have many opportunities to revisit *Iqbal* and *Twombly* if it chooses. Perhaps it will be in one of the many pleading cases currently pending decisions on petitions for writ of certiorari. Of course, even if it grants a petition in one of these cases, the Court will always have the option of trying to find a way to minimize the impact of its decisions in *Iqbal* and *Twombly*, and it should go without saying that I appreciate and admire the efforts of those who seek to find a way to live with plausibility pleading. I have, at times, joined their cause. At a certain point, however, the legal community might conclude that plausibility pleading was broken at its inception and that our attempts to live with it only further expose its instability. Even if the argument does not win the day in the short term, it may be the only long-term strategy that can return pleading to a coherent and just regime.

Alexander A. Reinert is a professor of law at Benjamin N. Cardozo School of Law. He teaches, researches, and writes in the areas of constitutional law, civil procedure, and criminal law.