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Pleading: Where Things Stand After *Iqbal*



BY CLAIRE PRESTEL

The U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 75 U.S.L.W. 4337 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 77 U.S.L.W. 4387 (2009), injected uncertainty into an area of the law that had been settled for decades—the standard for assessing the sufficiency of pleadings under Federal Rule of Civil Procedure 8 (“Rule 8”). After briefly summarizing *Twombly*, *Iqbal* and two other recent pleading decisions, this article examines where things stand with respect to pleading 18 months after *Iqbal*.

Supreme Court's Recent Pleading Decisions

In *Twombly*, the Supreme Court considered a putative class-action complaint alleging that the “Baby Bells” had conspired to exclude competitors from the market for local phone and high-speed internet service. The complaint relied on allegations of parallel conduct by the Baby Bells to support its claim of an antitrust

conspiracy. The putative class in *Twombly* included all local telephone or high-speed internet consumers from 1996 to the present. *See* 550 U.S. at 550.

In an opinion written by Justice David H. Souter, the Supreme Court held that the complaint's bare allegations of a conspiracy were “legal conclusions” insufficient to survive a motion to dismiss. *Id.* at 564. The court also held that under Rule 8, the plaintiffs' complaint had to include enough “factual matter” to provide “plausible grounds” to infer an illegal agreement. *Id.* at 556. In discussing the plausibility requirement, the *Twombly* court expressed concern about “expensive” discovery in complex antitrust cases and about a perceived risk that the threat of discovery could push cost-conscious defendants to settle “even anemic cases.” *Id.* at 559, 560.

Applying the plausibility standard to the pleadings in *Twombly*, the court concluded that the complaint's allegations of parallel conduct failed its test because such conduct could easily—and, in the telecommunications context, “natural[ly]”—be explained by legal, self-interested behavior on the part of the Baby Bells. Indeed, Justice Souter has since described the situation in *Twombly* as one where “the same actionable conduct alleged on the defendant's part” had actually been held in prior cases “to be lawful behavior.” *Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico*, Nos. 08-2283, 09-1801, slip op. at 11 (1st Cir. Dec. 20, 2010) (Souter, J., sitting by designation).

In the course of assessing the complaint in *Twombly*, the court rejected the following, familiar language from *Conley v. Gibson*, 355 U.S. 41 (1957): “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.” The court described this “no set of facts” test as “incomplete” and frequently misinterpreted and decided that it had “earned its retirement.” *Id.* at 563. At the same time that the court rejected *Conley*'s “no set of facts” standard, however, it affirmed the validity of other parts of the *Conley* opinion, citing *Conley* for the proposition that Rule 8 requires only “fair

Claire Prestel is a staff attorney with Public Justice P.C., a national public interest law firm headquartered in Washington, D.C.

notice of what the . . . claim is and the grounds upon which it rests.” *Id.* at 555 (quoting *Conley*, 355 U.S. at 47).

Twombly also affirmed the validity of a more recent pleading decision, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 70 U.S.L.W. 4152 (2002), which held that the courts of appeals could not impose a heightened pleading standard by requiring employment discrimination plaintiffs to plead “specific facts” establishing the elements of a *prima facie* case—elements that might have to be proven at trial but that are not necessary to state a claim. *Id.* at 508. *Swierkiewicz* reiterated that Rule 8 embodies a “simplified notice pleading standard” and that the Rules rely “on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Id.* at 512. Justice Souter’s *Twombly* majority opinion cited *Swierkiewicz* as supporting authority and confirmed its holding as good law. *Twombly*, 550 U.S. at 569–70.

The Supreme Court addressed pleading again in *Iqbal*, two years after *Twombly*. The plaintiff in *Iqbal* was a Pakistani citizen and Muslim detained in the United States after Sept. 11, 2001. He alleged that he was deprived of certain constitutional protections while in federal custody and, in particular, that Attorney General John Ashcroft and FBI Director Robert Mueller violated the First Amendment and the Equal Protection Clause by “adopt[ing] an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion or national origin.” *Iqbal*, 129 S. Ct. at 1942.

The Supreme Court held that *Iqbal*’s complaint against Ashcroft and Mueller should have been dismissed. In an opinion written by Justice Kennedy, the court summarized *Twombly*’s standard—which it held applicable to all cases—as based on “two working principles.” *Id.* at 1949. First, district courts need not accept a complaint’s “legal conclusions” as true. *Id.* Second, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 1950. The court explained that determining whether a complaint states a plausible claim will be a “context-specific task” and will require courts to draw on their “judicial experience and common sense.” *Id.*

Although *Twombly* and *Iqbal* are the recent Supreme Court pleading decisions that get by far the most attention, there are two other pleading cases that also deserve mention. Less than one month after *Twombly*, the Supreme Court addressed Rule 8’s pleading requirements again in *Erickson v. Pardus*, 551 U.S. 89, 75 U.S.L.W. 3643 (2007). *Erickson* held that the U.S. Court of Appeals for the Tenth Circuit erred in affirming the dismissal of a prisoner’s complaint for constitutional violations. The court, in a *per curiam* opinion, described Rule 8 as imposing “liberal pleading standards,” *id.* at 94, and held that “[s]pecific facts are not necessary” to state a viable claim. *Id.* at 93. The court accepted as true the prisoner-plaintiff’s allegations that denying him certain medication was “endangering [his] life” and that he was “still in need of treatment.” *Id.* at 94. The court rejected the argument that the plaintiff’s allegations of harm were “too conclusory . . . for pleading purposes.” *Id.* at 93.

In the same month that it decided *Erickson*, the Supreme Court also decided *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 75 U.S.L.W. 4462 (2007),

which addressed pleading requirements under the 1995 Private Securities Litigation Reform Act (PSLRA). PSLRA imposes a pleading standard that is higher than Rule 8’s, and even Rule 9(b)’s. In particular, and as the court explained in *Tellabs*, the allegations in a complaint governed by the PSLRA must give rise to an inference of scienter that is “more than merely plausible or reasonable.” *Id.* at 314. Under the statute’s higher-than-Rule-8 standard, an inference of scienter must be “at least as compelling” as any opposing inference. *Id.* at 324. But, as *Tellabs* also explained, even under PSLRA the plaintiff’s inference need not be “the most plausible of competing inferences.” *Id.*

Reaction to *Twombly* and *Iqbal*

By placing new emphasis on the concept of conclusiveness and by articulating a new plausibility standard for pleadings, *Twombly* and *Iqbal* re-worked a legal standard that federal courts apply in thousands of cases each year. Because the pleading standard comes up so often and in so many cases, courts began to cite *Twombly* and *Iqbal* immediately and on a massive scale: within six months, *Iqbal* had been cited in more than 3,520 federal cases; the number now stands at more than 15,000.

The sheer number of these decisions makes it difficult to generalize about federal judges’ reactions to *Twombly* and *Iqbal*, but one recurring theme in the case law is that from the perspective of the federal district courts and the courts of appeals, the Supreme Court’s decisions left key questions unanswered. Judge Diane P. Wood wrote recently in *Swanson v. Citibank N.A.*, 614 F.3d 400, 79 U.S.L.W. 1218 (7th Cir. 2010), that the federal courts are “still struggling” to answer the question of how high the Supreme Court meant to set the pleading bar. *Id.* at 403. Judge Richard A. Posner, in dissent in *Swanson*, described some of *Iqbal*’s language about plausibility as “opaque.” *Id.* at 411. And in a concurring opinion earlier this year in *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 78 U.S.L.W. 1451 (2d Cir. 2010), Judge Jon O. Newman described a different aspect of *Twombly* as “perplexing.” *Id.* at 328.

Twombly and *Iqbal* provoked a quick reaction among academics as well as judges. Articles about the pleading decisions began appearing almost immediately, and *Iqbal* has now been cited in more than 600. While some of these articles defend the Supreme Court’s decisions, others are sharply critical, faulting the court for importing summary judgment concepts into the pleading stage, for deviating from the intent of the rules’ drafters, and for acting outside the rules’ amendment process. See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519-25 (2010); Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009).

Two recent articles have also taken on the empirical assumptions underlying *Twombly* and *Iqbal*. From *Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010), an article written by Professor Arthur Miller, points to a lack of empirical data supporting the court’s assumptions

about excessive discovery costs and coerced settlements. The article cites a 2009 survey conducted by the Federal Judicial Center in which more than half of attorney respondents reported that discovery costs had no effect on the likelihood of settlement in their cases and that the costs and extent of discovery were the “right amount” in proportion to their clients’ stakes. *Id.* at 64.

The Costs of Heightened Pleading, 86 IND. L.J. ___ (forthcoming 2011), written by Professor Alex Reinert, takes on another unstated assumption underlying *Twombly* and *Iqbal*—that a complaint’s merit correlates with its factual detail. *The Costs of Heightened Pleading* finds no evidence of a correlation. Instead, the data examined in the article indicate that thinly pleaded cases have done at least as well as cases in general.

‘Conclusory’ Allegations

As the relative merits and demerits of *Twombly* and *Iqbal* continue to be discussed, federal courts around the country are applying the cases to pleadings on a daily basis in thousands of pending cases. This means that courts are constantly interpreting and applying the decisions’ two central concepts, conclusoriness and plausibility.

Twombly and *Iqbal* themselves identify a narrow category of “conclusory” allegations—allegations that “amount to nothing more than a ‘formulaic recitation of the elements’ ” of the plaintiff’s claim. *Iqbal*, 129 S.Ct. at 1951 (quoting *Twombly*, 550 U.S. at 555). But notwithstanding this narrowly worded test, district courts have already disagreed about whether identical or virtually identical allegations fall on the conclusory or non-conclusory side of line, with some giving “conclusory” a broad meaning. See *Miller* at 25–26 (citing examples). One important area of disagreement involves general allegations of discriminatory intent or of the defendant’s knowledge. Some courts have rejected such allegations as conclusory, as in *Johnson v. Hashagen*, 2010 WL 128316 (M.D. Pa. Jan. 12, 2010). Others have found them sufficient to state at least a plausible claim, as in *Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010), *Committee for Immigrant Rights v. County of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009), and *Equal Employment Opportunity Commission v. Scrub Inc.*, 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009).

Disagreements like these may not be surprising given the history of courts’ attempts to distinguish “conclusions” from “facts.” Professor Stephen Burbank has noted that the drafters of Rule 8 sought to avoid this exact distinction because it had proved unworkable in practice. As part of an online debate about *Iqbal* and *Twombly*, he quoted from the testimony of Edgar Tolman, who was largely responsible for presenting the rules to Congress. According to Tolman, the original rules’ advisory committee found “thousands of cases that have gone wrong on dialectical, psychological and technical argument as to whether . . . certain allegations were allegations of ‘fact’ or were ‘conclusions of law.’ ” See Burbank at 149; compare *Miller* at 26 (“If nothing else, the emerging case law is revealing that, like the Emperor in the well-known fable, the fact-conclusion dichotomy has no clothes.”).

As courts struggle with the fact/conclusion issue, several—although certainly not all—have taken care to reject overly broad applications of the term “conclu-

sory.” Among other things, these courts have emphasized that notice pleading remains the rule and that plaintiffs cannot be expected to plead specific facts peculiarly within the defendants’ control.

In *Nicholson v. UTi Worldwide Inc.*, 2010 WL 551551 (S.D. Ill. Feb. 12, 2010), for example, the district court held in a case under the Fair Labor Standards Act (“FLSA”) that a general allegation that the plaintiff had worked “overtime” was sufficient because it provided fair notice of his claim; the court wrote that “notice pleading is still alive and well in federal courts.” *Id.* at *4. In another FLSA case, *Connolly v. Smugglers’ Notch*, 2009 WL 3734123 (D. Vt. Nov. 5, 2009), the district court held that the plaintiff’s allegations were not conclusory, even though she did not identify exactly how many overtime hours she worked. The court emphasized the issue of informational asymmetry, explaining as follows: “[I]t is unreasonable to expect a plaintiff to allege with specificity much beyond the pleadings here as she has not yet been able to conduct discovery. Few employees could possibly remember the exact overtime hours they worked over a period of years without being able to engage in discovery.” *Id.* at *3.

Similarly, in *Santiago*, the Seventh Circuit pointed to informational asymmetry in reversing dismissal of one of the prisoner-plaintiff’s Eighth Amendment claims. The court held that a general allegation of the prison warden’s knowledge was sufficient at the pleading stage, explaining that “Mr. Santiago cannot know for certain what Warden Walls knew without discovery.” 599 F.3d at 759. The court also noted the “difficulty that prisoners face when litigating constitutional claims that involve the state of mind of the defendant.” *Id.* at 762.

Some courts have also rejected a broad reading of “conclusory” because it would effectively close the courthouse doors against even meritorious claims. In *Doe v. Astrue*, 2009 WL 2566720 (N.D. Cal. Aug. 18, 2009), the district court denied a motion to dismiss the plaintiff’s discrimination claim under the Rehabilitation Act and, in doing so, held that the plaintiff’s allegation that he was otherwise entitled to receive disability benefits was not conclusory. The court explained: “If defendant was correct, and this assertion would not be entitled to a presumption of truth, no claim could ever be brought by a wronged beneficiary of a government program unless the government agreed not to raise the issue of eligibility in a motion to dismiss. This is plainly not the proper function of Rule 12(b)(6).” *Id.* at *14.

As courts and counsel continue to address the issue of “conclusory” allegations, two other points may be worth keeping in mind: First, there is nothing wrong with using arguably conclusory statements as the backbone of a complaint. Indeed, it is almost impossible to allege a cause of action without at some point “recit[ing] . . . the elements” of the claim. *Iqbal*, 129 S.Ct. at 1951. For this reason, the presence of some conclusory allegations should not be treated as inherently suspicious or problematic. As the court itself held in *Iqbal*, “legal conclusions can provide the framework of a complaint.” *Id.* at 1950.

Second, and relatedly, a claim is not implausible merely because it contains some arguably “conclusory” statements. Although some post-*Iqbal* motions to dismiss devote the bulk of their time to identifying conclusory allegations, such a motion cannot be granted unless the movant meets its additional burden of demon-

strating implausibility. As is made clear in *Iqbal*, plausibility is the determinative test, *see, e.g., id.*, and it should be the movant's burden to show that the plaintiff's claims fail that test. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (movant bears the burden of demonstrating that the plaintiff has failed to state a claim); *Gonzalez v. Napolitano*, 684 F. Supp. 2d 555, 558 (D.N.J. 2010) (same).

Plausibility

Plausibility is *Twombly* and *Iqbal*'s second key concept and the one that has attracted the most attention. Critics contend that the plausibility test, if improperly applied, could invite subjective judgments, invade the jury's function, and could close the courthouse doors against meritorious claims. *See, e.g., Miller* at 22–23, 29–30; Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009); Joshua Civin & Debo P. Adebile, *Restoring Access to Justice: The Impact of Iqbal and Twombly on Federal Civil Rights Litigation*, Issue Br. for the Am. Const. Soc'y (2009), available at <http://www.acslaw.org/node/16971>.

A review of the post-*Twombly* case law suggests that there is cause for concern. Courts of appeals have reversed district courts that erred by relying on facts outside the pleadings as a basis for dismissal, by refusing to accept plaintiffs' factual allegations as true, by failing to construe complaints as a whole, by failing to construe them or draw inferences in plaintiffs' favor, and by improperly requiring plaintiffs to rebut alternative inferences. *See Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 79 U.S.L.W. 1532 (11th Cir. 2010); *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010); *Dolgalleva v. Va. Beach City Pub. Schs.*, 364 F. App'x 820, 826 (4th Cir. 2010); *Braden v. Wal-Mart Stores Inc.*, 588 F.3d 585, 594–98, 78 U.S.L.W. 1329 (8th Cir. 2009); *Merritt v. Fogel*, 349 F. App'x 742, 746 (3d Cir. 2009). Public Justice recently filed an *amicus* brief in the Third Circuit in *Renfro v. Unisys Corp.*, a case where we believe the district court erred in several of these respects. (The brief can be downloaded at www.publicjustice.net.)

On the other hand, there are several key principles that limit or guide the plausibility inquiry—principles that many other courts have applied post-*Iqbal*. *Iqbal* itself states that plausibility “is not akin to a ‘probability requirement,’ ” 129 S. Ct. at 1949, and in *Twombly*, the court said that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (quotation marks omitted). Several courts have rejected efforts to equate plausibility with a more-likely-than-not test. *See, e.g., Swanson v. Citibank N.A.*, 614 F.3d 400, 404, 79 U.S.L.W. 1218 (7th Cir. 2010); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42, 79 U.S.L.W. 1217 (3d Cir. 2010) (plausibility “does not require as a general matter that the plaintiff plead facts supporting an inference of defendant's liability more compelling than the opposing inference”).

Justice Souter recently made this same point in an opinion written for the First Circuit, where he was sitting by designation. In reversing dismissal of two plaintiffs' claims under the Americans with Disabilities Act,

Justice Souter wrote that plausibility is not “a standard of likely success on the merits.” *Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico*, Nos. 08-2283, 09-1801, slip op. at 11 (1st Cir. Dec. 20, 2010) (Souter, J., sitting by designation). Instead, a “plausible but inconclusive inference” will survive a motion to dismiss, and the fact that “other, undisclosed facts” may ultimately disprove a plaintiff's claim on the merits “does not negate plausibility.” *Id.* Justice Souter emphasized that complaints must still be read strongly in plaintiffs' favor and that plaintiffs cannot be required to plead evidentiary detail. *Id.* at 10.

Comparing *Twombly* and *Iqbal* to the Supreme Court's decision in *Tellabs* also helps to guide the plausibility inquiry. In *Tellabs*, the court said that even under the PSLRA's heightened pleading regime, the plaintiff's theory need not be more likely to be true than the defendant's theory. 551 U.S. at 324. The same must necessarily be the case for complaints governed by Rule 8—in other words, plausibility cannot mean that the plaintiff's inferences must be stronger than the defendant's.

Indeed, plausibility cannot require that plaintiffs offer even an *equally* compelling narrative. An “at least as compelling” narrative is what *Tellabs* requires for complaints governed by the PSLRA's “*more than . . . plausible*” pleading standard. *Id.* at 314 (emphasis added), 324. The same cannot be required when the standard is “merely plausible[ity]” and less than what the PSLRA requires. *Id.* at 314. According to the Seventh Circuit's recent decision in *Swanson*, plausibility “does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . As we understand it, the court is saying instead that the plaintiff must give enough details . . . to present a story that holds together.” 614 F.3d at 404; *see also id.* (describing the “ultimate question” as “*could* these things have happened, not *did* they happen” and comparing what Rule 8 requires to what the PSLRA requires).

In addition, *Iqbal* explains that assessing plausibility is a “context-specific task,” and several courts have understood this to mean that informational asymmetry should be taken into account when determining whether a plaintiff states a plausible claim. As the Fifth Circuit reiterated after *Iqbal*, a plaintiff should not be “required to plead facts peculiarly within the knowledge of defendants.” *Morgan v. Hubert*, 335 F. App'x 466, 472 (5th Cir. 2009); *see also Gee v. Pacheco*, — F.3d —, 2010 WL 4909644, at *5 (10th Cir. Dec. 2, 2010) (if prisoner-plaintiff is prevented from learning key information as part of the prison grievance process, that would be relevant to assessing plausibility); *Braden*, 588 F.3d at 598 (“[When assessing plausibility,] we must be cognizant of the practical context of ERISA litigation. No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.”); *Connolly*, 2009 WL 3734123, at *3.

On the other hand, *Iqbal*'s reference to “context” cannot be used as basis for applying a heightened pleading standard to any particular category of claims. The Third Circuit addressed this issue recently in *West Penn Allegheny Health System Inc. v. UPMC*, — F.3d —, 79 U.S.L.W. 1705, 2010 WL 4840093 (3d Cir. Nov. 29, 2010), when reviewing a district court opinion in an antitrust case. The district court had suggested that “judges presiding over antitrust and other complex

cases must act as ‘gatekeepers,’ and must subject pleadings in such cases to heightened scrutiny.” *Id.* at *7. The Third Circuit rejected that approach, emphasizing that *Twombly* refused to apply any “heightened pleading standard,” 550 U.S. at 569 n.14 (internal quotation marks omitted), and that *Iqbal* “made clear that Rule 8’s pleading standard applies with the same level of rigor in ‘all civil actions.’” *West Penn*, 2010 WL 4840093, at *7 (quoting *Iqbal*, 129 S. Ct. at 1953). With respect to *Iqbal*’s reference to “context,” the Third Circuit wrote that “[i]t is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise” because some claims (e.g., simple battery) require fewer factual allegations than others. *Id.* at *8. But considering context “does not mean that *Twombly*’s plausibility standard functions more like a probability requirement in complex cases.” *Id.*

***Twombly*, *Iqbal* and Affirmative Defenses**

In addition to deciding what “conclusory” and “plausible” mean in practice, many federal courts have also had to decide whether the *Twombly*/*Iqbal* standard applies to affirmative defenses. Courts disagree on this issue, although the majority rule appears to favor applying the standard to defenses.

Courts that have refused to apply *Twombly* and *Iqbal* to defenses have pointed out the wording in Federal Rule of Civil Procedure 8(b), which governs defenses, is slightly different from the wording in 8(a), which governs claims for relief: 8(b) does not include a requirement that the defendant’s answer “show” entitlement to relief. See *HCRI TRS Acquirer LLC v. Iwer*, 708 F. Supp. 2d 687, 690 (N.D. Ohio 2010) (discussing different approaches taken by district courts and citing examples). But other courts have rejected this minimal variation as a distinction without a difference. As explained in *HCRI*, the language difference is “minimal and simply reflects the fact that an answer is a response to a complaint.” *Id.* at 691.

Courts like *HCRI* that have applied *Twombly* and *Iqbal* to defenses have given a number of reasons for doing so. They have mentioned basic principles of fairness and the fact that both Rule 8(a) and 8(b) require a “short and plain” statement, which is the “essence” of the standard. *Id.* Courts have also pointed out that *Twombly* and *Iqbal* were in part intended to avoid expensive discovery on meritless claims and “[b]oilerplate affirmative defenses . . . can have the same detrimental effect on the cost of litigation as poorly worded complaints,” *id.*, and that plaintiffs, like defendants, need enough information to be able to

“prepare adequately to respond.” *Holtzman v. B/E Aerospace, Inc.*, 2008 WL 2225668, at *2 (S.D. Fla. May 29, 2008).

***Twombly* and *Iqbal* in State Courts**

In *Twombly* and *Iqbal*, the Supreme Court interpreted federal Rule 8, which applies only in federal court. State courts have no obligation to follow the Supreme Court’s lead in interpreting their own rules governing pleadings, and while some state courts have cited *Twombly* and/or *Iqbal*, others have rejected them as inconsistent with their states’ approach to pleadings.

Most state supreme courts have yet to address the issue in depth, but one court that has done so is the Washington Supreme Court, which rejected *Twombly* and *Iqbal* in *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861 (2010). The *McCurry* court criticized *Twombly* and *Iqbal* as inconsistent with prior articulations of the pleading standard, and it described the decisions as “predicated on policy considerations” about discovery that neither side in *McCurry* had demonstrated held true in Washington courts. *Id.* at 863. *McCurry* also held that the “appropriate forum for revising the Washington rules is the rule-making process,” not judicial decisions: “[The rule-making] process permits policy considerations to be raised, studied, and argued in the legal community and the community at large.” *Id.* at 864.

Possible Next Steps

Twombly and *Iqbal* are controversial decisions in both the federal and state courts and among lawmakers as well. Not long after *Iqbal* was decided, legislation to overturn *Twombly* and *Iqbal* was introduced in the 111th Congress. Sen. Arlen Specter introduced the 2009 Notice Pleading Restoration Act (S. 1504) (78 U.S.L.W. 2090), and Rep. Jerrold Nadler introduced the 2009 Open Access to Courts Act (H.R. 4115). Hearings were held on both bills (78 U.S.L.W. 2366).

The Advisory Committee on Civil Rules has also discussed *Iqbal* and *Twombly*, most recently at its November meeting (79 U.S.L.W. 1655). The committee noted that there is a menu of options for responding to the decisions, including the possibility of “discovery in aid of pleading” at the beginning of a case. The committee will return to the issue of pleading at its next meeting. By that time, the Federal Judicial Center may also have completed an empirical examination of the effect that *Iqbal* and *Twombly* are having on motions to dismiss in the federal courts.