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Iqbal: A Watershed Vignette in a Long Saga

In *Bell Atlantic v. Twombly,*[1] the Supreme Court, in the context of defining conduct establishing a conspiracy violative of Section 1 of the Sherman Anti-Trust Act, declared that Rule 8's requirement of a "short, plain statement" required the pleading of facts plausible. Speculation that *Twombly* was, at bottom, a decision fashioning pleading requirements specific to anti-trust litigation was dispelled by *Iqbal v. Ashcroft.*[2]

A shrunken majority of the Supreme Court, split 5-4 on the now familiar "liberal-conservative" fault line, cited *Twombly* in its dismantlement of the construct of Rule 8 prevailing since the 1937 adoption of the Federal Rules of Civil Procedure. *Iqbal*'s application of *Twombly*'s holding beyond the confines of anti-trust law caused Justice Souter, the author of *Twombly*, and Justice Breyer to join the *Twombly* dissenters in decrying the death of notice pleading. The dissent of Justice Stephens, in *Twombly*, discussing the history surrounding the

[1] 550 U.S.1955 (2007).
[2] 556 U.S. ___, 129 S. Ct. 1937 (May 18, 2009).

adoption of the Federal Rules of Civil Procedure and its supplanting of detailed fact pleadings by liberal discovery discerned *Twombly*'s sweep as borne out by *Iqbal.*[3]

However, viewing *Iqbal* simply as an exercise of an objective construction of a rule enacted with Congressional acquiescence ignores its unrestrained reinvention of Rule 8. *Iqbal* represents a bloodless coup to topple the civil justice regime created in large measure by the Federal Rules of Civil Procedure.

The 1938 Civil Litigation Sea Change

Prior to the adoption of the Federal Rules of Civil Procedure, pleadings were expected to explicate facts and narrow the issues. The Federal Rules reduced the role of pleadings to giving the opposing party notice of claims and defenses. The fleshing out of the facts and focusing of the issues for trial would be now the function of discovery.

The drafters of the Federal Rules of Civil Procedure sought to eliminate the possibility of a claim being dismissed due to a pleading defect. The winnowing process would begin in earnest only after an opportunity for discovery. No longer would a party have to plead "facts constituting a cause of action". As spelled out by Rule 8, a pleading need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[4]

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[3] *Twombly* (Stephens, J. dissenting), 550 U.S. at 573-76.
[4] 8 Wright, Miller & Marcus, Federal Practice and Procedure 2d § 2001.

Empowering the parties with the tools of liberal discovery would permit parties who believed they possessed a meritorious claim to ferret out the facts. It was felt by the drafters that discovery, with its aim of affording the parties a mutual knowledge of relevant facts, would be a more efficient means of resolving disputes, less prone to denying redress for procedural missteps than using pleadings to frame issues for trial.[5] In *Hickman v. Taylor*[6], the Supreme Court described the transformation wrought by the Federal Rules of Civil Procedure adopted nine years earlier:

> The pretrial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pretrial functions of notice-giving, issue-formulation, and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined, and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving, and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pretrial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus, civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

[5] *Id.*
[6] 329 U.S. 495, 500-01 (1947).

The Empowerment of the Private Bar and Resistance

Demotion of the gate keeping role of pleadings and the creation of liberal discovery empowered lawyers to file complaints upon suspicion of wrongdoing and armed with powerful discovery tools, launch intensive and wide ranging investigations for facts confirming the suspicions. Lawyers became proficient in using this power to prosecute claims against corporations and government officials.

The use of the power vested in lawyers by discovery and the low threshold for its commencement was augmented by employment of another innovation of the Federal Rules of the Civil Procedure-the class action.[7] Now, modest damage claims not previously worthy of a private lawyer's financial interest, if numerous enough, could be bundled up into a claim of sufficient magnitude to warrant the devotion of copious quantities of legal time.

By the 1970's, enactment of legislation creating rights and remedies (including attorney fees awards) in the areas of civil rights, securities law and consumer protection created opportunities for commencement of individual actions and class actions. Changes in tort law, particularly in the product liability arena, enabled the plaintiff's bar utlilizing discovery to build cases previously not feasible. Government and business were now subjected to an unprecedented level of scrutiny

[7] Fed. R. Civ. P. 23.

and potential liability from judicial proceedings instituted by private parties.

The term "private attorney general" coined in the 1940's perhaps best describes the role of the plaintiff's lawyer in much of the ambitious litigation which rose up in the decades following the adoption of the Federal Rules of Civil Procedure.[8] Proponents of "private attorneys general" see legal actions commenced by private litigants as a valuable ancillary to regulators, law enforcement and legislators in vindicating public interests and deterring wrongful conduct. Honoring the aphorism that a well paid private bar is the best protector of the rights and liberty of the citizenry, substantial fees generated by large damages recoveries and statutory fee awards encouraged zealous and imaginative advocacy.

By the 1970's, a push back had begun. In *Blue Chip v. Manor Drug Stores*[9], the Supreme Court noted its concern with class action securities litigation. The ease of getting to trial was blamed for lawsuits of dubious merit whose chief aim and result was to extract a settlement.[10]

Similar reservations were expressed in the context of damage actions against government officials. In strengthening the immunity

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[8] Hittinger and Bona, The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court, 4J. Bus. & Tech. L. 167 (2009)[hereinafter Hittinger and Bona]; Karlan, Disarming the Private Attorney General, U. Ill. L. Rev. 183 (2003) [hereinafter Karlan].

[9] 421 U.S. 723 (1975).

[10] "Even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." 421 U.S. at 740.

afforded to government officials in *Harlow v. Fitzgerald*, the Court expressed its concern that a plaintiff's pleading of bare allegations could subject a government official to the cost of trial and the burdens of discovery.[11]

The reaction to the ascent of discovery focused litigation led to the amending of Rule 11 in 1983 to impose sanctions on lawyers who sign pleadings deemed lacking in merit.[12] Amendments to the Federal Rules of Procedure sought to rein in unbridled discovery.[13] Complaints by the

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[11] "As Judge Gesell observed in his concurring opinion in *Halperin v. Kissinger*, 196 U.S.App.D.C. 285, 307, 606 F.2d 1192, 1214 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981):

> We should not close our eyes to the fact that. with increasing frequency in this jurisdiction and throughout the country. plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials' and their colleagues' being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

Harlow, 457 U.S. at 817, fn. 20.

[12] "A brief examination of the roots of the so-called litigation explosion is necessary for an understanding of the rationale behind the 1983 rule reforms. According to many, the early 1980's may well have been the most litigious period in American history to that date. Before drafting the 1983 amendments, the Advisory Committee considered four factors that seemed to underlie the perception that the civil justice system was in serious difficulty: (1) the unique American economic incentives facilitating litigation, (2) the growth of federal substantive rights, (3) the proliferation of lawyers, and (4) the easy access to the federal courts inherent in the procedural system established by the Federal Rules of Civil Procedure." (footnotes omitted) 5A Wright & Miller. Federal Practice and Procedure 3d § 1331.

[13] Fed. R. Civ. P. 26 Advisory Committee Note, 1980 Amendment (adopting discovery conferences to encourage early judicial intervention to curb discovery abuse); Fed. R. Civ. P. 26 Advisory Committee Note, 1983 Amendment (empowering judges to be more

financial and business sectors led Congress to pass legislation abrogating the liberal notice pleading requirements in securities litigation and imposing strictures on class action litigation.[14]

The private bar serving as "private attorneys general" wielding the power of discovery in fee generating cases was curtailed in a number of decisions impacting antitrust, securities, consumer protection, employment and civil rights litigation.[15] The unease of the current Supreme Court majority with the role of private litigants policing the marketplace was reflected in the antitrust decision *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*[16] Justice Kennedy, in an opinion joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, opined that an expansive view of the availability of private actions for damages would encroach upon the powers of the legislative branch.[17] The Court touted the efficacy of regulators in support of its precluding private litigants from seeking money damages.[18]

In 2005, the Supreme Court, acting on its concern expressed in *Blue Chip Stamps* of nettlesome securities litigation extracting non merit related settlements from defendants, construed Rule 8 to require a

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aggressive in identifying and discouraging discovery abuse and strengthening the duties imposed on counsel to engage in discovery in a "responsible manner" and deter abuse by "explicitly encouraging the impositions of sanctions".) ; Fed. R. Civ. P. 33 Advisory Committee Note, 1993 Amendment (limiting number of interrogatories); Fed. R. Civ. P. 26 Advisory Committee Note, 2000 Amendment (narrowing scope of discovery from subject matter to claims).

[14] Private Securities Litigation Reform Act,15 U.S.C. § 78u-4(b)(1) (2006); Class Action Fairness Act of 2005 § 4, 28 U.S.C. § 1332(d) (2000).

[15] Hittinger and Bona, *supra* note 8; Karlan, *supra* note 8.

[16] 552 U.S. 148, 128 S. Ct. 761.

[17] *Id.* at 128 S.Ct. 773-74

[18] *Id.* at 128 S.Ct 773.

pleading alleging economic loss from the purchase of securities to describe the loss and its causal connection to the alleged misrepresentation as a means to dismiss the action prior to the institution of discovery. This opinion set the stage for *Iqbal/Twombly*'s recasting of Rule 8 pleadings requirements.

Twombly* and *Iqbal

Twombly is less of a civil procedure case than an anti-trust case. It restated the long standing reluctance of the Supreme Court to throttle businesses with anti-trust penalties based solely on circumstantial evidence of a "conspiracy" when that evidence may simply reflect rational business decision making.[19] Once again, the majority opinion in *Twombly* trotted out the *Blue Chip Stamps* jeremiad about meritless class action litigation and the expense of discovery.[20]

The *Iqbal* majority's construction of Rule 8 expanded to all civil litigation *Twombly*'s charge that a complaint alleging an anti-trust conspiracy must contain enough factual matter suggesting a conspiracy was plausible. Prior to *Iqbal*, plausibility had not been a part of the lexicon of judicial interpretation of Rule 8 but a term descriptive of the substantive requirements of proof of the existence of a conspiracy

[19] *Twombly* cited to *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 which exhorted the lower courts not to draw "false inferences" in allowing anti trust conspiracy claims to survive summary judgment on proceed to trial. 550 U.S. at 543. (1986).
[20] 550 U.S. at 557-58.

violative of anti-trust law.[21] *Iqbal* requires judges to review the well pleaded factual allegations of any complaint challenged by a 12 (b) (6) motion and "then determine whether they plausibly give rise to an entitlement to relief."[22] In making this determination, the *Iqbal* majority enjoins judges to "draw upon [their] judicial experience and common sense".

Iqbal, a case involving the *Harlow* immunity bids of the Attorney General and F.B.I. Director, once again manifested the disdain for the burden of discovery imposed on high government officials. The majority opinion echoed *Twombly*'s skepticism that judicial management of discovery was an adequate means to minimize discovery's burden while still affording the plaintiff access to facts to bolster the complaint's allegations.[23]

Justice Stephens' dissent in *Twombly* decried the dismantlement of the well settled construct of Rule 8 foreshadowed by *Twombly* and accomplished by *Iqbal*. Unlike the majority in *Twombly* and *Iqbal*, Justice Stephens drew heavily upon the intent of the drafters of the Federal Rules of Civil Procedure.[24] He chided his colleagues who,

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[21] *Twombly* relies upon *Matsushita* as discussed in note 6, *infra* and quotes Judge Posner in *Asahi Glass Co. v. Pentech Pharmaceuticals,Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").
[22] 129 S. Ct. at 1950.
[23] 129 S. Ct. at 1953-54.
[24] U.S. at 575. (J. Stephens dissenting). Justice Stephens quoted Charles E. Clark the "principal draftsman of the Federal Rules:

although advocating strict judicial adherence to legislative intent, failed to do so in this instance.[25]

Will *Iqbal* Stand the Test of Time?

Disquiet with the empowerment of litigants and their lawyers with the use of the discovery tools granted to them by the Federal Rules of Civil Procedure produced the holding of *Iqbal* and its mandate to judges to rule on the "plausibility" of the factual allegations of a complaint prior to unleashing discovery. Although this will roil the waters in the short term, it remains to be seen if *Iqbal* has long term vitality. Although the ends accomplished by *Iqbal* will have many fans, the means are dubious.

Rules governing the procedures of the inferior federal courts are ultimately within the province of Congress.[26] The Supreme Court's transforming of the Federal Rules of Civil Procedure by a case decision seemingly altering the balance of power in litigation involving politically charged issues such as civil liberties, civil rights and consumer law invites Congressional response. A legislative restoration of the *status quo* would ironically weaken the power of the Court to guide and lead the crafting of judicial rules.

> "Experience has shown ... that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The New Federal Rules of Civil Procedure: The Last Phase-Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A.J. 976, 977 (1937).

[25] 550 U.S. at 595-96.

[26] Rules Enabling Act, 28 U.S.C. § 2071, et. seq. Congressional authority to ultimately determine the rules governing inferior federal courts is well settled. 5A Wright & Miller. Federal Practice and Procedure 3d § 1001.

A deliberative process spanning a number of years and listening to many voices gave birth to the Federal Rules of Civil Procedure. The American Bar Association had advocated the adoption of uniform rules for the federal courts for actions at law. The ultimate product of these deliberations merged law and equity, reduced the role of pleadings from laying out and narrowing the factual issues to simply giving notice, and created sweeping powers of discovery.

Notwithstanding its revolutionary content, the draft of the Rules resulting from a deliberate, consensual approach was universally well received. Congress failed to exercise its right to modify or reject the Rules.[27]

Iqbal lacks precedential stability. Its holding mustered the support of a bare majority of justices. The four dissenting justices speaking through the dissent of Justice Souter argued that the majority ignored concessions on the supervisory liability of government officials made by the defendants with the consequential result of a lack of briefing by the parties on what proved to be pivotal issue of the case-the rule of liability by which the complaint would be measured.

As a new precedent, the plausibility standard, relying upon little more than the subjective (and presumably diverse) experiences of judges to determine a complaint's viability, will spawn disparate outcomes requiring frequent appellate review and conciliation. The Supreme Court

[27] 5A Wright & Miller, Federal Practice and Procedure 3d §§ 1004-5.

will have many opportunities to revisit the meaning of Rule 8 and may very well overrule *Iqbal* either expressly or implicitly as the Court, seeded with new justices, examines its rationale and results.[28]

The change in the role of the complaint and the wisdom of judicial determinations of "plausibility" could have been considered through the rulemaking process. This would have allowed for the input of scholars, the practicing bar, judges and all other parties interested in the operation and role of the federal civil justice system. A rule change fashioned by the rule making process would have likely possessed a greater clarity and enjoyed a greater acceptance and longer life span than the *Iqbal* holding.

Tom Williamson of Williamson & Lavecchia L.C. prepared this paper for presentation to the John Marshall Inn of Court, Richmond Virginia at its November 10, 2009 meeting at the University of Richmond. To learn more about Tom and his law firm Williamson & Lavvechia L.C., please visit www.wllc.com.

[28] *Iqbal* may also disturb the Congressional deference accorded to the judicial determination of federal court procedural rules. At the current time, action is under way in both the House of Representatives and Senate to legislatively overrule *Iqbal*. Ingram, D., Supreme Court's 'Iqbal' Ruling to Get Congressional Hearing, Nat'l Law J. (October 26, 2009)