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Don't Shoot the Plaintiff: The New Regime in Federal Pleading

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Special to the Legal

Testifying at a congressional hearing last fall on federal court pleading standards, Arthur R. Miller of NYU Law School, a leading authority on American civil procedure, recounted the steady movement of case disposition earlier and earlier in a case, concluding that the only step left is to “shoot plaintiffs before they come into the courthouse.” While he may have been exaggerating, there is no doubt that plaintiffs have a harder time surviving a motion to dismiss these days. What Miller called a “philosophical sea change” has taken place in American civil procedure, culminating in two recent Supreme Court decisions.

JUSTICES CHANGE THE RULES

Ever since the Supreme Court's 1957 opinion *Conley v. Gibson*, a complaint in federal court could not be dismissed “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.” Over the years, this “no set of facts” standard has been steadily eroded. In 2007, the Supreme



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Court retired it once and for all.

In *Bell Atlantic Corp. v. Twombly*, a 7-2 decision, the court substituted a new standard of “plausibility,” holding that a plaintiff must set forth “enough facts to state a claim to relief that is plausible on its face.” The court explained that a complaint containing mere “labels and conclusions,” or “a formulaic recitation of the elements of a cause of action,” would no longer survive a motion to dismiss.

Last year, in *Ashcroft v. Iqbal*, a 5-4 decision, the court went even further, setting forth a two-part test for courts to apply in analyzing a motion to dismiss. First, the court should identify allegations in the complaint that are merely “conclusions” and disregard them. Second, the court should apply *Twombly*'s “plausibility” standard to the remaining allegations, using “judicial experience and common sense.”

While the court declined to identify this test as a heightened standard, lower federal courts have interpreted it as such. Last August, in reversing the dismissal of an employment discrimination claim in *Fowler v. UPMC Shadyside*, the 3rd U.S. Circuit Court of Appeals applied *Iqbal*'s two-part test and noted that “pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.” As of June 2010, *Twombly* had been cited in more than 28,000 decisions, *Iqbal* in more than 8,800.

PLAINTIFFS GROUPS SEEK CONGRESSIONAL FIX

After *Iqbal*, the plaintiffs bar and consumer groups immediately lobbied

Congress to turn back the clock. Last July, Pennsylvania Democratic Sen. Arlen Specter introduced the “Notice Pleading Restoration Act,” which would bar federal courts from dismissing cases under any other standard than *Conley’s* “no set of facts” formula. And last December, the U.S. Senate Judiciary Committee held hearings on the effect of these two decisions on citizens’ access to courts. The committee chair, Sen. Patrick L. Leahy, D-Vt., criticized the decisions, stating that the court’s “conservative majority ... is making it more difficult to hold perpetrators of wrongdoing accountable.”

House Democrats introduced the “Open Access to Courts Act of 2009,” which went further than the Specter bill by actually placing the *Conley* “no set of facts” language in the bill and expressly barring courts from using the new standards. The bill was referred to the Subcommittee on Courts and Competition Policy on Jan. 4.

Business groups have mounted a lobbying effort of their own to maintain the new pleading standards. The U.S. Chamber of Commerce and 40 major business associations and companies wrote to Congress last fall opposing the legislation, stating that such a “drastic change in standards would impose enormous costs on already struggling businesses and further impede economic recovery.”

THE EFFECT ON FEDERAL PLEADING

Although it is too early to tell with any certainty what effect these new

pleading rules will have, the early evidence suggests that courts are more inclined to grant motions to dismiss than they used to be.

An empirical study published in the February 2010 *American University Law Review* concludes that the new standards have already had an impact on decisions on Rule 12(b)(6) motions in federal court. The study compared the rate of dismissals in the two-year period before *Twombly* with the rate of dismissals between *Twombly* and *Iqbal*, and with a three-month period after *Iqbal*. Applying a regression analysis, the study found that, after *Twombly*, the odds that a 12(b)(6) motion would be granted with leave to amend, rather than denied, were 1.8 times greater than under *Conley*; after *Iqbal*, the odds jumped to four times greater than under *Conley*. The Advisory Committee on Civil Rules of the Judicial Conference of the United States, the Supreme Court’s policy-making body, is currently conducting its own empirical analysis but has not published the results yet.

Meanwhile, the Judicial Conference has also been studying whether a formal change to the Federal Rules of Civil Procedure to clarify pleading standards is necessary. Rule 8’s requirement of a complaint’s “short and plain statement” of the claim still stands, but it must now be interpreted in light of the heightened standards.

Even without formal rule changes, the practical effect of the new standards is obvious. Plaintiffs will need to show more of their cards at the

pleading stage by adding more factual detail to the complaint than in the past. Some plaintiffs, anticipating litigation over the adequacy of the complaint that they may end up losing, may decide not to sue at all. Defendants may now decide it is now worth spending the money for a motion to dismiss complaints that they would have answered in the past, concluding that they have a chance to avoid discovery altogether.

As the 3rd Circuit stated in *Fowler*, pleading standards in federal court have shifted; the “notice pleading” regime is effectively dead. Both plaintiffs and defendants will have to adjust to the new rules. •