A CLOSER LOOK *at* NEW PLEADING *in the* LITIGATION MARKETPLACE

By Scott Dodson

COURTS AND PARTIES UNDOUBTEDLY ARE AFFECTED BY THE NEW PLEADING REGIME OF *TWOMBLY* AND *IQBAL*. BUT, AS RATIONAL ACTORS, THEY ALSO ARE RESPONSIVE TO IT. THEIR RESPONSIVE BEHAVIORS BOTH MITIGATE THE EXPECTED EFFECTS OF NEW PLEADING AND CAUSE UNINTENDED EFFECTS. ASSESSING NEW PLEADING THUS REQUIRES UNDERSTANDING AND CONSIDERATION OF THESE MARKET FORCES AND REACTIVE IMPLICATIONS.

We are now more than five years out from the momentous shift in federal civil pleading standards from the old "notice pleading" regime of *Conley v. Gibson*[1] to the "New Pleading"[2] regime of *Bell Atlantic Corp. v. Twombly*[3] and *Ashcroft v. Iqbal*.[4] Although many courts and commentators promptly weighed in on the import of this shift, distance can be useful; time often tells whether developments are net positive or negative.

But part of the problem of assessing New Pleading, even with time, is that legal changes do not have static effects. Judges, parties, and lawyers are rational actors. They respond to changes in doctrine and practice with their own changes.[5] These secondary responses may temper or exacerbate the observable effects of New Pleading, and they may cause unintended effects. This essay situates New Pleading in the broader litigation marketplace and argues that evaluating its effects is both more complex than initially supposed and likely to continue to be hard to assess.

OLD PLEADING, NEW PLEADING

Historical, doctrinal, and social detail about the evolution of federal pleading standards in the United States is available elsewhere[6] and need not be repeated here. But I do want to reiterate briefly some basics to set the stage for considering the impact of what has changed.

Rule 8(a)(2), which still reads as it has since 1938, requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[7] This standard is quite different from — deliberately so — the pleading standards in America's past and in most of the present world.[8] The drafters intentionally omitted any reference to facts.[9] Their goal was to reduce the

gatekeeping function of pleadings — open the doors wider — and require only fair notice of the claim sufficient to enable a defendant to respond.[10] Provide notice, and as long as you don't sue for a cause of action that the law does not recognize, you generally survive a motion to dismiss.

Of course, fair notice requires some facts; otherwise, the defendant would not know how to respond. But the remedy for a defect in notice stemming from factual insufficiency is a motion for a more definitive statement, not a motion to dismiss.[11] That remedy alone suffices to ensure that troublesomely bare complaints will not go forward without more detail.

The Supreme Court opinion in *Conley v. Gibson*[12] confirmed all this in 1957, and it put an end to what some have called the Third Pleading War.[13] After *Conley*, it was clear that the pleading rules accepted the costs of false positives (letting some plaintiffs with meritless claims through the pleading stage) in exchange for the benefits of broad court access and avoidance of false negatives (shutting out some plaintiffs with meritorious claims).[14] The *Conley* standard for dismissing a complaint under Rule 12(b)(6) was whether it was "beyond doubt" that the plaintiff could prove "no set of facts" to establish relief.[15]

Such was the state of federal pleading law for 50 years, and *Conley* held a place of prominence in all of the major procedure casebooks in U.S. law schools. Although a few subsequent opinions seemed to create some tension with *Conley*, the major pleadings decisions by the Supreme Court after *Conley* tended to reaffirm it and its liberal standard emphatically.[16]

Then, in 2007 and 2009, the Supreme Court decided a pair of cases that altered *Conley*'s pleading regime. These cases — *Twombly* and *Iqbal* — did not change *Conley*'s screen for legal sufficiency. They left untouched the requirements that a complaint provide notice and that the complaint state a legally recognized claim for relief. But they added a new factual-sufficiency requirement of "plausibility."[17]

This "New Pleading" standard requires the complaint to survive a two-step test. First, the court must disregard all conclusory allegations in the complaint. Second, the court must determine, using "judicial experience and common sense," whether the remaining allegations state a "plausible" claim for relief.[18]

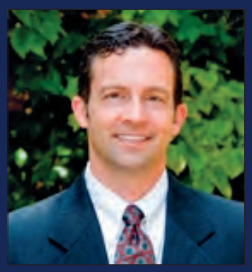
Naturally, what is "conclusory" and what is "plausible" are still somewhat unclear. And how judges will use their "judicial experience and common sense" is hard to predict. But what is clear is that New Pleading is a transsubstantive change that imposes a new and more difficult pleading requirement. Now, in addition to the notice and legal-sufficiency requirements that always existed, plaintiffs must overcome a factual-sufficiency hurdle that requires judges to disregard conclusory allegations and assess the complaint for plausibility.

How meaningful is New Pleading? That is the $65 million question. In this essay, I hope to show that although we know some things about the effects of New Pleading, assessing New Pleading is, in general, a highly complicated endeavor. Understanding that complexity should give pause to reflect upon how best to approach our assessments of New Pleading and how best to move forward from it.

THE EFFECTS OF THE LITIGATION MARKETPLACE

If the pleading standard has become more difficult for claimants, one might expect to see a higher dismissal rate after *Iqbal*. Indeed, the available empirical evidence suggests that New Pleading is having some impact on dismissal rates in federal court. The studies to date consistently reveal single-digit increases in the dismissal rate after *Iqbal*, though not all of the increases are statistically significant.[19] And a single-digit increase in the dismissal rate seems quite modest compared to the cataclysm some predicted.[20] The question then is why.

One answer is that New Pleading really isn't that different from Old Pleading. In other words, it just isn't a big deal. That answer is certainly a possibility,[21] but it ignores the anecdotal evidence. Lower courts almost universally hail the decisions as, together, creating a sea change in pleading standards.[22] Judge Sidney H. Stein, of the Southern District of New York, for example, recently pronounced that *Twiqbal* represents "a major shift in how I have to approach motions to dismiss."[23] Another judge confessed, "We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim."[24] One prominent practitioner called *Iqbal* "the most significant Supreme Court decision in a



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decade for day-to-day litigation in the federal courts."[25] The rampant belief among judges, practitioners, and scholars is that New Pleading is something quite different.

The more likely explanation for the lack of observable dismissal-rate changes is that rational actors, confronted with a meaningfully new standard, are changing their conduct in ways that end up masking, or mitigating, some of the otherwise expected effects of New Pleading.[26] In addition, these responses may be causing ancillary effects that ought to be considered in assessing New Pleading. In other words, rational actors in the litigation marketplace can be expected to react to the anticipated implications of New Pleading, and those reactions might cycle back to then both affect the observable dismissal rate and cause unintended effects. This part explores some of those complexities.

Plaintiffs

The threat of facing a motion under New Pleading appears to be inducing plaintiffs to conduct more factual investigation — even retaining experts — prior to filing a claim. Plaintiffs who choose to file are putting more factual information into their complaints in an effort to comply with the strictures of New Pleading.[27] Plaintiffs always have generally tended to put more information in their complaints than necessary, even before *Twombly*, but New Pleading imposes a legal standard that requires qualitatively important facts that seem to be of a different and more specific ilk than prior practice focused on.[28]

Rational plaintiffs who cannot obtain through additional investigation the facts needed to survive a *Twiqbal* motion might choose other alternatives. A small number might attempt to get that information through state-court discovery mechanisms. A few state systems (namely, Alabama, Connecticut, New York, Ohio, Pennsylvania, and Texas) allow what the federal system does not: presuit discovery.[29] If a plaintiff could obtain presuit discovery from the defendant in one of these states, then the plaintiff could potentially get the information needed to file a complaint that would survive a *Twiqbal* motion in federal court.[30]

Plaintiffs who cannot obtain the additional information needed potentially have some options. One option is to file suit in a state court that follows a more liberal pleading rule than New Pleading. State courts are free to adopt their own pleading rules. And even if the language of a state rule tracks Rule 8, the state is free to interpret its rule as it wishes. So, perhaps a complaint that would be screened out of federal court by New Pleading could survive in state court.

Several difficulties complicate this option. The first difficulty is that as of January 2015 only eight states — Arizona, Iowa, Minnesota, Montana, Tennessee, Vermont, Washington, and West Virginia — have maintained their liberal pleading standard in the wake of *Twombly*.[31] Thus, only a lawsuit filed in one of these eight states could be assured of avoiding a fact-based pleading standard.

And filing in one of these state courts may have its own disadvantages. For example, the peculiarities of state practice may be detrimental to certain plaintiffs. In addition, personal jurisdiction limitations may prevent a litigant from filing in one of these states.[32] Finally, savvy defendants may remove eligible cases from state court to federal court, where the New Pleading standard will apply.[33]

For these reasons, some plaintiffs rationally will not file at all,[34] or at least will file fewer claims. Perhaps some will try alternative dispute resolution mechanisms; others may forgo the claims altogether.[35]

Plaintiff-selection effects thus complicate assessments of New Pleading in two ways. The first is that the filing of fewer claims in federal court ought to *reduce* the dismissal rate if those that are selected out at filing also would have been dismissed on motion. If so, then the observed dismissal rate would *understate* the total screening effect of New Pleading. The second is that New Pleading induces most plaintiffs to obtain additional information before filing and to include that additional information in their complaints, making even those cases that survive New Pleading more expensive and burdensome for plaintiffs to file.

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Defendants

Defendants also can be expected to respond rationally to New Pleading. Most obviously, with New Pleading adding a new weapon to their arsenal, defendants will file motions to dismiss in more cases. New Pleading allows new challenges to assertions as conclusory and new challenges to claims as factually implausible. Rational defense-lawyer behavior should lead to more motions filed.

The anecdotal evidence suggests a significant uptick in the filing rates of motions to dismiss after *Iqbal*. Survey evidence reveals a dramatic increase in motions,[36] and prominent defense lawyers have said publicly that they now ▸

file dismissal motions in nearly every case.[37] Some have even opined that the failure to file a motion to dismiss could now constitute legal malpractice.[38]

Available empirical evidence supports these anecdotes. In a study of Rule 12(b)(6) motions, the Federal Judicial Center found a statistically significant (to the 99 percent confidence interval) increase in the motion-filing rate of more than 50 percent.[39] It seems clear that one effect of New Pleading is the increase in the filing of motions to dismiss.

In addition to affecting the incidence of motions, New Pleading likely also causes motions to be bigger and more complicated. Prior to *Twombly*, motions might justifiably focus entirely upon the plaintiff's allegations in the complaint and the scope of the law. Now, in addition to those arguments based on legal sufficiency, defendants can argue for factual insufficiency. That additional argument may include sub-arguments about what allegations in the complaint are conclusory, whether the remaining nonconclusory allegations establish a plausible entitlement to relief, and what other information might inform the judge's "judicial experience and common sense."

The result is a far more complicated, and more fact-intensive, motion process. Although empirical evidence on the quality of motions is not yet available, theoretical commentary suggests that dismissal motions are starting to resemble more substantial summary-judgment motions, with their heavy emphasis on evidentiary materials outside of the complaint.[40]

As discussed above, complaints that are fortunate to survive this intense scrutiny are likely to be far longer and more factually detailed than pre-*Twombly* complaints. Because answers must respond to each allegation specifically,[41] defendants forced to answer these complaints must file answers that are likely to be longer, more difficult, and more expensive to draft.

Thus, defense-side responses have two primary effects on any assessment of New Pleading. The first effect is that, despite any plaintiff-side filing screen imposed by New Pleading, defense-side motions appear to have increased after *Iqbal*. The increase in the motion-filing rate could affect the dismissal rate (as a function of motions filed) either positively or negatively, depending upon the kinds of cases in the subset facing motions. In absolute terms, however, the dramatic increase in the motion filing rate ought to negatively affect plaintiffs, for far more cases that never would have faced a motion to dismiss pre-*Twombly* will face one post-*Iqbal*, and at least *some* of those motions will be granted. In the best study to date of this defense-side selection effect of increased motions, Jonah Gelbach has concluded that the minimum negative effect on plaintiffs is 15 percent. In other words, at least 15 percent of cases dismissed under New Pleading would not have been dismissed under Old Pleading.[42] His study supports the conclusion that this defense-side selection effect exacerbates New Pleading's negative effect on plaintiffs.

The second effect is a cost effect. The increases in the motion-filing rate and in the complexity of both motions and answers will cause defense-side costs of litigation to increase, even in cases that do not result in a dismissal. They also will cause plaintiff-side costs of litigation to increase, as plaintiffs respond to the more complex motions with their own more complex opposition briefs.

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Federal Courts

A third set of rational actors includes federal judges wrestling with New Pleading. There was some hope by commentators in the immediate aftermath of New Pleading that judges might offer more lenient interpretations of New Pleading, perhaps playing off uncertainties remaining in the doctrine and the low probability of reversal. For example, Ben Spencer proposed that courts could suspend New Pleading strictures for plaintiffs who could not be expected to marshal the necessary facts because those facts were in the hands of the defendants.[43] Others proposed that New Pleading could be limited to certain kinds of cases of the same ilk as those at issue in the specific cases in *Twombly* and *Iqbal*.[44] For the most part, however, courts have rejected these options, instead interpreting New Pleading to apply to all cases and regardless of any information asymmetry confronting

unfortunate plaintiffs.[45]

Other commentators have argued that the discovery rules permit formal discovery while a motion to dismiss is pending.[46] Rule 26(c) allows a court to stay discovery only upon a showing of "good cause," and there is at least an argument that the mere pendency of a motion to dismiss is not "good cause."[47] The idea is that a plaintiff faced with a motion to dismiss based on New Pleading could seek discovery of the necessary facts while the motion was pending, and a judge could delay deciding the motion until the discovery was complete.

The main problem with this line of argument is that the language the Supreme Court used in its *Twombly* and *Iqbal* opinions suggests that it views discovery as unavailable if the complaint cannot survive a motion to dismiss. *Twombly* states that "it is only by taking care to require allegations that reach the level [of plausibility] that we can hope to avoid the potentially enormous expense of discovery"[48] and concludes that "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."[49] *Iqbal* asserts that "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"[50] and concludes that "[b]ecause respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."[51]

Thus, a plaintiff seeking to take advantage of discovery before surviving a motion to dismiss would have to file an admittedly deficient complaint and hope that a district judge would allow discovery pending the motion despite the Supreme Court's admonitions to the contrary. The lower courts appear, in the main, to have followed that admonition and refused to allow discovery pending a motion to dismiss.[52]

Still, it appears that at least some judges *are* allowing discovery pending a motion to dismiss.[53] If that practice becomes widespread enough, then plaintiffs might be emboldened to file factually insufficient complaints on the hope that a judge will permit discovery of the needed facts. Some judges will, and others won't, so presumably some plaintiffs will get the information needed to survive the motion and others won't. How many fall into each category is an unanswered question that nevertheless affects the assessment of what impact New Pleading is having overall.

OBSERVATIONS AND WAYS FORWARD

What do these marketplace effects tell us about the impact of New Pleading? This part explores that question and offers some thoughts for next steps.

The More We Know, the Less We Know

Although initial New Pleading assessments focused on dismissal rates, things are clearly more complicated. Dismissal-rate studies no doubt are an important piece of the puzzle. But they are influenced in ways that are not fully understood or studied. Rational responses in the litigation marketplace may temper or exacerbate otherwise expected or observed effects. As Gelbach's study suggests, for example, the increase in motions filed indicates that dismissal-rate studies likely understate New Pleading's effect. Similarly, we simply do not know how many cases plaintiffs siphon to other forums — such as state courts — or decline to pursue at all; the quality and quantity of those cases may influence the observed dismissal rate. The following list identifies just some of the unknowns that may bear on an accurate assessment of New Pleading's dismissal-rate effect:

- The quality and quantity of cases plaintiffs pursue in other forums, such as state courts.
- The quality and quantity of cases plaintiffs decline to pursue in any forum.
- The quality and size of complaints filed in federal court.
- The quality and quantity of motions filed by defendants.
- The standards applied by federal judges assessing complaints under the New Pleading standard.
- The quality and scope (if any) of pre-dismissal discovery opportunities federal courts afford plaintiffs.
- The rate and efficacy of amendments to complaints.[54]

These lacunae in our knowledge base demonstrate that we still don't really know with confidence what the dismissal-rate effect of New Pleading is. The dynamics of the litigation marketplace make that a much more difficult inquiry.

Yet even getting a more confident grasp of the dismissal-rate effect is only one piece of the puzzle. New Pleading's screening effect at the filing stage, for example, in addition to influencing the observed dismissal-rate effect, is independently important. In fact, it is a necessary component of understanding New Pleading's total screening effect. Ideally, if New Pleading functions as intended, plaintiffs with implausible claims will not even file in the first place, thereby sparing innocent defendants even of the costs of filing a motion to dismiss.[55]

New Pleading's total screening effect is not the final answer, however, for we do not know the quality of the cases being screened. If all screened cases are meritless, then New Pleading's screen may be normatively desirable. But if meritorious cases are being screened out when they otherwise would have proceeded to favorable judgment or settlement, then New Pleading incurs a significant justice problem, especially if meritorious plaintiffs have been denied a reasonable opportunity for discovery to bear that merit out.[56]

There is some evidence that New Pleading does screen out meritorious cases, perhaps significantly so. In 2011, Prof. Alexander Reinert published a study finding that, of the studied cases ▸

that survived under Old Pleading but would have been dismissed under New Pleading, more than 55 percent were meritorious.[57] This merit-based percentage was statistically insignificant from a control group that would have survived New Pleading. Thus, Reinert concluded that New Pleading's dismissal screen has almost nothing to do with the meritorious nature of the case.[58] In a draft study, Gelbach finds that summary-judgment rates have not changed, leading him to question the merits-screening efficacy of New Pleading.[59]

In addition to the merit of screened cases, the *kind* of meritorious case being screened could matter as well. Screening meritorious claims of a purely private nature — like, for example, breach-of-contract actions — presents an individual-justice problem for the uncompensated litigant. But such cases are, theoretically, less likely to be screened than meritorious cases of a public or quasi-public nature. Screening meritorious claims of a public or quasi-public nature — such as environmental, civil-rights, antitrust, RICO, securities, mass-tort, consumer, and discrimination claims, just to name a few — presents both individual-justice concerns and broader regulatory-deterrence concerns.[60] To fully understand the impact of New Pleading, both individual-justice concerns and regulatory-deterrence concerns must be considered.

The flip side of the normative question of New Pleading's desirability is its benefits. Its primary intended benefit is the screening of meritless cases at an earlier stage than otherwise would occur, thereby saving innocent defendants some litigation costs. But, to date, there has been no study — not one — of the cost savings of New Pleading. We simply do not know enough about the quantity or quality of meritless cases being screened. It is reasonable to assume that *some* screened cases are meritless, but we do not know the percentage. And we do not know how much defense costs are reduced by screening those meritless cases. It is entirely possible that the cost savings are quite low, especially if the kinds of meritless cases screened are predominantly low-cost prisoner civil-rights claims.[61] And, any cost savings must be compared to alternative cost-savings mechanisms that judges could employ in discovery to protect defendants from excessive litigation costs. In other words, only the *marginal* cost savings can be credited as a benefit of New Pleading. We know next to zero about all of this.

On the whole, then, we know very little about the pros and cons of New Pleading as it applies in practice. The litigation marketplace, with its tangle of dynamic responses and feedback loops, complicates matters considerably. Without knowing more, it is impossible to formulate an accurate assessment of New Pleading's intended effects.

ANCILLARY EFFECTS

New Pleading is having unintended effects, too, and any assessment must consider those unintended effects along with the intended ones. Discussions of two unintended effects follow.

Costs

The opinions in *Twombly* and *Iqbal* were grounded in minimizing the expense of litigation, particularly in cases that had weak claims. *Twombly* worried that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases," and concluded that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery."[62] And *Iqbal* made clear that New Pleading is a necessary hurdle to discovery.[63]

Screening more cases at the pleadings stage may, indeed, reduce discovery costs (though it is unclear exactly how much). But that does not mean that New Pleading will reduce litigation costs as a whole. To the contrary, the Federal Judicial Center has surmised that New Pleading seems likely, "at least in the short run, to increase [rather] than decrease the costs of litigation in the broad spectrum of cases."[64]

How could that be? The answer is that New Pleading increases costs at the pleading and motions stage. As discussed above, plaintiffs are likely to conduct more pre-filing investigation and spend more attorney time drafting bigger and more detailed complaints. Defendants are filing more — perhaps 50 percent more — motions to dismiss.[65] Dismissals are usually with leave to amend, which plaintiffs take advantage of, sometimes successfully, though they may face a second motion to dismiss. Defendants who ultimately must file an answer must respond to bloated complaints with their own bloated answers. These cost increases in the pre-discovery phase could be even greater than any cost savings in the discovery phase.

To illustrate, consider the following rough figures. Say 100 identical cases are filed pre-*Twombly* and post-*Iqbal*. Of these, around 13 face motions to dismiss under either regime,[66] and an additional seven (a 50 percent increase) face motions to dismiss under New Pleading. One might be tempted to stop here and conclude that the increased costs amount to the seven additional motions filed under New Pleading.

It is true that the seven new motions are additional costs of New Pleading. But it is a mistake to stop there. The 13 cases that face motions under either regime are likely to be bigger, more complicated, and more expensive motions post-*Iqbal* than pre-*Twombly*. Further, in far more of the cases, perhaps all 100, plaintiffs are likely to spend more time and effort in pre-filing investigation and in drafting bigger, more factually detailed complaints. The takeaway is that even for cases that face the same motion-filing result under both Old and New Pleading, costs may increase.

Even the seven additional motions entail more costs than just the inci-

dence of a motion. As with the other 13, the motions are likely to be expensive. And, some of those additional motions (let's say two of the seven) will be unsuccessful, meaning that these two cases absorbed significant additional cost for the same result as under Old Pleading.

Of the five successful motions, most dismissals will be with leave to replead, and repleading is fruitful for some, say two. Thus, two more cases absorbed very significant additional costs (increased expense drafting the complaint, a New Pleading motion, and an amended complaint) for the same successful result.

Thus, in this hypothetical scenario, the observable benefit of New Pleading is an earlier dismissal in 3 percent of cases, though we have no estimate of the cost savings likely to result. This benefit must be contrasted with the potential injustice if some of the 3 percent are meritorious cases erroneously screened. The benefit also must be contrasted with the increased expense New Pleading potentially imposes on the vast majority of all cases filed. It is entirely possible that the increased costs alone render New Pleading a net cost to the system. At this time, we cannot say for sure. But we ought to find out.

Federalism

New Pleading also has more latent systemic effects. One potential effect is a shadow effect on state courts, which also are actors in the litigation marketplace. As noted above, some state courts have rejected New Pleading. But six others (so far) have adopted or endorsed it.[67] Widespread adoption risks creating the perception that states and state courts are, in the main, mere followers rather than intellectual independents.[68]

In the U.S. federal system, states are free to create their own procedures, including pleading rules. Federal-court interpretations of federal rules have no force of law on the interpretation or development of state procedural rules. Thus, state courts are well within their spheres of power to reject New Pleading in state court.

To be clear, some state following raises little to no concern. If the state court adopts the reasoning of a federal court because that reasoning applies equally and persuasively to state law and policy and is consistent with any controlling state-codified law, then state courts can be seen as using independent judgment to reach the same conclusion as a separate court.

But the adoption of New Pleading by states that previously endorsed *Conley* raises more concern. It is highly suspicious that, after 50 years of adherence to *Conley*, these state courts happened to conclude independently — just after the Supreme Court did — that their pleading rules require New Pleading strictures, too. The suspicion could cause one to conclude that states have adopted New Pleading simply because the U.S. Supreme Court adopted it instead of exercising rigorous independent judgment in accordance with state law and policy.

I do not mean to suggest that a state court should never follow federal precedent. The District of Columbia, for example, is governed by a statute that requires its courts to follow the Federal Rules of Civil Procedure unless local rules mandate a different result.[69] For this reason, the D.C. Court of Appeals was on defensible grounds when it construed its rule — which mirrors Rule 8(a) of the Federal Rules of Civil Procedure — to have the same scope as that given by *Twombly* and *Iqbal*.[70]

Unless some codified law directs state courts to follow federal precedents, state courts adopting federal interpretations should do more than adopt them on the ground that they are from the U.S. Supreme Court.[71] That should not be hard to do. For example, the Supreme Judicial Court of Maine adopted *Twombly* after noting that the federal and state rules were identical and determining that the rationale of *Twombly* applied to the kind of civil-perjury claims at issue, and that the *Twombly* standard was needed to further the state policy of curbing abusive use of those claims.[72] And the Supreme Court of Nebraska offered a defensible assessment of New Pleading and its desirability in Nebraska courts.[73]

Other states, however, have not articulated sufficient justification for following *Twombly* and *Iqbal*. For example, the Minnesota Supreme

> "[I]f meritorious cases are being screened out when they otherwise would have proceeded to favorable judgment or settlement, then New Pleading incurs a significant justice problem, especially if meritorious plaintiffs have been denied a reasonable opportunity for discovery to bear that merit out.

Court has followed operative language from *Twombly* without any explanation at all.[74] The Supreme Court of South Dakota adopted *Twombly* merely because the federal rule and the state rule both use the word "showing," but it offered no reasoning based on state policy or the correctness (or even persuasiveness) of *Twombly*.[75] And in Massachusetts, although courts had followed the "no set of facts" standard of *Conley* for more than 30 years, the Supreme Judicial Court followed *Twombly* in an opinion that simply stated, without explanation, that the court "agree[d]" with *Twombly*'s analysis.[76]

Blindly following federal precedent when it is not controlling, as Minnesota, South Dakota, and Massachusetts have done with New Pleading, devalues both state law and state courts. It devalues state law by refusing to countenance that state law could demand a different result. And it devalues state courts by creating the perception that they do not exercise the rigorous, independent analysis that becomes the judicial function.

Now, state courts could avoid this devaluation entirely by demonstrating more rigorous reasoning in their opinions. But the U.S. Supreme Court could help by recognizing the state courts as eager marketplace consumers. A *Twombly* or *Iqbal* footnote emphasizing the limited reach of federal-court interpretations of federal rules and acknowledging that even analogous state rules may demand different interpretation could help spur state courts to rationalize adoption more rigorously. Without such cautionary signals, New Pleading risks contributing to the depreciation of state law and state courts.

MOVING FORWARD

Situating New Pleading in the broader litigation marketplace reveals a number of insights. First, it accentuates the need for more sophisticated study of intended effects, ancillary effects, and costs. The existing empirical and anecdotal studies are good initial steps. But, they are but a small part of the information necessary to assess New Pleading holistically.[77]

Second, information sharing ought to be a two-way street. Market participants both consume and produce information. They consume information to make informed decisions, while their decisions then produce additional information to be consumed by others. Yet the information consumed by market participants is rarely complete. Market participants with broad consumptive and productive capacity (such as the Supreme Court) along with market "outsiders" (such as academics, rulemakers, and legislatures[78]) can better ensure that the information they produce gets to, and is consumed by, market participants.

For example, parties and courts may find it useful to understand the potential costs of increased motion practice under New Pleading. They also could benefit from clarifications of how New Pleading and discovery could work together. State courts perhaps could benefit from better information on the impact of New Pleading in federal court and on the differences between federal and state litigation and pleading practice. In short, New Pleading presents an opportunity for both market participants and traditional outsiders to make a real difference through the dissemination of studies and scholarship.

Third, New Pleading offers an opportunity for procedural scholars to bring together a rich, interdisciplinary mix of theory, practice, empirics, doctrine, political science, economics, and normativity. Simply put, it is an exciting time to be an American proceduralist.

Conclusion

Assessments of New Pleading to date have focused on directly observable effects, namely, New Pleading's effect on dismissal rates. I have argued here that this focus elides the complexity that the litigation marketplace imparts to dismissal-rate studies. And the story of dismissal rates deemphasizes potentially more important stories of costs and other ancillary effects.

In some ways, though, we can relish the fact that the focus once again is on pleadings. Perhaps it is time to have another "war" — or at least a debate. New studies and scholarship might lead to intriguing new possibilities domestically. That, at least, is worth applauding.

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1 355 U.S. 41 (1957).

2 Scott Dodson, *New Pleading, New Discovery*, 109 Mich. L. Rev. 53 (2010).

3 550 U.S. 544 (2007).

4 556 U.S. 662 (2009).

5 *See* Robert G. Bone, The Economics of Civil Procedure (2003).

6 *See* Scott Dodson, New Pleading in the Twenty-First Century: Slamming the Federal Courthouse Doors? 6–78 (Oxford University Press 2013).

7 Fed. R. Civ. P. 8(a)(2).

8 *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. Pa. L. Rev. 441 (2010).

9 Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 Tex. L. Rev. 1665, 1671 (1998).

10 *See* Dodson, *supra* note 6, at 18–22.

11 Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 Akron L. Rev. 1189, 1992 n.14 (2010).

12 355 U.S. 41 (1957).

13 Richard L. Marcus, *The American Pleading Wars* (2013) (unpublished manuscript).

14 For a comprehensive account of *Conley*, see Dodson, *supra* note 6, at 26–30.

15 *Conley v. Gibson*, 355 U.S. 41, 43–47 (1957).

16 *See* Dodson, *supra* note 6, at 35–45.

17 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

18 *Iqbal*, 556 U.S. at 664.

19 *See* Dodson, *supra* note 6, at 83–89.

20 *See* Marcus, *supra* note 13, at 21.

21 For one of the few defenses of this position, *see* Adam Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293 (2010).

[22] *See, e.g.*, *Fowler v. UPMC Shadywide*, 578 F.3d 203 (3d Cir. 2009) ("[P]leading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading.").

[23] Pamela Atkins, Twombly*,* Iqbal *Introduce More Subjectivity to Rulings on Dismissal Motions, Judge Says*, 78 U.S.L.W. 2667 (May 11, 2010) (quoting Judge Stein).

[24] Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 Suffolk U. L. Rev. 851, 853 (2008).

[25] Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. Times, July 20, 2009, at A10 (quoting Tom Goldstein).

[26] For the definitive paper highlighting the importance of litigant selection effects, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1 (1984). For a *Twombly*-limited model controlling for plaintiff selection effects, see William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. Legal Stud. 35 (2013).

[27] *See* Leslie A. Gordon, *For Federal Plaintiffs,* Twombly *and* Iqbal *Still Present a Catch-22*, A.B.A. J. (Jan. 1, 2011); Herbert Hovenkamp, *The Pleading Problem in Antitrust and Beyond*, 95 Iowa L. Rev. Bull. 55, 56–57, 63 (2010); Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Attorney Satisfaction with the Federal Rules of Civil Procedure 12 (2010),

[28] *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821 (2010) (arguing that New Pleading imposes a novel standard).

[29] *Ex parte Anderson*, 644 So. 2d 961, 964 (Ala. 1994); *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994); *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 707 N.Y.S.2d 159, 161 (N.Y. App. Div. 2000); Ohio Civ. R. 34(D)(1); Pa. R. Civ. P. 4003.8(a); Tex. R. Civ. P. 202.1, 202.4.

[30] *See* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 Lewis & Clark L. Rev. 43 (2010).

[31] *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 345–48 (Ariz. 2008); *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 607–08 (Iowa 2012); *Walsh v. U.S. Bank, N.A*, 851 N.W. 2d 598, 600 (Minn. 2014); *McKinnon v. W. Sugar Coop. Corp.*, 225 P.3d 1221, 1223 (Mont. 2010); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 433, 427–37 (Tenn. 2011); *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 n.1 (Vt. 2008); *McCurry v. Chevy Chase Bank*, 233 P.3d 861, 862–64 (Wash. 2010); *Roth v. DeFelicecare, Inc.*, 700 S.E.2d 183, 188–89 & n.4 (W. Va. 2010). By contrast, six states that formerly followed *Conley* have adopted New Pleading as the rule for pleading under their state rules. *See infra* note 67. Another 16 or so already follow a form of fact pleading. *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 Wake Forest L. Rev. 1337, 1340 n.19 (2010). The others have not yet conclusively adopted or rejected New Pleading.

[32] The Supreme Court has recently tightened the scope of personal jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

[33] *See* Clermont & Yeazell, *supra* note 28, at 832 n.41.

[34] *See* Bone, *supra* note 5, at 148. Although no studies have attempted to measure the filing-screening effect of New Pleading, a recent analogous study found that stricter pleading standards under the federal securities laws have had a screening effect on the filing of securities class actions. *See* Stephen Choi, Karen K. Nelson & Adam C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. Emp. Legal Stud. 35 (2009).

[35] Interestingly, though the hope might be that New Pleading would incentivize settlement, the available empirical evidence does not support increased settlement rates in filed cases after *Iqbal*. *See* Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 28 J. L. Econ. & Org. 898 (2013).

[36] *See* Lee & Willging, *supra* note 27, at 11–12.

[37] *See* Gordon, *supra* note 27 (reporting that James Wareham, the chair of Paul Hastings's D.C. litigation group, raises *Twombly* and *Iqbal* in "nearly every securities case he handles"); Janet Cecelia Walthall, Iqbal*,* Twombly *Pleading Standards Hotly Debated by Conference Panelists*, 78 U.S.L.W. 2782, 2782 (2010) (quoting John Freedman, a partner at Arnold & Porter, as saying, "I am more likely now to file a motion to dismiss under Rule 12(b)(6) in almost every case").

[38] *See* Clermont & Yeazell, *supra* note 28, at 840.

[39] Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal 8–10 (2011).

[40] Marcus, *supra* note 13, at 16; *cf.* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Became (Disguised) Summary Judgments*, 25 Wash. U. J.L. & Pol'y 61 (2007) (comparing New Pleading motions to summary-judgment motions).

[41] *See* Fed. R. Civ. P. 8(b).

[42] *See* Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 Yale L.J. 2270, 2330–32 (2012).

[43] *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 29–30 (2009).

[44] *See, e.g.*, *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008) (Posner, J.); J. Douglas Richards, *Three Limitations of* Twombly*: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 St. John's L. Rev. 849, 851 (2008); Douglas G. Smith, *The* Twombly *Revolution?*, 36 Pepp. L. Rev. 1063, 1083–85 (2009).

[45] *See, e.g.*, *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 134 n.10 (3d Cir. 2010); *S. Cherry St. LLC v. Hennessee Group LLC*, 573 F.3d 98, 113–14 (2d Cir. 2009).

[46] *See* Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. Pa. L. Rev. 473, 503–15 (2010); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 Lewis & Clark L. Rev. 65, 123–41 (2010).

[47] Fed. R. Civ. P. 26(c).

[48] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

[49] *Id.* at 564 n.8.

[50] *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[51] *Id.* at 686.

[52] *See* Dodson, *supra* note 6, at 176-78.

[53] *See* Edward A. Hartnett, *Taming* Twombly*: An Update After* Matrixx, 75 L. & Contemp. Probs. 1, 49–50 (collecting examples) (2012).

[54] There is some empirical evidence that amendments can minimize the dismissal effect of New Pleading, *see* Joe S. Cecil et al., Fed. Judicial Ctr., Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend 13–14 (2011), but more evidence is needed to understand the full scope and magnitude of the effect of amendments.

[55] *Cf.* Bone, *supra* note 5, at 45–49, 150–55 (documenting systemic disincentives to filing frivolous claims).

[56] For exploration of this justice concern, see Dodson, *supra* note 2.

[57] Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 134 (2011).

[58] *Id.* at 149–50.

[59] *See* Jonah B. Gelbach, *Material Facts in the Dispute over* Twombly *and* Iqbal*: Using Defense Summary Judgment Win Rates to Measure the*

Quality of Cases Affected by Heightened Pleading, 68 Stan L. Rev. (forthcoming 2016).

[60] *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 878 (2010).

[61] *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 769–70 (2010).

[62] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007).

[63] *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

[64] *See* Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation 25 (2010).

[65] *See* Cecil et al., *supra* note 39 (finding a 50 percent increase in the motion-filing rate after *Iqbal*).

[66] *See* Thomas E. Willging, Fed. Judicial Ctr., Use of Rule 12(b)(6) in Two Federal District Courts (1998) (finding a 13 percent rate).

[67] *See Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693, 699–701 (Wis. 2014); *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531 (D.C. 2011); *Bean v. Cummings*, 939 A.2d 676 (Me. 2008); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass. 2008); *Doe v. Bd. of Regents of the Univ. of Neb.*, 788 N.W.2d 264 (Neb. 2010); *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008).

[68] I develop this argument more fully in Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. (forthcoming 2015).

[69] *See* D.C. Code § 11-946; *see also Behradresaere v. Dashtara*, 910 A.2d 349, 356 n.8 (D.C. 2006) ("We construe rules that are substantially identical to the corresponding federal rule in light of the meaning given to the federal rule.").

[70] *See Potomac*, 28 A.3d at 543.

[71] Perhaps a need for vertical uniformity could justify slavish state-court adherence to federal precedent for similarly worded rules, but, if so, that argument must be made and defended. For the position that even uniformity is not enough, see Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 Colum. L. Rev. 1431 (2008).

[72] *See Bean*, 939 A.2d at 680–81.

[73] *See Doe*, 788 N.W.2d at 274–78.

[74] *See Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010); *see also Charles H. Wesley Educ. Found., Inc. v. State Election Bd.*, 654 S.E.2d 127, 714 & n.7 (Ga. 2007) (Sears, C.J., dissenting) (doing the same in dissent).

[75] *See Sisney v. Best Inc.*, 754 N.W.2d 804, 808–09 (S.D. 2008).

[76] *See Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008).

[77] For a similar conclusion, see David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 Stan. L. Rev. 1203 (2013).

[78] I recognize that these groups are not wholly outside the litigation marketplace. I use the terms "outsider" and "participant" here to reflect relative rather than absolute roles.