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Twombly and *Iqbal*: Has the Court “Messed Up the Federal Rules”?

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ABSTRACT

This article considers whether the pleading standard enunciated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² was implemented in violation of the Rules Enabling Act³. The Act creates a mechanism for enactment or amendment of the Federal Rules of Civil Procedure (“Rules”), and provides that a Rule (or amendment) cannot take effect until Congress has been given the opportunity to review the proposed Rule in advance of its effective date.⁴

The *Twombly/Iqbal* pleading standard, which holds that conclusory pleadings do not suffice to state a cause of action,⁵ is difficult to reconcile with the conclusory style of pleadings illustrated by the Appendix of Forms which, according to Rule 84, “suffice under these rules.”⁶ This difficulty has led courts to take often contradictory positions as to the role of the Appendix Forms in light of *Twombly* and *Iqbal*.

Absent a convincing explanation from the Court as to how the pleading standard enunciated in *Twombly* and *Iqbal* is consistent with Rule

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1. 550 U.S. 544 (2007).

2. 129 S. Ct. 1937 (2009).

3. 28 U.S.C. §§2071-2077 (2006).

4. *Id.*

5. *Twombly*, 550 U.S. at 555 (“A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions . . . a formulaic recitation of the elements of the cause of action will not do.”); *Iqbal*, 129 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

6. FED. R. CIV. P. 84.

84, whether the promulgation of that standard was in conformity with the Rules Enabling Act will continue to be an open question.

ARTICLE

Unless they have been living in a cave, there are by now no members of the federal bench or bar who are unfamiliar with the changes wrought in the federal pleading landscape by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*⁷ and *Ashcroft v. Iqbal*.⁸ The purpose of this article is not to debate the wisdom of those changes as a matter of policy, but rather to consider whether they can be reconciled with the Rules Enabling Act.⁹ In other words, has the Court—as Justice Ginsburg suggests—“messed up the Federal Rules”?¹⁰

In *Hollingsworth v. Perry*,¹¹ decided earlier this year, the Court took great pains to emphasize the importance of compliance with the Rules Enabling Act. In staying the broadcast of a federal trial because the district court had improperly amended its local rules of practice (which would have barred the broadcast), the Court noted that “[f]ederal law . . . requires a district court to follow certain procedures to adopt or amend a local rule. Local rules typically may not be amended unless the district court ‘giv[es] appropriate public notice and an opportunity for comment.’”¹² Finding that the district court had “ignore[d] the federal statute that establishes the procedures by which its rules may be amended,”¹⁴ the Court concluded that a stay was necessary in order to vindicate the rule of law: “By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law’s own insistence on neutrality and fidelity to principle. . . . If courts are to require that others follow regular procedures, courts must do so as well.”¹⁵

The Rules Enabling Act also applies to the Federal Rules, which may not be enacted or amended other than in compliance with the procedures established thereunder. “[T]he statutory procedures surrounding the rule-

7. 550 U.S. 544 (2007).

8. 129 S. Ct. 1937 (2009).

9. 28 U.S.C. §§ 2071-2077 (2006).

10. “In my view, the [*Iqbal*] Court’s majority messed up the Federal Rules.” Justice Ruth Bader Ginsburg, Remarks for Second Circuit Judicial Conference (June 12, 2009), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-12-09.html.

11. 130 S. Ct. 705 (2010).

12. *Id.* at 701 (alteration in original) (citing 28 U.S.C. § 2017(b) & FED. R. CIV. P. 83(a)).

14. *Id.* at 715.

15. *Id.* at 713, 715.

making powers of the Court . . . [are] designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.”¹⁶ As such,

[The] Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. . . . The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered¹⁷

The Act provides that prior to enactment of a Rule:

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule . . . is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.¹⁸

The Court has noted that

[T]he rules [are] submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature. The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently . . . employed to make sure that the action under the delegation squares with the Congressional purpose.¹⁹

Adherence to this procedure “is essential to maintaining the constitutional system of checks and balances among the branches of government.”²⁰

These considerations also apply to specificity requirements for

16. *Miner v. Atlass*, 363 U.S. 641, 650 (1960) (citation omitted).

17. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted).

18. 28 U.S.C. § 2074(a) (2006).

19. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941). *See also* *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 552 (1991) (“The Federal Rules of Civil Procedure are not enacted by Congress, but ‘Congress participates in the rulemaking process.’ Additionally, the Rules do not go into effect until Congress has had at least seven months to look them over.”) (citation omitted).

20. 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 1.04[3][a] (3d ed. 2010).

pleadings. In *Jones v. Bock*,²¹ decided just four months before *Twombly*, a unanimous Court cautioned that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”²² “[A] ‘requirement of greater specificity for particular claims’ must be obtained by amending the Federal Rules.”²³

Rules 8, 9, and 84 address the level of specificity required of a federal court pleading. Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁴ Rule 9 dictates when further particularity is required. For example, Rule 9(b) requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake,”²⁵ and Rule 9(c) states that “when denying that a condition precedent has occurred or been performed, a party must do so with particularity.”²⁶

In *Swierkiewicz v. Sorema, N.A.*²⁷ the Court addressed the interplay between Rules 8 and 9:

Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. . . . ‘*Expressio unius est exclusio alterius.*’ . . . Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).²⁸

Rule 84, which is not even mentioned in *Twombly* or *Iqbal*, states that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”²⁹ As originally enacted in 1937, Rule 84 stated: “The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.”³⁰ The Rule was amended in 1946 by adding the phrase “sufficient under these rules”³¹ in order to:

21. 549 U.S. 199 (2007).

22. *Id.* at 212.

23. *Id.* at 213. (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)).

24. FED. R. CIV. P. 8(a)(2).

25. FED. R. CIV. P. 9(b).

26. FED. R. CIV. P. 9(c).

27. 534 U.S. 506 (2002).

28. *Id.* at 513 (citation omitted).

29. FED. R. CIV. P. 84 (emphasis added).

30. 14 MOORE’S FEDERAL PRACTICE, *supra* note 13, § 84 app. 02.

31. *Id.* § 84 app. 05. Rule 84 was amended again in 2007 by changing the word

[E]mphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent. . . . [P]leaders in the federal courts are not to be left to guess as to the meaning of [the] language in Rule 8(a) regarding the form of the complaint.³²

The Appendix Forms leave little doubt that brevity was intended to be the order of the day in pleading under the Rules. For example, Form 11 (“Complaint for Negligence”), requires merely the allegation that “[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.” In *Swierkiewicz*, the Court cited Form 9 (which was renumbered and restyled in 2007 as Form 11) as an example of the minimal pleading requirements of Rule 8(a).³³

Three years later, in *Mayle v. Felix*,³⁴ the Court again cited Form 9 (now Form 11) as satisfying Rule 8’s pleading requirements:

The federal rulemakers recognized that personal injury plaintiffs often cannot pinpoint the precise cause of an injury prior to discovery They therefore included in the Appendix to the Federal Rules an illustrative form indicating that a personal injury plaintiff could adequately state a claim for relief simply by alleging that the defendant negligently operated a certain instrumentality at a particular time and place. *See* Form 9, Complaint for Negligence.³⁵

The other Appendix Forms are equally conclusory. For example:

- Form 12 (“Complaint for Negligence when the Plaintiff Does Not Know Who is Responsible”): “On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff”;
- Form 15 (“Complaint for the Conversion of Property”): “On *date*, at *place*, the defendant converted to the defendant’s

“sufficient” to “suffice,” *Id.* § 84 app. 06; *see* FED. R. CIV. P. 84.

32. *Id.* §84 app. 05.

33. 534 U.S. at 513 n. 4. (“These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which ‘are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.’ For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states, in relevant part: ‘On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.’”) (citation omitted).

34. 545 U.S. 644 (2005).

35. *Id.* at 660.

own use property owned by the plaintiff. The property converted consists of *describe*”;

- Form 18 (“Complaint for Patent Infringement”): “The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention”; and
- Form 19 (“Complaint for Copyright Infringement and Unfair Competition”): “The defendant infringed the copyright by publishing and selling a book entitled, which was copied largely from the plaintiff’s book The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.”

Ironically, the Court approved the renumbering and restyling of the Appendix Forms by Order dated April 30, 2007³⁶—exactly three weeks before it decided *Twombly*. The specific question addressed by the Court in *Twombly* was “what a plaintiff must plead in order to state a claim under §1 of the Sherman Act.”³⁷ The Court held that

While a complaint . . . does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.³⁸

The Court emphasized that in order to sustain a §1 claim under the Sherman Act,

An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. . . . [A] naked assertion of conspiracy in a §1 complaint . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between

36. The Court ordered that “Forms 1 through 35 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended to become restyled Forms 1 through 82.” Order of the Supreme Court of the United States Adopting and Amending Rules and Forms (April 30, 2007), available at <http://www.supremecourt.gov/orders/courtorders/frcv07.pdf>.

37. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007).

38. *Id.* at 555 (citation omitted).

possibility and plausibility of “entitle[ment] to relief.”³⁹

Iqbal removed any doubt as to whether the Court’s statements in *Twombly* were limited to the antitrust context: “Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. . . . Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’”⁴⁰ The Court again emphasized that under Rule 8, “[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁴¹ “Rule 8 does not empower respondent to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.”⁴²

Iqbal’s interpretation of Rule 8, without reference to (or even mention of) Rule 84, is both curious and problematic. “[T]he Rules were intended to embody a unitary concept of efficient and meaningful judicial procedure, and . . . no single Rule can consequently be considered in a vacuum.”⁴³ Rules must be “understood and applied as a systematic and harmonious whole, not as detached and isolated paragraphs. Disproportionate emphasis may not prudently be accorded to the rule currently undergoing application, to the neglect of other prescriptions that illuminate its significance.”⁴⁴

The Court’s failure to consider Rule 84 as “illuminating the significance” of Rule 8(a)(2)’s pleading requirements⁴⁵ has led it to promulgate a pleading standard which seems to fly in the face of Rule 84. For example, how can *Iqbal* decree that “conclusions or a formulaic recitation of the elements of a cause of action will not do,”⁴⁶ when Rule 84 states that the Appendix Forms “suffice under these rules”?⁴⁷ Why is it that

39. *Id.* at 556-57.

40. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citation omitted).

41. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

42. *Id.* at 1954.

43. *Nasser v. Isthmian Lines*, 331 F.2d 124, 127 (2d Cir. 1964).

44. *United States v. Ass’n of Am. R.R.s*, 4 F.R.D. 510, 529 (D. Neb. 1945).

45. *Hamilton v. Palm*, No. 09-3676, 2010 WL 3619580, at *2 (8th Cir. Sept. 20, 2010) (“Rule 84 . . . provides, ‘The forms in the Appendix [to the Rules] suffice under these rules’ The rules referred to obviously include 8(a)(2).”) (alteration in original).

46. 129 S. Ct. at 1949 (internal quotations omitted). Moreover, Form 11 (which is deemed sufficient by Rule 84) *does not even allege* the elements of a cause of action for negligence, namely, “(1) the existence of a duty on defendant’s part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.” *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 535 (N.Y. 1981); nor does Form 15 allege the elements of a cause of action for conversion, namely, “(1) intent; (2) interference with property rights to the exclusion of such rights; and (3) possession or right to possession.” *McKinley Assocs., LLC v. McKesson HBOC, Inc.*, 110 F. Supp. 2d 169, 192 (W.D.N.Y. 2000), *aff’d*, 8 F. App’x 31 (2d Cir. 2001).

47. FED. R. CIV. P. 84.

“a bare assertion of conspiracy will not suffice”⁴⁸ to state a claim, whereas a bare assertion of negligence (as in Form 11)⁴⁹ does suffice? As Justices Stevens and Ginsburg pointed out in their *Twombly* dissent, “[t]he asserted ground for relief [under Form 9, now Form 11]—namely, the defendant’s negligent driving—would have been called a ‘conclusion of law’ under the code pleading of old. . . . But that bare allegation suffices”⁵⁰

The *Twombly* majority attempted to reconcile its holding with Form 9 by stating that “the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer. . . .”⁵¹ This explanation seems incomplete, given the Court’s insistence that the pleading must provide “not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests,”⁵² and that the latter “requires more than labels and conclusions”⁵³ While Form 9 (now Form 11) would provide “fair notice of the nature of the claim,” its conclusory reference to “negligently drove” does not satisfy *Twombly*’s requirement for showing the grounds of entitlement to relief.⁵⁴

The Court’s disapproval of conclusory pleading in *Twombly* is even more puzzling when one considers that revised Form 11, which the Court approved only three weeks prior to deciding *Twombly*, was not only renumbered (from Form 9), but also restyled so as to provide even *less* detail than did the earlier version: whereas Form 9 alleged that “defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway,” Form 11 merely alleges that defendant “negligently drove a motor vehicle against the plaintiff,” omitting the allegation that the plaintiff was crossing the highway.

The tension between Rule 84 and the Court’s pronouncements in *Twombly* and *Iqbal* has created an unhappy state of affairs for the federal court pleader, not to mention the federal court judge. Whereas the Appendix Forms were intended to eliminate guesswork as to the requirements of Rule 8(a), the continuing validity of the Forms has “been

48. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

49. Or, for that matter, a bare allegation of conversion (Form 15), patent infringement (Form 18), or copyright infringement and unfair competition (Form 19) – all of which are sufficient under Rule 84.

50. 550 U.S. at 576 (Stevens, J., dissenting).

51. 550 U.S. at 565, n.10.

52. *Id.* at 555, n.3.

53. *Id.* at 555.

54. *See Twombly*, 550 U.S. at 555 n.3.

cast into doubt by *Iqbal*.⁵⁵ While some courts believe that the *Twombly/Iqbal* pleading standards trump Rule 84 and the Appendix Forms,⁵⁶ others disagree.⁵⁷ Some courts have concluded that the *Twombly/Iqbal* standards govern except where an Appendix Form is directly applicable,⁵⁸ whereas others take a contrary view.⁵⁹

Although healthy debate is a good thing, the confusion spawned by *Twombly* and *Iqbal* is hardly conducive to the “just, speedy and inexpensive determination of every action” envisioned by Rule 1.⁶⁰ “For litigants, the upshot of *Iqbal* is tremendous unpredictability When even the form pleadings find no principled home in the *Iqbal* framework, it is clear that pleading doctrine is in disarray.”⁶¹

55. *Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.*, No. CIV. 09-245 WBS CMK, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009).

56. *See Gudenas v. Cervenik*, No. 1:09CV2169, 2010 WL 987699, at *3 n.2 (N.D. Ohio Feb. 22, 2010), *adopted by* No. 1:09CV2169, 2010 WL 1006532 (N.D. Ohio Mar. 16, 2010) (“Presumably, certain of the Forms provided in accordance with Civil Rule 84 will be eliminated or modified [T]he allegations as set forth in Forms 11 and 15 would surely fail as ‘legal conclusions [of negligence and conversion] couched as factual allegation[s],’ under *Twombly* and *Iqbal*.”) (alteration in original).

57. *See, e.g., Hamilton v. Palm*, No. 09-3676, 2010 WL 3619580, at *2 (8th Cir. Sept. 20, 2010) (“Rule 84 and Form 13 may only be amended by the process of amending the Federal Rules, and not by judicial interpretation” (internal quotations omitted)); *Mark IV Indus. Corp. v. Transcore, L.P.*, C.A. No. 09-418, 2009 WL 4828661, at *4 (D. Del. Dec. 2, 2009) (“*Iqbal* did not squarely address the continued vitality of the pleading forms appended to the Federal Rules of Civil Procedure. Absent an explicit abrogation of these forms by the Supreme Court, this court presumes that they are ‘sufficient to withstand attack under the rules under which they are drawn’ and ‘practitioner[s] using them may rely on them to that extent.’”); *Charles E. Hill & Assocs., Inc. v. ABT Elecs., Inc.*, No. 2:09-CV-313-TJW-CE, 2010 WL 3749514, at *2 (E.D. Tex. Aug. 31, 2010), *adopted by* No. 2:09-CV-313-TJW-CE, 2010 WL 3749513 (E.D. Tex. Sept. 20, 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid.”) (quoting unpublished opinion); *Eolas Techs., Inc. v. Adobe Sys., Inc.*, No. 6:09-CV-446, 2010 WL 2026627, at *2 (E.D. Tex. May 6, 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid. This cannot be the case.”).

58. *See Elan Microelectronics Corp. v. Apple, Inc.*, No. C09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) (“In the absence of any other form that addresses indirect infringement and is made binding on the courts through Rule 84, the Court must apply the teachings of *Twombly* and *Iqbal*.”).

59. *See CBT Flint Partners, LLC v. Goodmail Sys., Inc.*, 529 F.Supp. 2d 1376, 1380 (N.D. Ga. 2007) (“Although the Form [16] only provides a model for pleading direct infringement, there is no principled reason . . . for requiring more factual detail when the claim is one for contributory infringement as opposed to direct infringement.”); *Hamilton*, 2010 WL 3619580, at *2 (“The district court considered Form 13 irrelevant because it applies to F.E.L.A. claims by railroad workers. But that overlooks Form 13’s broader significance. As incorporated by Rule 84, Form 13 makes clear that an allegation in *any* negligence claim that the defendant acted as plaintiff’s ‘employer’ satisfies Rule 8(a)(2)’s notice pleading requirement for this element.”).

60. FED R. CIV. P. 1.

61. Rajiv Mohan, *A Retreat From Decision by Rule* in *Ashcroft v. Iqbal*, 33 HARV. J. L. &

Of even greater concern, however, is the sense among some that the Court has (as Justice Ginsburg suggests) “messed up the Federal Rules” by announcing a new pleading standard without first affording Congress or the public an opportunity for input. Legal scholar Erwin Chemerinsky stated:

The Court’s activism in this area is striking. There was no amendment to [Rule] 8. Congress did not pass a statute changing pleading standards. No party asked the Court to make this change. Yet, on its own, the Court has altered the very essence of the notice pleading system created by the Federal Rules.⁶²

“[T]hat the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.”⁶³

Although the *Twombly* majority insisted that it has not done so,⁶⁴ the absence of a satisfactory explanation for the striking discrepancy between the *Twombly/Iqbal* pleading standard on the one hand, and the Appendix Form pleadings on the other, makes that insistence difficult to accept at face value.

In the wake of *Iqbal*, legislative initiatives seeking to rescind its effect have been introduced in both the House and Senate: S. 1504 (the “Notice Pleading Restoration Act of 2009”) and H.R. 4115 (the “Open Access to Courts Act of 2009”). The Judicial Conference of the United States has asked Congress “not to proceed on this legislation . . . [but] instead to allow the Rules Enabling Act rulemaking process a fair opportunity to finish the thorough, transparent, and inclusive work that is well under way to understand the impact of . . . *Twombly* and *Iqbal*.”⁶⁵

However, amending the Rules to conform to the pleading standards enunciated in *Twombly* and *Iqbal* would not resolve the question of whether the standards were proper in the first place—for if Rule 84 expressly states that conclusory pleading “suffice[s] under these rules,”⁶⁶ can any court say otherwise?⁶⁷

PUB. POL’Y 1191, 1199-1200 (2010).

62. Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 416 (2009).

63. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

64. *Id.* at 569, n.14 (“[W]e do not apply any ‘heightened’ pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished ‘by the process of amending the Federal Rules, and not by judicial interpretation.’” (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002))).

65. Letter from James. C. Duff, Sec’y, Judicial Conference of the United States, to Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary (May 11, 2010).

66. FED. R. CIV. P. 84.

67. The Rules are “in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a] Rule’s mandate than they do

CONCLUSION

“If courts are to require that others follow regular procedures, courts must do so as well.”⁶⁸ Therefore, unless the Court can convincingly explain how the pleading standard which it enunciated in *Twombly* and *Iqbal* is consistent with Rule 84, the debate over whether that standard complies with the Rules Enabling Act is likely to continue.

to disregard constitutional or statutory provisions.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

68. *Hollingsworth v. Perry*, 130 S. Ct. 705, 715 (2010).