

The Subtext of *Iqbal* and How Bench and Bar Ought to Respond

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Within moments after the Court issued its decision last July in *Iqbal*, the hue and cry began with the so-called public interest groups accusing the majority of denying access to justice to plaintiffs throughout the land. We heard, over and over, that the courthouse doors were being slammed shut in the face of meritorious cases. Within days, Senator Specter of Pennsylvania introduced a bill—not a very thoughtful one—that sought to restore the status quo ante. S. 1504, the “Notice Pleading Restoration Act” simply stated as follows:

Notice Pleading Restoration Act, S.1504, 111th Cong. (2009):

“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”

In connection with his bill, Senator Specter entered a statement into the congressional record, in which he accused the Supreme Court of “jettison[ing]” the standard enunciated in *Conley*, and of directing federal judges to use subjective judgments in evaluating the plausibility of a complaint’s allegations.

Later, a more thoughtful bill was introduced—H.R. 4115, the Open Access to Courts Act of 2009, which states, in pertinent part, as follows:

Open Access to Courts Act of 2009, H.R. 4115, 11th Cong. (2009):

“A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”

And, congressional hearings were conducted at which various Senators did what they do so well, grandstanded and accused the Court majority and even the lawyer who argued the case

for the defense of stifling civil lawsuits and exaggerating research cited in defense of *Iqbal*'s holding.

But, none of the reactions of the opponents appears to discern the unstated message lurking beneath the surface text of the opinion. And, that subtext certainly ought not to be ignored. None of us I dare say would deny that we have a major problem with the civil justice system, and if that problem is not addressed in a meaningful way, its continuation dramatically and adversely impacts upon the quality of justice and access to justice.

The problems to which I allude, and the problems which I believe while unstated in *Iqbal* influenced the Court's thinking, are the following undisputable facts. First, the civil justice system is on overload—there are simply too, too many cases, and not enough judges to process them in a timely manner. Second, many of the cases are civil pro se complaints, and a substantial percentage of those pro se complaints are employment cases. And, few, precious few, of those pro se cases have any merit at all. Third, and now let's be brutally frank with one another and let's stop the posturing for the moment, we all know and we all talk about the garbage lawsuits that are being filed by some members of the bar. It cannot be denied. It may not be anyone in this room, but it is happening and it is not an occasional event. One of the judges on our bench here in federal district court, some twenty years ago described such lawsuits as throwing "mud against the wall [to] see what sticks".

These "jackleg" lawyers have affected all of us. Most importantly, they have given this area of the law a bad name.

Iqbal should have a salutary effect on those cases—allowing the federal judiciary to clear many non-meritorious cases off their dockets posthaste, at the front end on the pleadings. Our clients' transactional costs accordingly should be reduced significantly, and hopefully I will never again have to say to a client, as I have said many times in the past: "Unfortunately, the lawyer on the other side is not well versed in employment law and it is my experience in such cases that the bill multiplies by a factor of at least two because of all the unnecessary work that needs to be done."

Hopefully, *Iqbal* dismissals of cases filed without proper pleading will result in educating these lawyers that they ought not to come back unless they have done their due diligence. And, yes, the bench has to warn them; and, after warning, if the conduct is repeated, sanctions ought to be imposed. The judiciary might be somewhat creative in terms of sanctions and require specific educational courses to be taken rather than simply a monetary fine.

Now, how should *Iqbal* affect lawyering when indeed you have a meritorious case? Yes, the literal language of the opinion, as construed by some at least, strongly suggests that some percentage of meritorious cases could be dismissed because plaintiff's counsel does not plead facts sufficient to convince the district judge that there is a plausible claim. Even if the judges know, by reputation, that your firm invariably files cases that deserve to be on the federal docket, many have argued that the language of *Iqbal* could compel judges in even those circumstances to dismiss your case.

And, it seems abundantly clear that “old fashion” notice pleading is a thing of the past. We can now take a sample of those complaints that said: “I was fired; I am fifty-five years old; and I believe I have been discriminated against.” And we can take those in a museum case and place them in the Smithsonian Museum of American History.

So what do the good lawyers with good cases due to survive after *Iqbal*? While I would suggest there are a number of solutions all of which I rather suspect the trial bench particularly wants to see. First, you must do your “due diligence”. If anything, Rule 11 requires it. Now, that “due diligence” is constrained at times by a number of considerations. First, in many jurisdictions, the ethical prohibition on ex parte communications is so broad that it prevents you from interviewing key witnesses. I would document this. Sometimes the company’s general counsel issues an instruction to one and all that no one is to talk to the opposing lawyer. Putting aside whether that is ethical and whether that constitutes an inappropriate interference, document these facts. In most employment disputes the individual has been fired and required to return to the company all documents, hard copy and digital, in his/her possession. Document the fact that the client and you as counsel do not have those documents because you obeyed the company’s command that they be returned. Finally, in most cases, short of a decent EEOC or local anti-discrimination agency investigation, you have no ability to access company documents—documents relevant to the claim. And, absent a Rule 34 request, few companies will share documents prior to litigation.

So, I would propose that after you have conducted your “due diligence” and have documented the roadblocks that you have encountered, you lay out the facts in a draft complaint; you articulate each element of each claim, and state those facts that you have unearthed that bear on proving each element; and candidly lay out element by element the information gaps, describing the efforts you made to fill those information gaps and the roadblocks you encountered.

Once so drafted, I would propose to send it to defense counsel with a request that within X days defense counsel advise whether the company is prepared to fill in the information gaps or not. I have no illusions. In the current culture, I rather suspect that more often than not you will be told to “go pound sand.” But, cultures do change.

Once the time limit has expired and the company had declined to fill in the information gaps, then I would file suit with all of the evidence that you have documented of your “due diligence” and the roadblocks that you have encountered incorporated within the four corners of the complaint.

Having done this, I don’t think you get dismissed, and if you do, the Courts of Appeals will reverse. To do otherwise, would be to validate the hue and cry that *Iqbal* denies access to justice.

There is another subtext to *Iqbal* that ought not to be ignored, and that is that we need to return to the central theme of the Civil Rights Act of 1964—conciliation. When the statute was debated and passed in the summer of ’64, much of the discussion was about “the soft words of persuasion.” See, e.g., *Carr v. Conoco Plastics, Inc.*, 295 F. Supp. 1281 (N.D. Miss. 1969):

“[Title VII], after making reference to the receipt by the [EEOC] of a charge of unlawful employment practice, provides: ‘The Commission shall... make an investigation of such charge... If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.’ (emphasis added).

I could see the day when, as a jurisdictional prerequisite to suit, the parties are mandated to engage in non-binding mediation. I have grave misgivings as to whether the government has the ability to deliver quality mediation to one and all. Confession is good for the soul, and I have evolved to the point in life where I simply believe in small government that provides only the essentials for defense and other matters. So, I come at this with a belief that government does not perform as well as the private sector. Having said that, the price of a good mediator has skyrocketed, requiring a very substantial dollar investment. I have been in many mediations recently where the price tag well exceeded \$20,000. These prices do not make mediation universally available—rather, there is a quality of mediation available only to those who can afford these prices, and then a lesser quality of mediation to others, and little or no mediation available to some.

We need to make as a society a massive investment in this industry. We need to train cadres of thousands and thousands, infusing them with the unique skills of good mediators, a sufficient background in the law of whatever area they might choose to mediate, and a good sense of money and finance so that they have the ability to be creative in solving these cases.

With an infusion into the market of thousands and thousands of top-notch mediators, prices will be driven downward, and quality mediation will become available hopefully to all. I would have no hesitation in having an industry self-regulating organization like the securities industry has, so long as mediators are required to do a certain number of pro bono hours of mediation in a given year. That pro bono requirement would address the bottom end of the income scale, those who simply could not afford mediation no matter how low we can drive the price down by increasing the supply of quality mediators.

Please accept these thoughts as some humble ideas on how we might react to *Iqbal* in a way that takes us to a far better society, a society that winnows out cost-effectively non-meritorious cases, throws the door of the courts wide open to those who deserve to be there, and returns to the admonition of the authors of the ’64 Civil Rights Act with respect to pre-suit conciliation, that is “soft words rather than the big stick of the injunction.” *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1139 (5th Cir. 1971); *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 188 (M.D. Tenn. Mar. 3, 1966) (same).

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For further *Iqbal* reading, see, e.g., *Am. Dental Assoc. v. Cigna Corp.*, 2010 U.S. App. LEXIS 9928 (11th Cir. May 14, 2010).

Appendix A

Chart of Cases Prepared by the *Iqbal* Task Force of the Pretrial Practice & Discovery Committee of the ABA Litigation Section, *available at*
<http://www.nslc.org/documents/reinert.summary.cases.for.webinar.doc/view>.

Appendix B

Christy Ross, *Iqbal Webinar: Summary of Cases*, National Senior Citizens Law Center, *available at* <http://www.nslc.org/documents/reinert.summary.cases.for.webinar.doc/view>.

Appendix C - Articles on *Iqbal*

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Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535.

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Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010).

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<http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (Rebuttal and Closing Statement of Professor Burbank).

Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217 (2008).

Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 FED. RULES DECISIONS 604 (2006).

Posting of Ashby Jones to Wall Street Journal Law Blog, *Why Defense Lawyers Are Lovin' the Iqbal Decision*, <http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/tab/article/> (May 19, 2009 13:07 EST).

Gregory P. Joseph, *Supreme Court on Federal Practice 2009*, 77 U.S.L. WK. 2787 (2009).

Rakesh Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905 (2010).

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