OPEN ACCESS TO COURTS ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 4115

DECEMBER 16, 2009

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DECEMBER 16, 2009

OPEN ACCESS TO COURTS ACT OF 2009

WEDNESDAY, DECEMBER 16, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:26 p.m., in room 2237, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Conyers, Coble, and Goodlatte.

Staff present: (Majority) Christal Sheppard, Subcommittee Chief Counsel; Elisabeth Stein, Counsel; Rosalind Jackson, Professional Staff Member; and (Minority) Paul Taylor, Counsel.

Mr. JOHNSON. The hearing of the Committee on the Judiciary, Subcommittee on Courts and Competition Policy, will now come to order.

And without objection, the Chair will be authorized to declare a recess of this hearing.

I now recognize myself for a short statement. First, I will say that a little fire to put out caused me to be detained, and so I want to apologize to everyone for not getting this meeting started on time.

And access to the courts and the ability for claims to be heard by a judge or jury are fundamental to our system of justice. For over 50 years, courts have used the *Conley* standard to ensure that plaintiffs had the opportunity to present their case to a Federal judge even when they did not yet have the full set of facts.

The court in *Conley* set a relatively low bar that is, effectively, a non-plausibility standard. Only if the plaintiff could prove no set of facts in support of his or her claim would he or she fail to survive a 12(b)(6) motion to dismiss.

And in *Twombly*, a Section 1 antitrust case, the Supreme Court revised the *Conley* standard to require, "plausible grounds" which provide enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

However, it was not clear whether the court intended for the standard—this standard to apply only to antitrust cases. In its *Iqbal* decision, the court clarified that the plausibility standard not only applies to antitrust cases but to all civil cases.

Further, the court clarified that plausibility—"Plausibility is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

One critic of this decision commented that this is a subjective standard and it could prove devastating to civil rights cases.

What we have effectively seen is a gradual ratcheting up of the standard that plaintiffs must plead to survive a motion to dismiss. This raises several concerns in my mind, and I am particularly concerned that those who need it most will be denied access to the courts under *Iqbal*, under the pleading standard.

As Chairman of this Subcommittee, I believe it is extremely important that plaintiffs be able to survive an initial motion to dismiss when the facts in question can only be answered by information completely in the hands of the defendant alone.

In discrimination cases, including gender, race and employment discrimination, it is frequently only through the discovery process that plaintiffs are able to identify non-public information that would support their claims.

Initial studies have indicated that dismissals have increased as much as 10 percent in the 7 months since the court decided *Iqbal*.

In fact, we already know that employment discrimination claims, which the Supreme Court held were explicitly not subject to a heightened pleading standard in *Swierkiewicz*, are now subject to the plausibility standard.

I am also concerned that the Supreme Court may inadvertently—may have inadvertently subverted the Rules Enabling Act process which Congress established and which the Judicial Conference carries out every year.

The Rules Enabling Act calls for a deliberate process where the Judiciary, Congress and the bar can weigh in on potential rule changes.

The court is certainly entitled to change its legal interpretation of the *Conley* pleading standard. However, there is a legitimate argument that such a change in the pleading law ought to be done through the Rules Enabling Act process.

Even members of the Supreme Court have noted that the *Iqbal* decision may have changed the Federal rules. In the words of Justice Ginsberg, the Supreme Court may have "messed up the Federal rules."

The proposed legislation, H.R. 4115, that we are considering today was introduced by Congressman Nadler, Chairman Conyers and myself earlier this year.

And the bill, which is entitled "Open Access to Courts Act of 2009," is an attempt to clarify the pleading standard and ensure that any plaintiff with a valid claim will have an opportunity for discovery.

I look forward to the testimony from today's witnesses, the first of which is the primary author of the bill, Mr. Jerry Nadler, and I look forward to the testimony of the panel when its time comes.

And I look forward to hearing whether or not you think the proposed legislation will help clarify the state of notice pleading jurisdiction.

[The bill, H.R. 4115, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 4115

To amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 19, 2009

Mr. NADLER of New York (for himself, Mr. JOHNSON of Georgia, Mr. CONYERS, Mr. SCOTT of Virginia, Mr. DELAHUNT, Ms. JACKSON-LEE of Texas, Ms. CHU, Mr. MICHAUD, Ms. KILPATRICK of Michigan, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Open Access to Courts Act of 2009".

SEC. 2. NOTICE PLEADING RESTORATION.

(a) IN GENERAL.—Chapter 131 of title 28, United States Code, is amended by adding at the end the following:

"§ 2078. Limitation on dismissal of complaints

"(a) A court shall not dismiss a complaint under subdivision (b)(6), (e) 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.

"(b) The provisions of subsection (a) govern according to their terms except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this section or by amendments made after such date to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference under this chapter.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 131 of title 28, United States

Code, is amended by adding at the end the following new item:

"2078. Limitation on dismissal of complaints.".

○

Mr. JOHNSON. I now recognize my colleague, Mr. Coble, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, we are here today to discuss proposed legislation H.R. 4115 that would overturn the Supreme Court's decision in *Iqbal v. Ashcroft.* In that decision, decided last May, the Supreme Court held that a lawsuit could only go forward if a plaintiff has a plausible claim, which the court defined as "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

In so holding the Supreme Court reaffirmed the longstanding principle that a lawsuit based solely upon the bald and conclusory assertions should not proceed to the discovery stage of litigation.

The Supreme Court in *Iqbal*, Mr. Chairman, dismissed the lawsuit on the ground that a terrorism detainee's complaint failed to plead sufficient facts to state an intentional discrimination claim against government officials, including the director of the FBI and the attorney general.

Mr. Iqbal was arrested in the United States on criminal charges and detained by Federal officials after the September 11 terrorist attacks. He pleaded guilty to the criminal charges, served time in prison and was removed to his native Pakistan.

But then he indiscriminately sued high-level government officials, arguing that they were somehow responsible for allegedly tough treatment he received while in prison. The issue in this case was whether Mr. Iqbal had alleged claims against the Federal officials that were reasonably specific enough to allow the case to proceed.

The Supreme Court held he had not, stating as follows: The pleading standard, Federal Rule 8, analysis does not require detailed factual allegations, but it demands more than an unadorned the—defendant-unlawfully-harmed-me accusation.

A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.

The best evidence indicates that *Iqbal* decision was simply a reiteration of well-settled case law and consequently the Federal courts have continued to allow plausible claims to go forward while dismissing factually baseless claims.

The most comprehensive study to date of how the Federal courts have applied the *Iqbal* decision is currently being performed by the Advisory Committee on Civil Rules within the Judicial Conference of the United States, which is chaired by United States District Court Judge Mark Kravitz.

An advisory committee memo recently explained that at this early stage of the development of the case law discussing and applying the *Iqbal* pleading, standards—the *Iqbal* pleading standards, it is difficult to draw many generalized conclusions as to how the courts are interpreting and applying that decision.

Overall, the memorandum concludes the case law does not appear to indicate a major change in the standards used to evaluate

the sufficiency of complaints. The *Iqbal* decision has certainly not led to a wholesale dismissal of lawsuits.

A recently released letter from the Judicial Conference states that the official research body of the Federal courts conducted an empirical review of the 94 Federal court dockets, comparing the granting of motions to dismiss before and after the *Iqbal* decision. The data shows that the *Iqbal* decision has not resulted in an increase in the dismissal of civil rights suits.

Indeed, courts have continued to deny motions to dismiss in cases involving claims against government officials for actions undertaken in defending the country against terrorist attack as well as in the cases involving commercial claims. Likewise, complaints alleging civil rights claims have survived motions to dismiss.

In sum, all the evidence to date indicates it would be premature at best for the Congress to statutorily disrupt the court's reasonable application of longstanding precedents. These precedents go back many decades, Mr. Chairman.

As early as 1972, the Second Circuit explained that even under the liberal Federal Rules of Civil Procedure, a bare-bones statement of conspiracy or an injury without any supporting facts permits dismissal.

In reviewing the sufficiency of a constitutional claim in 1968, the Supreme Court held that for the purposes of this motion to dismiss we are not bound to accept as true a legal conclusion couched as a factual allegation.

Dozens of lower court decisions applied the same standard, refusing to credit a complaint's bald assertions, unsupported conclusions, unwarranted inferences or the like when deciding a motion to dismiss for failure to state a claim.

Further, even if some of the lower courts conclude that some lawsuits can't pass muster, courts continue to have the power under the Federal Rules of Civil Procedure to permit plaintiffs to amend their complaints.

Courts continue to allow plaintiffs the opportunity to amend their complaints to provide more specifics and to re-file their cases in a way that allows them to proceed.

Finally, courts can and should continue to perform an essential gatekeeping function. They have a responsibility to ensure that the courts are not overwhelmed with frivolous cases and that defendants are not hauled into court on a whim.

The Federal courts themselves have not indicated they are having problems applying the *Iqbal* decision as it was nothing more than a reaffirmation of longstanding case law.

I have an open mind on this topic, Mr. Chairman, although I am not embracing it warmly, as you can tell by my statement.

But unless and until the Federal courts themselves indicate there is a reason for Congress to intervene, there is much reason to believe that any statutory amendments to the existing rule could very likely do more harm than good.

And I thank you again, Mr. Chairman, for having called this hearing.

Thank the panelists for appearing.

And I yield back my time.

Mr. JOHNSON. Thank you, Congressman Coble.

I will, in response, say that I am happy that you have an open mind on this issue, as I do, but I will tell you that the issue of pretrial discovery is important to litigants because it—much of it puts people under oath and there is an opportunity to learn the real truth and thus amend the pleadings, as opposed to going through this nebulous standard which the Supreme Court has imposed.

I thank the gentleman for his statement, and I now recognize Mr. John Conyers, a distinguished Member of this Subcommittee and also the Chairman of the Committee on Judiciary.

Mr. CONYERS. Thank you, Chairman Johnson.

Could we offer a series of condolences for Committee Chairman Nadler, who has been forced to sit through our lectures to him and the audience? Normally he is on this side of the hearing process, and he gives lectures himself.

And now he has to receive them before he can make his statement. I don't know if that is justice—retributable justice, or if it is unfair or what, Jerry, but——

Mr. NADLER. Turnabout is always fair play.

Mr. CONYERS. Well, it looks like that is what might be happening this afternoon.

But I am proud to join with Chairman Nadler and Chairman Johnson in trying to examine this whole question of access to the courts, and that is really what we are here to examine today.

And it seems to turn mostly around the Supreme Court decisions of *Bell Atlantic v. Twombly* and the other case of *Ashcroft v. Iqbal.*

And what we are trying to do is deal with a phenomenon that has been noted in The Nation magazine by Herman Schwartz, September 30 of this year, 2009, in which this distinguished lawyer and professor had published an article entitled "The Supreme Court Slams the Door."

And I just want you to hear these two sentences. The Supreme Court ruling—and also ask unanimous consent that it be included in the record.

[The information referred to follows:]

THE Nation.

Published on *The Nation* (http://www.thenation.com)

The Supreme Court Slams the Door

Herman Schwartz | September 30, 2009

A Supreme Court ruling in May, *Ashcroft v. Iqbal*, on how much information civil complaints in a lawsuit must contain, might seem a narrow technical matter, of interest only to lawyers and law journals. Yet, it is on just such "technicalities" that the legal rights of victims of public or private wrongdoing often hinge. For almost four decades the Court's right wing has been perfecting such technicalities as legal weapons to deny Americans an opportunity to enforce their rights in court.

In *Iqbal* the Court's five conservatives dismissed a suit against former Attorney General John Ashcroft and FBI Director Robert Mueller that arose out of the jailing of thousands of Arab Muslim men in the wake of 9/11. At issue was how much evidence the plaintiff, Javaid Iqbal, needed to support his complaint about government mistreatment. Iqbal, a Pakistani Muslim, charged that he had been beaten, denied medical care and food, insulted, and otherwise brutalized by federal agents, all of which was conduct, he contended, that Ashcroft had authorized and Mueller had implemented. But Justice Anthony Kennedy, speaking for the majority, ruled that Iqbal's complaint did not set out enough facts "to state a claim to relief that is plausible on its face."

Under federal procedural rules 8(a)(2) and 9(b), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and the defendant's state of mind can "be alleged generally." These rules have consistently been interpreted liberally, because in many cases the evidence of what a defendant knew, intended or planned can be found only in his files, and until the plaintiff can remain in court long enough to have an opportunity to examine those files and to question defendants and others, the merits of the case cannot be determined.

Last year, in *Bell Atlantic Corp. v. Twombly* the Court unexpectedly raised the pleading requirements for anti-trust actions, but the majority left it unclear whether the ruling applied beyond anti-trust cases and other large, complex cases. This past May, the Court resolved that uncertainty by extending the *Twombly* rule to all civil cases, overturning decades of accepted practice. It threw out Iqbal's complaint even though it contained 153 detailed factual allegations describing the beatings, denial of medical care and the other abuses he suffered. As a result, businesses that discriminate against minorities, corporations that sell harmful products and many other wrongdoers can escape having to answer in court for their actions, no matter how blatant or egregious the violation, for the *Iqbal* decision gives judges virtual carte blanche to dismiss a case without allowing the plaintiff any pretrial examination.

In the few months since the decision in *Iqbal* came down, it has resulted in the dismissal of 1500 District Court and 100 appellate court cases, many if not most of which would probably have

survived; more dismissal motions are pending. Complaints against drug and other companies for multi-organ failure after taking an epilepsy drug, for false marketing and for excessive lead in baby bottle coolers have all been thrown out at the pleading stage, as have many civil rights cases.. *Iqbal* has also been used to dismiss a First Amendment suit by anti-Bush protesters against the Secret Service, and complaints against Coca-Cola and its Colombian subsidiaries for the murder and torture of trade unionists. In all these cases, the mental element--what defendants knew and when they knew it--is usually crucial, and without going into a defendant's files and oral questioning of knowledgeable people, that cannot be determined.

The *Iqbal* case is just the latest in a long line of decisions shutting the courthouse doors, few of which have drawn any public attention. The Warren Court had tried to make it easier for victims of public or private misconduct to have their day in federal court. Since 1972, however, when William Rehnquist and Lewis Powell joined the Court, conservative justices have been trying to undo almost everything the Warren Court had begun, often with legal doctrines specially crafted for the purpose.

The conservatives began by limiting standing to sue, making it much harder for plaintiffs to establish that they had personally suffered injuries sufficiently serious to warrant going to trial. In 1972 Rehnquist and his fellow conservatives dismissed a suit by opponents of the Vietnam War challenging Army surveillance of antiwar demonstrations in which the protesters had participated.

In 1974 they held that taxpayers and citizens lacked standing to enforce the constitutional ban on members of Congress serving in the military, and the constitutional requirement that "receipts and expenditures of all public money" be made public. Two years later, they dismissed a challenge by welfare recipients to an IRS regulation that allowed nonprofit hospitals to refuse to serve the poor without losing their tax exemption, and in 1984 they threw out a suit by black children in segregated schools who challenged the IRS's failure to enforce the Congressionally banned tax exemptions for private schools that excluded African-American students. Six years later they refused to allow environmentalists to challenge government actions threatening endangered species, even though Congress had authorized such suits by "anyone." And just two years ago a new right-wing majority barred suits against the executive branch for funding religious activities.

Limiting standing to sue is not the only technique the Court's right wing uses to close the courthouse door. Here's another one: some federal statutes do not specifically provide for private enforcement, but it is obvious that beneficiaries of the statute must have such a right if they are to have any remedy at all. That is because government agencies often don't have the resources or the will to enforce a law, especially when the incumbent administration has no sympathy for the particular statute; if the law's beneficiaries cannot sue, they are left with no remedy. For these reasons in the 1960s and 1970s, the Court developed a set of criteria for determining when statutory beneficiaries could sue in their own right. When Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy joined the Court in the 1980s, however, the Court tossed out these criteria. Today, victims of violations of civil rights, housing, drug, medical-device safety and securities laws, as well as those denied benefits under Medicaid, Medicare and similar laws, may not sue on their own behalf unless Congress specifically says so

This Court has also made it all but impossible to enforce federally created rights against state governments. Resurrecting and expanding the sovereign immunity doctrine--which is found nowhere in the Constitution and is based on the long-discredited common law notion that "the king can do no wrong"--the Court in a series of 5-4 decisions has denied state employees and others the right to sue state governments for violations of the Fair Labor Standards Act and other federal

statutes. The only exception to this ban is when Congress acts to enforce the Fourteenth Amendment. The majority has, however, imposed on Congress such high-evidentiary criteria for these exceptions that most of the cases to come before the Court--cases involving disability, violence against women, age discrimination, patent protection--have been turned down.

Led by Justice Scalia, the Court has also made it impossible to challenge gerrymandering. Claiming that gerrymanders raise political issues too difficult for courts to decide--even though all nine justices agree that partisan gerrymandering is unconstitutional and the four dissenters find the problem quite manageable--the Court upheld a 2002 Pennsylvania redistricting that produced a 12-7 Republican majority in the House of Representatives in a state where Democratic voters slightly outnumber Republican.

More than 200 years ago, in *Marbury v. Madison*, Chief Justice John Marshall wrote that "the government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." And that is as true today as it was then.

Source URL: http://www.thenation.com/article/supreme-court-slams-door

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Mr. CONYERS. The Supreme Court ruling in May, *Ashcroft v. Iqbal*, on how much information civil complaints in a lawsuit must contain, might seem a narrow technical matter of interest only to lawyers and law journals. Yet it is on just such technicalities that the legal rights of victims of public or private wrongdoings often hang. For almost four decades, the court's right wing has been perfecting such technicalities as legal weapons to deny Americans an opportunity to enforce their rights in court.

And they go on to point out, as I do in the rest of my statement, that there are a couple of classes of litigants that could be very

negatively impacted. And the first that come to mind is the fact that there will be a number of civil rights and civil liberties cases that could be negatively affected.

And the claim of weeding out non-meritorious claims sounds quite appropriate, but sometimes these decisions may throw out the baby with the bath water.

Studies have shown that the dismissal rules are up quite a bit, and that the protection of civil rights is—and this always normally ends up in Federal court—is essential. And the Supreme Court is now, through cleverly narrowing the rules of procedure, making it harder and harder for those kinds of cases to find their way into court.

And what we have is studies that show that these dismissals under 12(b)(6) are up 10 percent. Behind these statistics are numbers, countless numbers, of people who have suffered an injustice and are unable, therefore, to seek redress in court.

Now, some believe that these dismissals are higher for cases involving race, gender and employment discrimination. And it is often difficult to secure evidence that the—that demonstrates discrimination without first going through discovery. And if you can't get through discovery, you never can get the case into court in the first instance.

And so it seems that under these new standards, plaintiffs may often be locked out of the courthouse unless they can present a sort of smoking gun that shows that there is clear evidence of discrimination before you get to the case.

I can see some—well, some say it is unintentional. Some say it is deliberate. But in essence, the plaintiffs have to prove their case before they have a chance to gather the evidence to prove their claims. And this is not a very good picture.

And finally, the Rules Enabling Act provides a procedure for making changes as significant as elevating the pleading statement. While the Supreme Court does have the power to reverse their prior interpretation, it seems more proper to call upon the collective experience of bench and bar to develop these sweeping and significant changes in the pleading standard.

And so this is an important hearing. It is not just for lawyers alone. And I am glad that Chairman Nadler has been able to go through this without too much encroachment. I hope the Chair will give him as much time as he needs to make the case for our bill.

And thank you very much, Chairman Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Congressman Nadler, your ordeal will be over with shortly.

And I want to thank—well, I want to now recognize Mr. Bob Goodlatte out of Virginia for his opening statement.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. And, Mr. Chairman, I appreciate the opportunity to offer some comments on this.

I think that all of us here would agree, including you, and Chairman Conyers and Chairman Nadler as well, that if this involved a criminal investigation that we would require that somebody, before they got a search warrant of somebody's home, to allege some facts, some foundation, for obtaining that search warrant.

So when the Supreme Court in two cases now says that there should be a similar standard before a plaintiff can begin the process of searching somebody through their documents and their depositions, and questioning their family members and friends and employees, or whoever the people that may have discoverable evidence in a matter can proceed, that they have to allege some facts, some foundation, for doing so, seems to me to be very reasonable.

And H.R. 4115, the "Open Access to Courts Act of 4009," is an economic stimulus package for trial lawyers. This legislation removes any certainty that currently exists with regard to the legal standard for determining whether a complaint's allegations are sufficient to survive a motion to dismiss.

Incredibly, this legislation literally states that a court shall not dismiss a complaint when a judge believes the facts alleged do not show the claims to be plausible.

Similarly, a judge may not dismiss a claim when he believes that the facts are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged. This would overturn Federal rules and decades of precedent governing pleading standards.

The confusion created by this legislation would cause a huge flood of claims filed by plaintiffs because now, rather than presenting a factual pleading that shows some plausible way the defendant could be liable, plaintiffs need only a wild allegation and then enjoy access to discovery to try to prove their theory.

The bill's literal text binds the hands of judges from throwing cases out that are blatantly frivolous. The result is that defendants of all stripes will be forced to open up their wallets to foot the bill for discovery costs and attorneys' fees to defend even the most ridiculous claims.

In addition, the bill would overturn any standards that Congress has previously passed relating to the required substance of complaints. The text explains that the provisions of H.R. 4115 would trump everything other than acts of Congress passed after the effective date of the bill.

America's small businesses are hurting. They are not receiving capital from banks because banks are being forced to invest in the most risk-averse assets like Treasury securities, which happen to fund the debt accumulated from big government spending.

They are facing uncertainty about massive new taxes on energy and health care as well as penalties for those businesses that cannot afford to comply with the new regulations in these areas.

And now we are going to eliminate the very standards that protect them from extremely expensive frivolous lawsuits. The clear message seems to be that Congress does not want these small businesses to succeed or to create new jobs.

Mr. Chairman, it is getting close to Christmas, but American citizens and businesses cannot afford to pay for the gift this bill gives to the trial lawyers this year. Indeed, it is the gift that keeps on giving.

And I yield back.

Mr. JOHNSON. I thank the gentleman for his statement.

And without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce our witness on panel one, Representative Jerry Nadler, the distinguished representative from the 8th District of New York.

Representative Nadler's district includes parts of Manhattan and Brooklyn, and he is a Member of the Judiciary Committee where he chairs the Subcommittee on Constitution, Civil Rights—Constitution, Civil Rights and Civil Liberties. He also serves as the most senior northeastern Member of the Committee on Transportation and Infrastructure.

Mr. Nadler, don't put us through an ordeal to make us pay. I will count on Chairman Conyers to rule your time has expired. But please proceed with your statement, sir.

TESTIMONY OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. NADLER. Thank you, Chairman Johnson, Chairman Conyers, Ranking Member Coble, other distinguished Members of the Subcommittee.

Thank you for holding today's hearing on H.R. 4115, the "Open Access to Courts Act of 2009", which I introduced with Chairman Johnson and Chairman Conyers on November 19th.

The Supreme Court's decision in *Ashcroft v. Iqbal* was the subject of a hearing I chaired in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 26 entitled "Access to Justice Denied:

Ashcroft v. Iqbal."

It is the legislative response to that hearing's findings that bring us here today. What is really significant about the *Iqbal* decision is that it sets up a very stringent new standard that prevents people from having their day in court.

It does so not based on the evidence or on the law but on the judge's own subjective criteria. Rights without remedies are no rights at all. That is an ancient legal maxim.

All Americans are entitled to have access to the courts so that their claims can be heard, the evidence weighed, and their rights can be vindicated. Without recourse to the courts, our rights are merely words on paper.

In *Iqbal*, the court established a new test that Federal judges must use when ascertaining whether civil complaints will withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Rather than questioning, as required under Rule 8(a)(2), only that the plaintiff had included "a short and plain statement of the claim showing that the pleader is entitled to relief," it dismissed the case not on the merits or on the law but on the bald assertion that the claim was not plausible.

In the past, the rule had been, as the Supreme Court stated in *Conley v. Gibson*, that the pleading rules exist to "give the defendant fair notice of what the claim is and the grounds upon which it rests," not as a substantive bar to consideration of the case.

Now the court has required, in effect, that the pleading serve as a substantive bar to the consideration of the case by requiring that prior to discovery, courts must somehow assess the plausibility of

the claim, dismissing claims the court finds not plausible—before discovery and without submission of evidence.

This rule will reward defendants who succeed in concealing evidence of wrongdoing, since claims will be dismissed before discovery can proceed, whether it is government officials who violate people's rights, polluters who poison the drinking water or employers who engage in blatant discrimination.

Often, evidence of wrongdoing is in the hands of the defendants, and the facts necessary to prove a valid claim can only be ascertained through discovery.

The *Iqbal* decision overturned—and some of the statements of the last few minutes assume that—or asserted that my bill would establish a new requirement, a new standard. In fact, it will simply reassert the standard that existed for 50 years until the *Iqbal* decision.

The *Iqbal* decision has overturned 50 years of precedent and will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's subjective take on the plausibility of a claim rather than the—on the actual evidence.

At our hearing on *Ashcroft v. Iqbal*, we heard compelling testimony from the witnesses that the *Iqbal* decision has resulted in the substantial departure from previously well-settled practice in civil litigation.

Several witnesses said the new standard put forward by the Supreme Court to decide a motion to dismiss a civil complaint amounts to a heightened pleading standard.

Professor Arthur Miller of New York University School of Law, an expert on civil procedure, testified that "what we have now is a far different model of civil procedure than the original design."

We also heard from seasoned litigators. John Vail of the Center for Constitutional Litigation stated that there is "no doubt that the Supreme Court intended a sea change in pleading law."

Debo Adegbile of the NAACP Legal Defense Fund referred to the *Iqbal* decision as a "judicially heightened pleading barrier erected by the Supreme Court."

These three witnesses agreed that a legislative response like H.R. 4115, the "Open Access to Courts Act of 2009," is very necessary.

In addition to our witnesses, a diverse coalition of 36 civil rights, consumer, environmental and other organizations support a legislative response to

Ashcroft v. Iqbal.

Mr. Chairman, I ask that a copy of their letter be included in the record following my testimony.

Mr. JOHNSON. Without objection.

Mr. NADLER. Thank you, Mr. Chairman.

H.R. 4115 would restore the notice pleading standard that existed prior to *Ashcroft v. Iqbal*, a standard that was articulated over 50 years ago in *Conley v. Gibson*. Notice it would not establish a brand new standing, opening the courthouse doors to all sorts of frivolous claims. It would reestablish the pleading standard that existed for 50 years prior to Ashcroft.

Using the language in *Conley*, the Open Court—Access to Courts Act provides that a complaint under Rule 12(b)(6)(c) or (e) cannot

be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." That is not language that I invented. That is language from the *Conley* decision of roughly 50 years ago.

That was the correct and workable standard for a half-century. It is well understood and practical. The Open Access to Courts Act would simply restore that time-tested standard.

Mr. Chairman, this Supreme Court seems to be engaged on a crusade to deny access to the courts increasingly to litigants of all sorts by tightening and redefining the standing standards—and that is a constitutional doctrine we can't correct—and by redefining and amending through court ruling the rules of civil procedure, a change we can correct and should by passing this bill.

Again, I thank you, Mr. Chairman, for holding today's hearing and for your leadership on this issue. I look forward to working with you and with the other Members of the Subcommittee and the full Committee to restore the rights of all Americans to a day in court by enacting H.R. 4115, the "Open Access to Courts Act of 2009."

Thank you, and I yield back the balance of my time.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER,
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Testimony of Representative Jerrold Nadler
Subcommittee on Courts and Competition Policy
Hearing on H.R. 4115, the "Open Access to Courts Act"
Wednesday, December 16, 2009

Chairman Johnson, Ranking Member Coble, and other distinguished Members of the Subcommittee on Courts and Competition Policy, thank you for holding today's hearing on H.R. 4115, the "Open Access to Courts Act," which I introduced with Chairman Johnson and Chairman Conyers on November 19th.

The Supreme Court's decision in *Ashcroft v. Iqbal* was the subject of a hearing I chaired in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 26th entitled "Access to Justice Denied: *Ashcroft v. Iqbal.*" It is the legislative response to that hearing's findings that brings us here today.

What is really significant about the *Iqbal* decision is that it sets up a very stringent new standard that prevents people from having their day in court. It does so, not based on the evidence, or on the law, but on the judge's own subjective criteria.

Rights without remedies are no rights at all. All Americans are entitled to have access to the courts so that their claims can be heard, the evidence weighed, and their rights can be vindicated. Without recourse to the courts, our rights are merely words on paper.

In *Iqbal*, the Court established a new test that federal judges must use when ascertaining whether civil complaints will withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rather than questioning, as required under Rule 8(a)(2), only that the plaintiff had included a "short and plain statement of the claim showing that the pleader is entitled to relief," it dismissed the case, not on the merits, or on the law, but on the bald assertion that the claim was not "plausible."

In the past, the rule had been, as the Supreme Court stated in *Conley v. Gibson*, that the pleading rules exist to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests" not as a substantive bar to consideration of the case. Now the Court has required that, prior to discovery, courts must somehow assess the "plausibility" of the claim, dismissing claims the court finds not "plausible" – before discovery, and without submission of evidence.

This rule will reward defendants who succeed in concealing evidence of wrongdoing, since claims will be dismissed before discovery can proceed, whether it is government officials who violate people's rights, polluters who poison the drinking water, or employers who engage in blatant discrimination. Often evidence of wrongdoing is in the hands of the defendants, and

the facts necessary to prove a valid claim can only be ascertained through discovery.

The *Iqbal* decision overturned 50 years of precedent and will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's subjective take on the plausibility of a claim rather than on the actual evidence.

At our hearing on *Ashcroft v. Iqbal*, we heard compelling testimony from our witnesses that the *Iqbal* decision has resulted in a substantial departure from well-settled practice in civil litigation. Several witnesses said that the new standard put forward by the U.S. Supreme Court to decide a motion to dismiss a civil complaint amounts to a heightened pleading standard.

Professor Arthur Miller, of New York University School of Law, an expert on civil procedure, testified that "what we have now is a far different model of civil procedure than the original design." We also heard from seasoned litigators. John Vail, of the Center for Constitutional Litigation, stated that there is "no doubt that the Supreme Court intended a sea change in pleading law." Debo Adegbile with the NAACP Legal Defense Fund, referred to the *Iqbal* decision as a "judicially heightened pleading barrier erected by the Supreme Court."

These three witnesses agreed that a legislative response, like H.R. 4115, the "Open Access to Courts Act," is necessary. In addition to our witnesses, a diverse coalition of 36 civil rights, consumer, environmental, and other organizations, support a legislative response to *Ashcroft v. Iqbal*. Mr. Chairman, I ask that a copy of their letter be included in the record following my testimony.

H.R. 4115 would restore the notice pleading standard that existed prior to *Ashcroft v. Iqbal*, a standard that was articulated over fifty years ago in *Conley v. Gibson*. Using the language in *Conley*, the "Open Access to Courts Act" provides that a complaint under Rule 12(b)(6), (c), or (e) cannot be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."

That was the correct and workable standard for a half-century. It is well understood and practical. The "Open Access to Courts Act" would restore that time-tested standard.

Again, I thank you, Mr. Chairman, for holding today's hearing, and for your leadership on this issue. I look forward to working with you to restore the rights of all Americans by enacting H.R. 4115, the "Open Access to Courts Act."

ATTACHMENT

October 26, 2009

The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
U.S. House of Representative Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

We are writing to urge you to support legislation that would restore the legal standards required to bring federal court litigation that have been the law for half a century. In two recent cases, the U.S. Supreme Court fundamentally changed these standards and erected new barriers that may keep victims of unlawful conduct from getting into court to prove their claim, thereby immunizing lawbreakers from appropriate sanction and encouraging disrespect for the law.

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Court created a brand new requirement that federal complaints must meet in order to overcome motions to dismiss. The Court ruled that the complaint must state enough facts to persuade the presiding court that the claim is "plausible." Prior to *Twombly,* the Court had followed a standard set out in 1957 in *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should 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." The Court further said that the claimant does not need to "set out in detail the facts upon which he bases his claim." The Court cited the language of *Conley* in at least a dozen decisions in the half-century since the case was decided.

In *Twombly*, without benefit of any new rulemaking proceedings, new statutory language or any significant new empirical information, the Court discarded the *Conley* standard in favor of a new, subjective, "plausibility" standard. In May, the Court expanded on the new standard in *Ashcroft v. Iqbal*, _____ U.S. _____ (May 18, 2009), ruling that civil claimants must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that in making that determination a court is to "draw on its judicial experience and common sense." Through these two cases, the Court devised its own novel pleading standards, thus usurping the authority of Congress and the assigned legislative rule-making role of the Judicial Conference.

Operating under these vague and subjective new legal standards, defendants are increasingly urging federal judges to dismiss federal lawsuits, before the claimants have any opportunity to develop facts in support of their claims through discovery, on the basis that the factual allegations do not establish a "plausible" claim for relief. Because information about the details of wrongful conduct is often in the hands of the defendants,

many meritorious cases could be dismissed before the discovery process begins, and wrongdoers will then escape accountability. Indeed, meritorious cases have been thrown out of federal court under the new Iqbal standards because claimants were unable to identify nonpublic facts in their initial pleadings, such as the precise time, place and manner of the alleged misconduct.

The new standards substantially hamper access to the courts for people who are harmed by illegal conduct, undermine the fundamental right to a jury trial, and infringe the rights of civil plaintiffs to due process of law, fundamental fairness and their day in court. According to a September 21, 2009 article in the *National Law Journal* (attached), motions to dismiss based on *Iqbal* have already produced more than 1,500 district court and 100 appellate court decisions. The American Bar Association's *Litigation News* reported that, in the two years after *Twombly*, federal circuit courts relied on the new standards to dismiss federal lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, employment discrimination and the taking of private property.

The severe nature of the mischief *Iqbal* is creating is shown by a Third Circuit decision, *Fowler v. UPMC Shadyside*, __ F.3d __, 2009 WL 2501662 (3d Cir. Aug. 18, 2009) (No. 07-4285), which actually held that *Iqbal* silently overruled the part of the *Twombly* decision rejecting heightened pleading standards in employment discrimination cases.

Rule 8 of the Federal Rules of Civil Procedure requires claimants to file a "short and plain statement" of the claim. In the *Twombly* and *Iqbal* decisions, the Supreme Court unilaterally expanded the rule to require a factual basis that is "plausible" and "reasonable" in the subjective judgment of lower court judges. As long as this new standard is the law of the land, the doors to federal court can be slammed shut on many Americans harmed by serious wrongdoing. Congress should act swiftly to restore the legal standards that have kept the courthouse doors open for the last half-century.

Sincerely,

Alliance for Justice
American Antitrust Institute
American Association for Justice
American Civil Liberties Union
The Brennan Center for Justice at NYU School of Law
Center for Justice & Democracy
Christian Trial Lawyer's Association
Committee to Support the Antitrust Laws
Community Catalyst

The Honorable Jerrold Nadler
October 26, 2009
Page Three

Consumer Federation of America
Consumers Union
Earthjustice
Environment America
Essential Information
The Impact Fund
La Raza Centro Legal
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
Mexican American Legal Defense and Educational Fund
NAACP Legal Defense and Educational Fund
National Association of Consumer Advocates
National Association of Shareholder and Consumer Attorneys
National Consumer Law Center
National Consumers League
National Council of La Raza
National Crime Victims Bar Association
National Employment Lawyers Association
National Senior Citizens Law Center
National Whistleblowers Center
National Women's Law Center
Neighborhood Economic Development Advocacy Project
Public Citizen
Sierra Club
Southern Poverty Law Center
Taxpayers Against Fraud
U.S. Public Interest Research Group

cc:
Chairman John Conyers
Ranking Member Rep. Lamar Smith
Members of the House Judiciary Committee

Mr. JOHNSON. Thank you, Congressman Nadler.

And I am pleased to—we will call this hearing, this part of the hearing, to a halt, allowing the full ordeal to be over, Mr. Congressman.

And then we will call up our second panel. Thank you.

And by the way, he is one of the brightest guys in Congress, and also long-winded. [Laughter.]

Okay, this is the second panel of this very important hearing. And I want to first start by introducing the people who are serving on this Committee, and I also want to thank all of you all for serving on this Committee as well.

The first witness is Professor Eric Schnapper. Professor Schnapper is a professor of law at the University of Washington School of Law where he is an expert in employment discrimination law, equal protection and civil rights.

He previously worked as assistant counsel at the NAACP Legal Defense and Education Fund.

Welcome, Professor Schnapper.

The next witness will be Mr. Gregory Katsas. Mr. Katsas was the former assistant attorney general for the Civil Division of the U.S. Department of Justice. In his work at the U.S. Department of Justice, Mr. Katsas argued or supervised most of the leading civil appeals brought by the U.S. government between 2001 and 2009.

Mr. Katsas was directly involved in defending Attorney General Ashcroft and FBI Director Robert Mueller in the *Iqbal* litigation.

Welcome, Mr. Katsas.

Next, we will hear from Jonathan Rubin. Mr. Rubin is a partner at Patton Boggs LLP in Washington, DC. He practices all facets of antitrust law, including litigation, mergers and acquisitions, counsel in compliance and public policy.

Mr. Rubin is the author of "Twombly and its Children," which was recently presented to the American Antitrust Institute.

Welcome, Mr. Rubin.

And last but certainly not least, we will hear from Professor Joshua Davis. Professor Davis is the director of the Center for Law and Ethics at the University of San Francisco School of Law. He also teaches civil procedure, remedies, legal ethics, constitutional theory and First Amendment law.

I tell you, those law students might hit you for more than three or four classes, so I would advise them to be quite nice to you, sir.

And Professor Davis is a member of the advisory board of the American Antitrust Institute.

We want to welcome you to the panel and to this hearing.

Without objection, your written statements will be placed into the record, and we would ask that you limit your oral argument—or your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light. At 4 minutes it turns yellow, then red at 5 minutes. After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

Professor Schnapper, will you please proceed with your statement, sir?

Mr. SCHNAPPER. [Off mike.]

Mr. JOHNSON. Thank you, Professor. And is that green button—okay, it is a green button.

Mr. SCHNAPPER. Oh, but it is light green. Now it is a dark green.

Mr. JOHNSON. All right. Okay. All right, thank you.

TESTIMONY OF ERIC SCHNAPPER, PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON, SCHOOL OF LAW, SEATTLE, WA

Mr. SCHNAPPER. The decisions in these cases, particularly *Iqbal*, present a serious obstacle to the enforcement of Federal laws which forbid actions because they are the result of an unlawful purpose.

Most civil rights cases today involve claims of an unlawful but secret motive. *Iqbal* makes those cases much more difficult to pursue. It requires that the plaintiff have enough evidence before the lawsuit starts to convince a judge that his or her claims are plausible.

Mr. Coble raised a question—Congressman Coble raised a question of whether that might be consistent with laws going back many decades. I personally go back many decades, and I——

Mr. COBLE. [Off mike.]

Mr. SCHNAPPER. I wouldn't have guessed.

And I can assure you, this is not the legal system on which we were practicing for the year—the many years that I have been handling these cases in court.

I have set out in my written statement a number of lower court decisions I think correctly describing what the new set of standards under *Iqbal* as new, and I could provide with a substantial number of others.

Congressman Goodlatte expressed the concern—and I think it was an entirely legitimate question—about what the consequences of this bill would be, and I think it is always appropriate for Congress to be concerned about that.

But the legal regime that the bill would establish is the legal regime that has been in place for four decades. We have got years of experience with it. And it just hasn't had the kind of concerns that have been expressed.

Mr. Chairman, your point was exactly correct when you noted that in civil rights cases it is usually essential to be able to have access to discovery in order to prove claims of discrimination.

In most cases, the most telling evidence—sometimes almost all the evidence—only comes out in the course of discovery. And that is true of employment discrimination cases under Title 7, the ADA, the Age Discrimination in Employment Act.

The effect of *Iqbal* is the equivalent of writing an exemption for good liars into the statutes, because if defendant does a good job of covering his or her tracks, it is going to be very difficult to meet the standard.

That intent standard isn't limited to employment discrimination cases. It also applies to retaliation and whistleblower statutes.

There are many antiretaliation provisions in Federal discrimination laws, but it is—they are present in many other laws such as Sarbanes-Oxley. And constitutional claims involving free speech or equal protection also require proof of secret motives.

What we will be reliably left with as viable claims are going to be primarily claims involving fairly inept discriminators, people who blurt out their motives or do a very bad job of covering their tracks.

And my brother Mr. Katsas has a list of a number of cases which have survived *Twombly* and *Iqbal*. I only had a chance to look at the list he had in his previous testimony. But they are exactly

those kinds of cases, discriminatory officials who make avowedly discriminatory remarks directly to the plaintiff at the time, and those simply aren't typical cases.

Congressman Coble, you expressed a concern to perhaps defer action until the courts themselves were indicating a concern about what is happening in the law.

That concern is out there, and I quote one of those cases in my prepared statement from the Ocasio-Hernandez case where the judge applies the law as he understands it and dismisses a case and then, frankly, says that as the standard he has being forced to apply is draconian and that it is requiring proof of a smoking gun, and the vast majority of plaintiffs in discrimination cases just aren't going to have that.

There are concerns, and I understand them, that this may be—this imposes a burden on plaintiffs—on defendants. I have to point out to the Committee that when this same standard has been applied to defendants, or when plaintiffs have tried to apply the standard to defendants, because defendants have to file pleadings too, the defendants have vehemently objected to that.

The standard that defendants have asked be applied to defendant pleadings is notice pleading. And I think they are right. But I think sauce for the goose should be sauce for the gander. But defendants don't like this rule at all when it is applied to them, only when it is applied to plaintiffs.

So there——

Mr. JOHNSON. If you could wrap up, please, Professor Schnapper. You are almost at the end of your time.

Mr. SCHNAPPER. I am happy to end here. Thank you, Mr. Chairman.

[The prepared statement of Mr. Schnapper follows:]

PREPARED STATEMENT OF ERIC SCHNAPPER

TESTIMONY OF

PROFESSOR ERIC SCHNAPPER

UNIVERSITY OF WASHINGTON SCHOOL OF LAW

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE HOUSE COMMITTEE ON THE JUDICIARY

HEARING ON

H.R. 4115

OPEN ACCESS TO THE COURTS ACT OF 2009

INTRODUCTION

Good afternoon Chairman Johnson, Ranking Member Coble, and Members of the Subcommittee. My name is Eric Schnapper, and I am a profess or law at the University of Washington School of Law. I appreciate this opportunity to testify regarding H.R. 4115 and the action needed to assure that litigants will continue to have access to the federal courts to enforce their rights under federal statutes and the Constitution.

I am here today to express only my own views; I do not represent any group or organization. But my testimony reflects the work I have done over the course of the last forty years representing in federal court plaintiffs who were the victims of discrimination on the basis of race, national origin, gender, religion, and disability. The largest number of the cases I have handled involved employment discrimination. For approximately twenty-five years I worked as an associate counsel for the NAACP Legal Defense and Educational Fund, Inc. Since joining the faculty of the University of Washington in 1995, I have devoted a large portion of my professional life to representing civil rights plaintiffs, primarily at the appellate level, and most frequently in the Supreme Court of the United States. This body of experience provides the context in which I have attempted to assess the problems that have given rise to H.R. 4115.

FROM *CONLEY* TO *TWOMBLY* AND *IQBAL*

Two hundred years ago civil litigation in American courts was governed by the exceedingly intricate rules known as common law pleading, under which the outcome of much litigation turned largely on the skill of attorneys in mastering arcane legal concepts and categories of forms of action. That unfortunate system was replaced in the nineteenth century by what became known as code pleading, beginning with the adoption of the Field Code by New York in 1848. Code pleading, however, lead to a new set of problems; the courts came to impose ever changing and more detailed requirements about what particularized allegations had to be contained in a complaint.

The problems of now discredited code pleading are illustrated by the decision in *Gillespie v. Goodyear Service Stores*, 258 N.C. 487 (1963), in which the plaintiff alleged that "[o]n or about May 5, 1959, and May 6, 1959" the defendants had "trespassed upon the premises occupied by the plaintiff as a residence," "assaulted the plaintiff" "by use of . . . physical force," caused her "to be seized . . . and to be confined in a public jail." 258 N.C. at 488. The Supreme Court of North Carolina dismissed this complaint, holding that these allegations did not meet the requirements of code pleading.

> The complaint states no facts upon which these legal conclusions may be predicated. Plaintiff's allegations do not disclose *what* occurred, *when* it occurred, *where* it occurred, *who* did *what*, the relationships between the defendants and plaintiff or of defendants *inter se*,

> or any other factual data that might identify the occasion or describe the circumstances of the alleged wrongful conduct of defendants.

258 N.C. at 490 (emphasis in original). Under the standards of code pleading, the statement that the plaintiff had been "confined in a public jail" was deemed a "legal conclusion" not an assertion of a "fact," and the statement that the wrongful conduct occurred "[o]n or about May 5, 1959 or May 6, 1959," was too vague to constitute an allegation of "when" the events occurred. Unsurprisingly both the national government and the states repudiated code pleading, and adopted instead the sort of simplified requirements now found in the Federal Rules of Civil Procedure.

It was for the very purpose of ending the evils of code pleading that the Federal Rules of Civil Procedure adopted an avowedly undemanding standard for what must be contained in a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ.Pro. 8(a). The Federal Rules of Civil Procedure provide a variety of effective tools for testing the legal sufficiency of a plaintiff's claim and for ascertaining whether a plaintiff had sufficient evidence to warrant proceeding to trial.

For half a century the reigning and entirely uncontroversial interpretation of Rule 8(a) was the unanimous decision in *Conley v. Gibson*, 355 U.S. 41 (1957).

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim 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.

355 U.S. at 45-46. This passage from *Conley* is one of the most widely applied formulations in civil procedure; it is quoted so often that a Westlaw search for the phrase indicates that it appears more than 10,000 times in federal decisions. In the twelve months prior to the decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this phrase was quoted 1631 times in the lower federal courts.

Conley's interpretation of Rule 8(a) expressly established the "notice pleading" standard. 355 U.S. at 47. A complaint was acceptable so long as it was sufficiently clear and specific that a defendant would know how to frame an answer. In the year before *Twombly* the phrase "notice pleading" appeared 1821 times in lower federal court decisions. Until the spring of 2007 this area of the law was entirely uncontroversial, even uninteresting. A complaint could be challenged under Rule 12(b)(6) if the circumstances it alleged simply were not illegal (such as a claim under Title VII of discrimination on the basis of party affiliation). But for the purposes of a motion to dismiss all the allegations of a complaint were assumed to be true. Rule 12(b)(6) could not be used to challenge a complaint on the grounds that the wrong which it alleged had not actually occurred, except in the

case of an allegation that bordered on the fantastic, such as a claim that the defendant was beaming death rays into the brain of the plaintiff.

Half a century of stable, workable, and widely understood law regarding what must be contained in a complaint--one of the most fundamental and hitherto uncontroversial aspect of civil litigation--has been thrown into a state of turmoil by the decisions in *Twombly* and most recently *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *Twombly* somewhat summarily discarded the "no set of facts" standard in *Conley* that had long guided federal pleading, rejecting with it one of the most fundamental and successful principles of modern procedure, that a complaint is sufficient if it provides a defendant with notice of the nature of the plaintiff's claims. The phrase "notice pleading," once a staple of the Court's account of federal pleading[1], is emphatically absent from the new formulation.

The decisions in *Twombly* and *Iqbal*, ending notice pleading as the measure of the adequacy of a complaint, establishes a new regime whose purpose is to require a plaintiff, on pain of dismissal, to demonstrate in the complaint itself that his or her

[1]E.g., *Christopher v. Harbury*, 536 U.S. 403, 419 n. 17 (2002); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002)("simplified notice pleading standard", "liberal notice pleading of Rule 8(a)"); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)("the liberal system of 'notice pleading' set up by the Federal Rules"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

claim is not "speculative." *Twombly*, 550 U.S. at 555. *Twombly* and *Iqbal* lay down three new principles for determining whether a complaint can withstand dismissal.

First, the factual allegations of a complaint are no longer all accepted as true. Certain allegations, which the Court denotes "conclusions," are not assumed to be true; in determining the sufficiency of a complaint, these allegations are essentially disregarded. A factual allegation is a "conclusion" stripped of the presumption of accuracy if the fact alleged is a necessary element of the plaintiff's complaint. Thus an allegation of conspiracy is a "conclusion" in an antitrust case, and an allegation of racial motivation is a "conclusion" in a discrimination case. See *Iqbal*, 129 S.Ct. at 1949-50.

Second, a complaint must now allege particular "facts," a requirement that resurrects one of the central pillars of the old, discredited code pleading system. See *Iqbal*, 129 S. Ct. at 1249-50; *Twombly*, 550 U.S. at 556.

Third, the facts alleged must "plausibly suggest" that a violation has occurred. *Iqbal*, 129 S. Ct. at 1951. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. A complaint must be dismissed if the facts only permit the court to infer "the mere possibility" of unlawful action. *Id.*; see *Twombly*, 550 U.S. at 556.

THE IMPACT OF *TWOMBLY* AND *IQBAL* ON LITIGATION IN THE LOWER COURTS

The decisions in *Twombly* and *Iqbal* have brought about sweeping changes in the lower courts[7], all for the worse. The

[7] In *Ocasio-Hernandez v. Fortuno-Burset*, the district judge candidly acknowledged that the case would not have been dismissed under the legal standard that existed prior to *Iqbal*. Indeed, the judge pointed out that the defendants counsel had not even moved for dismissal until *Iqbal* was decided.

> The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision. The original complaint . . . , filed before *Iqbal* was decided by the Supreme Court, . . . clearly met the pre-*Iqbal* pleading standard. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-*Iqbal* standard.

639 F.Supp. 2d at 226 n. 4.

In *Kyle v. Holinka*, 2009 WL 1867671 (W.D.Wis. 2009), the plaintiff, alleging racial segregation at the federal prison where he was confined, filed suit against six federal defendants, including three high ranking officials--the warden, regional director, and national director. The court initially permitted the case to go forward against all of the defendants. Following the decision in *Iqbal*, the Department of Justice moved to dismiss the complaint against the two highest ranking officials.

> I agree with defendants that my conclusion must be revisited in light of *Iqbal*, which extended the pleading standard enunciated in . . . *Twombly* . . . to encompass discrimination claims and implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . . Under the Supreme Court's new standard, an allegation of discrimination needs to be more specific.

2009 Wl 1867671 at *1.

In dismissing the complaint in *Ansley v. Florida Dept. of Revenue*, 2009 WL 1973548 at *2 (N.D.Fla.), the court explained that "These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not."

In applying *Iqbal* to a counterclaim in *Carpenters Health and*

impact of those decisions on civil rights claims has been particularly serious, both because *Twombly* and *Iqbal* are especially likely to prevent litigation of those claims, and because enforcement of the Constitution and of federal laws against invidious discrimination are of unique importance to the nation.

The Pre-Filing Evidence Requirement

The *Twombly/Iqbal* requirement that a complaint allege facts showing that the plaintiff's claim is plausible is a requirement that--prior to filing suit (and before obtaining discovery)--the plaintiff must already have evidence sufficient to meet the new "plausibility" standard.

In discrimination cases this will often be an insurmountable barrier. Discriminatory officials understand what they are doing is unlawful; they will ordinarily take prudent measures to avoid engaging in actions or making statements that would reveal their illegal purposes, especially to the intended victims.

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Thought they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. . . . It has become

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Welfare Fund of Philadelphia v Kia Enterprises, Inc., 2009 WL 2152276 (E.D.Pa.), the court recognized that "The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has raised the bar for claims to survive a motion to dismiss." 2009 WL 2152276 at *3.

> easier to coat various forms of discrimination with the appearance of propriety. . . In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it."

Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074, 1081-82 (3d Cir. 1996)(*quoting Riordan v, Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987)). If discriminatory officials do a good job covering their tracks, under *Iqbal* and *Twombly* they can cut off any legal challenge before discovery is available to unearth their records or force them to answer questions under oath.

Much of the most probative evidence of discrimination, evidence which in some cases may be the only solid proof of an invidious purpose, can be obtained solely through discovery; under *Twombly* and *Iqbal*, however, discovery is only available if a plaintiff already has substantial evidence of discrimination to describe in his or her complaint. Statistical evidence, for example, is often relied on to prove the existence of discrimination.[3] In *Bazemore v. Friday*, 478 U.S. 385, 394 (1986), the plaintiffs offered a compelling analysis of the defendants' payroll information; that analysis was only possible after discovery could be used to obtain the underlying data. An unsuccessful applicant for a job or promotion is entitled to

[3]See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)("statistics as to petitioner's employment policy and practice may be helpful").

support a discrimination claim with proof that he or she was better qualified than the individual who got the disputed position[4]; but such a plaintiff will usually be unable, without discovery, to obtain a copy of the successful applicant's resume, application, or personnel file. In a discriminatory discipline case the manner in which the employer dealt with workers, outside the protected group in question, who engaged in comparable or more serious misconduct would be "especially relevant."[5] But that evidence too is unlikely to be available except through discovery. A review of an employer's files may indeed reveal a smoking gun or exceptionally probative evidence; for example, in *Kolstad v. American Dental Ass'n*, 108 F. 3d 1431 (D.C.Cir. 1997), discovery revealed that the job description for the position denied to the female plaintiff had been "cut-and-paste[d]" from job description of the male applicant who won the job, and that the applicant had had a series of private meetings with the selecting officials. 108 F. 3d at 1436.

Actual experience under *Iqbal* and *Twombly* demonstrates how those decisions can be used to deny discrimination plaintiffs access to the evidence they need, and thus to deny them meaningful access to the courts.

In *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179 (D.Conn. 2009),

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[4] *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989).

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

the plaintiff alleged that an employer expressly refused to hire him because of an earlier back injury, and asserted that the employer regarded the plaintiff as substantially limited in his ability to work, an allegation which if true would have placed the plaintiff within the protections of the Americans With Disabilities Act. After holding that the complaint lacked sufficient factual allegations from which to infer that the employer regarded the plaintiff as limited in that manner, the judge commented that "if Logan had alleged that [the hiring official or other company] managers made remarks that people with back injuries could not perform most jobs, then Logan might have been able to present a plausible ADA claim." 632 F. Supp. 2d at 184. But Logan was not a current employee; he was a job applicant who had only a single conversation with the hiring official and (presumably) had never even met the other company managers. It was utterly impossible for the plaintiff to obtain the type of evidence proposed by the court without access to discovery to question those managers or other company employees who--unlike the plaintiff--would have been in a position to hear such remarks.

In *Ibrahim v. Department of Homeland Sec.*, 2009 WL 2246194 (N.D.Cal.), the plaintiff had been detained and arrested by San Francisco authorities. The court concluded that the complaint lacked the needed specific factual allegations to support Ibrahim's claim that she was the victim of discrimination on the basis of religion and national origin. The district judge

commented on the unfairness of the rule he was required to apply.

> A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law a laid down by the Supreme Court.

2009 WL 2246194 at *10.

In *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217 (D.P.R. 2009), fourteen former domestic and maintenance workers at the Governor's mansion in Puerto Rico alleged that they had been fired because of their political affiliation. They sued the new governor, the mansion's Chief of Staff, and the mansion's Administrator. The letter dismissing the plaintiffs had been signed by the Administrator. The court held the complaint insufficient to state a claim against the Governor and Chief of Staff because it contained no specific allegations regarding their role (if any) in the termination decision set out in the letter from the Administrator.

> Because of the positions that these [other] defendants hold within the governor's mansion, plaintiffs make an implicit assumption that defendants participated in the decision to terminate the plaintiffs' employment. However, there are no additional factual allegations . . . to tie [the other officials] to the decision to terminate the plaintiffs' employment

639 F. Supp. 2d at 221-22. If the Governor or Chief of Staff had been involved in the decision, that would have occurred during confidential conversations or communications with the Administrator, events that would assuredly have occurred when the

plaintiffs were not in the room, or involving memos or emails that would not have been sent to the plaintiffs. The effect of the decision was that all relevant written materials were protected from discovery, and none of the officials was asked under oath if the Administrator had ever communicated with the Governor or Chief of Staff about the issue.[6]

The district judge in *Ocasio-Hernandez* candidly recognized that *Iqbal* would close the federal courts to complaints except in those exceptional cases in which a plaintiff already had compelling evidence before the suit was ever filed.

> As evidenced by this opinion, even highly experience counsel will henceforth find it extremely difficult, if not impossible, to plead a . . . political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain direct and/or circumstantial evidence needed to sustain the First Amendment allegation. . . . This no longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is, thus available. Counsel will also likely only raise local law claims to avoid removal to federal court where *Iqbal* will sound the death knell.

639 F. Supp. 2d at 226 n. 4.

[6]The plaintiffs also alleged that the First Lady had been involved in the terminations, pointing to a statute which made the First Lady the chair of the Committee (including the Administrator) that was to oversee maintenance work at the mansion. Those facts were also insufficient to prevent dismissal of the complaint regarding the First Lady since "no additional facts are alleged to suggest that she in fact participated in the decision." 639 F. Supp. 2d at 222. Here too the dismissal of the claim under *Iqbal* and *Twombly* precluded the obvious, and likely limited discovery that would have shed light on the claim.

In *Adams v. Lafayette College*, 2009 WL 1777312 (E.D.Pa. 2009), the plaintiff pointed out that requiring him to allege in his complaint specific facts sufficient to support an inference of discrimination would "limit a plaintiff's ability to raise a discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendants' hands, *before* discovery." 2009 WL 1777312 at *4 (emphasis in original). The court held, however, that under *Iqbal* the plaintiff was not entitled to obtain discovery because the facts alleged in the complaint, based on the limited evidence the plaintiff was able to gather without discovery, were not "sufficient facts to nudge his claim from conceivable to plausible." *Id.*

In *Ansley v. Florida, Dept. of Revenue*, 2008 WL 1973548 at *2 (N.D.Fla.), the plaintiff alleged that because of his gender he had been treated worse than others who were similarly situated. The court dismissed the complaint in part because the complaint did not "allege a factual basis for the conclusion that the others who were treated better were similarly situated." Although proof of dissimilar treatment of comparable workers can be an important method of demonstrating discrimination, that dismissal prevented the plaintiff from obtaining the needed evidence as to how female workers had been treated.

The discovery (and evidence) bar of *Twombly* and *Iqbal* operates in a decidedly haphazard manner. If a plaintiff happens to have significant evidence of discrimination (or other

illegality), he or she can defeat a motion to dismiss the complaint and use discover to unearth other evidence and prevail at trial, even though the evidence used to avoid dismissal proved inaccurate and was never relied on after the denial of the dismissal motion. Similarly, if a plaintiff has two claims, and only one is dismissed under *Twombly* and *Iqbal*, the plaintiff may thereafter use discovery regarding the surviving claim to obtain evidence sufficient to resuscitate the dismissed claim; several lower courts have permitted plaintiffs to do this.[7] But a

[7] In *Kyle v. Holina*, 2009 WL 1867671 (W.D.Wis. 2009), the plaintiff sued a number of federal prison officials, alleging that they had approved a policy of racial segregation. Applying *Iqbal*, the district court dismissed the claims against the warden, regional director, and director, but permitted the case to go forward against three prisons officials, all of whom had expressly endorsed the segregation practice in statements to the plaintiff. The court held that "plaintiff is free to engage in discovery to determine whether [the remaining] defendants . . . were following a discriminatory policy." 2009 WL 1867671 at *2. "[I]f the discovery process reveals evidence that [the warden, regional director, or director] *are* responsible for discriminatory treatment against plaintiff, he may seek leave to amend his complaint at that time to include them as defendants again." *Id.* (emphasis in original); see *id.* ("plaintiff may amend his complaint if the discovery process provides support for [his claims against the dismissed defendants]"), *id.* at 3 (claims dismissed against higher level officials "without prejudice to plaintiff's filing an amended complaint if discovery reveals a basis for his claim against them.")

In *Ibrahim v. Department of Homeland Sec.*, 2009 WL 2246194 (N.D.Cal.), the court held that *Iqbal* required dismissal of the plaintiff's discrimination complaints; the defendants had not challenged the sufficiency of the allegations of a separate Fourth Amendment violation. The court held that Ibrahim could therefore use discovery in her still pending Fourth Amendment claim to seek to resuscitate her discrimination claim.

> Counsel for the [remaining defendants] admit that plaintiff's Fourth Amendment claim can go forward. That means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on

plaintiff who has only a single claim does not have this opportunity.

Civil Rights Claims Against Cities and Counties

In a section 1983 action under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), a city or county is only liable for constitutional violations by its employees if that violation arises out of municipal or county policy or custom. In police misconduct cases, this usually requires proof of a practice of inadequate training or supervision of employees, or a knowing tolerance of repeated unconstitutional actions. A victim of a particular constitutional violation would rarely if ever have access to information about such practices without discovery.

Lower court decisions applying *Iqbal* and *Twombly* to these cases mechanically dismiss claims against cities and counties--precluding discovery into the relevant policies and practices--because the plaintiffs do not, almost by definition could not, have such evidence when their complaints are framed. For example, in *Williams v. City of Cleveland*, 2009 WL 2151778 (N.D.Ohio), the

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> the incident, including why her name was on the [no fly] list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

2009 WL 2246194 at *10.

court dismissed the complaint against the city by a man who had been held in jail for eight months even though city officials had critical exculpatory evidence.

> Plaintiff makes no factual allegations that can support the conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. . . . Plaintiff must allege facts, which if true, demonstrate the city's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. . . . Plaintiff . . . has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, but he has not alleged facts from which it can be inferred that this conduct is recurring . . . . Accordingly, the amended complaint would not state a claim cognizable under federal law.

2009 WL 2151778 at *4. The type of evidence which the court indicated was needed to support a claim against the city was precisely the sort of information that could only be gleaned through discovery. A court in *Young v. City of Visalia*, 2009 WL 2567847 (E.D.Cal.) dismissed a police misconduct civil rights claim against the city on similar grounds.

> The complaint does not identify what the training and hiring practices were, how the training and hiring practices were deficient, or how the training and hiring practices caused Plaintiffs' harm.

2009 WL 2567847 at *7.[8] That was precisely the type of evidence

[8] *Gelband v. Hondo*, 2009 WL 1686832 at *6 (D.Me.)(dismissing claim based on filing false reports about the plaintiff's arrest and failing to provide treatment for his head injuries); *Jackson v. County of San Diego*, 2009 WL 3211402 at *1 (S.D.Cal) (dismissing claim by inmate who allegedly been severely beaten by jail guards because he had asked for a different set of jail clothes when those had been given did not fit).

which the plaintiff could only obtain through discovery.

The effect of such lower court decisions applying *Twombly* and *Iqbal* to municipal and county lability claims has been to recreate the very pleading requirement that the Supreme Court rejected in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In *Leatherman* the Fifth Circuit had rejected the plaintiff's claim against the defendant county agency because the plaintiff's complaint failed to satisfy that Circuit's "heightened pleading" standard for civil rights claims.

> Under the heightened pleading standard, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including . . . , in cases like this one, facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible.

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 954 F. 2d 1054, 1055 (5th Cir. 1992). The court of appeals dismissed the complaint because "it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." 954 F. 2d at 1058. The Supreme Court, in rejecting a requirement of such detailed allegations, held that it would be "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. With the notice pleading standard now abandoned by *Twombly* and *Iqbal*, lower courts have resumed applying the very standard

which the Supreme Court unanimously rejected in 1993.

The Plausibility Standard

Iqbal and *Twombly* direct federal judges to make a determination as to whether the factual allegations in the complaint (excluding the factual allegations disregarded because they are "conclusions") would support an inference that the claimed violation is "plausible." In making that determination the judge is also to consider "judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. This new authority to dismiss complaints is fraught with potential for unequal justice.

This new standard creates a novel, somewhat peculiar judicial role. The judge is not to apply decide whether after considering all the admissible evidence a reasonable jury could find for the plaintiff, the well established standard used for Rule 56 summary judgment motions under Rule 56 and for Rule 50 motions for judgment as a matter of law. Some, maybe most of the evidence, remains unknown until and unless the complaint is sustained and discovery is permitted. Rather, the judge must decide if the evidence renders plausible a claim regarding which more evidence remains to be discovered. "Plausibility" seems an apt phrase here, because the judge--emphatically *not* knowing all the evidence that may exist--has to consider whether (in light of what little the plaintiff already can show) the violation asserted is the kind of thing that is particularly likely to occur at all. This

undertaking is like listening to a random portion of a trial and then trying to predict whether the plaintiff has a good or poor chance of winning.

What judges know (or think they know) about the plausibility of a particular type of claim would almost have to be part of this analysis. Given otherwise similar and limited evidence of discrimination in employment, for example, any sensible person in assessing whether a claim was "plausible" would want to know if a plaintiff claiming national origin discrimination was alleging discrimination against Mexican-Americans or discrimination against, say, Swedish-Americans. The plausibility of a claim of religious discrimination on the basis of religion might be different if the alleged victim was a Muslim or a Lutheran. But it is wholly inappropriate that the survival of a discrimination complaint would thus turn, for example, on whether a judge happens to think the racial discrimination is happily rare or deplorably common.

This problem is illustrated all too well by the dispute in *Iqbal* itself. Five members of the Court found implausible, on the facts of that case and a reading of the domestic events in the wake of the attack of September 11, 2001, a claim of anti-Arab or anti-Muslim bias on the part of the Attorney General or the Director of the FBI. Perhaps the average American would agree with that evaluation; conceivably most lawyers attending a convention of the Federalist Society would think that the

allegations in *Iqbal* were implausible. But it seems fair to guess that that allegation might be regarded as more plausible by delegates to a convention of the ACLU or the Arab-American Anti-Discrimination Committee. I express no view as to which assessment would be correct, but it seems wholly inappropriate to confide responsibility for that unavoidably speculative assessment to federal judges.

In making the plausibility determination authorized by *Iqbal* and *Twombly*, federal judges have at times been remarkably unwilling to see inculpatory significance in the facts alleged.

In *Ocasio-Hernandez* the plaintiffs, in support of the asserted that the First Lady had been involved in the decision to dismiss workers at the Governor's mansion who were members of the opposing party, and alleged in support of that claim that she had been overheard by one of the plaintiffs stating that "they were going to 'clean up the kitchen.'" 639 F. Supp. 2d at 222 n. 1. The court held that this was insufficient to support a plausible inference that the First Lady was involved in the dismissals, or that they were part of a political purge, because it was "an ambiguous remark that does not necessarily refer to the dismissals at issue in this case." *Id.* The remark was not "necessarily" about dismissals; the First Lady might have been asserting an intention to go to the kitchen with someone else (perhaps the Governor) to wash dirty dishes or mop the floor. But surely that is a far less plausible than the more likely interpretation that

she was involved in a plan to purge the kitchen staff.

The complaint in that case alleged that (a) within two months after the inauguration of the new governor the Administrator of the Governor's mansion had dismissed the 14 plaintiffs, all members of the opposition party, (b) that the Administrator had neither given them a reason for the dismissal nor attempted to evaluate the quality of their work, (c) that the Administrator had given the press an untruthful explanation of the reason for the dismissal, and (d) that that official had then promptly replaced them with workers who were members of the new governors party. 639 F. Supp. 2d at 220. The court held that those factual allegations were "unpersuasive" and thus insufficient under *Iqbal* and *Twombly* to support the claim that the plaintiffs had been dismissed for poitical reasons. 639 F. Supp. 2d at 223.

In *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179 (D.Conn. 2009), the complaint alleged that the defendant regarded the plaintiff as disabled, and that its refusal to hire the defendant thus violated the Americans With Disabilities Act. The company official who rejected the plaintiff candidly explained that he did so because the plaintiff earlier "had been out of work due to [a back] injury." 632 F.Supp. 2d at 182. In dismissing the complaint under *Iqbal*, the judge explained that she found this evidence insufficiently persuasive.

> In the present case, it is possible that [the employer] perceived Logan's back injury to substantially limit his ability to work. . . . [But the hiring official]

> spoke of Logan's injury in the past tense and did not mention Logan's health or ability to work. Therefore, it is merely possible, but not plausible, that [the official] perceived Logan to be disabled in accordance with the ADA definition.

632 F. Supp. 2d at 183-84. If the hiring official thought Logan was completely and permanently cured, and would have no further back problems, it would have made no sense for the official to give the back injury as a reason for not hiring the plaintiff; the only plausible explanation for the official's remark was that he believed that the past injury would affect the applicant's ability to work in the future.

In *Kyle v. Holinka*, 2009 WL 1867671 (W.D.Wis. 2009), the black plaintiff alleged that when he arrived at a particular federal prison he was told by a guard that he could not share a cell with a white inmate because "inmates of different races couldn't live together." When plaintiff complained to the unit manager, he was told "This is the way *we* do it here." 2009 WL 1867671 at *1 (emphasis added). The plaintiff then complained about this race-based housing assignment to the assistant warden, who told him she was "aware of it being practiced" at the prison "but that it was 'self imposed' by the prisoners." *Id.* The explanation was obviously disingenuous, since the plaintiff had complained that a guard and a manager--not a fellow prisoner--had ordered the segregation. The plaintiff sued the guard, unit manager, assistant warden, and warden; he alleged that the warden (and higher BOP officials) were aware of and permitted these

segregation practices. After the decision in *Iqbal*, the judge dismissed the claim against the warden, explaining that "plaintiff fails to allege any facts showing that [the warden] has implemented a discriminatory policy." 2009 WL 1867671 at *2. But the plaintiff had alleged specific facts indicating that officials up to the level of assistant warden had sanctioned a policy of segregation. It was entirely plausible that the warden knew what was going on, both because the assistant warden would not and could not have kept the systemic segregation secret from the warden, and because the warden would have noticed segregation (which assertedly including parts of the prison other than the cells) merely by walking through the institution. The possibility that the prison staff was operating a segregated prison which the warden never noticed, or that they would have continued to do so if the warden had ever seriously ordered an end to the practice, borders on the fantastic.

Special Ad Hoc Specificity Requirements

The condemnation in *Iqbal* and *Twombly* of "conclusions" and "conclusory" allegations has prompted the lower courts, in an as yet an unpredictable manner, to require plaintiffs to make specific allegations about particular facts singled out by the district judge. The practice bears a certain resemblance to the days of code pleading, when judges developed ever growing and changing lists of things that had to be alleged in a particular

category of case.

In *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217 (D.P.R. 2009), the plaintiffs who contended that they had been dismissed because of their membership in one political party alleged that every one of the 14 individuals who were immediately hired as replacements were members of the opposing political party, which had recently taken power. The court held that allegation insufficient because "plaintiffs do not provide any factual allegations to indicate how they are aware of their replacements' political affiliations, or of the immediacy of their replacements." 639 F. Supp. 2d at 220. The judge also rejected the allegations that the plaintiffs had been replaced by members of the other party because "plaintiffs do not identify who replaced any or all of the plaintiffs, nor the date of the replacements; plaintiffs merely present a conclusory statement that this occurred as to all of the plaintiffs." 639 F. Supp. 2d at 222. The complaint also alleged that all of the individual defendants had questioned each of the plaintiffs regarding when they were hired, a quaere apparently calculated to identify the plaintiffs party affiliation based on who was in power when they were hired. This allegation too was dismissed as insufficient. "The allegation that all of the defendants asked all of the plaintiffs about how and when they began working [at the government job in question] is a generic allegation, made without reference to specific facts that might make it 'plausible on its

face.'" *Iqbal*." 617 F.Supp. 2d at 222.

In *Adams v. Lafayette College*, 2009 WL 2777312 (E.D.Pa. 2009), the plaintiff alleged that he had been disciplined more harshly for asserted misconduct that had younger workers. The court held that allegation insufficient under *Iqbal* because complaint failed to specify exactly how he had been disciplined.

> No mention or discussion has even been presented on the kinds of penalties Adams has already received for prior infractions, facts with which he would be intimately familiar. . . . Adams failure to highlight the alleged discriminatory treatment he has suffered as compared to his younger co-workers leaves those allegations without the factual support necessary to survive the motion to dismiss.

2009 WL 277312 at *3-*4.

In *Argeropoulos v. Exide Technologies*, 2009 WL 2132443 (E.D.N.Y.), the plaintiff alleged that he had been harassed on a "daily and continuous basis because he is Greek." 2009 WL 2132443 at *6. The court held that this allegation would have been sufficient under *Conley* to state a claim for national origin harassment, but that it was insufficient under the new standard in *Iqbal*.

> [T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old "no set of facts" standard for assessing motions to dismiss. See *Conley* . . . . But it does not survive the Supreme Court's "plausibility standard," as most recently clarified in *Iqbal*. . . . [T]he Court need not accept as true Plaintiff's conclusory and entirely non-specific allegation that similar conduct occurred on a "daily and continuous basis because he is Greek." Rather, Plaintiff must plead sufficient "factual content" to allow the Court

> to draw a reasonable inference" that Plaintiff suffered from a hostile work environment. *Iqbal*, 129 S. Ct. at 1949. And Plaintiff has not done so. At most, Plaintiff's national origin hostile work environment claim is "conceivable." *Id.* at 1951. But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is "plausible.' *Id.*

Id. The first asserted defect under *Iqbal* was that the complaint alleged that the harassment was "daily," which was somehow insufficient to provide information about the "frequency" of the harassment. The second defect was the failure to spell out the particulars of the anti-Greek remarks or other biased acts.

In *Ansley v. Florida, Dept. of Revenue*, 2009 WL 1973548 (W.D.Fla.) the plaintiff alleged he was discriminated against and ultimately fired because of his gender and his medical condition. In holding that the complaint was insufficient after *Iqbal*, the first asserted defect in the complaint, according to the court which dismissed the complaint, was that it "does not say what the alleged reason--the pretextual reason--for the firing was." 2009 WL 1973548 at *2.

In *Adams v. Lafayette College*, 2009 WL 2777312 (E.D.Pa. 2009), the court noted that in resolving a Rule 12(b)(6) motion "a federal court must . . . accept all factual allegations in the complaint as true." 2009 WL 2777312 at *2. The plaintiff alleged that "he was penalized or suspended for minor infractions while younger employees would not receive such treatment for similar violations." *Id.* at *3. The court refused to accept that

allegation as true on the ground that the assertion was not a "factual allegation" at all.

> These are legal conclusions and are properly disregarded. . . . Adams' statements that younger employees were treated differently on several occasions and that he received harsher treatment because of his age are merely legal conclusions. Without some factual basis, they . . . are not entitled to be assumed to be true.

2009 WL 2777312 at *3.

The Viability of Swierkiewicz

Prior to the decisions in *Twombly* and *Iqbal*, the Supreme Court decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), had governed challenges to complaints in discrimination cases. *Swierkiewicz* held that a discrimination complaint need not allege facts constituting a prima facie case, and reiterated the application of the notice pleading standard to such cases. 534 U.S. at 510. The Court in *Twombly* insisted that its decision was consistent with the decision in *Swierkiewicz* that a plaintiff need not allege a prima facie case, but made no mention of the notice pleading standard accepted in *Swierkiewicz*. The majority in *Iqbal* did not refer to *Swierkiewicz* at all.

In the wake of these decisions the lower courts are confused as to whether *Swierkiewicz* is still good law, in whole or in part. In *Francis v. Giacomelli*, 2009 WL 4348830 at *9 n. 4 (4th Cir), the Fourth Circuit held that "[t]he standard that the plaintiffs

quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*," referring to the portion of *Swierkiewicz* that had relied on *Conley*. In *Fowler v. UPMC Shadyside*, 578 F. 3d 203, 211 (3d Cir. 2009), the Third Circuit held that "because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."[9] Other lower courts have reasoned that *Swierkiewicz* remains good law.[10]

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[9]See *id.* ("[t]he demise of *Swierkiewicz*."); *U.S. v. Nobel Learning Communities, Inc.*, 2009 WL 3617734 at *2 n.6 (E.D.Pa.)(rejecting plaintiff's reliance on *Swierkiewicz* because "the Third Circuit found *Iqbal* and *Twombly* to have effectively overruled *Swierkiewicz* to the extent that it concerns pleading requirements. *Fowler*"); *Guirguis v. Movers Specialty Services, Inc.*, 2009 WL 3041992 at *2 n. 7 (3d Cir.)(quoting *Fowler*); *Brown v. Castleton State College*, 2009 WL 3248106 at *9 n. 8 (D. Vt.)("*Swierkiewicz* itself has questionable status after *Twombly* . . . and especially after *Iqbal*").

[10]*Harper v. New York City Housing Authority*, 2009 WL 3861937 at *4 (S.D.N.Y.)("nothing in *Iqbal* indicates that the Supreme Court intended that decision to affect the continued applicability of *Swierkiewicz*, and the courts in this district have continued to apply *Swierkiewicz* in employment discrimination claims subsequent to the Supreme Court's decision in *Iqbal*")(citing cases); *EEOC v. Universal Brixius, LLC*, 2009 WL 3400940 at *3 (E.D.Wis.)("As *Swierkiewicz* makes clear, a plaintiff is not required to set forth the elements of a prima facie case of sexual discrimination in a complaint. *Twombly* and *Iqbal* did not change this"); *Gillman v. Inner City Broadcasting Corp.*, 2009 WL 2003244 at *3 (S.D.N.Y.)("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*"); cf. *Kasten v. Ford Motor Co.*, 2009 WL 3628012 at *7 (E.D.Mich.)("it remains to be seen whether *Swierkiewicz*'s rejection of a heightened pleading requirement in civil rights cases, and its implicit endorsement of a liberal pleading standard, can be reconciled with *Iqbal*'s plausibility pleading standard").

The Federal Rules of Civil Procedure Forms

When the Supreme Court adopted the Federal Rules of Civil Procedure, it also adopted an Appendix of Forms, which, like the Rules themselves, has been amended from time to time. Twelve of those officially approved forms are model complaints regarding particular types of claims.

At least half of the Forms contain precisely the type of language which *Iqbal* and *Twombly* now label merely conclusory allegations, with none of the factual allegations which those decisions require. Form 11, a "Complaint for Negligence" contains only a single sentence regarding the defendant's asserted misconduct: "On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff." "[N]egligently drove" is precisely the sort of conclusory statement of an element of a negligence claim that *Iqbal* and *Twombly* insist is insufficient. Form 12, "Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible," is essentially the same.[11] Form 14, "Complaint for Damages Under the Merchant Marine Act" calls for an allegation modeled on Rule 11.[12] The Forms for

[11]Paragraph 2 reads "On [date], at [place], defendant [name] or defendant [name] or both of them willfully or reckless or negligently drove, or caused to be driven, a motor vehicle against the plaintiff."

[12]Paragraph 6 states "As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured . . . ."

complaints regarding patent infringement, copyright infringement, and conversion are similarly conclusory.[13]

The validity of the Forms themselves has been repeatedly called into question in light of *Iqbal* and *Twombly*. In one case the defendant argued "that *Iqbal* supersedes all previous jurisprudence on the issue of pleading requirement, including Form 18 of the Federal Rules of Civil Procedure."[14] *Doe ex rel. Gonzales v. Butte Valley Unified School Dist.*, 2009 WL 2424608 at *8 (E.D.Cal.), noted that

> even the official Federal Rules of civil Procedure Forms, which were touted as "sufficient under the rules and . . . intended to indicate the simplicity and brevity of the statement which the rules contemplate," F.R.Civ.Proc. 84, have been cast into doubt by *Iqbal*.

Several other decisions have expressed the same concern, particularly regarding Form 18 which is used for patent claims.[15]

A complaint which rigidly adheres to the specific language in

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[13]Forms 15, 18, and 19.

[14]*Mark IV Industries Corp. v. TransCore, L.P.*, 2009 WL 4403187 at *4 (D.Del. 2009).

[15]*Sharafabadi v. University of Idaho*, 2009 WL 4432367 at *3 n. 5 (D.Idaho) ("[t]his court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court's guidance in [*Iqbal* and *Twombly*]")(patent case); *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 at 82 (N.D.Cal. 2009)("It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*. . . . Under Rule 84 . . . , however, a court must accept as sufficient any pleading made in conformance with the forms"); *Anthony v. Harmon*, 2009 WL 4282027 at *2 (E.D.Cal.)("[e]ven the official Federal Rules of Civil Procedure Forms . . . have been cast into doubt by *Iqbal*").

these forms probably could not be dismissed based on the interpretation of Rule 8(a) in *Twombly* and *Iqbal*. Rule 84 states expressly that "[t]he forms contained in the Appendix of Forms are sufficient under the rules." On the other hand, a complaint which merely used some elements of a Form (or even all of it), might now be subject to challenge if the complaint also included other material.

But the very existence of the Forms highlights the intolerable disparity in the standards of pleading now applied to different types of claims. A plaintiff whose claim happens to be among the claims covered by an official Form is not subject to the harsh strictures of *Iqbal* and *Twombly*; that plaintiff can frame its complaint in an entirely conclusory manner so long as the complaint uses the particular conclusory language of a Form. There are, however, no official Forms for claims of discrimination or constitutional violations. The Forms exempt from the *Iqbal/Twombly* standards plaintiffs alleging claims for negligence, conversion, patent infringement, copyright infringement, specific performance of a contract to convey land, damages under the Merchant Marine Act, and "to cover a sum certain." But the claims of all other plaintiffs are subject to dismissal if they cannot satisfy the requirements of *Iqbal* and *Twombly*.

Application of Iqbal and Twombly to Defendants' Pleadings

Defendants have repeatedly insisted that defendants themselves should be exempt from the stringent pleading standards in *Twombly* and *Iqbal*. This issue arises when a defendant asserts a claim (e.g., a counterclaim) against another party, or when its answer asserts an affirmative defense. Defendants argue that they should continue to be governed only by the traditional *Conley* notice pleading standard.

> The plaintiff contends that all of the affirmative defenses should be stricken . . . because they are conclusory statements which contain no facts specifying how the affirmative defenses apply to this action. In response, the defendant argues that it is only required to give the plaintiff "fair notice" of the defenses being advanced. . . . The parties dispute whether the pleading standard recently outlined in . . . *Twombly* . . . applies to affirmative defenses.

Voeks v. Wal-Mart Stores Inc., 2008 WL 89434 at *5-*6 (E.D.Wis.)[16]. There is significant dispute among the lower courts about whether a double standard should be applied, exempting defendants themselves from the requirements of *Twombly* and *Iqbal*. This issue has arisen most frequently in commercial litigation, in which both parties are corporations.

Lower courts have generally applied *Twombly* and *Iqbal* to pleadings in which defendants themselves assert that assert claims

[16]*Sun Microsystems v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 408 n. 8 (D.Del. 2009)("[t]he parties dispute whether . . . *Twombly*. . . applies to pleading affirmative defenses").

against the plaintiffs or other, e.g. counterclaims, cross claims, and third-party complaints.[17] Whether defendants themselves are exempt from *Twombly* and *Iqbal* has arisen most often with regard to affirmative defenses. A number of lower court decisions have held that defendants can plead affirmative defenses in conclusory, fact-free language.[18]

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[17]See *Nesselrotte v. Allegheny Energy, Inc.*, 2007 WL 3147038 at *2, *6 (W.D.Pa.)(applying *Twombly* to counterclaims of contract violation and breach of fiduciary duty); *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 404 (D.Del. 2009)(applying *Twombly* and *Iqbal* to counterclaim); *Carpenters Health and Welfare Fund of Philadelphia v. Kia Enterprises, Inc.*, 2009 WL 2152276 at *3 (E.D.Pa.)(applying *Iqbal* to counterclaim).

[18]*First Nat. Ins. Co. of America v. Camps Services, Ltd.*, 2009 WL 22861 at *2 (E.D.Mich.)("*Twombly* . . . is inapplicable to . . . Rule 8(c)[pleading of affirmative defenses]") The Answer to which *Twombly* was held inapplicable contained nine affirmative defenses stated in the following language:

1. Any damages suffered by Plaintiff were due solely to intervening cases.
2. Plaintiff failed to state a claim upon which relief can be granted.
3. Plaintiff failed to mitigate its damages, if any, which resulted from any alleged conduct by Camps.
4. Plaintiff's claims ar barred, in whole or in part, by their own actions.
5. Defendants have not breached any contractual relationship with Plaintiff.
6. Plaintiff's complaint must be dismissed because Plaintiff has incurred no damages as a result of any alleged contractual breach of contractual relationship with Camps.
7. Plaintiff's claimed damages, if any, were caused by the acts, errors, or omissions of other persons.
8. Plaintiff's claim may be barred, in whole or in part, by the statute of limitations.
9. Plaintiff's claims may be barred, in whole or in party,by their own actions.

2009 WL at 22861 at *1.

Romantine v. CH2M Hill Engineers, Inc., 2009 WL 3417469 (W.D.Pa.)("[t]his court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c),

Other decisions have refused to adopt such a double standard. In *United States v. Quadrini*, 2007 WL 4303213 (E.D.Mich.), for example, the defendants filed an amended answer listing several affirmative defenses. The district court refused to exempt defendants from the requirements in *Twombly*. *Twombly*

> cannot be a pleading standard that applies only to plaintiffs. It must also apply to defendants in pleading affirmative defenses, otherwise a court could not make a Rule 12(f) determination on whether an affirmative defense is adequately pleaded under Rules 8 and/or 9 and could not determine whether the affirmative defense would withstand a Rule 12(b)(6) challenge. Thus, a wholly conclusory affirmative defense is not sufficient. . . . [A] defendant must plead sufficient facts to demonstrate a plausible affirmative defense, or one that has a "reasonably founded hope" of success.

2007 WL 4303213 at *4. A substantial number of other courts have rejected defense arguments that they should be exempted from the pleading standard in *Twombly* and *Iqbal*.[19]

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or general defenses under Rule 8(b)"); see 2008 WL 3417469 at *1 ("Defendants in this case, not unlike defendants in most answers received by this court, set forth a list of affirmative defenses to Plaintiff's complaint. These consist of a recitation of a legal defense without reference to the facts upon which such defense is based. Plaintiff is requesting that the court strike all 17 of these affirmative defenses.")

[19]In *Shinew v. Wszola*, 2009 WL 1076279 (E.D.Mich.), the court also rejected a double standard for plaintiffs and defendants.

> The *Twombly* decision . . . dealt with a claim for relief under Fed.R.Civ.P. 8(a). The instant case raises the question whether the same pleading standards apply to the assertion of defensive matters under F.R.Civ.P. 8(b) and (c). There is a substantial body of authority for the proposition that they do. "The general rules of pleading that are applicable to the

This issue is of substantial importance. Defendants generally include in their answers a laundry list of affirmative defenses with few if any factual allegations. Defense counsel often plead those affirmative defenses without having engaged in a factual investigation to determine if they have a factual basis, postponing until later in the litigation any effort to determine whether the asserted affirmative defenses are plausible. If *Twombly* and *Iqbal* apply to the pleading of affirmative defenses, that would require a major change in the manner in which defense

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> statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c)." Wright and Miller, *Federal Practice and Procedure*: Civil 3rd Section 1274.

2009 WL 1076279 at *2-4.

Safeco Insurance Co. of America v. O'Hara Corporation, 2008 WL 2558015 (E.D.Mich.), held that

> *Twombly* . . . states a principle that applies also in the context of a defendant asserting an affirmative defense. . . . This court requires more than the assertion of any and all defenses that *may* apply. Such defenses fall within the ambit of *Twombly*

2008 WL 2558015 at *1.

See *Holtzman v. B/E Aerospace, Inc.*, 2008 WL 2225668 at *2 (S.D.Fla.)("th[e] . . . logic [of *Twombly* holds true for affirmative defenses"); *Home Management Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834 at *3 (S.D.Fla.)(applying *Twombly* to affirmative defenses); *In re Mission Bay Ski & Bike, Inc.*, 2009 WL 2913438 at *6 (Bkrtcy. N.D.Ill.)(applying *Twombly* and *Iqbal* to affirmative defenses); *Tracy v. NVR, Inc.*, 2009 WL 3153150 at *7 and n. 13 (W.D.N.Y.)(applying *Twombly* to affirmative defenses); *Aspex Eyewear, Inc. v. Clariti Eyewear Inc.*, 531 F. Supp. 2d 620, 621 (S.D.N.Y. 2008)(*Twombly* applies to counterclaims and affirmative defenses); *Greenheck Fan Corp. v. Loren Cook Co.*, 2008 Wl 4443805 at *1 (W.D.Wis.)(applying *Twombly* to affirmative defenses); *Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc.*, 2008 WL 4391396 at *1-*2 (W.D.Tex.)(applying *Twombly* to affirmative defense); *Home Management Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834 at *3 (S.D.Fla.).

counsel plead and litigate cases.

On the other hand, the district courts which apply *Twombly* and *Iqbal* to affirmative defenses have declined to do so where the defendants--without access to discovery--would be unable to identify the facts supporting a proffered defense. See *Voeks v. Wal-Mart Stores, Inc.*, 2008 WL 89434 at *6 (E.D.Wis.)("[i]t would not be reasonable to expect the defendant to have detailed information about mitigation or offset at this early stage of the litigation"); *Stoffels v. SBC Communications, Inc.*, 2008 WL 4391396 at *2 n. 3 (W.D.Tex.)(exempting defendant from obligation to plead facts as part of its affirmative defense because it "cannot provide this detailed information at the pleading stage"). This more indulgent treatment of defendants is precisely the opposite of the manner in which *Twombly* and *Iqbal* are generally applied to plaintiffs, whose complaints are routinely dismissed because the plaintiffs were unable to obtain the needed evidence without discovery.

THE NEED FOR PROMPT LEGISLATIVE ACTION

Congress should act promptly to overturn *Iqbal* and *Twombly*, and return to the clear, well-established and equitable system of notice pleading that for more than five decades has governed civil litigation in the federal courts.

First, the decisions in *Iqbal* and *Twombly* have created intolerable obstacles to plaintiffs seeking redress in the federal

courts. The district judge who applied the *Iqbal* standard in *Ocasio-Hernandez v. Fortuno-Burset*, candidly described the *Iqbal* standard as "draconianly harsh to say the least."[20]

Second, the emerging practices governing pleading have created a haphazard system in which the application of *Iqbal* and *Twombly* varies in ways entirely unrelated to the merits of a claim. Plaintiffs who at trial would have prevailed on the basis of discovery-based evidence are barred because they have too little evidence when their complaints are written. Plaintiffs with far weaker claims can proceed to discovery and trial if they chanced to have more of that evidence before filing suit. Plaintiffs whose claims were dismissed without discovery under *Iqbal* and *Twombly* have a second chance to engage in discovery and resuscitate their claims if they happen to have a another claim which was not dismissed; plaintiffs with only a single claim are denied that opportunity.

Third, different pleading standards apply depending on whether a particular claim is the subject of one of the official Forms. A plaintiff in a diversity case who has a simple negligence claim can use Form 11 and file an entirely conclusory claim. A civil rights plaintiff, who alleges that his or her constitutional rights were violated as a result of reckless indifference by city policy makers, must run the gauntlet of *Iqbal*

[20]639 F. Supp. 2d at 226 n. 4,

and *Twombly*. A plaintiff suing for damages under the Merchant Marine Act can use Form 14; a plaintiff suing for damages under Title VII or the Americans With Disabilities Act has no such safe harbor.

Fourth, significant delay in addressing this problem will result in an ever growing number of plaintiffs whose complaints were unfairly dismissed under *Iqbal* and *Twombly*. As currently drafted H.R. 4115 applies only to cases pending on or after its date of enactment, not to cases previously dismissed under *Iqbal*. In another year or two, however, Congress will be under increasing pressure to include those dismissed cases in this legislation. Should that day come, the very organizations which are now urging Congress to postpone action on H.R. 4115 will then be insisting that covering those dismissed cases would be unfair, pleading that in reliance on the continued inaction of Congress they destroyed records and permitted memories to fade, and that they are no longer in a position to defend themselves against the improperly dismissed claims.

Mr. JOHNSON. Thank you, sir.
And, Mr. Katsas, would you please begin your testimony?

TESTIMONY OF GREGORY G. KATSAS, FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. KATSAS. Chairman Johnson, Ranking Member Coble, Members of the Subcommittee, thank you for the opportunity to testify about whether Congress should overrule the Supreme Court's recent decisions in *Twombly* and *Iqbal*.

For many reasons, I believe that it should not. As explained in my written testimony, *Twombly* and *Iqbal* are consistent with decades of prior precedent. In essence, those cases hold that conclusory and implausible claims should not proceed to discovery.

That conclusion follows from settled principles of black letter law that courts, even on a motion to dismiss, are not bound to accept conclusory allegations or to draw unreasonable inferences from the specific allegations actually made, and also that discovery is not appropriate for fishing expeditions. Dozens, if not hundreds, of cases support those basic propositions.

Twombly and *Iqbal* also protect government officials from being subjected to baseless litigation and a threat of personal liability simply for doing their jobs.

Those cases reinforce the doctrine of qualified immunity which protects government officials from burdensome pretrial civil discovery described by the Supreme Court as peculiarly disruptive of effective government.

Such disruption is most apparently where, as in the *Iqbal* case itself, the litigation is conducted against high-ranking officials and involves conduct undertaken during a war or other national security emergency.

Imagine the paralyzing effect if any of the thousands of detainees currently held abroad by our military could seek damages and discovery from the secretary of defense merely by alleging in a complaint that the detention was motivated by religious animus in which the secretary was complicit.

That astounding result is exactly what *Iqbal* forecloses. Overruling that decision would, in the words of Second Circuit Judge Cabranes, provide a blueprint for terrorists and others to sue those government officials called upon to prosecute two ongoing wars abroad and to defend the Nation at home.

In less dramatic contexts as well, *Twombly* and *Iqbal* prevent—protect defendants from being unfairly subjected to the burdens of discovery in cases likely devoid of merit. That is no small consideration. Discovery is almost always expensive, and electronic discovery costs alone can easily run into the millions of dollars in complex cases.

Defendants cannot recover their discovery costs, even if the plaintiff's case turns out to be meritless. So if weak cases are routinely allowed to proceed to discovery, defendants would have no choice but to settle rather than incur the substantial and non-reimbursable discovery costs.

Twombly and *Iqbal* have not prevented the pursuit of meritorious claims. In fact, according to data compiled by the Civil Rules Committee of the Judicial Conference, data that encompasses hundreds of thousands of cases filed between January 2007 and

September 2009, *Twombly* and *Iqbal* have had at most a negligible impact on how the Federal courts adjudicate motions to dismiss.

Moreover, a 150-page memorandum prepared for the committee after exhaustively reviewing dozens of lower court opinions that discuss *Twombly* and *Iqbal* concluded that overall the case law does not appear to indicate a major change in the standards used to evaluate complaints.

Judge Mark Kravitz, who chairs the committee, likewise has concluded that courts are taking a nuanced view of *Twombly* and *Iqbal* and that neither decision has proven to be a blockbuster.

Individual decisions confirm that, in the words of the Seventh Circuit, *Twombly* and *Iqbal* preserve a liberal notice pleading regime.

In sum, conclusory and implausible claims have always been subject to dismissal on the pleadings. Congress should not enact what would be a wrenching departure from that fundamental and critically important principle.

Thank you.

[The prepared statement of Mr. Katsas follows:]

PREPARED STATEMENT OF GREGORY G. KATSAS

Statement of Gregory G. Katsas

Partner, Jones Day

Former Assistant Attorney General, Civil Division, Department of Justice

Before the Subcommittee on Courts and Competition Policy

House Judiciary Committee

Federal Pleading Standards Under *Twombly* and *Iqbal*

Presented on December 16, 2009

Chairman Johnson, Ranking Member Coble, Members of the Subcommittee: Thank you for the opportunity to testify about ongoing efforts to overrule the Supreme Court's recent decisions in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 244 (2007). For the reasons explained below, I believe that these decisions faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants. Moreover, overruling these decisions would threaten to upset pleading rules that have been well-settled for decades, and thereby open the floodgates for what lawyers call "fishing expeditions" – intrusive and expensive discovery into implausible and insubstantial claims. In the context of complex litigation such as antitrust, such discovery would impose massive costs on defendants who have engaged in no wrongdoing. Even worse, in the context of litigation against government officials sued in their individual capacity, such

discovery would vitiate an important component of the officials' qualified immunity, even for claims seeking to impose personal liability on Cabinet-level officials for actions undertaken to prosecute wars abroad or to respond to national-security emergencies at home. Such a result would be paralyzing if not deadly. For all of these reasons, I urge the Committee to reject any bill that would overrule *Twombly* and *Iqbal* by statute, including the proposed Open Access to Courts Act of 2009.

Let me begin with a few words about my background. Between 1992 and 2001, I practiced at the law firm of Jones Day, to which I returned in November 2009. During my time at Jones Day, I have focused primarily on complex civil litigation, in the trial courts and the courts of appeals. I have represented both plaintiffs and defendants, and I have been involved in many large antitrust and other matters. Between 2001 and 2009, I was privileged to hold many senior positions in the Civil Division of the Justice Department, which handles most of the federal government's civil litigation, and in the Office of the Associate Attorney General, which supervises five of the Department's seven litigating divisions, including the Civil Division. As Assistant Attorney General for the Civil Division, I supervised all of the Division's enforcement and defensive litigation – including litigation against federal officials sued in their individual capacities. I was personally involved in the defense of Attorney General John Ashcroft and FBI Director Robert Mueller in the *Iqbal* litigation, and in the defense of Attorney General Janet Reno and then-Deputy Attorney General Eric Holder in litigation brought against them for actions taken to seize Elian Gonzalez from his Miami relatives in order to remove him to Cuba. During my tenure as Assistant Attorney General, I also served as an *ex officio*

member of the Advisory Committee on the Federal Rules of Civil Procedure, which advises the Judicial Conference of the United States about possible amendments to those rules.

In my testimony below, I will first summarize the Supreme Court's decisions in *Twombly* and *Iqbal*, which permit the dismissal of conclusory or implausible claims on the pleadings. Next, I will explain why those decisions are correct and consistent with decades of prior law. I will also address the critically important interests served by *Twombly* and *Iqbal*, for civil litigants in general and for government officials in particular. I will also address the modest impact of *Twombly* and *Iqbal* in the lower courts to date. Finally, I will consider two pending legislative proposals to overrule *Twombly* and *Iqbal*, which seem to me both unwise and entirely unnecessary.

A. The *Twombly* and *Iqbal* Decisions

1. In *Twombly*, the Supreme Court addressed federal pleading standards in the context of antitrust conspiracy claims. The Court held that, under Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," a complaint must satisfy minimal requirements of specificity and plausibility. As to specificity, the Court explained that proper pleading "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. As to plausibility, the Court explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*; see also *id.* (complaint "'must contain something more * * * than * * * a statement of facts that merely creates a

suspicion [of] a legally cognizable right of action'" (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure Section 1216, at 235-36 (3d ed. 2004) (alterations by the Court in *Twombly*))).

The Court stressed the modest nature of both requirements. A plaintiff need not "'set out *in detail* the facts upon which he bases his claim,'" 550 U.S. at 555 n.3 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added in *Twombly*)), but need only make some minimal "'showing,' rather than a blanket assertion, of entitlement to relief," *id.* (quoting Fed. R. Civ. P. 8(a)(2)). Moreover, "[a]sking for *plausible* grounds to infer an agreement does not impose a *probability* requirement at the pleading stage; it simply calls for enough fact to raise a *reasonable expectation* that discovery will reveal evidence of illegal agreement." *Id.* at 556 (emphases added).

In *Twombly,* the Court also limited some broad language from its prior opinion in *Conley* v. *Gibson.* In *Conley*, the Court had stated that "a complaint should not be dismissed for failure to state a claim 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." 355 U.S. at 45-46 (emphasis added). The *Twombly* Court explained that "[t]his 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." 550 U.S. at 561. The Court rejected such a "focused and literal reading" of the "no set of facts" phrase, which would imply that even a "wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish

some 'set of [undisclosed] facts' to support recovery." *Id.* Instead, the Court explained that the "no set of facts" language was best "understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief." *Id.* at 562-63. And because *Conley's* "no set of facts" language had been "questioned, criticized, and explained away long enough," the *Twombly* Court concluded that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: *once a claim has been stated adequately*, it may be supported by any set of facts consistent with the allegations in the complaint." *Id.* at 563 (emphasis added).

The Court in *Twombly* applied these principles to order dismissal of the antitrust claims before it. The *Twombly* plaintiffs had alleged that the defendants "engaged in a 'contract, combination, or conspiracy' and agreed not to compete." See 550 U.S. at 564 n.9 (quoting complaint). That allegation merely restated the elements of Section 1 of the Sherman Act, and the Court accordingly held the allegation insufficient to state a claim. See *id.* at 564. Moreover, because parallel conduct is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," as it is with conspiracy, see *id.* at 554, the Court declined to infer an adequately-pleaded conspiracy from subsidiary allegations of parallel conduct: "In identifying facts that are suggestive enough to render a [Section] 1 conspiracy plausible, we have the benefit of prior rulings and considered views of leading commentators * * * that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of

conspiracy will not suffice." *Id.* at 556. Finally, the Court concluded that the defendants' alleged failure to compete did not render the conspiracy allegation sufficiently plausible to state a claim, given an "obvious alternative explanation" rooted in the defendants' prior experience as lawful monopolies in a regulated industry. See *id.* at 567-68.

The *Twombly* decision garnered support from judges across the jurisprudential spectrum. The case was decided by a seven-to-two margin. The majority opinion was written by Justice Souter and joined by Justice Breyer. Moreover, that opinion upheld the decision of then-District Judge Gerald Lynch, whom President Obama later nominated, and the Senate recently and overwhelmingly confirmed, to the Court of Appeals for the Second Circuit.

2. In *Iqbal*, the Supreme Court applied the same pleading principles in a constitutional tort action filed against former Attorney General John Ashcroft and sitting FBI Director Robert Mueller. The case arose from the detention of suspected terrorists in the wake of the devastating attacks of September 11, 2001. After those attacks, the FBI embarked on a vast investigation to identify the perpetrators and to prevent further attacks on our homeland. During its investigation, the FBI questioned more than 1000 individuals with suspected links to terrorism; the government detained some 762 of those individuals on immigration charges; and it held about 184 of those immigration detainees, deemed to be of "high interest" to the terrorism investigation, in restrictive conditions. See 129 S. Ct. at 1943. Javaid Iqbal, a citizen of Pakistan and convicted felon, was one of those "high interest" detainees. He brought suit against 34 present and former federal officials, ranging

from the prison guards with whom he had had day-to-day contact all the way up the chain-of-command to the Director of the FBI and the Attorney General. As relevant here, Iqbal alleged that Attorney General Ashcroft and Director Mueller selected him for restrictive detention solely on account of his race, religion, and national origin. In an opinion by Justice Kennedy, the Court held Iqbal's allegations to be insufficient to state a claim against those high-ranking officials.

The Court in *Iqbal* began by restating the modest specificity and plausibility requirements identified in *Twombly*. It reiterated that Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." See *id.* at 1949. Moreover, the Court explained that a claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged. *Ibid.* (emphasis added). It further explained that "[d]etermining whether a complaint states a plausible claim for relief" will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. The Court also confirmed that this approach does not require a reviewing court to assess the truth of specific factual allegations made in the complaint; rather, "[w]hen there are well-pleaded factual allegations, a court should simply assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ibid.*

Applying these principles, the Court ordered dismissal of the claims against Attorney General Ashcroft and Director Mueller. First, it identified allegations too "conclusory" to be "entitled to the assumption of truth": that Attorney General

Ashcroft and Director Mueller willfully subjected Iqbal to harsh conditions solely on account of his race, religion, or national origin, as a matter of official government policy; that Attorney General Ashcroft was a "principal architect" of this asserted invidious policy; and that Director Mueller was "instrumental" in adopting and executing it. See *id.* at 1951. The Court reasoned that "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements'" of the relevant claim. *Ibid.* Next, the Court considered whether the remaining, more specific factual allegations – to the effect that Attorney General Ashcroft and Director Mueller approved the detention of "thousands of Arab Muslim men" – plausibly suggested an entitlement to relief. The Court answered no: because "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group, * * * [i]t "should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce such a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 1951. Accordingly, the facts alleged did not plausibly support an inference of unconstitutional intentional discrimination. See *id.*

Finally, the Court addressed three other important points. First, it noted that *Twombly* rested on an interpretation and application of the Federal Rules of Civil Procedure, and thus could not arbitrarily be confined to antitrust cases. See *id.* at 1953. Second, it explained that the theoretical possibility of managed discovery does not justify lax pleading rules; indeed, the court stressed, its "rejection of the

careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity," which operates "to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ibid.* (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). Third, the Court explained that its holding in no way imposes a heightened pleading requirement under Rule 9 of the Federal Rules of Civil Procedure, which requires "fraud or mistake" to be pleaded "with particularity," but which provides that "intent" may be alleged "generally." As the Court explained, "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8." See 129 S. Ct. at 1954.

In dismissing the claims against Attorney General Ashcroft and Director Mueller, the Court did not prevent Iqbal from pursuing his claims against any other defendant in the case, as the court of appeals had permitted. See *id.* at 1952. Nor did the Court definitively foreclose Iqbal from proceeding even against Attorney General Ashcroft and Director Mueller; to the contrary, the case was remanded to the district court to permit Iqbal to seek leave to "amend his deficient complaint." *Id.* at 1954; see *Iqbal* v. *Hasty*, 574 F.3d 820 (2d Cir. 2009). Instead, the Court simply held that the complaint, as initially pleaded, was insufficient as to two of the 34 defendants in the case.

Four Justices dissented in *Iqbal*. However, the dissenters – who included two Justices from the *Twombly* majority, including the author of that opinion – did not

disavow the pleading standards discussed in *Twombly*, much less urge a literal application of *Conley*. Rather, the dissenters simply disagreed with the majority's *application* of the *Twombly* pleading standards to the complaint in *Iqbal*. See *id.* at 1955 ("The majority * * * *misapplies* the pleading standard under [*Twombly*] to conclude that the complaint fails to state a claim.") (emphasis added). Moreover, the dissenters further agreed that Rule 8 incorporates a "'plausibility standard,'" but disagreed with the majority's application of that standard to the case at hand. See *id.* at 1959-60. Thus, in *Iqbal* itself, no Justice disputed the general proposition that conclusory and implausible claims should be dismissed, and no Justice expressed support for the recently-interred "no set of facts" language from *Conley*.

B. *Twombly* and *Iqbal* Were Correctly Decided

Twombly and *Iqbal* properly construe the governing provisions of the Federal Rules of Civil Procedure, and they are consistent with decades of prior precedent.

The directly controlling provision at issue is Federal Rules of Civil Procedure Rule 8(a)(2), which requires the plaintiff to plead "a short and plain statement of the claim *showing* that the pleader is entitled to relief" (emphasis added). The text of Rule 8 thus strongly supports the Supreme Court's reasoning. As the Court twice explained, neither a barebones allegation that merely parrots the legal elements of a claim, nor a more detailed pleading in which the facts alleged do not plausibly support the claim, can fairly be described as "showing" that the pleader is entitled to relief. See *Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 557.

Twombly and *Iqbal* also are consistent with settled and longstanding Supreme Court precedent. In the context of claims for securities fraud, the Supreme

Court, speaking unanimously through Justice Breyer, has held that an unadorned allegation of loss causation is insufficient to state a claim, because such barebones pleading "would permit a plaintiff 'with a largely groundless claim to simply take up the time of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (alteration by the Court in *Dura*)). In the antitrust context, the Court, speaking this time through Justice Stevens, has held that, despite the "no set of facts" statement from *Conley*, "it is not proper * * * to assume that the [plaintiff] can prove facts that it has not alleged," *Associated General Contractors* v. *Carpenters*, 459 U.S. 519, 526 (1983), and that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *id.* at 528 n.17. In the civil rights context, the Court has confirmed that, on a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan* v. *Allain,* 478 U.S. 265, 286 (1986). And in the specific context of motive-based constitutional claims against federal officials sued in their individual capacity, the Court repeatedly has insisted on a "firm application of the Federal Rules of Civil Procedure," see, *e.g.*, *Crawford–El* v. *Britton*, 523 U.S. 574, 597 (1998); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), under which the district court "may insist that the plaintiff 'put forth specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal."

Crawford-El, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)).

Twombly and *Iqbal* are also consistent with decades of settled lower-court precedent. Indeed, within each of the federal courts of appeals, one could generate long string-cites for each of the critical propositions confirmed in those cases: that conclusory pleading is insufficient to state a claim; that courts need not accept implausible inferences from well-pleaded facts; that an unadorned allegation of conspiracy is insufficient to state an antitrust claim; that motive-based constitutional claims against government officials raise special concerns warranting a firm application of Rule 8; and that the "no set of facts" language from *Conley* cannot be literally construed apart from the detailed pleading actually at issue in *Conley* itself. Here is a partial, illustrative sample of that caselaw by circuit:

First Circuit: *Aponte-Torres* v. *University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'") (citation omitted); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003) (court is not bound to credit "'bald assertions'" or "'unsupportable conclusions'") (citation omitted); *DM Research* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) (despite *Conley*, "courts 'do not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow

from his description of what happened'") (quoting Wright & Miller, *Federal Practice and Procedure: Civil* § 1357).

Second Circuit: *Cantor Fitzgerald, Inc.* v. *Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'we give no credence to plaintiff's conclusory allegations'") (citation omitted); *Virtual Countries, Inc.* v. *Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("bald assertions" of harm are not sufficient); *George Haug Co.* v. *Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (*Conley* qualified by *Associated Gen. Contractors*); *Heart Disease Research Found.* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal").

Third Circuit: *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998) ("We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner"; thus, courts need not accept "'unsupported conclusions and unwarranted inferences'") (citation omitted); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss") (citation omitted).

Fourth Circuit: *Jordan* v. *Alternative Res. Corp.*, 458 F.3d 332, 345 (4th Cir. 2006) ("we have rejected reliance on * * * conclusory allegations" at the pleading stage); *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002) ("'allegations must be stated in terms that are neither vague nor conclusory'") (citation omitted); *Estate Constr. Co.* v. *Miller & Smith Holding Co.*, 14 F.3d 213, 220-21 (4th Cir. 1994) (same).

Fifth Circuit: *United States ex rel. Bain* v. *Georgia Gulf Corp.*, 386 F.3d 648, 654 (5th Cir. 2004) ("legal conclusions" are not sufficient); *Blackburn* v. *City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (despite *Conley*, "'conclusory allegations or legal conclusions masquerading as factual assertions will not suffice to prevent a motion to dismiss'") (citation omitted); *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("Conclusory allegations and unwarranted deductions of fact are not admitted as true * * * * ").

Sixth Circuit: *Columbia Natural Resources, Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences"); *Blackburn* v. *Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971) ("we are not bound by allegations that are clearly unsupported and unsupportable").

Seventh Circuit: *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) ("mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss."); *Kyle* v. *Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (*Conley*'s "no set of facts" language "'has never been taken literally'") (citation omitted); *Sneed* v. *Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998) (despite *Conley*, courts are "not obliged to accept as true conclusory statements of law or unsupported conclusions of fact").

Eighth Circuit: *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("we are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the

form of factual allegations'") (citation omitted); *Wiles* v. *Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002) (same).

Ninth Circuit: *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) ("no set of facts" language limited by *Associated General Contractors*, qualified immunity doctrine, and standing requirements; "'conclusory allegations without more are insufficient to defeat a motion to dismiss'") (citation omitted); *Woodrum* v. *Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989) ("conclusory allegations that [defendants] conspired do not support a claim"); *Jackson* v. *Nelson*, 405 F.2d 872, 873 (9th Cir. 1968) (per curiam) ("a series of broad conclusory statements unsupported, for the most part, by specific allegations of fact" are insufficient to resist dismissal for failure to state a claim).

Tenth Circuit: *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("Bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim."); *Cayman Exploration Corp.* v. *United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 & n.2 (10th Cir. 1989) (despite *Conley*, "courts may require some minimal and reasonable particularity in pleading before they allow an antitrust action to proceed") (citing *Associated General Contractors*).

Eleventh Circuit: *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."); *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (same).

District of Columbia Circuit: *Trudeau* v. *FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) ("'we are not bound to accept as true a legal conclusion couched as a factual

allegation,' or to 'accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint'") (citations omitted); *Browning* v. *Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("we accept neither 'inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations'") (citation omitted); *Kowal* v. *MCI Comm'ns Corp.*, 15 F.3d 1271, 1276 (D.C. Cir. 1994) (despite *Conley*, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." (citing *Papasan*, 478 U.S. at 286)).

Federal Circuit: *Samish Indian Nation* v. *United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (courts accept as true only "non-conclusory allegations of fact"); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice * * * * ").

An exhaustive discussion of this pre-*Twombly* caselaw is beyond the scope of my testimony, so let me briefly elaborate on only two lower-court decisions applying these principles in contexts strikingly similar to those presented in *Twombly* and *Iqbal* respectively.

Like *Twombly*, *Eastern Food Services* v. *Pontifical Catholic University*, 357 F.3d 1 (1st Cir. 2004), involved dismissal of an antitrust claim for lack of plausibility. The district court ordered dismissal on the ground that the alleged geographic market was, "as a matter of common experience," highly "improbable." See *id.* at 7. In affirming, the First Circuit agreed "it is not a plausible antitrust case, however

tempting may be the lure of treble damages and attorney's fees." *Id.* at 3. The court stressed the importance of dismissing weak cases prior to discovery: "[t]he time of judges and lawyers is a scarce resource; the sooner a hopeless claim is sent on its way, the more time is available for plausible cases." *Id.* at 7. The First Circuit acknowledged the "no set of facts" statement derived from *Conley*, but explained: "the cases also say that it is not enough merely to allege a violation in conclusory terms, that the complaint must make out the rudiments of a valid claim, and that discovery is not for fishing expeditions." See *id.* at 9. And in the case at hand, "nothing * * * suggests that discovery would be remotely productive, apart from the random (and insufficient) possibility that rummaging through [the defendant's] files would produce evidence of some wholly unknown violation." *Ibid.*

Like *Iqbal*, *Gonzalez* v. *Reno*, 325 F.3d 1228 (11th Cir. 2003), and *Dalrymple* v. *Reno*, 334 F.3d 991 (11th Cir. 2003), involved damages litigation against high-ranking government officials for conduct arising from a controversial and high-profile law-enforcement operation. Specifically, these cases arose from the raid in which agents of the former Immigration and Naturalization Service ("INS") seized Elian Gonzalez from his Miami relatives in order to remove the boy to Cuba. During that raid, INS agents sprayed tear gas inside and outside the Gonzalez residence, used a battering ram to break down the door to the residence, and pointed weapons at family members inside and protesters outside the residence. The *Gonzalez* plaintiffs included family members inside the house, and the *Dalrymple* plaintiffs consisted of supporters of the family protesting outside. Plaintiffs alleged, and the Eleventh Circuit assumed, that INS agents onsite violated the First and Fourth

Amendments in executing the seizure. The plaintiffs further alleged that former Attorney General Janet Reno, former Deputy Attorney General Eric Holder, and former INS Commissioner Doris Meissner should be held liable as supervisors for these alleged constitutional violations.

The Eleventh Circuit disagreed and affirmed the dismissal of claims against those three defendants. In so doing, it recognized that the qualified immunity of government officials includes "'an entitlement not to stand trial or face the other burdens of litigation,'" including specifically discovery. *Gonzalez*, 325 F.3d at 1233 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)); see also *Dalrymple*, 334 F.3d at 994. Accordingly, the court demanded "'specific, non-conclusory allegations of fact'" establishing that Reno, Holder, and Meissner were personally involved in the violation of clearly established constitutional rights. *Gonzalez*, 325 F.3d at 1235 (citation omitted); see also *Dalrymple*, 334 F.3d at 996. The *Gonzalez* plaintiffs had alleged that Reno, Holder, and Meissner "personally directed and caused a paramilitary raid" upon their residence; that they "agreed to, and approved of" the raid in violation of the Constitution; and that agents on the scene "acted under the personal direction of" Reno, Holder, and Meissner. See 325 F.3d at 1235. The court held these allegations insufficient to state a claim, because plaintiffs did not "allege any facts to suggest that the defendants did anything more than personally direct and cause the execution of valid search and arrest warrants" and, in particular, plaintiffs did not specifically allege that Attorney General Reno, Deputy Attorney General Holder, or INS Commissioner Meissner "directed the agents on the scene to spray the house with gas, break down the door with a battering ram, point guns at

the occupants, or damage property." *Id.* at 1235. Under similar reasoning, the court found similar allegations likewise insufficient to state a claim in *Dalrymple*. See 334 F.3d at 996-97.

Finally, prior to *Twombly* and *Iqbal*, prominent commentators had also recognized that the pleading requirements established by Rule 8, although generous to plaintiffs, are not entirely toothless. For example, Professors Wright and Miller had observed that "the pleading must contain something more * * * than * * * a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 236 (3d ed. 2004). See also *id.* § 1216, at 220-227 (complaint "must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial").

The *Twombly* and *Iqbal* decisions fit comfortably within this deeply-rooted body of precedent and represent a straightforward application of existing law.

C. *Twombly* and *Iqbal* Prevent Costly and Illegitimate Discovery "Fishing Expeditions"

Allowing conclusory and implausible claims to proceed to discovery would impose significant costs on the courts, on civil litigants, and on society at large. As the Supreme Court recognized in *Twombly*, "discovery accounts for as much as 90 percent of litigation costs when [it] is actively employed." 550 U.S. at 559 (citing Memrandum from Hon. Paul Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony Scirica, Chair, Standing Committee on Rules of Practice and Procedure (May 11, 1999). Imposing those costs may be justified only when the plaintiff has alleged a sufficiently specific and plausible claim. As Chief Judge Boudin has

explained, "the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings which may be costly and burdensome." *D.M. Research*, 170 F.3d at 56. Moreover, this principle applies despite the theoretical possibility of meritorious but implausible allegations:: "Occasionally, an implausible conclusory assertion may turn out to be true. * * * But the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *Id.* at 56.

Discovery burdens are particularly high in complex civil litigation. Courts have recognized this point most often in the context of antitrust and patent litigation. See, *e.g.*, *Car Carriers Inc.* v. *Ford Motor Company*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery where there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); *Asahi Glass Co.* v. *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("some threshold of plausibility must be crossed at the outset before a patent or antitrust case should be permitted to go into its inevitably costly and protracted discovery phase"); see also *Intel Corp v. Advanced Micro Devices*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) ("discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes") (citing Brookings Institute,

Justice For All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force at 6-7 (1989). Of course, the same observation could be made with respect to securities litigation, putative class actions, and many other kinds of cases.

Several considerations magnify the potential burdens of discovery. To begin with, the Federal Rules of Civil Procedure permit exceedingly broad discovery: in general, a party make take discovery, through depositions or document requests, of *any* nonprivileged information that is "relevant to any party's claim or defense" and is either admissible at trial or "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Moreover, in typical complex litigation, defendants are often large entities with vast amounts of potentially discoverable information. As a result, responding to even a relatively simple discovery request can be extremely time-consuming and expensive. Furthermore, the universe of potentially discoverable material has grown exponentially because of electronic data storage. At present, more than 90 percent of discoverable information is generated and stored electronically. See Association of Trial Lawyers of America, Ethics in the Era of Electronic Evidence (Oct. 1, 2005). Such storage has vastly increased the volume of information that is either itself discoverable, or that must be searched in order to find discoverable information. Large organizations receive, on average, some 250 to 300 million e-mail messages monthly, and they typically store information in terabytes, each of which represents the equivalent of 500 million typed pages. See Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure (Sept. 2005). Searching such systems for discoverable information is enormously expensive, as is producing

such information and reviewing it document-by-document for privilege. One recent study found an average of $3.5 million of e-discovery litigation costs for a typical lawsuit. See Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines 25 (2008). And even those out-of-pocket costs do not measure the further opportunity costs to a defendant of having its computer systems and key personnel bogged down for months if not years in unproductive discovery. As one court of appeals recently acknowledged, "the burdens and costs associated with electronic discovery, such as those seeking 'all email,' are by now well known." *Regan-Touhy* v. *Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008).

To be sure, not all federal cases involve huge discovery costs. But even in typical cases, discovery burdens are rarely insubstantial, and even relatively small discovery obligations may be quite burdensome on relatively small defendants such as individuals or small busineses. In any event, whatever the scope of discovery in any given case, there is simply no basis to subject defendants to it based on nothing more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," or allegations so implausible that they cannot even support a "reasonable inference that the defendant is liable for the misconduct allleged" (*Iqbal*, 129 S. Ct. at 1949). Doing so would burden defendants with significant litigation costs for no good reason, would flood the system with meritless or highly dubious litigation, and would and compel "cost-conscious defendants to settle even anemic cases" (*Twombly*, 550 U.S. at 559), just to avoid the considerable time and expense of protracted discovery. Such results would flout Rule 1 of the Federal Rules of Civil

Procedure, which provides that all of the civil rules – including Rule 8 – "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding..

D. *Twombly* and *Iqbal* Protect Government Officials From Burdensome and Paralyzing Exposure To Discovery

In its qualified-immunity caselaw, the Supreme Court has recognized that government officials may be chilled from the vigorous performance of their duties not only by the prospect of individual damages liability, but also by the "'the costs of trial'" and "'the burdens of broad-ranging discovery" in cases filed against them individually. See *Mitchell*, 472 U.S. at 526 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982)). Thus, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow*, 457 U.S. at 817); see also *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment) ("avoidance of disruptive discovery is one of the very purposes of the official immunity doctrine"). Accordingly, the Court has stressed "the importance of resolving immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam), including through "firm application of the Federal Rules of Civil Procedure," *Butz*, 438 U.S. at 507. Moreover, it has recognized that "high officials require greater protection than those with less complex discretionary responsibilities," *Harlow*, 457 U.S. at 807, particularly in the areas of national security and foreign policy, see *Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment) ("there is surely a national interest in enabling Cabinet officers with

responsibilities in this area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation").

The Court has invoked the requirement of specific and plausible pleading as the only possible means to enforce the immunity-from-discovery component of qualified immunity. Thus, where unconstitutional motive is an element of the claim, it has instructed district courts to "insist that the plaintiff 'put forth specific, non-conclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion to dismiss." *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)); see also *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) ("If a mere assertion that a former cabinet officer and two other officials 'acted to implement, approve, carry out, and otherwise facilitate' alleged unlawful policies were sufficient to state a claim, any suit under a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial." (citation omitted)).

The facts of *Iqbal* graphically illustrate these concerns. As explained above, the *Iqbal* plaintiffs sought to impose individual damages liability on the Attorney General and FBI Director for what Judge Cabranes aptly described as their "trying to cope with a national and international security emergency unprecedented in the history of the American Republic." *Iqbal* v. *Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (concurring opinion), *rev'd sub nom. Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). For his efforts, Attorney General Ashcroft has been sued in his individual capacity for the

detention of suspected terrorists under the immigration statutes and under the material witness statute, and for the removal of a suspected terrorist to a foreign country where he allegedly was mistreated. Similarly, in prosecuting the wars that ensued from the unprecedented emergency after September 11, 2001, former Secretary of Defense Donald Rumsfeld has been sued in his individual capacity for the domestic detention and interrogation of a United States citizen as an enemy combatant, for the brief detention of American citizens in Iraq, and for the detention of aliens as enemy combatants in Iraq and at Guantanamo Bay, Cuba. And former Director of Central Intelligence George Tenet was sued in his individual capacity for treatment of detainees in covert operations allegedly conducted abroad by the CIA. Absent the Supreme Court's ruling in *Iqbal*, such litigation would only multiply: as Judge Cabranes explained, had Iqbal succeeded in obtaining discovery from the former Attorney General and FBI Director based on his conclusory and implausible allegations that they selected him for harsh treatment on account of his race and religion, "little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery." *Ibid.*

The threat posed by baseless litigation targeting high-ranking government officials is neither new nor confined to the activities of any particular Administration. For example, Attorney General Edward Levi, who served with distinction during the Ford Administration, was faced upon leaving office with over 30 suits filed against him personally for actions undertaken as Attorney General.

Not a single one of them had merit, and no judgment against him was ever entered. Nonetheless, all of these cases "needed attention," and "[i]t took about eight more years before the last of them was cleaned up." Bennett Boskey, ed., Some Joys of Lawyering 114 (2007) (describing "this long aggravation so undeserved"). As explained above, the controversial removal of Elian Gonzalez to Cuba produced meritless and politically-driven damages litigation against Attorney General Janet Reno and her then-Deputy Eric Holder. And the Obama Administration continues wartime operations in Iraq and Afghanistan, and detention operations at Guantanamo Bay, thus making present Executive-Branch officials a likely target for yet further damages litigation.

In sum, top American officials charged with prosecuting two ongoing wars and defending our homeland from further catastrophic attacks in the past have faced – and in the future predictably will face – an onslaught of litigation for their decisions and the decisions of their subordinates. Whatever the merits of individual cases, it simply cannot be right that these officials would face exposure to discovery, if not trial and personal liability, every time an individual harmed by the wartime activities or homeland defense is willing to make an unadorned allegation that the Attorney General or the Secretary of Defense was personally involved in the specific action at issue, and that the action was undertaken with an unconstitutional motive. *Iqbal*'s rejection of that absurd consequence is supported by the text and precedent of Rule 8, by settled principles of qualified immunity, and by commonsense. By contrast, overruling *Iqbal* would afford an unfortunate "blueprint" for even further litigation against those most responsible for protecting our national security.

E. *Twombly* and *Iqbal* Do Not Prevent Litigation of Legitimate Claims

Given the consistency of *Twombly* and *Iqbal* with prior precedent, it would be surprising if those decisions had worked a sea-change in the adjudication of motions to dismiss. In fact, the best available data indicate that *Twombly* and *Iqbal* have had at most a negligible impact on such motions. The responsible authorities within the Judicial Conference of the United States – who are actively studying the impact of *Twombly* and *Iqbal* – have reached essentially the same conclusion. And the lower courts have understood *Twombly* and *Iqbal* to be largely consistent with prior law. *Twombly* and *Iqbal* thus protect government officials and other defendants from the burdens of vexatious litigation, without imposing any significant impediment on the ability of plaintiffs to pursue legitimate claims.

1. The Judicial Conference of the United States is the body charged by Congress with monitoring implementation of, and proposing amendments to, the Federal Rules of Civil Procedure. Under the Rules Enabling Act, the Judicial Conference must establish a Standing Committee on Rules of Practice and Procedure, and it may establish further advisory committees, to assist the Conference in discharging its statutory responsibilities. See 28 U.S.C. § 2073(a)(2) & (b). The Standing Committee is presently chaired by United States District Judge Lee Rosenthal. The Conference has established an Advisory Committee on the Federal Rules of Civil Procedure, which is presently chaired by United States District Judge Mark Kravitz. Under the Rules Enabling Act, Congress has required these Committees to make recommendations about "rules of practice, procedure, and evidence" in the federal courts. See *id.* More generally, Congress has also provided

that the Judicial Conference "shall make a comprehensive survey of business in the courts of the United States."

In carrying out these various statutory responsibilities, both the Standing Committee and the Advisory Committee on Civil Rules have been actively engaged in studying the impact of *Twombly* and *Iqbal* in the lower federal courts. Judge Rosenthal and Judge Kravitz recently explained that their respective Committees are "dedicated to obtaining the type of reliable empirical information needed to enact rules that will serve the American justice system and will not produce unintended harmful consequences." See Letter from Hon. Lee Rosenthal & Hon. Mark Kravitz to Hon. Patrick Leahy at 1-2 (Dec. 9, 2009). Moreover, Judge Rosenthal and Judge Kravitz explained that their Committees "are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act," in monitoring the impact of *Twombly* and *Iqbal*. *Id.* at 2. As part of that work, the Committees have assembled – and posted on the Rules Committees' website – "[c]harts and graphs setting out preliminary data drawn from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal*." *Id.* at 2. Moreover, the Committees commissioned a comprehensive, 150-page memorandum – also posted on the website – exhaustively "describing the case law since *Iqbal* was decided." *Id.* at 2. These materials constitute the best available data on the impact of *Twombly* and *Iqbal*.

The Judicial Conference data (available at www.uscourts.gov/rules) have been collected electronically from docket entries from each of the 94 United States district courts. To date, the data already encompass the massive number of cases

filed in federal court – at a rate of almost 20,000 cases per month – from January 2007 through September 2009. According to that data, *Twombly* and *Iqbal* have had virtually no impact on the filing or adjudication of motions to dismiss. For example, the data indicate that, in the four months before *Twombly* was decided, there were 71,711 new cases filed; 24,653 motions to dismiss filed; and 9433 motions to dismiss granted. Those figures show that, in the period just before *Twombly*, (1) motions to dismiss were filed in about 34 percent of all cases, and (2) courts granted about 38 percent of all such motions. By contrast, in the four months after *Iqbal* was decided, there were 84,398 new cases filed; 30,591 motions to dismiss filed; and 11,632 motions to dismiss granted. Those figures show that, in the period just after *Iqbal* (and the latest period for which comprehensive data is presently available), (1) motions to dismiss were filed in about 36 percent of all cases, and (2) courts granted about 38 percent of all such motions. Based on the best presently available data, the systemic impact of *Twombly* and *Iqbal* thus appear to be negligible.

The data also rebuts a contention often made by opponents of *Twombly* and *Iqbal*: that those cases have imposed distinctive and unfair burdens on civil-rights plaintiffs. According to the data for civil-rights employment cases, in the four months before *Twombly*, motions to dismiss were filed in 51 percent of all cases, granted in 20 percent of all cases, and denied in 8 percent of all cases. By contrast, for civil-rights employment cases in the four months after *Iqbal*, motions to dismiss were filed in 44 percent of all cases, granted in 16 percent of all cases, and denied in 6.6 percent of all cases. A similar pattern emerges from data for other kinds of civil-rights cases: In the four months before *Twombly*, motions to dismiss were filed in

73 percent of all cases, granted in 26 percent of all cases, and denied in 6.4 percent of all cases. By contrast, in the four months after *Iqbal*, motions to dismiss were filed in 64 percent of all cases, granted in 25 percent of all cases, and denied in 8.6 percent of all cases.

The memorandum prepared for the Civil Rules Committee further addresses the question of how the lower courts have been interpreting *Twombly* and *Iqbal*. See Application of Pleading Standards Post-*Ashcroft* v. *Iqbal* " at 1 (Nov. 25, 2009) (available at www.uscourts.gov/rules). That 150-page memorandum summarizes each appellate decision that has examined or discussed *Iqbal*, as well as legions of district-court opinions that also have done so. The memorandum cautions that no definitive conclusion is possible "[a]t this early stage in the development of the case law discussing and applying the *Iqbal* pleading standards." *Id.* at 2. But based on the data presently available, the memorandum nonetheless concludes: "Overall, the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints." *Id.*; see also *id.* at 2-3 ("Many courts have emphasized that notice pleading remains intact and continue to rely on pre-*Twombly* case law to support some of the propositions at the heart of *Twombly* and *Iqbal* – that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage."); *id.* at 3 ("Some of the post-*Iqbal* cases dismissing complaints note that the pleadings would not have survived before *Twombly* and *Iqbal*"); *id.* ("there are many cases supporting the proposition that pleading standards have not changed significantly"). The memorandum further explains that, "[w]hile it seems likely that *Twombly* and *Iqbal*

have resulted in screening out some claims that might have survived before those cases, it is much more difficult to determine whether *meritorious* claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those cases that have no plausible basis for proceeding." *Id.* at 3-4 (emphasis added).

Judge Kravitz, the chair of the Advisory Committee on Civil Rules, has reached similar conclusions. In a recent interview, he commented that judges are "'taking a fairly nuanced view of *Iqbal*,'" and that *Iqbal* has *not* proven to be a "'blockbuster that gets rid of any case that is filed.'" See National Law Journal, *Plaintiffs' Groups Mount Effort to Undo* Iqbal (Sept. 21, 2009) (quoting Judge Kravitz). Similarly, Committee staff have also concluded that *Iqbal* has had "little or no impact" so far in the adjudication of motions to dismiss. See Business Insurance, *Congress Eyes Pleading Standard* (Nov. 9, 2009) (quoting John Rabiej).

2. Consistent with the statistics and general observations of Judge Kravitz, the courts of appeals have understood *Twombly* and *Iqbal* to effect at most incremental changes in federal pleading standards. The Third Circuit, in refusing to dismiss a claim of disability-based discrimination "not as rich with detail as some might prefer," stressed that a complaint "'may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable,'" and that a discrimination plaintiff "is not required to establish the elements of a *prima facie* case but instead, need only put forth allegations that 'raise a reasonable expectation that discovery will reveal evidence of the necessary element.'" *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (quoting *Twombly*, 550 U.S. at 556). The

Seventh Circuit, in addressing post-*Iqbal* pleading standards in civil-rights cases, explained that Rule 8 still "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim,' rather than on technicalities that might keep plaintiffs out of court." *Brooks* v. *Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002)). The Eighth Circuit likewise has stressed that "Rule 8 does not * * * require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful." *Braden* v. *Wal-Mart Stores*, 2009 WL 4062105, *7 (8th Cir. Nov. 25, 2009).

District courts have recognized these same points. One district judge, in denying a motion to dismiss, characterized pleading standards under *Iqbal* as "minimal." *Xstrata Canada Corp.* v. *Advanced Recycling Technology*, 2009 WL 2163475, *3 (N.D.N.Y. July 20, 2009). Another, in denying a motion to dismiss, stated that "[n]otice pleading * * * remains the rule in federal courts," and thus "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible." *Chao* v. *Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass, 2009). A third reportedly stated, during oral argument in an employment discrimination case, that *Twombly* and *Iqbal* "don't operate as a kind of universal 'get out of jail free' card." See National Law Journal, Plaintiffs' Groups Mount Effort to Undo *Iqbal* (Sept. 21, 2009) (quoting Judge Milton Shadur).

Consistent with these principles, courts routinely have denied motions to dismiss in all manner of cases, including among others: (1) cases involving damages claims against high-ranking government officials for actions undertaken in the

wartime defense of this country, see, *e.g.*, *Al-Kidd* v. *Ashcroft*, 580 F.3d 949 (9th Cir. 2009); *Padilla* v. *Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); (2) cases involving motive-based constitutional claims, see, *e.g.*, *Hollis* v. *Mason*, 2009 WL 2365691 (E.D. Cal. July 31, 2009) (constitutional claim for retaliation); *Lange* v. *Miller*, 2009 WL 1841591 (D. Colo. June 25, 2009) (conspiracy to violate Fourth Amendment); *Oshop* v. *Tennessee Dep't of Children's Servs.*, 2009 WL 1651479 (M.D. Tenn. June 10, 2009) (bad-faith denial of substantive due process); (3) cases involving other kinds of civil-rights claims, see, *e.g.*, *Fowler*, 578 F.3d 203 (disability discrimination); *McGrath* v. *Dominican College of Blauvelt*, 2009 U.S. Dist. LEXIS 110122 (S.D.N.Y. Nov. 25, 2009) (sex discrimination); *Jacobeit* v. *Rich Twp. High School District 227*, 2009 U.S. Dist. LEXIS 110302 (N.D. Ill. Nov. 25, 2009) (race, age, and disability discrimination); *Kelley* v. *7-Eleven Inc.*, 2009 WL 3388379 (S.D. Cal. Oct. 20, 2009) (disability discrimination); *Montano-Perez* v. *Durrett Cheese Sales, Inc.*, 2009 WL 3295021 (M.D. Tenn. Oct. 13, 2009) (race discrimination); *Glover* v. *Catholic Charities, Inc.*, 2009 WL 3297251 (D. Md. Oct. 8, 2009) (sex discrimination); *Garth* v. *City of Chicago*, 2009 WL 3229627 (N.D. Ill. Oct. 2, 2009) (race discrimination); *Weston* v. *Optima Commc'ns Sys., Inc.*, 2009 WL 3200653 (S.D.N.Y. Oct. 7, 2009) (employment retaliation); *Gillman* v. *Inner City Broad. Corp.*, 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009) (hostile-work-environment discrimination); *Bell* v. *Turner Recreation Comm'n*, 2009 WL 2914057 (D. Kan. Sept. 8, 2009) (race discrimination and retaliation); *Peterec-Tolino* v. *Commercial Elec. Contractors, Inc.*, 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009) (disability and age discrimination); and (4) cases involving antitrust and other kinds of commercial claims, see, *e.g.*, *Executive Risk*

Indemnity, Inc. v. *Charleston Area Medical Center*, 2009 WL 2357114 (S.D. W.Va. July 30, 2009) (breach of contract); *Consumer Protection Corp.* v. *Neo-Tech News*, 2009 WL 2132694 (D. Ariz. July 16, 2009) (claim under Telephone Consumer Protection Act); *Intellectual Capital Partner* v. *Institutional Credit Partners LLC*, 2009 WL 1974392 (S.D.N.Y. July 8, 2009) (breach of contract); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 587 F. Supp. 2d 27 (D.D.C. 2008) (antitrust conspiracy); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 580 F. Supp. 2d 896 (N.D. Cal. 2008) (same).

Twombly and *Iqbal* have had at most a marginal impact on the adjudication of motions to dismiss in federal court, and have not prevented plaintiffs from pursuing potentially meritorious claims.

F. The Proposed Legislative Response Is Unnecessary And Unsound

This hearing addresses the proposed Open Access to Courts Act of 2009, which would overrule *Twombly* and *Iqbal* in significant respects. The proposed Notice Pleading Restoration Act of 2009 seeks to accomplish the same result through somewhat different language. Neither bill should be enacted.

1. The Open Access to Courts Act explicitly codifies *Conley*'s "no set of facts" language. Specifically, it provides that "[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." H.R. 4115, 111th Cong. § 2 (2009). It further provides that a complaint, in order to survive a motion to dismiss, need not be "plausible" on its face, or even sufficient to support a "reasonable

inference that the defendant is liable for the alleged misconduct." *Ibid.* Moreover, by its terms, the Act would apply "except as otherwise expressly provided by an Act of Congress enacted after the date of [its] enactment" or as expressly provided by post-enactment amendments to the Federal Rules of Civil Procedure. *Ibid.* The Act is problematic in several respects.

First, as explained above, *Twombly* and *Iqbal* were correctly decided and are consistent with a longstanding body of precedent in the Supreme Court and the courts of appeals. Moreover, those decisions protect government officials from the burdens of defending against baseless civil litigation while attempting to protect the country from terrorist attacks and other threats. More generally, they protect civil defendants against the burdens of expensive and protracted discovery unless the plaintiff can articulate some reason to reasonably believe that he or she might actually have a claim. And they have not significantly changed how the federal courts adjudicate motions to dismiss – or otherwise interfered with the pursuit of potentially meritorious claims. For all of those reasons, overruling *Twombly* and *Iqbal* would be harmful and unnecessary.

Second, whatever disagreement might exist about the reasoning or results in *Twombly* and *Iqbal*, the Act seems to codify a literal understanding of the "no set of facts" language from *Conley*. For decades, however, courts and commentators have recognized that a literal application of that language makes no sense – and cannot be the law. See, *e.g.*, *Kyle* v. *Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (*Conley*'s "no set of facts" language "'has never been taken literally'") (citation omitted); *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th

Cir. 1989) (*Conley* "unfortunately provided conflicting guideposts"); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.) (*Conley's* "no set of facts" language "has never been taken literally"); *Gen-Probe, Inc.* v. *Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (*Conley*'s "no set of facts" language is not to be "taken literally") (citation omitted); Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1028 n.44 (1989) (*Conley*'s "no set of facts" language, "if taken literally, would foolishly protect from challenge complaints alleging that only that defendant wronged plaintiff or owes plaintiff a certain sum"); Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998) ("Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."); Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1769 (1998) ("if courts hewed rigidly to the line laid down in *Conley* v. *Gibson*, pleading practice would probably have vanished."). As a broad coalition of seven Justices concluded in *Twombly*, *Conley*'s "no set of facts" language had "puzzle[ed]" the profession long enough." 550 U.S. at 563. It ought not be resurrected.

Third, the Act would expressly prevent courts from dismissing complaints based on a determination that the facts alleged "are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged." H.R. 4115, § 2. But as explained above, dozens of pre-*Twombly* cases establish that claims survive a motion to dismiss – and thus proceed to discovery – only where the facts alleged support a *reasonable* inference of liability. See, *e.g.*, *Eastern Food*

Services v. *Pontifical Catholic University*, 357 F.3d 1, 3 (1st Cir. 2004) (affirming dismissal where allegations did not state "a plausible antitrust case"); *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998) (courts need not accept "'unwarranted inferences'" from facts alleged) (citation omitted); *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("unwarranted deductions of fact are not admitted"); *Columbia Natural Resources, Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded * * * unwarranted factual inferences"); *Sneed* v. *Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998) (courts "not obliged to accept * * * unsupported conclusions of fact"); *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (courts may reject "'unwarranted inferences'") (citation omitted); *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("unwarranted factual deductions * * * will not prevent dismissal."); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("unwarranted inferences of fact do not suffice"). The Act would replace these familiar formulations of black-letter law with the following, jarring alternative: "Courts must accept implausible, unreasonable, and unwarranted inferences from the facts alleged." With all due respect, I cannot imagine any fair justification for such a rule, even on a motion to dismiss.

Fourth, by imposing the "no set of facts" standard "except as otherwise provided by an Act of Congress enacted *after* the date of the enactment of this section," H.R. 4115, § 2 (emphasis added), the Act would appear to override numerous pleading requirements previously established in important *earlier* federal statutes. Such statutes include the Private Securities Litigation Reform Act, 15 U.S.C.

§ 78u-4(b)(1) and (2), and the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2), which established heightened pleading rules in areas where Congress responded to particularly clear patterns of abusive and vexatious litigation. By eliminating any threshold screen for conclusory or implausible allegations, the Act would invite such litigation across-the-board, in these areas and others. Likewise, the Act appears to override various pleading requirements in the Federal Rules of Civil Procedure other than those set forth in Rule 8. Such requirements include those set forth in Rule 9(b), which for more than seven decades has provided that, in order to plead a claim involving fraud or mistake, "a party must state with particularity the circumstances constituting the fraud or mistake."

Finally, the Act cannot be defended as an attempt merely to restore the pleading standards that prevailed prior to *Twombly* and *Iqbal*. On the day before *Twombly* was decided, *Conley*'s "no set of facts" language was not applied literally. To the contrary, as discussed above, the lower courts repeatedly had held that conclusory and implausible allegations were insufficient to state a claim. And seven Justices in *Twombly* rejected the "no set of facts" language not only as unworkable, see 550 U.S. at 561 ("focused an literal reading" of *Conley* would imply that "a wholly conclusory statement of claim would survive a motion to dismiss"), but also as inconsistent with then-existing law, see *id.* at 562 ("a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard"). By imposing that very standard, and foreclosing dismissals where the facts alleged support at most an unreasonable inference of liability, the Act would effect a radical change in the standards that had applied even before

Twombly. Such legislation would impose great costs on the courts, on defendants, an on society at large, by permitting baseless and implausible claims to proceed to discovery wholesale.

2. The proposed Notice Pleading Restoration Act of 2009 would use different language in responding to *Twombly* and *Iqbal*. Specifically, that Act would provide that "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 in *Conley* v. *Gibson*." To the extent that Act were construed to codify a literal understanding of the specific "no set of facts" statement from *Conley*, it would effect the same radical change in current and pre-*Twombly* law addressed above. Under such an interpretation, *no* case would be subject to dismissal based on the conclusory nature of a complaint; courts reviewing motions to dismiss would be compelled to accept even unwarranted and unreasonable inferences from any facts specifically pled; decades of settled law would be overruled; and fishing expeditions would become permissible and therefore routine.

To be sure, the Notice Pleading Restoration Act is not entirely clear in codifying the "no set of facts" statement from *Conley*, but that lack of clarity itself raises concerns. If the Act does not codify the "no set of facts" statement, exactly what "standards set forth * * * in *Conley*" does it codify? And if the Act does not disapprove of *Twombly*'s rejection of a "focused and literal reading" of *Conley*'s "no set of facts" statement, see 550 U.S. at 561, exactly what aspects of *Twombly* and *Iqbal* does the Act intend to overrule? Could the courts still rely on *Dura Pharmaceuticals* (544 U.S. at 347) for the proposition that naked allegations of loss

causation are insufficient to plead a claim for securities fraud? Could they still rely on *Associated General Contractors* (459 U.S. at 528 n.17) for the proposition that a district court may insist on "some specificity in pleading" before allowing a complex case to proceed to discovery? Could they still rely on *Crawford-El* (523 U.S. at 598) for the proposition that a plaintiff must "put forth specific, non-conclusory factual allegations" to overcome a qualified-immunity defense at the pleading stage? How would the Act affect the enormous body of court-of-appeals caselaw holding – long before *Twombly* and *Iabal* – that conclusory and implausible allegations are insufficient to state a claim for relief? The answers to all of those questions remain a mystery.

In short, the Act would do nothing less than create a cloud of uncertainty over five decades of pleading jurisprudence, as developed between *Conley* in 1957 and *Twombly* in 2007. That is a recipe for a vast increase in litigation, which would impose huge costs, for no good reason, on the overburdened federal courts and on the parties to all civil litigation.

G. Any Response To *Twombly* and *Iqbal* Should Occur Through the Judicial Rulemaking Process

Any concerns about *Twombly* and *Iqbal* should be addressed through the judicial rulemaking process established by Congress. The Rules Enabling Act sets forth a procedure for amending the Federal Rules of Civil Procedure in an orderly and measured fashion by those with expert knowledge of the Rules. Under that procedure, proposed amendments to the rules must be subjected to notice and public comment; consideration by appropriate advisory committees comprised of judges and lawyers who are experts in the area; consideration by the Standing

Committee, the Judicial Conference, and Supreme Court itself; and transmission to Congress at the end of this deliberative process. See 28 U.S.C. §§ 2072-2074; U.S. Courts, *Federal Rulemaking*: *A Summary for the Bench and Bar*, *available at* http://www.uscourts.gov/rules/newrules3.html.

"The ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees – commonly known as 'court rulemaking' – has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934." Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 Geo. L.J. 887, 888 (1999). There are enormous institutional advantages to this process. As Judge Weinstein has explained, "[r]ulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress." *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905, 929 (1976), quoted in *Rules Enabling Act of 1985: Hearing before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 307-08 (1985); see also *id.* at 930 ("The effectiveness of the rulemaking mechanism under a delegation system depends heavily on the wisdom of Congress in exercising a considered restraint; absent this, the expertise of the various advisory committees will be almost valueless."); *Oversight and H.R. 4144, Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 4 (1983-1984) (statement of Judge Edward T. Gignoux) (noting that membership of the committees tasked with reviewing and

revising the Rules consists of "experienced judges, lawyers and law professors" with "expertise in procedural matters," and explaining that "[t]he advisory committees and their reporters are the heart of the rulemaking process" provided for under the Rules Enabling Act). By contrast, "legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems." Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem In Constitutional Revision*, 107 U. Pa. L. Rev. 1, 10 (1958), quoted in *Oversight and H.R. 4144 Rules Enabling Act: Hearings before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 300 (1983-1984).

As Congress itself has recognized, "[f]ederal national or supervisory rulemaking since 1934 has generally been a story of successful implementation of the Congressional plan for creating a uniform and consistent set of rules of practice and procedure. This rulemaking process has worked, in part, because Congress has granted the judicial branch a high degree of deference due to that branch's intimate working knowledge of problems of practice and procedure." H.R. Rep. No. 99-422, at 7 (1985). And that process is ideally suited for monitoring the situation in the lower courts in the wake of *Twombly* and *Iqbal* – and responding if need be. As discussed above, the Advisory Committee on Civil Rules is already actively monitoring the caselaw applying *Twombly* and *Iqbal*. That Committee – which is comprised of judges and practitioners who are intimately familiar with the Federal Rules of Civil Procedure and decisions in this area – occupies an ideal vantage point

to evaluate the situation and determine the extent of any necessary response. If the Advisory Committee should determine (contrary to initial data) that *Twombly* and *Iqbal* are having an adverse impact on civil litigation in the federal courts, it may craft an appropriate amendment through the time-honored judicial rulemaking process. There is no good reason for Congress to override that process.

* * * *

Thank you, Mr. Chairman. I look forward to answering the Subcommittee's questions.

Mr. JOHNSON. Thank you, Mr. Katsas.

I think it is appropriate now, because we are just—you just called for votes, is that right? Okay.

I think it is appropriate, so that Professor Davis would not feel abandoned and left out, that he have Mr. Rubin to do his statement along with you. And so I think it is good for us to break here, go vote. That is going to take, I would say, 40 minutes—30 to 40 minutes.

And so if you all could stay with us, we would greatly appreciate it. This hearing is now in recess.

[Recess.]

Mr. JOHNSON. Mr. Rubin?

TESTIMONY OF JONATHAN L. RUBIN, PATTON BOGGS, LLP, WASHINGTON, DC

Mr. RUBIN. Thank you, Mr. Chairman.

Chairman Johnson, Ranking Member Coble, Members of the Subcommittee, thank you for the opportunity to testify today about H.R. 4115, the "Open Access to Courts Act of 2009" and the Supreme Court's recent decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.

My name is Jonathan Rubin, and I am a practicing attorney here in Washington, D.C., where I practice antitrust law. I have written scholarly articles and given lectures about the interpretation and application of the *Twombly* standard in practice.

I appear today as an individual and not in any capacity representing my law firm or any of its clients, so the views I express are solely my own.

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires civil pleadings to contain a short and plain statement of the claims showing that the pleader is entitled to relief.

In the 1957 case of *Conley v. Gibson*, the Supreme Court interpreted these words to mean that civil cases should 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.

Under the *Conley* standard, courts were directed not to dismiss a claim unless it is implausible—that is, unless no set of facts could support it.

In *Twombly*, the court overruled the *Conley* no-set-of-facts test for what Rule 8 requires, imposing a new, stricter interpretation for what constitutes an adequate statement of a plaintiff's entitlement to seek relief.

Civil pleadings must now set forth a particular factual narrative supporting liability, and courts must disregard conclusory or factually neutral allegations not pleaded in a sufficiently suggestive factual context.

This new and nuanced standard does not affect all pleadings, but it does eliminate meritorious claims presented in pleadings that allege facts consistent with liability but unable to satisfy the stricter requirements of the new standard.

Significantly, the cases that cannot be pleaded to *Twombly* standards are generally those in which the plaintiff lacks essential information about the defendant's wrongful acts.

This is likely to occur in factually complex cases, in cases involving abstract economic or financial subject matter, and in cases such as a conspiracy or discrimination in which the culpable conduct is committed in private or under a cloak of secrecy.

These cases include antitrust conspiracy, fraudulent financial schemes, employment discrimination, civil rights violations and other substantive areas of the law in which private enforcement, in addition to compensating the immediate victim of actionable conduct, is particularly useful in remediating public wrongs, promoting sound public policy and deterring similar wrongdoing by others.

The principal undesirable effect of the *Twombly* pleading standard, therefore, is to impair the contribution of private enforcement to the regulation of business, governmental and other conduct affecting the public interest.

The *Twombly* standard disproportionately penalizes private civil cases most likely to generate positive public externality.

While the investigatory function of private enforcement can be restored by enacting legislation designed to reinstate the pre-*Twombly* civil pleading standard, such as the Open Access to Courts Act of 2009, capturing the pre-*Twombly* standard could be a challenging legislative task because it rests on a more fulsome jurisprudence beyond *Conley v. Gibson.*

In my view, Congress should decline to engage directly in writing or interpreting the Federal Rules of Civil Procedure. As an alternative, the erosion of the investigatory function of Federal civil litigation due to *Twombly* could be mitigated by a statutory option granted to a plaintiff in lieu of dismissal with prejudice on *Twombly* grounds to proceed to targeted discovery followed by the filing of an amended pleading and post-discovery re-review.

Such proceedings in aid of pleading would substantially alleviate the problem of placing a judicial remedy out of the reach of cases based on a well-founded suspicion of wrongdoing but where the allegations cannot be pleaded to the satisfaction of the *Twombly* plausibility standard.

At the same time, such an option would retain the advantages engendered by *Twombly*'s enhanced and more disciplined standards of pleading.

I thank the Committee for its attention and for the opportunity to share my views on this important subject. I have submitted a recent paper on *Twombly* and would ask that it be introduced as part of my written statement. And I look forward to answering your questions.

[The prepared statement of Mr. Rubin follows:]

PREPARED STATEMENT OF JONATHAN L. RUBIN

STATEMENT OF JONATHAN L. RUBIN

Hearing on: H.R. 4115, the "Open Access to Courts Act of 2009"

December 16, 2009

Mr. Chairman, Ranking Member, Members of the Committee:

Thank you for the opportunity to testify today regarding H.R. 4115, the "Open Access to Courts Act of 2009." My name is Jonathan Rubin, and I am a practicing lawyer here in Washington, D.C. I appear today as an individual—and not in any capacity representing my law firm or any of its clients. The views I express are solely my own.

As a practitioner in the area of antitrust litigation, I have observed the practical effects of the new pleading standard established by the Supreme Court's decision two terms ago in *Bell Atlantic v. Twombly*.[1] In this statement I will discuss what I believe the *Twombly* standard to be, what I believe to be its principal effects on federal civil litigation, and what I believe to be the best approach to a legislative remedy.

To be sure, the *Twombly* decision generates both benefits and costs. The advantages of requiring a plaintiff to meet the demands of the *Twombly* standard include significantly clarifying the pleadings and the legal theories presented and promoting the early weeding-out of non-meritorious claims. However, not all plaintiffs, including those with meritorious claims, can satisfy the standards of *Twombly* at the very inception of their case and without the benefit of discovery. The cost of the *Twombly* decision, therefore, as the proponents of the Open Access to Courts Act of 2009 recognize, is that it denies a judicial remedy to plaintiffs with meritorious claims unable to plead them in accordance with the stricter *Twombly* standards. Exacerbating

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

matters is that the new standard disproportionately penalizes cases most likely to generate positive externalities from private enforcement, such as the correction of a market imperfection, the remediation of an unsafe environmental condition, the shuttering of a fraudulent business operation, in short, any relief that promotes sound public policy and deters undesirable conduct. By limiting the authority of courts to oversee investigatory discovery in cases based only on a well-founded suspicion and known facts consistent with liability, the principal effect of the *Twombly* standard is to impair private enforcement and its contribution to the regulation of business and other conduct affecting the public interest.

Restoring the investigatory function of the federal courts in connection with private enforcement after *Twombly* will require an amendment to the Federal Rules of Civil Procedure or the enactment of correcting legislation. I believe that granting plaintiffs a statutory option in lieu of dismissal with prejudice on *Twombly* grounds to pursue targeted discovery followed by amendment of the pleading in question would alleviate the most significant undesirable effect of the *Twombly* plausibility standard on open access to the courts while retaining its benefits.

1. A Brief Summary of the *Twombly* "Plausibility" Standard

Rule 8 of the Federal Rules of Civil Procedure requires civil pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In the 1957 case of *Conley v. Gibson*,[2] the Supreme Court interpreted these words to mean that civil cases should 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." This standard is an "implausibility" standard, because it directs courts not to dismiss a claim unless it is implausible, that is, unless no

[2] 355 U.S. 41 (1957).

set of facts could be adduced to support it. This standard has been an important benchmark for notice pleading in the federal courts for half a century.

Twombly overruled this test for what Rule 8 requires to be pleaded. Although it reaffirmed *Conley* in all other respects, the *Twombly* Court repudiated the "no set of facts" formulation and in its place articulated a new, stricter standard for what constitutes adequate notice of the plaintiff's claim.

The new standard has two prongs. The first, or substantive, prong requires pleadings to state a particular set of facts that provide the basis for the lawsuit. The Court called this the "Rule 8 entitlement requirement."

The second prong is evidentiary in nature and requires the plaintiff to allege evidence that would be probative, if proven, of the set of facts entitling plaintiff to relief. As the Court confirmed in *Ashcroft v. Iqbal*,[3] this part of the standard requires courts to disregard "conclusory allegations," assume the remaining factual allegations to be true, and then disregard ambiguous or neutral circumstantial evidence not pleaded in a sufficiently suggestive factual context.

Pleadings that satisfy both the substantive and evidentiary prongs of the *Twombly* standard allege a "plausible" claim to relief. One way of summarizing the plausibility standard is to say that pleadings must completely express the grounds for the plaintiff's entitlement to seek relief and a description of evidence sufficient to prove it.

This plausibility standard clearly requires judges to examine pleadings for requirements that did not exist under *Conley*. Judges must now determine whether the plaintiff has set forth *a particular set of facts* rather than *a consistent set of facts* showing an entitlement to relief, and they must also determine whether the facts alleged are sufficiently suggestive or probative.

[3] 129 S. Ct. 1937 (2009).

Whereas, before *Twombly* courts were advised not to dismiss complaints unless they were *im*plausible, courts after *Twombly* must dismiss complaints unless they are plausible, that is, satisfy the significant new pleading requirements established by the Court.

2. Three Observations about the New Pleading Standard

A. The plausibility standard affects a subset of cases that vindicate important public policies but where the plaintiff lacks essential information

The cases that are denied a judicial remedy by virtue of the *Twombly* standard are those in which the plaintiff does not know the full particulars of the defendants' wrongful acts. Although capable of alleging facts consistent with an entitlement to a claim for relief, the claimant is unable to allege the basis of his entitlement with the particularity called for by the Rule 8 entitlement requirement. This is likely to occur in factually complex cases, in cases involving abstract economic or financial subject matter and in cases such as a conspiracy or discrimination, in which the culpable conduct is committed in private or under a cloak of secrecy.

This category of cases includes antitrust conspiracies, fraudulent financial schemes, employment discrimination, civil rights, and other substantive areas of the law in which private enforcement, in addition to compensating the immediate victim of actionable conduct, is particularly useful in remediating public wrongs, promoting sound public policy and deterring similar wrongdoing by others. As a consequence, the *Twombly* standard bars a class of potentially meritorious claims from the courthouse in precisely those circumstances in which judicial intervention may be most necessary and beneficial.

B. The plausibility standard gives judges less, not more, discretion to dismiss, or not to dismiss, complaints

Under the standards prevailing before *Twombly*, judges read pleadings and evaluated them based on their experience and common sense for whether the defendant had been provided with reasonable notice of the basis of the plaintiff's entitlement to seek relief against him. A material gap occurring in the grounds alleged as the basis of the plaintiff's entitlement for relief, or the lack of specific allegations of facts probative of those grounds, was accommodated through a process of common-sense "gap filling" by judges.

Under the *Twombly* plausibility standard, by contrast, courts must apply a new, complex and nuanced standard to evaluate the adequacy of pleaded claims. The requirement for a specific narrative supporting liability and the disqualification of "conclusory" or "factually neutral" allegations repeal common-sense judicial "gap filling." The *Twombly* standard removes from the discretion of the court the right to retain what may be a meritorious claim pleaded with facts consistent with liability but unable to satisfy the stricter requirements of *Twombly*.

C. A legislative remedy should mitigate the costs of *Twombly* while retaining its benefits

The Court implicitly embraced in *Twombly* the view that closing the courthouse doors on some meritorious claims is less harmful than some non-meritorious claims surviving a motion to dismiss and proceeding to discovery. But, if the rationale behind the *Twombly* standard is to reduce the burden of non-meritorious claims, a less restrictive means of doing so would still afford the plaintiff an opportunity to conduct discovery commensurate to the needs of his pleading and the ultimate ends of justice, and neither exclude an important category of civil litigation nor expose defendants to the burdens of unbounded discovery. This alternative,

however, was expressly rejected by the *Twombly* Court, which takes a dim view of the efficacy of judicial case management.

The investigatory capacity of the federal courts in connection with private enforcement can be restored by enacting legislation designed to reinstate the civil pleading standard as it prevailed before *Twombly*—such as the Open Access to Courts Act of 2009. But, because the pre-*Twombly* standard rests on a more fulsome jurisprudence beyond *Conley v. Gibson*, doing so is a challenging legislative task. In my view, Congress should decline to engage directly in writing or interpreting the Federal Rules of Civil Procedure.

The principal undesirable effect of *Twombly*, the erosion of the investigatory function of federal civil litigation, could be mitigated by a statutory option granted to a plaintiff in lieu of dismissal with prejudice on *Twombly* grounds to proceed to targeted discovery followed by the filing of an amended pleading and post-discovery re-review. The opportunity for such "proceedings in aid of pleading" would substantially alleviate the problem of placing a judicial remedy out of the reach of cases based on a well-founded suspicion of wrongdoing but where the allegations cannot be pleaded to the satisfaction of the *Twombly* plausibility standard. At the same time, such an option would retain the advantages engendered by *Twombly*'s enhanced and more disciplined standards of pleading.

I thank the committee for its attention and for the opportunity to share my views on this important subject. I have submitted my recent paper entitled "*Twombly* and its Children" and would ask that it be introduced as part of my written statement.

I look forward to answering your questions.

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ATTACHMENT

Twombly and its Children

Jonathan L. Rubin[1]

I. Introduction

Two recent US Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*,[2] decided May 21, 2007, and *Ashcroft v. Iqbal*,[3] decided May 18, 2009, strengthened the Court's interpretation of the pleading requirements in Rule 8(a)(2) for stating a claim in antitrust and other federal civil cases.

Rule 8(a)(2) requires a complaint to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court's new standard for the showing required by this provision is more granular and more demanding than the preceding permissive and deferential "no set of facts" formulation of *Conley v. Gibson*, which the *Twombly* Court repudiated.

Plaintiffs now bear a greater obligation at the inception of their lawsuit to allege facts reasonably confirmable by discoverable evidence that are sufficient, if proven, to establish the grounds for the plaintiffs' claimed right to relief. This new pleading obligation, sometimes referred to as a "plausibility standard," requires the pleader to give at least some particulars about *how* the defendants are bound to the plaintiffs through the latter's entitlement to seek judicial relief.

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[2] 550 U.S. 544 (2007).

[3] 556 U.S. ____, 129 S.Ct. 1937 (2009).

For the half-century immediately preceding *Twombly*, *Conley v. Gibson* stood as an important expression of notice pleading. The standard was permissive by design. Civil complaints had merely to allege facts consistent with an entitlement to relief. Gaps in certain particulars or unpleaded material information unknown to the plaintiff were presumed to emerge out of discovery, barring which the case would be disposed of on summary judgment. Provided that some set of facts could support the relief sought, including those residing solely within the imagination of the presiding judge, a complaint setting forth conclusory allegations that mentioned all the necessary elements of the claim was not subject to dismissal.

With the retirement of the "no set of facts" formulation, however, courts can require plaintiffs to provide at least one set of facts in a chain that connects a prohibited act by a defendant to a remediable injury suffered by a plaintiff. A complaint that alleges *some* basis for entitlement to relief no longer will suffice; a plaintiff must plead *the* basis for the entitlement. The Court refers to this as the "Rule 8 entitlement requirement."

The Rule 8 entitlement requirement constitutes the first prong of the *Twombly* standard. It tests the sufficiency of the evidence alleged in the complaint. The necessary quantum and nature of the allegations depend on the circumstances. The substantive prong of the new standard is likely to be dispositive in difficult or complex cases, where judicial gap-filling has been most frequently relied upon.

The second prong of the new standard addresses the probative value of the facts being offered. With the "no set of facts" standard withdrawn, the courts are free to scrutinize the inferential weight of the facts alleged. "Conclusory" or "factually neutral" allegations standing alone are insufficient under the *Twombly* standard for the purposes of alleging grounds for entitlement.

The rest of the article proceeds as follows. Section II begins with the "substantive" prong of the *Twombly* standard, the Rule 8 entitlement requirement. This is followed by a discussion of the evidentiary prong and the categories of evidence identified by the Court. The section closes with precisely how the complaint in *Twombly* failed to satisfy the new pleading standard. It is apparent

almost immediately that the term "plausibility standard" is a counterintuitive term of art. Whatever its flaw, the complaint in *Twombly* did not lack "plausibility," as that word is ordinarily understood.

Section III summarizes the Court's further discussion of the standard in *Erickson v. Pardus*[4] and *Ashcroft v. Iqbal*.[5] Section IV visits with some of "*Twombly*'s children." A selection of circuit court opinions are discussed in the first part of the section, followed by a review of some district court rulings that illustrate successful post-*Twombly* Section 1 cases alleging only circumstantial and economic evidence.

The discussion abstracts from whether *Twombly* represents sound judicial policy or ought to be repealed by legislative enactment, as currently being proposed. The Supreme Court's penchant for formulaic reasoning and cost-benefit analysis, its recalibration of pleading standards in a fashion that disproportionately burdens claimants and favors defendants, and the Court's apparent disdain for the capacity of the federal judiciary to manage discovery and its own dockets and to control abuse of the system by litigants all may be regrettable developments, but, short of an act of Congress (or the Supreme Court overturning itself), the *Twombly* standard will remain a fixture of federal practice for the foreseeable future.

II. Deconstructing *Twombly*

The Court in *Twombly* decisively repudiated "the accepted rule [of the Court's 1957 decision in *Conley v. Gibson*] that a complaint should not be dismissed for failure to state a claim 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."[6] Its mission was to "address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,"[7] and take a "fresh look at

[4] 551 U.S. 89, 127 S.Ct. 2197 (2007).

[5] 556 U.S. ____, 129 S.Ct. 1937 (2009).

[6] Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[7] 550 U.S. at 553.

[the] adequacy of pleading when a claim rests on parallel conduct."[8] In *Ashcroft v. Iqbal*,[9] the Court confirmed that *Twombly*, as an "interpretation and application of Rule 8," "expounded the pleading standard for 'all civil actions.'"[10]

The *Conley* standard delegated the responsibility to the presiding court to bring its experience and sound judgment to bear on whether the allegations of a complaint provided the defendant with sufficient notice of the claim against him. By contrast, the standard articulated by the *Twombly* Court is far less forgiving. *Twombly*'s repudiation of the largely discretionary, and, by construction, standard-less regime of *Conley* has both substantive and evidentiary implications.

Substantively, the new standard requires that the facts adequately show entitlement to seek relief. Procedurally, the new standard ranks certain *kinds* of facts according to the probative value of the evidence they describe.

A. The Substantive Prong: The Rule 8 Entitlement Requirement

The *Twombly* Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,' [under Rule 8] requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do."[11] Under the Rule 8 entitlement requirement a complaint requires "[f]actual

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[8] Id. at 561, n. 7.

[9] 556 U.S. ____, 129 S.Ct. 1937 (2009). The Court had already expanded the *Twombly* analysis to Section 2 of the Sherman Act, *see* Pacific Bell Telephone Co. v LinkLine Comm'ns, Inc., 556 U.S.--, 129 S.Ct. 1109, 1123 (2009) ('[i]t is for the District Court on remand to consider whether the amended complaint states a claim [for predatory pricing] upon which relief may be granted in light of the new pleading standard we articulated in *Twombly*").

[10] 129 S.Ct. at 1953 quoting Rule 1.

[11] 550 U.S. at 555 (citation omitted, alteration in original).

allegations ... enough to raise a right to relief above the speculative level,"[12] and "'something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.'"[13] The "threshold requirement [is] that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[14] Excluding a "recitation of a cause of action's elements," what other factual material is needed to show entitlement?

The nature of the allegations called for is suggested by the reasoning in *Dura Pharmaceuticals, Inc. v. Broudo*,[15] which the Court cited as "alluding to" the Rule 8 entitlement requirement. *Dura* was a securities fraud case in which the plaintiffs alleged they were injured when they paid an inflated price for the issuer's shares compared to what the price would have been in the absence of the issuer's misrepresentations. The Supreme Court held that the purchase of shares whose price fluctuated for a variety of reasons did not state a cause of injury.

Other than the elements of the cause of action, the nature of the factual matter that may be needed is suggested by Justice Stevens, writing for the dissent in *Twombly*, explaining why dismissing the complaint in *Dura* was correct:

> Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to 'provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation.'[16]

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[12] 550 U.S. at 555.

[13] *Id.*

[14] *Id.* at 557 (citation omitted, second alteration in original).

[15] 544 U.S. 336 (2005).

[16] *Twombly*, 550 U.S. at 588 (Stevens, J., dissenting).

As the *Twombly* majority put it, "something beyond the mere possibility of loss causation must be alleged."[17] So, the complaint was not dismissed because it failed to allege the essential element that the plaintiffs' loss was caused by the fraud, but because it failed to allege *how* the plaintiffs' loss was caused by the fraud.

The Court's description of *Dura* as the source of "the practical significance of the Rule 8 entitlement requirement" suggests that showing an entitlement to relief requires a plaintiff to plead the factual thread that ties a defendant's bad act to the plaintiff's remediable loss. The required facts are not the elements of the claim, but the supporting material between them. If the elements are akin to the bricks from which a claim is built, the facts called for by the *Twombly* standard are the mortar that holds them in place.

Conceiving of the required allegations as the factual thread of loss causation resolves the apparent contradiction between the generality of Form 9, a sample complaint for automobile negligence, on the one hand, and the *Twombly* Court's standards for the antitrust conspiracy claim before it on the other. The *Twombly* dissenters argued that Form 9 provided a sufficient showing in the case of an automobile crash, and suggested that nothing more specific should be required in an antitrust case.

The difference between the two cases lies in the common understanding of automobile accidents. A defendant is hard pressed to demand that the details of precisely *how* his negligence caused harm to the plaintiff be pleaded in the complaint on the grounds that he otherwise would lack notice of the plaintiff's entitlement to seek relief. The link between negligent driving and injuries to person or property is common knowledge, so there would be little point in an automobile negligence complaint to require detailed allegations about the plaintiff's injuries and precisely how they occurred. The words "collided with" or "struck" are suggestive enough by themselves to give the defendant ample notice of the grounds of the plaintiff's entitlement to sue.

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[17] *Id.* at 557-58.

By contrast, a claim based on an antitrust conspiracy depends on a complex set of facts removed from common experience. A plaintiff's entitlement to seek relief depends on the particular facts of the case, and the grounds may be far from evident where only generalities or conclusions are alleged. Thus, the substantive prong of the *Twombly* standard is flexible, because it demands additional facts only where some enhanced showing is necessary, *i.e.*, where the chain of loss causation does not find adequate expression in the pleading, so that the defendant can claim a legitimate lack of notice of the grounds for the plaintiff's entitlement to seek relief.

B. The Evidentiary Prong of the *Twombly* Standard

The *Twombly* standard also requires that the grounds for relief be alleged through facts that possess minimal inferential qualities. The *Conley* "no set of facts" language was tolerant of allegations of evidence with little or no inferential value. The *Twombly* Court's differentiation in its new standard between conclusions and indeterminate evidence on the one hand and ordinary direct and circumstantial evidence on the other is inconsistent with the long-standing rule in *Conley*. To make way for the new standard, therefore, the Court declared that the "no set of facts" language "ha[d] earned its retirement."[18] The Court observed that the language "ha[d] been questioned, criticized, and explained away long enough," and "[wa]s best forgotten as an incomplete, negative gloss on an accepted pleading standard ...."[19]

The obligation to show the specific grounds of the plaintiff's entitlement to relief (calling in some cases for additional factual material to be pleaded) must be met through allegations of fact that are suggestive and discoverable. Suggestive allegations cross the "boundary ... between the factually neutral and the

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[18] *Id.*

[19] 550 U.S. at 563.

factually suggestive ..." to enter "the realm of plausible liability."[20] Entitlement must be alleged with "enough facts to state a claim to relief that is plausible on its face."[21] And the discoverability component, which concerns the prospect of a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence,"[22] hinges entitlement to relief on a "reasonable expectation that discovery will reveal relevant evidence."[23]

The Court likened the claim in *Twombly* to a claim alleging parallel pricing, which by itself neither proves an unlawful Section 1 agreement[24] nor is sufficient to overcome a defendant's motion for summary judgment.[25] It is settled precedent that to survive a

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[20] 550 U.S. at 557 n. 5. The word "plausible" appears fifteen times in the opinion as a noun, adverb, and adjective, excluding quoted instances.

[21] *Id.* at 570.

[22] 550 U.S. at 559, citing *Dura*, 544 U.S. at 347 (quoting Blue Chip Stamps v Manor Drug Stores, 421 U.S. 723, 741 (1975)) (alteration in *Dura*).

[23] *Id.* at 556.

[24] Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537, 540 (1954) ("To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement ...[but the Court] ... has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense"), citing Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), United States v. Masonite Corp. 316 U.S. 265 (1942), United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), American Tobacco Co. v. United States, 328 U.S. 781, and United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[25] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("conduct as consistent with permissible

defense motion for summary judgment in a parallel pricing case (and, perforce, to make out a *prima facie* case at trial), the plaintiff must present additional evidence beyond mere parallel conduct. The additional evidence creates a factual issue on the issue of agreement where it tends to contradict tacit, lawful oligopoly conduct. In the parlance of summary proceedings, ambiguous evidence of parallel conduct must be accompanied by "plus factors," evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently."[26]

The Court did not look to the plus factor paradigm to address what it framed as the antecedent issue of whether the pleaded allegations of parallel conduct in *Twombly* were sufficient to state a Section 1 claim. Instead, in a now familiar pattern, the Court first modified the interpretation of Rule 8 and then applied the modified standard to the complaint before it. The plus factor paradigm, in any case, would have been inadequate for the Court's purposes of articulating the new pleading standards. The plus factor approach treats all evidentiary factors more or less equally.[27] The Court's *Twombly* analysis, by contrast, distinguishes between four categories of evidence of agreement: i) direct evidence of the agreement itself, ii) unambiguous circumstantial evidence of an agreement, iii) ambiguous evidence of an agreement, and, iv) "labels and conclusions" and formulaic recitations of the elements of a claim.

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competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

[26] *Id.* quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

[27] *See* William E. Kovacic, "The identification and proof of horizontal agreements under the antitrust laws," 38 *Antitrust Bull.* 5, 35 (Spring, 1993) ("...[C]ourts rarely attempt to rank plus factors according to their probative value or to specify the minimum critical mass of plus factors that must be established to sustain an inference that the observed market behavior resulted from concerted conduct rather than from 'consciously parallel' choices.").

With respect to allegations of conspiracy under Section 1, the *Twombly* standard requires plausible direct evidence of agreement, circumstantial evidence "plausibly suggesting" agreement,[28] or parallel conduct "placed in a context that raises a suggestion of a preceding agreement."[29] "A blanket assertion of entitlement to relief" and "labels and conclusions" are not entitled to credit as well-pleaded facts. This flexible standard is summarized in the following table:

Nature of the Allegation	Type of Inference Required	Applicable Standard
1. Direct evidence of agreement	No inference	Plausible
2. Communications and other unambiguous circumstantial evidence of agreement	Ordinary inference from circumstantial evidence	Plausibly suggestive
3. Parallel conduct and other ambiguous circumstantial evidence of agreement	Inference from economic data or market behavior	Plausibly suggestive when placed in context
4. Labels and conclusions	No inference warranted	Not creditable

[28] 550 U.S. at 557.

[29] *Id.*

The most frequent forms of category 1, or direct evidence of agreement in private Section 1 claims are guilty pleas in criminal prosecutions and the admissions recited in deferred prosecution agreements.

Category 2, unambiguous circumstantial evidence, is indirect evidence, such as evidence of secret communications or clandestine meetings of the conspirators or of documents that appear to further a common scheme or purpose, which is probative of agreement and also tends to exclude the hypothesis of non-cooperation, justifying an inference of agreement.

By contrast, category 3 evidence of parallel conduct or other economic data may be ambiguous on the issue of agreement, that is, as consistent with agreement as it is with oligopolistic interdependence.[30]

In singling out this category 3 evidence for special treatment, the *Twombly* decision serves as the vehicle for the incorporation into antitrust of the principle that economic evidence of this kind often requires interpretation and factual context to show that it rejects the hypothesis of Nash non-cooperative equilibrium before an inference of agreement is justified. Standing apart from a sufficiently suggestive context, such evidence is what the *Twombly* court labeled "factually neutral" on the issue of agreement. The flexible plausibility standard, therefore, accommodates the practical distinction between allegations of non-economic, circumstantial evidence of agreement and economic evidence of a market outcome probative of agreement only if inconsistent with non-cooperation. Finally, allegations that are conclusions and labels, in category 4, do not adequately show grounds for entitlement to relief.

The Court in footnote 4 of *Twombly* cited three factual scenarios that might provide plausibly suggestive context for a

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[30] *See In re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (2002) ("The evidence upon which a plaintiff will rely will usually be ... of two types—economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete.")

claim based on parallel conduct. The first is "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties."[31] The second is "'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.'"[32] Finally, "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason"[33] would also provide a suitable context. These allegations supporting a plausible inference of conspiracy are likely to supplant plus factors as the focus of Section 1 claims based on circumstantial evidence for the simple reason that what must be alleged also must be proven.

To summarize, the evidentiary prong of *Twombly* Court's more granular pleading standard governs the character of the evidence being described as grounds for entitlement for relief. For complaints alleging direct and unambiguous circumstantial evidence of facts that posses a reasonable hope of being discovered, the existing pleading standard remains largely unaffected. But, in complaints describing ambiguous circumstantial evidence and stating conclusory assertions of liability, that is, evidence in categories 3 and 4, grounds for entitlement to relief are not necessarily sufficiently stated absent a further analysis consistent with an approach that requires category 3 evidence to be pleaded in a suggestive factual context before it may be given inferential weight and that gives no weight to conclusions or labels.

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[31] 550 U.S. at 557, n. 4 quoting 6 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1425, at 167-185 (2d ed.2003).

[32] *Id.* quoting Blechman, "Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws," 24 N.Y.L. S. L.Rev. 881, 899 (1979).

[33] *Id.* quoting Brief for Respondent (Twombly) at 37.

C. The Dismissal in *Twombly*

In *Twombly*, the allegations in the plaintiffs' amended complaint did not adequately establish plaintiff's entitlement to relief. The Court held that an allegation of parallel conduct in a Section 1 case, without more, does not suffice to state a claim. "[S]uch a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[34]

The plaintiff in *Twombly* was a putative class consisting of the customers of the regional Bell telephone monopolies. The plaintiffs alleged that the phone companies had agreed among themselves to refrain from expanding into one another's service regions after passage of the Telecommunications Act of 1996. As a result of the alleged agreement, the companies could maintain an anticompetitive market allocation and exclude potentially competitive, third-party entrants. Proof of these facts would in all likelihood establish a *per se* violation of Section 1. Moreover, such a conspiracy among the nation's incumbent telephone monopolists seems hardly implausible.

The collusive agreement was expressly, if generally, alleged, as was the defendants' non-rivalarous marketplace conduct. The plaintiff also averred that the defendants' marketplace conduct would have been against' their individual economic self-interests were they not, in fact, engaged in a collusive arrangement.

But, the amended complaint in *Twombly* was ideal for illustrating the principle that oligopolistic interdependence does not support an inference of agreement. Both before the 1996 deregulatory telecommunications legislation and afterward, the regional telephone companies each occupied in their own regions optimal, jointly profit-maximizing monopoly positions from which none of the companies would have had an economic incentive to deviate, and for the maintenance of which no prohibited agreement would have been necessary. To allege that the defendants had acted against their own self-interest after passage of the Act in circumstances in which it appeared that the defendants had simply chosen to continue in a position upon which it was difficult or

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[34] Id. at 556.

impossible to improve did not supply sufficient grounds to infer that the defendants had entered into an unlawful agreement.

The *Twombly* Court viewed the plaintiffs' allegations that the defendants engaged in a "contract, combination or conspiracy" and "agreed not to compete with one another" were merely legal conclusions resting on the prior allegations.[35] "The nub of the complaint," the Court observed, "is the [defendants'] parallel behavior."[36] But, applying the standard for category 3 to those allegations, the Court concluded that the complaint had not "nudged [the] claims across the line from conceivable to plausible." This was so even though the plaintiffs had alleged a widely recognized plus factor, that the defendants' conduct was contrary to their economic self-interests. Had the alleged plus factor been instead category 2 circumstantial evidence of agreement, plausible grounds for relief would certainly have been stated. But, plaintiffs apparently knew of no category 2 evidence. The Court's implicit conclusion was that the complaint did not allege facts that were inconsistent with a Nash non-cooperative equilibrium in the US telephone market, including the alleged plus factor. Indeed, the defendants' *ex ante* occupancy of allocated monopolies fails to suggest that refraining from competition was necessarily against their individual economic self interests. Under the circumstances, the Court deemed plaintiffs' assertion in this regard as conclusory and not entitled to the presumption of truth, placing it in category 4.

III. *Erickson* and *Iqbal*

A. *Erickson v. Pardus*

The Court used *Erickson v. Pardus*,[37] decided two weeks after *Twombly*, to reaffirm the undisturbed portion of *Conley* and its continued fidelity to the concept of notice pleading where ordinary language conveys the entitlement to seek relief. The case involved a suit by a prisoner seeking to have prison officials reinstate

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[35] 550 U.S. at 565.

[36] *Id.* at 566.

[37] 551 U.S. 89, 127 S.Ct. 2197 (2007).

necessary medical treatment that the prisoner claimed had been discontinued in violation of his Eighth Amendment rights. A magistrate judge recommended that the complaint be dismissed, deeming the allegations too "conclusory" to state a claim for relief, and the district judge adopted the recommendation. The Tenth Circuit Court of Appeals affirmed.

The Supreme Court reversed. "It was error," the Court said, "for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program."[38] In the final analysis, the district court may be proven to have been correct to dismiss the complaint, the Court observed, but "that is not the issue here." Treating the facts alleged as true, the prisoner's entitlement to relief was clear from the face of his complaint: he would be injured by the unconstitutional denial of necessary medical care. The claimant's theory of loss causation is obvious. Consequently, the pleaded facts showed the grounds claimed for his entitlement to relief, which is all that Rule 8(a) requires.

Quoting from its *Twombly* decision, which in turn quoted from *Conley*, the Court's *per curiam* order reiterated that a pleading need only "'... give the defendant fair notice of what ... the claim is and the grounds upon which it rests.'" As with the example of the automobile accident, the holding in *Erikson* rests on the clear notice of loss causation expressed by allegations that necessary medical attention was withheld, which in ordinary and common experience is likely to cause injury. The Court's citation to the part of the *Conley* standard that survived the repudiation of the neighboring "no set of facts" formulation is also a strong declaration of fidelity to traditional notions of notice pleading where the entitlement to seek relief is clear from the face of the complaint.

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[38] *Id.* at 2200.

B. *Ashcroft v. Iqbal*

In *Ashcroft v. Iqbal*, in which the plaintiff's entitlement was somewhat less clear, the Court offered the following guidance for implementing the *Twombly* standard:

> Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. ... [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[39]

Iqbal involved a civil claim against US government officials for prisoner abuse and discrimination which alleged that the Attorney General and FBI Director personally "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[40] The Court held that "[u]nder *Twombly*'s construction of Rule 8," these allegations "are conclusory and not entitled to be assumed true."[41] As to the remaining allegations describing the conduct of the officials inflicting the discrimination, while arguably consistent with an intent of the two named defendants to discriminate, the Court concluded that the plaintiff needed "to allege more by way of

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[39] 129 S.Ct. 1950.

[40] 129 S.Ct. at 1951.

[41] *Id.*

factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"[42]

Under *Iqbal*, courts ruling on Rule 12(b)(6) motions to dismiss claims based on circumstantial grounds for relief should identify conclusory allegations and then test whether the remaining allegations describe sufficiently suggestive facts to state grounds for relief. Facts that are equally as consistent with an entitlement to relief as not, such as parallel conduct, state grounds for relief only if pleaded in a sufficiently suggestive factual context.

IV. *Twombly*'s Children

Twombly and *Iqbal* have already been cited in thousands of reported cases, including opinions of the various Circuit Courts of Appeal reviewing the new standard as applied by trial courts.[43] A discussion of some of these circuit court opinions appears next, followed by a discussion of some significant district court rulings.

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[42] *Id.* at 1952 quoting *Twombly*, 550 U.S. at 570 (alteration in original).

[43] *See, e.g.*, *In re* New Motor Vehicles Canadian Export Antitrust Litigation, 533 F.3d 1 (1st Cir. 2008); *In re* Elevator Antitrust Litigation, 502 F.3d 47 (2nd Cir. 2007); Phillips v. County of Allegheny, 515 F.3d 224 (3rd Cir. 2008); Total Benefits Planning Agency, Inc., v. Anthem Blue Cross and Blue Shield, 552 F.3d 430 (6th Cir. 2008); Nicsand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007); Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663 (7th Cir. 2007); *In re* Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, 491 F.3d 638 (7th Cir. 2007); Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590 (7th Cir. 2008); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008); Rick-Mik Enterprises, Inc. v Equilon Enterprises, LLC, 532 F.3d 963 (9th Cir. 2008); Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174 (10th Cir. 2007); Alvarado v. KOB-TV, LLC, 493 F.3d 1210 (10th Cir. 2007); and McZeal v. Sprint Nextel Corp., 501 F.3d 1354 (Fed. Cir. 2007).

A. Some Circuit Court Opinions

In an early test of the new standard, the Second Circuit in *In re Elevator Antitrust Litigation*[44] affirmed dismissal of an antitrust conspiracy and monopolization case brought in the Southern District of New York against the world's leading elevator manufacturers. The plaintiff's suit followed investigations by the European Commission and the Italian Antitrust Authority, and reports of admitted wrongdoing by some of the defendants' European employees. Moreover, subsequent to the complaint, the Commission levied substantial fines against the defendants for various antitrust violations.

In affirming dismissal of the claim, the Second Circuit held,

> Plaintiffs provide an insufficient factual basis for their assertions of a worldwide conspiracy affecting a global market for elevators and maintenance services. Allegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct and conduct here—is merely to suggest (in defendants' words) that "if it happened there, it could have happened here."[45]

The court also noted the absence of allegations of "global marketing or fungible products," and "no indication that participants monitored prices in other markets," or "allegations of the actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct."[46] Quoting *Twombly*, the panel concluded that "[w]ithout an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory

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[44] 502 F.3d 47 (2nd Cir. 2007).

[45] 502 F.3d at 52.

[46] *Id.*

allegations do not 'nudge[their] claims across the line from conceivable to plausible.'"[47]

With respect to the "similarities in contractual language, pricing, and equipment design," and other parallel conduct that the plaintiff alleged, the court held that under *Twombly*

> these allegations do not constitute "plausible grounds to infer an agreement" because, while that conduct is "consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[48]

In *Phillips v. County of Allegheny*,[49] the Third Circuit asked the parties at oral argument to brief the court on the impact of the *Twombly* decision generally and on their appeal of the dismissal of a wrongful death suit against a 911 call center and its employees. In its opinion, the court recognized that "'Plausibility' is related to the requirement of a Rule 8 'showing:'"[50]

> The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: "stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element.[51]

The court concluded that Rule 8 mandates "some showing sufficient to justify moving the case beyond the pleading to the

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[47] *Id.* (internal citations omitted) (Second alteration in original).

[48] *Id.* quoting *Twombly*, 127 S.Ct. at 1964.

[49] 515 F.3d 224 (3rd Cir. 2008).

[50] *Id.* at 234.

[51] *Id.* (internal citations omitted).

next stage of litigation," and held that the complaint in the case before it "clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of [the plaintiff's] claims." "Context matters in notice pleading," the court observed, managing to absorb the essential *Twombly* standard yet deciding in favor of the plaintiff.

Both of these cases, although reaching different conclusions, are well-behaved children of *Twombly*. Both cases hew closely to the Court's language, both properly emphasize the Rule 8 entitlement requirement and both seem to understand the aim of the new standard of showing entitlement though the factual connections between defendant and plaintiff.

These cases stand in contrast to at least two opinions from the Sixth Circuit, which appears to wield the *Twombly* standard somewhat recklessly. In *Total Benefits Planning Agency, Inc., v. Anthem Blue Cross and Blue Shield*,[52] the court listed ten prior occasions in which it applied what it called the "heightened pleading standard of *Twombly*." The Supreme Court, of course, foreswore any heightened pleading standard, observing that such a modification would require formally amending the Civil Rules, which is beyond the Court's authority. In affirming dismissal of the rule of reason claim in *Total Benefits*, the court stated that "[g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*."

This flawed conception of the *Twombly* standard apparently led the Sixth Circuit to condemn the *Total Benefits* plaintiffs, because they

> only offer bare allegations without any reference to the "who, what, where, when, how or why." Similarly, the vague allegations in the instant case "do not supply facts adequate to show illegality" as required by *Twombly*.

[52] 552 F.3d 430 (6th Cir. 2008).

This view of *Twombly* is mistaken because it implies that the *only* route to pleading a conspiracy is to know what plaintiffs rarely know, that is, "who, what, where, when and how" (most plaintiffs know the "why"). Although the court recognized that an antitrust plaintiff in a conspiracy case must "provide factual allegations plausibly suggesting, not merely consistent with, such a claim," the court's disposition of the case establishes a rule that other routes to adequate pleading, such as economic evidence, pleaded in a suggestive context probative of agreement, would still fail to satisfy a demand for the "who, what, where, when and how," even though such contextual pleading clearly is contemplated as sufficient by the *Twombly* Court.

In another Sixth Circuit antitrust case, *Nicsand, Inc. v. 3M Co.*,[53] the court seemed to overwork the *Twombly* standard to affirm dismissal of an antitrust case based not on any lack of factual allegations, but because the court appeared to be hostile to the antitrust theory being advanced. Nicsand and 3M shared the market for do-it-yourself automotive sandpaper for several years. Starting in 1997, however, Nicsand began to lose most of its market to 3M, which had begun to offer up-front rebates and multi-year discounts to the principal auto parts retail outlets. The court stated that "a 'naked assertion' of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury."[54]

The difficulty with the court's holding that the plaintiff's allegations offered merely "naked assertions" of antitrust injury is that the factual thread of loss causation was described in detail in the complaint, and painstakingly recounted in the dissent, which remarked that "[i]t simply cannot be that a business must know everything about its competitors before bringing suit in an antitrust case. After all, a business that knows everything about its competitors is likely to dominate them, rather than fall prey to them, as NicSand did here."[55]

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[53] 507 F.3d 442 (6th Cir. 2007).

[54] 504 F.3d at 451.

[55] *Id.* at 463.

A similar transgression was committed in *Kendall v. Visa U.S.A.*,[56] in which the Ninth Circuit inexplicably remarked that *Twombly* "specifically abrogated the usual 'notice pleading' rule,...." for purposes of pleading antitrust cases.[57] The *Kendall* panel further stated that the *Twombly* Court

> also suggested that to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a "specific time, place, or person involved in the alleged conspiracies" to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin."[58]

This statement of the *Twombly* standard suffers from the same flaw as the Sixth Circuit's preference for "who, what, where, when and how." More specific pleading of direct evidence and detailed circumstantial evidence is but one route to allegations that are suggestive enough to plead a conspiracy under the new standard. As the district court rulings discussed below demonstrate, circumstantial economic evidence of parallel conduct, provided it is pleaded in a sufficiently suggestive context, can satisfy the standard without any allegation of a "specific time place or person" or "who, what, where, when and how."

The result in *Kendall* may nevertheless have been correct in spite of its clumsy application of the *Twombly* standard. The plaintiffs alleged a price fixing conspiracy among certain large banks and credit card consortiums, but, even after depositions, the were unable to plead any of the particulars about the agreement. The court probably was justified at that stage in expecting some factual allegation beyond parallel pricing as the alleged proof of agreement. But the proper grounds for dismissal under *Twombly* was not the absence of direct evidence of agreement—which every court would like but no conspiracy plaintiff possesses—but the absence of allegations suggestive enough of agreement.

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[56] 518 F.3d 1042 (9th Cir. 2008).

[57] 518 F.3d at 1047 n. 5.

[58] 518 F.3d at 1047.

Some dicta in two circuit court opinions also deserve mention. In *Ridge at Red Hawk, LLC v. Schneider*,[59] the Tenth Circuit reflected on the *Twombly* standard in anticipation of issues it thought the district court might face on remand. The court said

> the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.[60]

Finally, in *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*,[61] Judge Wood for a panel of the Seventh Circuit wrote,

> Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.

B. District Court Rulings on Parallel Pricing

In most cases, contextual pleading will be the only viable method for pleading a Section 1 conspiracy under the *Twombly* standard. Numerous post-*Twombly* district court rulings on motions to dismiss bear out the viability of conspiracy claims based on circumstantial economic evidence when they are pleaded in a sufficiently suggestive context. In the period immediately following the *Twombly* decision, at least thirteen Section 1 claims based on parallel conduct were permitted to proceed to discovery in federal court.[62]

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[59] 493 F.3d 1174 (10th Cir. 2007).

[60] *Id.* at 1177.

[61] 499 F.3d 663 (7th Cir. 2007).

[62] See In re: Chocolate Confectionary Antitrust Litigation, 2009 WL 560601 (M.D.Pa.); Home Quarters Real Estate Group v.

These cases vary by the degree to which contextual allegations are important, but they all fail to allege any direct evidence of agreement, or even much about the "who, what, where or when" of the alleged agreement, beyond perhaps the approximate year or month and opportune locations for the parties to interact.

For example, in *City of Moundridge v. Exxon Mobil Corp.*,[63] eighteen municipalities sued ExxonMobil, BP America and ConocoPhillips for agreeing to raise prices in the U.S. natural gas market where no natural gas shortage existed. A motion to dismiss was denied. The defendants moved to reconsider in light of *Twombly*, arguing that "the complaint does not provide factual allegations to suggest an actual agreement among the defendants."[64]

In explaining why the motion should be denied, Judge Roberts observed that the plaintiffs did not "rely on only bare allegations of parallel behavior, or assume that there is a conspiracy because there is an 'absence of any meaningful competition,'" as in *Twombly*. The court found that

> [t]he complaint alleges facts providing circumstantial evidence of a price fixing agreement.

Michigan Data Exchange, 2009 WL 276796 (E.D. Mich.); U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, ADCO, 2008 WL 409143 (S.D.N.Y.); Babyage.Com, Inc. v. Toys-R-Us, 558 F.Supp.2d 575 (E.D. Pa. 2008); In re: Pressure Sensitive Labelstock Antitrust Litigation, 566 F.Supp.2d 363 (M.D. Pa. 2008); Heartland Payment Systems, Inc. v. Micros Systems, Inc., 2008 WL 4510260 (D.N.J.); In re: Southeastern Milk Antitrust Litigation, 555 F.Supp.2d 934 (E.D.Tenn. 2008); Fox v. Piche, 2008 WL 4334696 (N.D.Cal.); In re: Western States Wholesale Natural Gas Antitrust Litigation, 2008 WL 486607 (D.Nev.); In re: OSB Antitrust Litigation, 2007 WL 2253419 (E.D.Pa.); Hyland v. Homeservices of America, Inc., 2007 WL 2407233 (W.D.Ky.).

[63] 250 F.R.D. 1 (D.D.C., 2008).

[64] *Id.* at 4.

> It alleges that the natural gas total resource base had not decreased, that the prices had risen and never fallen below an agreed-upon price, that the defendant had reported high profits, and that Hurricanes Katrina and Rita should not have affected the market as the defendants claimed and they were only a pretextual reason to justify withholding market supply to create an artificial shortage. It also identifies the years and location where the agreement was reached and the defendants who participated.[65]

Citing *Iqbal*, the court noted that *Twombly* had implemented a "flexible 'plausibility standard'" and noted that "[e]conomic interests and motivations can be relevant to evaluate plausibility, and price increases can be the result of an independent business decision. But, a complaint need not be dismissed where it does not 'exclude the possibility of independent business action.'"[66] Pointing out that "*Twombly* requires allegations to be 'placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action,'"[67] the court concluded that

> [t]he plaintiffs provided some circumstantial facts, including historical supply and consumption levels, market prices, profit levels, and the use of the industry reports, to support an inference that the defendants engaged in not merely parallel conduct, but rather agreed to contribute false information regarding gas supply levels to industry reports, withhold supply, and engage in price-fixing.[68]

"[W]hile the claim may rest ultimately on a thin factual reed," the court said, "the plaintiffs have alleged supporting circumstantial facts and placed their claims 'in a context that raises a suggestion

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[65] *Id.* at 4 (citations omitted).

[66] *Id.* at 5 (citation omitted).

[67] *Id.* (citing *Swierkiewicz* and *Erickson*).

[68] *Id.*

of a preceding agreement,' 'nudg[ing] their claims across the line from conceivable to plausible[.]'"[69]

A similar result was reached by Judge Friedman in *In re: Rail Freight Fuel Surcharge Antitrust Litigation*,[70] involving eighteen class actions against the four major U.S. railroads comprising ninety percent of the rail freight market. About eighty percent of all rail shipments are made under private transportation contracts. The plaintiffs alleged that the defendants "determined that the most efficient means to increase their profits was through the imposition of an across-the-board artificially high and uniform fuel surcharge, rather than attempt to renegotiate all of these separate contracts."[71]

The "barrier to this plan, according to plaintiffs, was that the great majority of rail freight transportation contracts already included rate escalation provisions that weighted a variety of cost factors, including fuel...."[72] The plaintiffs alleged a conspiracy among the defendants to remove fuel from the "All Inclusive Index" published by the Association of American Railroads "so that they could apply a separate 'fuel surcharge' as a percentage of the total cost of freight transportation.'"[73] The complaint also alleged that "top executives from each of the defendants met regularly at restaurants and various recreational and conference facilities in the spring of 2003," that in July 2003 the two western railroads "began charging identical fuel surcharges," a "parallel and complex pricing decision ... based on an agreement among the defendants," and that in December 2003 the two eastern railroads announced that they would apply identical fuel surcharges ...."[74] Moreover, "the defendants each applied their fuel surcharges in the

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[69] *Id.* quoting *Twombly* (alteration in original).

[70] 587 F.Supp.2d 27 (D.D.C., 2008).

[71] *Rail Freight Fuel Surcharge*, 587 F.Supp.2d at 30.

[72] *Id.*

[73] *Id.* quoting Complaint at ¶ 5.

[74] *Id.* (citations omitted).

same way—as a percentage multiplier of the total base rate for rail freight transportation."[75]

The railroads argued that the complaint did "not plead facts plausibly suggesting that they reached any agreement on fuel surcharges, and that it shows instead only price matching and follow-the-leader pricing—neither of which violates antitrust laws."[76] The court rejected the challenge, declaring that the plaintiffs had "alleged substantially more" than the claim in Twombly, by supporting "their theory of conspiracy with sufficient factual details to bring their allegations beyond the realm of bare legal conclusions,"[77] and providing "robust factual details in their complaint ... from which the Court can infer that it is plausible that an actual agreement existed."[78]

In particular, the court noted the plaintiffs' allegation that because cost and fuel efficiency differed widely among the defendant railroads, "it is unlikely that the eastern and western defendants would independently impose identical fuel surcharges."[79] The plaintiffs had also alleged that the revised "All Inclusive Index Less Fuel" represented a "break from the past" and "an entirely new practice." "Taken together," the court concluded, "these allegations make plaintiffs' allegations that defendants entered into an agreement plausible."[80]

In *In re: OSB Antitrust Litigation*,[81] the court noted that, "[a]s *Twombly* requires, Plaintiffs situate [their] allegations of parallel conduct in a context that suggests preceding agreement." The complaint alleged that the defendants, manufacturers of oriented strand board, had agreed to mill shutdowns, delayed or canceled the construction of new mills, over bought at the open

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[75] *Id.*

[76] *Id.* at 31.

[77] *Id.* at 32.

[78] *Id.* at 34.

[79] *Id.*

[80] *Rail Freight Fuel Surcharge*, 587 F.Supp.2d at 35.

[81] 2007 WL 2253419 (E.D.Pa., Aug. 3, 2007).

market to create shortages, and maintained low operating rates, resulting in record high prices for OSB. The court held that

> Plaintiffs have made specific factual allegations of Defendants' wrongdoing—including actions in furtherance of the conspiracy, Defendants' purported motive, the approximate time and manner of their agreement, and the mechanism by which Defendants fixed prices. *Twombly* requires no more.[82]

Finally, in *Home Quarters Real Estate Group v. Michigan Data Exchange*,[83] a non-traditional real estate broker sued two overlapping trade associations that provided him local multiple listing data when they terminated his access. Approving the magistrate's report and recommendation to deny the associations' motion to dismiss on *Twombly* grounds for failing to adequately plead an agreement between them, the court noted

> In addition to the allegation of parallel conduct, the plaintiff has asserted that the defendants are comprised of the plaintiff's competitors, have overlapping memberships, operate in the same geographic region, and took action within 24 hours of one another. All of these allegations, taken as true, "suggest that an agreement was made."[84]

The report and recommendation of the magistrate noted that "an undesired effect of *Twombly* is that the argument 'that plaintiffs have not pleaded sufficient facts appears to have become the mantra of defendants in antitrust cases.'"[85] He concluded that "'*Twombly* ... was not intended as a shield to be used by antitrust defendants to defeat even a meritorious claim.'"[86]

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[82] *Id.* at *1.

[83] 2009 WL 276796 (E.D. Mich. Feb. 5, 2009).

[84] *Id.* at *1.

[85] *Id.* at *5 (citation omitted).

[86] *Id.* (citation omitted).

V. Conclusion

Retirement of *Conley*'s "no set of facts" formulation allowed the Supreme Court to articulate a new interpretation of Rule 8 with both substantive and evidentiary requirements. Substantively, it is no longer sufficient that a claim may be supported by some set of facts. A showing of entitlement to relief now requires a description of the specific grounds in factual terms that connect the defendant's wrongful act with the plaintiff's injury. With respect to the evidentiary requirement, the statement of grounds must be adequately suggestive and reasonably subject to confirmation by discoverable evidence. Allegations of conventional direct or circumstantial evidence will ordinarily be sufficiently suggestive and discoverable to satisfy the required showing, but not conclusory allegations or factually neutral economic evidence, unless placed in a sufficiently suggestive factual context.

As a selection of district court rulings indicates, significant scope remains under *Twombly* to allege a Section 1 conspiracy based on circumstantial economic evidence. The *Twombly* Court recognized that allegations of parallel conduct in any event require an industrial context before their value as probative of agreement can be assessed. The re-calibrated standard provides a framework for evaluating whether economic evidence is adequately supported by context to render it suggestive enough to establish entitlement on the basis of an unlawful agreement and to justify moving the case beyond the pleading stage.

Mr. JOHNSON. Thank you, sir.
And now we will hear from Professor Davis.

TESTIMONY OF JOSHUA P. DAVIS, PROFESSOR, CENTER FOR LAW AND ETHICS, UNIVERSITY OF SAN FRANCISCO, SCHOOL OF LAW, SAN FRANCISCO, CA

Mr. DAVIS. My name is Josh Davis. I am a professor at the University of San Francisco School of Law. My teaching is largely in civil procedure and somewhat in complex litigation and antitrust law. I have some practical experience there as well.

And I want to thank you sincerely for the honor and the privilege of presenting testimony today.

Twombly and *Iqbal* do very substantially undermine private enforcement of the law generally and private enforcement in antitrust in particular. So very briefly, in the time allotted to me, I want to make a handful of points.

I want to emphasize the importance of the antitrust laws. I want to emphasize the importance of private enforcement of the antitrust laws. And I want to express some concerns about *Twombly* and *Iqbal* which can be summarized as—that they are an attempt to make a change in the law to fix a problem that probably doesn't exist, that engendered great cost and inefficiency, and gives rise to significant problems of political illegitimacy.

So first, as to the importance of antitrust law, antitrust violations are a little bit like steroids in sports. When you violate the antitrust laws, cheaters win, consumers lose, and honest competitors, including small businesses, are at a terrible disadvantage.

But antitrust law is far more important. And in particular, in Exhibit A to my written testimony, I have co-authored an article, and that article demonstrates that since 1990 plaintiffs in private antitrust cases have recovered many hundreds of millions of dollars, almost a billion dollars, alone from the pharmaceutical industry.

And in a day and age when everyday citizens are having to choose between paying for their medication and buying food or paying their rent, that is an issue of the greatest sort.

Now, as to private enforcement of the antitrust laws, as opposed to government enforcement, it is an elegant free market solution to a free market problem.

It is a reflection of American ingenuity, if you will, the genius of America, that we would come up with harnessing the power of private action in service of the public good.

And that same study that I did, the written—attached as Exhibit A to my written testimony, shows that private plaintiffs' lawyers perform two key functions, compensation and deterrence.

As for compensation, cumulatively in just those 40 cases, plaintiffs have recovered—plaintiffs' lawyers and plaintiffs have recovered over $18 billion as a result of antitrust violations.

Over 5 billion of those dollars come from foreign actors who were preying on the American economy. It is important compensation that would not occur in the absence of private enforcement.

In a separate article that currently is being drafted, attached as Exhibit B to my written testimony, I also, with my co-author, established that the deterrence effect of private enforcement in those

40 cases alone since 1990 is probably significantly greater than the deterrence effect of all of the Department of Justice's excellent efforts in criminal enforcement. So private antitrust enforcement is absolutely crucial.

Now to my three criticisms, very quickly, of *Twombly* and *Iqbal*—that they are an attempted solution to a problem that probably doesn't exist, expensive and inefficient, and of questionable legitimacy.

First of all, *Twombly* is premised almost entirely as a matter of public policy on the speculation that plaintiffs' lawyers may bring cases—plaintiffs may bring cases without any significant merit and defendants may settle those cases because of the fear of litigation costs.

The problem with *Twombly* is it offered absolutely no evidence that this is a phenomenon that occurs with any significant frequency at all. And indeed, there isn't any evidence that I have come across anywhere, and I said that in writing. It has been published. It has been out for a couple of years. And nobody has responded otherwise. And so I don't think there is evidence.

And it is implausible as a matter of theory once we attend to the dynamics of litigation, because the reality is that the defendants in these actions are large corporations with substantial resources and sophistication.

They benefit from the delay of litigation. In effect, they get an interest-free loan from the plaintiff until they have to pay, so that is very valuable to them.

They also benefit, as do their lawyers, from having a reputation of being tough fighters. And then finally, the lawyers are paid by the hour, and so protracted litigation is very attractive to them. So defendants have every reason to fight hard in this litigation, and they do.

Plaintiffs and plaintiffs' lawyers, on the other hand, have reason to settle on reasonable terms and early. They are small players. The plaintiffs are giving an interest-free loan to the defendants so they can recover. And the plaintiffs' lawyers are paid on a purely contingent basis. And so what they want to do is settle early, if reasonably.

In terms of costs, the massive change—and it is a massive change that we have seen in the pleading standards—is incredibly costly for parties to litigate and for courts to try to figure out and apply.

And then in terms of the political legitimacy issues, first of all, the Supreme Court made up facts in *Twombly*. As I said, that is a form of activism just like making value judgments that are better delegated to the democratic branches.

Also—and I would be happy in questions to address this at greater length—they didn't follow the protocol in the—set out in the Rules Enabling Act.

And then, as to the judges themselves, they have been granted tremendous discretion under these new pleadings standards. We have four panelists here, and I think if you asked us to define *Twombly* and the new standard under *Twombly* and *Iqbal* you would get five opinions.

And that gives tremendous discretion for judges to indulge their ideology rather than to respond to the merits in deciding any particular case and determining who gets access to justice.

And therefore, I encourage you to overrule *Twombly* and *Iqbal* along the lines of H.R. 4115 or some similar legislation. Thank you for your time.

[The prepared statement of Mr. Davis follows:]

PREPARED STATEMENT OF JOSHUA P. DAVIS

WRITTEN TESTIMONY OF PROFESSOR JOSHUA P. DAVIS

THE HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

HEARING ON H.R. 4115, THE "OPEN ACCESS TO COURTS ACT OF 2009"
DEC. 16, 2009, AT 2:00 P.M.

I am a full professor at the University of San Francisco ("USF") School of Law, and Director of USF's Center for Law and Ethics. I have taught Civil Procedure and related classes for the last ten years, and write scholarship addressing issues in civil procedure and antitrust, among other areas. I also have experience in the practice of complex litigation and class actions in general and in antitrust cases in particular. I have argued cases in various state and federal courts, often focusing on procedural issues and substantive antitrust law. Although my role as a scholar and teacher is a full-time commitment, I continue to assist in the litigation of class actions and other complex cases, particularly in the area of antitrust.

I have three main points to make. First, private enforcement of the law—in general and in antitrust in particular—serves important purposes. Second, recent Supreme Court decisions pertaining to pleading standards, as interpreted by the lower courts, have undermined private enforcement of the law. Third, these recent Supreme Court decisions are unjustified: (1) they attempt to solve a problem that probably does not exist (2) by imposing a new pleading standard that is expensive and inefficient (2) in a manner that reflects and encourages what might be called "judicial activism."

I. Private Enforcement of Law—in General and in Antitrust in Particular—Serves Valuable Purposes.

Private antitrust litigation serves valuable purposes. In the vast majority of circumstances, only private actions compensate the victims of antitrust violations. Government litigation makes very little effort to provide recompense to victims. Further, private enforcement of the antitrust laws provides a powerful deterrent. In part because of budget constraints and in part because government tends to pursue only the most egregious antitrust violations, in many cases of illegal activity only private litigation occurs. And in other cases civil liability provides an important complement to the threat and fact of government action.

The contribution of private litigation in these regards is substantial. Professor Robert Lande, Venable Professor of Law at the University of Baltimore School of Law, and I studied forty successful antitrust cases that were completed after 1990. The article we wrote based on that effort is attached as Exhibit A. We determined that these cases alone provided over $18 billion in compensation, well over $5 billion from foreign actors targeting American victims. In an article we are currently drafting, we argue that the aggregate deterrent effect of these private cases is greater than even the deterrent effect of

the Department of Justice's excellent work pursuing criminal prosecution of antitrust violations. The current draft of the article on deterrence is attached as Exhibit B.

II. *Twombly* and *Iqbal*, Especially as Interpreted by Some Lower Courts, Undermine Private Enforcement of the Laws.

As interpreted by the lower courts, *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] undermine private enforcement of the law. Depending on how *Twombly* is read, it empowers judges to dismiss cases that they do not find "plausible."[3] A significant number of lower courts have interpreted this standard as imposing a high bar for antitrust plaintiffs simply to get past the pleadings and enter the discovery phase of a legal action. That interpretation impedes private enforcement in at least two ways. First, courts have dismissed the legitimate cases of some private plaintiffs who might well have prevailed at trial. Second, the anticipated expense of litigating complicated motions to dismiss and the risk of losing even meritorious cases—on top of the pre-existing high costs of prosecuting private litigation—together discourage the filing of the lawsuits necessary to vindicate the rights of antitrust victims.

Two cases illustrate these points. First, in *In re Air Cargo Antitrust Litigation*,[4] the Magistrate Judge recommended dismissing private litigation for failure to state a "plausible" claim under *Twombly* despite the guilty pleas of numerous of the defendants in criminal litigation arising from the same conduct. The District Court Judge ultimately rejected the Magistrate Judge's recommendation in this regard, but the parties and the courts still bore the cost of litigating an issue that should never have been raised. Second, the Sixth Circuit dismissed another private antitrust case, *In re Travel Agent Commission Antitrust Litigation*,[5] despite allegations of concerted behavior strongly suggesting an antitrust conspiracy. In all likelihood we will never know—just as we do not in *Twombly* itself—whether what appears to have been an illegal conspiracy in fact occurred.

In general, there are three natural consequences from the interpretations some lower courts have given to *Twombly* and *Iqbal*. First, potential wrongdoers will be emboldened by the difficulty of prosecuting private rights of action, leading to an increase in antitrust violations, harming the economy and consumers and putting honest businesses at a competitive disadvantage. Second, plaintiffs will be discouraged from filing meritorious cases by the increased cost of litigation and the prospect that even a meritorious case may be dismissed. Third, defendants will file motions to dismiss in cases where they would not have done so in the past,[6] hoping to obtain a dismissal

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[1] 550 U.S. 544 (2007).
[2] 129 S. Ct. 1937 (2009).
[3] *See, e.g., Twombly*, 550 U.S. at 556-57.
[4] 06-MD-1775 (JG) (VVP) (E.D.N.Y).
[5] 583 F.3d 896 (6th Cir. 2009).
[6] Consider *In re Nuvaring Products Liability Litigation*, 4:08-MD-1964 RWS at 2, n. 2 (E.D. Mo. Dec. 11, 2009) (recounting that the defendants explained they moved to dismiss in federal court but not in the related state court proceedings because the state courts employ "notice pleading") (denying motions to dismiss).

whatever the merits of plaintiffs' claims or to gain a strategic advantage by imposing costs on plaintiffs and protracting litigation.

III. *Twombly* and *Iqbal* Changed the Law Without an Empirical Basis by Imposing a Costly New Rule in a Questionable Manner.

In modifying the pleading standard the Supreme Court in *Twombly* declared facts without any empirical basis. The Court's opinion appeared to rely in part on two assertions: (1) plaintiffs bring cases lacking any merit with some frequency and (2) defendants settle these cases with some frequency to avoid the costs and disruption of litigation.[7] But the Court cited no empirical support for these propositions. Merely declaring facts does not make them so. This apparently unnecessary change comes at a high cost. It has created great uncertainty in the law, adding to the frequency and cost of litigating motions to dismiss. It is also the product of and contributes to procedural improprieties: the Court acted without following the appropriate protocol for amending the Federal Rules of Civil Procedure; and its new standard—based on "plausibility"—invites judges to bring their political views to bear in deciding which plaintiffs will be given access to the courts.

A. The New Pleading Standard Attempts To Solve a Problem that Probably Does Not Exist.

As far as I know—and I have spent a considerable amount of time and effort researching the issue—there is no empirical evidence that plaintiffs often file and defendants often settle antitrust claims that have no significant merit. My research with Professor Lande, in contrast, suggests that at least a significant number of private antitrust cases do have merit. It is not credible that the defendants would have settled those cases—each involving a recovery of at least tens of millions of dollars and some recoveries of billions of dollars—unless defendants feared they would lose on the merits. Litigation costs cannot explain payments in those large amounts. But there is no similar effort of which I am aware to document any material number of private cases in which the plaintiffs' claims had no merit, but defendants nonetheless settled for a large sum.

Of course, those who are accused of running afoul of the antitrust laws—and, indeed, those who are found liable for doing so—at times claim that unmeritorious or frivolous cases are common. So do the lawyers and lobbyists who represent them. But unsubstantiated anecdotes about supposed meritless cases are not an appropriate predicate for modifying the law.

Moreover, the litigation costs that worried the Supreme Court in *Twombly* do not provide a strong basis for restricting access to the courts. In my experience, courts have various ways to maintain control over litigation,[8] including through phased discovery and motions for summary judgment on particular issues. Given the host of obstacles courts

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[7] *Id.* at 558-60.

[8] *See, e.g.*, Jack Weinstein, *What Discovery Abuse? A Comment on John Setear's the Barrister and the Bomb*, 69 B.U. L. REV. 649, 653-54 (1989).

have put in place to private antitrust enforcement in recent years—from weakening antitrust law to making it easier for defendants to win at summary judgment and class certification[9]—concerns about meritless cases involving great discovery costs are probably greatly exaggerated.

Indeed, when defendants incur substantial costs in discovery, that is often a problem of their own making. They generally possess all or the overwhelming majority of the relevant information. They could provide that information in a streamlined manner to plaintiffs. But they choose not to do so, all too often burying plaintiffs in irrelevant materials so as to make it difficult to find the key evidence or, in the alternative, stonewalling, playing word games, and otherwise resisting disclosure of the information to which plaintiffs are entitled. For defendants to complain, then, about the costs of discovery is not compelling.

Moreover, as a matter of theory, it is not particularly plausible that antitrust plaintiffs often bring meritless cases and antitrust defendants often pay large sums to settle them. First of all, antitrust defendants tend to be large, sophisticated corporations with great assets, well-situated to protect their legal rights. Large corporations also have incentive to acquire a reputation for being aggressive in litigation. So do the attorneys who represent them. And defense counsel generally bill by the hour, benefiting from protracted litigation.

In contrast, the reality is that plaintiffs' attorneys take the risks in most private antitrust litigation, particularly class actions. Those cases are expensive and time-consuming. And plaintiffs' attorneys recover only if they prevail. If they bring cases without merit, they can lose hundreds of thousands or even millions of dollars of their own cash, and millions of dollars of their time. A plaintiffs' attorney who brings bad cases with any regularity will quickly go out of business.

In short, early settlement of private litigation is unlikely, unless the defendant and defense counsel fear that discovery will prove highly damaging. And the supposed problem of strike suits—of meritless cases resulting in settlements—is probably insignificant. We should certainly not assume otherwise without seeing evidence.

B. The New Pleading Standard Is Expensive and Inefficient.

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[9] The Supreme Court has decided fifteen antitrust cases in a row against plaintiffs, some limiting substantive antitrust rights and others increasing procedural barriers. See *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Weyerhaeuser Co. v. Ross-Simmons Lumber Co.*, 549 U.S. 312 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Ill. Tool Works Inc. v. Indep. Ink*, Inc., 547 U.S. 28 (2006); *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1998); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The new pleading standard is expensive and inefficient. This is so in part simply because it is new. Litigants and judges knew what to expect under the old pleading standard. The rules of pleading had sorted themselves out. Now parties and courts spend a great deal of resources in trying to figure out what the appropriate standard is, not to mention attempting to apply it to particular cases. No one is sure what the new rule is or, to put the same point differently, many claim to know what it means but they all tend to disagree with one another.

The new pleading standard is also expensive and inefficient because it forces plaintiffs to write much longer complaints, often reciting evidence as if they were preparing to oppose summary judgment. And defendants—and defense counsel—are encouraged to file motions to dismiss in cases where they would have foregone that effort in the past.

C. The Questionable Legitimacy of the Supreme Court's Amendment of the Pleading Standard.

In the past the Supreme Court has repeatedly held that the judicial imposition of any heightened pleading standard would be procedurally improper. The appropriate method of reforming the law would be through the Federal Rules Advisory Committee. As recently as 2002, Justice Thomas writing for a unanimous Supreme Court in *Swierkiewicz v. Soreman N.A.*[10] held, "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[11] I do not believe that *Twombly* and *Iqbal*—particularly as interpreted by some lower courts—can be reconciled with *Swierkiewicz* or with the text of the Federal Rules of Civil Procedure, particularly Form 11 (formerly Form 9).

Equally troubling is the predicate for the Supreme Court's actions. It merely declared that plaintiffs bring meritless antitrust actions and defendants settle them. Judicial activism does not only involve judges making value judgments that are more appropriately left to other governmental institutions. It also occurs when courts effect changes in the law based on factual assertions without any adequate grounding—resolving factual issues that other governmental institutions are better able to assess. Abiding by the process for amending the Federal Rules of Civil Procedure might have allowed for a more careful assessment of the evidence.

And the pleading standard under *Twombly* and *Iqbal* invites activism by lower courts. The range of interpretations is greater under the new rule than under the old one. Some judges reason as if nothing has changed while others in effect impose a heightened pleading standard in some or all cases. Great discretion lies even in the hands of those judges who seize on the Supreme Court's reference to "plausibility." What is plausible and implausible varies with the eye of the beholder. As a result, the political

[10] 534 U.S. 506 (2002).
[11] *Id.* at 515 (quoting *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993)).

predispositions of judges—rather than the merits—can dictate which plaintiffs will have their day in court and which plaintiffs will never have a chance to try to prove their case.

IV. Conclusion.

Twombly and *Iqbal*—at least as interpreted by the lower courts—attempt to solve a problem that probably does not exist in a way that imposes heavy costs on parties and the judiciary as result of a rule change with dubious legitimacy. We would do better to return to the standard that existed before this innovation. Parties and courts understood what to expect in litigation and the process was less expensive and more predictable. Moreover, private attorneys were in a much better position to assist government in enforcing our laws in general and in policing our free markets in particular. Legislative action could greatly assist private attorneys general in pursuing these valuable efforts.

Moreover, we should act promptly. Under the current standard, antitrust violators have a new license to violate the law and their victims face a significant impediment to recovery. As long as wrongdoers do not confess their actions—and only the obvious outward manifestations of their wrongdoing become apparent—many meritorious cases will not be brought and others will get dismissed. We should act soon to protect the rules essential to a robust free market.

Nor is waiting before passing legislation apt to serve any meaningful purpose. Complaints about alleged frivolous litigation have circulated for decades. But I am not aware of any evidence that has been amassed to demonstrate it occurs with any frequency. And we are unlikely to gain new insight into the problems created by *Twombly* and *Iqbal* with the passage of time. How will we ever learn about cases that are not brought but should have been? How will we ever know whether dismissed cases had merit, including cases like *Air Cargo* and *Twombly*? This is so even if litigation under the old rules would have proven that someone violated the law or would have secured a large settlement because defendants knew that discovery would reveal damaging evidence. Delay can do great harm, but it is unlikely to do much good.

A final note is in order. Some commentators worry about the effect of reversing *Twombly* and *Iqbal* on potential claims by terrorists. Terrorism is a grave issue. But civil claims by terrorists constitute only the tiniest percentage of cases. If those cases warrant a heightened pleading standard, that could be addressed by specialized legislation. Indeed, any other approach is dangerous. It could, for example, deprive U.S. victims of foreign terrorists of any ability to obtain discovery if they bring claims for their grievances.[12] The point is that the highly specific issue of terrorism should play no role in formulating a general pleading standard.

[12] This is no mere theoretical possibility. Defendants in litigation arising from the terrorist attacks on September 11, 2001 have in fact moved to dismiss, relying in part on *Iqbal*. *See In re Terrorist Attacks on September 11, 2001*, 03-MDL-1570 (GBD). I am not sufficiently familiar with this litigation to take any position on its merits. My point is only that altering the rules of procedure in all cases merely because a handful of alleged terrorists could bring cases in U.S. courts could have unintended and perverse results.

Articles

Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases

By ROBERT H. LANDE & JOSHUA P. DAVIS*

Introduction

THIS STUDY TAKES A first step toward providing an empirical basis for assessing whether private enforcement of the antitrust laws serves its intended purposes and is in the public interest. It does this by assembling, aggregating, and analyzing information about forty of the largest recent successful private antitrust cases.[1] This information includes, inter alia, (1) the amount of money each action recovered for the victims of each alleged antitrust violation, (2) what proportion of the money was recovered from foreign entities, (3) whether govern-

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We are also grateful to Morgan Anderson, Erin Bennett, Maarten Burggraaf, Stratis Camatsos, Jonathan Cuneo, Gene Crew, Erika Dahlstrom, Michael Einhorn, Michael Freed, Robert Gordon, Norman Hawker, Gabrielle Hunter, Richard Kilsheimer, Ruthie Linzer, Phyra McCandless, Polina Melamed, Joseph Pulver, Brian Ratner, Douglas Richards, Tara Shoemaker, Andrew Smullian, and Andrew Stevens for researching and writing drafts of the individual case studies. We also thank Jonathan B. Baker, Richard Brunell, John Connor, Eric Cramer, Albert Foer, Jonathan Jacobson, Carl Lundgren, Daniel Small, and members of the private bar too numerous to mention for information about individual cases and for comments on earlier versions of this Study. We are grateful for excellent research assistance by Erika Dahlstrom and Joseph Pulver.

1. See *infra* Appendix II for a list of the forty cases analyzed. The full versions of the forty case studies can be found at ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523.

ment action preceded the private litigation, (4) the attorney's fees awarded to plaintiffs' counsel, (5) on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor), and (6) the kind of claim the plaintiffs asserted (rule of reason, per se, or a combination of the two). The Study also draws various comparisons between the deterrence effects of private enforcement and federal criminal enforcement of the antitrust laws. First, it compares the total monetary amounts paid in all forty cases to the total criminal antitrust fines imposed during the same period by the U.S. Department of Justice ("DOJ"). Next, it makes that same comparison for the subset of the forty cases that also resulted in criminal penalties. Finally, the Study takes into account the deterrence effects of the prison sentences that resulted from DOJ prosecutions during this period.

This Study analyzes the collected information to help formulate policy conclusions about the desirability and efficacy of private enforcement of the antitrust laws. The results of the Study show that private antitrust enforcement helps the economy in many ways. It very significantly compensates victims of illegal corporate behavior and is almost always the only way these victims can receive redress. Private enforcement often prevents foreign corporations from keeping the many billions of dollars they illegally obtain from individual and corporate purchasers in the United States. This Study also shows that almost half of the underlying violations were first uncovered by private attorneys, not government enforcers, and that litigation in many other cases had a mixed public/private origin. The results of the Study also show that private litigation probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the DOJ. This is one of the most surprising results from our Study. We do not know of any past study that has documented that private enforcement has such a significant deterrence effect as compared to DOJ criminal enforcement.

Part I explores the purposes of private enforcement of the antitrust laws, including compensation and deterrence. Part II sets forth some of the typical criticisms of private enforcement, criticisms which generally lack any empirical basis. Part III explains the purpose of this Study—to provide some factual basis for assessing private enforcement of the antitrust laws—and also its design. Part IV presents the results of this Study, which support some surprising conclusions, perhaps most notably that private antitrust enforcement provides a greater deterrence effect than criminal enforcement by the DOJ.

I. The Purposes of Private Enforcement and Private Remedies

The federal antitrust laws prohibit violations of section 1 of the Sherman Act.[2] These violations include price fixing, bid rigging, market and customer divisions, and other collective anticompetitive behavior.[3] Federal antitrust laws also prohibit violations of section 2 of the Sherman Act,[4] which include monopolization, attempts to monopolize, and conspiracies to monopolize any part of the trade or the commerce of the United States,[5] as well as mergers, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."[6] Some offenses, like price fixing and bid rigging, are per se offenses while others, including monopolization, are governed by the rule of reason.[7] If conduct is per se illegal, proof of the conduct itself establishes a violation of the law.[8] Under the rule of reason, in contrast, courts will compare the procompetitive and anticompetitive effects of the conduct to determine its legality.[9] Antitrust laws can be enforced by government prosecutors (the DOJ,[10] the Federal Trade Commission[11] ("FTC"), and state enforcers[12]) and also by aggrieved private parties.[13]

The legislative history[14] and case law[15] interpreting the federal antitrust laws indicate that one important goal of the laws is to com-

2. 15 U.S.C. § 1 (2000).

3. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 165–285 (West Group ed., 2000); *see also* 15 U.S.C. § 1.

4. 15 U.S.C. § 2.

5. *See* SULLIVAN & GRIMES, *supra* note 3, at 71–140; *see also* 15 U.S.C. § 2.

6. 15 U.S.C. § 18; *see also* SULLIVAN & GRIMES, *supra* note 3, at 510–34.

7. For a fuller discussion of the distinction between per se and rule of reason cases, see SULLIVAN & GRIMES, *supra* note 3, at 202–17.

8. *Id.*

9. *Id.*

10. 15 U.S.C. § 15(1).

11. The Federal Trade Commission ("FTC") enforces the Federal Trade Commission Act which prohibits, inter alia, "unfair methods of competition." 15 U.S.C. § 45. This provision is similar to the Sherman Act and Clayton Act. *See generally* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980) (explaining precisely how the FTC Act is similar to but slightly broader than the Sherman Act and the Clayton Act).

12. 15 U.S.C. § 15(c).

13. *Id.* § 15.

14. Senator Coke complained about a bill that would have provided only for double damages:

> How would a citizen who has been plundered in his family consumption of sugar by the sugar trust . . . recover his damages under that clause? It is simply an impossible remedy offered him. . . . [H]ow could the consumers of the articles

pensate victims of illegal behavior.[16] Moreover, their primary goal is to prevent wealth transfers from these victims to firms with market power,[17] a concept that is consistent with and complementary to the goal of compensating overcharged victims of antitrust violations. To be sure, Congress's decision to award treble damages[18] might suggest that at least two-thirds of the damages remedy was intended only for punitive or deterrence purposes. It is possible, however, that even this

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produced by these trusts, the great mass of our people—the individuals—go about showing the damages they had suffered? How would they establish the damage which they had sustained so as to get a judgment under this bill? I do not believe they could do it.

21 CONG. REC. 2615 (1890).

Representative Webb stated that the damages provision "opens the door of justice to every man whenever he may be injured by those who violate the antitrust laws and gives the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1911). He also stated that "we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender." *Id.* at 16,274; *see also* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21–30 (1989).

15. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("[The treble damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing."). A large number of Supreme Court cases hold that both deterrence and compensation are purposes of the treble damages remedy. *See* Atl. Richfield Co. v. USA Petroleum, 495 U.S. 328, 360 n.20 (1990); California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 557 (1982); Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746, 748, 749 (1977); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969).

16. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1976) ("Treble-damages antitrust actions . . . [were] conceived of primarily as a remedy for [t]he people of the United States as individuals, especially consumers. . . . Treble damages were provided in part for punitive purposes . . . but also to make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit against a combination such as is described in the Act." (internal quotations and citations to legislative history quoting Senators Sherman and George omitted)).

17. Many statements by the Sherman Act's sponsors about the overall purpose of the proposed legislation suggest that their primary concern was that firms might use market power to increase prices to consumers. For example, Senator Sherman termed monopolistic overcharges "extortion which makes the people poor," and "extorted wealth." Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 449 (1988) (citations omitted). Congressman Coke referred to the overcharges as "robbery." *Id.* Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people." *Id.* Congressman Wilson complained that a particular trust "robs the farmer on the one hand and the consumer on the other." *Id.* Representative Fithian declared that the trusts were "impoverishing" the people through "robbery." *Id.* Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community . . . wealth which ought to be generally diffused over the whole community." *Id.* at 449–50. Senator George complained, "They aggregate to themselves great enormous wealth by extortion which makes the people poor." *Id.* at 50.

18. *See* 15 U.S.C. § 15(a).

portion is necessary to compensate plaintiffs for the difficulty of bringing suit,[19] for unawarded prejudgment interest,[20] and for difficult-to-quantify unawarded damages items such as the allocative inefficiency effects of market power and the value of plaintiffs' time expended pursuing litigation.[21] Antitrust verdicts that produce treble damages are rare,[22] and we believe that few, if any, of the many antitrust cases that settle do so for more than single damages.[23] Of course, private enforcement also serves to deter antitrust violations.[24]

II. Criticisms of Private Enforcement

While government criminal and civil actions are essential in deterring future antitrust violations, virtually the only way to secure redress for the victims of antitrust violations is through private

19. Senator Sherman observed, "[t]he measure of damages, whether merely compensatory, putative [sic], or vindictive, is a matter of detail depending upon the judgment of Congress. My own opinion is that the damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described." 21 CONG. REC. 2456 (1890). Representative Webb stated, "Under the civil remedies any man throughout the United States, hundreds and thousands, can bring suit in the various jurisdictions, and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket." *Id.* at 16,275.

20. Damages should include victims' lost prejudgment interest, the lack of which often can reduce the value of an antitrust damages award by fifty percent. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 130–36, 158–68 (1993).

21. As the Antitrust Modernization Commission noted: "Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will receive at least their actual damages." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 246 (2007) [hereinafter AMC REPORT] (citation omitted), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. To the extent the purpose of the remedy is compensation, the damages caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from consumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly via "umbrella" effects. Plaintiffs' attorney's fees, the value of plaintiffs' time spent pursuing the case, and the cost to the American taxpayer of administering the judicial system should also be included. When all these adjustments are made it is likely that antitrust's "treble" damages remedy actually is less than single damages. *See* Lande, *supra* note 20, at 122–24, 158–68.

22. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513 app. at 565 (2005), for a list of antitrust verdicts that calculated damages amounts.

23. See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004), for an analysis of this issue.

24. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977).

litigation.[25] And, as we explore below, private enforcement also plays a significant role in deterring antitrust violations. This Study attempts to provide an empirical basis for assessing these benefits. Before doing so, however, it is worthwhile to canvass some of the criticisms of private enforcement of the antitrust laws. Indeed, detractors of private enforcement seem to greatly outnumber its supporters, even if those detractors rarely provide any empirical basis for their position.

Many commentators have criticized the existing system of private antitrust litigation. Some assert that private actions too often result in remedies that provide lucrative attorney's fees but secure no real benefits for overcharged purchasers.[26] Others suggest that private class actions often follow an easy trail blazed by government enforcers and that, as a result, private actions add much less than they should to government enforcement.[27] Still others contend that private antitrust damages lead to excessive deterrence in light of government sanc-

25. State Attorneys General can bring parens patria actions on behalf of victims located within their states. The FTC has succeeded in disgorgement actions, but these actions are rare compared to private actions. *See generally* PHILLIP AREEDA ET AL., ANTITRUST LAW ¶ 302, at 23–26 (2008) (explaining the problems with disgorgement).

26. This belief was ably summarized by Professor Cavanagh:

> Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for "cents off" coupons while their attorneys are paid their full fees in cash fall within this category. Coupon settlements may take the form of a discount certificate on future purchases from defendants, or, as in the case of airlines, a right to discounts on future travel. Coupon settlements are of dubious value to the victims of antitrust violations . . . . Clearly, the types of coupon settlements described here, which are not atypical, confer no real benefits on the plaintiffs. Equally important, defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed. In such situations, it is difficult to justify paying attorneys their full fees in cash, instead of in kind.

Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005) (citation omitted). Professor Cavanagh, however, provides only an anecdote to support these conclusions. He makes no effort to assess whether the types of settlements he describes are in fact "not atypical." *Id.* He provides no data to show how often antitrust class action cases result in useless coupons.

27. John C. Coffee, Jr., at one point, subscribed to this view. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 223–26 (1983). Coffee later concluded, however, that the evidence was to the contrary in antitrust cases. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'" (citations omitted)).

tions.[28] Indeed, one common criticism of private actions in general—and of class actions in particular—is that they are a form of blackmail or extortion, one in which plaintiffs' attorneys, with little risk to themselves, coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[29] These actions also serve to discourage legiti-

28. An example of an argument, without empirical evidence, that criminal fines and prison terms reduce the need for treble damages in antitrust class actions is found in David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 162 (2006). See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 669–73 (2006), for an argument that treble damages do not lead to excessive deterrence and in fact should be increased further.

As the Antitrust Modernization Commission noted: "[S]ome have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence or systematic overdeterrence were presented to the Commission, however." AMC REPORT, *supra* note 21, at 247 (citation omitted).

29. *See* Donald F. Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 811–12 (1987); *see also* JOHN H. BEISNER & CHARLES F. BORDEN, INST. FOR LEGAL REFORM, EXPANDING PRIVATE CAUSES OF ACTION: LESSONS FROM THE U.S. LITIGATION EXPERIENCE (2005) [hereinafter BEISNER & BORDEN, EXPANDING], *available at* http://instituteforlegalreform.com/issues/issue.cfm?doctype=STU&page=8 (follow "Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience (PDF, 116 Kb)" hyperlink); JOHN H. BEISNER & CHARLES E. BORDEN, INST. FOR LEGAL REFORM, ON THE ROAD TO LITIGATION ABUSE: THE CONTINUING EXPORTATION OF U.S. CLASS ACTIONS AND ANTITRUST LAW (2006) [hereinafter BEISNER & BORDEN, EXPORTATION], *available at* http://instituteforlegalreform.com/issues/docload.cfm?docId=1061. Moreover, the argument runs, the plaintiffs' attorneys—particularly class counsel—settle cases in a way that lines their pockets but provides no meaningful compensation to the injured plaintiffs. *Id.* However, those who embrace this view provide no systematic empirical basis for its factual predicates.

Consider the claim that the costs of discovery for plaintiffs are trivial but can be exorbitant for defendants. *See* BEISNER & BORDEN, EXPANDING, *supra*, at 16. Beisner and Borden make this assertion but offer no evidence that the cost of litigation is low for plaintiffs and that plaintiffs' counsel can spread any costs and risks across their overall portfolio. *Id.* Beisner and Borden cite to Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 127 (2003). Rowe in turn, however, offers no evidence and, indeed, contends generally that class actions would not be viable without contingency fees and fee shifting. *Id.* at 127–33.

Similarly unsupported is Beisner and Borden's claim that the cost of discovery for defendants can run into "the tens of millions of dollars." BEISNER & BORDEN, EXPANDING, *supra*, at 16. To substantiate this assertion, Beisner and Borden cite to Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery?*, N.Y. L.J., Jan. 30, 2003, *available at* http://www.risk-averse.com/index_files/dd.pdf, who in turn cites to *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (2002). In *Rowe*, the defendants estimated the cost of recovering electronic data in response to a discovery request at $10 million, but the plaintiffs estimated the cost at $24,000 to $87,000. *Id.* at 425, 427. The court ordered the plaintiffs to pay part of the expense of responding to the request. *Id.* at 433. Even as an anecdote for the high cost of discovery for defendants this example is highly dubious. It has been cited, however, as if it was a fact. *See, e.g.*, Corinne Bergen, *Generating Extra Wind in the Sails of the*

mate competitive behavior.[30] For these and related reasons many prominent members of the antitrust community, even those not a part of the Chicago School on antitrust matters,[31] have called for the curtailment of private enforcement in significant ways.[32] Some even call

EU Antitrust Enforcement Boat, 5 J. INT'L BUS. & L. 203, 222 n.145 (2006) (citing BEISNER & BORDEN, EXPANDING, *supra*).

Much the same is true for the claim that class counsel receive high fee awards but the class receives little of value, *see, e.g.*, *id.* at 218 (citing Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 437 (2004) (making this assertion unsupported by citation or example)), or that class cases are often brought without a meritorious basis. *See, e.g.*, Gary D. Ansel, *Admonishing a Drunken Man: Class Action Reform*, 48 ANTITRUST BULL. 451, 454, 455 (2003) (relying on "war-stories" and "hearsay" and providing no examples of frivolous lawsuits).

Also questionable is evidence for the assertion that defendants regularly settle class actions simply to avoid the risk of an erroneous, catastrophic loss. Along these lines, a version available on the Internet of an amicus brief for the Chamber of Commerce includes the following quotation: "A 1995 study of more than 400 class actions brought in four U.S. districts showed that in one of those districts, the Southern District of Florida, *every* class action was settled." Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) at 6, Gilchrist v. State Farm, 390 F.3d 1327 (11th Cir. 2004) (No. 02-90047-E). However, the empirical study that serves as a basis for this claim reveals that the sample in the Southern District of Florida consisted of only six cases and that, on the whole, the settlement rate was slightly over seventy percent. *See* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 29–31 (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf. As others have pointed out, this settlement rate is about the same as in general litigation. *See, e.g.*, Allan Kanner & Tibor Nagy, *Exploding the Black Mail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 697 (2005). Also without ultimate empirical basis are the judicial assertions that class certification coerces defendants into settling. *See, e.g.*, Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001); *In re* Rhone-Poulenc, Inc., 51 F.3d 1293 (7th Cir. 1995). Moreover, there is an odd asymmetry in the judicial concern about vulnerable corporations—what about victims who are unable to pursue their legal rights against large corporations simply because their individual claims are not large enough to warrant litigation?

None of this establishes that critics of private litigation and class actions are wrong and surely some of their anecdotes are correct. It does suggest, however, that their claims have not been proven.

30. Turner, *supra* note 29, at 811–12.

31. For example, Harvard Professor Donald Turner called for the replacement of mandatory treble damages by a system that imposed it only when "the law was clear at the time the conduct occurred" and "the factual predicates for liability are clear." *Id.* at 812.

32. For example, Professor Herbert Hovenkamp writes that treble damages and attorney's fees for victorious plaintiffs give plaintiffs too great an incentive to sue: "As a result many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip to strengthen the hands of plaintiffs who really have other complaints." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 59 (2005). Professor Hovenkamp does not, however, give data that supports his conclusions.

for the complete abolition of private rights of action.[33] FTC Chair William Kovacic succinctly summarized the prevailing view of the antitrust profession as follows: "[P]rivate rights of action U.S.-style are poison. They over-reached dramatically. And we have to use substantive liability standards to push back on what we think are hard-wired elements of the private rights of action mechanism."[34]

While these criticisms are longstanding and widespread, they have been made without any systematic substantive or empirical basis.[35] Those who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes, some of which are questionable, rather than provide reliable and rigorous data to support their arguments.[36] Indeed, the same point applies to attacks on

33. For example, Professors Elzinga and Breit would "replace the entire damage-induced private actions approach with a system of fines (well in excess of current levels). This proposal would eliminate the perverse incentives and misinformation effects and reparations costs. Public enforcement has the advantage of separating incentives for enforcement from the penalty itself." William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 440 (1985) (citations omitted). Professors Elzinga and Breit do not, however, provide data to support their conclusions.

34. WASH. REGULATORY REPORTING ASSOCS., FTC:WATCH No. 708, at 4 (quoting William E. Kovacic, speaking at an ABA panel on Exemptions and Immunities) (on file with author). Chair Kovacic has also made the point elsewhere that the very existence of the treble damages remedy, which is perceived as punitive, causes "the adjustment by the courts of the malleable features of the U.S. antitrust system to offset perceived excesses in characteristics (e.g., mandatory trebling of damages and availability of jury trials) . . . . [T]he method of equilibration is to alter liability rules." William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 62; *see also* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1088–98 (1986) (describing the relationship between private treble damages actions and the evolution of substantive antitrust liability standards).

35. One prominent critic, former ABA Antitrust Section Chair Jan McDavid, candidly admits this. She asserted: "[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary." *Antitrust and the Roberts Court*, 22 ANTITRUST 8, 12–13 (2007).

Professor Andrew Gavil then asked McDavid and other lawyers participating in the discussion, "What empirical bases do you have for any of those assumptions, other than your personal experience largely as defense lawyers?" *Id.*

McDavid replied, "I am not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved." *Id.*

A Professor at Columbia Law School, C. Scott Hemphill, added, "The Court's attention to false positives relies upon a somewhat older theoretical literature. I'm not aware of a sizeable empirical literature making the point." *Id.*

36. For example, Michael Denger, former Chair of the ABA Antitrust Section, wrote: "Substantial windfalls go to plaintiffs that are not injured or only minimally injured." Michael L. Denger, Chair, Remarks at the 50th Anniversary Spring Meeting of the ABA Antitrust Section 15 (Apr. 24–26, 2002). Mr. Denger, however, provides no data to prove his assertions, or any citations to scholarly articles containing such data. He does not even

private litigation generally—critics tend to make factual assertions without an adequate empirical basis. We emphasize that we are not disputing that the anecdotes the critics use may raise important concerns about abuses in particular cases. Private antitrust enforcement certainly is not perfect.[37] The contention of this Study is, however, that a valid assessment of the net efficacy of private antitrust enforcement, which accounts in most years for more than ninety percent of filed antitrust cases,[38] is possible only by also systematically consider-

provide a single supporting anecdote. He also fails to address any of the well-known deterrence-related benefits of private enforcement or show why society would be better off if antitrust violators were permitted to keep their windfalls.

Antitrust Modernization Commission ("AMC") Commissioner Stephen Cannon wrote:

> [P]rivate plaintiffs act in their own self-interest, which may well diverge from the public interest. Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. If the legal system were costless and errorless, these incentives would pose no problem. However, litigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. Under these conditions, private plaintiffs will bring suits that should not be brought and that deter competitively beneficial conduct. They know that defendants often will be willing to offer significant settlements rather than incur substantial litigation costs and risks. Since potential defendants know this too, they will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation.

W. Stephen Cannon, *A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 ANTITRUST L.J. 103, 106 (1986).

AMC Commissioner Jonathan Jacobson co-authored the following observations:

> For the weaker firm suing the stronger firm, the suit may be a way of sensitizing the stronger firm so that it will not undertake any aggressive actions while the suit is outstanding. If the stronger firm feels itself under legal scrutiny, its power may be effectively neutralized. For large firms suing smaller firms, private antitrust suits can be veiled devices to inflict penalties. Suits force the weaker firm to bear extremely high legal costs over a long period of time and also divert its attention from competing in the market. Or, following the argument above, a suit can be a low-risk way of telling the weaker firm that it is attempting to bite off too much of the market. The outstanding suit can be left effectively dormant through legal maneuvering and selectively activated (inflicting costs on the weaker firm) if the weaker firm shows signs of misreading the signal.

Jonathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 277 n.10 (1998) (quoting MICHAEL PORTER, COMPETITIVE STRATEGY 85–86 (1980)). However, Jacobson and Greer do not provide systematic data to support their conclusions.

37. Of course, there is no reason to think government enforcement is perfect. For those who believe in the importance of the antitrust laws, it is therefore important to compare the role that private antitrust enforcement has played with the role that government enforcement has played.

38. *See* Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online: Antitrust Cases filed in United States District Courts by Type of Case, 1975–2006, http://www.albany.edu/sourcebook/pdf/t5412006.pdf (last visited Apr. 7, 2008). For the most

ing its benefits to victimized consumers and businesses, and to the economy and the public interest more generally.

III. The Purpose and Design of This Study

This Study is a first step towards providing the empirical data necessary to assess some of the benefits of private antitrust enforcement. Toward this end, the Study analyzes a group of forty recent, successful, large-scale private antitrust cases. To our knowledge no similar study has ever been undertaken.

Nevertheless, we note at the outset that this Study does not purport to be comprehensive or in any way definitive. It does not analyze every recent significant private antitrust case, assess a random sample of private cases, or even include all of the largest or "most important" ones.[39] Through paper and electronic searches, website searches, and discussions with antitrust attorneys, we have simply tried to assemble and evaluate some of the largest and most beneficial private antitrust cases that have reached resolution since 1990.

Of the cases we considered, we did not include some because acquiring the necessary information would have been too difficult or time consuming. Other cases were so recent that we have not yet been able to tell the precise value of the relief.[40] We excluded still other

recent reported year, 96.3% of all antitrust cases filed were private cases. In only nine out of thirty-two years reported did the percentage of private cases fall below ninety percent. The lowest reported percentage was 83.4. *Id.*

39. For example, we were unable to include an analysis of the consumer class action suits against Microsoft or the private cases against Microsoft by AOL Time Warner, even though a highly respected journalist reported that together these cases recovered more than $2 billion for victims of antitrust violations. *See* Todd Bishop's Microsoft Blog, http://blog.seattlepi.nwsource.com/microsoft/archives/104794.asp (July 7, 2006, 06:50 PST). All of the damages figures analyzed in this Study were generated by ourselves and our researchers, and their methodology is reported in ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523. The only exception is for the *Vitamins* cases, where we used the estimates generated by Professor John M. Connor, for United States private cases only. *See* JOHN M. CONNOR, THE GREAT GLOBAL VITAMINS CONSPIRACY: SANCTIONS AND DETERRENCE 131, at tbl.18 (2008) (on file with authors).

40. For example, the California *Microsoft* settlement is difficult to value in large part because the relief is not yet final. Settlement Agreement, *In re* Microsoft I-V Cases, 37 Cal. Rptr. 3d 660 (Ct. App. 2006) (J.C.C.P. No. 4106). Because the California consumers in that case settled primarily for vouchers available on a "claims made" basis, the actual value of the settlement is yet to be determined. *Id.* at 31. At a maximum, if every voucher is ultimately redeemed, Microsoft will pay out $1.1 billion in cash. *Id.* at 17. However, even if no claims are made by the class, $733 million in vouchers and technology support will go to California public schools as part of a *cy pres* distribution. *Id.* at 31–42.

cases because they produced benefits that were mostly injunctive in nature and, while they may have yielded tremendous benefits to consumers or to the United States economy, these benefits are difficult to quantify or substantiate. We also did not include any cases that were dismissed or were otherwise unsuccessful, or cases that yielded only "small" recoveries, even though in certain contexts a recovery of, say, $5 million should be considered a tremendous victory for the public interest.[41] Rather, we defined success simply in terms of plaintiffs either winning a favorable decision in court or obtaining a substantial settlement. Moreover, we have surely missed many successful cases and, for purposes of drawing lines and to save time, simply omitted cases that concluded before 1990 or that produced less than approximately $50 million in cash benefits. Finally, we made no attempt to ascertain what proportion of all private cases can be defined as successful, unsuccessful, or somewhere between the two.

The primary focus of this project, moreover, was not to demonstrate that private litigation often has established important legal precedents; other studies have done this convincingly.[42] Our goal was, instead, to look for recent private cases that are final, including ap-

41. For example, in *Pease v. Jasper Wyman & Son*, 845 A.2d 552 (Me. 2004), plaintiffs won a $56 million verdict in a case that involved a conspiracy to suppress the price of wild blueberries. Pease v. Jasper Wyman & Son, No. CV-00-015, 2004 WL 4967228, at *1 (Me. Super. Jan. 2, 2004). Plaintiffs also won significant non-monetary relief that restructured anticompetitive pricing methods in the industry. Settlement Agreement at 10, *Pease*, 2004 WL 4967228, at *1. To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly $5 million. *Id.* at 11–12. This case was a purely private action. To our knowledge there was never a government enforcement action.

42. For an excellent analysis, see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, *in* EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 343 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007).

Professor Calkins found that, of leading antitrust cases decided before 1977, twelve were private and twenty-seven were government. *Id.* at 353. Of the leading cases decided 1977 or later, however, he found thirty private cases and only fifteen government cases. *Id.* at 354. Professor Calkins took as his sample the leading cases printed in the leading antitrust casebook.

Professor Calkins concluded:

> Today what is known as U.S. antitrust law no longer is exclusively or even principally the consequence of Justice Department enforcement. The leading modern cases on monopolization, attempted monopolization, joint ventures, proof of agreement, boycott, other horizontal restraints of trade, resale price maintenance, territorial restraints, vertical boycott claims, tying, price discrimination, jurisdiction, and exemptions are almost all the result of litigation brought by someone other than the Justice Department.

Id. at 355 (citations omitted).

peals, and that recovered at least $50 million.[43] We have no reason to believe that the cases examined in this Study were more or less likely to establish important legal principles than other private cases. It might well be that many cases recovering far less than $50 million, or cases securing only injunctive relief (or, indeed, no relief at all), established more important legal principles.

IV. The Results of This Study

A. Recovery in the Forty Cases

Table 1 shows that the forty cases (or groups of cases)[44] analyzed in this Study provided a cumulative recovery in the range of at least $18.006 to $19.639 billion in allegedly[45] illegally acquired wealth to United States consumers and businesses.[46] All of this was cash—products, services, discounts, coupons, and injunctive relief were not included in this total.[47] Of this, more than $5.706 to $7.056 billion came from foreign companies that violated United States antitrust laws. Table 2 shows that eighteen of the forty cases involved this kind of recov-

43. Some of the cases included in this Study did, however, establish important legal principles. *See, e.g.*, ROBERT H. LANDE & JOSHUA P. DAVIS, BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 (*Fructose*, *Cardizem*, and *Terazosin* case summaries). Note: The cases analyzed in this Study are referred to by short names (e.g., "*Fructose*") for brevity. For a full list of the cases analyzed and their formal citations, see *infra* Appendix II.

44. To arrive at this number we counted related cases as being a single "case." For example, there have been many separate cases involving vitamin cartels, brought by different plaintiffs and often against different groups of defendants.

The vitamins cases could have been reported as two cases if, for example, the direct purchaser and indirect purchaser actions were analyzed separately. Alternatively, we could have reported that there were three primary categories of vitamins affected, so the vitamins cases could have been counted as three cases, or as six cases if these were each divided into direct and indirect purchaser cases. Alternatively, each vitamin case could have been reported separately. However, this Study analyzes and counts them all together as one "case." *See* LANDE & DAVIS, *supra* note 43, at 234 (*Vitamins* case summary).

45. For simplicity, we are calling the charges "allegations" even though many were proven in court.

46. We did not change recoveries to 2008 dollars or otherwise correct for the time-value of money. All figures include the awarded attorney's fees.

Although a verdict would produce treble damages for victims, almost all of our cases involved settlements, and in none of the cases did a court determine the size of the damages. It is possible that some of these settlements were for an amount that exceeded the harm done from an antitrust violation, in which case the amount in excess of that harm could not readily be described as illegally acquired wealth. We know of no way to determine, however, whether any of the settlements exceeded single damages.

47. Securities were counted in one case because they had a readily ascertainable market value.

ery. This means that without the private enforcement of the antitrust laws this money would have remained with foreign lawbreakers instead of being returned to the United States consumers and businesses from which it was taken.[48]

Table 1: Recoveries in Private Cases[49]

Case	*Recovery ($ millions)*
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Augmentin	91
Automotive Refinishing Paint	106
Buspirone	220
Caldera	275
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1,050
DRAM	326
Drill Bits	53
El Paso	1,427 (plus 125 in uncounted rate reductions)
Flat Glass	122
Fructose	531
Graphite Electrodes	47
IBM	775 (plus 75 in uncounted credit towards Microsoft software)
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1,027

48. This project did not select cases on the basis of whether a foreign defendant was likely to be involved. The selection criteria used were whether $50 million or more was paid to victims of the antitrust violation and the date of the completion of the litigation.

49. The results in every Table in this Article have been rounded to the nearest million dollars.

NCAA	74
Netscape	750
Paxil	165
Platinol	50
Polypropylene Carpet	50
RealNetworks	478 to 761
Relafen	250
Remeron	75
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Sun	700
Taxol	66
Terazosin	74
Urethane	73
Visa/MasterCard	3,383
Vitamins	3,908 to 5,258
Total	18,006 to 19,639

B. A Comparison of Deterrence from Private Enforcement and DOJ Criminal Enforcement of the Antitrust Laws

As noted in Part I, in addition to compensating victims of antitrust violations, private enforcement also has the goal of deterring future antitrust violations. While it is extremely difficult to measure the deterrence effects of private actions, by at least one measure they are quite significant. This is because the amount recovered in private cases is substantially higher than the aggregate of the criminal antitrust fines imposed during the same period.

Table 12[50] shows the criminal antitrust fines imposed in DOJ cases since 1990 (the period covered by this Study).[51] The fines total $4.232 billion for all cases combined (not just for the cases analyzed in our Study).[52]

Since one of the goals of the antitrust system is optimal deterrence of anticompetitive behavior,[53] it is fair to compare the $18.006

50. *See infra* Appendix 1.

51. A very small mismatch may exist because the DOJ operates on a fiscal calendar.

52. This total includes both corporate and individual fines. See Table 12 *infra* Appendix I for our methodology.

53. *See supra* notes 18–21 and accompanying text.

Table 2: Recoveries from Foreign Cartels and Monopolies

Case	*Recovery ($ millions)*
Auction Houses	Virtually all of the 452 was recovered by United States citizens
Augmentin	91
Automotive Refinishing Paint	31
Cardizem	110
Citric Acid	55 (plus unidentified recoveries by opt outs)
Commercial Explosives	62
DRAM	311
Graphite Electrodes	47
Flat Glass	38
Fructose	100
Lysine	24
Microcrystalline Cellulose	25
Remeron	75
Relafen	Unknown amount—much of 250; but not included in totals
Rubber Chemicals	268
Sorbates	36
Urethane	73
Vitamins	3,908 to 5,258
Total	5,706 to 7,056

billion (at a minimum) paid in private litigation[54] to the $4.232 billion paid in criminal fines.[55] Measured this way, private litigation provides more than four times the deterrence of the criminal fines.[56]

54. *See* Table 1 *supra* Part IV.A.

55. *See* Table 12 *infra* Appendix 1.

56. This ratio might need to be adjusted for net present value because government fines occur more quickly than private recoveries, but such an adjustment would be small and would not affect our conclusions. We also note that we are comparing the deterrence effect of United States government criminal efforts to private litigation, and we do not consider the effect of fines imposed by foreign governments. We are grateful to John Connor for raising these issues. Professor Jonathan Baker raises the possibility that potential cartelists could, depending upon the information known to the various parties in a market, take the possibility they will have to pay damages into account when they set their prices. To the extent this occurs often, it would greatly complicate the optimal deterrence analysis. *See* Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damages Remedies*, 4 J.L. Econ. & Org. 385 (1988).

It is arguable, however, that it would be more appropriate to compare the actual criminal fine total only to those cases in our Study that did result in a criminal fine or prison sentence. This way we would be certain that the compared cases would be of the same type as the ones that contributed to the DOJ fine total. As Table 11 shows,[57] the same antitrust violations that resulted in some criminal penalties to the affected cartels also gave rise to private cases that caused payouts to victims that totaled between $6.171 and $7.521 billion.

Regardless of which figure we use, we may safely conclude that the private cases provided far more deterrence than the criminal antitrust fines. Even the lowest figure of $6.171 billion in private payouts is significantly greater than the total for criminal fines of $4.232 billion and, as noted, the total private enforcement figure for the forty studied cases[58] was more than four times as large.

Prosecutions by the DOJ also result in prison sentences, and these of course significantly deter illegal activity as well. If we want to fairly compare the deterrence effects of private antitrust enforcement with that by the government, we must take prison time into account. Even when we do, however, the deterrence effect of private enforcement is far greater than the deterrence effect of the DOJ's criminal prosecutions.[59]

Since 1990, criminal antitrust prosecutions by the DOJ have resulted in sentences that aggregate to 428.6 years of prison time.[60] There is, unfortunately, no objective way to compare the deterrence effect of time spent in prison to the deterrence effect of a criminal fine, and different people would trade off jail and fines in different ways. Any "average" figure used to equate the two necessarily is speculative and arbitrary.[61]

57. *See* Table 11 *infra* Appendix I.

58. As noted earlier, this Study's analysis did not include many large and significant private enforcement actions. Nor does our analysis attempt to set a value to the public of important precedents that were established by either private or government cases. Interestingly, Professor Calkins's analysis shows that thirty of the forty-five most important precedents decided since 1977 have come from private litigation. *See* Calkins, *supra* note 42.

59. Our analysis does not take into account injunctive relief, whether obtained by the DOJ or private litigation. It is unclear how this additional consideration might alter the comparison, if it would at all.

60. *See* Table 12 *infra* Appendix I.

61. See Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 128 (2000), for a brief discussion of the literature comparing the deterrence effects of fines and imprisonment. The authors mention ten different analyses that compare or discuss the tradeoffs between fines and imprisonment. *Id.*

We note, however, scholarship by two distinguished teams of economists that attempted to "value" jail incarceration in this context. A 1988 article by Professors Howard P. Marvel, Jeffry M. Netter, and Anthony M. Robinson equated a fine of $25,000 to a month in jail for an antitrust offense.[62] Adjusting their estimate of $300,000 per year for inflation would mean equating a year in jail to slightly less than $600,000 today.[63] Similarly, a 1994 article by Professors Kenneth Glenn Dau-Schmidt, Joseph Gallo, Charles Parker, and Joseph Craycraft equated a year in jail with a fine of $1 million.[64] If this estimate were adjusted for inflation, it would be almost $1.5 million today.[65]

Under the conservative assumption that a sentence (not the actual time served[66]) of a year of incarceration has the same deterrence effect as a $5 million fine,[67] the collective 428.6 years of jail sentences received by antitrust defendants would be the equivalent of $2.143 billion in criminal fines.

Since the total DOJ criminal antitrust fines during this period were approximately $4.232 billion, the total deterrence effect of the DOJ criminal fines and prison sentences together, since 1990, has been approximately $6.4 billion. This is far less than the more than

62. Howard P. Marvel et al., *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN. L. REV. 561, 573 (1988). The article appeared in the February 1988 issue, so we assume they were using 1987 dollars.

63. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $300,000 in 1987 to $547,570 in 2007. They do not have a figure for 2008. *See* Bureau of Labor Statistics, Consumer Price Index Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Apr. 7, 2008).

64. *See* Kenneth Glenn Dau-Schmidt et al., *Criminal Penalties Under the Sherman Act: A Study of Law and Economics*, 16 RES. L. & ECON. 25, 58 (1994).

65. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $1,000,000 in 1994 and $1,399,070 in 2007. This calculator does not include figures for 2008. *See* Bureau of Labor Statistics, *supra* note 63. Professors Dau-Schmidt et al. were using 1982 data for much of their paper's analysis. If they meant their valuation of a year in jail to be expressed in 1982 dollars, since $1,000,000 in 1982 dollars is the equivalent of $2,148,620 today, perhaps it would be fair to ascribe this higher figure to them. Dau-Schmidt et al., *supra* note 64.

66. The DOJ reports only the amount of time to which defendants are sentenced. *See* Table 12 *infra* Appendix I. We do not know how much of this time defendants actually served. Because our calculations use incarceration sentences rather than actual incarceration times, our methodology implicitly values incarceration time as being worth much more than the nominal figures used in our calculations. Moreover, we treat various forms of confinement, including house arrest, as equivalent to incarceration. This no doubt overstates the deterrence effect of the DOJ's efforts.

67. We believe that the deterrence effect of being sentenced to a year of confinement is likely significantly less than $5 million, but we make this very high assumption because we do not want to select a figure that reasonably could be criticized as being too low.

$18 billion total defendants paid to victims in the forty cases we studied.[68]

Indeed, even if we used $10 million for the equivalent value of a year's imprisonment (an estimate we believe is much too high), the value of DOJ sanctions would total only $8.5 billion, less than half the amount recovered by private plaintiffs in the cases we studied.

Although the above figures can be analyzed in several different ways, it is safe to conclude that private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits. We did not expect that our project would show this result.

C. Private Antitrust Litigation Does Not Just Follow Criminal Government Enforcement

While we certainly were aware that private antitrust cases often do not follow from government investigations, we were somewhat surprised at the high representation of private actions that were filed in the absence of government cases or that significantly expanded the relief obtained through government enforcement alone. It is especially interesting that of the total amount recovered almost half—at least forty-three to forty-seven percent; $7.631 to $8.981 billion—came from the fifteen cases that did not follow federal, State, or EU government enforcement actions.[69] For each of the cases listed in Table 3, the private plaintiffs completely uncovered the violations, and initiated and pursued the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another $4.212 billion came from cases with a mixed private/public origin.[70]

68. We have not adjusted either the DOJ figures or the private recoveries for inflation. In light of the robustness of our comparison, however, doing so should not make a difference in our conclusions.

69. For conduct that gave rise to both government and private litigation, we tried to untangle cause and effect as accurately as possible. For many cases our researchers spent dozens of hours on this issue alone. However, because government investigations can proceed for many months or even for years before the enforcers file suit, their records are confidential, and the enforcers typically do not reveal or discuss their investigations or what piece or body of evidence prompted them to file suit, we could not always make definitive classifications.

70. *See* Table 5 *infra* Appendix I. For example, *In re Polypropylene Carpet Antitrust Litigation*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000), started as a result of a different private antitrust suit, which led to a government investigation in the polypropylene carpet market, that in turn led to the private litigation analyzed in this Study. See Table 5 *infra* Appendix I for other examples.

Table 3: Private Litigation Not Preceded by Government Action

Case	*Recovery ($ millions)*
Augmentin	91
Buspirone	220
Cardizem	110
Taxol	66
Caldera	275
Commercial Explosives	77
Conwood	1,050
Microcrystalline Cellulose	50
NCAA	74
NASDAQ	1,027
Lease Oil	193
Paxil	165
Relafen	250
Remeron	75
Vitamins	3,908 to 5,258
Total	7,631 to 8,981

Note: In some cases we have not been able to determine whether private or public action came first, or arose simultaneously or in a mixed fashion. We did not include these cases in this Table. Some private cases were uncovered as a result of a government investigation into a different conspiracy, but we excluded these cases from this Table as well.

There also were cases whose origin we could not definitively ascertain.[71] In many of these cases, only the private actions achieved a successful result. Still other private cases followed a government investigation, but provided significantly greater relief than the government action (if, indeed, the government brought it), expanded the scope of inquiry and claims, or obtained relief against parties not included in the government actions.[72] Moreover, the fourteen private cases that also involved criminal fines from government prosecutions recovered a total of $6.171 to $7.521 billion for victims.[73]

Thus, not only were many cases not follow-ons, but many of these cases arose and proceeded in a wide and unpredictable range of ways,

71. *See* LANDE & DAVIS, *supra* note 43, at 77–87 (*El Paso* case summary).

72. *See* Table 6 *infra* Appendix I. For example, in *Linerboard*, the FTC charged one firm with a unilateral violation of Section 5 of the FTC Act, but the private case involved an entire alleged cartel.

73. *See* Table 11 *infra* Appendix I.

often involving a complex interplay between the federal government, States, and various classes of private plaintiffs. Indeed, there might be a very complicated general interaction between public and private antitrust enforcement. It could well be the case that private victories or losses in one type of case (e.g., bundled rebate cases or predatory pricing cases) affect similar or related government cases in different industries, or vice versa. For this reason it is possible that curtailing private litigation might undermine antitrust enforcement in ways that would be extremely difficult to predict.

D. Types of Plaintiffs That Recovered: Direct Purchasers, Indirect Purchasers, and Competitors

Of the total $18.006 to $19.639 billion in recoveries we analyzed, $12.088 to $13.438 billion, in thirty-two cases, was recovered by direct purchasers; $1.815 billion, in six cases, was recovered by indirect purchasers; and $4.028 to $4.311 billion, in six cases, was recovered by competitors.[74] This means that direct purchasers obtained roughly sixty-seven to sixty-eight percent of the total recoveries we studied. This also means that indirect purchasers only recovered nine to ten percent of the total; less than one-sixth as much as direct purchasers.

Table 4: Recoveries by Category of Plaintiff

Direct		*Indirect*		*Competitor*	
Case	*Result*	*Case*	*Result*	*Case*	*Result*
Augmentin	62	Augmentin	29	Conwood	1,050
Lysine	50	Lysine	15	Sun	700
Auction Houses	452	Vitamins	204	Real-Networks	478 to 761
Automotive Refinishing	106	Paxil	65	Caldera	275
Buspirone	220	Relafen	75	IBM	775
Cardizem	110	El Paso	1,427	Netscape	750
DRAM	326				
Citric Acid	175				
Flat Glass	121				
Fructose	531				
Graphite Electrodes	47				

74. *See* Table 4 *infra*.

Insurance	36				
Linerboard	202				
Microcrystalline Cellulose	50				
Oil Lease	193				
Paxil	100				
Platinol	50				
Polypropylene Carpet	50				
Relafen	175				
Specialty Steel	50				
Terazosin	74				
Urethane	73				
Visa/ MasterCard	3,383				
Vitamins	3,704 to 5,054				
NASDAQ	1,027				
Sorbates	96				
Drill Bits	53				
Commercial Explosives	77				
Remeron	75				
Rubber Chemicals	268				
Taxol	66				
Airline Tickets Commission	86				
Total	12,088 to 13,438		1,815		4,028 to 4,311

Note: The *El Paso* settlement was recovered mostly, but not entirely, by indirect purchasers. We have not been able to segregate the small amount of recovery by direct purchasers.

In addition, it should be noted that *NCAA*[75] involved a monopsony by direct purchasers. The *Airline Tickets Commission*[76] case also involved collusion by buyers.

75. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (1998).

76. *In re* Airline Ticket Comm'n Litig., 1996 U.S. Dist. LEXIS 20361 (D. Minn. Aug. 12, 1996).

E. Types of Cases: Per Se and Rule of Reason

Fourteen of the forty cases dealt with conduct that was governed solely by the rule of reason, which netted at least a combined $8.182 to $8.465 billion for victims.[77] In addition, of the twenty-five per se cases,[78] three (*Insurance, Airline Ticket Commission,* and *Cardizem*) did not involve the traditional, hard-core per se categories of naked price fixing or bid rigging. Two other cases involved both per se and rule of reason claims.[79] We would have predicted that a higher percentage of the forty cases followed directly from hard-core per se offenses. Further, and perhaps not surprisingly, all but six of the cases were class actions.[80]

F. Non-Monetary Relief

Some of the cases we analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years (however, to be very conservative we did not count any part of this as a "cash" recovery).[81] Another case resulted in a $125 million rate reduction for consumers (we did not count this reduction in our benefits total).[82] Some cases involved extremely useful *cy pres* grants.[83] Many other cases restructured industries in ways that, according to the judge presiding over the litigation, provided improvements for competition even more beneficial than the monetary relief they conferred on the plaintiffs (even in cases where that monetary relief was quite large). For example, the *Visa/MasterCard* case was settled in April 2003 for "$3,383,400,000 in com-

77. *See* Table 8 *infra* Appendix 1.

78. *See* Table 9 *infra* Appendix 1.

79. *See* Table 10 *infra* Appendix 1.

80. Although we did not intend this Study to focus particularly upon class action litigation, the requirement of court approval of class action settlements enabled us to obtain information that often is not available in individual settlements, the terms of which often are confidential. Final verdicts are, of course, publicly available for individual cases, but these are rare in the antitrust field. *See* Connor & Lande, *supra* note 22, at 513 app. at 565.

81. *See* LANDE & DAVIS, *supra* note 43, at 13–18 (*Auction House* case summaries). These coupons traded for a value that reflected their discounted present value. *Id.* at 18. They also comprised twenty percent of the legal fees paid to the prevailing attorneys, who said that they will redeem them for cash after the expiration of the mandatory five year period. *Id.*

82. *See id.* at 77–87 (*El Paso* case summary).

83. *See, e.g., id.* at 110 (*Insurance* case summary). This case resulted in a cash settlement with a creative remedy that: (i) funded the development of a public entity that provides risk management, education, and technical services to small businesses, public entities, and non profits; and (ii) funded the States for development of a risk database for municipalities and local governments. *Id.*

pensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[84] Similarly, *NASDAQ* decreased the spreads received by market makers,[85] the *Insurance* litigation eliminated restrictions on insurance policies,[86] and *NCAA* eliminated caps on pay to college coaches.[87] Further, the generic drug cases—*Buspirone*,[88] *Cardizem*,[89] *Oncology* (*Taxol*),[90] *Relafen*,[91] *Remeron*,[92] and *Terazosin*[93]—discouraged collusion between brand name and generic drug manufacturers, saving consumers many millions, perhaps even billions, of dollars in lower cost drugs.[94]

G. Awards of Attorney's Fees

An analysis of the attorney's fees awarded in these cases provides a more interesting and complex picture than is generally recognized. The amounts awarded varied, of course, based in large part upon the opinion of the presiding judge about the quality of the legal representation, the risks involved, and the success of the case. In a significant number of cases, the courts determined that the exemplary work of counsel and other factors warranted an award of one third of the recovery.[95] In other cases, particularly those involving recoveries of more than $500 million, counsel requested, and the court awarded, a much smaller percentage of the fund.[96] A point rarely appreciated is that plaintiffs' counsel often exercised significant self-restraint in

84. Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l, 396 F.3d 96, 117 (2d Cir. 2005).

85. *See* LANDE & DAVIS, *supra* note 43, at 131–34 (*NASDAQ* case summary).

86. *See id.* at 110–13 (*Insurance* case summary).

87. *See id.* at 135–39 (*NCAA* case summary).

88. *In re* Buspirone Antitrust Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

89. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

90. Vista Healthplan, Inc. v. Bristol-Myers Squibb Co., 266 F. Supp. 2d 44 (D.D.C. 2003).

91. *In re* Relafen Antitrust Litig., 346 F. Supp. 2d 349 (D. Mass. 2004).

92. *In re* Remeron Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005).

93. *In re* Terazosin Hydrochloride, 352 F. Supp. 2d 1279 (S.D. Fla. 2005).

94. *See* LANDE & DAVIS, *supra* note 43, at 31–39 (*Buspirone* case summary), 45–55 (*Cardizem* case summary), 155–60 (*Oncology* (*Taxol*) case summary), 183–92 (*Relafen* case summary), 193–98 (*Remeron* case summary), and 212–20 (*Terazosin* case summary); *see also* Table 7C *infra* Appendix I.

95. Tables 7A and 7B show that, for the thirty cases where we were able to ascertain the attorney's fee percentage, nine cases involved an award of a third of the recovery, and eight cases involved an award of thirty to thirty-two percent of the recovery. *See* Tables 7A–B *infra* Appendix I. By contrast, three of the five actions recovering more than $500 million resulted in attorney's fee awards of only five to seven percent. *Id.*

96. *Id.*

these cases—the amount of the award reflected a request by class counsel of a relatively small percentage of the fund.[97] And, of course, an analysis of the fees awarded in these successful cases does not reflect others in which private counsel lost, recovered nothing for their time, and received no compensation or reimbursement for their substantial expenditures, often including hundreds of thousands of dollars in expert witness fees and other costs.[98]

H. Judicial Praise for Plaintiffs' Counsel

In the cases we analyzed, the judges generally expressed great satisfaction with the efforts of the plaintiffs' counsel that appeared before them. For example, in her opinion approving the final settlement in the direct purchaser *Cardizem* case,[99] Judge Nancy G. Edmunds awarded class counsel their full request of attorney's fees—thirty percent of the total recovery of $110 million—noting that the award was justified by their "excellent performance on behalf of the Class in this hotly contested case."[100]

Similarly, the Honorable Michael M. Mihm, the judge who oversaw the *Fructose* litigation,[101] repeatedly praised class counsel.

> I've said many times during this litigation that you and the attorneys who represented the defendants here are as good as it gets. Very professional . . . . You've always been cutting to the chase and not wasting my time or each others' time or adding to the cost of the litigation. And this was very difficult litigation . . . . Skill and efficiency of the attorneys. As good as it gets. Complexity and duration of the litigation. It was very complex. We made some new law on more than one occasion . . . .[102]

97. In *El Paso*, for example, plaintiffs' counsel received six percent of the common fund as an attorney's fee award, but that was the amount that they requested. *See* LANDE & DAVIS, *supra* note 43, at 77 (*El Paso* case summary).

98. In considering an appropriate contingent fee award, it is necessary to take into account the high proportion of contingent fee cases that do not result in any award to the attorneys. Unlike defense attorneys, who are normally paid by the hour, a system of contingent fees depends upon a portfolio of cases where the small number of large winners offsets the large number of cases in which there is a small fee, or no fee at all.

99. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003).

100. Order Granting Sherman Act Class Plaintiffs' Motions for Final Approval of Settlement, Plan of Allocation and Sherman Act Class Counsel's Joint Petition for Attorney's Fees, Reimbursement of Expenses, and Incentive Awards for Named Plaintiffs at 21, *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

101. *In re* High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (1996).

102. Transcript of Record at 45–46, *In re* High Fructose Corn Syrup Antitrust Litig., *id.* (No. 95-1477). He accordingly awarded class counsel twenty-five percent of the settlement fund in fees, in addition to costs, the precise amount that class counsel requested. *Id.*

Chief Judge Thomas Hogan in one of the vitamins cases stated in his opening remarks to the jury pool: "[T]his is a very challenging and interesting case . . . involving, I think, some of the finest business litigating lawyers or litigation-type lawyers in the country that are before you that you will have the privilege to listen to."[103] After the jury returned a verdict of $49.5 million in damages for the class plaintiffs, Chief Judge Hogan thanked the jurors for their service and stated: "[T]his is a serious case, and you had the pleasure of having very excellent lawyers on both sides appear before you."[104]

V. Conclusion

The distinctive system of private enforcement we have in this country is substantially underappreciated. Congress's venerable "private attorneys general" idea[105] has produced tremendous benefits for the United States economy—for consumers and for businesses of all sizes. Private antitrust enforcement is virtually the only way that victims of anticompetitive behavior can obtain redress: in the cases we studied, lawbreakers or alleged lawbreakers were forced to return approximately $18–$20 billion to victimized consumer and business pur-

103. Transcript of Record at 25:1-6, *In re* Vitamins Antitrust Litig. v. BASF AG, 2004 U.S. Dist. LEXIS 6869 (D.D.C. Apr. 2, 2004).

104. *Id.* at 1520:8-10. There are numerous other examples of complimentary remarks. The judge in *Automotive Refinishing Paint* noted that "[p]laintiffs' counsel have repeatedly demonstrated their skill in managing" the litigation. *In re* Auto Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162, at *20 (E.D. Pa. Oct. 13, 2004). The court in *Buspirone* stated, "Let me say that the lawyers in this case have done a stupendous job." Milberg, LLP, Why Milberg?, http://www.milbergweiss.com/whymilberg/whymilberg.aspx?strNav=fir. . . Nav&Page=/firm/firm.aspx (last visited Apr. 7, 2008) (citing Final Approval Hearing Transcript at 34:2-3, *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2003)). California Attorney General Bill Lockyer praised private counsel in *El Paso*, noting they "were well-financed and expert litigators, bringing particular credibility to the [settlement] negotiations," and stating, "Class counsel were crucial to bringing [the settlement] to fruition." LANDE & DAVIS, *supra* note 43, at 87 (*El Paso* case summary). The court in *Linerboard* made repeated comments to the effect that "the lawyering in the case at every stage was superb." *In re* Linerboard Antitrust Litig., 2004 WL 1221350, at *6 (E.D. Pa. June 2, 2004). The court in *Relafen* lauded "the exceptional efforts of class counsel" and pointed out that the settlement was "the result of a great deal of very fine lawyering on behalf of the parties." *In re* Relafen Antitrust Litig., 231 F.R.D. 52, 80 (D. Mass. 2005). The court in *Remeron* noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience." *In re* Remeron Direct Purchaser Antitrust Litigation, 2005 U.S. Dist. LEXIS 27013, at *37 (D.N.J. Nov. 9, 2005).

105. The federal antitrust laws permit a private right of action, awarding treble damages as well as attorney's fees to successful plaintiffs. 15 U.S.C. § 15 (2000). By establishing this framework, designed to encourage victims to sue violators, these laws create "private [A]ttorneys [G]eneral," providing incentives to pursue private litigation in the public interest. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

chasers. More than $6 billion of this otherwise would have remained in the hands of foreign lawbreakers.

Private enforcement also deters anticompetitive behavior significantly. Indeed, the forty studied cases helped deter anticompetitive behavior more than all the criminal fines and prison sentences imposed in cases prosecuted by the DOJ during this period. Moreover, almost half of the studied violations or alleged violations were uncovered solely by private counsel, and in many other cases, private counsel played a large role in uncovering and proving the offense.

These private attorneys general—lawyers representing businesses, farmers, individuals, or classes of consumers who believe they have been injured by antitrust violations—often work thousands of hours and lay out millions of dollars in the course of prosecuting antitrust litigation, time and costs which are reimbursed only if they prevail. Their work has saved the United States taxpayer tremendous sums in enforcement costs by shifting the enormous burdens and risks of litigating against sophisticated, well-financed lawbreakers to private plaintiffs' counsel. Private enforcement has often substituted for federal and state action entirely when government did not act at all or did not achieve meaningful results. Private actions have also complemented governmental enforcement in many situations where the government investigated, prosecuted, and imposed penalties, but was unable to compensate private victims for the harms they suffered as a result of antitrust violations. Private antitrust enforcement has also restructured many industries in ways that have improved efficiency and competitiveness, redounding to the benefit of consumers, the affected industries themselves, and the economy as a whole.[106]

In fact, there are many reasons to believe that these private antitrust actions complement government enforcement of the antitrust

106. As Irwin Stelzer observed,

> An army of private enforcers, enlisting help from attorney-entrepreneurs free to accept cases on a contingency fee basis, freed of "loser pays" obligations, is an important supplement to those limited resources. In America, the number of private actions brought under the antitrust laws historically had exceeded by ten times the number brought by the government. True, many of these follow successful government-initiated actions, but it is also true, according to the estimate of one scholar, that some 80% of court decisions establishing important principles (not all of which I find agreeable, I might add) in the competition policy area have resulted from private actions.

Irwin Stelzer, Notes for Talk at Workshop on Private Enforcement of Competition Law Sponsored by Office of Fair Trading: Implications for Productivity Growth in the Economy 2 (Oct. 19, 2006), *available at* http://stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%2006.pdf.

laws in important ways. Indeed, private enforcement may be every bit as essential as public enforcement. As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints;[107] undue fear of losing cases;[108] lack of awareness of industry conditions;[109] overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior;[110] higher turnover among government attorneys;[111] and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.[112] One would expect a

107. This is especially true in the current climate of tight federal budgets. Critics of private enforcement never explain where, if private actions were abolished, the substantial amount of money would come from to replace the resources that otherwise would be spent by the private enforcers. Nor do they discuss the deleterious effects on deterrence and victim compensation that curtailing private enforcement would bring.

108. Professor Calkins notes:

> Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as accomplishments. All too often, agencies worry about their win rates. . . . [T]he Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice boast about the rate at which merger challenges are successfully resolved; and general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats. It is one thing to lose one of many cases; it is considerably more devastating to lose a third, half, or more of one's cases.

Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 5–6 (1998) (citations omitted).

109. "Private parties operating in the real markets . . . [will] act on the reality they confront." Stelzer, *supra* note 106, at 4. "The administrators of our antitrust laws . . . might not feel competent to tell what sort of pricing practice is exclusionary or predatory. But the victims most certainly can." *Id.* at 5.

110. Of course, many do not believe this. "[W]ho better to argue that . . . [certain conduct is anticompetitive] than a competitor, injured by illegal anticompetitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well informed of the details and consequences of the dominant firm's practices." *Id.* at 5–6.

111. The largest antitrust cases often last for five to ten years. The government often has trouble retaining a well-qualified team for this long a period. Private firms, by contrast, often are able to retain relatively intact teams for longer periods.

112. Stelzer noted:

> A less obvious but equally important reason that private enforcement is so important is that it is free of direct political influence. In America, administrations come and go, some more given to a jaundiced view of the activities of dominant firms than others, witness the soft settlement worked out with Microsoft when the Bush administration took office and control of the Department of Justice, and its current disinclination to file any Section 2 cases.

vigorous private antitrust regime, then, to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement.

Moreover, under the current legal system it is striking that not only is the conduct that results in criminal antitrust violations greatly under-deterred, but there is simply no good way for the government, by itself, to optimally deter most conduct that is illegal but does not give rise to criminal penalties.

The anticompetitive conduct that does give rise to criminal antitrust violations currently occurs far too frequently and is almost certainly significantly underdeterred[113]—even factoring in the effects of the present system of private litigation. A fortiori this conduct would be even more underdeterred if private litigation were eliminated or substantially curtailed.

The effects of any significant curtailment or repeal of private rights of action on conduct that does not result in criminal violations might, however, be even more inimical to the public interest. As a remedy for this conduct divestiture, as a practical matter, almost never occurs, and while an injunction can stop future anticompetitive behavior, it puts violators in a no-lose situation (unless there also is the prospect of private litigation). Even if defendants lose their case and have to stop the practices in question, an injunction alone would permit them to keep the fruits of their past anticompetitive behavior. Optimal deterrence under the current regime is not possible without the prospects of private litigation.

Indeed, private litigation actually does a better job than the government in advancing the primary goal of the government's enforcement program: deterring illegal corporate behavior. The forty cases analyzed in this study, by themselves, provide greater deterrence against anticompetitive behavior than all the DOJ imposed criminal fines and prison sentences since 1990.[114] This is remarkable consider-

Stelzer, *supra* note 106, at 2; *see also* WILLIAM F. SHUGHART II, ANTITRUST POLICY AND INTEREST-GROUP POLITICS 36 (1990). Each of the two antitrust agencies is subject to separate influences. *See id.* at 83, 93. The Antitrust Division is part of the executive branch, so the Assistant Attorney General for Antitrust reports to the Attorney General and, indirectly, to the President. *See id.* at 83. The FTC enjoys the independence from direct executive control associated with its special status, but it may be correspondingly more prone to congressional influence and interference. *See id.* at 93. The agency is supposed to respond to proper congressional oversight, but ensuring that oversight is proper is no easy task.

113. *See* Lande, *supra* note 23; Connor & Lande, *supra* note 22.

114. *See supra* Part IV.B.

ing that these forty cases were only a portion of all private cases initiated during this period.

Notwithstanding the substantial benefits of private antitrust enforcement, negative assertions about the efficacy of private litigation have been very well publicized. This might be due in part to the powerful economic interests that stand to benefit from a curtailment of private antitrust enforcement and, ultimately, from lax enforcement of the antitrust laws.

However, the frequent and high praise from judges when they approved these settlements, concerning both the settlements themselves and the lawyers involved in bringing the violators to justice, belies the possibility that these cases and settlements were not in the public interest. It also adds to the certainty that these cases were desirable and that the settlements significantly assisted the victims of antitrust offenses. Moreover, the amount of these settlements is far greater than the cost of defending litigation—suggesting that defendants were responding to a real risk of liability in agreeing to pay damages rather than merely seeking to avoid the cost of the litigation itself.

In contrast to negative assertions about private antitrust enforcement, the benefits of private enforcement tend to be underreported and underappreciated. They deserve much more public attention and acknowledgement. This Study is a first step toward recognizing those benefits empirically.

Because our cases were not randomly selected, it is difficult to generalize from our conclusions. Our sense is that our results would hold up if a larger or random sample were examined, and it is our hope that our project will encourage future researchers to test our sample's validity against different and larger data bases. However, to the extent these conclusions are likely to be representative, they should be helpful for antitrust policymaking.[115]

115. Moreover, this Study focused only on successful private actions. One of this Study's major shortcomings is that it ignored meritorious antitrust cases that the private bar did not pursue. It is possible that for every successful antitrust case, there was another case where victims suffered significant losses that never were recovered, whether because damages were too small to warrant a private action, because denial of class certification rendered such a prosecution impractical, or for some other reason. These cases might well have aided victims of illegal behavior if they had been viable. Our Study could not, of course, measure the benefits of these never-brought cases, and for this reason might significantly understate the harms to consumers and the economy from antitrust violations.

Appendix I

The following tables provide a summary of key information about the antitrust cases included in this Study. All results were rounded to the nearest million dollars:

Table 5: Cases with a Mixed Private/Public Origin

Case	*Recovery ($ millions)*
Drill bits – private suit led to government investigation which prompted this suit	53
Flat Glass – DOJ investigation but no indictment or civil proceeding ever initiated by government	122
Fructose – uncovered by government action, but no indictments	531
Polypropylene Carpet – conduct uncovered in different private case, to DOJ investigation, to private case	50
Urethane – grew out of a government investigation into a conspiracy involving a different chemical	73
Visa/MasterCard – unclear which investigation began first, although private action was filed well before government action and addressed different conduct.	3,383
Total	4,212

Table 6: Private Recoveries that Were Significantly Broader than the Government Enforcement Action (in addition to all of the compensation to victims noted in Table 1) (does not include the cases in Table 3 that were not preceded by a government action)

Case	***Reasons Why Private Remedy Was Significantly Broader than Government Remedy***
Automotive Refinishing Paint	Government investigation yielded no indictments; private cases got $106 million.
El Paso	Private plaintiffs obviated need for separate government action seeking monetary recovery.
Fructose	Government did not indict antitrust violators.
Insurance	Private plaintiffs provided compensation and contributed to restructuring of industry, eliminating restrictions on insurance and reinsurance.
Linerboard	FTC action was against one firm for unilateral conduct; the private case involved a conspiracy.
Polypropylene Carpet	Private plaintiffs obtained greater monetary recovery and prosecuted larger number of defendants.
Relafen	No federal case; state governments intervened only after settlement—private plaintiffs provided the compensation to victims.
Sun v. Microsoft	Private plaintiffs made broader allegations than United States government action, obtained information that supported later European action, and protected distribution of "pure" Java software.
Specialty Steel	Private action included longer time period.

Table 7A: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Less than $100 Million

Case ($ millions in the recovery)	*Attorney's Fee Percentage*
Airline Ticket Commission (86)	33.3
Augmentin (91)	21.6 (weighted average of direct (20%) and indirect (25%))
NCAA (74)	26.8
Remeron (75)	33.3
Platinol (50)	33.3
Remeron (75)	33.3
Taxol (66)	30
Drill Bits (53)	30.8
Polypropylene Carpet (50)	33.3
Sorbates (96)	22–33
Terazosin (74)	33.3
Microcrystalline Cellulose (50)	33.3
Specialty Steel (50)	30
Lysine (65)	7
Commercial Explosives (77)	30
Graphite Electrodes (47)	15

Table 7B: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Between $100 Million and $500 Million

Case ($ millions in the recovery)	*Attorney's Fee Percentage*
Automative Refinishing Paint (106)	32–33.3
Buspirone (220)	33.3
Cardizem (110)	30
DRAM (326)	25
Flat Glass (122)	32
Linerboard (202)	30
Oil Lease (193)	25
Paxil (165)	20 & 30
Relafen (250)	33

Table 7C: Percentage of Recovery Awarded as Attorney's Fees for Recoveries Exceeding $500 Million

Case ($ millions in the recovery)	*Attorney's Fee Percentage*
Visa/MasterCard (3,383)	6.5
Auction Houses (552)	5.2 (plaintiffs' attorneys got 20% of their fee in coupons—the same percentage that class members got of their recovery in coupons)
El Paso (1,427)	6
Fructose (531)	25
NASDAQ (1,027)	13

Table 8: Recoveries in Rule of Reason Cases

Case	*Recovery ($ millions)*
Augmentin	91
Caldera	275
Conwood	1,050
IBM	775
NCAA	74
Netscape	750
Paxil – Section 2	165
Platinol – Section 2	50
RealNetworks	478 to 761
Relafen – Section 2	250
Remeron – Section 2	75
Sun	700
Taxol – Section 2	66
Visa/MasterCard	3,383
Total	8,182 to 8,465

Note: *Insurance, Airline Ticket Commission, Cardizem,* and *Buspirone* charged per se violations, but they were not hard-core price-fixing or bid-rigging cases. Several cases charged both per se and rule of reason violations. They were not included in this Table.

Table 9: Recoveries in Per se Cases

Case	*Recovery ($ millions)*
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Automotive Refinishing Paint	106
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1,050
DRAM	326
Drill Bits	53
Flat Glass	122
Fructose	531
Graphite Electrodes	47
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1,027
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Terazosin	74
Urethane	73
Vitamins	3,908 to 5,258
Total	9,227 to 10,577

Note: The *Polypropylene Carpet* settlement was preceded by another private suit that alleged both rule of reason and per se violations.

Table 10: Recoveries in Mixed Cases

Case	*Recovery ($ millions)*
Buspirone	220
El Paso	1,427 (plus 125 in uncounted rate reductions)
Total	1,647

Note: While the plaintiffs in *Buspirone* alleged that the defendants' patent infringement settlement was actually a horizontal market allocation and therefore per se illegal, the case was settled before the court decided this issue. However, the *Cardizem* court declared a similar agreement a per se violation.

Table 11: Recoveries for Cases with a Criminal Penalty as Well

Case	*Recovery ($ millions)*
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Citric Acid	175
Commercial Explosives	77
DRAM	326
Drill Bits	53
Fructose	531
Graphite Electrodes	47
Lysine	65
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Urethane	73
Vitamins	3,908 to 5,258
Total	6,171 to 7,521

Table 12: Total United States Criminal Antitrust Fines from 1990–2007

The following figures are, as noted, from a variety of different sources published at different times. We found results for some years from some sources that contradicted results given by different sources, for reasons we could not determine. The figures in the following table are our best attempt to reconcile these sometimes conflicting data sources. The totals include both corporate and individual fines.

Year (Fiscal)	*Criminal Fines Recovered ($ millions)*[116]
1990	24
1991	20
1992	24
1993	42
1994	40
1995	41
1996	27
1997	205
1998	244
1999	972
2000	308
2001	273
2002	103
2003	64
2004	141
2005	600
2006	473
2007	631
Total	4,232

116. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1990–1996, at 11 (on file with author); U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1998–2007, at 12, http://www.usdoj.gov/atr/public/workstats.pdf.

Appendix II

The following is a list of the cases included in this Study and the researchers who analyzed them.[117]

1. *In Re* Airline Ticket Comm'n Litig., 1996 U.S. Dist. LEXIS 20361 (D. Minn. Aug. 12, 1996). Tara Shoemaker

2. *In re* Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001), *aff'd*, 2002 U.S. App. LEXIS 15327 (2d Cir. July 30, 2002); Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002). Douglas Richards

3. Ryan-House v. GlaxoSmithKline PLC, 2005 U.S. Dist. LEXIS 33711 (E.D. Va. Jan. 10, 2005); SAJ Distribs., Inc., v. SmithKline Beecham Corp., No. 2:04cv23 (E.D. Pa. filed Nov. 30, 2004) (Augmentin). Michael Einhorn

4. *In re* Auto. Refinishing Paint Antitrust Litig., 177 F. Supp. 2d 1378 (E.D. Pa. 2001). Maarten Burggraaf & Andrew Sullivan

5. *In re* Buspirone Antitrust Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002), *final settlement approval*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 17, 2003). Morgan Anderson & Erika Dahlstrom

6. Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295 (D. Utah 1999). Tara Shoemaker & Erica Dahlstrom

7. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003). Morgan Anderson

8. *In re* Citric Acid Antitrust Litig., 996 F. Supp. 951 (N.D. Cal. 1998). Bobby Gordon

9. *In re* Commercial Explosives Litig., 945 F. Supp. 1489 (D. Utah 1996). Ruthie Linzer

10. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002). Erika Dahlstrom

11. *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841 (N.D. Cal. June 5, 2006). Erika Dahlstrom

12. Natural Gas Antitrust Cases I, II, III & IV: Sweetie's v. El Paso Corp., No. 319840 (S.F. Super. Ct. filed Mar. 20, 2001); Continental Forge Co. v. S. Cal. Gas Co., No. BC237336 (L.A. Super. Ct. filed Sept. 25, 2000); Berg v. S. Cal. Gas Co., No. BC241951 (L.A. Super. Ct. filed Dec. 18, 2000); City of Long Beach v. S. Cal. Gas Co., No. BC247114 (L.A. Super. Ct. filed Mar. 20, 2001); City of L.A. v. S.

117. See LANDE & DAVIS, *supra* note 43, for complete case analyses.

Cal. Gas Co., No. BC265905 (L.A. Super. Ct. filed Mar. 20, 2001); Phillip v. El Paso Merchant Energy LP, No. GIC 759425 (San Diego Super. Ct. filed Dec. 13, 2000); Phillip v. El Paso Merchant Energy LP, No. GIC 759426 (San Diego Super. Ct. filed Dec. 13, 2000) (El Paso). Erin Bennett & Polina Melamed

13. *In re* Flat Glass Antitrust Litig., 191 F.R.D. 472 (W.D. Pa. 1999). Richard Kilsheimer

14. *In re* High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (C.D. Ill. 1996). Michael Freed

15. *In re* Graphite Electrodes Antitrust Litig., 2003 WL 22358491 (E.D. Pa. Sept. 9, 2003). Norman Hawker

16. Scott Brooks, *Microsoft and IBM Resolve Antitrust Issues*, IBM, July 1, 2005 http://www-03.ibm.com/press/us/en/pressrelease/7767.wss. Erika Dahlstrom

17. *In re* Insurance Antitrust Litig., 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd sub nom*, Hartford Ins. Co. v. California, 509 U.S. 764 (1993). Maarten Burggraaf

18. *In re* Linerboard Antitrust Litig. (*Linerboard I*), No. 1261, 2000 WL 1475559, at *1–3 (E.D. Pa. Oct. 4, 2000); *In re* Linerboard Antitrust Litig. (*Linerboard II*), 203 F.R.D. 197, 201–04 (E.D.Pa. 2001), *aff'd*, *In re* Linerboard Antitrust Litig. (*Linerboard III*), 305 F.3d 145, 147–49 (3d Cir. 2002); *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619 (E.D. Pa. 2004). Maarten Burggraaf

19. *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996). Maarten Burggraaf

20. *In re* Microcrystalline Cellulose Antitrust Litig., 221 F.R.D. 428 (E.D. Pa. 2004) Michael Einhorn

21. *In re* NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703 (S.D.N.Y. 1995). Maarten Burggraaf

22. Law v. Nat'l Collegiate Athletic Ass'n, 902 F. Supp. 1394 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998). Joey Pulver

23. Netscape Comm. Corp. v. Microsoft Corp., Civil Action Nos. 98-1232, 98-1233 (D.D.C. filed Jan. 22, 2002). Andrew Smullian

24. N. Shore Hematology & Oncology Assocs. v. Bristol-Myers Squibb Co., Civil Action No.:04 cv248(EGS) (D.D.C. filed Feb. 13, 2004). Tara Shoemaker

25. *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999). Stratis Camatsos

26. Vista Healthplan, Inc. v. Bristol-Myers Squibb Co., 266 F. Supp. 2d 44 (D.D.C. 2003). Tara Shoemaker

27. Stop & Shop Supermarket Corp. v. SmithKline Beecham Corp., Civil Action No. 03-CV-4578 (E.D. Pa. filed Aug. 6, 2003); Nichols v. SmithKline Beecham Corp., 2003 WL 302352 (E.D. Pa. Jan. 23, 2003). Tara Shoemaker

28. *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000). Drew Stevens

29. Settlement Agreement, RealNetworks, Inc. v. Microsoft Corp., No. JFM-04-968, M.D.L. Docket No. 1332 (D. Md. Oct. 11, 2005). Norman Hawker

30. Red Eagle Res. v. Baker Hughes Inc. (*In re* Drill Bits Antitrust Litig.), No. 4:91cv00627 (S.D. Tex. filed Mar. 11, 1991). Ruthie Linzer

31. *In re* Relafen Antitrust Litig., 346 F. Supp. 2d 349 (D. Mass. 2004). Morgan Anderson & Erika Dahlstrom

32. *In re* Remeron Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005). Morgan Anderson & Erika Dahlstrom

33. *In re* Rubber Chemicals Antitrust Litig., 350 F. Supp. 2d 1366 (Judicial Panel on Multidistrict Litigation 2004). Ruthie Linzer

34. *In re* Sorbates Direct Purchaser Antitrust Litig., 2002 WL 31655191 (N.D. Cal. Nov. 15, 2002). Joey Pulver

35. Sun Microsystems v. Microsoft, 333 F.3d 517 (4th Cir. 2003). Robert Lande

36. *In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005). Morgan Anderson & Erika Dahlstrom

37. Settlement Agreement, Transam. Refining Corp. v. Dravo Corp., No. 4:88CV00789 (S.D. Tex. filed Mar. 10, 1988) (Specialty Steel Piping Antitrust Litigation). Ruthie Linzer

38. *In re* Urethane Antitrust Litig., 232 F.R.D. 681 (D. Kan. 2005). Bobby Gordon

39. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc., 396 F.3d 96, 114 (2d Cir. 2005). Robert Lande

40. *In re* Vitamins Antitrust Litig. (many related cases), *see* JOHN M. CONNOR, THE GREAT GLOBAL VITAMINS CONSPIRACY: SANCTIONS AND DETERRENCE (2008) (on file with the authors). Brian Ratner & Robert Lande

ATTACHMENT 2

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Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws

Robert H. Lande & Joshua P. Davis[1]

The purpose of this article is to determine which type of antitrust enforcement deters more anticompetitive behavior: the U.S. Department of Justice ("DOJ") Antitrust Division's criminal anti-cartel enforcement program or private enforcement of the U.S. antitrust laws. The answer to this question—and answers to related questions concerning deterrence and compensation issues—could have important implications for the United States, pertaining both to appropriate antitrust remedies and to the course of litigation of private antitrust cases. Those answers also could influence other nations considering either adopting or changing criminal penalties for competition law violations, or allowing private rights of action by the victims of competition law violations.

Anti-cartel enforcement by the DOJ long has been the gold standard of antitrust enforcement worldwide. If a country were to have only one type of antitrust violation, surely it would be against horizontal cartels, and surely this law would be enforced by that country's government officials. Even critics who believe that monopolization and vertical restraints never or rarely should be challenged almost always believe in strong anti-cartel enforcement.[2] People in the antitrust world disagree about many things, but it is extremely difficult to find responsible critics who do not applaud the U. S. government's anti-cartel program.[3] We strongly agree with this almost-unanimous consensus and are second to no

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1 The authors are, respectively, Venable Professor of Law, University of Baltimore School of Law, and a Director of the American Antitrust Institute; Professor of Law and Director, Center for Law and Ethics, University of San Francisco School of Law, and member of the Advisory Board of the American Antitrust Institute. This article in part relies upon and significantly extends analysis contained in the authors' earlier joint work, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV.. 879 (2008) [hereinafter *Benefits*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661. For summaries of the individual case studies analyzed in this article see Robert H. Lande & Joshua P. Davis, *Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 (last revised Oct. 15, 2008). The authors are grateful to participants in conferences sponsored by American Antitrust Institute, George Washington University, and also the Lear Conference, for comments and suggestion, and to Thomas Appel, Christine Carey, Joanna Diamond, Ken Fung and Thomas Weaver for valuable research assistance.

2 *See* ROBERT BORK, THE ANTIRUST PARADOX: A POLICY AT WAR WITH ITSELF 66-67 (2d ed. 1993).

3 Both Democratic and Republican Administrations have made anti-cartel activity their highest priority. Both have succeeded wonderfully at this crucial task and for this they have

one in our appreciation of the DOJ's anti-cartel activity. In terms of taxpayer dollars well spent, the program surely is one of the most outstanding in all of government.

By contrast, private antitrust enforcement under the United States antitrust laws gets little respect and much criticism. Indeed, it is difficult to find many people other than members of the plaintiffs' bar willing to say much good about private enforcement. For example, even moderates like FTC Commissioner Rosch believe that treble damage class action cases "are almost as scandalous as the price-fixing cartels that are generally at issue. . . [T]he plaintiff's lawyers. . . stand to win almost regardless of the merits of the case."[4] Due to these widespread beliefs former FTC Chairman Kovacic recently summarized the conventional wisdom about private enforcement succinctly: "private rights of actions U.S. style are poison."[5]

Given these criticisms, it may come as a surprise—even a shock—that a quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the U.S. Department of Justice's anti-cartel program.[6] This

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been applauded widely. It is difficult to find many who have even questioned the DOJ's anticartel enforcement, except for small criticisms at the margins. If we may use the terms of professors, it is possible to find critics who give the DOJ anti-cartel programs an A instead of an A+, but almost impossible to find responsible critics grading them lower than this. See AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES, 2-3 (2008) [hereinafter AAI TRANSITION TEAM REPORT], available at http://www.antitrustinstitute.org/Archives/transitionreport.ashx. By contrast, it is easy to find critics on both sides of the political aisle giving much lower grades, even failing grades, to their other antitrust programs. For example, the AAI Transition Team Report sharply criticized the DOJ's record in the Section 2 area. *See id.* at 55, 58-59.

4 J. Thomas Rosch, Fed. Trade Comm'n Comm'r, Remarks to the Antitrust Modernization Commission (June 8, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf, at 9-10. Similarly Steve Newborn was asked which areas of antitrust need reform, and replied: "Class actions: they are increasingly beneficial only to plaintiffs' law firms and not to consumers." Q&A With Weil Gotshal's Steven A. Newborn, June 2, 2009. http://competition.law360.com/articles/103359

5 FTC:WATCH No. 708, Nov. 19, 2007, at 4 (quoting William E. Kovacic speaking at an ABA panel on Exemptions and Immunities where he summarized the conventional wisdom in the field but was not necessarily agreeing with it). For additional criticisms of private antitrust enforcement see *Benefits*, *supra* note 1, at 883-89.

6 We will not, however, attempt to compare private enforcement to FTC enforcement, because, except for a few disgorgement cases, the FTC obtains only injunctive relief.

deterrence effect is, of course, in addition to its virtually unique compensation function.[7] If this article's conclusion about the importance of private enforcement for deterrence is true, private antitrust enforcement also should receive much of the praise the field gives to the DOJ anti-cartel efforts. Private enforcement should be encouraged in the United States rather than hampered through new legislation[8] or through restrictive judicial interpretation of existing law.[9] And the United States' version of private antitrust enforcement also becomes something for other countries to consider.

Section I of this paper analyzes the deterrence effects of DOJ anti-cartel efforts by studying the DOJ cases filed from 1990 to 2007. Section II compares these results to the cumulative deterrence effects of a sample of 40 large private cases that ended during this same period. (We do not compare the DOJ with the deterrence effects of every private case filed during this period, however, because we were unable to obtain this information).

Before coming to any policy conclusions based on this comparison, we address some criticisms of private enforcement. Few commentators dispute that most DOJ anti-cartel prosecutions involved anticompetitive conduct or that most DOJ cartel cases should have been brought. But are most private enforcement cases legitimate? Do most involve anticompetitive behavior? Considering the widespread criticism within the profession of private enforcement, and that most successful private cases result only in settlements, can a neutral observer be confident that such cases mostly involve underlying anticompetitive conduct? We address this topic in Section III, concluding that the evidence suggests the legal actions on which we rely did indeed entail claims with merit. Section IV then acknowledges some qualifications and caveats.

Finally, Section V concludes by offering policy suggestions that follow from our analysis. Our results demonstrate that private enforcement most certainly has crucial deterrence effects. These effects are so important that U.S. courts should not continue their steps to curtail private enforcement, and foreign jurisdictions should consider permitting private enforcement of competition laws as a complement to government efforts.

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7 *See Benefits*, *supra* note 1, at 881-83; Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law* (2009 draft). Another goal of private enforcement is to restore competition to markets. *See Benefits*, *supra* note 1, at 881.

8 An example is the Class Action Fairness Act ("CAFA"). Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). CAFA allows defendants to remove most class actions to federal court and, as a result, arguably makes certification of classes bringing state law claims more difficult. *See, e.g.*, Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 1530-31 (noting one goal of CAFA was to make class certification more difficult for plaintiffs).

9 *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (overruling precedent and applying heightened pleading standard to private antitrust case).

I. Deterrence From DOJ Anti-Cartel Cases

The DOJ Antitrust Division can deter illegal cartel activity in several ways. First, it can request that courts fine the corporations involved. Second, it can request that the most culpable individuals be fined. Third, it sometimes asks for restitution. Fourth, it can request that some of the individuals involved be imprisoned or placed under house arrest.[10] The Division also can secure injunctions to restore competition to the affected markets. Since we know of no way to value these injunctions, however, or to compare them to injunctions secured by private parties, we have omitted them from our analysis. [11]

A. Optimal Deterrence of Cartels

The most generally accepted approach to optimally deterring antitrust violations was developed by Professor William Landes,[12] who convincingly showed that to achieve optimal[13] deterrence,[14] the total amount of the sanctions imposed against an antitrust violator

10 U.S. DEP'T OF JUSTICE, ANTITRUST DIVISON WORKLOAD STATISTICS 1999-2008 n.14, http://www.usdoj.gov/atr/public/workstats.pdf (last visited May 26, 2009) (The term other confinement "[i]ncludes house arrest or confinement to a halfway house or community treatment center.").

11 Additionally, DOJ cases often set important legal precedents which can deter anticompetitive conduct significantly. We do not know how to value these precedents, however, or to compare their value to the value of precedents established through private enforcement. For an excellent analysis of this topic see Stephen Calkins, Coming to Praise Criminal Antitrust Enforcement, European University Institute 11th EU Competition Law and Policy Workshop, (Florence, Italy, June 2-3 2006). Calkins found that, of leading antitrust cases decided before 1977, 12 were private and 27 were government. Of the leading cases decided in 1977 or later, however, he found 30 private cases and only 15 government cases. Id. at 17 (sample taken from the leading cases printed in the leading antitrust casebook). Calkins concluded: "[t]oday what is known as U.S. antitrust law no longer is exclusively or even principally the consequence of Justice Department [or FTC or State] enforcement. The leading modern cases on monopolization, attempted monopolization, joint ventures, proof of agreement; boycott; other horizontal restraints of trade, resale price maintenance, territorial restraints, vertical boycott claims, tying, price discrimination, jurisdiction, and exemptions are almost all the result of litigation brought by someone other than the Justice Department [or the FTC of the States]." Id. at 18-19 (citations omitted).

12 William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. CHI. L. REV. 652, 656 (1983). Landes built upon concepts developed in Gary S. Becker's article Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968), applying them to the antitrust field.

should be equal to the violation's expected "net harm to others," divided by the probability of detection and proof of the violation.[15] Moreover, because not every cartel is detected or successfully sanctioned, the "net harm to others" from cartels should be multiplied by a number that is larger than one (the multiplier should be the inverse of the probability of detection and proof).[16]

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13. The goal is optimal deterrence not complete deterrence because enforcement aggressive enough to deter all cartels is likely to unduly penalize honest business conduct. Therefore a proper balance must be struck to achieve optimal deterrence.

14. Professor Landes was not concerned with compensating victims. For an analysis that takes victim compensation into account, see Robert H. Lande, Are Antitrust "Treble" Damages Really Single Damages?, 54 OHIO ST. L.J. 115, 16168 (1993), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

15. *See* Landes, *supra* note 12, at 66668. If the harm were ten and the probability of detection and proof were .333..., since (10/.333... = 30) the optimal penalty for this violation would be 30. This ignores risk aversion and other factors. *See id.* Analysts of both the Chicago and post-Chicago schools of antitrust have almost universally accepted these principles. *See* Lande, *supra* note 14. Despite the general acknowledgement of he superiority of the Landes approach, however, many respected scholars and enforcers instead focus upon the gain to the lawbreaker, perhaps because it simpler to calculate. For an insightful analysis see Wouter P. J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 World Competition 183, 190-93 (2006).

16 "Of course, no one knows the percentage of cartels that are detected and proven. In 1986, the Assistant Attorney General for Antitrust, Douglas Ginsburg (AAG Ginsburg), estimated that the enforcers detected no more than 10% of all cartels. There are reasons to believe that the Antitrust Division's amnesty program has resulted in a larger percentage of cartels detected and proven today, but there is anecdotal evidence that, despite the enforcers' superb efforts, many cartels still operate. From an optimal deterrence perspective it would be necessary to know the percentage of cartels that are detected and proven to know what number to multiply the 'net harms to others' by. At a minimum, however, we know that if the combined antitrust sanctions only total the actual damages, firms would be significantly undeterred from committing antitrust violations.

Ideally, optimal deterrence should be based upon the expectations of potential price fixers, not the results of their pricefixing or the actual fines imposed. To ascertain this, however, we would have to interview a random sample of potential price fixers and discern their expectations. In reality, however, it would be impossible to assemble a proper random sample or to get them to respond candidly." John M. Connor & Robert H. Lande, How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines, 80 TUL. L. REV. 513, 519-20 (2005) (citations omitted).

In applying Landes' model we will undertake several important steps that warrant noting. First, we will attempt to compare financial penalties imposed on corporations with similar penalties imposed on the individual corporate actors who are personally responsible for an antitrust violation. Second, we will attempt to compare financial penalties with time in prison (or time spent under house arrest).

Of course, making these comparisons in an objective, accurate and non-controversial manner is not possible. The conventional wisdom seems to be that fines are superior to prison as a way to secure optimal deterrence.17 However, one might argue, to put the points in their strongest form, that corporate actors care only about their own financial well-being and that prison sentences are so abhorrent[18] that no corporate actor would be willing to risk prison, no matter how large the financial gain (or, to put the point somewhat differently, that a corporate actor would be willing to pay virtually any amount of money to avoid the risk of prison19).

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17 The conventional wisdom in the field was well summarized by V.S. Khanna, Corporate Criminal Liability: What Purpose Does it Serve, 109 Harv. L. Rev. 1477 (1996) ("Thus, some justification for corporate criminal liability might have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations.").

[18] See Gregory J. Werden, Sanctioning *Cartel Activity: Let The Punishment Fit The Crime,* 5 European Competition J. 19, 31 (2009). "To the businessman ... prison is the inferno, and conventional risk-reqard analysis breaks down when the risk is jail." A. Linman, *The paper Lable Sentences: A Critique,* 86 Yale L. J. 630, 630-31 (1977); "Experience supports the conclusion that businessmen view prison as uniquely unpleasent and therefore incarceration is a uniquely effective deterrent." D. Baker and B. Reeves, *The Paper Lable Sentences: Critiques,* 86 Yale L. J. 619, 621-22 (1977). [We need to fix the citation form; I can't tell which quotations come from which articles.]

19 Id. Note the important difference in these two baselines: a corporate actor might demand a different sum to risk prison than they would be willing to pay to avoid the risk of prison. For example, suppose someone would (just) rather pay a $2 million fine than be imprisoned for a year. How would that person react to the question of whether they would accept $2 million in return to going to prison for a year? They might or might not agree to this deal.

Part of the difference is the relative wealth of the actor in the two situations. A corporate actor can demand an unlimited amount to accept the risk of prison. And any such payment increases his or her wealth. But the same person cannot pay an unlimited amount to avoid the risk of prison. She can only spend as much money as she has or can borrow. *See* David Cohen and Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, in CHOICES, VALUES AND FRAMES 428 (2000). But there is another element at play here as well. Empirical evidence shows that people's attitude toward costs and benefits depends on their perception of the *status quo*. *Id.* at 428-29. A person who accepts prison as the *status quo* may be willing to pay less to avoid it than a person who sees

The extreme form of these arguments is unpersuasive. Corporate actors do in fact risk their own prison time for the financial benefit of their employers when they violate the antitrust laws—by, for example, participating in price fixing. Moreover, the literature on antitrust law generally assumes that corporations maximize profits, which means that it also assumes the interests of corporate representatives and corporations generally align.[20] Any other approach would greatly complicate antitrust analysis, requiring an inquiry not only into the market and its participants, but also into the internal workings of particular corporations. Indeed, there is an odd—and usually unexplained—inconsistency when proponents of the free market claim that corporations should not be subject to civil liability for the wrongdoing of their representatives: If the free market works in the sense that corporations respond in an efficient manner to market incentives, including by encouraging corporate representatives to act for the benefit of the corporation, why shouldn't the same be true of legal sanctions?[21]

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prison as a deviation from the *status quo*. A corollary is that, depending on the odds and stakes, people value avoiding losses—and are willing to take risks to do so—far more than they value gains—which they generally will not take risks to do (although, oddly, this principle may vary depending on the odds of the risk and the size of the gain or loss). *See* Daniel Kahneman and Amos Tversky, *Choices, Values, and Frames* in CHOICES, VALUES AND FRAMES 35-36 (2000)). This psychological phenomenon—and others—greatly complicates an economic analysis of behavior. So, for example, a corporate actor who perceives herself as taking steps that violate the antitrust law to return to the *status quo* (perhaps because she thinks her corporation is suffering from unfair competition) may be far more tolerant of risk than the same corporate actor who contemplates the same measure as a means of obtaining a perceived economic advantage. Even for a single corporate actor, then, there may be no single correct amount that represents her willingness to trade off between gain for her corporation and the risk of prison for herself.

[20] *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001) [hereinafter, ANTITRUST LAW] (arguing that his brand of economic analysis of antitrust law has come to predominate judicial doctrinal, with a consensus that "business firms should should be assumed to be rational profit maximizers, so that the issue in evaluating the antitrust significance of a particular business practice should be whether it is a means by which a rational profits maximizer can increase its profits at the expense of efficiency"). *See also* Richard A. Posner, *Optimal Sentences for White-Collar Crime*, 17 AM. CRIM. L. REV. 409, 418 & n. 27 (1979-1980) (acknowledging that he has made "an argument. . . in the antitrust context for confining criminal (or civil-penalty) liability to the corporation, on the theory that if it is liable it will find adequate ways of imposing on its employees the costs to it of violating the law.") (citing RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 225-26 (1976)) [hereinafter "*Optimal Sentencing*"]. The same is true for scholars of a similar ilk in the field of securities. *See, e.g.*, EASTERBROOK AND FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 4 () ("managers may do their best to take advantage of their investors, but they find that the dynamics of the market drive them to act as if they had investors' interests at heart. It is almost as if there was an invisible hand.") .

[21] *See, e.g.*, Christopher D. Stone, *Sentencing the Corporation*, 71 B.U. L. REV. 383, 385 (1991) ("While it is true that managers have a hard time getting the rank and file to adapt to

The work of Richard Posner provides a useful illustration. He addresses—and rejects—the twin concerns about correlating financial penalties to corporations with prison terms for corporate representatives: (1) that corporate representatives have different interests than corporations and (2) that prison time cannot be equated with a monetary sum. The first issue involves a potential divergence of interests between principal and agent, which economists tend to call agency costs. Posner's response: "A corporation has effective methods of preventing its employees from committing acts that impose huge [antitrust] liabilities on it. A sales manager whose unauthorized participation in a paltry price-fixing scheme resulted in the imposition of a $1 million fine on his employer would thereafter, I predict, have great difficulty finding responsible employment, and this prospect should be sufficient to deter."[22] In other words, corporations can and will impose incentives that align their interests and the interests of their representatives.

Posner has also addressed the second issue—the concern that prison time cannot be correlated to financial penalties. He has argued for "the substitution, whenever possible, of the fine (or civil penalty) for the prison sentence as the punishment for crime. . . ."[23] His contentions are, particularly in cases of "white collar" crime,[24] that a sufficiently large financial penalty is just as effective as the threat of prison, and "that it is cheaper to administer and therefore socially preferable."[25] As he notes, "The fine [or civil liability] for a white collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead."[26]

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market threats, no one suggests that corporations are so hidebound or so buffered from their capital environments that market penalties must be ruinously high before the company will respond. Why should it be otherwise with legal penalties?").

[22] *Id.* at 271. *But see* John Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 458-59 (1980) [hereinafter "*Corporate Crime and Punishment*"] (noting examples of limited internal sanctions imposed against individuals responsible for antitrust violations).

[23] Posner, *Optimal Sentences*, *supra* note __, at 409.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 410. Posner is familiar with resistance to this claim—indeed, his article responds in part to a sophisticated criticism by John Coffee that contends that "the threat of imprisonment is inherently greater than that of a fine," *id.* at 413 (citing Coffee, *Corporate Crime and Punishment*, *supra* note __), or, presumably, civil liability. Posner usefully distills Coffee's argument to three points: (1) financial penalties work only if the culpable party has the means to pay them; (2) fines themselves work only if backed by a sufficient penalty for non-payment (otherwise they will not be paid); and (3) culpable parties are likely to experience an

Thus skeptics of private enforcement with a Chicago school orientation—including Posner himself[27]—should not rely on agency costs or the inherent superiority of prison as a deterrent to reject an effort to compare the deterrence effects of private enforcement and criminal prosecutions.[28]

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increasing marginal loss of utility as fines get larger (at least up until the point that they have no money left), but a decreasing marginal loss of utility as prison sentences grow in length. *Id.* at 413-14. The first two points have only limited significance for our paper: corporations generally can pay the damages they owe and courts have methods of making them do so, including mulcting them with sanctions for contempt. But Coffee's point about the potentially complicated relationship between financial penalties and prison time does suggest that any ratio between prison time and money will be an imperfect approximation.

[27] *See, e.g.*, Posner, ANTITRUST LAW, *supra* note __, at . 274-75. Posner's concern about antitrust class actions is particularly curious. He levels two criticisms: first, that class action lawyers have incentive to settle cases for relatively small amounts compared to their actual worth and, second, that risk averse corporations may settle claims for too much because of an unlikely possibility of an extraordinarily large loss. *Id.* at 275. Posner does not address that these tendencies—if real—are off-setting.

[28] Indeed, Posner even suggests what he believes to be a feasible method for estimating the trade-off been years in prison and monetary sanctions:

> [A] promising method would be to infer statistically the relative deterrent effect of fine and prison. Suppose that in one federal district the average fine for a federal white-collar offense is $1,000 and the average prison terms 30 days, and in another district it is $800 and 40 days, and so forth. Then, by comparing the incidence of the offenses across districts, we should be able to infer the rate of exchange at which days in jail translate into dollars of fine with no loss of deterrence. (A study of state white-collar prosecutions, conducted along similar lines, might also be feasible.) Since no such study has been attempted, I cannot evaluate the difficulties it might encounter arising, for example, because the incidence of many white-collar crimes (e.g., price-fixing conspiracies) is unknown, or the gravity of crime may vary across districts, which affects the optimal sentencing. Such a study might not produce results entitled to great confidence. Nevertheless, supplemented by the intuition that judges today in devising fine-prison "packages" to impose on white collar offenders, such a study should provide a close enough approximation of the actual fine-prison trade-off that we need not fear that by substituting fines for prison sentences in white-collar cases we would be drastically altering the expected punishment cost, and hence the level, of white-collar crime.

Posner, *Optimal Sentences*, *supra* note __, at 413. We know of no study along these lines. And, of course, the analysis assumes that compliance with antitrust law depends primarily, perhaps even exclusively, on the incentives created by money or prison. *Cf.* Christopher D. Stone, *supra* note __, at 389 (arguing that the "moral responsibility" to obey the law explains the compliance of many corporate actors).

More plausible points are that a financial penalty against an individual has more of an impact than a similar penalty against a corporation and that a year of prison time is equivalent to a relatively large financial penalty. We make accommodations for these plausible assumptions in our analysis *supra* by tripling the disvalue or deterrence effects of individual sanctions relative to corporate sanctions.29

Perhaps optimal deterrence only can be secured by a mix of corporate and individual sactions. If violations only were subject to corporate penalties, individuals might be unduly tempted to form cartels if, as has been suggested by some research,[30] they do not face significant internal sanctions for their illegal behavior[31] or an appropriate diminuition of their future income. On the other hand, if only individual penalties existed, it could be in the interests of some corporations to establish internal incentives that failed to discourage, rewarded, or even coerced employees into engaging in illegal behavior.[32] Some corporations

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29 A critic of private enforcement could argue that even a very large amount of money paid by the corporation is meaningless from a deterrence perspective—that managers could care less how much money their corporations pay. *See, e.g.*, John Coffee, "*No Soul to Damn, No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 393 (1981). They could argue that only individual fines and prison matter at all from a deterrence perspective, so private enforcement does not deter anything.

Of course, this view contradicts the basic assumption that corporations are profit maximizers. Surely corporations do not like paying millions or billions of dollars, so there must be some deterrence from private cases. Moreover, the individuals responsible for this liability are likely to have their careers detrimentally affected when their actions require their corporation to pay large sums in private cases. *See* POSNER, ANTITRUST LAW, *supra* note __, at 271 (arguing that causing a corporation to suffer financial losses will harm careers of employees); *cf.* Coffee, *Corporate Crime and Punishment*, *supra* note__, at 458-59 (providing examples of corporate representatives violating the law to the detriment of the corporation but not suffering adverse consequences). For these reasons, while correlating financial penalties to corporations with prison time to corporate representatives is tricky, it seems to overstate the case to suggest there is no correlation whatsoever.

30 See Coffee, id.

31 Greg Werden suggests additional reasons: "This can occur as a result of defects in the design of compensation schemes, especially if the executives have short time horizons or are more willing than business exterprises to take risks. Consequently, business enterprises can incur substantial costs in monitoring their executives and complying with the law." See Gregory J. Werden, Sanctioning *Cartel Activity: Let The Punishment Fit The Crime*, 5 European Competition J. 19, 31-32 (2009) (footnotes omitted).

32 Id. at 32.

might preferver to offer up a few executuves for multi-year prison terms rather than pay $100 million or more in a criminal fine or payout in private litigation.[33]

In light of these complexities, this article will use a total deterence approach, and will determine the sum of individual and corporate deterrence. As noted earlier, our analysis will make accommodations for these complexities and agency-principle problems by tripling the disvalue or deterrence effects of individual sanctions relative to corporate sanctions. With these qualifications in place, we can begin our analysis by addressing the deterrence effect of the Department of Justice's enforcement of the antitrust laws.

B. Deterrence from DOJ Cartel Fines and Restitution

The Antitrust Division successfully has prosecuted hundreds of cartels. While it is of course impossible to determine how many cartels never were formed due to the prospect of penalties resulting from investigations (*i.e.*, how much how much deterrence its cases were responsible for), surely it is significant. We will address in turn various DOJ remedies—corporate fines, individual fines, restitution, and imprisonment.

The total of the corporate fines imposed in every DOJ antitrust case from 1990 to 2007 has been $4.166 billion.34 The total of the individual fines imposed in these cases has been $67 million.[35]

During this same period, the Antitrust Division has also secured restitution of $118 million in conjunction with criminal antitrust cases.[36] This largely or totally consists of restitution to the federal government for the overcharges it paid to price fixers. As the Division's Workload Statistics notes with considerable understatement, "Frequently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damages actions filed by the victims."[37]

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[33] Suppose that, instead of a corporate fine or payouts in private cases, a corporation could offer up to the Department of Justice five executives who would each be sentenced to 3 years in prison. Suppose the corporation could pay each of the individuals involved $2 million per executive per year by depositing the appropriate sums in Swiss bank accounts. This would only cost the corporation $30 million, far less than many of the larger fines that have been imposed in recent years, and less than the private payouts in every one of the cases studied by the authors in their sample of private cases.

34 *See* tbl. 1.

35 *See* tbl. 2.

36 *See* tbl 3.

37 WORKLOAD STATISTICS 1999-2008, supra note __, at n.13.

C. Deterrence Effects of Prison and House Arrest

DOJ prosecutions also result in prison sentences and house arrests, which significantly deter illegal activity as well. From 1990 to 2007 criminal prosecutions by the Department of Justice Antitrust Division have resulted in sentences that total 330.24 years in prison.[38] In addition, Antitrust Division activity also has led to another 96.85 years of "house arrest or confinement to a halfway house or community treatment center."[39] However, these figures might be somewhat inaccurate for the purposes at hand, for two reasons.

First, these figures are for time sentenced, not time served. We were unable to determine how much of this time actually was served or how often sentences were reduced. Second, sometimes an investigation by the Antitrust Division results in a sentence for an unrelated or marginally related crime regardless of whether an antitrust violation was uncovered. Unrelated crimes can include perjury, mail fraud, contempt, obstruction of justice, and false statements.[40] Since the Antitrust Division uncovered these crimes, often Antitrust Division investigators are in the best position to pursue these issues, even though they are not antitrust violations. They often do so but, unfortunately, we have not been able to find out how frequently this occurs.[41]

For simplicity we are ignoring these issues. The figures reported above for prison time and house arrest therefore will be used in our subsequent analysis even though they are larger than hey should be. As such, these unadjusted estimates will overestimate the probable deterrence effect of the DOJ anti-cartel program to some extent.

Using these figures, how could we fairly value—or disvalue—time spent in prison or under house arrest? Since of course no one wants to spend any time in prison or under house arrest, should we disvalue it infinitely and assume that even a small probability of spending any time in prison or under house arrest has an infinite deterrence value?

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38 *See* tbl.4.

39 *See* tbl.5. *See also supra* note 10.

40 WORKLOAD STATISTICS 1999-2008, *supra* note 10, at 8 (listing these crimes under the header "Other Criminal Cases").

41 Sometimes these other crimes are related to an antitrust offense—such as when a cartel bribes a federal purchasing agent. Other times they are not. Often they are very difficult to classify. According to the DOJ, "Other Federal Crimes such as Perjury, Mail Fraud, Contempt, Obstruction of Justice, or False Statements" have constituted 16% of their criminal convictions since 1990 (23% in recent years, when prison sentences have been longer). *Id.*

No. People do not act as if they infinitely disvalue the risk of getting put into prison or placed under house arrest for an antitrust offense. If they did, they would never try to form a cartel because this would put them at risk of getting caught and sentenced. Rather, potential offenders appear to tolerate the risk of prison. Perhaps they calculate, at least to some very rough degree, their apparent chances of getting caught, and the prison sentence, house arrest, or fine they are likely to face. They then may balance this chance of a penalty, again in an extremely rough way, against the rewards of cartelization. In any case, often they decide to form cartels. We know they often make this decision because cartelists surely know cartels are illegal, yet the number of cartels caught in recent years has been quite significant and does not seem to be decreasing.[42] Since 1990, 550 people have been sentenced to prison or house arrest as a result of successful Antitrust Division cases against 958 cartels.[43]

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42 The continued high number of Department of Justice (DOJ) grand juries, and the recent DOJ success rate in the courts, is evidence that many cartels still exist. As of February 2004, the DOJ had approximately 100 pending grand jury investigations. Antitrust Div., U.S. Dep't of Justice, Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program 1 (2004), available at http://www.usdoj.gov/atr/public/guidelines/202531.pdf (last visited Sept. 28, 2005) [hereinafter Status Report]. Between 1994 and 2008, the DOJ filed from thirtytwo to sixtythree criminal cases per year, most of which resulted in convictions. Antitrust Div., U.S. Dep't of Justice, Workload Statistics: FY 19942008, at 4, 7 (2004), available at http://www.usdoj.gov/atr/public/12848.pdf (last visited ___). The following table, extracted from this data, shows the DOJ's success in prosecuting antitrust violations:

Total Criminal Cases	'94	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08
Filed	57	60	42	38	62	57	63	44	33	41	42	32	34	40	54
Won	51	65	38	40	64	48	52	38	37	32	35	36	31	31	47
Lost	4	2	5	1	1	2	-	2	1	1	1	1	-	1	4
Pending	-	-	-	-	17	24	35	39	34	42	48	43	44	54	57
Appeal Decisions	9	7	6	4	6	-	-	5	1	2	7	4	5	1	4
Grand Juries Initiated						19	26	26	26	48	21	38	38	34	32

It seems clear that in the opinion of a large number of judges, grand juries, and juries the DOJ Antitrust Division has been bringing a large number of meritorious anti-cartel cases in recent years. Note that in some years the DOJ won more cases than it filed because the cases the DOJ won in any given year were often filed in an earlier year.

43 864 individuals were charged, as were 678 corporations. All statistic totals for the years 1990-2007 were calculated by adding the yearly totals as reported in the U.S. DEP'T OF

Moreover, the large number of cartels discovered in recent years may be evidence that the current overall level of cartel sanctions is too low.

Thus, in theory we can establish a non-infinite value for the disutility of prison time. To do this in practice is, of course, extremely difficult and speculative. There is no one objective way to compare the deterrence effect of time spent in prison to the deterrence effect of a criminal fine because different people would trade off jail versus fines in different ways. Any "average" figure used to equate the two necessarily is imprecise and arbitrary. We will undertake three different approaches to this issue. We hope that this paper's use of three approaches will increase the reliability of its results.

i. Valuations of Lives and Years of Life For Other Public Policy Purposes.

The valuation of a year of life "loss" in prison or due to house arrest is similar to one that, regrettably, society often must undertake for any number of public policy purposes. Sometimes even a life must be valued at an amount that is less than infinity. For example, our nation cannot afford perfect safety and we do not want every automobile to be built as safely as possible because society cannot afford this. Similarly, even though a life is beyond value and society does not want people to drive negligently, courts do not award infinite damages for the loss of life in car crashes.

On average, studies that value lives in the U.S. for public policy purposes, such as when we try to decide how safe to make products, or when the Department of Transpotation or the Environmental Protection Agency sets policy, typically arrive at values between $3 million and $10 million per life.[44] By contrast, lower figures, from $1.4 million to $3.8 million, are awarded on average in wrongful death cases.[45] Other studies analyze the data

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JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1990-1998 (on file with author) and the U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1998-2007, available at http://www.usdoj.gov/atr/public/workstats.pdf. (on file with author).

44 *See* Joseph E. Aldy & W. Kip Viscusi, *Adjusting the Value of a Statistical Life for Age and Cohort Effects*, (Jan. 2008) (Vanderbilt Law and Economics Research Paper No. 08-01) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898189. Recently the Department of Transportation has used $5.8 million for the value of a life. Memorandum from Tyler D. Duvall, Assistant Secretary for Transportation Policy & D. J. Gribbin, General Counsel to Secretarial Officers & Modal Administrators, http://ostpxweb.ost.dot.gov/policy/reports/080205.htm (last visited May 26, 2009). The Environmental Protection Agency currently uses $6.9 million. *All Things Considered: Value* on Life 11 Percent Lower Than 5 Years Ago (NPR radio broadcast July 11, 2008) available at http://www.npr.org/templates/story/story.php?storyId=92470116.

45 See Mark A. Cohen & Ted R. Miller, "Willingness to Award" Nonmonetary Damages and theimplied Value of Life from Jury Awards, 23 INT'L REV. L. & ECON. 165, 166, 179 (2003) (calculations made in 1995 dollars).

slightly differently by attempting to place a value on a year of life. They calculate figures in the range of an average of $300,000 to $500,000 per person per year of life (depending upon a number of variables).[46] It is likely that most people would view the prospect of spending a year in prison as not as bad as losing a year of life; after all, prisoners with no chance at parole still generally resist the death penalty.

Thus, in theory we can establish a non-infinite value for the disutility of prison time. To do this in practice is extremely difficult and speculative. While there is no way directly to value the deterrence effect of prison time, can't we conclude that people would disvalue a year in prison at very roughly the same as, or less than, they would value a year's worth of life? Shouldn't the above results, which calculated the average value of a year of life to be worth $300,000 to $500,000 per year, be roughly equal to (or more than?) the average disvalue of a year in prison? Moreover, shouldn't a year of house arrest be disvalued at a significantly lower figure?

ii. Awards in Wrongful Imprisonment Cases

Another approach to approximating the disutility of prison or house arrest time is to use the value society places on prison time in a very different context: the compensation provided to people who have been wrongly imprisoned. Sometimes people are wrongly sentenced to prison in a miscarriage of justice by, for example, perjured testimony.[47] The victims potentially can recover for a variety of torts depending upon the jurisdiction: wrongful imprisonment, wrongful conviction, wrongful confinement, malicious prosecution, abuse of process, intentional or negligent infliction of emotional distress, false arrest, or an unconstitutional depravation of their civil rights. They can receive compensatory damages, emotional damages, punitive damages, or some combination thereof.48 Many of these

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46 See Aldy & Viscusi, supra note 27. These figures are lower for older people. Id. A study by Stanford researchers calculated only $129,000 per year. Kathleen Kingsbury, The Value of Human Life: $129,000, TIME, May 20, 2008, available at http://www.time.com/time/health/article/0,8599,1808049,00.html.

47 *See* Limone v. United States, 497 F. Supp. 2d. 143, 152 (D. Mass. 2007) (FBI was aware chief witness would perjure himself). *See also* Newsome v. McCabe 319 F.3d 301, 304-305 (7th Cir. 2003) (officers induced eyewitnesses to falsely identify plaintiff); Mark Diaz Bravo v. Giblin, 2002 WL 31547001, 2002 Cal. App. Unpub. LEXIS 10494 (Cal. App. 2 Dist. 2002) (investigating officer fabricated evidence).

48 "Losses of this magnitude are almost impossible to catalogue. The loss of liberty. The loss of the enjoyment of their families. The loss of the ability to care for and nurture their children. The loss of intimacy and closeness with their spouses. Indeed, the task of quantifying these losses-which I am obliged to do-is among the most difficult this Court has ever had to undertake.

situations involve suits against governmental actors, and sometimes the maximum awards in these cases are fixed by statute.[49] Other times suit is brought as a common law tort case.

The highest award we have found for a case involving at least a year of prison was $1.138 million per year for three years of wrongful confinement in a case involving a false conviction for rape.50 We found a total of seven such cases producing awards between $764,000 and $1.308 million per year in prison including, in an alleged murder case, $1 million per year for the wrongfully confined individuals and smaller sums for loss of consortium and emotional damages for their close relatives.[51] By contrast, the lowest case award of this type we found compensated the wrongfully imprisoned person at the rate of only $23,500 per year.[52] We should note that our results are complicated because these cases often also involved allegations of, and sometimes specific awards for, false arrest, false conviction, overly harsh interrogation techniques, malicious prosecution, and other factors.53

Where triers of fact must assign values to the intangible and invaluable, they may look to the values assigned by other fact-finders in the past. I do not blindly follow other awards, but I do look to them for perspective and as an indication of how society has valued these harms. I note also that damage and suffering do not accrue smoothly and proportionally on a monthly or annual basis. Some injury occurs all in a rush at the start-the shock and horror of arrest and conviction-while other injury only begins to compound after a significant period of time has passed-the setting in of despair, or the withering of relationships. I consider the particular story of this case and these plaintiffs' suffering." Limone, 497 F.Supp.2d at, 243.

49 *See, e.g.*, 42 U.S.C.A. § 2513 (2009).

50 *Bravo v. Giblin*, 2002 WL 31547001, 2002 Cal.App.Unpub. LEXIS 10494 (Cal.App. 2 Dist. 2002). Suit filed under under 42 U.S.C. § 1983 yielded "damages in the amount of $221,976 for his economic losses, $3,537,000 to compensate him for 1,179 days of incarceration at the rate of $3,000 per day, and $1 million to compensate him for emotional distress suffered between the date of the incident and the date of his sentencing." Id. at *24, 2002 Cal.App.Unpub. LEXIS 10494 at *74. We arrived at the award per year of imprisonment of $1,138,951.77 in this case by multiplying $3,000 a day by 365.25 to arrive at $1,095,750. The lost earnings of $221,976, divided by 1,179 days in prison and multiplied by 365.25 days, comes to $118.28 per day and adds another $43,201.77 per year. The total award per year of imprisonment thus comes to $1,138,951.77.

51. *See Limone v. U.S.*, 497 F. Supp. 2d 143, 250-51 (D. Mass. 2007) (total award amounted to $101,000,000).

52 *See Avery v. Manitowoc Co.*, 428 F.Supp.2d 891, 893 (E.D. Wis., 2006).

53 *See e.g., Jones v. City of Chicago*, 1987 WL 19800, *1, 1987 U.S. Dist. LEXIS 10510 at *1 (N.D.Ill, Nov. 10 1987), *aff'd*, 856 F.2d 985 (7th Circ.1988).

We also found some very short imprisonments that yielded awards that would be larger than $1.138 million if figured on an annual basis.54 For example, one case involved a week in jail and a $437,670 award, which would come to $22,758,840 on an annual basis. Most of the damages, however, seemed to result from post-traumatic stress resulting from wrongful arrest, not time in prison.55 Similarly, another case involved a month in jail and an award of $355,500 for false imprisonment, as well as "$71,100 for false arrest; $71,100 for intentional infliction of emotional distress . . . and $213,300 for malicious prosecution" 56 Although $355,500 for a month of false imprisonment is the mathematical equivalent of $4.266 million on an annual basis, because the emotional stress and discomfort could be disproportionately greater at the beginning of a prison sentence,57 it is unclear whether the award would have been increased proportionately if the victim had been imprisoned for a year. As noted, in these cases it is difficult to segregate the amounts awarded for false imprisonmant from the amounts awarded for one time events or other torts.

We have found a total of 16 final awards in such cases.[58] We found many others that eventually produced a secret settlement.59 For a variety of reasons, including the fact that

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54 *See* Haywood v. Strehl, *Verdict Search Weekly* (Incisive Media U.S. Properties, LLC) No. 84-413369-cz (January 5, 2004), 2004 WL 333055 (Mich.Cir.Ct.).

55 "INJURIES: Haywood spent one week in jail with hardened criminal with the knowledge that he was charged with murder and could recieve a sentence of life in prison if convicted. After his incarceration Haywood claimed that he became depressed, suffered post traumatic stress disorder, and could no longer work. Haywood eventually became homeless and lives on the street or in shelters." *See Id.*

56 *Jones*, 1987 WL 19800, *1, 1987 U.S. Dist. LEXIS 10510 at *1 (N.D.Ill, Nov. 10 1987), *aff'd*, 856 F.2d 985 (7th Circ.1988).

57 "Where the period of incarceration is shorter (e.g., less than one year), proportionately larger awards (measured by annualizing the award) have been rendered, presumably reflecting Limone's observation that the injury from incarceration may be more intense towards the beginning." Smith v. City of Oakland, No. C-05-4045 EMC, (N.D, Calif. March 17, 2008); 2008 U.S. Dist. Lexis 20735. *See also* Coffee, *Corporate Crime and Punishment*, *supra* note __, at 431 (noting that "the declining marginal utility of imprisonment means that each increment of incarceration increases the perceived penalty by a less than proportionate amount. Or, reduced to its simplest terms, a two-year prison term is not twice as bas as a one-year terms.").

[58] See tbl. 6.

59 For example, *see e.g.* Longtin v. Prince George's Co., Verdict and Settlement Summary, 2006 WL 4587710 (MD Cir. Ct. August 31, 2006) The Circuit court awarded $3,187,500.00 for 2 years for a total of $6,375,000.00. The case was appealed and heard but no opinion has been issued.

our research surely missed many cases, the existence of secret settlements, and the confounding of awards for false imprisonment with awards for related torts such as false arrest, we decline to present a mean or median of these figures. Moreover, although some of the plaintiffs were middle class,60 none of the wrongfully imprisoned people appear to have been corporate executives or upper class professionals. It is possible that a jury or judge would award a corporate executive wrongfully imprisoned for price fixing a larger than average amount for their suffering. Still, the figures in the neighborhood of $1 million per year appear to be the practical maximum that society is willing to award for a year wrongfully spent in prison.

iii. Estimates by Other Scholars

A third approach is to analyze the estimates of other scholars. We have been able to find only two estimates for the disutility of a year in prison for an antitrust offense that seem plausible in this context.[61] Both are roughly consistent with the estimates above.

First, an article by Professors Howard P. Marvel and others equated a year in jail for price fixing to approximately $600,000 in 2009 dollars.[62] Another study by Professors Kenneth Glenn Dau-Schmidt and others equated a year in jail for price fixing with a fine of $1.5 million today.[63] These figures are higher than the average valuations for a year of life

60 For example, *see e.g. Newsome*, 319 F.3d at 307 (Plaintiff was an unemployed paralegal, although he testified at trial that he was employed at the time incarceration began).

[61] We have found one other estimate, but it seems to value prison time at an unduly low level for white collar criminals. *See* Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 283 & n. 52 (2008) (estimating value of prison at approximately $200 per day, which amounts to slightly more than $70,000 per year).

62 *See* Howard P. Marvel, *et al.*, *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN. L. REV. 561, 573 (1988). The authors equated a year in prison with a $300,000 fine. The article appeared in the February 1988 issue so we assume they were using 1987 dollars. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $300,000 in 1987 to $563,133 in 2009. See http://data.bls.gov/cgi-bin/cpicalc.pl

63 Kenneth Glenn Dau-Schmidt, *et al.*, *Criminal Penalties Under the Sherman Act: A Study of Law and Economics*, *in* 16 RESEARCH IN LAW AND ECONOMICS 25 (Richard O. Zerbe, Jr. ed., 1994) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=712721. This article equated a year in jail with a fine of $1 million. The Bureau of Labor Statistics Consumer Price Index inflation calculator equates $1,000,000 in 1994 and $1,438,866 in 2009. See http://data.bls.gov/cgi-bin/cpicalc.pl

noted earlier, perhaps because price fixers are wealthier on average and can afford to disvalue prison time much more than most people can, or perhaps because price fixers' time is more valuable on average.[64]

iv. A Conservative Resolution Of The Issue

These three approaches yield estimates that are broadly consistent with one another. To be conservative, we have taken the highest of these estimates for the disvalue of a year in prison, $1,500,000 per year, and arbitrarily increase it to $2 million.[65] We will use this as the disvalue or deterrence equivalent of a year in prison. We will use $1,000,000 for the disvalue or deterrence equivalent of a year of house arrest. We note that $2 million is as much as the lowest estimates for the value of a human life noted earlier. We believe these figures are significantly more than the average deterrence effect of a year in prison (or, a fortiori, of a year of house arrest, but we are selecting them so that our methodology will be conservative and as non-controversial as possible.66

Using the assumption that a sentence of a year of incarceration has the same deterrence effect as a $2,000,000 fine, the collective 330.24 years of prison sentences received by antitrust defendants from 1990 to 2007 would be the equivalent of $660 million in criminal fines. Using the assumption that a sentence of a year of house arrest has the same deterrence effect as a $1,000,000 fine, the collective 96.85 years of house arrest received by antitrust defendants from 1990 to 2007 would be the equivalent of another $97 million in criminal fines. These figures total $757 million.

As noted earlier, however, penalties directed against the individuals involved might well have more of a deterrence effect than penalties directed against the corporations. To illustrate how this could affect our analysis, we have trebled the deterrence effect of every individual penalty before adding them to the corporate penalties. This means using $6

Professors Dau-Schmidt et al. were using 1982 data for much of their paper's analysis. If they meant their valuation of a year in jail to be expressed in 1982 dollars, then their $1,000 estimate would be the equivalent of $2,209,740 in 2009. *Id.*

64 Whether the time or the life of a price fixer is more, or less, valuable than that of an average person is an interesting philosophical question that this article will not explore.

65 We do not believe $2 million is the true cost or deterrent value of a year in prison. We nevertheless decided to use this figure, which we believe to be unduly high, in our subsequent analysis in order to take a conservative and relative non-controversial approach to the issue.

66 We note that valuing a year's worth of life at $2 million would mean that a 20 year prison sentence would be valued at $40 million, a figure far in excess of the amount that society places on an individual's life.

million for the deterrence value of a year in prison67 and $3 million for the deterrence value of a year of house arrest, and also trebling the $118 million in individual penalties. Thus, the $757 million calculated earlier would be increased to $2.271 billion, and the $67 million in individual fines would be increased to $201 million. To these figures would be added the $4.166 billion in corporate fines and $118 million in restitution. Adding these figures together, the quantifiable deterrence effect of the Antitrust Division's remedies from 1990 to 2007 totals $6.756 billion.

One final note about DOJ enforcement is appropriate. Its record of overwhelming success suggests the government pursues only very strong cases. Note, for example, that for the years 1992 to 2008, the DOJ filed 699 cases and won 645 cases.68 This would appear to translate to a winning rate of over 92%. To be sure, that percentage may be misleading. The cases filed in a given year generally are not the ones resolved in that year. Still, the record suggests that the DOJ wins more than 90% of the time. Such a high success rate means the DOJ does not like to lose. We do not mean this point as a criticism. It may well be appropriate for the government to bring litigation only if it is very confident it will win. But that comes at a cost. The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.69

II. Deterrence Effects of Private litigation.

We know of no information concerning how much defendants have paid in total as a result of private antitrust litigation during this same or any other period. We do not even know of extraordinarily rough estimates.

One extremely low floor on this amount, however, can be obtained from the Lande/Davis study of 40 of the largest private antitrust cases that ended between 1990 and 2007.[70] Our primary screen was that each case must have returned $50 million or more to

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67 We note that valuing a year's worth of life at $6 million would mean that a 20 year prison sentence would be valued at $120 million, a figure far in excess of the amount that society places on an individual's life.

68 WORKLOAD STATISTICS 1999-2008, *supra* note 10.

69 The ideal proportion of success to failure will depend on a number of variables, including the relative harms from false negative and false positives and the likelihood of false negative to false positives. A full discussion of this issue is beyond the scope of this Article.

70 This was not a cost/benefit analysis of private enforcement. We made no attempt

victims of antitrust violations. Actually, they were "alleged" victims because almost all the cases settled with no finding that defendants had violated the antitrust laws.[71] We did not want to make subjective judgments over whether to value products at their retail value, their wholesale value, or defendants' cost. We counted all products as being worth nothing. We did the same thing for coupons or for discounts because they all have uncertain redemption rates: all discounts and coupons were counted as zero.[72]

This study documents between $18 and $19.6 billion in cash paid by defendants in these 40 cases alone. Since this total does not include any value for the products, discounts, or coupons received in these cases, and also leaves out defendants' attorneys' fees and other litigation costs (including expert witness fees) and the disruptive effects of the litigation on corporate efficiency, it understates the actual deterrence from these cases because all these omitted factors also have deterrence effects.[73]

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to assess any of its costs, or all of its benefits. Rather, the main point of this project was to assess those benefits that easily could be quantified. We did not select a random sample of private cases and follow them cradle to grave, assessing the merits or lack of merits of each. This would be difficult to do since almost every private case is dismissed or settles, and for this reason it would be hard to find out the relevant information about each case. We did not limit ourselves to cases where the Court found an antitrust violation because these are rare. Only 24 final cartel cases calculated an overcharge since 1890! See Connor & Lande, supra note 16.

71 See Benefits, supra note 1, at 891 n.46

72 We eliminated many cases because they were too difficult to value, even cases valued in the press at more than $1 billon. Moreover, sometimes it was just not possible to get the necessary information out of old files or from the preoccupied lawyers possessing the necessary information.

We did not adjust the settlements for inflation by raising them to their present value. Nor did we subtract attorneys' fees or other claims administration expenses because for deterrence purposes, it does not matter what happened to the money paid by Defendants.

We did not attempt to value injunctive relief, even for those cases where a Court characterized this relief as being very important. Although injunctions greatly can benefit both victims and the economy as a whole, we were unable to ascertain an objective and reliable way to quantify the value of injunctive relief. Neither did we attempt to value the injunctive relief secured by the DOJ. For more on our methodology see Benefits, supra note 1, at 889-91.

73 As noted earlier, injunctive relief secured by these 40 cases also was omitted, further understating the deterrence value of these cases. However, the effects of injunctive relief secured by DOJ cases also was excluded.

In terms of overall deterrence, therefore, these 40 private cases resulted in approximately three times the deterrence of the $6.756 billion in deterrence produced by every criminal case brought by DOJ during this same period. (As noted earlier, this comparison is not just to DOJ actions involving these 40 private cases; the DOJ total is for every cartel sanction secured by the Division between 1990 and 2007.)

However, not all of these 40 cases were against cartels: some were against monopolies (although none of the many class actions against Microsoft were included due to data problems). Of the total recoveries of $18-19.6 billion, $9.2 to $10.6 billion was paid in 25 cases that were litigated under the per se approach. This sample of 25 cases thus excludes payouts by monopolies. Comparing this $9.2 to $10.6 billion to the $6.756 billion in DOJ deterrence calculated earlier shows that these 25 private cases alone probably deterred more anticompetitive behavior than the entire DOJ criminal antitrust enforcement.

Another comparison involves only cases in which the government obtained some sort of relief. This comparison might appeal to those who praise government action and are skeptical of private enforcement. They might doubt whether the purely private cases were meritorious.[74] As Table 12 reflects, the plaintiffs in the 24 cases validated by some sort of successful government action recovered between $10.34 and $11.973 billion. That amount is somewhere between slightly over 150% and 175% of the $6.756 billion in deterrence produced by every criminal case brought by DOJ during the same period

Yet another interesting comparison is to the 13 cases in the Lande/Davis sample that also involved a DOJ action that resulted in a criminal penalty. These 13 private cases yielded $5.6 to $7.0 billion in payments, roughly the same as the $6.756 billion DOJ total.[75]

The larger, per se sample surely includes some cases that could not have resulted in criminal penalties, so one could argue that the comparison to only those cases involving criminal penalites is the fairer one. However, not only is criminal conduct anticompetitive; so too is all per se illegal conduct. We should be grateful to the private cases for discouraging any per se illegal conduct. Moreover, DOJ fines must be proven to a criminal standard, while private cases operate under a civil standard. Perhaps the fairer comparison is, after all, to the deterrence from the sample of 25 per se cases, or to the deterrence from all 40 cases. DOJ did little or nothing to discourage the conduct in many of these non-criminal cases. The only deterrence came from the private actions.

One could, of course, re-do this analysis using different values for the disvalue or disincentive effect of a year in jail. For example, one could use a low estimate of $2 million

[74] It is important to note that, for the reasons discussed in Part III *infra*, almost all of the private cases we include have strong indicia of being meritorious.

[75] Of note, a better comparison might be limited to the deterrence effect of the DOJ action in those 13 cases, rather than *all* of the DOJ cases in the same time frame.

or a high estimate of $10 million for the deterrence effect of a year in prison.[76] Similarly, one could use $500,000 and $5,000,000 estimates for the deterrence effects of a year of house arrest. Doing this would of course change the total estimated deterrence effects of the DOJ criminal enforcement program. The low estimates would decrease the $6.756 billion DOJ deterrence estimate to $4.728 billion. The high estimates would increase the DOJ deterrence estimate to $8.136 billion. Even these larger figures yield results that are less than the $9.2 to 10.6 billion secured by the 25 private per se cases, or the $10.34 to $11.973 billion paid in the 24 cases that also resulted in government relief, much less the $18 billion or more from all 40 cases.

III. Were the Private Cases Meritorious?

If the criticisms of private antitrust enforcement noted earlier are correct and private actions often obtain results in cases that lack merit, not only might they fail to discourage anticompetitive behavior, they might discourage legal—and beneficial—conduct. In other words, they might have the opposite of a beneficial deterrence effect! For several reasons, however, this concern is likely misplaced, at least with respect to most of the forty cases we studied.

First, even though almost all of the forty cases were only settlements, it should be recalled that a federal a judge approved these settlements. While this certainly is not the same as a verdict, a diverse and generally conservative group of federal judges did ratify that the settlements were fair to all affected parties. We note that of the 40(?) federal judges who approved the settlements or decided the cases we studied, ___ were appointed by a Republican President.[77] We also note that these judges approved these cases during an era where every Supreme Court antitrust decision has been decided in favor of the defendant. Each of the last 15 antitrust decisions, by a court rated by Judge Posner as the most

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76 Even the $ 2 million estimate is as large as some of the estimates of the value of a life according to some of the studies cited earlier. See supra notes 27-29. The larger figure of $10 million would be at the upper end of the range of estimates of the value of a human life calculated by the studies cited earlier. See supra notes 27-29. (Is a year in the life of price fixer really "worth" the same as an average human life?)

If we were to use the $10 million figure for the value of a year in prison and $5 million for a year of house arrest, the deterrence value of all the DOJ anti-cartel programs since 1990 would rise significantly. Instead of $6.756 billion it would rise to $8.136 billion, more than the amounts that defendants paid in the 13 private cases that also had a criminal penalty, but less than the deterrence value of the 25 per se cases in the sample, and only half as large as the more than $18 billion paid in all 40 cases in the sample.

77 See appendix ___.

conservative since 1930,[78] including every case decided after 1992, ruled against plaintiffs.[79] Because this tide of pro-defendant instruction effectively tells the lower courts how to decide close cases, perhaps most of the 40 surveyed cases were not close to the margin.

Second, a large number of the opinions in the forty cases contain generous and gratuitous praise for the plaintiffs' counsel handling the case.[80] Of the __ judges who explicitly and generously praised the conduct of plaintiffs' attorneys, ___ were appointed by a Republican president. This too helps give assurance that the cases brought by private counsel generally were in the public interest.

Third, an advantage of our selecting only cases that returned more than $50 million in cash benefits to victims is that this screens out nuisance settlements. We are very skeptical about claims that defending these suits often costs innocent firms $10 million or more. We would believe this only for very unusual cases. Regardless, $50 million should be well above the nuisance value of an unmeritorious case. Moreover, the majority of the cases we studied (22/40) settled for more than $100 million.[81]

Fourth, since actions that settle for more than $50 million are not nuisance lawsuits, the recoveries almost surely reflect the defendants' perception that they could well lose on the merits, not only at trial but also on appeal. To be sure, some may assert that defendants

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78 *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical* Study, 6-7, 18, 46 tbl.3 (U. Chi. L & Econ. Online Working Paper No.404), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126403

79 *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109 (2009) (9-0 in the judgment, 5-4 in regard to the Court's opinion); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (5-4 decision); *Weyerhaeuser Co. v. Ross-Simmons Lumber Co.*, 127 S. Ct. 1069 (2007) (9-0); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (7-2); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (7-1); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (8-0); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (7-2); *Ill. Tool Works Inc. v. Indep. Ink*, Inc., 547 U.S. 28 (2006) (8-0); *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004) (8-0); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (9-0); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (9-0); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1998); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). See Andrew I. Gavil, *Antitrust Book Ends: The 2006 Supreme Court Term in Historical Context*, 22 ANTITRUST 21, 22 (2007) ("The last clear plaintiffs' victories in the Court occurred in 1992 in two cases . . . ."

80 For examples see *Benefits*, *supra* note 1, at 903-04.

81 It is difficult for a firm to believably claim, in effect: "We are saints who did absolutely nothing wrong. Nevertheless, we paid $50 m or $100 m or more just to make the case go away." While we are not saying this can never happen, as the settlements get higher, this argument loses credibility.

settle regardless of the merits of their cases simply because they are risk averse. This sometimes may be true. Of course, the risk to which they are averse is that they may lose. Moreover, plaintiffs—or, in contingency fee cases, plaintiffs' counsel—also tend to be averse to risk, probably more so than defendants. Plaintiff's lawyers often pay millions of dollars toward the costs of litigation - both in terms of out of pocket expenses and in terms of the implicit value of thousands of hours of their time -all of which will be uncompensated if the case proceeds to trial and defendants prevail. This could give plaintiffs attorneys an incentive to settle for amounts that are too low. Defendants' attorneys, by contrast, are paid by the hour, so they do not have the same kind of risk aversion incentives. In sum, there is no basis for believing that defendants are more risk averse than plaintiffs. If anything, we believe the reverse could well be true.[82] For these reasons the amount of settlements is at least as likely to be too low as too high.[83]

A final reason to believe that the cases we studied were generally meritorious is that most were validated in whole or in part other than through settlement in private litigation. This validation took various forms: 1. In 13 of the 40 cases (32.5%), defendants or their employees were subject to criminal penalties, generally through guilty pleas. 2. In 12 of the 40 cases (30%), government enforcers obtained a civil recovery, usually in the form of a consent order. 3. In 9 of the 40 cases (22.5%), plaintiffs survived or prevailed on a motion for summary judgment (or partial summary judgment). 4. In 9 of the 40 cases (22.5%), defendants lost at trial in the private litigation or in a closely related case. 5. In at least 3 out of 40 cases (7.5%) plaintiffs survived a motion to dismiss.

In sum, 34 of the 40 cases (85%) had at least one of these indicators that plaintiffs' case was meritorious. (This total would be 33 of the 40 cases if the motions to dismiss are not included. The percentages do not add up because 8 of the 40 cases involved more than one basis for validation.) Table 7, below, summarizes this information. Table 8 in the Appendix lists the cases in which the merits received each kind of validation.

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82 It could be argued that plaintiffs' attorneys sometimes have an incentive to "sell out their clients" by settling for too low an amount, too quickly, that their incentive is just to take less money then the victims deserve and then to move on to the next case. Moreover, in class action cases, plaintiffs cannot effectively police their counsel so the possibility of settlements that are too quick and too low is a serious one. By contrast, it could be argued that defense lawyers have the incentive to delay and reject reasonable offers and thereby bill as many hours as possible, but defendants' clients are in a better position to oversee their activity and prevent this from occurring.

83 Others may also say that defendants worry that they will lose when they should not. This raises a philosophical issue. If the courts say conduct violates the antitrust laws, and if even an appellate court, perhaps even the Supreme Court, confirms liability, is it meaningful to say that the outcome is wrong? For practical purposes, we adopt a positivist's view and suggest that the law is whatever the ultimate court declares it to be. Any other perspective would make a study like ours infeasible.

Table 7: Summary of Kinds of Validation in Cases

Kind of Validation of Merits	Number of Cases
Criminal Penalty	13 out of 40 (32.5%)
Government Obtained Civil Relief	12 out of 40 (30%)
Ds Lost Trial in Same or Related Case	9 out of 40 (22.5%)
Ps Survived or Prevailed at Summary Judgment	9 out of 40 (22.5%)
Ps Survived Motion to Dismiss	3 out 40 (7.5%)
At Least One Basis for Validation	34 out of 40 (85%)
At Least One Basis for Validation, not including surviving motion to dismiss	33 out of 40 (82.5%)

Ultimately there is no way to prove or fully refute assertions that many or most private cases are unmeritorious and are tantamount to extortion. But the previous analysis shows there are reasons to believe they are mostly legitimate, and there is no reason to believe otherwise beyond defendants' self-serving assertions.

IV. Qualifications and Caveats

Throughout this article we have explicitly or implicitly added a large number of qualifications and caveats to our analysis. Some of the most important are worth recapitulating briefly so the conclusions presented in the next section can be assessed fairly.

Concerning DOJ enforcement: Most criminal fines and all restitution and payments in private cases are made by the corporations involved. Prison terms and house arrests (which are virtually impossible to value accurately), and the individual fines, are served or paid by the individuals involved. We are adding the deterrence effects of all these together to arrive at a measure of total deterrence. We are implicitly assuming that the corporations involved are profit-maximizing and that the executives involved care what happens to their employer. We recognize there are agent/principle problems and behavioral economics issues as well. As noted above, some executives may care only or primarily about the sanctions directed against them as individuals; some may care equally what happens to their employer (either out of professional pride, corporate loyalty, or because of how a corporate sanction could affect their career); other executives might care about both, but weigh the individual

sanctions more heavily. Does to these agent/principle problems we have arbitrarily tripled the deterrence effects of the individual sanctions (prison, house arrest and fines) compared to the corporate payouts (fines, restitution, and payouts in private cases).

Concerning private enforcement: The $18-19.6 billion in payments made in 40 large private antitrust cases is only an extremely low floor on the total deterrence effects of private antitrust enforcement, for many reasons. While these were among the largest private antitrust cases brought during the relevant time period, surely the total paid by defendants in the thousands of private antitrust cases that ended during this period was many times as large. This total also omitted the deterrence value of the products, discounts, services, and coupons that were part of the relief in these cases.

Concerning the DOJ/private comparison: The comparison of the relative deterrence from private and DOJ cases did not attempt to value the injunctive relief or legal precedent obtained in either type of case. The deterrence effects of defendants' attorneys' fees and the stress and time involved for defendants in defending both the DOJ and the private cases also has been omitted. These are significant omissions. This paper's analysis assumes the effects of these omitted factors would be the same for both private enforcement and DOJ enforcement, but we know of no way to ascertain whether this is true. [84]

Further, reasonable people could dispute who first discovered some of the violations that gave rise to the sample of 40 large private cases. The Lande/Davis study concluded, on the basis of admittedly imperfect public information and interviews with attorneys, that 16 of these 40 cases originally had been discovered by private parties and their counsel, 10 were follow-ons to government enforcement actions, and the others had mixed or uncertain origins. This figure for follow-on cases of 10/40, or 25%, is consistent with a survey by Kauper & Snyder which found that only 20% of private cases were follow-on cases.[85] Moreover, at least __ of the private cases were significantly broader than the DOJ case: they involved more defendants than the DOJ case, more causes of action, or longer periods of illegality.[86]

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84 The only indication of the relative value of the precedents that were established comes from the Calkins study, *supra* note 11, which concludes that the most important precedents in recent years were established through private litigation.

85 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 n. 36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'" (quoting Moore, *Data Galore in Georgetown Damage Study*, LEGAL TIMES, Nov. 4, 1985, at 24, col. 4)).

86 See __

Even if, contrary to our findings, every private antitrust violation originally was uncovered by the DOJ (even for private actions where the DOJ never filed a case) this would not detract from the important deterrence provided independently by the private actions in these cases. If there has been no private enforcement, this deterrence never would have arisen. Of course, if all 40 violations had first been discovered by the DOJ, it would complicate an analysis of the relative deterrence effect of private and public antitrust enforcers.[87] But important deterrence effects from private enforcement - in a system that already had public enforcement - would remain.

Another general caveat concerns how, from a deterrence perspective, perceptions are more important than the realities this article has attempted to document. For example, Professor Steven Calkins noted the widespread publicity over Mr. Taubman going to prison for an antitrust offense and surmised that this did more to discourage price fixing than almost any fine that would have been likely to be imposed against defendants in that case.[88] In this regard, some of the stereotypes about private enforcers also could help to deter antitrust violations. Irwin Stelzer articulated the widely held belief: "An army of private enforcers, enlisting help from attorney-entrepreneurs free to accept cases on a contingency fee basis, freed of 'loser pays' obligations, is an important supplement to those limited [government] resources."[89] Although defendants to a large extent have succeeded in portraying plaintiffs' attorneys as the modern economies' bogymen, their fears of this swarming private "army"

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87 The DOJ should get partial credit for any cases they uncovered or helped to uncover even if the private parties secured the bulk of the sanctions. Each type of plaintiff might make a different contribution to the deterrence mix. As we noted in Global Competition Litigation Review: "[i]n fact, there are many reasons to believe that private antitrust or competition actions complement government enforcement in important ways. As a practical matter the government cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by 'losers' that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys, and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are at times politically motivated. Not surprisingly, a vigorous private antitrust or competition regime is likely to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement." Robert H. Lande & Joshua P. Davis, Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries Considering a Private Right of Action for Competition Law Violations, GLOBAL COMPETITION LITIG. REV. (forthcoming 2009).

88 Steven Calkins, Professor of Law, Remarks at the European University Institute 11th EU Competition Law and Policy Workshop (Florence, Italy, June 2-3 2006). Verbal remark at GW Conference - check with him.

89 Irwin Stelzer, Implications for Productivity Growth in the Economy, Talk at Office of Fair Trading's Workshop on Private Enforcement of Competition Law (London, Eng., Oct. 19, 2006).

might do a great deal to discourage anticompetitive conduct, despite the fact that many recent court decisions have weakened private enforcement substantially.[90]

Finally, this paper is not attempting to perform a cost/benefit analysis of private antitrust enforcement. Many others have asserted problems with private enforcement (although without any systematic evidence), and we readily agree that some private cases have not been in the public interest. Nevertheless, we believe the debate over private antitrust enforcement deserves balance.

V. Conclusions

Our primary conclusion is that the benefits of private antitrust enforcement are substantial and underappreciated. The importance of private enforcement to compensation perhaps requires little elaboration because there is no meaningful alternative means for victims of anticompetitive behavior to recover for the harm they suffered as a result of antitrust violations. Perhaps more surprisingly, there is evidence that private antitrust enforcement does more than DOJ criminal enforcement to deter anticompetitive behavior.

It is, of course, extremely difficult to isolate successes in the antitrust world. Even if a particular private case succeeded in forcing violators to surrender $100 million or more to their victims, it often would be reasonable to credit many parties in addition to the victims and their counsel. A case could rely in whole or in part on a conspiracy uncovered or partly uncovered by an earlier Department of Justice investigation, as well as on a legal precedent established by a State Attorney General in an unrelated case, and the case itself could have been financed by private counsel who were able to do so only because of their success in a prior private litigation. As always, success has many parents. Rather than enter into fruitless arguments about which type of enforcement is entitled to what percentage of the credit, and, regardless whether viewed from a deterrence or compensation perspective, perhaps the safest conclusion is that private enforcement is an important complement to government enforcement.

Moreover, the cost to the taxpayer of the deterrence and compensation that arises from private enforcement is practically nonexistent. The only cost to the taxpayer is the cost of maintaining some portion of the judicial system. This amounts to only a tiny fraction of the benefits of private enforcement, and would be incurred even if all these cases were brought by government enforcers.

In addition, the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws. In most cases, if the law is somewhat unclear, or the evidence of illegal conduct is not absolutely compelling at the outset of a legal action, the DOJ does not seem to be willing to

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90 *See supra* note ***43*** and accompanying text.

pursue litigation. This may well be the appropriate approach for the government to take. But it holds the potential for antitrust laws to go largely unenforced.

Within this context, private litigation of the antitrust laws seems to play a crucial role. In the United States the anticompetitive conduct that gives rise to government enforcement currently occurs far too frequently and is almost certainly significantly underdeterred[91] - even factoring in the effects of the present system of private litigation. A fortiori this conduct would be even more undeterred if the United States eliminated or substantially curtailed private enforcement. We would be surprised if firms in other nations were significantly more law abiding than United States firms, and suspect that the United States record of underdeterrence of anticompetitive conduct (and undercompensation of victims) exists in many if not most other nations as well. Although each nation has unique needs, history, institutions, capabilities and circumstances, and we would never advocate a "one size fits all" approach to competition legislation, we do urge every nation without private enforcement of its competition laws to seriously consider permitting victim suits.[92]

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91 *See* Lande, *supra* note 14, at (". . .antitrust damages levels should be raised so that they do result in the effective treble damages necessary to insure optimal deterrence of anticompetitive conduct . . . ."); *see also* Connor & Lande, *supra* note 16, at 560 ("If the worldwide system of criminal fines can be made to correspond more closely to the actual levels of cartel overcharges, sanctions against price-fixing will more closely provide optimal deterrence.").

92 Europeans often believe that public enforcement should be concerned with deterrence while private enforcement should be concerned with compensation of victims. See Wouter P. J. Wils, *The Relationship Between Public Antitrust and Private Actions for Samages, 32 World Competition,* 3 (2009), passim and especially 12-15. We believe that the deterrence effects of private enforcement should be given greater consideration.

Appendix I Tables

Table 1 Total Corporate Antitrust Fines 1990-2007

The following figures are from a variety of different sources published at different times. We found results for some years from some sources that contradicted results given by different sources, for reasons we could not determine. The figures in the following table are our best attempt to reconcile these sometimes conflicting data sources.

Year (Fiscal)	Total Corporate Fines ($000)
1990	22658
1991	17573
1992	22430
1993	40427
1994	38996
1995	40222
1996	25245
1997	203931
1998	241645
1999	959866
2000	303241
2001	270778
2002	93826
2003	63752
2004	140586
2005	595966
2006	469805
2007	615671
Total	**$4,166,168,000**

U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1990–1996, 11 (on file with author); U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1998–2007, 12, http://www.usdoj.gov/atr/public/workstats.pdf.

Table 2: Total Individual Antitrust Fines 1990-2007

The following figures are from a variety of different sources published at different times. We found results for some years from some sources that contradicted results given by different sources, for reasons we could not determine. The figures in the following table are our best attempt to reconcile these sometimes conflicting data sources.

Year (Fiscal)	Total Individual Fines ($000) from 1990-2007
1990	917
1991	2806
1992	1275
1993	1868
1994	1240
1995	1211
1996	1572
1997	1247
1998	2499
1999	12273
2000	5180
2001	2019
2002	8685
2003	470
2004	644
2005	4483
2006	3650
2007	15109
Total	**$67,148,000**

U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1990–1996, 11 (on file with author); U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1998–2007, 12, http://www.usdoj.gov/atr/public/workstats.pdf.

Table 3.

Year	Restitution Imposed in Connection with Criminal Antitrust Cases ($000)
1990	5670
1991	3185
1992	3550
1993	950
1994	4220
1995	1200
1996	799
1997	275
1998	4250
1999	2343
2000	1713
2001	31083
2002	7278
2003	15545
2004	18776
2005	10371
2006	2165
2007	4790
Total	**118163**

Table 4: Recoveries in Private Cases

Case	Recovery ($ millions)
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Augmentin	91
Automotive Refinishing Paint	106
Buspirone	220
Caldera	275
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1050
DRAM	326
Drill Bits	53
El Paso	1,427 (plus 125 in uncounted rate reductions)
Flat Glass	122
Fructose	531
Graphite Electrodes	47
IBM	775 (plus 75 in uncounted credit towards Microsoft software)
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1027
NCAA	74
Netscape	750
Paxil	165
Platinol	50
Polypropylene Carpet	50
RealNetworks	478 to 761
Relafen	250
Remeron	75

Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Sun	700
Taxol	66
Terazosin	74
Urethane	73
Visa/MasterCard	3383
Vitamins	3,908 to 5,258
Total	**18,006 to 19,639**

Table 11

Year	Incarceration: Total Number of Incarceration Days Imposed by the Court in Antitrust Division Cases
1990	2739
1991	6594
1992	2488
1993	4726
1994	1497
1995	3902
1996	2431
1997	789
1998	1301
1999	6662
2000	5584
2001	4800
2002	10501
2003	9341
2004	7334
2005	13157
2006	5383
2007	31391
Total	**120620** 120,620 ÷ 365.25 = 330.24

Table 5

Year	Other Confinement: Number of Other Confinement Days Imposed in Antitrust Division Cases
1990	632
1991	1519
1992	1734
1993	3552
1994	2475
1995	2933
1996	1148
1997	1270
1998	1530
1999	2850
2000	2567
2001	1844
2002	3607
2003	1025
2004	1575
2005	1270
2006	2760
2007	1085
Total	**35376**

35,376 ÷ 365.25 = 96.85 years

Table 6

Plaintiff	Imprisonment	Total Award	Award per year
Haywood	1 week	$437670	22758840.00
George Jones	1 month	$355500	4266000.00
Kerry Edwards	30 days	$327,500 (settlement)	3875416.66
Mark Diaz Bravo	1,179 days	$3676451.90	1138951.77
Edward Greco (Limone v. U.S.)	27 years (died while incarcerated)	$28000000	1037037.04
James Newsome	15 years	$15000000	1000000.00
Joseph Salvati (Limone v. U.S.)	29 years	$29000000	1000000.00
Peter Limone (Limone v. U.S.)	33 years	$26000000	787878.79
Tameleo (Limone v. U.S.)	17 years (died while incarcerated)	$13000000	764705.88
Larry Mayes	21 years	$4,500,000 (settlement)	214285.72
Eduardo Velazequez	14 years	$ 2,450,000 (settlement)	175000.00
Clarence Elkins	7 years	$ 1,075,000 (settlement)	153571.43
Olmedo Hidalgo	14 years	$2,000,000 (settlement)	142857.15
Darryl Hunt	19.5 years	$ 1,958,454. (settlement)	100433.54
Eddie Joe Lloyd	17 years	6000000 (settlement)	35294.12
Stephen Avery	17 years	$ 400,000 (settlement)	23529.41

Appendix to Table 6 -- Following is a list of cases included in Table 6. This appendix contains each suit's cause of action, the researcher's methodology notes, the plaintiff's occupation, if known, and any other general case notes.

1. George Jones. Jones v. City of Chicago, 1987 WL 19800, 1987 U.S. Dist. LEXIS 10510 (N.D.Ill. 1987), *aff'd*, 856 F.2d 985 (7th Cir. 1988). Filed under 42 U.S.C. § 1983. This case was cited by the *Limone* case. George Jones was a high school student at time of arrest. Our total award includes only the false imprisonment award.[93]

2. Kerry Edwards. Edwards v. Freehold Township, No. 3:07-cv043763-MLC-TJB, 2006 WL 4587710 (2006). Filed under 42 U.S.C. § 1983. This verdict summary was found by running a Westlaw verdict search.[94] Kerry Edward's occupation is unknown. The settlement is ambiguous as to the portion of the award pertaining to false imprisonment and the portion of the award pertaining to civil rights violations.[95]

3. Mark Diaz Bravo. Bravo v. Giblin, 2002 WL 31547001, 2002 Cal.App.Unpub. LEXIS 10494 (Cal.App. 2 Dist. 2002). Filed under 42 U.S.C. § 1983. This case was cited by the *Limone* case. Mark Diaz Bravo was a nurse falsely convicted of raping a patient. The total award of $3,676,451.90 was calculated by taking the $3,000.00 per day awarded by the court for 1,179 days in prison and adding the court's $221,976.00 award for lost earnings.[96] An award of $1,000,000 for time spent in prison before conviction was not included in our calculations.

4. Edward Greco, Joseph Salvati, Peter Limone, and Tameleo. Limone v. United States, 497 F. Supp. 2d. 143 (D. Mass. 2007). Filed under the Federal Torts Claims Act, *Bivens*, and 42 U.S.C. § 1983 and Massachusetts law. This case was found by performing a Westlaw verdict search[97] followed by a search for the case name in the allfeds database. Despite lengthy biographies of all four plaintiffs in the district court opinion, the occupations are never stated.[98] We only included the false imprisonment portions of the $101,000,000 award in this case. Additional awards went to friends and family of the plaintiffs for emotional distress and loss of consortium. At this time, the outcome of any possible pending appeal or settlement is unknown. We include this case despite its status as perhaps not final because of the unprecedented $101,000,000 award and its important discussion of the disvalue of time in prison.

5. James Newsome. Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003) *cert. denied*, 539 U.S. 943 (2003). Filed under 42 U.S.C. § 1983. This case was cited by the *Limone* case. James Newsome was an unemployed paralegal at the time of arrest. However, he testified that he was still employed and the court held that this was not reversible error. The court

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[93] *See supra* note 42 and accompanying text.

[94] Database: JV-NAT, LRP-JV, VS-JV. Search terms: "wrongful imprisonment" "wrongful confinement "false imprisonment" "malicious prosecution" "wrongful arrest" on June 1, 2009.

[95] *See* Complaint at 2007 WL 3388973 (Oct. 2, 2007).

[96] *See supra* note 36 and accompanying text.

[97] *See supra* note 75.

[98] *Limone,* 497 F.Supp.2d at 237.

awarded $1,000,000 per year of imprisonment plus $850,000 total in attorneys fees, which we did not include in our calculations.

6. Larry Mayes. Mayes v. City of Hammond, 2008 WL 3874685 (N.D. Ind., 2008). Filed under 42 U.S.C. § 1983. This case was found by performing a Westlaw search in the allfeds database for "wrongful imprisonment" "wrongful confinement" "false imprisonment" on June 1, 2009. Larry Mayes' occupation is unknown. The original award was $9,000,000 but the parties settled for $4,500,000 to avoid the possibility of appeal.

7. Eduardo Velazquez. Valazquez c. City of Chicopee, 226 F.R.D. 31 (D. Mass, 2004). Filed under 42 U.S.C. § 1983. The verdict summary was found by running a Westlaw verdict search.[99] Eduardo Velazquez' occupation is unknown. Prior to this action, Eduardo Velazquez had filed and settled a lawsuit under Massachusetts' exoneration statute[100] for statutory maximum of $500,000.00.

8. Clarence Elkins. Elkins v. Ohio, JAS OH Ref No. 224622WL, Case No. CR-98-06041 (April 6, 2006). The cause of action is unknown. Clarence Elkins' occupation are unknown. This verdict summary was found by performing a Westlaw search.[101]

9. Olmedo Hidalgo. Hidalgo v. City of New York, No. 06 CIV 13118, 2009 WL 1199430 (April 7, 2009). The cause of action is unknown. Olmedo Hidalgo's occupation is unknown. This verdict summary was found by running a Westlaw verdict search.[102]

10. Darryl Hunt. Hunt. v. North Carolina, JAS NC Ref. No. 231251 WL (February 16, 2007). The cause of action is unknown. Darryl Hunt's occupation is unknown. This verdict summary was found by running a Westlaw verdict search.[103]

11. Eddie Joe Lloyd. Lloyd v. City of Detroit, JAS MI Ref No. 223208 WL (March 1, 2006). The cause of action is unknown. Eddie Joe Lloyd's occupation is unknown. The verdict summary was found by running a Westlaw verdict search.[104]

12. Stephen Avery. Avery v. Manitowoc Co., No. 04-C986, slip op. (D. Wis. April 28, 2006). Filed under 42 U.S.C. § 1983. Stephen Avery's occupation is unknown. The verdict summary was found by conducting a Westlaw search.[105] Avery's case probably settled very low because he was accused of a second murder in 2005.[106]

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[99] *See supra* note 75.
[100] Mass. Gen. Laws ch. 258D, §§1-9 (2006).
[101] *See supra* note 75.
[102] *See supra* note 75.
[103] *See supra* note 75.
[104] *See supra* note 75.
[105] *See supra* note 75.
[106] Issue 31, Winter 2006. Justice Denied Magazine. "Wisconsin Innocense Project Needs to Show Backbone in Steven Avery's Case". http://www.justicedenied.org/issue/issue_31/jd_issue_31.pdf, Retrieved on 2009-06-8.

Table 8: Summary of Validation of Merits in Individual Cases

Case	Validation of Merits
Airline Tickets Commission	None Reported
Auction Houses	Criminal Penalty
Augmentin	Rulings against Ds on Underlying Patent Issues in Related Cases
Automotive Refinishing	None Reported
Buspirone	Part of Course of Conduct Resulting in FTC Consent Order
Caldera	Survive SJ
Cardizem	Partial SJ for Ps on Per Se Issue (aff'd on appeal) and Conduct Resulted in FTC Consent Order
Citric Acid	Criminal Penalty
Commercial Explosives	Jury Verdict Against Ds by competitor, Criminal Penalty
Conwood	Jury Verdict Against D (Aff'd on Appeal)
DRAM	Survived SJ and Criminal Penalty
Drill Bits	Criminal Penalty
El Paso	FERC Ruling Against D
Flat Glass	SJ Against Ps Overruled on Appeal
Fructose	SJ Against Ps Overruled on Appeal
Graphite Electrodes	Criminal Penalty
IBM	Government Prevailed at Trial in Related Case
Insurance	Dismissal Reversed in Appellate Court (Aff'd by USSC)

Linerboard	None Reported (Other than Class Certification)
Lysine	Criminal Penalty
Microcrystalline Cellulose	FTC Consent Orders
NCAA	SJ for Ps on Liability (aff'd on appeal)
Netscape v. Microsoft	Government Prevailed at Trial in Related Case
Oil Lease	None Reported
Paxil	None Reported
Platinol	Part of Course of Conduct Resulting in FTC Consent Order
Polypropylene Carpet	Criminal Penalty
RealNetworks v. Microsoft	EU Preliminary Findings Against D in Related Case and U.S. Government Prevailed at Trial in Somewhat Related Case
Relafen	Ruling against D on Underlying Patent Issues in Related Case (Aff'd on Appeal) and Ps Survive Motion to Dismiss and for SJ and Prevail on Motion of Issue Preclusion Regarding Patent Validity
Remeron	None Reported
Rubber Chemicals	Criminal Penalty
Sorbates	Criminal Penalty
Specialty Steel	Criminal Penalty and Ps Survived Motions to Dismiss
Sun v. Microsoft	Government Prevailed at Trial in Related Case
Taxol	Part of Course of Conduct Resulting in FTC Consent Order
Terazosin	Partial SJ for Ps on Per Se Issue and Government Obtained Injunctive Relief
Urethane	Criminal Penalty
Visa/MasterCard	Ps Prevailed on SJ and Defeated SJ

Vitamins	Criminal Penalty and Jury Verdict Against Non-Settling D

Table 9: Recoveries in Per se Cases

Case	**Recovery ($ millions)**
Airline Ticket Commission Litigation	86
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Automotive Refinishing Paint	106
Cardizem (direct class)	110
Citric Acid	175
Commercial Explosives	77
Conwood	1050
DRAM	326
Drill Bits	53
Flat Glass	122
Fructose	531
Graphite Electrodes	47
Insurance	36
Lease Oil	193
Linerboard	202
Lysine	65
Microcrystalline Cellulose	50
NASDAQ	1027
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Terazosin	74
Urethane	73
Vitamins	3,908 to 5,258
Total	**9,227 to 10,577**

Table 10: Recoveries for Cases with a Criminal Penalty as Well

Case	Recovery ($ millions)
Auction Houses	452 (plus 100 in uncounted fully redeemable coupons)
Citric Acid	175
Commercial Explosives	77
DRAM	326
Drill Bits	53
Graphite Electrodes	47
Lysine	65
Polypropylene Carpet	50
Rubber Chemicals	268
Sorbates	96
Specialty Steel	50
Urethane	73
Vitamins	3,908 to 5,258
Total	**5,640 to 6,990**

Table 12: Recoveries in Cases Validated by Government Action

Case	Validation of Merits in Government Action	Recovery ($ millions)
Auction Houses	Criminal Penalty	452
Buspirone	Part of Course of Conduct Resulting in FTC Consent Order	220
Cardizem	Conduct Resulted in FTC Consent Order	110
Citric Acid	Criminal Penalty	175
Commercial Explosives	Criminal Penalty	77
DRAM	Criminal Penalty	326
Drill Bits	Criminal Penalty	53
El Paso	FERC Ruling Against D	1,427
Graphite Electrodes	Criminal Penalty	47
IBM	Government Prevailed at Trial in Related Case	775
Lysine	Criminal Penalty	65
Microcrystalline Cellulose	FTC Consent Orders	50
Netscape v. Microsoft	Government Prevailed at Trial in Related Case	750
Platinol	Part of Course of Conduct Resulting in FTC Consent Order	50
Polypropylene Carpet	Criminal Penalty	50
RealNetworks v. Microsoft	EU Preliminary Findings Against D in Related Case and U.S. Government Prevailed at Trial in Somewhat Related Case	478 to 761
Rubber Chemicals	Criminal Penalty	268
Sorbates	Criminal Penalty	96

Specialty Steel	Criminal Penalty	50
Sun v. Microsoft	Government Prevailed at Trial in Related Case	700
Taxol	Part of Course of Conduct Resulting in FTC Consent Order	66
Terazosin	Government Obtained Injunctive Relief	74
Urethane	Criminal Penalty	73
Vitamins	Criminal Penalty	3,908 to 5,258
Total		10,340 to 11,973

Appendix II - Following is a list of the cases included in this Study and the researchers who analyzed them.107

1. *In Re* Airline Ticket Comm'n Litig., 1996 U.S. Dist. LEXIS 20361 (D. Minn. Aug. 12, 1996). Tara Shoemaker

2. *In re* Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001), *aff'd*, 2002 U.S. App. LEXIS 15327 (2d Cir. July 30, 2002); Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002). Douglas Richards

3. Ryan-House v. GlaxoSmithKline PLC, 2005 U.S. Dist. LEXIS 33711 (E.D. Va. Jan. 10, 2005); SAJ Distribs., Inc., v. SmithKline Beecham Corp., No. 2:04cv23 (E.D. Pa. filed Nov. 30, 2004) (Augmentin). Michael Einhorn

4. *In re* Auto. Refinishing Paint Antitrust Litig., 177 F. Supp. 2d 1378 (E.D. Pa. 2001). Maarten Burggraaf & Andrew Sullivan

5. *In re* Buspirone Antitrust Litig., 185 F. Supp. 2d 340 (S.D.N.Y. 2002); *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002), *final settlement approval*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 17, 2003). Morgan Anderson & Erika Dahlstrom

6. Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295 (D. Utah 1999). Tara Shoemaker & Erica Dahlstrom

7. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003). Morgan Anderson

8. *In re* Citric Acid Antitrust Litig., 996 F. Supp. 951 (N.D. Cal. 1998). Bobby Gordon

9. *In re* Commercial Explosives Litig., 945 F. Supp. 1489 (D. Utah 1996). Ruthie Linzer

10. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002). Erika Dahlstrom

11. *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841 (N.D. Cal. June 5, 2006). Erika Dahlstrom

12. Natural Gas Antitrust Cases I, II, III & IV: Sweetie's v. El Paso Corp., No. 319840 (S.F. Super. Ct. filed Mar. 20, 2001); Continental Forge Co. v. S. Cal. Gas Co., No. BC237336 (L.A. Super. Ct. filed Sept. 25, 2000); Berg v. S. Cal. Gas Co., No. BC241951 (L.A. Super. Ct. filed Dec. 18, 2000); City of Long Beach v. S. Cal. Gas Co., No. BC247114 (L.A. Super. Ct. filed Mar. 20, 2001); City of L.A. v. S. Cal. Gas Co., No. BC265905 (L.A. Super. Ct. filed Mar. 20, 2001); Phillip v. El Paso Merchant Energy LP, No. GIC 759425 (San Diego Super. Ct. filed Dec. 13, 2000); Phillip v. El Paso Merchant Energy LP, No. GIC 759426 (San Diego Super. Ct. filed Dec. 13, 2000) (El Paso). Erin Bennett & Polina Melamed

13. *In re* Flat Glass Antitrust Litig., 191 F.R.D. 472 (W.D. Pa. 1999). Richard Kilsheimer

14. *In re* High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (C.D. Ill. 1996). Michael Freed

15. *In re* Graphite Electrodes Antitrust Litig., 2003 WL 22358491 (E.D. Pa. Sept. 9, 2003). Norman Hawker

16. Scott Brooks, *Microsoft and IBM Resolve Antitrust Issues*, IBM, July 1, 2005 http://www-03.ibm.com/press/us/en/pressrelease/7767.wss. Erika Dahlstrom

17. *In re* Insurance Antitrust Litig., 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd sub nom*, Hartford Ins. Co. v. California, 509 U.S. 764 (1993). Maarten Burggraaf

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107 See LANDE & DAVIS, *supra* note 43, for complete case analyses.

18. *In re* Linerboard Antitrust Litig. (*Linerboard I*), No. 1261, 2000 WL 1475559, at *1–3 (E.D. Pa. Oct. 4, 2000); *In re* Linerboard Antitrust Litig. (*Linerboard II*), 203 F.R.D. 197, 201–04 (E.D.Pa. 2001), *aff'd*, *In re* Linerboard Antitrust Litig. (*Linerboard III*), 305 F.3d 145, 147–49 (3d Cir. 2002); *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619 (E.D. Pa. 2004). Maarten Burggraaf

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21. *In re* NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703 (S.D.N.Y. 1995). Maarten Burggraaf

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23. Netscape Comm. Corp. v. Microsoft Corp., Civil Action Nos. 98-1232, 98-1233 (D.D.C. filed Jan. 22, 2002). Andrew Smullian

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25. *In re* Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999). Stratis Camatsos

26. Vista Healthplan, Inc. v. Bristol-Myers Squibb Co., 266 F. Supp. 2d 44 (D.D.C. 2003). Tara Shoemaker

27. Stop & Shop Supermarket Corp. v. SmithKline Beecham Corp., Civil Action No. 03-CV-4578 (E.D. Pa. filed Aug. 6, 2003); Nichols v. SmithKline Beecham Corp., 2003 WL 302352 (E.D. Pa. Jan. 23, 2003). Tara Shoemaker

28. *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000). Drew Stevens

29. Settlement Agreement, RealNetworks, Inc. v. Microsoft Corp., No. JFM-04-968, M.D.L. Docket No. 1332 (D. Md. Oct. 11, 2005). Norman Hawker

30. Red Eagle Res. v. Baker Hughes Inc. (*In re* Drill Bits Antitrust Litig.), No. 4:91cv00627 (S.D. Tex. filed Mar. 11, 1991). Ruthie Linzer

31. *In re* Relafen Antitrust Litig., 346 F. Supp. 2d 349 (D. Mass. 2004). Morgan Anderson & Erika Dahlstrom

32. *In re* Remeron Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005). Morgan Anderson & Erika Dahlstrom

33. *In re* Rubber Chemicals Antitrust Litig., 350 F. Supp. 2d 1366 (Judicial Panel on Multidistrict Litigation 2004). Ruthie Linzer

34. *In re* Sorbates Direct Purchaser Antitrust Litig., 2002 WL 31655191 (N.D. Cal. Nov. 15, 2002). Joey Pulver

35. Sun Microsystems v. Microsoft, 333 F.3d 517 (4th Cir. 2003). Robert Lande

36. *In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005). Morgan Anderson & Erika Dahlstrom

37. Settlement Agreement, Transam. Refining Corp. v. Dravo Corp., No. 4:88CV00789 (S.D. Tex. filed Mar. 10, 1988) (Specialty Steel Piping Antitrust Litigation). Ruthie Linzer

38. *In re* Urethane Antitrust Litig., 232 F.R.D. 681 (D. Kan. 2005). Bobby Gordon

39. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc., 396 F.3d 96, 114 (2d Cir. 2005). Robert Lande

40. *In re* Vitamins Antitrust Litig. (many related cases), *see* JOHN M. CONNOR, THE GREAT GLOBAL VITAMINS CONSPIRACY: SANCTIONS AND DETERRENCE (2008) (on file with the authors). Brian Ratner & Robert Lande

Mr. JOHNSON. Thank you, Professor Davis. I wish I could overrule the Supreme Court decision or decisions in *Twombly*, *Iqbal*.

I have got a question I will recognize myself for. And you know, this was a judicial animal the way that it was done for the last 40 years—I mean, not a judicial animal but a legislative animal. Is that correct?

This standard of the previous standard which was ruled unconstitutional—is that standard still—we have had that—let me just drop that question and move on.

This is a case of kind of legislative ruling from the bench. Is that right? In other words, taking out legislation that Congress enacted and then changing it for no real good reason?

Mr. DAVIS. Is that to the panel generally, or——

Mr. JOHNSON. Yes, generally.

Mr. DAVIS. I am happy to take a stab at that. I think that *Conley* is certainly an interpretation of the Federal Rules of Civil Procedure and that the judiciary is bound under the Rules Enabling Act by the Federal rules.

And I do think that within certain parameters the judiciary has room to interpret those rules. But I actually think that *Twombly* and *Iqbal* exceed those bounds.

And just as an example, to make this concrete, part of the Federal Rules of Civil Procedure under Rule 84 are the forms. And one of the forms is what used to be called Form 9 and is now Form 11.

And what it says—all it says—and this is supposed to be absolutely sufficient—according to the Federal rules, for a complaint, is it says on a date to be specified, at a place to be specified, the defendant negligently drove a motor vehicle against the plaintiff.

Now, that is conclusory. There is no explanation of the negligence. And if you take *Twombly* and *Iqbal* literally—now, the court says that survives, but it doesn't really give a very satisfactory explanation as to why.

If you take *Iqbal* and *Twombly* literally, you would say, "Well, negligence—that is a conclusion. There is nothing else other than the word negligence to say the defendant did anything wrong." I think there is a very good argument that applying *Twombly* and *Iqbal* literally—that form is no longer good.

Now, nobody wants to go there, but I think that that is a powerful piece of evidence that in *Twombly* and *Iqbal* the Supreme Court really didn't abide by the framework that was enacted pursuant to the Rules Enabling Act and it acted in essentially a legislative fashion.

Mr. JOHNSON. The legislating from the bench. I am going to move on.

How does *Iqbal*—how does it affect the ability of a litigant to go to court? I want to ask Mr. Katsas that.

Mr. KATSAS. Based on the data we have to date, which admittedly cover only a few months, the answer is *Iqbal* has had essentially zero impact on the ability of litigants. The federal——

Mr. JOHNSON. Well, if I might ask, why is it that previous law was changed if this is not having much effect on litigants' ability to come into the courthouse and file their pleadings?

Mr. KATSAS. Because previous law wasn't changed, Mr. Chairman. Previous law was crystal clear on the propositions I men-

tioned. Conclusory allegations aren't good enough, a plaintiff is only entitled to the reasonable inferences from the facts pled, discovery is not for fishing expeditions, and so on.

Mr. JOHNSON. Let me ask Professor Schnapper to respond to it, and also Mr. Rubin.

Mr. SCHNAPPER. Well, with all deference to my colleague, I disagree with both that characterization of what the law was before and what its impact has been.

Certainly, you can see any number of cases—and I have tried to identify a number of them in my prepared remarks—which were dismissed under the new standard which wouldn't have been dismissed under the old standard and which the judges said wouldn't have been dismissed under the old standard.

So it is clearly—it has clearly had an effect. And as I noted earlier, it has had an effect on defendants, because judges have been striking affirmative defenses under the *Iqbal-Twombly* standard, and that was not something that would have happened before.

Mr. JOHNSON. Thank you.

And, Mr. Rubin?

Mr. RUBIN. Thank you, Mr. Chairman. I think that the question of legislating from the bench is not a rigorous way of looking at it. This is not an unusual situation where the Supreme Court interprets, for example, a statute.

If the interpretation is within the range of the interpretations that were envisioned for the statute by Congress, then we say the Supreme Court is interpreting. If the Supreme Court goes outside of that range, then we say the Supreme Court is legislating from the bench.

In this case, the question is whether or not the Supreme Court exceeded in some manner its authority in its more granular and more specific interpretation of the pleading requirements set down in Rule 8(a)(2).

Now, I believe that the Supreme Court was probably within its rights to interpret the rule as it did. Others may think that that is a—such a far-out interpretation that it is essentially legislating in the sense that it is changing the essential nature of the rule.

I think that we don't have to decide that question to know that there is a change, that the change is very clear in the sense that the requirements for expressing entitlement to seek relief in a civil complaint have been changed, and it is important to see how they have been changed.

They have been changed in a way that only certain cases are going to be affected by the change. And as I tried to point out in my statement, there is a class of cases which comes up to the edge of the *Twombly* standard but does not, as the court said, go over the line into plausibility, and those cases are cases where the plaintiff is in the dark with respect to some of the essential ingredients of their claim.

They can allege facts that are consistent with the claim, but they cannot allege facts that get over the line established by *Twombly*. When we are talking about some fix for the problem, I believe this is the problem we are talking about, a class of cases that will get—which is a minority of cases, or maybe a majority, maybe more than 50 percent—I don't know how many there.

But we know that there are cases that are unaffected by the *Twombly* standard because it keeps intact most of the existing motion to dismiss standard, but we always—also know that there is a class of cases that will be ensnared by *Twombly*.

That is the problem to be addressed. Those cases——

Mr. JOHNSON. Those pro se——

Mr. RUBIN [continuing]. Did not have a problem before the court made its decision. They do have a problem now.

Mr. JOHNSON. Pro se cases, cases involving unpopular ideas—those cases would be adversely impacted.

Mr. KATSAS. Actually, Mr. Chairman, there is a case called Erikson decided between *Twombly* and *Iqbal* in which the Supreme Court very specifically said that pro se litigants are still entitled to the benefit of the doubt in construing their complaint, so I don't think that is right.

Mr. RUBIN. Well, if I could address that, Mr. Chairman, I think that something that gets lost in this debate is that not all cases are created equal. There is a class of cases, such as an automobile negligence complaint, which needs only the barest allegations in order to make clear what the entitlement of the plaintiff to sue is based on.

Everyone knows that an automobile accident will result—can result in injury to people and property. It is not necessary in a complaint to allege exactly how the injury was caused and the other factual details in order to support and to demonstrate the entitlement of the plaintiff to sue.

And Erikson was also such a case, because in that case the essential allegation was that medical treatment was being denied a prisoner, and all of us know from our common experience that when medical treatment is denied, injury can result. We do not need specific factual allegations in order to support the entitlement to sue in such a context.

Contrast that with a—yes, sir.

Mr. JOHNSON. So the point that you are making, if you could just boil it down——

Mr. RUBIN. Well, is that there is a different kind of case that is a complicated case, an economic case, a case of discrimination, a case of financial shenanigans, where it is not close to our experience what the basis of the entitlement to sue is.

And in those cases, the *Twombly* standard will come into effect. And in those cases, the court is saying, "We need additional factual enhancements in order to make clear the entitlement to sue."

So you can't say that *Twombly* is somehow inconsistent with Rule—pardon me, with Form 9, which is now Form 11. They are two different kinds of case, two different worlds, one to which *Twombly* applies and one to which it doesn't.

Mr. DAVIS. Oh, sorry. May I say just a word on this? I mean, Mr. Rubin has one theory of *Twombly*, which is a very interesting one, and I could respond on the particulars of that issue.

But I do think the more important point is that fundamentally you are right that there is a threat from *Twombly* to the very cases, the very important cases, that you have identified. And the reality is that there are lots of ways to construe *Twombly* and *Iqbal*.

They have given judges far more room than existed under the old system. And so if you get—draw Mr. Rubin as a judge, you may get one conclusion. If you draw somebody with a different take on *Twombly* that kind of fits the reasoning in many ways, you get a different one.

And if you get a judge who feels that unpopular views or the claims of a pro se litigant are implausible, whatever that means based on the good sense of that particular judge, there is a very real possibility of dismissal.

And this is one of the concerns about *Twombly* and *Iqbal*, that any one of us may come up with our theory of what it—what they mean, but there is an awful lot of room that will vary by the judge.

And Mr. Rubin is putting forth one very insightful, well-reasoned possibility that has to compete with all the others that judges may apply in any given case.

Mr. JOHNSON. Thank you.

One last question can be answered a yes, no, maybe so, and that is do you think the legislation H.R. 4115 will remedy this situation that exists at this time?

Mr. SCHNAPPER. As drafted, it will remedy it for plaintiffs but not for defendants because it only applies to complaints. As written, it will not apply to affirmative defenses. It wouldn't apply to counterclaims.

It is unclear if it would apply to a cross complaint. I would think it would. But so it works for plaintiffs. It doesn't work for defendants.

Mr. JOHNSON. Mr. Katsas?

Mr. KATSAS. The legislation would make it impossible for any complaint to be dismissed based on either the conclusory or implausible nature of the allegations. To that extent, it would overrule decades of prior precedent and eliminate any screening of complaints on a motion to dismiss.

Those changes would not simply restore the law to what it was immediately before *Twombly*. It would work very substantial and very unwelcome changes in the law.

Mr. JOHNSON. Mr. Rubin?

Mr. RUBIN. Well, as I said in my testimony, I would favor a less ambitious approach. This legislation would remedy the problem we are discussing, but it may also do a lot more and have other unintended consequences, which is why I favor a more limited approach.

Mr. DAVIS. May I——

Mr. JOHNSON. Well, what kind of—what kind of things could happen as a result of this particular legislation?

Mr. RUBIN. Well, one of the things that it appears that the legislation overlooks is the fact that a motion to dismiss is a—it is primarily a legal maneuver in order to test the illegal sufficiency of the claim as pleaded.

Not all motions to dismiss go to whether the facts alleged are sufficiently informative. Sometimes we are going to—whether the facts allege—try to state a case that might be non-cognizable for other reasons besides a failure of the factual allegations—for example, where there is——

Mr. JOHNSON. Well——

Mr. RUBIN [continuing]. Immunity or some other legal reason not to proceed.

If the statute says that you can't dismiss because—unless no set of facts could support the case, where is the demarcation between what we are trying to remedy, which is the *Twombly* problem case—which is where you can allege consistent but you can't allege suggestive—and the other range of 12(b)(6) dismissals, which are an interaction between facts and law?

Because the facts are going to be an input into whether or not you have got a legal problem with your claim, whether you have got an immunity, whether you have got a Trinko-type situation where it is not a cognizable claim because of regulation—that sort of thing.

So that is what I am referring to by the unintended consequences of the statute.

Mr. JOHNSON. All righty.

And, Professor Davis, will this legislative proposal remedy the state of pleading now so that people are not restricted in coming into court?

Mr. DAVIS. I think in large measure it would, and let me just say three quick things about it. First, I think the gist of the bill is to say let's undo *Iqbal* and *Twombly* and take us back to the position we were in before those very significant changes that the Supreme Court effected.

And so to that extent, I think it absolutely will. It will put us back to a system that worked. It wasn't broke. We shouldn't have tried to fix it.

There are two other points I might make. One is it says a court shall not dismiss a complaint, and I think that consistent with the current language of Rule 8 it might be better to say "shall not dismiss a claim." That would deal with counterclaims, cross claims, and not just complaints. So I think that is a very technical civil procedure sort of point, but that would be an improvement.

And then one might consider more express language saying that this doesn't—this just takes us back to the pre-*Twombly*, pre-*Iqbal* world. One could consider that.

But I think on the whole it is a very reasonable bill and it would solve a lot of the problems that have been created by *Iqbal* and *Twombly*.

Mr. JOHNSON. Thank you.

And I will now turn it over to the Ranking Member for questions.

Mr. COBLE. Thank you, Mr. Chairman.

And good to have you all with us, gentlemen.

Mr. Katsas, Judge Mark Kravitz, the chair of the Judicial Rules Advisory Committee, recently commented that judges are "taking a fairly nuanced view of *Iqbal* and that *Iqbal* has not thus far proven to be a blockbuster that gets rid of any case that is filed."

What is your comment on Judge Kravitz's judgment?

Mr. KATSAS. His judgment is supported by a massive array of statistics collected by the Judicial Conference and by a comprehensive 150-page memorandum prepared for the Judicial Conference.

With respect to the statistics, the Judicial Conference has looked at some 800,000 cases between the beginning of 2007 and September of 2009. That is about 20,000 cases filed a month. They

have looked at motions to dismiss—how many are filed, how many are granted, in the period before *Twombly* and compared that to the period after *Iqbal*.

One can hypothesize all one wants about what some particular judge might do, but what the statistics show over some 55,000 motions to dismiss is that motions to dismiss prior to *Twombly* were granted at a 38 percent rate in the 4 months before *Twombly*. Motions to dismiss in the 4 months after *Iqbal* were granted at a 38 percent rate as well.

That is pretty strong initial evidence that Judge Kravitz's view that there is no big change here is, in fact, correct.

Mr. COBLE. And I want to ask you another question, Mr. Katsas, then I want to hear from the other panelists as well, but you first, Mr. Katsas. And you touched on it peripherally.

Experience in the 6 months since *Iqbal* was decided provides that no basis for believing that the decision will limit access to the Federal courts for plaintiffs with legitimate claims as defendants continue to lose motions to dismiss complaints even when they rely upon *Iqbal*.

Do you think that this indicates that the *Iqbal* decision was simply a reiteration of what had already been largely prevailing law?

You first, Mr. Katsas. Then the other gentlemen.

Mr. KATSAS. Yes, I do. The fact that motions to dismiss are not being granted at higher rates tends to confirm what is quite obvious on the face of *Twombly* and *Iqbal* themselves, which is that neither decision changes prior law.

We have heard some suggestion that the court just made up a plausibility requirement out of whole cloth. If you look at *Iqbal*, nine justices agreed that there is a plausibility requirement, citing *Twombly*, and disagreed about the particular complaint.

In *Twombly*, seven justices endorsed plausibility, citing the respected treaties of Professor Wright and Miller and the numerous cases that I have mentioned.

So whether you look at pre-*Twombly* case law or post-*Iqbal* case law, the plaintiffs have a great deal of leeway to pursue litigation, but at some point conclusory or implausible claims have to be dismissed in order to protect qualified immunity, in order to protect defendants from harassment in meritless cases, and so on.

Mr. COBLE. I thank you for that.

And, folks, I am trying to beat my red light, so if you all can sum up as quickly as you can.

Professor, go ahead.

Mr. SCHNAPPER. Thank you, your Honor—sorry. Just a couple of quick points. There are a number of studies which reach the opposite conclusion about the effect of this, and I could provide copies of those to the staff.

But having read them, it is my view that none of this material is helpful. And the reason is, as Mr. Katsas points out, it is about the rate at which motions to dismiss are granted. The problem is that motions to dismiss are now made in cases they wouldn't have been made before.

Defendants don't move to dismiss in all cases. They move to dismiss in cases that fit the law at the time. And they are now moving

to dismiss in cases that wouldn't have been dismissed before. That is where the problem is, and it is reflected in two things.

First of all, the numbers of dismissals of employment discrimination cases is up about a third after *Iqbal*. The rate hasn't changed in all the studies, but the number has gone up.

Secondly, in one of the cases I have referred to in my materials, the Ocasio-Hernandez case, at the end of the case the judge points out that until *Iqbal*—and the judge dismissed the case under *Iqbal*.

At the end of the case, he points out that before *Iqbal* the defense lawyer, who was a very good lawyer, he said, didn't even move to dismiss, because under the law that existed prior to *Iqbal* that wasn't suitable for motion.

So I think the problem isn't the rates, it is the numbers.

Mr. COBLE. And my red light is on, guys, so if you can—if you could sum up as quickly as you can, I would appreciate it.

Mr. RUBIN. Yes, I just would like to—I don't find the statistical evidence helpful one way or the other. We simply don't know what wasn't filed after *Iqbal* because of *Iqbal*, and we don't know what really was dismissed because of *Iqbal* or *Twombly* just because they cite *Iqbal* or *Twombly*. So I don't find them informative at all.

Mr. COBLE. Thank you.

Professor?

Mr. DAVIS. And just two quick points. One is Arthur Miller, the author of the very treatise to which Mr. Katsas cites, has described *Iqbal* and *Twombly* as a sea change. And the reality is it is a radical change from what existed before.

The other thing on statistics—I would just concur about how limited is what we know. If they have the effect that we believe, where it is harder to survive a motion to dismiss, you would expect more violations of the law because defendants are emboldened, because they are unlikely to be held accountable.

You would expect stronger cases to be filed as plaintiffs give up on some of the cases they would have filed before because they can't survive a motion to dismiss.

And then a similar level of either filing of motions to dismiss or of granting them wouldn't tell us much, because the whole background has changed in light of these rules.

And until we can figure out how to measure those things, the statistics aren't really going to tell us much one way or the other. It is a dynamic system, not a static one.

Mr. KATSAS. Could I just make one quick point? We actually do know something about the rate of filing of motions to dismiss.

In that same universe of 55,000 cases that I mentioned—motions to dismiss filed in 34 percent of cases in the 4 months before *Twombly*, 36 percent of cases in the 4 months after *Iqbal*—that does not, to me, sound like a sea change.

Mr. COBLE. Gentlemen, you have been a good panel.

And I yield back, Mr. Chairman.

Mr. JOHNSON. Thank you, sir.

All right, I will recognize Bob Goodlatte for questions.

Mr. GOODLATTE. Well, thank you, Mr. Chairman.

I find this debate about the impact that this—these two decisions have had to be very interesting. I, quite frankly, agree with Mr. Katsas that the evidence does not show a significant change, and

I think that that in and of itself reflects on the fact that these decisions were not a significant change in the law.

In fact, this legislation—and Mr. Nadler in his testimony harkened back to the *Conley* decision, which I don't think has ever had a very high standard of credibility in our courts—there is a long chain of decisions by a host of courts and legal scholars and notes in various legal—I have got two pages of these things in our memo here on this.

And it culminated in the comment by Justice Souter in the *Twombly* case, who concluded that the standard that some have advocated should be imposed through this legislation in H.R. 4115, the standard of *Conley*, had puzzled the profession long enough, and it made no sense to employ it any further.

So quite frankly, Justice Souter—and some have alleged, including Mr. Nadler and others, that this is a conservative cabal, this is a conservative legislating from the bench. Justice Souter is not known by many people on my side of the aisle as a conservative justice in any way, shape or form.

And quite frankly, I think every single member of the court recognized that there is a requirement for plausibility.

So my question for each and every one of you is can you actually sit here with a straight face and say that we should put into a statute language that says 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?

In other words, if the plaintiff's claim is implausible, that is not a basis for dismissing the case. This, in my opinion, would be a radical sea change in the standards that are set in our courts, not the other way around.

So I will start with you, Professor Schnapper, and you are welcome to respond to that. But this language is stunning in terms of specifically instructing judges in our Federal courts to not dismiss cases if they are implausible. How do you defend that?

Mr. SCHNAPPER. Your Honor, let me—I don't want to seem too word-smithy about this, but there is some—there is an important distinction here between whether the plaintiff, without discovery, is able to establish that a complaint is plausible, or whether the judge affirmatively concludes it is an implausible claim.

The problem is that the—we are talking about a decision that is made before all the evidence is known. And you know, at the point—we get to a point where——

Mr. GOODLATTE. So is your standard anything goes? I mean, you really like this *Conley* no-set-of-facts standard that you can allege anything and get into court?

I mean, we talked here about how—in fact, Professor Davis cited that one of the reasons why we can argue about the statistics is that a lot of people may not have filed cases because they couldn't stand up in court. That, to me, is a good thing, not a bad thing.

Why would we waste billions of dollars of resources in our country, jamming our courts with cases that shouldn't be in those courts, because we specifically tell the courts—the Congress specifically tells the courts that if you find a case is implausible, you can't dismiss it on that basis?

Mr. DAVIS. If I may just—because the word "plausible," as so many legal terms do, has—is a term of art. And plausibility has been read to require all sorts of things that very reasonable plaintiffs are unable to show.

If you had told me that it was—that Tiger Woods had cheated on his spouse, I would have found that not only implausible but outrageous. And if his wife had brought suit on that basis, she never would have had her day in court, though it turned out she was absolutely right.

The Bernie Madoff scheme—there are many things that happen that are implausible. And the way that courts have interpreted that word is often to ask plaintiffs not only to establish that something may well have happened that gives them every reason to believe they have a legal right, but that they at times have to allege the who, what, where, how of things they could not possibly know or get dismissed.

And so that is—the word "plausible" here——

Mr. GOODLATTE. Well——

Mr. DAVIS [continuing]. It is——

Mr. GOODLATTE [continuing]. We don't have divorce cases in Federal courts. But in the state of Virginia, you have to allege adultery with specificity. You can't just say this happened.

So you know, I understand what you are saying, but I don't understand how you could build a standard into the law that says the issue of plausibility is off the table in every single pleading.

Mr. Katsas?

Mr. KATSAS. Yes. Think of the black-letter statements of motion to dismiss law. A plaintiff is entitled to have the truth assumed of well-pleaded factual allegations and all reasonable inferences from those allegations.

A court need not accept unwarranted inferences. All right? Those are standard formulations that one sees in all of the case law.

What this bill would do is compel the courts to adopt the opposite formulation, which is that a court must accept even unwarranted and unreasonable inferences from the facts pled. To me, that is just crazy.

And think about how it would play out on the facts of *Iqbal* itself, right? We are in the wake of an unprecedented national security emergency after September 11th. The attorney general uses his authority under immigration law to detain people who may be connected to the terrorist attacks.

And one of those guys wants to say, "Well, I was just detained because of my religion and the attorney general was not acting to protect the country but to discriminate against Muslims. I get to sue the attorney general." That seems to me crazy. And that is exactly what would be permitted under this bill.

And as Judge Cabranes said in the Second Circuit decision in *Iqbal*, if you allow that case to go forward, you have a blueprint—a blueprint—for people to bring baseless, politically motivated suits against cabinet officers for doing their job and making very tough calls to keep the country safe and to exercise all sorts of other—make all sorts of other difficult decisions in the performance of their duties.

That seems to me a floodgate that we should not open.

Mr. SCHNAPPER. If I could respond a second——

Mr. GOODLATTE. Yes, we took it away from Professor Schnapper, and I think we need to let him get back to——

Mr. SCHNAPPER. Just to respond to the second questions you asked, I understand that your view is that the no-set-of-facts standard is a bad standard and that that is not what the courts were applying prior to *Iqbal*.

I took a look in Westlaw for that particular phrase to see if it was, in fact, being relied on by the courts prior to *Iqbal*, in the year before *Iqbal*. The number of cases in which it was cited is 1,631. So it was out there.

Mr. GOODLATTE. Yes, but you have to read what those cases said, because I have here in front of me—well, I am going to—here you have a case—no-set-of-facts standard has never been taken literally, or unfortunately provided conflicting guideposts, or no-set-of-facts language in *Conley* has never been taken literally, or noting that *Conley*'s no-set-of-facts language has not been—is not to be taken literally, noting that *Conley*'s no-set-of-facts statement if taken literally would foolishly protect from challenge complaints alleging that only that the defendant wronged the plaintiff or owes plaintiff a certain sum, literal compliance with *Conley* could consist simply of giving names of the plaintiff and the defendant and asking for judgment.

I mean, so I don't—you know, we are talking about statistics here. I don't think you can simply say that you ran a search on no-set-of-facts and found that the courts were favorably viewing that as a standard in pleadings cases.

And let me just close—my time has expired, too—by saying that this is an area that is clearly a fine point in the law. We want people to be able to get into court, and they are not going to be able to allege in their pleadings a full set of facts upon which they base their claims because they don't know the full set of facts and want to get to discovery.

But we have to have some kind of standard other than no-set-of-facts to get into court. Otherwise, we are going to see, you know, an explosion of litigation. In this day of the preservation of information—e-mails and so on—the amount of and the cost of discovery in these cases is staggering.

And to say that you can get into court on the basis of no-set-of-facts and then start plowing through and require the defendant to plow through and provide documentation when they have an infinitely larger amount of data to plow through than they ever did in the old environment, where every—where whatever was kept was on a piece of paper, is a standard that I don't think is an acceptable one for the future.

I think that we are far better off letting the court deal with these nuances than trying to ham-handedly write legislation that would actually say into law that a judge cannot dismiss a case that he finds to be implausible.

Thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Goodlatte.

And since I took so much time asking questions myself, I feel obligated to bestow that same right upon my friends on the other side of the aisle.

Mr. COBLE. I am fine, Mr. Chairman.

Mr. JOHNSON. All right. All right.

No further questions. This has been an intriguing hearing. And a lot needs to be done to restore—I guess not sanity, but to restore the conditions which allowed people to come into court with a pleading.

Now, it may or may not be meritorious. How do you make that—how do you make that determination? Is it something that you just don't like this claim, and you don't like the party who made the claim, and a judge deciding to—well, it is not very meritorious?

I think we have heard the answer to that question. But it really does concern me deeply. And this will not be the last hearing that we have on this issue.

I want to appreciate your time and your effort in coming to testify today. And I wish everybody happy holidays as well.

And with that, this hearing is adjourned.

[Whereupon, at 5:22 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

SUBMISSION BY THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS (COSAL)
TO THE HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
HEARING ON H.R. 4115, THE "OPEN ACCESS TO COURTS ACT OF 2009"
DEC. 16, 2009

The Committee to Support the Antitrust Laws (COSAL) is an association of law firms that prosecute private antitrust cases. The organization was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL's members have litigated many antitrust cases under the new pleading standards enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.

During congressional consideration of legislation to restore the pleading standards that existed before *Twombly* was decided in 2007, there has been much debate about whether *Twombly* represented a significant change in the law regarding the standard to be applied when federal courts consider motions to dismiss in civil litigation. In order to assist the committee in its deliberations, COSAL compiled the following examples of statements that antitrust defendants have made to the federal courts that strongly suggest that *Twombly* was, indeed, a significant change in the law governing motions to dismiss antitrust complaints.

1. In re Pressure Sensitive Labelstock Antitrust Litig., MDL No. 1556 (M.D. Pa.)

In renewing their motion to dismiss plaintiffs' complaint shortly after *Twombly* was decided, defendants stated:

> Indeed, courts and scholars alike agree that *Twombly* marks a sea change in the way courts analyze the adequacy of parallel conduct allegations in antitrust cases.

Reply Memorandum In Support Of Defendants Bemis Company, Inc.'s and Morgan Adhesives Company's Motion To Dismiss Plaintiffs' Second Amended Complaint, p. 1 (Nov. 2, 2007, Doc. 330).

Defense counsel amplified their position in the court's hearing of their motion to reconsider or for an interlocutory appeal:

> With respect to the comments that [Plaintiffs' counsel] said that the Court made that *Twombly* is not radically different from what Courts have always done in the past, I fail to see how that argument can stand in light of the Supreme Court, the highest court in the land, telling us that *Conley versus Gibson* had earned its retirement. There was something going on there that the Supreme Court didn't want to have to continue.

Transcript of Proceedings of Oral Argument and Settlement Agreement, p. 17 (Jul. 22, 2008, Doc. 339).

2. In re Aftermarket Filters Antitrust Litig., MDL No. 1957 (N.D. Ill.)

In moving to dismiss plaintiffs' complaint, defendants characterized *Twombly* in the following way:

> *Twombly* sets the bar high for an allegation of a long-lasting conspiracy.

Memorandum of law of Arvinmeritor, Inc.; Cummins Filtration Inc.; Donaldson Company, Inc.; Honeywell International Inc.; Purolator Filters NA LLC; Affinia Group Inc.; and Wix Filtration Corp. in Support of Their Motion to Dismiss Consolidated Indirect Purchaser Complaint, Direct Purchaser Consolidated Amended Complaint, and Gasoline and Automotive Service Dealers of America's Complaint for Failure to State a Claim, p. 19 (Feb. 2, 2009, Doc. 209).

3. In re Puerto Rican Cabotage Antitrust Litigation, MDL No. 1960 (D.P.R.)

In moving to dismiss plaintiffs' complaint, defendants characterized *Twombly* in the following way:

> In fact, the First Circuit has explicitly and directly held that *Twombly* "rais[ed] the pleading requirements for an antitrust claim, in light of the 'unusually high cost of discovery in antitrust cases.'" *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Assoc. of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77 n.7 (1st Cir. 2008), quoting *Twombly*, 127 S. Ct. at 1967.

Defendants Crowley Maritime Corp. and Crowley Liner Services, Inc.'s Memorandum of Law in Support of its Motion to Dismiss Second Amended Consolidated Complaint, p. 5 (Mar. 10, 2009, Doc. 289).

4. In re Packaged Ice Antitrust Ligation, MDL No. 1952 (E.D. Mich.)

From the Brief in Support of Reddy Ice Holdings, Inc. and Ready Ice Corporation's Rule 12(b)(6) Motion to Dismiss the Direct Purchaser Plaintiffs' Consolidated Amended Complaint, at p. 5 (Oct. 30, 2009, Doc. 202): Defendants, quoting from the Sixth Circuit, "elaborat[ed] on ***the heightened [pleading] standard to be applied in the context of a motion to dismiss***" and quote *Twombly* at length. *Id.* (emphasis added).

5. In re Air Cargo Shipping Services Antitrust Litig., MDL No. 1775 (E.D.N.Y.)

In moving to dismiss plaintiffs' claims, defendants suggested that caselaw prior to *Twombly* no longer applies: "It is unclear what relevance this pre-*Twombly* decision in the summary judgment context has to [do with] whether or not plaintiffs satisfied their *Twombly*

pleading obligations . . . ." Reply In Support of Defendants' Motion To Dismiss, p. 95, n. 72 (Jan. 4, 2008, Doc. 674).

COSAL supports legislation that would restore the pleading standards that existed prior to the *Twombly* decision. We are happy to supply additional comments or answer any questions that the committee may have about the effects *Twombly* has had on antitrust cases. If you would like further information, please contact our Washington representative, Pamela Gilbert, at 202-789-3960 or pamelag@cuneolaw.com. Thank you for your consideration.