



14 Vesey Street  
New York, NY 10007-2992  
(212) 267-6646 · www.nycla.org

## **Comments on the Report of the New York State Bar Association's Special Committee on Standards for Pleading in Federal Litigation**

This Report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on May 10, 2010.

The New York County Lawyers' Association (NYCLA) appreciates the opportunity to comment on the Report of the New York State Bar Association's Special Committee on Standards for Pleading in Federal Litigation (the "Report"). Our comments are based on reports prepared by our Committee on the Federal Courts, chaired by Gregg Kanter, and our Civil Rights and Liberties Committee, chaired by Louis Crespo. We recognize the significant research and analysis in the Report and share many of the Report's concerns about the U.S. Supreme Court's recent interpretations of the pleading standard under Rule 8(a) of the Federal Rules of Civil Procedure ("Rule 8(a)"). Nevertheless, we do not support the Report for the following reasons:

1. The Report does not present persuasive evidence that Rule 8(a) should be revised.
2. The Report does not adequately address the discovery burdens in high-stakes, complex cases, such as commercial cases in the Southern District of New York.
3. The proposed Rule 8(a) is not, as asserted in the Report, closely derived from established New York pleading standards, and the language of the proposed Rule is ambiguous.
4. The Report does not address the effect of its proposed revision to Rule 8(a) on plaintiffs in civil rights and employment cases, particularly *pro se* litigants.
5. The Report proposes a deviation, disrespectful of the Supreme Court, from the well-established rule-making process.

### **Evidence that Rule 8(a) Should Be Revised**

While *Twombly* and *Iqbal* may justify a revision of Rule 8(a), the Report does not demonstrate this. The Report's presumption that *Twombly* and *Iqbal* have dramatically altered federal pleading standards is not universally accepted. A recent study on *Twombly* and *Iqbal* concludes:

The case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency. Some courts have emphasized that notice pleading remains intact. Many courts also continue to rely on pre-*Twombly* case law to support some of the propositions cited in *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. In addition, some of the post-*Iqbal* cases dismissing complaints note that those complaints would have been deficient even before *Twombly* and *Iqbal*.

Memorandum Prepared for the Advisory Committee on Civil Rules (Dec. 30, 2009).<sup>1</sup> *But see Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217 (D.P.R. Aug. 4, 2009) (stating that the heightened pleading standard in *Twombly/Iqbal* could cause some litigants to avoid federal court).

The Report discusses preliminary data compiled by the Administrative Office of the United States Courts regarding dismissal rates for various categories of cases before *Twombly* and after *Iqbal*, but these statistics do not appear adequate to bear the weight the Report gives them. *See* Report at 17-20. As the Report acknowledges, these statistics have various shortcomings, including a short time period and a correspondingly small sample. *See id.* at 17 & n.82. It is doubtful that the dismissal rates for various categories of cases in this sample – motions to dismiss were granted *less* often after *Iqbal* than pre-*Twombly* in six categories and were granted more often in only three categories – are meaningful. This is particularly so in light of the recent analysis of cases applying *Twombly* and *Iqbal* discussed above, which concluded that the impact of those cases on dismissal rates was at most questionable. The Report's suggestion that the statistics do not account for cases that were never brought or were settled before adjudication of motions to dismiss is speculation, unsupported by empirical evidence that the number of complaints has dropped after *Iqbal* or that more cases are settling before adjudication of motions. *See id.* at 18-19.

The Report does not sufficiently acknowledge the concerns that *Twombly* and *Iqbal* address, including the excessive burdens of discovery in large cases and the need to ensure that plaintiffs make some showing of a basis for suing before imposing the costs of discovery on defendants, as set forth below.

### **Discovery Burden in Complex Cases**

The Report states that discovery burdens are not a problem in federal court, and the sole basis for this statement is a Federal Judicial Center survey of federal court practitioners. *See* Report at 41-42. The bulk of federal cases analyzed by the survey, however, appear to be minor-stakes disputes that are very dissimilar from the high-stakes, complex commercial litigation prevalent in districts such as the Southern District of New York. In these types of cases, the discovery burdens discussed in *Twombly* are real, particularly in cases involving electronic discovery. Just as the Supreme Court's discussion in *Twombly* of a few law review articles about purported discovery burdens provided inadequate support for the Court's rejection of 50 years of pleading

---

<sup>1</sup> *See* <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>.

precedent, *see* 127 S. Ct. at 1957, the Report's discussion of discovery statistics from one survey is not an adequate basis to reject *Twombly* and *Iqbal*.

### **Proposed Revised Rule 8(a) Is Not Based on New York Pleading Standards and Is Ambiguous**

The Report's suggestion that Rule 8(a) should be revised to adopt a formulation purportedly based on the pleading standard under the New York Civil Practice Law and Rules ("CPLR") is unpersuasive for several reasons. *See* Report at 29-33, 39. First, the Report's proposed amended Rule 8(a) – requiring “a short and plain non-conclusory statement of grounds sufficient to provide notice of the claim and relief sought” – bears no resemblance to the pleading standard set forth in CPLR 3013 – “sufficiently particular [statements] to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” The Report does not explain how the CPLR or the New York case law applying the CPLR supports the Report's reformulation of Rule 8(a).

Second, the Report's proposed reliance on New York State law as a model for the federal pleading standard is likely to be particularly unpersuasive to a national audience because the Report offers almost no substantive analysis of other states' pleading standards. *See* Report at 34. New York lawyers should refrain from promoting our own state law as a national model without undertaking a more serious analysis of the possible models provided by other states. The existing body of federal law, which is familiar to lawyers nationwide, provides ample materials for reforming the federal pleading standard, if that is desirable.

Third, the Report does not convincingly demonstrate that the pleading standard under the CPLR is a good model. It may be possible to derive a coherent pleading standard from the CPLR's statutory language and the case law of the Court of Appeals, but the Report does not present such a standard.<sup>2</sup>

Any amendment to the Rules should be drafted as carefully as possible. While we do not support the Report's proposed amendment, we note several apparent drafting problems that result in the proposed Rule lacking the clarity it is intended to provide. The amendment appears to be ambiguous. “A short and plain non-conclusory statement of grounds sufficient to provide notice of the claim and the relief sought” (Report at 1) could be read in at least two different ways:

- A short and plain non-conclusory statement of (i) grounds sufficient to provide notice of the claim and (ii) the relief sought; or

---

<sup>2</sup> Indeed, commentators have noted the confusion in New York's pleading standards. E.g., J. Higgitt, CPLR 3211(a)(&): Demurrer or Merits Testing Device?, 73 Albany L. Rev. 99 (2009) (stating that New York motion to dismiss standard is unclear because recent decisions have “muddied the waters as to the appropriate standard”).

- A short and plain non-conclusory statement of grounds sufficient to provide notice of (i) the claim and (ii) the relief sought.

The latter interpretation arguably would require greater specificity regarding the grounds for the relief sought than the former interpretation. This might make a significant difference to the outcome of motions to dismiss actions seeking injunctive relief, difficult-to-measure damages, or other non-obvious relief.

Finally, the proposed amendment’s inclusion of the word “non-conclusory” could invite courts to require detailed fact pleading, which would undermine the amendment’s apparent intention of restoring the balance between plaintiffs’ and defendants’ rights after *Twombly* and *Iqbal*, assuming an imbalance exists, and assuming that is desirable.

### **Effect of Proposed Rule 8(a) on Plaintiffs in Civil Rights and Employment Cases, Particularly *Pro Se* Litigants**

The term “non-conclusory statement” could be construed as requiring the equivalent of a “statement of facts.” If so, the proposed standard could bar viable claims brought under certain civil rights statutes, *e.g.*, 42 U.S.C. Section 1983. For example, as noted in the Report on page 25, civil rights litigants may encounter problems in pleading supervisory liability in Section 1983 cases as alleged acts of supervisors may “happen behind closed doors” and plaintiffs do not have access to certain information unless it is “unlocked by discovery.” Under these circumstances a plaintiff can only plead conclusory statements based on inferences from the other facts and circumstances known at the time of pleading. Similar considerations could affect many other plaintiffs, including plaintiffs in employment cases and *pro se* plaintiffs, who believe correctly that they have a valid claim, but who cannot marshal the facts to support some elements of claims without discovery other than by plausible inference.

### **The Proposed Deviation from the Well-Established Rule-Making Process Is Disrespectful to the Supreme Court**

NYCLA opposes the Report’s recommendation that an amendment of Rule 8(a) be enacted through a deviation from the well-established rule-making process, in which the Judicial Conference would adopt the revision and Congress would deprive the Supreme Court of its normal authority under the Rules Enabling Act to reject a Rules amendment proposed by the Judicial Conference. *See* Report at 40.<sup>3</sup> Any amendment to the Rules, or other change in the

---

<sup>3</sup> A number of commentators have criticized similar suggestions.

“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) . . . 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

pleading standards established by the Supreme Court in *Twombly* and *Iqbal*, should be achieved through one of the two traditional means – either an amendment to the Rules drafted by the Rule Advisory Committee, proposed by the Judicial Conference, and promulgated by the Supreme Court, or, if the Advisory Committee fails to act after it has been given an opportunity to complete its ongoing review and analysis of *Twombly* and *Iqbal*, legislation enacted by Congress.

In conclusion, NYCLA does not support the Report and suggests further study to evaluate the full range of views about the federal pleading standard and issues that arise in different circumstances. NYCLA also recommends that the normal rule-making process not be short circuited.

---

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.”

Statement of Gregory J. Katsas, Former Asst. Attorney Gen., Civil Div., Dept. of Justice, Federal Pleading Standards Under *Twombly* and *Iqbal*, Testimony Before the Subcomm. On Courts and Competition Policy, House Judiciary Comm (Dec. 16, 2009) (avail. at <http://judiciary.house.gov/hearings/pdf/Katsas091216.pdf>).