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# A New Look at Dismissal Rates in Federal Civil Cases

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# A NEW LOOK DISMISSAL RATES OF FEDERAL CIVIL CLAIMS



*Empirically examining the effect of the Iqbal and Twombly decisions on dismissals at the pleading stage.*

by SCOTT DODSON

For most of the last seventy years, the Supreme Court has interpreted the Federal Rules of Civil Procedure to impose on federal-court litigants a civil pleading regime called notice pleading. Under this regime, a civil claim may be dismissed under Rule 12(b)(6) only if *legally* insufficient—only if the claim could not be maintained under any set of facts. The pleading of facts was necessary only to provide “fair notice” of the claim to the defendant.<sup>1</sup>

Beginning in 2007, the Supreme Court abruptly changed course by issuing *Bell Atlantic Corp. v. Twombly*<sup>2</sup> and *Ashcroft v. Iqbal*,<sup>3</sup> which impose a new factual-sufficiency requirement. Under these cases, a court should disregard all “conclusory” allegations (whether of law or fact) and assess

the “plausibility” of the claim using the judge’s own “judicial experience and common sense.” If the judge determines that the complaint does not supply sufficient facts to allow the claim to cross the threshold from the conceivable to the plausible, then the claim should be dismissed under Rule 12(b)(6).

Such a sea change in pleading standards immediately set off alarms in procedural circles. Serious doctrinal, normative, and institutional discussions immediately ensued. But many of those discussions were based, in part, on empirical speculation of what real effects the new pleadings decisions were having on civil claims in the federal district courts.

Commentators obliged by studying the cases’ effect. However, because

of coding and collection difficulties, those studies have approached data with two problematic methodological choices. The first is that studies have tended to code whole cases rather than claims, leading to the ambiguous coding category of “mixed” dismissals and to problems

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1. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
2. 550 U.S. 544 (2007).
3. 556 U.S. 662 (2009).

in characterizing the nature of the dispute. The second is that studies have failed to distinguish between legal sufficiency and factual sufficiency. These methodological choices potentially mask important detail about the effects of the pleadings changes.

This paper begins to fill in that detail. I compiled an original dataset of district court opinions and coded each claim—rather than whole case—subject to an adjudicated Rule 12(b)(6) motion. For each claim, I also determined whether the court resolved the motion on grounds of legal or factual sufficiency. This methodology opened an unprecedented level of granularity in the data.

The data reveal statistically significant increases in the dismissal rate overall and in a number of subsets of claims. Prior studies based on cases rather than claims have consistently found modest increases in the dismissal rate but have differed in their findings of statistical significance. My findings, based on claims rather than cases, suggest that the prior studies' case-based coding choices may mask some significance.

I also find an increase in the prevalence and effectiveness of factual-insufficiency arguments for dismissal. Perhaps surprisingly, I find a decrease in the prevalence and effectiveness of legal-insufficiency arguments for dismissal. These data and insights on the rationales of dismissals are new to the literature and suggest that *Twombly* and *Iqbal* are affecting both the strategy employed by movants and the rationale for deciding motions to dismiss.

Overall, I find evidence that *Twombly* and *Iqbal* are affecting pleading-stage dismissals in federal district courts in a variety of important ways not adequately captured or reflected by prior studies.

This article proceeds as follows: First I offer background on pleading and the previous studies, isolating some of their deficiencies and demonstrating the need for additional study. Then I outline my methodology followed by results. Last I analyze

the methodology and results, exploring possible areas for further study.

#### Civil pleading standards in federal district court

Rule 8(a)(2), which governs most civil pleadings in federal court, requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>4</sup> The rule was designed to relax pleading strictures, requiring only a viable legal claim (legal sufficiency) and enough description of the circumstances to notify the defendant of the general nature of the dispute (notice).<sup>5</sup>

Rule 12 provides mechanisms for testing a complaint's sufficiency. Rule 12(b)(6) addresses legal insufficiency. It allows a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted.<sup>6</sup> In the seminal case *Conley v. Gibson*, the Court stated:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed [under Rule 12(b)(6)] 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.<sup>7</sup>

Under this standard, a federal court could dismiss a civil claim under Rule 12(b)(6) only if *legally* insufficient—only if the claim could not be maintained under any set of facts. If the law does not recognize the claim or prohibits it under the circumstances alleged, then relief

cannot be granted even if all of the plaintiff's allegations are true. For example, a complaint that asserts a federal claim for discrimination on the basis of baldness should be dismissed as legally insufficient because the law does not recognize such a claim and provides no relief for it, even if every fact the plaintiff alleges is true.

*Conley* also imposed a requirement that the complaint provide “fair notice” of the claim to the defendant. Any lack of notice was remedied not by dismissal but by a more definite statement under Rule 12(e),<sup>8</sup> which permits a court to order the plaintiff to file a more definite statement if the complaint “is so vague or ambiguous that the [defendant] cannot reasonably prepare a response.”<sup>9</sup>

Thus, under *Conley*, and as understood by most commentators, Rule 12(b)(6) was for legal insufficiency only; factual insufficiency was tied to a lack of notice and remediable by a more definite statement.<sup>10</sup> By contrast, weak or implausible claims were largely unremediable at the pleading stage; those quintessentially merits-based defects were relegated to later stages, such as summary judgment, which were designed to test the factual meritousness of claims after the opportunity for discovery.<sup>11</sup>

Many lower courts have resisted the liberality of notice pleading by applying stricter tests of factual insufficiency.<sup>12</sup> Judges of those courts feared that Rule 12(b)(6) was

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

5. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460-61 (1943).

6. FED. R. CIV. P. 12(b)(6).

7. 355 U.S. 41, 45-46 (1957).

8. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

9. FED. R. CIV. P. 12(e).

10. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 865 (2010); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 550-51; Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 837-38 (2010); Wendy Gerwick Couture, *Conley v. Gibson's “No Set of Facts” Test: Neither Cancer Nor Cure*, 114 PENN. ST. L. REV. PENN. STATIM 19, 29 (2010); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433,

438 (1986); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J., 1, 18 n.59 (2010); Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 316 n.83 (Kevin M. Clermont ed., 2d ed. 2008); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 20 (2009); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1321 (2010).

11. FED. R. CIV. P. 56.

12. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Marcus, *supra* note 10; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 983-84 (1987).

toothless, and some commentators have credited that fear.<sup>13</sup> Nevertheless, during much of the last seventy-five years, the Supreme Court repeatedly endorsed the lax structure described above.<sup>14</sup>

In 2007, however, the Court surprised everyone with *Bell Atlantic Corp. v. Twombly*.<sup>15</sup> There, the Court held that a complaint alleging a federal antitrust conspiracy, supported only by allegations of conscious parallel conduct, failed Rule 8(a)(2) and should be dismissed under Rule 12(b)(6). Undeniably, the claim was legally sufficient: federal law does prohibit conspiracies to restrain trade,<sup>16</sup> and the plaintiffs did not allege any facts that would have precluded liability.<sup>17</sup> And the complaint seemingly provided ade-

quate notice of the claim and its grounds.<sup>18</sup> Nevertheless, the Court dismissed the complaint because it failed to allege sufficient facts showing a "plausible" entitlement to relief.<sup>19</sup> Crucially, *Twombly* does not eliminate the old requirements of legal sufficiency and notice; rather, it adds a new dimension of factual sufficiency.

In 2009, the Court confirmed and expanded *Twombly* in *Ashcroft v. Iqbal*.<sup>20</sup> The Court made three significant holdings. First, judges may disregard all "conclusory" allegations when deciding a motion to dismiss.<sup>21</sup> This was a reversal of prior pleading doctrine, which required courts to credit all factual allegations unless wholly incredible and to evaluate all factual inferences in the light most

favorable to the pleader.<sup>22</sup> Second, the Court confirmed that *Twombly* sets a transsubstantive pleading standard that requires the pleader to state—using nonconclusory factual allegations—a claim that is "plausible."<sup>23</sup> Third, the Court held that judges should assess plausibility by drawing upon "judicial experience and common sense."<sup>24</sup> The purpose of this new pleading standard is, in the Court's words, to screen out factually weak or meritless claims before they impose costs on defendants and the judicial system.<sup>25</sup>

To determine whether the intended effect was occurring, commentators conducted a number of empirical or quasi-empirical studies of *Twombly* and *Iqbal*.<sup>26</sup> Although each has its flaws, and although they span a variety of methodological approaches, they are relatively consistent in finding a modest increase in the grant rate of dismissal motions filed.

For example, Professor Patricia Hatamyar conducted two post-*Iqbal* studies based on Westlaw opinions.<sup>27</sup> She coded by case and whole-motion result (i.e., grant, deny, or mixed).<sup>28</sup> In her first study, Hatamyar found a statistically significant increase in grant rates, from 46% (pre-*Twombly*) to 56% (post-*Iqbal*), and a statistically significant decrease in denial rates, from 26% to 18%. The bottom line was that the odds of a motion to dismiss being granted or granted in part were 1.5 times greater under *Twombly* and *Iqbal* than under the pre-*Twombly* regime, holding all other variables constant. The strongest predictor of this variation was pro se status.<sup>29</sup> In her second study, which amplified the post-*Iqbal* data,<sup>30</sup> she found that the rate of motions granted without leave to amend increased by a factor of 1.67 under *Iqbal*, and that the rate of grants with leave to amend increased by a factor of 5.9 times (both significant at the 95% confidence interval).<sup>31</sup> Excluding pro se constitutional civil-rights cases still showed an increase in dismissal rates, but only to the 93% confidence interval.<sup>32</sup>

Recently, the Federal Judicial

13. Geoffrey C. Hazard, Jr., *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."); Mark Hermann & James M. Beck, Opening Statement, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 *U. PA. L. REV. PENNUMBRA* 141, 143 (2009) ("Taken literally, the *Conley* dictum could make it impossible for a defendant to win a motion to dismiss, thus rendering Federal Rule of Civil Procedure 12 a nullity."), available at <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf>; Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 *DENV. U. L. REV.* 245, 252 (2010) ("*Conley*'s 'no set of facts' standard did not appear to require the recitation of any facts at the pleading stage."); William M. Janssen, *Iqbal "Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 *LA. L. REV.* 541, 548-49 (2011) (calling Rule 8 "toothless").

14. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Conley v. Gibson*, 355 U.S. 41 (1957). Some commentators, looking at other cases, see more ambiguity in the Court's pleading doctrine. See Edward H. Cooper, *King Arthur Confronts Twiqy Pleading*, 90 *OR. L. REV.* 955, 963-64 & n.27 (2012); SCOTT DODSON, *SLAMMING THE FEDERAL COURTHOUSE DOORS? NEW PLEADING IN THE TWENTY-FIRST CENTURY* (Oxford Univ. Press, forthcoming 2013).

15. 550 U.S. 544 (2007).

16. 15 U.S.C. § 1.

17. *Twombly*, 550 U.S. at 557 (acknowledging that the allegations were "consistent with" liability). But see Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 *F.R.D.* 604, 620 (2007) (contending that the plaintiffs pleaded themselves out of court).

18. *Twombly*, 550 U.S. at 565 n.10; *id.* at 588 n.8 (Stevens, J., dissenting).

19. *Id.* at 556-57.

20. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009).

21. *Id.*

22. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FED. PRAC. & PROC.* § 1357 (3d ed. 2004) ("For purposes of the motion to dismiss, (1) the complaint is construed in the light most favorable to plaintiff, (2) and its allegations are taken as true. . . . Basically what this means. . . is [the court] will accept the pleader's description of what happened to him or her along with any conclusions that can reasonably be drawn therefrom.")

23. *Iqbal*, 556 U.S. at 604-86.

24. *Id.* at 678.

25. *Twombly*, 550 U.S. at 562.

26. Four studies consider the effects of *Twombly* alone. See Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 *NOTRE DAME L. REV.* 1811 (2008); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 *U. ILL. L. REV.* 1011; Joseph A. Seiner, *Pleading Disability*, 51 *B.C. L. REV.* 95 (2010); William H.J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (draft of June 14, 2011). That limitation is problematic because it was not until *Iqbal* that the new pleading regime was settled as meaningful and transsubstantive. The results of these studies might be as indicative of the confusion surrounding the *Twombly* standard as of the changing rate of dismissal under the new standard. It is true that some uncertainty persists after *Iqbal*, see Alex Reinert, *Pleading as Information-Forcing*, 75 *L. & CONTEMP. PROBS.* 1, 2, 16 (2012) (documenting disparate applications of *Iqbal*), but *Iqbal* resolved many of *Twombly*'s broader ambiguities.

27. Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 *U. RICH. L. REV.* 603 (2011); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 *AM. U. L. REV.* 553 (2010).

28. Hatamyar, *supra* note 27, at 589-96.

29. *Id.* at 621-22.

30. Moore, *supra* note 27, at 605.

31. *Id.* at 605.

32. *Id.* at 618, 622-23.

Center published a study using civil dockets rather than Westlaw databases. Like Hatamyar's studies, the FJC coded by case and whole-motion result (grant, grant in part, deny). The FJC excluded all prisoner and pro se cases.<sup>33</sup> The FJC included cases filed under pleading standards other than Rule 8(a)(2), namely, financial-instrument cases. Excluding the financial-instrument cases results in an overall grant-or-grant-in-part rate increase of 5% post-*Iqbal* (from 66% to 71%), which is significant to the 95% confidence interval, though this figure is not regressed. Breaking down the data by type of case

revealed increases in the dismissal rate across all types, and a substantial increase in civil-rights cases,<sup>34</sup> although the smallish Ns did not generate statistical significance.<sup>35</sup>

Methodologically, all these studies have two common features. First, the studies' unit of analysis is a whole case. Yet a large percentage of cases have multiple claims. Coding a multi-claim case's "type" necessarily involves either reliance on classification by others (i.e., the plaintiff or the clerk) or difficult judgment calls about the relative importance of one claim over others, and prior studies have conceded the messiness of such classifications.<sup>36</sup> Further, because decisions on motions to dismiss operate at the claim level rather than the case level, coding results by case necessarily requires the ambiguous category of "mixed" decisions, in which at least one but not all the claims were dismissed. Coding by claim could provide a clearer picture of how the new pleading standard is operating.

The second common methodological feature is that existing studies fail to distinguish between decisions based on factual sufficiency and decisions based on legal sufficiency. Neither *Twombly* nor *Iqbal* disturbs

the legal-sufficiency standard that Rule 12(b)(6) has always tested. Rather, *Twombly* and *Iqbal* impose a new factual-sufficiency standard. Inclusion of a relatively constant subset of legal-insufficiency challenges could overwhelm and mask the significance of any increase in dismissals for factual insufficiency. Thus, distinguishing between the

limit the searches only to cases citing the permissive *Conley* or the restrictive *Twombly*, as other studies did. Instead, I used those terms only in the disjunctive, to capture cases that may have used them as a proxy for the motion-to-dismiss standard instead of referencing Rule 12 or "failure to state a claim." In addition, I included the term "Conley" in the post-*Iqbal* search. I thereby hoped to reduce the risk of any sample-skewing effect from potentially loaded search terms.<sup>39</sup> Finally, I used a full twelve-month period in each search to avoid any seasonal biases.<sup>40</sup>

Each search generated a list of cases, and I first excluded all Supreme Court and circuit opinions to isolate district courts. District courts are on the front line and have the most experience with motions to dismiss. Including appellate decisions may have skewed the results because generally only grants of dismissal motions are appealable. Further, although district courts follow circuit law as well as Supreme Court decisions, *Iqbal* was relatively clear on the legal standard, and so there is little difference among the circuits on New Pleading. To control for any latent differences in circuit law, I coded for circuit.

Using a random-number generator, I selected 100 opinions from each search list. Thus, I ended up with 100 pre-*Twombly* and 100 post-*Iqbal*

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bases for the outcomes is a crucial omission.<sup>37</sup> Coding decisions by type of sufficiency challenged (factual or legal) could better isolate the effect of the new pleading standard.

This study undertakes to fill some of these details left out of prior studies.

**Methodology**

I studied the impact of *Twombly* and *Iqbal* on dismissal rates in federal district courts using an original dataset with an eye toward exploring the detail left out of previous studies. I began with broadly permissive circuit-specific Westlaw searches in each of the "FedX-all" databases (where "X" is each circuit).<sup>38</sup> I did not

33. Joe S. Cecil et al., *Motions to Dismiss by Failure to State a Claim After Iqbal* 5-6 (Fed. Jud. Ctr. 2011).

34. *Id.* at 13.

35. *Id.* at 14, 19-21. The p values in some categories were very close to conventional statistical significance levels, leading one commentator to challenge the FJC's conclusions that the increases found were not meaningful. See Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 24-26 (2012).

36. Cecil, *supra* note 33, at 3 (noting idiosyncratic coding practices by clerks); Hatamyar, *supra* note 27 (noting the difficulties of coding for "type" of case); cf. Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of*

*Causes of Action in Federal Complaints* (draft) (questioning the efficacy of characterizing cases by traditional grouping suppositions).

37. Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1367 n.140 (2010).

38. Pre-*Twombly*: `dismiss! /p (rule-12 12(b)(6) conley (fail! /3 state /3 claim)) & da(aft 21/5/2006) & da(bef 21/5/2007)`. Post-*Iqbal*: `dismiss! /p (rule-12 12(b)(6) conley twombly iqbal (fail! /3 state /3 claim)) & da(aft 18/5/2009)`.

39. Clermont & Yeazell, *supra* note 10, at 839 n.66.

40. See Moore, *supra* note 27, at 635 (finding a denial rate of 30% in the first six months of 2006 and a 37% denial rate in the last six months of 2006).

TABLE 1. Designations

Category	Designations
Circuit	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, DC, Fed
Published Opinion	Yes, No
Pro Se Claimant	Yes, No
Outcome	Dismissed, Not Dismissed

district-court opinions from each circuit.

I then read each case and excluded opinions that did not resolve a Rule 12(b)(6) motion to dismiss under the Rule 8(a)(2) standard. This was an important step because many cases that cited to *Conley* or *Twombly* or *Iqbal* or that used 12(b)(6) terminology actually did not resolve a motion to dismiss for failure to state a claim. The intentional breadth of my search terms assured a relatively high number of false hits, making the reading stage important for catching and excluding them.

In this reading stage, I discarded opinions resolving only motions for summary judgment (which pertains to a review of the evidence rather than of the pleadings), Rule 12(c) motions, jurisdictional dismissals under Rule 12(b)(1) or (b)(2), venue dismissals, and motions to dismiss only on heightened pleading grounds such as Rule 9(b) or the PSLRA. The reason I disregarded each of these is because they potentially were subject to a different dismissal or pleading standard. The standards of *Twombly* and *Iqbal* may apply beyond merits

pleading under Rule 8(a)(2), but the courts have not resolved so definitively (and, in fact, many courts have refused to so apply them). Accordingly, to maintain a pure sample, I excluded all non-Rule 8(a)(2) claims.

I then turned to coding. I did not code based on whole case, as other studies have done; rather, I coded each Rule 8(a)(2) claim decided on a Rule 12(b)(6) motion to dismiss. Thus, I was not confined to difficult characterizations of grouped claims, such as classifying the type of a whole case. Nor did I have the ambiguous category of "mixed" decisions. Table 1 describes the coding scheme used for each claim.

A few notes about my coding. I used the political-party affiliation of the judge's appointing president to code the judge's political affiliation. There are some problems with this proxy, but the proxy seems to be an acceptable one in most studies using similar measurements.<sup>42</sup>

I designated a claim as a published opinion if it was published or slated to be published in an official reporter, as indicated by Westlaw. All others were coded as unpublished.

I coded as "no" in the Pro Se Claimant category claimants who litigated on their own behalf but who identified themselves as attorneys or who were corporations using in-house counsel.

I coded for claim based on several groupings. "Civil Rights" included § 1983 and *Bivens* actions against

public officials and entities, most prisoner-government litigation, and habeas corpus petitions. "Employment Discrimination" included Title VII, ADA, ADEA, and other like claims against private defendants. "Tort" included intentional torts, medical malpractice, negligence, FTCA, and other common-law and statutory torts. "Contract" included breach of contract, breach of implied warranties, indemnification, and other similar kinds of contract or quasi-contract claims. "IP" included statutory and common-law claims commonly associated with intellectual property disputes. "Other" included all other claims, including antitrust, ERISA, RICO, and environmental statutes.

I included as "dismissed" claims that were found insufficiently pleaded but that were technically not dismissed in the opinion itself. These circumstances came up in primarily two types of circumstances: when a district court found a claim dismissable but nevertheless permitted the plaintiff an opportunity to replead, and when a magistrate judge recommended dismissal but the district court's adoption of the recommendation was not attached to the magistrate's opinion. Although these opinions did not technically result in an immediate dismissal, they functionally represent a judicial finding that a pleading is insufficient under Rule 12(b)(6) and therefore should be coded with dismissals. For the same reason, I coded magistrate recommendations that a motion be denied as "not dismissed," even though it is possible that the district judge subsequently disagreed.

I coded rationale as "Fact" if the court determined that the complaint was factually sufficient or insufficient, "Law" if the court determined that the complaint was legally sufficient or insufficient, and "Both" if the court decided on both bases. The distinction between fact-based and law-based decisions was generally clear from the opinions.

My methodology has two potential weaknesses. The first is that it relies on Westlaw databases of judicial opinions, which overrepresent pub-

41. These acronyms stand for decisions based on the In Forma Pauperis statute, 28 U.S.C. § 1915A, or the Prisoner Litigation Reform Act, Pub. L. No. 104-134, both of which permit sua sponte dismissal of claims for failure to state a claim upon which relief can be granted.

42. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Decisions: A Window Into the Behavior of Judges*, 37 J. LEGAL STUD. 87, 94 (2008).

lished decisions and thus may reflect selection bias in the judge's decision to publish a case.<sup>43</sup> I will have more to say about this potential weakness in the final section of the paper.

The second weakness is that I did not code for the presence of an amended complaint, partly because of the difficulty of following a particular claim through any amendment process. The FJC recently concluded that the presence of an amended complaint is correlative with grant rates.<sup>44</sup> I leave it to others to determine how much this potential weakness affects my findings.

### Results

My results show an overall increase in the dismissal rate (as a function of motions) of all claims from 73.3% pre-*Twombly* to 77.2% post-*Iqbal*. This 4% increase was significant to the 99% confidence interval. The overall dismissal rate in each category increased after *Iqbal*, in most cases significantly. Table 2 sets out the results for all claims using a two-tailed test, with significance measured at 95% by \*, and 99% by \*\*.

The statistical significance of the "All claims" differential in Table 2 holds up using a multivariate probit regression analysis controlling for all other variables (dummies used for Other Claim, Democratic Judge, Eleventh Circuit, Represented, Not PLRA, and Unpublished;  $Z=2.96$ , statistically significant to the 99% confidence interval). This adds to the robustness of the two-tailed tests above, suggesting that the significance of the differences in overall dismissal rates of all claims pre-*Twombly* and post-*Iqbal* are not due to changes in the distributions of types of cases, litigants, or judges.

In addition to coding by claim instead of by case, a primary innovation of my study is its coding of the rationale of the opinion as based on factual or legal sufficiency. The data reveal that the rationale for dismissals is more heavily weighted toward factual insufficiency after *Iqbal*. The data show that the factual-insufficiency dismissal rate, as a percentage of dismissals, has increased in all categories of cases, and significantly so in most. Table 3

TABLE 2. Overall Dismissal Rate (as a function of motions)

	Pre- <i>Twombly</i>		Post- <i>Iqbal</i>		Z Value
	N	Grant Rate	N	Grant Rate	
All claims	1924	73.3%	1979	77.2%	2.77**
Published opinions	1314	73.0%	1377	74.8%	2.01*
Unpublished opinions	1585	75.0%	1602	77.8%	1.88
PLRA	473	74.0%	482	75.0%	0.83*
Non-IFP/PLRA	1352	72.0%	1426	73.5%	0.86
Not Represented	133	81.0%	111	82.0%	0.56
Represented	935	65.2%	961	67.0%	1.74

TABLE 3. Factual-Insufficiency Dismissal Rate (as a function of dismissals)

	Pre- <i>Twombly</i>		Post- <i>Iqbal</i>		Z Value
	N	Rate	N	Rate	
All claims	1411	34.5%	1528	47.9%	7.33**
Published opinions	798	33.0%	877	49.0%	6.77**
Unpublished opinions	1188	35.4%	1247	48.6%	7.09**
PLRA	324	36.8%	319	46.4%	4.04**
Non-IFP/PLRA	973	28.2%	1048	46.8%	8.57**
Not Represented	101	41.5%	89	50.4%	1.56*
Represented	610	25.4%	644	44.9%	7.15**

sets out the data, using a two-tailed test, with significance measured at 95% by \*, and 99% by \*\*.

Predictably, the rate of dismissal for factual insufficiency as a function of all motions has also increased after *Iqbal*. In other words, for any given claim subject to a motion to dismiss, the likelihood that the claim will be dismissed for factual insufficiency is higher after *Iqbal*. This is true, and statistically significant (using a two-tailed test, where significance is measured at 95% by \* and 99% by \*\*) for all categories of claims. Table 4 sets out those data.

As was the case in Table 2, the statistical significance of the "All claims" differential in Table 4 holds up using a multivariate probit regression analysis controlling for all other variables, with  $Z=5.36$ , statistically significant to the 99% confidence interval.

Perhaps surprisingly, the rate of dismissal for legal insufficiency as a function of motions has decreased after *Iqbal*

for most categories. Table 5 provides data on these changes using a two-tailed test, where significance at 99% is denoted \*\*.

As was the case in Tables 2 and 4, the statistical significance of the "All claims" differential in Table 5 holds up using a multivariate probit regression analysis controlling for all other variables, with  $Z=-6.25$ , statistically significant to the 99% confidence interval.

Note that adding the percentages in Tables 4 and 5 produces totals that exceed the percentages in

43. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004); Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1558-60 (2008); see also Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 130 (showing a selection bias in publication of summary-judgment opinions).

44. Cecll, *supra* note 33, at 15, 29.

**TABLE 4. Fact-Based Dismissal Rate (as a function of motions)**

	Pre- <i>Twombly</i>		Post- <i>Iqbal</i>		Z Value
	N	Rate	N	Rate	
All claims	1924	25.3%	1979	37.0%	7.84**
Unpublished opinions	1585	26.5%	1602	38.6%	7.27**
Non-IFP/PLRA	1352	20.3%	1426	34.4%	8.27**
Represented	935	16.6%	961	30.1%	6.88**

**TABLE 5. Law-Based Dismissal Rate (as a function of motions)**

	Pre- <i>Twombly</i>		Post- <i>Iqbal</i>		Z Value
	N	Rate	N	Rate	
All claims	1924	50.2%	1979	43.2%	-4.33**
Unpublished opinions	1585	50.3%	1602	42.4%	-4.40**
Non-IFP/PLRA	1352	52.3%	1426	42.1%	-5.35**
Represented	935	56.1%	961	39.4%	-7.27**

Table 2; that is because a few claims were resolved on both law and fact grounds, leading to their inclusion in both Table 4 and Table 5.

**Analysis and implications**

In this section, I highlight and discuss some of the more relevant results of the study.

**Pre-*Twombly* Legal-Insufficiency Dismissals Were Routine**

One key result is that, even before *Twombly*, motions to dismiss were successful more than 73% of the time, and no category revealed a grant rate lower than 65%. These results are consistent with other studies of pre-*Twombly* grant rates.<sup>45</sup>

These percentages are a function of motions filed, so the data do not reflect what the overall dismissal rate is of *claims* filed. Previous studies, however, have tended to show a motion-filing rate of around 15% pre-*Twombly*.<sup>46</sup> Based on these figures, one could roughly estimate that approximately 10% of all claims filed were dismissed under Rule 12(b)(6) under the pre-*Twombly* regime.

This dismissal rate undermines the contention that the pre-*Twombly* standard for testing pleadings was a toothless one. Contrary to that popular misconception, any number of relatively common legal deficiencies could justify dismissal. Perhaps the claim is preempted by federal law. Perhaps the complaint misconstrues the scope of the law governing the claim. Perhaps the plaintiff alleges specific facts that, as a matter of law, preclude the claim.

These are not necessarily rare or unusual defects, nor are they necessarily the result of poor lawyering. The scope of the law is often unclear but important, and therefore highly contested. Whether the Constitution protects flag burning, what legal standard applies to gender discrimination under the Equal Protection Clause, whether Section 1983 requires exhaustion, whether Title VII applies extra-territorially—these are important legal questions that are presented best by a well-crafted complaint and decided by a well-prepared judge, often without needing any further factual enhancement. A legal-sufficiency challenge, even before *Twombly*, tees these questions up for judicial decision. For this reason, it is unsurprising that the data indicate that the legal-sufficiency requirement of Rule 12(b)(6) erects a useful and workable mechanism for resolving—often by way of dismissal—questions of law.

**Pre-*Twombly* Factual-Insufficiency Dismissals Were Routine**

The data show that courts deciding motions to dismiss under the pre-*Twombly* standard often dismissed for factual insufficiency (more than 1/3 of all pre-*Twombly* dismissals, and more than 1/4 of all pre-*Twombly* claims facing a motion) even though such dismissals generally were not permitted by existing law. From the 1980s into the early 2000s, several papers documented the practice by some lower courts of requiring a more stringent factual-sufficiency standard than then-prevailing Supreme Court precedent allowed.<sup>47</sup> The results of my study lend empirical support to those observations and suggest that the practice persisted in the lower courts even after repeated and emphatic denunciations by the Supreme Court.

***Twombly* and *Iqbal* Have Changed Pleading**

Some have argued that *Twombly* and *Iqbal* did not change pleading, either doctrinally or in practice, or that they did not change it very

45. *Civil Case Processing in the Federal District Courts: A 21st Century Analysis* 47-48 (IAALS 2009) (finding more than 70% of all Rule 12 motions to be granted at least in part).

46. Cecil, *supra* note 33, at 10 n.21.

47. See *supra* note 12.



much.<sup>48</sup> The data undermine this argument, though how much is certainly debatable.

Table 2 shows essentially single-digit increases in the dismissal rate (as a function of motions) overall and across all categories. The increases overall and in a number of categories are statistically significant. These results add confirmatory support to other studies, which have found single-digit but significant or near-significant increases in the overall dismissal rate of cases after *Iqbal*. These results also suggest that studies finding non-significant increases, such as the FJC's study, just didn't have enough data points to generate significance. The data appear to support the conclusion that *Twombly* and *Iqbal* are affecting the dismissal rate of claims and cases, at least as a function of motions, in federal court.

Pleading has changed within dismissals as well. Table 3 indicates that factual insufficiency now rivals legal insufficiency as the dominant justification for dismissal. I can offer three explanations, all of which may in fact be at play here. One is that the motion-filing rate has increased, and that that increase is primarily or even exclusively attributable to motions relying on factual insufficiency, such that factual-insufficiency dismissals now appear as a higher percentage even if the absolute numbers of legal-insufficiency dismissals has remained constant. Another likely explanation is that movants are strategically switching legal theories from a perceived weak legal-insufficiency argument to a perceived stronger factual-insufficiency argument.<sup>49</sup> A third possible explanation is that some pre-*Twombly* courts were stretching the legal-insufficiency standard to reach certain claims, perhaps questionably so, and that *Twiqbal* now

enables those courts to dismiss factual-insufficiency claims that they had been uncomfortably squeezing into a legal-insufficiency rationale.<sup>50</sup> In other words, New Pleading may be legitimizing a practice by some district judges to dismiss claims that, while not technically legally insufficient, struck the judge as so doubt-

\*\*\*\*\*  
DISMISSAL RATES OF ALL CLAIMS  
INCREASE SIGNIFICANTLY POST  
*TWOMBLY* AND AGAIN AFTER *IQBAL*.  
\*\*\*\*\*

ful or unlikely that the judge thought justice might be served by dismissing them anyway.

Whatever the justification, the results have some implications for further study. If for example, dismissals based on legal insufficiency are generally without leave to amend but dismissals for factual insufficiency are generally with leave to amend, then it is possible that *Twiqbal*, to the extent it shifts the rationale for dismissals in favor of factual insufficiency, may ultimately give plaintiffs more opportunities to amend their complaints.

More study is necessary to bear these theories out. The more general story here is that factual-insufficiency dismissals are up and dismissals overall are up. The overall increase is modest—only a single digit—but statistically significant. These data support the anecdotal commentary that *Twombly* and *Iqbal* have changed pleading standards and are having an effect in the lower courts.<sup>51</sup>

***Prisoner, Pauperis, and Pro Se Litigants Are Affected Most***

The disaggregated data suggest that prisoner, pauperis, and pro se litigation are highly correlative with dismissal-rate increases. One might

suppose that these cases would show the inverse relationship because courts often screen IFP/PLRA complaints without adversarial input from the defendant<sup>52</sup> and pro se cases with leniency in pleading sufficiency.<sup>53</sup> These factors might lead one to surmise that dismissal rates in these cases ought to be lower than other cases. But my data reveal instead that these cases exhibit relatively high dismissal rates even before *Twombly* (over 80% of all pro se claims facing a motion were dismissed) and strongly significant increases after *Iqbal*. These results could

be explained by the meaningful assistance that attorneys provide in drafting complaints, or perhaps by the absence of meaningful attorney-selection mechanisms at the filing stages.<sup>54</sup> Regardless, the data strongly suggest that any study of pleading effects that omits such cases is incomplete.

***Westlaw Databases May Be Probative***

Westlaw-based datasets have been criticized as unrepresentative of dockets generally. Westlaw databases include all published opinions, plus some—but not all—unpublished opinions. It has been hypothesized that the unpublished set of opinions

48. See, e.g., Steinman, *supra* note 10.

49. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 142 (2007) (predicting this effect).

50. See Marc Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 667 (2011).

51. See Reinert, *supra* note 26, at 1-2 [surveying commentary]; see also *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 90 (2009) (prepared statement of Stephen B. Burbank) (appending a list of post-*Twombly* dismissal opinions in which the judge remarked that the complaint would have survived before *Twombly*).

52. 28 U.S.C. §§ 1915A(b)(1), 1997a(c)(1)

53. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

54. Cf. Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 681 (1987) (finding a correlation between representation and success).

has a greater percentage of denials of motions because such decisions are generally not appealable and thus have less need to be reduced to a published decision.<sup>55</sup> If so, then a dataset that includes only a subset of unpublished decisions would exclude a disproportionate number of denials and thus tend to overstate the grant rate of motions.<sup>56</sup>

That theory could be true, but it is not supported by my data. Because Westlaw captures some unpublished opinions, I was able to compare dismissals in unpublished and published subsets. Table 2 suggests that unpublished opinions reflect *higher* grant rates than published opinions, both before *Twombly* and after *Iqbal*, and the probit analysis suggests that any temporal variation in the publication status did not affect the overall dismissal rates. My results therefore lend some support to other studies that rely on Westlaw databases, and

they undermine the criticism that Westlaw-database studies overstate any *Twiqbal* effect.

These results might have rational explanations. Let's assume that judges ordinarily do not publish denials of motions to dismiss because they often neither are appealable nor present novel questions of law. Under the *Conley* regime, then, one might expect only a small percentage of denials to be published. In the wake of *Twombly* and *Iqbal*, however, a far greater percentage of denials would be published because *Twombly* and *Iqbal* were new, important, and potentially unclear cases, and thus motions to dismiss were more likely to present novel questions of law. Relying only on published cases, then, potentially overestimates the grant rate under *Conley* and reduces the differential in dismissal rates. Alternatively, if dismissals of prisoner, pauperis, and pro se cases are disproportionately more

likely to generate unpublished opinions, yet they also are disproportionately more likely to show increased rates of dismissal after *Iqbal*, then studying only published opinions is likely to understate the effects of *Twiqbal* on dismissal rates.<sup>57</sup> In sum, even if Westlaw databases are not representative of all decisions, it is not at all clear that they overrepresent dismissals.<sup>58</sup>

## Conclusion

As others have pointed out, the most accurate empirical tests on the effect of *Twiqbal* would be very difficult to develop.<sup>59</sup> Defendant-selection and plaintiff-selection effects may be far more meaningful than the dismissal effect.<sup>60</sup> In addition, the dismissal effect may be mitigated by opportunities for amendment.<sup>61</sup> Also, the dismissal effect studied here reveals nothing about the merit of the cases affected.<sup>62</sup> Finally, the dismissal effect is but one factor in a host of normatively relevant *Twiqbal* effects yet to be fully studied.<sup>63</sup>

This paper speaks directly to none of these questions. Instead, it strives to add knowledge and understanding to how *Twombly* and *Iqbal* are affecting dismissal rates. In particular, it adds granularity at the claim level and in the rationale for decisions on motions. The results are not insignificant. The claim-based results add to the robustness of the case-based findings of other studies. And the disaggregation of legal-sufficiency and factual-sufficiency rationales opens a new window into the effects of *Twombly* and *Iqbal*. \*

55. Cecil, *supra* note 33, at 2.

56. It is worth noting that many commentators have defended the utility of published-only datasets despite their potential for underrepresentation. See, e.g., Clermont & Eisenberg, *supra* note 42, at 1560; Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1542 n.59 (2004); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991).

57. One researcher found nearly identical dismissal-rate increases among Westlaw-only and PACER datasets when filtered for represented parties. See Patricia Hatamyar, *Thoughts on the Federal Judiciary Committee's Study of 12(b)(6) Motions After Iqbal*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (July 11, 2011), available at <http://lawprofessors.typepad.com/civprof/2011/07/thoughts-on-the-federal-judiciary-committees-study-of-12b6-motions-after-iqbal.html>.

58. A related selection issue is Westlaw capture of unpublished decisions. Westlaw captures some, but not all, unpublished opinions that are issued, and the rate of capture varies widely by district. Cecil, *supra* note 33, at 37 n.47. It has been reported, however, that Westlaw includes every opinion it can find unless asked specifically not to. *Id.* at 27. It does not seem to me that this selection criterion is biased against capturing unpublished denials. Accordingly, absent some evidence of a selection bias in Westlaw capture of unpublished opinions, my data strongly suggest that *Twiqbal* affects dismissal rates across the publication divide.

59. Clermont, *supra* note 37, at 1365.

60. On defendant-selection effects, see Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012). On plaintiff-selection effects, see Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination*

*Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 72-86 (2010); Scott Dodson, *Federal Pleading and State Pre suit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010). For seminal studies of party-selection effects, see Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 522-29 (1997); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

61. See Joe S. Cecil et al., *Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend* (Fed. Judicial Ctr. 2011).

62. For an attempt to study this feature, see Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); cf. Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL L. STUD. 35 (2009) (studying this feature in the context of the PSLRA).

63. Bone, *supra* note 10, at 879 & n.141 (predicting an increase in motions and pleading practice, and arguing that these "process costs" should be part of any assessment); *id.* at 878 (articulating the social cost of erroneous dismissals); Edward Brunet, *The Primacy of Private Attorney General Enforcement in the United States*, IND. J. ALT. DISP. RESOL. (forthcoming 2012) (positing regulatory-deterrence costs of *Twiqbal*); Cecil, *supra* note 33, at 8-10 (finding a statistically significant increase in Rule 12(b)(6) motions filed after *Iqbal*); Clermont & Yeazell, *supra* note 10 (describing costs of doctrinal destabilization); Emery G. Lee III & Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure 12* (Fed. Judicial Ctr. 2010) (publishing survey results revealing plaintiff attorneys to be adding more facts to complaints as a result of *Twombly* and *Iqbal*); Miller, *supra* note 10, at 67-68 (predicting that plaintiffs will have to spend more time and effort investigating claims and filing more detailed complaints).

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