

# PRESIDENT'S PAGE

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Lawyers who represent ordinary people against powerful interests know all too well that wrongful conduct is invariably concealed and almost never admitted. Lawsuits are the means by which the truth is revealed.

After commencing formal legal action through the filing of a complaint, plaintiff lawyers must skillfully use discovery procedures to open the doors to the deepest government and corporate vaults to obtain documents and learn operative facts. This is not some academic exercise. The purpose of this often long and arduous endeavor is to deliver justice to those who have been wronged, ultimately in the form of a verdict—from the Latin *verdictum*—which means “to say the truth.”

Recent developments on two fronts threaten the rights of ordinary people who take on powerful interests in the courtroom. Evolving standards for pleading cases and proposed changes in the discovery process threaten to close the legal process to legitimate claims. Fundamental procedural changes will make it impossible for some plaintiffs to plead their case, and constrictions on discovery could seriously impede plaintiffs from obtaining the evidence needed to reveal the truth and prove their claims.

Two U.S. Supreme Court decisions—*Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)) and *Ashcroft v. Iqbal* (129 S. Ct. 1937 (2009))—have significantly altered the long-accepted standard for “notice pleading” embodied in the 1938 Federal Rules of Civil Procedure. Rule 8(a)(2) purports to require only a “short and plain statement of the claim showing that the pleader is entitled to relief.” If the plain meaning of these words was ever in doubt, the Supreme Court in 1957 held 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.” (*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).)

The *Twombly* and *Iqbal* decisions have turned this standard on its head, requiring a plaintiff to plead specific facts supporting each element of the asserted claim to survive a Rule 12(b)(6) motion to dismiss. The Court ruled that a plaintiff must plead sufficient factual content to allow a court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” (*Iqbal*, 129 S. Ct. at 1949.)

The Court expounded on this requirement, stating, “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”” (*Iqbal*, 129 S. Ct. at 1949.) One can only imagine how judges intent on winnowing their dockets will interpret this standard.

## **Obvious threat**

On another front, a Denver-based group called the Institute for the Advancement of the American Legal System, in collaboration with the American College of Trial Lawyers Task Force on Discovery, recently issued a report calling for a variety of changes to the federal rules. They include:

- the elimination of notice pleading and a mandate for fact-based pleading
- a more restrictive definition of the scope of permissible discovery under Rule 26 (“ . . . the primary goal is to change the default from unlimited discovery to limited discovery.”)
- severely restricted use of interrogatories and requests for admissions
- further restrictions on the time and extent of discovery
- cost-shifting

(For more details on these proposals, see *A Misguided Mission to Revamp the Rules* on page 52.)

The threat to ordinary people who seek redress for legal wrongs in America’s courtrooms should be obvious. AAJ’s *Iqbal/Twombly* Task Force, chaired by Don Slavik of Milwaukee and Allan Kanner of New Orleans, is aggressively advocating restoration of notice pleading through legislative changes. A Senate bill (S. 1504)—the Notice Pleading Restoration Act—was introduced by Sen. Arlen Specter (D-Pa.) in July. A House version will likely be introduced shortly after this issue goes to press. The legislation as written mirrors *Conley*’s language and would legislatively reverse the *Iqbal* and *Twombly* decisions.

The task force is gearing up for hearings on this important bill before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties. At the same time, we are monitoring proposed changes in the federal rules championed by corporate and defense-based interests. One thing we can count on: Any proposals will not favor plaintiffs who take on corporate interests in the courtroom.

Every one of us must be vigilant to ensure that the rights of Americans are not eliminated through seemingly innocuous changes to procedural rules. Please support this effort by joining the *Iqbal/Twombly* Task Force and advocating for the people we represent. To be added to the task force list server ([open\\_courts@list.justice.org](mailto:open_courts@list.justice.org)), send a request to [scott.gehring@justice.org](mailto:scott.gehring@justice.org). For more information, contact Sue Steinman at (800) 424-2725.