A Well-Pleaded Argument

Author : Elizabeth G. Thornburg

Date : April 24, 2017

Lonny Hoffman, *Plausible Theory, Implausible Conclusions*, 83 **U. Chicago L. Rev. Online** 143 (2016).

I should start by putting my own bias on the table: I think the changes to pleading standards brought about by Twombly and (especially) Iqbal are a really bad idea. Procedural systems that turn on early pleading of factual detail have failed for centuries to provide either accurate or efficient results. Rather, gatekeeping based on pleadings encourages and rewards pleading disputes, leads to wasteful motion practice about degrees of particularity, and, worse, the dismissal of meritorious claims under conditions of information asymmetry. Even if I did not hold these views, however, I would find much to admire in Lonny Hoffman's elegantly structured response to William H.J. Hubbard's article, *A Fresh Look at Plausibility Pleading*, an article that doubts that "plausibility" analysis has much impact and suggests that plaintiffs with weak cases are better off losing quickly.

Hubbard's piece is a fascinating thought experiment: what if there were no pleading standards, so that decisions about what cases to bring and how to plead them were entirely in the hands of plaintiff-side lawyers? It is generally agreed that lawyers play a gatekeeping role in litigation. In fact, lawyer gatekeeping itself represents only a tip of the no-lawsuit iceberg, since studies consistently show that most people with a potential justiciable claim do not even consult an attorney. (American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans, Major Findings of the Comprehensive Legal Needs Study* (1994); Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (1999).) Nevertheless, Hubbard's article contributed to the discussion by updating and attempting to quantify this effect.

Hoffman describes the way in which Hubbard combines economic theory with data from the Federal Judicial Center about median case values and litigation costs. As a result of this cost/benefit calculus, most meritless and very weak cases will not be brought at all. One might conclude from this that an additional rigorous screening mechanism is unnecessary (Hoffman) or unlikely to make a difference (Hubbard).

Hoffman's article proceeds to tackle important flaws in Hubbard's descriptive and normative conclusions, starting with the problem of information asymmetry. Hoffman concisely describes the problem:

> How do information imbalances that favor the defendant (such as those in cases that turn on the defendant's state of mind or on wrongful conduct that occurred in private) interact with a strict pleading filter? And the answer, as many scholars have noted, is that, when relevant information is primarily in the possession of the defendant, plausibility pleading can create a catch-22: the plaintiff needs access to information to plead sufficiently, but a pleading stage dismissal denies her the information that would have enabled her to plead a nonconclusory, plausible claim.

Hubbard recognizes that there may be many meritorious cases in which a lack of information at the outset leads to dismissal in the "plausible" pleading regime, but argues that those cases are doomed to lose in any case – that it is a lack of "facts" rather than the pleading rules that defeat such a plaintiff. As Hoffman's article points out, however, this is just wrong. It is not that there are no facts to support this type of claim, but that without discovery the would-be plaintiff has no access to those facts. We should not assume that case-supporting information would not be discovered. The problem is exactly that a pleadings-based dismissal prevents the equalizing of information, not that the information must forever remain asymmetric.

Further, the pleading barrier might skew the lawyer-gatekeeping process so that fewer claims are even filed – the lack of discovery forces the lawyer to evaluate the probability of success based solely on facts known to the potential plaintiff, unaided by discovery. This is true not because a loss at trial would be inevitable, but because the lawyer knows that the pleading rule will allow no discovery. Because of the combined effects of dismissals and gatekeeping, the pleading filter will mean that private enforcement of civil norms will fail when it should have succeeded.

Hoffman's article also points out that pleading-based regimes increase cost and decrease accuracy. In order to understand why this is so, one must understand that *Iqbal* requires a two-step inquiry. First, judges are instructed to go through the complaint to identify and consider only allegations of facts, ignoring things that are conclusory. In cases in which the plaintiff knows, and can plead, direct evidence of the defendant's liability, there will likely be no motion to dismiss filed.

Many cases, however, will turn on circumstantial "facts," and ultimately on the question of whether those facts support the inference needed to prove liability. The tricky and unpredictable task of separating facts from conclusions may well lead judges to discard as "conclusory" allegations that explicitly draw those inferences, leaving only isolated nuggets of information. The question is often not "no facts" versus "conclusive facts." It is "some facts" that are within the plaintiff's knowledge at the pleading stage. Consider an employment discrimination example. Suppose that the complaint states that the plaintiff's supervisor called her an "ugly bitch" on two occasions, but did not do so when explaining why the plaintiff was not promoted. That namecalling is a "fact," but an allegation that the plaintiff was denied a promotion based on sex might be disregarded as conclusory. (I'd disagree with calling it conclusory, but it's certainly possible that a judge would do so.)

The analysis thus turns to the second step: do the non-conclusory nuggets of information plausibly support the needed inference? *Iqbal* provides little guidance on what this test means or what the judge may consider, but does suggest that the inference must be at least as plausible as competing inferences (fifty percent or better?), and that the judge should use his "experience and common sense" in making this decision.

Not surprisingly, this sketchily explained, fact-dependent analysis makes it very difficult to predict how a judge would rule on a Rule 12(b)(6) motion in any particular case. Consider, again, the employment example. Does the judge's experience suggest that the use of such language supports an inference that the supervisor's attitudes toward women affected the promotion decision? Does the judge's experience suggest that the language is meaningless locker room talk? If the motion to dismiss is denied, the plaintiff will have the opportunity to do discovery to try to unearth additional circumstantial evidence of discrimination, which could strengthen the basis for an inference of discrimination. If the motion is granted, the plaintiff will never have the opportunity to learn what information available only to the defendant might reveal. With nothing more than the sexist epithets, the plaintiff might lose even on summary judgment under substantive Title VII law; but the summary judgment decision would not be made until after an opportunity to do discovery, while the 12(b)(6) decision is based on only those "facts" available to the plaintiff at the outset.

Given this process, I find interesting two of Hoffman's points about early merits decisions mandated by pleading practice. First, the newly invigorated motion to dismiss comes with a cost to the court system. The existence of a high-reward-low-risk motion to dismiss has increased the frequency with which such motions are filed. Why would a rational defendant not routinely file such a motion – given the fuzziness of the law, such motions will not violate Rule 11, will cost plaintiffs time and money, will reveal much about what the plaintiff knows (and does not know), and may even result in dismissal. As I have written previously, this is consistent with the experience of countries whose civil justice systems continue to use pleadings as a tool for screening and issue-narrowing – the energy that U.S. lawyers spend on discovery disputes is, in those countries, poured into fights about pleading.

Because the rate of pleadings-motion practice has increased, the cost to courts and parties of those motions has also increased. In assessing systemic impact, that cost must be subtracted from whatever savings might result from the early dismissal of a small number of cases (as Hoffman reminds us, Hubbard contends that since lawyers already avoid filing weak cases in most situations, this number will be small). Unsuccessful motions will take more time and

result in no cost savings to the court or the parties. A 12(b)(6) dismissal, if without prejudice, allows the plaintiff a second chance to plead more "facts," and in some situations the plaintiff might have access to the necessary information. But those motions that result in a more detailed amended complaint but not dismissal are also unlikely to save costs, unless the amended complaint limits the issues (and thus discovery) in a way that the original would not have done. For example, it seems unlikely that the amended complaint in Branham v. Dolgencorp (in which the court dismissed as insufficient a complaint that clearly met the requirements of the then-existing negligence form pleading) saved any expense that would have been incurred under the original bare-bones slip-and-fall complaint. Even successful motions to dismiss on the pleadings will vary in the marginal cost savings of foregone case management and dispute resolution prior to settlement (court) plus foregone discovery expense (parties). And while some parties and courts might save costs, it will come at the expense of increased costs for other courts and litigants.

Second, early pleadings-based decisions require an undesirable change in judicial role. Hubbard argues that early dismissal is better for plaintiffs, even in the case of the intentionally biased judge. It is still better, he suggests, to lose sooner than later. But, Hoffman argues, this straw-man image of judicial malice ignores the real problem: the common combination of sparse facts and implicit bias causes even well-meaning judges to make worse decisions. It is becoming increasingly clear that all of us, including judges, perceive the world through a set of attitudes and stereotypes – implicit biases – that arise out of precisely the factors that *Iqbal* directs judges to use in making plausibility decisions, our "experience and common sense." While judges can make an effort to become more aware of, and try to counteract, their own biases, doing so is much more difficult in situations in which information is sparse. Returning to the problem of information asymmetry, the information-poor plaintiff may not be able to provide a rich enough body of "facts" to convince a judge, perhaps against his experience and common sense, that a needed inference is plausible.

Hubbard may be correct that we will not soon have conclusive empirical evidence about the impact of *Twiqbal* on access to justice. Unfortunately, Hubbard's *Fresh Look* discounts the ability of the civil procedure process to counter other problems. Information asymmetry? That is the problem, not the pleading rule (even though a different pleading rule could allow information exchange). Biased judges? That is the problem, not a pleading rule that helps empower and disguise that bias (when a different pleading rule would deter bias-based outcomes). As Hoffman's article demonstrates, information matters and reliable process matters. The world prior to *Iqbal* was different in important ways, and we should not assume away its effects.

Cite as: Elizabeth G. Thornburg, *A Well-Pleaded Argument*, JOTWELL (April 24, 2017) (reviewing Lonny Hoffman, *Plausible Theory, Implausible Conclusions*, 83 **U. Chicago L. Rev. Online** 143 (2016)), http://courtslaw.jotwell.com/a-well-pleaded-argument/.