

If It (Ain't) Broke, Don't Fix It: *Twombly*, *Iqbal*,  
Rule 84, and the Forms

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“In my view, the Court’s majority messed up the Federal Rules.”

–Justice Ruth Bader Ginsburg<sup>1</sup>

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INTRODUCTION

The past decade has not been kind to the Federal Rules of Civil Procedure (the Rules). From the growth of summary judgment as a

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1. Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Remarks for Second Circuit Judicial Conference (June 12, 2009), *available at* [http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp\\_06-12-09](http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_06-12-09).

mechanism to let judges instead of juries determine facts,<sup>2</sup> to the love–hate relationship with class actions,<sup>3</sup> judicial interpretations of the Rules have revealed a trend toward complicating the ability of plaintiffs to find redress for their claims.<sup>4</sup> Nowhere is this more apparent than in the shifting standards of pleading requirements under Rule 8. Much has been written by academics and practitioners alike regarding the ripples caused by *Twombly* and *Iqbal*.<sup>5</sup> Although the Court would like to believe otherwise, would-be plaintiffs are faced with a greater pleading standard than the plain language of Rule 8 suggests. Now, a new victim of judicial misinterpretation has emerged: the Appendix of Forms under Rule 84.

In its entirety, the Rules are designed with the overarching purpose of securing the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>6</sup> Rule 84 and the accompanying Appendix of Forms were initially adopted in 1938 to illustrate the “simplicity and brevity . . . which the [R]ules contemplate.”<sup>7</sup> In fact, the practice of providing sample forms can be traced back to the twelfth century English legal system wherein an aggrieved party petitioned for a writ from the Crown carefully tailored to the specific legal claim involved.<sup>8</sup> Using the wrong writ led to a failure of the claim; thus, sample writs were compiled and provided for lawyers to use.<sup>9</sup>

Although critics often debate whether the present-day forms were *in fact* relied upon by practitioners, their adoption served as a reflection of what the Rules are meant to be—a type of check and balance against

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2. See *Scott v. Harris*, 550 U.S. 372, 395 (2007) (Stevens, J., dissenting) (“Whether a person’s actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. Here, the Court has usurped the jury’s factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable.”).

3. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting prior case law referring to one component of class action suits as an “adventurous innovation”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974) (quoting one case describing the litigation as a “Frankenstein monster posing as a class action”).

4. See, e.g., *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2562 (2011) (Ginsburg, J., concurring in part and dissenting in part) (finding fault with the majority’s use of what appears to be a Rule 23(b)(3) test in a Rule 23(a) analysis); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that conclusory allegations unsupported by well-pleaded facts are disregarded under Rule 8); *Harris*, 550 U.S. at 380–81 (holding that the court’s interpretation of the video tape was the only reasonable interpretation sufficient for summary judgment under Rule 56); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (finding a requirement of plausibility in Rule 8).

5. *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544. These cases are discussed in greater detail later in this Note.

6. FED. R. CIV. P. 1.

7. FED. R. CIV. P. 84 advisory committee’s note (2015) (internal quotations omitted).

8. A. Benjamin Spencer, *The Forms Had a Function* 3–4 (Va. Pub. Law & Legal Theory Research, Working Paper No. 2014-44, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2472083](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472083).

9. *Id.* at 4.

expansive judicial interpretation contrary to the liberal vision of the Rules.<sup>10</sup> As an example of this, Rule 8 requires that a complaint need only a “short and plain statement” of jurisdiction, the claim entitling the pleader to relief, and a demand for the relief sought.<sup>11</sup> Accompanying this rule, Form 11 illustrates a sample complaint for negligence, consisting of a single paragraph covering jurisdiction followed by one line each for the claim and demand for relief.<sup>12</sup> The theory went that a plaintiff who plainly modeled their complaint on Form 11 should survive a motion to dismiss.<sup>13</sup> In contrast, the recent holdings of the Court now require consideration of whether the allegations of a claim are “plausible,”<sup>14</sup> a sharp departure from the language of Rule 8 and the content of Form 11.

The contradiction between the Rules and the interpretations arrived at by the *Twombly* and *Iqbal* courts, among other reasons, led the Advisory Committee on Civil Rules to recommend abrogating the entirety of Rule 84 and the Forms.<sup>15</sup> Last year, the Supreme Court of the United States approved the recommendations and, with no intervention by Congress, the forms died a quiet death this past December.<sup>16</sup> This Note examines the drastic and unnecessary reaction by the Advisory Committee and recommends what would have been a more evenhanded approach to resolving the pleading juxtaposition created by the Court: amending only those forms affected by *Twombly* and *Iqbal*—to wit, Rule 8 and Forms 10 through 21. It may be that the Advisory Committee cannot craft a sample complaint that would in all cases be sufficient under the Court’s interpretations, but that is precisely the point. It is an uncomfortable conversation that needs to happen: the Court changed the Rules in *Twombly* and *Iqbal* without going through the appropriate legislative process. Now the process has been used to sweep the mess under the rug. If the Advisory Committee could not prepare a sufficient sample complaint, how can we expect plaintiffs to do so?

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10. *Id.* at 2. Professor Spencer states that the “principal function of the forms was to reify the liberal vision of the Federal Rules and to guard against deviations therefrom.” *Id.*

11. FED. R. CIV. P. 8(a).

12. FED. R. CIV. P. Appendix of Forms, Form 11.

13. *See, e.g.,* García-Catalán v. United States, 734 F.3d 100, 104 (1st Cir. 2013).

14. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

15. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA BOOK FOR MAY 29–30, 2014, COMM. MEETING 412 (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf> [hereinafter COMM. AGENDA BOOK MAY 2014].

16. A full copy of the packet of amendments forwarded to Congress by the Supreme Court on April 29, 2015, may be found at [http://www.supremecourt.gov/orders/courtorders/frcv15%28update%29\\_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15%28update%29_1823.pdf) (last visited May 21, 2015) [hereinafter Amendments].

Part I of this Note discusses the history of *Twombly* and *Iqbal* and their effect on pleading standards under the Rules. Part II describes how courts have struggled, unsuccessfully in many cases, to reconcile the Court's interpretation with the language of Rule 8 and the illustrative forms under Rule 84. Part III outlines the response of the Standing Committee on Rules of Practice and Procedure to the dilemma created by *Twombly* and *Iqbal*. Finally, Part IV discusses the author's alternative to abrogation of the Forms.

## I. THE RIPPLES OF *TWOMBLY* AND *IQBAL*

### A. *First Came Twombly . . .*

In 2007, the Supreme Court caused a shift in pleading requirements when it considered the antitrust case of *Bell Atlantic Corp. v. Twombly*.<sup>17</sup> The plaintiffs in the original action—representing subscribers to local telephone and internet services—sought to break up the monopolies held by various regional telecommunications corporations.<sup>18</sup> The complaint alleged violations of § 1 of the Sherman Act<sup>19</sup>, which prohibits all contracts in restraint of trade or commerce.<sup>20</sup> As support for this allegation, the plaintiffs pointed to the behavior of the regional corporations including: (1) parallel conduct in each region seemingly designed to stifle competition; (2) common failure to pursue attractive business opportunities when doing so would compete with another regional corporation; and (3) the statement by one regional chief executive officer noting that competition with another regional corporation did not seem right.<sup>21</sup>

The district court originally dismissed the plaintiffs' claims, noting that an allegation of parallel business conduct, taken alone, did not suffice for a claim under § 1.<sup>22</sup> According to the district court, the plaintiffs were required to plead additional facts tending "to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."<sup>23</sup> The court of appeals reversed, stating that the complaint had been tested under the wrong standard and that additional facts were unneces-

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17. *Twombly*, 550 U.S. at 544.

18. *Id.* at 550.

19. 15 U.S.C. § 1 (2004).

20. *Twombly*, 550 U.S. at 550.

21. *Id.* at 550–51.

22. *Id.* at 552.

23. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *vacated* 425 F.3d 99 (2d Cir. 2005).

sary.<sup>24</sup> The ruling was appealed and the Supreme Court granted certiorari.

The Court's analysis appeared to be grounded in both the language of Rule 8 and what the requirements meant when taken with the ability to attack the sufficiency of a complaint under Rule 12. The Court began its analysis by considering Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>25</sup> The purpose of this requirement, according to the Court, was to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."<sup>26</sup> However, a complaint attacked under Rule 12(b)(6) strikes at the plaintiffs' obligations to provide the "grounds" of their "entitle[ment] to relief," requiring more than mere labels, conclusions, or formulaic recitations of the elements.<sup>27</sup> Notably, the Court quoted Rule 8(a) when it referred to the "grounds" of a complaint, yet that word appears only in Rule 8(a)(1) referring to the "grounds for the court's jurisdiction," not in Rule 8(a)(2) dealing with the "short and plain statement that the pleader is entitled to relief."<sup>28</sup> Regardless, the Court determined that it need not accept as true those allegations not supported by factual allegations and that a plaintiff must plead enough facts such that the remaining allegations are "plausible" and "not merely consistent with" the allegations.<sup>29</sup>

It is clear from the Court's discussion that the "plausible" standard was meant to be narrow and uncontroversial. Because the issue in the case, as stated by the Court, was a determination of the "proper standard for pleading an antitrust conspiracy through allegations of parallel conduct," the new "plausible" pleading standard was meant only to apply to pleadings in those limited claims.<sup>30</sup> Immediately after announcing the (new) standard, the Court attempted to clearly distinguish between the plausible standard required and a heightened pleading standard reaching probability.<sup>31</sup> The Court even pointed out that well-pleaded complaints

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24. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd* 550 U.S. 544 (2007) (holding that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal").

25. *Twombly*, 550 U.S. at 555 (quoting FED. R. CIV. P. 8(a)(2)).

26. *Id.* (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

27. *Id.* (alteration in original) (citing generally *Papasan v. Allain*, 478 U.S. 265 (1986)).

28. FED. R. CIV. P. 8(a).

29. *Twombly*, 550 U.S. at 557.

30. *Id.* at 553.

31. *Id.* at 556 ("Asking 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.").

under the “plausible” pleading standard may still go forward despite “savvy judge[s]” believing that proof of a plaintiff’s case is improbable.<sup>32</sup>

Unfortunately, Rule 8 makes no distinction between antitrust cases and any other cause of action, and the Court did not make the narrow application explicit in its opinion. Thus, “plausibility” became the new standard for all civil pleadings going forward.<sup>33</sup>

### B. . . . Then Came Iqbal

Nearly two years to the day after its decision in *Twombly*, the Court had occasion to again consider pleading standards in the case of *Ashcroft v. Iqbal*.<sup>34</sup> The plaintiff, a Pakistani Muslim, brought charges against a number of government officials, including former Attorney General John Ashcroft, following the terrorist attacks of September 11, 2001.<sup>35</sup> In his complaint, Mr. Iqbal alleged that various institutional behaviors amounted to a policy of systemic discrimination against Muslims in violation of the First and Fifth Amendments to the Constitution.<sup>36</sup> The defendants filed for dismissal under Rule 12(b)(6), but their motion was denied.<sup>37</sup> On appeal, the appellate court applied the “plausibility” test as decided in *Twombly*, ultimately deciding that Mr. Iqbal’s claim did not require “amplification” with additional factual allegations.<sup>38</sup>

The appellate court’s opinion, however, revealed a strained application of the *Twombly* standard against the Rules. On one hand, the court expressed concern that federal government officials might be subjected to “inherently onerous discovery requests” by other plaintiffs regarding other national security programs and policies.<sup>39</sup> On the other hand, the court seemed to stress that the *Twombly* test should not be applied as a heightened pleading standard, going so far as to quote the Supreme Court’s earlier proclamation that heightened pleading standards “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”<sup>40</sup>

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32. *Id.*

33. *See, e.g., In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 613 (N.D. Cal. 2007) (tort action involving violation of California’s wage and overtime laws); *Marshall v. West*, 507 F. Supp. 2d 1285, 1288 (M.D. Ala. 2007) (case involving a violation of civil rights arising out of a stop and search); *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr. Phila.*, 489 F. Supp. 2d 30, 35 (D.D.C. 2007) (case involving government contracts).

34. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

35. *Id.* at 666.

36. *Id.* at 669.

37. *Id.*

38. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007), *rev’d* 556 U.S. 662 (2009).

39. *Id.* at 179.

40. *Id.* at 158 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002)).

With these arguments in mind, the Supreme Court granted certiorari. The Court began its analysis by restating the core tenants from *Twombly*: (1) that the court need not accept as true legal conclusions not supported by factual allegations; and (2) that only a complaint that states a plausible claim for relief survives a motion to dismiss.<sup>41</sup> From this two-pronged test, the Court in *Iqbal* distilled two “working principles”: (1) threadbare recitals of a cause of action’s elements, supported by “merely conclusory statements,” will not suffice; and (2) a court is required to draw on “its own judicial experience and common sense” when determining whether a complaint is plausible.<sup>42</sup> Whether the Court was adding new components to the *Twombly* test or just explaining how judges should arrive at “plausibility,” the end result was the same: surviving a motion to dismiss became much harder.

Academic commentators were swift to point out the paradoxical effect of *Iqbal*’s ruling when compared to the simple requirements of Rule 8.<sup>43</sup> The two-part test in *Iqbal* seemed to call upon language noticeably absent in the Rule itself<sup>44</sup> while creating greater unpredictability for litigants contrary to the “simplicity and brevity” envisioned under Rule 84.<sup>45</sup> Even Congress was spurred into action, introducing measures in both the House and Senate to rescind the Court’s decision.<sup>46</sup> However, both measures stalled when the Judicial Conference of the United States asked Congress not to intercede so that the Rules Enabling Act process could sort through the issue.<sup>47</sup> The Court’s analysis is made even more confusing when one considers that, just three weeks prior to its decision in *Iqbal*, the Court reviewed and approved changes to Form 11 (renumbered from Form 9).<sup>48</sup> The changes to this basic complaint form for negligence actually provided fewer specifics than the prior version, raising the question: Would a complaint drafted pursuant to Form 11, as ap-

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41. *Iqbal*, 556 U.S. at 678–79 (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

42. *Id.*

43. See, e.g., Jeremiah J. McCarthy & Matthew D. Yusick, *Twombly and Iqbal: Has the Court Messed Up the Federal Rules?*, 4 FED. CTS. L. REV. 121 (2011).

44. For example, the word “plausibility” is found nowhere within Rule 8. See FED. R. CIV. P. 8.

45. FED. R. CIV. P. 84.

46. See generally Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

47. Letter from James. C. Duff, Sec’y, Judicial Conference of the United States, to Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary (May 11, 2010); see Memorandum from the Admin. Office of the Courts to the Standing Comm. (May 18, 2010), available at <https://www.hitpages.com/doc/6708666036125696/1>.

48. McCarthy & Yusick, *supra* note 43, at 128.

proved by the Court, pass its minimal pleading standards outlined three weeks later in *Iqbal*?<sup>49</sup> The answer to this question remains unclear.

## II. HARMONY OR DISCORD BETWEEN *TWOMBLY*, *IQBAL*, AND RULE 84

### A. Pleading and Form 11

In addition to scholarly critique, district and appellate courts have also struggled to reconcile the (new) test with the pleading requirements outlined in Rule 8 and illustrated by the Forms. In *García-Catalán v. United States*, the district court dismissed the complaint because it failed to state a “plausible” claim under *Iqbal* and *Twombly*, but the First Circuit reversed, specifically citing Form 11 and stating that the plaintiff had “plainly modeled” the complaint on the Form.<sup>50</sup> In the U.S. Court of Appeals for the Federal Circuit, the court more bluntly stated its position that a “pleading, motion, or other paper that follows one of the Official Forms cannot be successfully attacked.”<sup>51</sup> Thus, to the extent that *Twombly* and *Iqbal* can be read to conflict with the Forms, at least some courts in the Federal Circuit believe that “the Forms control.”<sup>52</sup> Several unpublished opinions have followed this line of reasoning, going so far as to openly resist the *Twombly* and *Iqbal* tests. In fact, one court in a surprising act of prescience stated as follows: “Absent an explicit abrogation of these forms by the Supreme Court, this court presumes that they are ‘sufficient to withstand attack under the rules under which they are drawn’ and ‘practitioner[s] using them may rely on them to that extent.’”<sup>53</sup>

### B. Patent Litigation

Patent litigation in particular has served as a prime example of the Court’s fracture over how to reconcile *Twombly* and *Iqbal* with

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49. *Id.*

50. *García-Catalán v. United States*, 734 F.3d 100, 104 (1st Cir. 2013).

51. *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3162 (2d ed. 1997)).

52. *R+L Carriers, Inc.*, 681 F.3d at 1334.

53. *Mark IV Indus. Corp. v. Transcore, L.P.*, C.A. No. 09-418 GMS, 2009 WL 4828661, at \*4 (D. Del. Dec. 2, 2009) (alteration in original) (“*Iqbal* did not squarely address the continued vitality of the pleading forms appended to the Federal Rules of Civil Procedure.”); *see also* Automated Transactions, LLC v. First Nigeria Fin. Grp., Inc., No. 10-CV-00407(A)(M), 2010 WL 5819060, at \*3 (W.D.N.Y. Aug. 31, 2010) (“In my view, reconciling the dictates of *Twombly* and *Iqbal* with the Appendix Forms is not merely difficult, it is impossible. Whereas *Iqbal* decrees that ‘conclusions or a formulaic recitation of the elements of a cause of action will not do,’ the Appendix Forms allege conclusions which fail to even mention the elements of a cause of action.”) (internal citation omitted).

Rule 84.<sup>54</sup> Although patent law is a notoriously tumultuous sea to navigate, the pleading standards set forth in Form 18 were, like its counterpart in Form 11, undeniably barebones.<sup>55</sup> Courts have taken numerous different approaches to harmonizing Form 18 with the *Twombly* and *Iqbal* standards set forth by the Supreme Court. The end result was a lack of uniformity, frustrating practitioners and judges alike.<sup>56</sup>

While some courts have drawn the line clearly that “the Forms control,” there is dissent and disagreement within the ranks as to the quality of that control.<sup>57</sup> In *R+L Carriers, Inc. v. DriverTech LLC*, the court indicated that providing fewer facts than what is laid out in Form 18 may be sufficient.<sup>58</sup> Other defenders of Form 18 took a more conservative approach, noting that the Form offered guidance only for pleading *direct* patent infringement but no other types of infringement.<sup>59</sup> Thus, a complaint alleging indirect patent infringement (such as through inducement or contributory infringement) had to be analyzed under the lens of *Twombly* and *Iqbal* and not simply through the Forms themselves.<sup>60</sup> Finally, some defenders of the Forms critiqued Form 18 for not addressing the complexities of patent infringement claims involving multiple or different types of products.<sup>61</sup>

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54. See, e.g., *Eolas Techs., Inc. v. Adobe Sys., Inc.*, No. 6:09-CV-446, 2010 WL 2026627, at \*2 (E.D. Tex. May 6, 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid. This cannot be the case.”).

55. FED. R. CIV. P. Appendix of Forms, Form 18. The Form requires only a statement of jurisdiction, an assertion of patent ownership, a simple claim of infringement, a certification that notice of the infringement was provided to the defendant, and a demand for relief.

56. *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893 (E.D. Pa. 2011). The court concedes that “[i]t is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*.” *Id.* at 905. The court goes on to imply that a pleading made under Form 11 (“outlining a three-paragraph complaint for negligence”) would survive a motion to dismiss under *Twombly/Iqbal*. *Id.*

57. *R+L Carriers, Inc.*, 681 F.3d at 1334. Although Form 18 refers to the infringement of a specific “device,” the complaint may still survive a motion to dismiss if it provides “notice and facial plausibility” of the allegations, which is “not an extraordinarily high [bar].” See M. Andrew Holtman, C. Brandon Rash & Luke J. McCammon, *Avoiding Dismissal in Patent Infringement Cases: An Update on the Twombly / Iqbal Pleading Standard*, 26 INTELL. PROP. & TECH. L.J. 10 (2014).

58. *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1286 (Fed. Cir. 2013).

59. *R+L Carriers*, 681 F.3d at 1336; see also *Halton Co. v. Streivor, Inc.*, No. C10-00655 WHA, 2010 WL 2077203, at \*3 (N.D. Cal. May 21, 2010) (“On its face, however, Form 18 is silent as to any theory of patent infringement besides *direct* infringement.”); *Eolas Techs., Inc.*, 2010 WL 2026627, at \*3 (“Form 18 does not expressly address indirect infringement claims . . . .”); *Gradient Enters., Inc. v. Skype Techs. S.A.*, 932 F. Supp. 2d 447 (W.D.N.Y. 2013) (suggesting that Form 18 applies to patent *infringement* cases, and not patent *invalidity* claims).

60. Holtman, Rash & McCammon, *supra* note 57, at 11.

61. See Stacy O. Stitham & David Swetnam-Burland, *Fractious Form 18*, 45 CONNTEMPLATIONS 1, 5 (2012); *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at \*1 (N.D. Cal. Sept. 6, 2003) (“In light of these facts, Plaintiff’s claim must

The underlying question remains: did the Forms stand above *Twombly* and *Iqbal* in the hierarchy of authority, or did the Supreme Court manage to change the rules of the game without changing the Rules?<sup>62</sup> Up until this year the answer was unclear, with courts taking positions all along the spectrum and then sniping at their colleagues for disagreeing. One Eastern District of Virginia court noted that “the threshold problem with [cases such as *R+L Carriers*] is that they accord no force to either the text or teaching of *Twombly* and *Iqbal* which require more to plead a legally sufficient claim than is set out in Form 18.”<sup>63</sup> However, one thing is certain: the lower courts made no effort to hide the direct collision between the Federal Rules and the decisions of *Twombly* and *Iqbal*. And now that the Forms have been tossed aside, this particular riddle will never be solved.

### III. THE ADVISORY COMMITTEE’S RESPONSE

Given the difficulties experienced by the lower court in applying the new pleading standard, the Advisory Committee considered a revision to the Rules to confront the issue. Under federal law, the Federal Rules of Civil Procedure may be changed only pursuant to the Rules Enabling Act.<sup>64</sup> The Rules Enabling Act, very generally, requires deliberation by the Advisory Committee on Civil Rules followed by an opportunity for public comment on any proposed changes to the Rules.<sup>65</sup> Any proposed changes must then be presented to the Supreme Court before finally giving Congress a chance to intervene prior to enactment.<sup>66</sup> Because *Twombly* and *Iqbal* seemingly changed the Rules in violation of the Rules Enabling Act process—without public input or congressional oversight—the Advisory Committee ostensibly had a problem on its hands.

Initially, the Advisory Committee held off on taking action, preferring instead to observe the effect of the Supreme Court’s decisions as they played out in the lower courts.<sup>67</sup> In the meantime, Congress made

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be read as follows: one or more of Defendant’s 4000-plus products directly infringes, contributorily infringes, or induces infringement of at least one claim in each of the patents-in-suit. Form [18] simply does not address a factual scenario of this sort.”)

62. See Holtman, Rash & McCammon, *supra* note 57.

63. *Macronix Int’l, Co. v. Spansion Inc.*, No. 3:13-cv-679, 2014 WL 934505, at \*6 (E.D. Va. Mar. 10, 2014).

64. Rules Enabling Act, 28 U.S.C. §§ 2071–77 (1988).

65. *Id.*

66. *Id.*

67. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., MINUTES FOR OCT. 8–9, 2009, COMM. MEETING 8 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2009-min.pdf> [hereinafter COMM. MIN. OCT. 2009]

several attempts to repeal the Court's holding in *Twombly* and *Iqbal*, but neither bill survived the Judicial Committee.<sup>68</sup> In 2009, the Advisory Committee considered abrogation of Rule 84 and the Appendix of Forms, but no action was taken at that time.<sup>69</sup> The Committee noted that “[abrogation] so soon would generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under *Twombly* and *Iqbal*.”<sup>70</sup> The Committee found that to be “a serious reason to hold off,” for the time being, on complete abrogation.<sup>71</sup>

The Advisory Committee revisited the Forms in 2011 when it again considered abrogation under the specter of the “debates engendered by *Twombly* and *Iqbal*.”<sup>72</sup> While it found the Forms had been “important in 1938” when the pleading philosophy was new, the Committee found that the Rules had now “matured.”<sup>73</sup> The Committee further lamented the “great amounts of time” required in managing and updating the Forms and espoused a desire for some method in revising the Forms outside of the Enabling Act process.<sup>74</sup> This comment on a speedier method of form revision was framed as being useful when “respond[ing] to changing circumstances.”<sup>75</sup> Again, the implicit message was that cases such as *Twombly* and *Iqbal* did necessitate an update of the Forms outside of the Enabling Act process—even if the Committee insisted that abrogation “need not be seen as implicit commentary on the *Twombly* and *Iqbal* decisions.”<sup>76</sup> Having laid the foundation for a critical review of the Forms, the Committee concluded simply that “work should begin on Rule 84.”<sup>77</sup> A subcommittee was formed soon thereafter to begin reviewing the Forms and proposing solutions. Members of the subcommittee

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(“[A]ny hasty response in the Enabling Act process or in Congress might miss the mark. But ongoing consideration is not the same as hasty action. It seems wise to maintain constant attention.”).

68. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010).

69. COMM. MIN. OCT. 2009, *supra* note 67, at 16.

70. *Id.*

71. *Id.*

72. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., MINUTES FOR APRIL 4–5, 2011 COMM. MEETING 32 (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/Civil-Minutes-2011-04.pdf> [hereinafter COMM. MIN. APRIL 2011].

73. *Id.* (“The pleading forms were time-bound; they are no longer important.”).

74. *Id.*

75. *Id.*

76. *Id.* at 32–33 (“Revising the whole framework need not be seen as implicit commentary on the *Twombly* and *Iqbal* decisions, but instead can be recognized for what it is—a program to shift the initiating responsibility for forms away from the full Enabling Act process.”).

77. *Id.* at 33.

surveyed judges, law firms, public interest law offices, and individual lawyers, and concluded that “virtually none of them use the forms.”<sup>78</sup>

On May 2, 2014, the guillotine was prepared at last. In a report to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee recommended abrogating Rule 84 and all of the accompanying forms.<sup>79</sup> The reasons for complete abrogation were twofold: first, the Committee brought up the familiar argument that regular review of the Forms required more time than was available without diverting attention from “more important tasks”; and second, the Committee discussed in greater detail the “tension” between the Forms and modern pleading standards.<sup>80</sup> To illustrate its second point, the Committee pointed to “Supreme Court decisions on the requirements of Rule 8 [specifically *Twombly* and *Iqbal*], and a general increase in the complexity of litigation,” among other reasons, as the source of friction with the Forms.<sup>81</sup> With regard to the complexity of litigation, the Committee noted that a single form may often not suffice with some particularly complex areas of law—such as patent infringement.<sup>82</sup>

The Committee was not content to rest purely on the same arguments made three years prior, and it took a swipe at opponents of abrogation as well. Notwithstanding the disrespect to Civil Procedure professors across the nation, the Committee expressed concern that “most of the opposition to abrogation springs from the academic community” based on a “continuing unease over the direction of contemporary federal pleading.”<sup>83</sup> It is hard to believe that this statement did not receive even a glare from Committee member Robert H. Klonoff, Dean of Lewis & Clark Law School and an expert in the area of civil procedure. Additionally, the Committee noted the argument of some opponents that the abrogation proposal violated the Rules Enabling Act.<sup>84</sup> These opponents argued that the Forms had become integral parts of the rules they illustrated, and thus, any change to the Forms necessarily required a change to

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78. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA E-19 SUMMARY 93 (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>.

79. COMM. AGENDA BOOK MAY 2014, *supra* note 15, at 412.

80. *Id.*

81. *Id.*

82. *Id.* (“[S]ome of the uncertainty lies in determining whether a single form could be crafted to address the wide variety of factual circumstances that might arise with respect to any particular type of claim, such as patent infringement.”).

83. *Id.*

84. *Id.*

the accompanying rules as well.<sup>85</sup> Despite these objections, the Committee urged that abrogation was still the “best course.”<sup>86</sup>

The Standing Committee approved abrogation during its session in May 2014, and the Civil Rules amendments were sent for consideration to the Judicial Conference of the United States.<sup>87</sup> On September 16, 2014, the Judicial Conference approved the proposed amendments and forwarded them to the United States Supreme Court for review.<sup>88</sup> The Court approved the amendments and forwarded them to Congress, which, to the shock of no one, did not intervene.<sup>89</sup> The guillotine had fallen and the Forms were no more.

#### IV. THE ALTERNATIVE: HONEST DIALOGUE AND TARGETED CHANGES

The statement that the United States Supreme Court substantially changed the pleading requirements under the Rules outside of the Rules Enabling Act process is neither controversial nor excessive. Many legal scholars, academics, practitioners, and district court judges have openly acknowledged this reality.<sup>90</sup> The problems lie, however, with the Court's stubborn refusal to do the same—a position expressed by the Advisory Committee as well.<sup>91</sup> Supporting this legal fiction resulted in the sacrifice of Rule 84 and all of the Forms, yet such a solution was unnecessary.

Precedent already exists for amendment of both the Rules and the Forms in tandem. In 1993, Rule 4 was amended to include waiver of service as an acceptable method under the Rules.<sup>92</sup> Along with the amendments to Rule 4, Forms 1A and 1B were adopted to demonstrate how the new summons and waiver of service of process would work in practice.<sup>93</sup> Additionally, in a comment by the Judicial Conference, the amendments to Rule 4 were noted to serve two important purposes, one of which was

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85. *Id.* For an excellent discussion of this argument in much greater detail, see Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093 (2015).

86. COMM. AGENDA BOOK MAY 2014, *supra* note 15, at 413.

87. *CCL's Nannery Attends Meeting of Committee on Rules of Practice & Procedure*, CTR. FOR CONST. LITIG. (June 2, 2014), <http://www.cclfirm.com/blog/13984/>.

88. *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, UNITED STATES COURTS (Sept. 16, 2014), <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>.

89. Amendments, *supra* note 16.

90. *See supra* Part II.

91. *See e.g.*, COMM. MIN. OCT. 2009, *supra* note 67; COMM. MIN. APRIL 2011, *supra* note 72; COMM. MIN. MAY 2014, *supra* note 15.

92. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA E-19 SUMMARY 244 (1992), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1992.pdf>.

93. *Id.* Forms 1A and 1B are currently named Forms 5 and 6 following the re-styling of the Rules in 2007.

to “codify” the Supreme Court’s decision in *Houston v. Lack*.<sup>94</sup> In so doing, the Judicial Conference—and by extension, the Supreme Court—acknowledged that the Forms were invariably tied to the rules they illustrate, even when a Supreme Court decision might modify those rules.

In the context of Rule 4, the amendment process provided by the Rules Enabling Act functioned precisely as it was meant to. The Rules and Forms were updated in tandem to codify a Supreme Court decision, with complete transparency for public comment and Congressional review.<sup>95</sup> In stark contrast, the method of bringing the Rules in line with the Court’s decisions in *Twombly* and *Iqbal* was more akin to avoidance rather than transparency. The struggle of district courts to reconcile the Forms with the Court’s decisions suggests that the Forms were glaring examples of how the Court changed the rules outside of the Rules Enabling Act process. Because the evidence was on the table, and because of the amount of time required to fix this mess, the Advisory Committee was content to simply sweep the evidence under the rug.<sup>96</sup>

There were plenty of reasons, both as practice and as policy, for the Advisory Committee to avoid rule revision,<sup>97</sup> yet, for better or for worse, the Rules Enabling Act process is precisely what was needed. Rather than abrogate the entirety of Rule 84 and the Forms, the Advisory Committee would have been better served trying to amend Forms 10 through 21 so that they conform to the standards laid out in *Twombly* and *Iqbal*. Had the Advisory Committee failed to draft twelve complaints that lived up to the Court’s vague, imprecise standards, then the Court may well have rejected the proposed changes.<sup>98</sup> Alternatively, public commentary could have unleashed a hornet’s nest of frustration as to how unpredictable the *Twombly* and *Iqbal* standards are for plaintiffs. Regardless of the outcome, the insulated bubble of the Supreme Court might have been breached long enough for the Court to realize that Justice Ginsburg was right: the Court has indeed made a mess of the Rules. In this regard, the Rules Enabling Act process would have provided the sort of check on judicial interpretation that it was designed for. Instead, the Court may go on insisting that *Iqbal* and *Twombly* changed nothing.

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94. *Id.* at 20.

95. *Id.* at 9–11.

96. COMM. AGENDA BOOK MAY 2014, *supra* note 15, at 412 (“Abrogation is recommended in large part because this Committee has not been able to spare any significant share of its agenda for regular review and potential revision of the official forms . . . . A secondary consideration has been the tension that may be found between the forms and modern pleadings standards.”).

97. See generally Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483 (2013). Professor Hoffman examines a variety of hurdles that might have dissuaded the rulemaking committee from revising the Forms, including the ability of the Court to block any proposed changes. *Id.*

98. *Id.* at 1552.

## CONCLUSION

Excising the Forms as the Court has done provided neither clarity to practitioners struggling to abide by the *Twombly* and *Iqbal* standards nor a coherent standard for judges to use in adjudicating a 12(b)(6) motions to dismiss. Perhaps more alarmingly, the death of the Forms raises the concern that the Court can avoid the Rules Enabling Act when changing Federal Rules of Civil Procedure simply by virtue of the Advisory Committee declaring the rules unchanged.<sup>99</sup> Even if the Advisory Committee could not bring the Forms in line with the requirements of *Twombly* and *Iqbal*, there would have been significant benefit from making the effort.

As it stands now, the Forms have been thrown out, and the Court continues to insist that *Twombly* and *Iqbal* made no changes to pleading standards under Rule 8. The abrogation of the Forms simply emboldens this legal fiction. On the other hand, an attempt by the Advisory Committee to bring the Forms in line would have demonstrated the herculean task that practitioners in federal courts face every day. The Court would have been required to confront the mess it had made—especially if the Committee had determined that no sample complaint would suffice! After all, if the Advisory Committee could not draft a sample complaint that suffices under the Court's standard, how can we expect practitioners to do so?

In the end, avoidance won the day. The task of sorting through the pleading conundrum now falls to the district and appellate courts, and plaintiffs are no closer to finding the “simplicity and brevity” that Rule 84 once promised.

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99. See Coleman, *supra* note 85.