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October 8, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Rules Amendments
For Consideration by the Advisory
Committee on Civil Rules at its
Next Meeting in November 2008

Dear Mr. McCabe:

Along with my co-counsel, Professor Paul Rothstein of Georgetown University Law Center, I represent a physician interest group, including the American Medical Association, the American Academy of Neurology Professional Association, the American College of Obstetricians and Gynecologists, the American Academy of Otolaryngology-Head and Neck Surgery, the American Osteopathic Association, the Medical Group Management Association, the Physician Insurers Association of America and the American Association of Neurological Surgeons, relevant to the Federal Rules amendment process.

At the meeting of the Rules Advisory Committee that was held on April 7-8, 2008 in Half Moon Bay, California, Committee Chairman Judge Mark Kravitz requested that interested participants suggest potential new project areas for the Committee to consider, looking toward the establishment of a new working agenda at the Committee meeting now set for November 17-18, 2008 in Washington, D.C.

We offer for the Advisory Committee's consideration a series of amendments that we believe would further both the interests of physicians and the larger public interest in fostering a fair and efficient federal trial system.

Codification of *Twombly* Principles

We suggest three separate amendments that we believe would carry forward the views of the Supreme Court as set forth in Bell Atlantic Corp., *et al.* v. Twombly, *et al.*, ___ U.S. ___, 127 S.Ct. 1955 (2007), decided May 21, 2007 ("Twombly").

A. Background

Twombly provided a new standard for properly pleading an antitrust conspiracy and, by implication, any other cause of action in the federal courts, abrogating the earlier standard, set forth in Conley v. Gibson, 355 U.S. 41 (1957). The earlier standard required that a complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," Conley 355 U.S. at 47. The new standard requires the plaintiff to allege "enough facts to state a claim to relief that is plausible on its face" (emphasis added), Twombly 127 S.Ct. at 1979. In the intervening two years, thousands of lower court opinions have been rendered on the point but there remains some confusion as to the full impact of Twombly. [1]/

The current language of Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Since the adoption of the Federal Rules in 1937, federal

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[1]/ Broadly stated, the main question appears to be whether Twombly is limited to a cluster of complex cases (e.g., discrimination, antitrust and RICO cases) and those where allegations are pleaded upon "information and belief" and require significant inferential leaps or, on the other hand, whether it extends to all cases. *See, e.g.,* E.E.O.C. v. Concentra Health Servs. Inc., 496 F.3d 773, 776 (7th Cir. 2007) (Twombly imposes "two easy-to-clear hurdles"- fair notice to defendants of claims and grounds, and plausible allegations); Gregory v. Dillard's, Inc., 494 F.3d 694, 698 (8th Cir. 2007) (plaintiff's racial discrimination allegations satisfied Twombly because they stated "how, when, and where they were discriminated against"); Iqbal v. Hasty, 490 F.3d 143, 155-58 (2d Cir. 2007), cited with favor in Phillips v. County of Allegheny, 515 F.3d 224 (3rd Cir. 2008) (Twombly does not create a new heightened pleading standard, but a flexible approach requiring pleaders to amplify their claim only when needed for plausibility), cited with favor in Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008); Weisbarth v. Geauga Park Dist., 499 F.3d 538 (6th Cir. 2007) (after Twombly, claim must be plausible on its face). Further confusion was created by the fact that Twombly was not even the last word on pleading in the October 2006 term of the Supreme Court. *See* Erickson v. Pardus, __ U.S. __, 127 S.Ct 2197 (decided June 4, 2007, in which the Court granted review and then vacated and, quoting Twombly, said that a complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." (restating the earlier Conley standard); *see* Wysong v. Dow Chem. Co., 503 F.3d 441. 446 (6th Cir. 2007) (a complaint need only provide the defendant with fair notice of what the claim is and the ground upon which it rests, citing Erickson).

law has been clearly and unequivocally understood to require simple "notice pleading," meaning that the drafter of a complaint must only put the defendant on notice of the claim against him and the relief sought. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002). The idea was not to keep litigants out of court but, rather, to keep them in. Overstreet v. North Shore Corp., 318 U.S. 125, 127 (1943). Thus, until Twombly, the long accepted rule was that a complaint should not be dismissed for failure to state a cause of action, pursuant to Rule 12(b)(6), 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 at 45-47. That law has changed and we believe that the Rules should be made reflective of the letter and spirit of the change in several respects.

B. Amendment to Rule 8(a)(2)

The federal courts are clearly embarked upon a new course of action in evaluating the sufficiency of complaints, tightening pleading requirements by interposing one version or another of some new "plausibility" standard. The Rules should incorporate the new standard. At the same time, however, we believe that the codification should be limited to the precise language utilized in Twombly, allowing for further growth in the law regarding its outermost limits.

Toward this end, we respectfully suggest an amendment to Rule 8(a)(2), inserting, just before the concluding semicolon, the following: ", containing sufficient factual allegations to make such claim plausible on its face". Thus, the amended subsection would require that all complaints contain "a short and plain statement of the claim showing that the pleader is entitled to relief, containing sufficient factual allegations to make such claim plausible on its face". (emphasis added).

This is not to suggest any retreat to discredited common-law pleading notions but, rather, to ensure that the Rules at least embrace the principle underlying Twombly.

C. Amendment to Rule 12(e)

To further reflect the intent of Twombly, we suggest that Rule 12(e), permitting a motion for a more definite statement in a complaint before the filing of an answer, be amended by inserting, just before the period concluding the first sentence thereof, the following: "or if the interests of justice would otherwise be clearly served by greater specificity." Thus, the amended sentence would provide: "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response or if the

interests of justice would otherwise be clearly served by greater specificity" (emphasis added).

Such an amendment would permit our courts to apply the principle underlying Twombly in a supplementary or an alternative fashion, again toward the efficient administration of justice without any significant limitation on accessibility to the courts.

D. Amendment to Rule 16(c)(2)(E)

We suggest yet a third amendment in support of the principle set forth in Twombly. [2]/

Rule 16(b)(3)(B) of the Rules, lists matters that a federal trial court may consider and treat in the initial Scheduling Order after the initial pretrial conference with counsel for the parties. Our proposed amendment would add a new clause prior to the semicolon at the end of subsection (ii) thereof, to read as follows: "including the possible conduct of phased discovery". Thus, in its new entirety, Rule 16(b)(3)(B)(ii) would expressly authorize a trial court, in its initial Scheduling Order, to "modify the extent of discovery, including the possible conduct of phased discovery". [3]/

At its initial pretrial conference with counsel, trial courts consider, among other items, an initial discovery plan. By fostering the utilization of so-called "phased discovery" in appropriate circumstances, trial courts could permit the parties to initially focus on perceived defects in the pleading of a particular claim or counterclaim. Thus, if one party's allegations in support of a claim or counterclaim appear to be particularly thin, e.g., lacking adequate factual foundation to support one element of a tort, the trial court could direct initial discovery efforts toward the perceived weakness early on, perhaps allowing an initial 60-90 days to expose the fatal defect, prior to the expenditure

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[2]/ We earlier mentioned this idea in the context of proposed Rule 56 amendments that were issued for public comment. *See* letter from K. Lazarus to P. McCabe under date of September 29, 2008, expressing support for proposed amendments to Rule 56 and various concerns with respect to proposed amendments to Rule 26.

[3]/ Rule 16 already vests a federal trial judge with substantial authority, backed by sanctions, to regulate pretrial proceedings, including actions toward: the elimination of frivolous claims and defenses, Rule 16(c)(2)(A); the necessity or desirability of amendments to the pleadings, Rule 16(c)(2)(B); the control and scheduling of discovery, Rule 16(c)(2)(F); and the adoption of special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems, Rule 16(c)(2)(L). Nonetheless, we believe that express authority for phased discovery is warranted to give appropriate attention to this particular method of dealing with the sorts of problems raised by Twombly.

of large sums on other discoverable matters. Justice Stevens, dissenting in Twombly, discussed at length the utilization of phased discovery as an available alternative to the substantial tightening of pleading requirements in order to dispose of unsupportable claims sooner, rather than later, in the litigation process. *See* Twombly, Stevens dissenting at 24-26. We suggest that phased discovery more logically supplements, rather than supplants, the enhanced pleading requirements set forth in Twombly.

Electronic Discovery

At the Half Moon Bay meeting in April 2008, Judge Kravitz expressed some tentative interest in considering possible amendments to the electronic discovery compliance provisions (so-called "e-discovery"), particularly as those provisions relate to the assertion of privilege in the context of electronic data production. [4]/ We have an additional amendment to suggest in this area.

The 2006 e-discovery Amendments to the Rules were primarily designed to ensure that electronically-stored documents were available to parties to support their claims and defenses to the same extent as paper documents and tangible things. Further, Rule 37 was also amended at that time to allow for the imposition of sanctions by a trial court for the failure of a party to comply with proper e-discovery requests, permitting, however, one important exculpatory provision. In this regard, present Rule 37(e) provides that a court may not impose sanctions on a party for failing to provide e-discovery information "lost as a result of the routine, good-faith operation of an electronic information system." [5]/

The 2006 amendment to Rule 37 seems to have created a facially-different standard for the protection of reasonable retention plans governing information stored electronically as opposed to those involving hard copy. Physicians can take comfort in the "safe-harbor" provided by Rule 37(e) when introducing a system for the regular purging of electronically-stored information. However, no such comfort is available in considering their office paper-retention policies.

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[4]/ The cost of e-discovery compliance and attendant costs associated with the preservation and documentation of relevant privileges, i.e., so-called "discovery logs," is apparently growing by leaps and bounds.

[5]/ This provision was originally enacted into law as Rule 37(f). The 2007 Amendments relating to style extensively reorganized, subsectioned and relabeled Rule 37. Former Rule 37(e), which had been abrogated, was deleted altogether, and Rules 37(f) and 37(g) were renumbered 37(e) and 37(f).

Accordingly, we propose that the safe-harbor provided by Rule 37(e) be expressly extended to cover paper-retention policies. This amendment can be incorporated into the rules in a variety of ways and we leave possible implementation of the idea to the capable staff of the Advisory Committee.

Closing Note

We look forward to the establishment of a new agenda by the rules Advisory Committee and we fully intend to continue our participation in its efforts.

Your consideration is appreciated.

Sincerely,

Kenneth A. Lazarus

cc: Judge Mark R. Kravitz, Chairman, Advisory Committee on Civil Rules
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
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