Twombly and Iqbal: Fists of Death?

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Hardly a week goes by when we don't blow kisses at *Twombly* and *Iqbal*. As we did last week, we frequently discuss those cases and the ways in which they facilitate dismissal of deficiently pleaded complaints. Those cases comfort and embolden the defense bar. It's as if, upon seeing a threadbare compaint, we say, "Just wait until we introduce these plaintiff bozos to *Twombly* (gesturing with our left fist) and *Iqbal* (pumping our right fist)."

Perhaps such macho posturing is a teensy-weensy bit overblown. Truth be told, it is inherently comical for a lawyer to talk tough. There is a reason why there is no legal equivalent to **Deadliest Catch** or **Dirty Jobs** on the Discovery Channel. A briefbag and tasseled loafers don't scare anybody. And it has now become a venerable comedy trope for a self-deluded character to refer to his (sorry, but the doofus in question is invariably male) fists with vaguely inappropriate nicknames. It happened in **Anchorman** and it happened last week, to brilliant effect, in **Modern Family**. The feckless dad, played with typical genius by Ty Burrell, promises violence via his left fist, "England Dan," and right fist, "John Ford Coley." We agree with a local media outlet that it was the single funniest moment so far this television season.

Better yet, the article includes a video clip of '70's soft rockers England Dan and John Ford Coley doing their biggest hit, "I'd Really Love to See You Tonight," so you can see why the obscure reference is so perfect. (The really weird thing is how the schmaltzy song now seems not-so-bad to our geezerish ears.)

Are *Twombly* and *Iqbal* really fists of death? Are they game-changers? With all the sturm und drang over those cases -- much of it acted out by the scribblers on this humble blog -- you would certainly think so. But a recent paper by a University of Chicago Law School professor calls that assumption into question. Professor William Hubbard, in "The Problem of Measuring Legal Change, with Application to *Bell Atlantic v. Twombly*," John M. Olin Law & Economics Working Paper No. 575 (September 2011), runs a quantitative analysis to determine whether *TwIqbal* has resulted in more cases being dismissed.

Surprisingly, Hubbard"s paper "strongly rejects the view that *Twombly* constitutes a major change in how district courts have applied the law of pleading." *Id*. at 32. Hubbard even looks

at whether *Twombly* and *Iqbal* might have prompted different selections by plaintiffs as to which cases to file, but still finds no effect. The dataset does not go past December 31, 2008, so it is possible that the effects of *TwIqbal* were slow-moving and showed up past that window. But the available data suggests that *TwIqbal* really has not changed results all that much. Whether it has had an effect in certain subsets, such as civil rights cases or cases where expensive discovery is threatened, the paper does not venture to say. It just might be that in many cases where *TwIqbal* was invoked by the court, the case would have been dismissed even under the *Conley* standard, or at least the not-completely-literal way in which most district courts applied the *Conley* standard. Shabbily pleaded cases are shabbily pleaded, no matter whether *Conley* or *TwIqbal* rule the day.

We think there's a recent example of that in *Cardenas v. Abbott Laboratories*, No. 11-C-4860 (N.D. Ill. October 7, 2011). The plaintiffs sued the manufacturers of Lupron, a drug used to treat, inter alia, prostate cancer and endometriosis. The plaintiffs alleged that despite knowledge of a potential side-effect of bone depletion, the manufacturers did not take corrective action or withdraw the drug from the market. The complaint included claims for negligence, strict liability, failure to warn, breach of warranty, fraudulent misrepresentation, and negligent misrepresentation. The defendants filed a motion to dismiss and the Judge made a nod in the direction of *Twombly* and its requirement that the plaintiff supply "'enough details about the subject matter of the case to present a story that holds together.'" *Cardenas*, slip op. at 4, quoting *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011). Cut to the bottom line: the court ends up dismissing the complaint. *TwIqbal* to the rescue, right?

Maybe not. When you look at the complaint, it's hard to believe it wouldn't have been dismissed under *Conley* -- or under any any semi-rational regime that makes plaintiffs submit even minimal information. We pretty much know the game is up when we read the following: "Plaintiffs concede that the only facts they provide with respect to themselves are their states of residence and that they rfeceived Lupron injections 'on several occasions.'" Slip op. at 7. Wow. The complaint does not even disclose "whether Plaintiffs are women, nor does it establish whether Lupron was prescribed to Plaintiffs for endometriosis, for prostate cancer, or for some off-label use." *Id*. at 8. All of these facts are, of course, within the plaintiffs' control. Plaintiffs' "acts and injuries remain a mystery." *Id*. We like it when movies or books keep us in suspense. Not so much with legal pleadings.

The plaintiffs' fraud claim is nothing but boilerplate: "At all relevant times, the Defendants, jointly, severally, acting in concert, with or through others, their agents, servants and/or employees, the companies they own, control, or for whose actions they are responsible, made false and fraudulent representations to the medical community and to users of Lupron, including but not limited to that Lupron had been tested and found to be a safe and effective drug for, among other things, treatment of endometriosis." *Id*. at 9-10. As the court concludes, such pleading does not come close to satisfying Rule 9's requirement that fraud be pled with specificity. *Id*. at 10. The plaintiffs did not even try to allege the who, what, when, where, and how with the requisite specificity. Rule 9 was, as you all well know, around way before *Twlqbal*.

You can say that the plaintiffs in *Cardenas* were undone by *Twlqbal*. But the fact is that they did it to themselves. The complaint was just another cookie-cutter mass tort complaint. We've been looking at them for years. And courts have been seeing through them for years. *Twlqbal* or no *Twlqbal*, these plaintiffs punched themselves in the nose.