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Pending Bills in House and Senate Seek to Loosen Federal Court Pleading Standards

Congress is considering legislation that would substantially raise the bar for defendants who move to dismiss civil lawsuits under Federal Rule of Civil Procedure 12. Introduced by Sen. Arlen Specter (D.-Pa.) in the Senate and Rep. Jerry Nadler (D.-N.Y.) in the House, the two bills would prohibit federal judges from dismissing a case under Rule 12 unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." Although they differ in several respects, the key language in the two bills — S. 1504 (The Notice Pleading Restoration Act of 2009) and H.R. 4115 (The Open Access to Courts Act of 2009) — is borrowed from a 50-year-old case, *Conley v. Gibson*, 355 U.S. 41 (1957), which has been heavily criticized over the last five decades and has never been strictly followed by federal courts.

The bills are being pushed strongly by the plaintiffs' bar as a reaction to two recent U.S. Supreme Court decisions — *Bell Atlantic Corp. v. Twombly*, 550 U.S. 244 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) — which held that a plaintiff must allege sufficient facts to show that his or her claim is *plausible* on its face to survive a motion to dismiss. These decisions confirmed that plaintiffs cannot proceed with a suit in federal court if all they have to offer are "[t]hreadbare recitals" and "conclusory statements." *Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 555.

Although proponents of the bills say that they would merely return the law to a pre-*Twombly/Iqbal* state, they would in fact go much further, profoundly changing the litigation landscape in several respects.

First, federal courts never applied the language of *Conley v. Gibson* literally. *See, e.g., Kyle v. Morton High Sch*., 144 F.3d 448, 455 (7th Cir. 1998) (*per curiam*) (the "no set of facts" language "has never been taken literally"); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (explaining that *Conley* "unfortunately provided conflicting guideposts"); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (noting that *Conley*'s "no set of facts" language is not to be "taken literally"). The U.S. Supreme Court has itself held this language to be incapable of literal application — otherwise, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561. Instead of following *Conley* literally, courts have taken a practical approach to pleading standards. This practical approach is critical to defendants because it puts an end to frivolous cases before discovery. As the *Twombly* court noted, discovery can "account[] for as much as 90 percent of litigation costs," *Twombly*, 550 U.S. at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)), making it critical to dismiss meritless cases early. The Specter and Nadler bills thus threaten to substantially lower the pleading standards that were being routinely applied by federal courts at the time *Twombly* was decided and expose defendants to substantial discovery costs based on frivolous allegations.

Second, the Specter and Nadler bills would override the heightened pleading standards previously established by Congress in several statutes, including the Private Securities Litigation Reform Act of 1995 (PSLRA). Under the PSLRA, plaintiffs alleging securities fraud based on allegedly misleading statements must specify "each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading." 1995, Pub. L. 104-67, § 101(b)(1)(B), 109 Stat. 737. This provision has provided federal judges with an important tool to help "weed out" frivolous securities suits through early dismissals. The proposed legislation will nullify these important protections set forth in the PSLRA by forbidding a federal judge from dismissing a lawsuit "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of" his or her claim. Should the "no set of facts" standard become law, plaintiffs' lawyers will once again be able to exert settlement pressure on defendants by filing nuisance securities suits with no factual support and then seeking expensive discovery.

Third, the bills would also nullify the particularity requirements set forth in Federal Rule of Civil Procedure 9(b). Since 1937, Rule 9(b) has required that claims of fraud be pled with particularity. (This is commonly known as the "who, what, where and when" requirement.) Rule 9(b) helps to ensure that plaintiffs cannot accuse defendants of cheating them without providing verifiable facts in their complaint to support their claims. Federal courts have applied this rule to a variety of claims, including consumer fraud actions and cases brought under the False Claims Act (FCA) and the Racketeer Influenced and Corrupt Organizations Act (RICO). Application of Rule 9(b) to such cases helps to limit frivolous suits and protect defendants from needless reputational harm. The proposed legislation would eliminate these important protections.

On Wednesday, December 2, the full Senate Judiciary Committee held a hearing on the topic: "Has the Supreme Court Limited Americans' Access to Courts?" with part of the discussion focusing on the Specter bill. Earlier, on October 27, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee held a hearing with the title "Access to Justice Denied — *Ashcroft v. Iqbal*." The Nadler bill was introduced in connection with that hearing.

The forms of the two bills (particularly the Specter bill) are expected to change somewhat as they proceed through the legislative process. Because of the press of other business, neither bill is expected to reach the floor during 2009. However, it is possible that the bills could receive full committee consideration and advance to floor debate in both houses during the first quarter of next year.

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