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Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards

INTRODUCTION

On June 24, 2010, the Washington Supreme Court issued its opinion in *McCurry v. Chevy Chase Bank*,[1] declining to follow nonmandatory but highly persuasive federal pleading standards. In doing so, Washington State became the first state supreme court post-*Iqbal* to abandon the ideal of national procedural uniformity over the contentious issue of plausibility pleading. Other states will have to decide the same issue in the months and years to come. This Essay explains the history and stakes of this development.

McCurry provides an opportunity to pause and reconsider the relationship between state and federal pleading regimes and the value of national procedural uniformity compared to local variation. It allows us to do so not based on theory alone but grounded in a record that reveals which rationales actually mattered to a state supreme court.

Petitioners in *McCurry* had asked the court to consider abandoning the pleading standard currently applicable in Washington State. Developments in federal courts prompted this request: one year ago the Supreme Court decided *Ashcroft v. Iqbal*, a case that radically transformed federal civil litigation by abolishing notice pleading in favor of plausibility pleading.[2]

Though state courts are not bound by the Federal Rules of Civil Procedure or by federal courts' interpretations of those rules, many have followed the

1. McCurry v. Chevy Chase Bank, 233 P.3d 861 (Wash. 2010).

2. 129 S. Ct. 1937, 1949 (2009).

rules and interpretations in a bid for national procedural uniformity.[3] The petitioners in *McCurry* therefore asked the Washington Supreme Court to revise Washington's pleading standards to bring them into conformity with the new federal pleading standards. The Washington Supreme Court declined to do so. As such, *McCurry* entrenches a significant split between federal and state pleading standards.

The twenty-six state courts that have modeled their pleading standards after the federal rule will begin to diverge in their approaches to *Iqbal*, shattering any remaining semblance of national procedural uniformity.[4] *McCurry*, for now, settled Washington's approach to this question. Similar cases are working their way through other state court systems. Pleading standards in state courts are beginning to splinter into a wide spectrum of pleading standards, with some jurisdictions endorsing *Iqbal*,[5] others citing *Iqbal* approvingly but falling short of outright adoption,[6] some observing approvingly that the federal rule is moving closer to their state court practice,[7] others simply noting the importance of *Iqbal* but declining to adopt or reject it,[8] some citing Justice Souter's dissent in *Iqbal* approvingly,[9] and others still,

3. *See, e.g.*, Am. Disc. Corp. v. Saratoga W., Inc., 499 P.2d 869, 871 (Wash. 1972) (arguing that parallel language allows state courts to "look to decisions and analysis of the federal rule for guidance"); Sanderson v. Univ. Vill., 989 P.2d 587, 590 n.10 (Wash. Ct. App. 1999) ("Because the Washington rules were based on the federal rules, federal court interpretation of the federal rules is highly persuasive in determining the effect of Washington's rules.").

4. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting) ("Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief." (citing state cases)).

5. *See, e.g.*, Plante v. Town of Blackstone, 27 Mass. L. Rptr. 147 (Mass. Super. Ct. 2010) ("'[L]abels and conclusions' are no longer an acceptable foundation for a complaint attacked by a motion to dismiss . . . ." (internal citations omitted)); Rassias v. Mass. Bay Transp. Auth., 27 Mass. L. Rptr. 25 (Mass. Super. Ct. 2010) ("[Plaintiff's] threadbare recital[] of the elements of a cause of action, supported by mere conclusory statements, [does] not suffice." (internal citations omitted)).

6. *See, e.g.*, Estate of Williams v. Corr. Med. Serv., Inc., C.A. No. 09C-12-126 WCC, 2010 WL 2991589, at *3 n.14 (Del. Super. Ct. July 23, 2010); Doe v. Bd. of Regents Univ. of Neb., 280 Neb. 492, 506 (2010) (noting that *Twombly* and *Iqbal* "provide[] a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery").

7. *See, e.g.*, McKinnon v. W. Sugar Coop. Corp., 225 P.3d 1221 (Mont. 2010) (Rice, J., dissenting) (noting that the federal rule under *Iqbal* is moving closer to Montana's pleading rule by rejecting conclusory statements).

8. *See, e.g.*, Duncan v. State, 774 N.W.2d 89, 136-37 (Mich. Ct. App. 2009).

9. *See, e.g.*, Smith v. Wrigley, 908 N.E.2d 354, 359 (Ind. Ct. App. 2009).

like Washington State, rejecting the use of heightened pleading standards in their state courts.[10] At least one state jurisdiction is split internally over *Iqbal*.[11]

There has been procedural variation before, but the splintering of pleading standards in the wake of *Iqbal* has the potential to usher in a new era of procedural diversity. Pleading standards are the lynchpin of the common law procedural regime. Pleading comes early in the life cycle of a case, shapes litigation strategy, reveals valuable information to the opposing party (that can be used to encourage settlements), and is the gateway to all subsequent procedural devices. Variation among pleading standards thus has a more significant impact on the shape of litigation than variation in other procedural rules.

Part I of this Essay situates the current debate over pleading standards in the context of the long-sought ideal of national procedural uniformity. Part II explains the developments in federal jurisprudence that replaced notice pleading, long the standard in federal and state courts, with plausibility pleading. Part III explains how these developments have created a dilemma for the Washington Supreme Court, one that other state courts will soon face as well. Part IV assesses the implications of this developing split between federal and state civil procedure.

I. THE RISE AND FALL OF NATIONAL PROCEDURAL UNIFORMITY

In 1938, Congress enacted the Rules Enabling Act (REA) and adopted the Federal Rules of Civil Procedure. This "transformed civil litigation . . . . [and] reshaped civil procedure."[12] It remains "surely the single most substantial procedural reform in U.S. history."[13] Prior to 1938, civil practice in federal district courts was governed by a "hodgepodge of federal practice" under the

10. *See, e.g.*, Roth v. Defelicecare, Inc., No. 34805, 2010 WL 2346248, at *104, *107 (W. Va. June 8, 2010) (rejecting *Iqbal* and noting that the court's interpretation of Rule 8 of the West Virginia Rule of Civil Procedure and 12(b)(6) is more liberal than the "more stringent [federal] pleading requirements" even though they are parallel provisions).

11. *See* Morris v. Grusin, No. W2009-00033-COA-R3-CV, 2009 WL 4931324, at *3-4 (Tenn. Ct. App. Dec. 22, 2009) (refusing to adopt *Iqbal*); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 311 S.W.3d 913, 918-19 (Tenn. Ct. App. 2009) (citing *Iqbal* approvingly and dismissing the complaint).

12. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229; *see also* Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to* The Revolution of 1938 Revisited: The Role and Future of the Federal Rules, 61 OKLA. L. REV. 257 (2008).

13. Yeazell, *supra* note 12, at 248.

tame Conformity Act of 1872.[14] The Federal Rules of Civil Procedure replaced this diversity of procedural rules with a single uniform code of federal procedure that governed civil proceedings in every federal district court. It was "a triumph of uniformity over localism."[15] The new uniformity among the federal district courts adhered to the ideal that procedure should be simple and promote adjudication on the merits. Under a uniform procedural regime "any lawyer could go to any federal court, and be secure that she could understand and master the procedure required, since that procedure would be at once uniform and simple."[16]

Initially, the adoption of the Federal Rules of Civil Procedure was marked by the hope and belief that states would replicate these procedures in state courts.[17] Simplicity was to be the new guiding principle for civil litigation within the United States. It should not matter, so the argument went, in which state a suit was brought or whether it ended up in federal court. The merits of the case should settle the dispute, not procedural variation.[18]

At first, the ideal of procedural uniformity between state and federal courts seemed to become reality. By 1975, twenty-three states had replicated the Federal Rules of Civil Procedure in their state courts (they are thus called "replica jurisdictions").[19] Many other states closely patterned their civil rules

14. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1170 (2005); *see also* Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (suggesting vaguely that federal courts only had to conform "as near as may be" to the state procedure "in like causes").

15. Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995).

16. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018 (1989).

17. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 320 (2001) ("[T]he Federal Rules would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model."); Subrin, *supra* note 16, at 2026 ("To those who advocated federal rules, intrastate uniformity was to result from the modeling by state supreme courts of state procedure on federal.").

18. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 274 (1989) ("The concept of uniformity among federal district courts, between federal and state courts, and among the states represents a variation on the idea of simplicity.").

19. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358 (2003).

after the Federal Rules.[20] Complete national procedural unity seemed to be just a matter of time.

However, national procedural unity increasingly came under attack from four sides beginning in the 1980s. First, federal judges, who had previously exercised considerable restraint, began to rely increasingly on local rules.[21] This fragmented uniformity among the federal district courts. As national uniformity was already in doubt, states considered abdication of their own state procedures less desirable.

Second, recognition of the power of procedure to advance substantive agendas has led to increased political pressures.[22] Interest groups lobby rulemakers and legislators to create or preserve procedural advantages. The political successes of these interest groups further undermined national procedural uniformity.

Third, states increasingly asserted their own rulemaking independence. Commentators have cited a long list of potential causes for this development, including "discovery abuse, expense and delay, excessive judicial power and discretion, excessive court rulemaking, unpredictability, litigiousness, an overly adversarial atmosphere, unequal resources of the parties, lack of focus, and formal adjudication itself."[23] Others have speculated that the reinvigorated role for the states in crafting rules of state civil procedure is related to "the

20. *See* Thomas D. Rowe, Jr., *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843 ("Well over half the states now have civil rules closely patterned after the Federal Rules of Civil Procedure, and movement toward adoption of federal-model rules continues in at least some of the other states." (footnote omitted)).

21. *See, e.g.*, Chemerinsky & Friedman, *supra* note 15, at 761-62 ("In general, the local rules have handled practical aspects of litigation not covered by the federal rules. Increasingly, however, local rules deal with much more important aspects of court procedure, and there is enormous variance among the districts."); Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 615 (2002) ("The growing balkanization of federal civil procedure has received considerable critical commentary.").

22. *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1734 (2004) (analyzing congressional "substance-specific" procedural legislation); Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 184 (2007) ("[J]udges, and legislatures for that matter, under the more conservative political landscape of the last thirty years, have through such techniques as demanding more rigorous pleading, reducing discovery both in scope and amount, and expansive use of summary judgment already limited the alleged gains of plaintiffs under more expansive procedure.").

23. Stephen N. Subrin, *How Equality Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911-12 (1987).

resurgence of state government authority in substantive law and constitutional rights promoted by the Rehnquist Court's 'new federalism' jurisprudence."[24]

Whatever the reasons, national procedural uniformity currently seems extremely unlikely.[25] In fact, the "trend toward state conformity to the federal rules . . . has substantially reversed itself."[26]

Fourth, some jurisdictions followed federal rules to achieve uniformity with federal courts in their state. Other jurisdictions hoped for uniformity with other states. *Iqbal* thus creates a tension between the desire of some states to achieve uniformity with federal courts and the desire to follow the same standard as other states. Uniformity with the federal rules is likely to lose in at least some states while others will continue to value state-federal uniformity over interstate uniformity.

In short, the procedural landscape is now increasingly complex as more and more state courts diverge from the Federal Rules.[27] Many states are experimenting with procedural innovations that depart significantly from the federal regime.[28] For example, the great majority of states, including many former replica jurisdictions, have declined to adopt the amendment to Federal Rule of Civil Procedure 26(b), which limited the scope of discovery from subject-matter relevance to claims-and-defenses relevance.[29] We are left with an "increasingly byzantine world of civil procedure."[30]

24. Koppel, *supra* note 14, at 1175 (footnote omitted).

25. *See, e.g.*, Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 105 (2007) ("Unless all can agree on how to resolve . . . basic value choices, the vision of a perfect procedural system is something of a chimera.").

26. *See* Oakley, *supra* note 19, at 355. The author also notes the dearth of new replica states and the divergence of state procedural rules from their federal counterparts. *See id.* at 358-59.

27. *See* Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 613 (2002).

28. *Id.* at 647 ("While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges . . . .").

29. *See generally* Koppel, *supra* note 14, at 1184-88 (noting that the amendment to Federal Rule 26(b) that presumptively narrowed the scope of discovery has been "universally criticized by legal scholars" and, as a result, the Federal Rules "moved away from the states, rather than vice versa" (citations and quotations omitted)).

30. Tobias, *supra* note 21, at 616.

II. THE NEW FEDERAL PLAUSIBILITY-PLEADING STANDARD

Twombly[31] and *Iqbal*,[32] two recent Supreme Court decisions concerning pleading, further complicate this picture. Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of a complaint that fails to state a claim upon which relief may be granted.

Until May of 2009, the sufficiency of a complaint was judged by the standard the Supreme Court had first announced more than fifty years ago in *Conley v. Gibson*.[33] Under *Conley*, pleadings withstood 12(b)(6) motions under "the accepted rule that a complaint should not be dismissed for failure to state a claim 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."[34] *Conley*'s liberal notice-pleading formulation became a cornerstone of federal civil procedure. It also had a significant impact on state pleading standards as many states, including Washington, incorporated *Conley* into their local practice.[35]

At the federal level, *Iqbal* and *Twombly* together abrogated the prior standard for judging the sufficiency of pleading first stated fifty years ago in *Conley*. *Twombly* replaced *Conley*'s old notice-pleading standard with a new plausibility-pleading standard. Under this standard, a complaint must now allege "enough facts to state a claim to relief that is plausible on its face" or risk dismissal.[36] To avoid dismissal at the pleading stage, post-*Iqbal* plantiffs must plead sufficient facts to "nudge[] their claims across the line from conceivable to plausible."[37]

Twombly arose in the context of an allegation of "antitrust conspiracy through . . . parallel conduct."[38] Commentators speculated briefly whether the new plausibility-pleading standard would only apply to Sherman Act cases. On

31. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

32. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

33. 355 U.S. 41 (1957).

34. *Id.* at 45-46 (emphasis added); *see* FED. R. CIV. P. 12(b)(6) ("[A] party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . . .").

35. *See, e.*g., Halvorson v. Dahl, 574 P.2d 1190, 1191 (Wash. 1978) ("On a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim."); *see also* Christensen v. Swedish Hosp., 368 P.2d 897 (Wash. 1962) (citing *Conley*).

36. *Twombly*, 550 U.S. at 570.

37. *Iqbal*, 129 S. Ct. at 1974.

38. *Twombly*, 550 U.S. at 553.

May 18, 2009, the Supreme Court settled this question when it issued its opinion in *Ashcroft v. Iqbal*, holding that the *Twombly* plausibility standard applies to all civil cases in federal courts.[39]

The Court elaborated that determining whether a complaint states a plausible claim for relief will be a "context-specific task."[40] The Court went on to say that "judicial experience and common sense" should inform the plausibility standard.[41] Under *Iqbal*, courts are instructed to follow a "two-pronged" approach to 12(b)(6) motions. First, courts must identify pleadings that are "no more than conclusions" and deny them the "assumption of truth."[42] Second, courts must apply the plausibility standard to any remaining well-pleaded factual allegations to "determine whether they plausibly give rise to an entitlement to relief."[43]

Federal pleading has now become "a significant veto-gate through which all claims must pass."[44] Supporters of *Iqbal* and *Twombly* point out that notice pleading under *Conley* was a low barrier of entry into federal courts. Once plaintiffs had passed this bar, they were able to utilize the full power of court sanctioned pretrial discovery.[45] This created high costs for defendants, even if they were eventually granted a favorable summary judgment motion.[46] In the

39. *Iqbal*, 129 S. Ct. at 1953.

40. *Id.* at 1950.

41. *Id.*

42. *Id.*

43. *Id.*

44. Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 159 (2010).

45. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 n.6 (2007) (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)); *see also* Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009) ("The Court's specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden."); Jay Tidmarsh, *Resolving Cases "on the Merits"*, 87 DENV. U. L. REV. 407, 409 (2010) (expressing concern over "the significant costs that the 'on the merits' principle generates").

46. *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 559-60; *see also* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 70-71 (2007); Richard L. Marcus, *The Story of* Hickman*: Preserving Adversarial Incentives While Embracing Broad Discovery*, *in* CIVIL PROCEDURE STORIES 323, 355 (Kevin M. Clermont ed., 2d ed. 2008). In part, heightened concerns about discovery costs might be driven by the difficulties associated with discovery in the digital age. *See, e.g.*, GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 4-5 (2006); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007), http://law.richmond.edu/jolt/v13i3/article10.pdf; Salvatore Joseph

meantime, litigious plaintiffs, so the argument goes, were able to harass defendants through extensive discovery and use pretrial litigation costs as a bargaining chip to settle nonexistent grievances.

Twombly and *Iqbal* changed this, though it is not clear whether the change was for the better. What is clear is that under *Twombly* and *Iqbal*, more claims are dismissed at the pleading stage.[47] Predictably, plausibility pleading makes it particularly hard to plead cases that involve the state of mind of the defendant. There, plaintiffs often cannot know or plead essential information with particularity at the beginning of a case without the benefit of discovery.[48] It is precisely this discovery that *Iqbal* denies to plaintiffs who fail to plead with the necessary factual detail. Early evidence suggests that civil rights, antitrust, consumer protection, and employment discrimination suits are disproportionally affected by the new heightened pleading standard.[49]

Commentators[50] and legislators[51] are now pondering whether the reduced discovery burdens justify the reduced access to federal courts.

III. THE DILEMMA OF THE WASHINGTON SUPREME COURT

Developments in federal pleading jurisprudence through *Iqbal* and *Twombly* were bound to make an appearance in state courts. Given

Bauccio, Comment, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 271-72 (2007).

47. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010).

48. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1950; Epstein, *supra* note 46, at 70-71; Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1262 (2008).

49. *See, e.g.*, Wasserman, *supra* note 44, at 160-61 ("Civil rights is one substantive area in which *Iqbal* will empower courts to increase scrutiny over pleadings, a prediction already bearing out in the early days of the new pleading regime.").

50. *See, e.g.*, *id.* at 159 ("*Iqbal* and *Twombly* together inextricably link pleading and discovery—the motivation for the apparent move to strengthen pleading as a threshold hurdle was the perceived need to protect defendants from wide-ranging, expensive, burdensome, and distracting discovery."); *id.* at 183 ("[The result of *Iqbal* and *Twombly*] is a disconnect between *Iqbal*'s rigid pleading regime and substantive constitutional and civil rights laws that depend on looser pleading and broader discovery for proper vindication of underlying substantive policies of exposing and deterring governmental misconduct and of holding public officials accountable for constitutional violations.").

51. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009); *see also Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009).

longstanding ideals of uniform national civil procedures, it was only a matter of time before defendants would invoke *Iqbal* and *Twombly* outside of federal courts. *McCurry v. Chevy Chase Bank* is the first case in which a state supreme court has ruled on this issue.

In doing so, the Washington Supreme Court faced a formidable dilemma. It had to weigh the value of uniformity against congruence with the rest of the local rules.[52] The Washington Civil Rules are based on the federal rules.[53] Their wording and numbering also reflects the federal rules. For example, Washington Civil Rule 8(a)(1) contains identical language to Federal Rule of Civil Procedure 8(a)(1) that a pleading setting forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[54] As the respondent in *McCurry* reminded the court, procedural uniformity has long allowed Washington courts to look "to federal court interpretations of the Federal Rules of Civil Procedure for guidance in construing the Civil Rules."[55]

Washington courts have also declared repeatedly that federal court interpretations of the federal rules are "highly persuasive in determining the effect of Washington's rules."[56] For example, the Washington Supreme Court has previously held that "when the language of a Washington Rule and its federal counterpart are the same, courts should look to decisions interpreting the Federal Rule for guidance."[57] Petitioners therefore urged the Washington court to construe the local Rule 12(b)(6) along the lines that the Supreme Court had construed Federal Rule of Civil Procedure 12(b)(6). The respondents countered by stressing local autonomy and citing only Washington State cases reflecting the old pleading standard from *Conley v. Gibson*.[58]

The Washington Supreme Court weighed these considerations and declined to follow the new federal plausibility-pleading standard.[59] As a result,

52. *See* Tobias, *supra* note 18.

53. *See, e.g.*, Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1282 n.2 (Wash. 2006) (Madsen, J., concurring) ("Our version of CR 12(b) mirrors its federal counterpart.").

54. FED. R. CIV. P. 8(a)(1); WASH. SUP. CT. C.R. 8(a)(1).

55. Brief of Respondent at 11, McCurry v. Chevy Chase Bank, 233 P.3d 861 (Wash. 2010) (No. 60075-3), 2007 WL 6839814, at *11.

56. Sanderson v. Univ. Vill., 989 P.2d 587, 590 n.10 (Wash. Ct. App. 1999).

57. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 n.14 (1984) (citing Am. Disc. Corp. v. Saratoga W., Inc., 499 P.2d 869 (Wash. 1972)).

58. Appellant's Opening Brief, *McCurry*, 233 P.3d 861 (No. 60075-3-I), 2007 WL 6839813, at *10-*11 (citing Washington cases that incorporate *Conley*'s "no set of facts" language).

59. McCurry v. Chevy Chase Bank, 233 P.3d 861 (Wash. 2010).

the pleading standard in Washington State will begin to diverge significantly from the federal pleading standard.

The court was willing to depart from the uniform civil procedure regime because it perceived that *Twombly* and *Iqbal* had relied on "policy determinations specific to the federal courts."[60] According to the Washington Supreme Court, *Twombly* had reformed federal pleading standards because the Court considered federal trial courts incapable of adequately preventing discovery abuses.[61] This inability makes federal discovery expensive and encourages defendants to settle "largely groundless" claims.[62] The Washington Supreme Court declared that there had been no showing that these factors were significant in Washington State.[63] Absent such a showing, the Washington Supreme Court abandoned conformity with the Federal Rules of Civil Procedure.

The Washington Supreme Court also stressed policy considerations that counseled against following the new federal plausibility-pleading regime. For example, the court highlighted the danger that plausibility pleading denies many plaintiffs access to necessary discovery and leads to the early dismissal of meritorious suits.[64] The Washington Supreme Court also wondered whether "runaway discovery expenses [could] be addressed by better means—perhaps involving more court oversight of the discovery process or a change in the discovery rules."[65] Finally, the Washington Supreme Court stressed that the formal rulemaking process is the appropriate forum to consider sweeping changes in pleading standards, as courts are ill equipped to analyze systematically perceived discovery abuses.[66]

In the months and years to come, other state courts will face the same dilemma that the Washington Supreme Court faced: is it better to be uniform with federal rules or consistent with local rules?

IV. IMPLICATIONS AND EVALUATIONS

The Washington Supreme Court's decision to depart from the federal civil procedure regime presents both problems and opportunities. Uniformity, in

60. *Id.* at 863.

61. *Id.*

62. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557-59 (2007).

63. *McCurry*, 233 P.3d at 863.

64. *Id.*

65. *Id.*

66. *Id.* at 864.

some ways, is highly desirable. State-federal procedural uniformity is advantageous for the same reason that interdistrict federal uniformity is advantageous: both simplify litigation, allow lawyers to practice in a number of jurisdictions, and discourage forum-shopping.[67]

Pleading standards, at issue in *Twombly*, *Iqbal*, and *McCurry*, illustrate this point. Heightened pleading standards affect which cases can benefit from discovery and which cases are dismissed at an earlier stage. Predictably this affects substantive rights, litigation outcomes, and the enforcement of rights. This is particularly true in cases where plaintiffs observe questionable behavior by the defendant but lack detailed factual information. For example, the greater factual details demanded by *Iqbal* cannot be satisfied in many civil-rights[68] and employment-discrimination cases.[69] There, plaintiffs often do not or cannot plead information with the particularity demanded by *Iqbal* without the benefit of discovery.[70]

Given the impact of pleading regimes on the enforcement of rights, procedural variation among state courts and between state courts and federal courts encourages forum-shopping and the attendant risk that "similarly situated litigants may be treated differently and, as a result, unfairly."[71] A complaint's chances of survival will vary from state to state depending on the local pleading standards with little or no relation to each other or to the federal pleading regime.

Under current *Erie* jurisprudence, federal courts in a diversity action would not be required to adopt state pleading standards. The rules regarding the specificity to be applied to federal pleadings, the allocation of burdens among parties, and special pleading requirements (under Federal Rule of Civil

67. *See, e.g.*, Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1423-24 (1992) ("Procedural choices that enhance complexity and disuniformity can foster particular values and serve specific interests. Accumulating evidence suggests that many practitioners and their clients, especially those with significant resources and information, have increasingly capitalized on numerous tactical advantages that growing balkanization affords." (internal citation omitted)).

68. *See, e.g.*, Monroe v. City of Charlottesville, 579 F.3d 380, 389 (4th Cir. 2009); Moss v. U.S. Secret Serv., 572 F.3d 962 (9th Cir. 2009).

69. *See, e.g.*, Lopez v. Beard, 333 F. App'x 685 (3d Cir. 2009) (affirming the dismissal of a discrimination suit brought under 42 U.S.C. § 12,132, relying in large part on *Iqbal*); Brown v. JP Morgan Chase Bank, 334 F. App'x 758 (7th Cir. 2009) (same as to a suit brought under 42 U.S.C. § 1985(3)).

70. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009); Epstein, *supra* note 46, at 70-71; Hoffman, *supra* note 48, at 1262.

71. *See* Koppel, *supra* note 14, at 1191 (quoting Am. Law Inst., Complex Litig. Project 1-2, § 4.02, at 51 (Tentative Draft No. 3, 1992)).

Procedure 9) are governed by federal rules and not state rules.[72] Plaintiffs are thus likely to shift litigation to state courts when not constrained by the exclusive subject-matter jurisdiction of the federal courts. Similarly, some plaintiffs might reconfigure their complaints to avoid the diversity jurisdiction of the federal courts. Widening procedural diversity, in short, will constrain more plaintiffs in more jurisdictions in how they can structure complaints that will survive the pleading phase.

The same problem arises under a reverse-*Erie* analysis. State courts hearing federal subject-matter claims utilize state procedures unless the procedural rights are a "basic and fundamental" part of the federal right at issue.[73] In such cases, states may not eliminate those rights.[74] The Supreme Court, most notably in *Brown v. Western Railway of Alabama*, held that pleading standards can be integral to the enforcement of federal rights.[75] However, under *Western Railway*, states may not apply *more* stringent pleading standards than would be applied to the case had it been brought in federal court.[76] The cases are silent on whether states may apply *less* stringent pleading standards to federal claims. The main rationale cited in *Western Railway* was the protection of federal rights in state courts.[77] Less stringent pleading standards do not threaten the enforcement of federal rights and will pass muster under currently existing reverse-*Erie* jurisprudence.[78] The forum-shopping concern is thus present in *Erie* and reverse-*Erie* cases.

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72. Hanna v. Plumer, 380 U.S. 460 (1965).

73. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 151 (1988) (noting, in striking down Wisconsin's notice-of-claim statute, that "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws" (quotations and citations omitted)); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952)("[T]he right to trial by jury is too substantial a part of the rights accorded by [Congress] to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used.").

74. These cases typically involve claims arising under the Federal Employers' Liability Act and section 1983 of the Civil Rights Act.

75. 338 U.S. 294 (1949).

76. In *Western Railway*, the Georgia rule instructed courts to construe pleading allegations "most strongly against the pleader." *Id.* at 296.

77. *See id.* at 298-99.

78. *But cf.* Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432, 1453 (2008) (arguing that "dual pleading standards create minimal risk of forum shopping and will not transform state courts into havens for speculative lawsuits" and that "just as the scales cannot be weighted in favor of the defendant, they similarly cannot be weighted in favor of the plaintiff"). However, the only case cited for this proposition is a case from 1915 that vaguely suggests that "[w]hen a law that is relied on as a source of an obligation in tort . . . sets a limit to the

However, the Washington Supreme Court's departure from conformity with the federal civil procedure regime does not only present problems; it also presents opportunities. States, like Washington, can fashion procedures that are attentive to local needs. As early opponents of a uniform procedural regime pointed out when the Federal Rules of Civil Procedure were first adopted, conditions around the country vary and different regions need different procedures.[79] The Washington Supreme Court saw no evidence of discovery abuses in Washington State and thus found little reason to import heightened pleading standards to a system that did not need them.[80]

Additionally, in this instance it was the federal system that moved away from long-standing pleading rules. *Conley* has governed pleading in federal court and in many states for more than fifty years. States that would like to adhere to *Conley*'s pleading standard can point to the value of settled expectations, predictability in litigation, a massive body of decisions that clarifies how *Conley* is to be applied, and a bench and bar familiar with the old pleading standard.

Finally, other states can learn by comparing the experience of states that continue to follow *Conley* and those that adopt the *Iqbal* plausibility standard. Variation among states allows them to evaluate what procedures are effective for their particular setting.[81] In effect, each state that diverges from the federal pleading rules becomes another laboratory of experimentation with procedural mechanisms.

existence of what it creates, other jurisdictions naturally have been *disinclined to press the obligation farther*." *Id.* at 1452 (quoting Atl. Coast Line R.R. v. Burnette, 239 U.S. 199 (1915)).

79. Subrin, *supra* note 16, at 2007-08 (highlighting Senator Thomas Walsh's opposition to uniform federal rules: "[Walsh] believed it was unlikely . . . that all states would agree to follow a new set of federal rules. Conditions around the country varied and different regions needed different procedures" (footnote omitted)).

80. Also, once one local procedural rule departs from the federal regime other local procedural rules are more likely to be changed as well because procedures interact. *Twombly* and *Iqbal* demonstrate this point: there, the court used heightened pleading standards to reduce discovery costs and the risk of discovery abuse.

81. Koppel, *supra* note 14, at 1246 (calling procedural innovation across state jurisdictions "a rich medium for empirical research"); Marcus, *supra* note 25 (providing a skeptical reply to Koppel). Koppel also authored a reply to the reply. *See* Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971 (2009).

CONCLUSION

State and federal civil procedure have been diverging for a number of decades. The Washington Supreme Court's decision in *McCurry v. Chevy Chase Bank* marks the beginning of further divergence. Pleading standards in many state courts will continue to follow, explicitly or implicitly, the old *Conley* notice-pleading standard. Federal pleading standards will follow the plausibility-pleading standard of *Twombly* and *Iqbal*. In many ways this lack of uniformity is lamentable. Civil procedure, already complicated, will become even more byzantine, unpredictable, and local.

On the positive side, however, procedural variation is creating opportunities to study which rules are best suited to advance given goals. Will states that follow *Conley* see more cases that lack merit and that were filed merely to extract an early settlement from defendants concerned with high discovery costs? Will states that follow *Iqbal* actually see lower discovery costs? Will they find that claims that turn out to be meritorious were dismissed prematurely under the new heightened pleading standard? Will different types of cases, say employment-discrimination suits or trade-secret suits, find it easier to prevail in a pre-*Iqbal* or post-*Iqbal* jurisdiction?

Only time will tell. In the meantime, lawyers should be alert to a rapidly changing civil procedure environment that lacks predictability and uniformity.

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