# ACCESS-TO-JUSTICE V. EFFICIENCY: AN EMPIRICAL STUDY OF SETTLEMENT RATES AFTER *TWOMBLY* & *IQBAL*†

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*A party's decision to settle may be affected by the plausibility pleading standard required by* Bell Atlantic Corp. v. Twombly. *While previous empirical studies have focused on motions to dismiss, this study attempts to find a relationship between settlement rates and the pleading standard. Our data and analysis show that the probability of settling after* Twombly *has decreased while the rates of settlements themselves are increasing. In particular, IP and civil rights cases are especially likely to settle, and meritorious claims settle at a higher rate than nonmeritorious claims. These findings question the current arguments that the* Twombly *pleading standard may be inhibiting access to justice and/or improving efficiency. The goal of conserving judicial resources may have been circumvented by litigant behavior as more cases are going on to litigation rather than settling. The access-to-justice arguments may have also been challenged in that more cases are being adjudicated after* Twombly *instead of less.*

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† The authors would like to thank Professor Paul Stancil for providing the inspiration for this piece. The authors would also like to thank Professors Robert Lawless, Jennifer Robbennolt, Suja Thomas, Daniel Hamilton, and Peter Molk for their helpful conversations, comments, and guidance. The authors are also grateful for the feedback received from the participants of the Western Empirical Legal Studies Conference, Midwestern Law & Economics Association Conference, and the Conference on Empirical Legal Studies. The authors are also thankful to the editors, members, and staff of the *University of Illinois Law Review*. Lastly, the authors would like to thank their family and friends for their support and encouragement.

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"[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[1]

Justice David Souter, *Bell Atlantic Corp. v. Twombly*

## I. INTRODUCTION

In *Bell Atlantic Corp. v. Twombly,* the U.S. Supreme Court reinterpreted the notice pleading standard of the Federal Rules of Civil Procedure and with that changed the standard for dismissal for failure to state a claim under Rule 12(b)(6).[2] This reinterpretation created a new, heightened standard for a pleading's required specificity. *Ashcroft v. Iqbal,* decided two years later, expanded the *Twombly* standard to all cases.[3] The Court's new requirement that a complaint allege facts with sufficient specificity to state a claim for relief that is plausible on its face, and not merely conceivable, will affect the dismissal of certain claims under Rule 12(b)(6).[4]

A party's decision to settle may also be affected by the heightened pleading standard required by *Twombly*. This link between *Twombly's* plausibility standard and settlements may be due to the economic underpinnings of litigation in the United States.[5] Economic gamesmanship in litigation has been described as a product of two competing asymmetries; these asymmetries may have become more predominant through the current pleading standards leading to a change in the way parties weigh their options (in time and money) between entering litigation and settling.[6] However, the economic reasoning that led the Court to adopt *Twombly's* plausibility standard may have been overly friendly to certain defendants and could cause a significant access-to-justice problem for claims that cannot meet the plausibility standard due to informational and resource disparities.[7] Both theories—the economic game theory of litigation and the access-to-justice theory—infer that *Twombly's* heightened pleading standard has changed the way cases are disposed.[8]

Empirical study of settlement rates may provide validation for one (or both) of these theories. The purpose of this Note is to answer the call for further empirical research by examining the relationship between the

1. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).
2. *Id.* at 545; *cf.* FED. R. CIV. P. 8(a)(1), 12(b)(6).
3. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
4. *Twombly*, 550 U.S. at 547.
5. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 93 (2009).
6. Stancil, *supra* note 5, at 92; *see* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 71–76 (2003).
7. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010); Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 646–47 (2010) [hereinafter *Frivolous Cases*]; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1852 (2008) [hereinafter *Unconstitutional*].
8. *See infra* Part IV and accompanying text.

heightened *Twombly* pleading standard and settlement rates. Part II of this Note explains the U.S. Supreme Court's decisions in *Conley*, *Twombly*, and *Iqbal*, as well as the development of the pleading standard under Rule 8(a). Part III discusses past empirical studies that have assessed the effect of *Twombly* on motions to dismiss. In addition, Part III discuses past empirical studies examining the rates at which federal civil cases settle. Part IV explores the normative background of the *Twombly* pleading standard's effect on economic and access-to-justice theories of litigation and presents our research hypotheses. Part V explains the methodology and limitations of this study. Part VI presents our data and an analysis of our results. Part VII discusses our conclusions and suggestions for future studies.

## II. UNDERSTANDING THE PLEADING STANDARD: RULE 8(A), *CONLEY*, *TWOMBLY*, AND *IQBAL*

Rule 8(a)(2) of the Federal Rules of Civil Procedure states that "[a] pleading that states a claim for relief must contain . . . a *short and plain statement* of the claim showing that the pleader is entitled to relief . . . ."[9] The adoption of the Federal Rules of Civil Procedure—and particularly the adoption of Rule 8—in 1938 established the notice pleading standard within federal courts. Notice pleading meant that "plaintiffs [were] not required to include a comprehensive factual statement in their complaint 'so long as defendants receive fair notice of the nature and basis of the claims against them.'"[10] As one commentator explained, "[t]he drafters chose this language deliberately to signal the softening of an earlier pleading regime known as 'code pleading,' under which the equivalent requirement was that a complaint contain a 'statement of the facts constituting the cause of action.'"[11]

### *A.* Conley v. Gibson*: The No Sets of Facts or Conceivability Standard*

Before the Supreme Court decided *Twombly* in 2007, the leading Supreme Court case interpreting Rule 8(a)(2) was *Conley v. Gibson*, decided in 1957.[12] In *Conley,* the plaintiffs were unionized African-American railroad workers whose collective-bargaining agreement provided special protections for African-American workers, including loss of employment and seniority provisions.[13] The plaintiffs claimed that the

9. FED. R. CIV. P. 8(a)(2) (emphasis added).
10. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1016–17 (quoting Koan Mercer, Comment, *"Even in These Days of Notice Pleading": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1172 (2004).
11. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 557 (2010).
12. Conley v. Gibson, 355 U.S. 41 (1957).
13. *Id.* at 43.

Union had violated their rights to fair representation under the Railway Labor Act ("RLA").[14] The plaintiff's complaint alleged that the railroad eliminated forty-five jobs held by African-Americans and refilled those jobs with either white employees or the same African-American employees, rehired with the loss of seniority.[15] The complaint also alleged that despite the plaintiff's request to the Union, the Union did nothing to prevent the railroad from eliminating the forty-five jobs because the plaintiffs were not white.[16]

The issue before the Court was whether the plaintiffs failed to state a claim upon which relief could be granted.[17] While finding for the plaintiffs, the Court held 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," thus introducing the "no sets of facts" or "conceivability" standard.[18]

### *B.* Bell Atlantic Corp. v. Twombly*: The Plausibility Standard*

Fifty years after *Conley*, the Supreme Court reinterpreted Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.[19] In *Twombly*, the plaintiff's complaint alleged that Bell Atlantic and its system of regional service monopolies ("Baby Bells") had violated the Sherman Antitrust Act.[20] Specifically, the plaintiff's complaint alleged that the defendants conspired and engaged in parallel conduct to inhibit the growth of upstart telecommunication companies and to eliminate competition with each other.[21] The alleged purpose of the conspiracy was to allow each Baby Bell to have dominance over a specific market.[22] As in *Conley*, the issue before the Supreme Court was whether the plaintiffs failed to state a claim upon which relief could be granted.[23] In finding for the defendants, the Supreme Court held that "stating a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement [showing a conspiracy between Bell Atlantic Corporation and the Baby Bells] was made."[24]

Justice Souter, writing for the majority, explained that because pleadings are inherently substantive, the *Conley* "no-set-of-facts" stand-

14. *Id.*
15. *Id.*
16. *Id.* at 42–43.
17. *Id.* at 42.
18. *Id.* at 45–46.
19. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
20. *Id.* at 550–51.
21. *Id.*
22. *Id.*
23. *Id.* at 553.
24. *Id.* at 556.

ard should be retired for a heightened plausibility standard.[25] Justice Souter explained that the Court does not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[26] Instead, the plausibility standard requires that "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true"[27] and the plaintiff need merely nudge "their claims across the line from conceivable to plausible."[28]

After *Twombly* was decided, the issue facing federal courts was whether the plausibility standard was confined to the antitrust context of *Twombly*. Adding to the speculation that *Twombly* was confined to the antitrust context, two weeks after *Twombly* was decided the Court issued a *per curiam* opinion in *Erickson v. Pardus*.[29] In *Erickson*, it rejected a prisoner's civil rights complaint for deliberate indifference to serious medical needs for being too conclusory and did not refer to the plausibility standard.[30] However, the Supreme Court in *Erickson* did cite *Twombly* and stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[31]

In addition, most federal courts viewed the *Twombly* decision as not altering the pleading standard set forth in *Conley*.[32] In fact, one federal court even illustrated a misunderstanding of the plausibility standard set forth in *Twombly*.[33]

### C. Ashcroft v. Iqbal*: Reexamining and Clarifying the Plausibility Standard*

Enter *Ashcroft v. Iqbal*.[34] In the wake of the September 11, 2001 terrorist attacks, federal officials arrested and detained the plaintiff, Javaid Iqbal.[35] While in prison, Iqbal filed a *Bivens* action against multiple par-

25. *Id.* at 563.
26. *Id.* at 570.
27. *Id.* at 545.
28. *Id.* at 570.
29. Erickson v. Pardus, 551 U.S. 89 (2007).
30. *Id.* at 93–94.
31. *Id.* at 93.
32. *See* Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) ("[T]he Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression . . . ."); Boykin v. Keycorp, 521 F.3d 202, 213–14 (2d Cir. 2008) (finding that *Twombly* did not change the notice focused standard set forth by *Conley*); Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 296 n.1 (6th Cir. 2008) (explaining that *Twombly* "did not significantly alter notice pleading"). *But see* Morgan v. Hanna Holdings, Inc., 635 F. Supp. 2d 404, 407 (W.D. Pa. 2009) ("[*Twombly*] required a heightened degree of fact pleading . . . .").
33. Halpin v. David, No. 4:06cv457-RH/WCS, 2009 WL 789684, at *3 (N.D. Fla. Mar. 20, 2009) ("The pleading standard is not heightened, but flexible, in line with Rule 8's command to simply give fair notice to the defendant of the plaintiff's claim and the grounds upon which it rests.").
34. 556 U.S. 662 (2009).
35. *Id.* at 666.

ties, including FBI Director Robert Mueller and Attorney General John Ashcroft.[36] Iqbal's complaint alleged that Mueller and Ashcroft had "adopted an unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin."[37]

Just like in *Conley* and *Twombly*, the issue before the Supreme Court was whether the plaintiff failed to state a claim upon which relief could be granted.[38] Finding for the defendants, the Court held that Iqbal's allegations were "bare assertions, much like the pleading of conspiracy in *Twombly*."[39] More importantly, the Court evaluated Iqbal's complaint under *Twombly's* plausibility standard.[40] By evaluating Iqbal's claims under the plausibility standard, the Supreme Court eliminated any doubt that the plausibility standard would be confined to antitrust cases.[41] To avoid misunderstandings of the plausibility standard's application, the Supreme Court explained that determining whether a complaint states a *plausible* claim for relief, the Court explained that a *Twombly* analysis should be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[42]

## III. Literature Review

### *A. Motion to Dismiss Empirical Studies*

Since the Supreme Court handed down *Twombly* in 2007 and *Iqbal* in 2009, at least nine empirical studies have been conducted to determine if the heightened pleading standard articulated in *Twombly* has had an effect on the rates at which motions to dismiss have been granted.

#### *1. Post-*Twombly *(pre-*Iqbal*) Motion to Dismiss Empirical Studies*

Four of these nine studies considered the post-*Twombly* (pre-*Iqbal)* period. These studies compared the rate at which motions to dismiss were granted in the pre-*Twombly* era with the rate at which motions to dismiss were granted in the period after *Twombly* but before *Iqbal*. Kendall Hannon's Note was the first empirical study to determine if

36. *Id.*
37. *Id.*
38. *Id.* at 689 (Souter, J., dissenting).
39. *Id.* at 681.
40. *Id.* at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007))).
41. *Id.* at 684 ("Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure.").
42. *Id.* at 679.

*Twombly* had any effect on the rate at which motions to dismiss were granted.[43]

Hannon's Note assessed 3287 (2212 pre-*Twombly* (*Conley*) cases and 1075 post-*Twombly* (pre-*Iqbal*) cases) published[44] district court opinions from June 2006 to September 2007 (pre-*Twombly* era) and June to December 2007 (post-*Twombly* era). Hannon found the rate at which 12(b)(6) motions to dismiss were granted increased almost 3% from 36.8% in the pre-*Twombly* era to 39.4% in the post-*Twombly* (pre-*Iqbal*) era.[45] In terms of civil rights cases, Hannon found the rate at which 12(b)(6) motions to dismiss were granted was more pronounced, reporting an 11% increase from 41.7% in the pre-*Twombly* era to 52.9% in the post-*Twombly* (pre-*Iqbal*) era.[46] In all other cases (excluding civil rights cases), Hannon found the rate at which 12(b)(6) motions to dismiss were granted increased less than 1% from 36.9% in the pre-*Twombly* era to 37.4% in the post-*Twombly* (pre-*Iqbal*) era.[47]

Jospeh A. Seiner conducted two empirical studies that assessed the impact of *Twombly* on motions to dismiss in cases filed pursuant to Title VII (employment discrimination)[48] and the Americans with Disabilities Act ("ADA").[49] In his Title VII study, Seiner analyzed 532[50] motions to dismiss that were filed in the year immediately prior to *Twombly* and the year immediately after *Twombly*.[51] After disqualifying and eliminating some opinions for various reasons, Seiner's study analyzed 191 pre-*Twombly* decisions and 205 post-*Twombly* (pre-*Iqbal*) decisions.[52] Seiner found the rate at which motions to dismiss were granted (in whole) in-

43. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

44. Hannon's study only considered opinions that were published on Westlaw. *Id.* at 1833–34. Hannon acknowledges that only looking at published Westlaw opinions can be a limitation of his study. *Id.* at 1829 ("While relative dismissal rates based on reported cases may not perfectly correspond with the relative dismissal rates in all federal court cases, the fact that any 'reported case bias' is equally present in both the pre- and post- *Twombly* case set allows for a meaningful comparison and analysis of any change.").

45. *Id.* at 1836. If you include cases where the 12(b)(6) motion to dismiss was granted-in-part/denied-in-part, Hannon found that the grant rate increased almost 2% from 65.9% in the pre-*Twombly* era to 67.4% in the post-*Twombly* (pre-*Iqbal*) era. *Id.*

46. *Id.* at 1837. If you include cases where the 12(b)(6) motion to dismiss was granted-in-part/denied-in-part, Hannon found that the grant rate increased 6% from 76.4% in the Pre-*Twombly* era to 83.1% in the post-*Twombly* (pre-*Iqbal*) era. *Id.*

47. *Id.* If you include cases where the 12(b)(6) motion to dismiss was granted-in-part/denied-in-part, Hannon's study found that the grant rate increased less then 1% from 61.3% in the Pre-*Twombly* (*Conley*) era to 62.1% in the post-*Twombly* era. *Id.*

48. Seiner, *supra* note 10, at 1027.

49. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 95 (2010).

50. Seiner analyzed 264 pre-*Twombly* decisions and 268 post-*Twombly* decisions that were posted on Westlaw. Seiner, *supra* note 10, at 1027–28. Seiner acknowledges that only looking at published Westlaw opinions is a limitation of his study. *Id.* at 1031 ("Rather, the study focuses only on those cases that appear in the Westlaw database. Thus many decisions that did not result in a published opinion go undetected by this analysis. There may be some concern that utilizing this source will result in a skewed result as the study omits decision not reported in Westlaw.").

51. *Id.* at 1027–28.

52. *Id.* at 1028–29.

creased about 3% from 54.5% in the pre-*Twombly* era to 57.1% in the post-*Twombly* (pre-*Iqbal*) era.[53] Including motions that were granted-in-whole or granted-in-part, Seiner found the rate at which motions to dismiss were granted increased almost 2% from 75.4% in the pre-*Twombly* era to 77.6% in the post-*Twombly* (pre-*Iqbal*) era.[54] When the comparison is restricted to the most recent six months of the study, Seiner found the increase was more pronounced, as the rate at which motions to dismiss were granted (in whole or in part) increased almost 6% from 75.4% in the pre-*Twombly* era to 80.9% in the post-*Twombly* (pre-*Iqbal*) era.[55]

In his ADA study, Seiner examined 478 (233 pre-*Twombly* cases and 245 post-*Twombly* (pre-*Iqbal*) cases) cases filed pursuant to Title I of the ADA, which prohibits employment discrimination, or an employment-related retaliation claim under Title V of the ADA where a motion to dismiss was filed.[56] After eliminating some cases,[57] Seiner ultimately analyzed 59 pre-*Twombly* opinions and 65 post-*Twombly* (pre-*Iqbal*) opinions.[58] Seiner found the rate at which motions to dismiss were granted (in whole) increased over 10% from 54.2% in the pre-*Twombly* era to 64.6% in the post-*Twombly* (pre-*Iqbal*) era.[59] Including motions that were granted-in-whole or granted-in-part, Seiner found the rate at which motions to dismiss were granted increased over 14% from 64.4% in the pre-*Twombly* era to 78.5% in the post-*Twombly* (pre-*Iqbal*) era.[60]

The last post-*Twombly* (pre-*Iqbal*) empirical study to determine if *Twombly* had any effect on 12(b)(6) motions to dismiss was a study conducted by William H.J. Hubbard.[61] Accounting for possible selection effects in litigation, Hubbard concluded *Twombly* caused no significant change in terms of the rates at which a 12(b)(6) motion to dismiss was granted.[62]

### 2. *Post-*Iqbal *Motion to Dismiss Empirical Studies*

Published in 2010 and 2012 respectively, Patricia W. Hatamyar conducted two empirical studies to determine the effect of *Twombly* as well

53. *Id.* at 1029.
54. *Id.* at 1029–30.
55. *Id.* at 1030–31.
56. Seiner, *supra* note 49, at 116–17.
57. Seiner eliminated cases "[b]ecause the search terms used were extremely broad" and because some cases "were not brought under Title I or V of the ADA, or that they involved a claim brought under a statute other than the ADA." *Id.* at 116.
58. *Id.* at 116–17. Seiner acknowledges that the limited number of ADA decisions addressing motions to dismiss is a limitation of his study. *Id.* at 118 ("From a purely numerical standpoint, the limited number of cases makes it difficult to draw any substantial conclusions regarding the resulting differentials between the two data sets.").
59. *Id.* at 118.
60. *Id.*
61. William H. J. Hubbard, *The Problem of Measuring Legal Change, with Application to* Bell Atlantic v. Twombly (Univ. of Chi. Law & Econ., Olin Working Paper No. 575, 2012), *available at* http://ssrn.com/abstract=1883831.
62. *Id.* at 25–26.

as *Iqbal* on 12(b)(6) motions to dismiss. In her first study, Hatamyar examined a total of 1039 cases (444 pre-*Twombly* cases, 422 post-*Twombly* cases and 173 post-*Iqbal* cases) in which a 12(b)(6) motion to dismiss was filed.[63] Comparing the pre-*Twombly* cases to the post-*Twombly* and post-*Iqbal* cases, Hatamyar found that there was a general increase in the rates at which 12(b)(6) motions to dismiss were granted, irrespective if the defendant was given leave to amend, from 46% in the pre-*Twombly* era to 48% and 56% in the post-*Twombly* era and post-*Iqbal* era respectively.[64] Including 12(b)(6) motions to dismiss that were granted-in-part and denied-in-part, Hatamyar found that there was a general increase in the rates at which motion to dismiss were granted from 74% in the pre-*Twombly* era to 77% and 82% in the post-*Twombly* era and post-*Iqbal* era respectively.[65]

In a subsequent study, Hatamyar updated her initial study by analyzing 460 different post-*Iqbal* cases, not included in her original study, in which a 12(b)(6) motion to dismiss was filed.[66] Irrespective if the defendant was given leave to amend, Hatamyar found the rate at which 12(b)(6) motions to dismiss were granted was 61%.[67] Including 12(b)(6) motions to dismiss that were granted in part and denied in part, Hatamyar found the rate at which motions to dismiss were granted was 83%.[68] More notably, Hatamyar found the percentage of 12(b)(6) motions to dismiss granted in full with leave to amend increased from 6% in the pre-*Twombly* era to 9% in the post-*Twombly* era to 21% in the post-*Iqbal* era.[69]

In addition to Hatamyar's two empirical studies, Raymond H. Brescia examined the effect of *Twombly* and *Iqbal* on 12(b)(6) motions to dismiss on two classes of civil rights cases, those alleging employment and housing discrimination.[70] Brescia examined a total of 625 cases (187 pre-*Twombly* cases, 160 post-*Twombly* cases, and 278 post-*Iqbal* cases) in which the defendant filed a 12(b)(6) motion to dismiss.[71] Brescia found a general increase in the percentage of 12(b)(6) motions to dismiss that were granted from 61% in the pre-*Twombly* era and 57% in the post-

63. Hatamyar, *supra* note 11, at 585. Hatamayar initially randomly selected 1200 cases but excluded certain cases for various reasons. *Id.* at 585–88 (explaining why Hatamyar excluded certain cases).

64. *Id.* at 601.

65. *Id.* at 598.

66. Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal's *Impact on 12(b)(6) Motions*, 45 U. RICH. L. REV. 603, 605 (2012).

67. *Id.* at 613.

68. *Id.*

69. *Id.* at 613–14.

70. Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 260 (2012) ("First, has the new pleading standard had an adverse impact on certain civil rights cases: here, employment and housing discrimination cases?").

71. *Id.* at 264.

*Twombly* era to 72% in the post-*Iqbal* era.[72] Brescia also found that defendants were more likely to file a 12(b)(6) motion to dismiss after *Iqbal* than either before *Twombly* or immediately after *Twombly*.[73]

Jonah B. Gelbach's Note in the Yale Law Journal summarized these seven studies:

> They tend to find relatively little difference in MTD grant rates across their pre-*Twombly* and post-*Twombly*/pre-*Iqbal* period. They tend to find differences in the [motion to dismiss] grant or denial rate that range between zero and ten percentage points across their *Conley* and post-*Iqbal* periods, with larger differences for cases involving civil rights of one type or another. They find either small or no changes in the rate at which [motions to dismiss] are granted without leave for the plaintiff to amend her complaint, and sizable increases in the rate they are granted with leave to amend.[74]

### 3. *Federal Judicial Center Studies*

In addition to the seven studies discussed above, the Federal Judicial Center ("FJC") conducted an initial study and a follow-up study to assess the impact of *Twombly* and *Iqbal* on 12(b)(6) motions to dismiss.[75] The two FJC studies examined motion activity in 2006 and 2010 by selecting civil cases in 23 federal district courts (two districts in each of the eleven circuits and the U.S. District Court for the District of Colombia) which account for 51% of all federal civil cases filed.[76] The first FJC study found there was a general increase from 4.0% to 6.2% in the rates at which motions to dismiss for failure to state claims were filed.[77] The first FJC study also found that the rate at which motions to dismiss for failure to state a claim were granted (with or without leave to amend) increased from 65.9% in 2006 to 75% in 2010.[78] The first FJC study also found that the increase in 12(b)(6) dismissal rates only extended to motions being granted with leave to amend with an increase from 20.9% in 2006 to 35.3% in 2010.[79] Furthermore, the first FJC study found a decrease (although not statistically significant) in the rate at which 12(b)(6) motions

72. *Id.* at 269.
73. *Id.* at 281.
74. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2289 (2012).
75. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf [hereinafter FJC 1]; JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf [hereinafter FJC 2].
76. FJC 1, *supra* note 75, at 5.
77. *Id.* at 9.
78. *Id.* at 14.
79. *Id.*

were granted without leave to amend from 45.0% in 2006 to 39.7% in 2010.[80]

Delineated by case type, the first FJC study found that none of the specific case types (contract, torts, civil rights, employment discrimination, and "other"), except for financial instruments, had a statically significant difference in the rate at which 12(b)(6) motions were granted with or without leave to amend.[81]

Six months later, the FJC published a follow-up study that examined 543 cases from the previous study (143 cases from 2006 and 400 cases from 2010) to determine the outcome of motions that were granted in whole or in part with leave to amend the complaint.[82] The second FJC study confirmed the first, finding that an

> opportunity to present an amended complaint reduced the overall rate at which movants prevail[ed] (from 65.9% to 56.4% in 2006, and from 75% to 62.9% in 2010) and reduced the size of the movant's advantage in 2010 (from 9.1% in the [first FJC] study to 6.3% in the [second FJC] study).[83]

The second FJC study found that none of the specific case types (contract, torts, civil rights, employment discrimination, and "other"), except for financial instruments, had a statistically significant difference in the rates in which that 12(b)(6) motions were granted between 2006 and 2010.[84]

### B. *Other* Twombly/Iqbal *Empirical Studies*

This Section will discuss five other noteworthy empirical studies that have assessed the impact of the *Twombly/Iqbal* heightened pleading standard. Jonah B. Gelbach's meta-empirical study used a conceptual model of party behavior to derive an adjusted measure of *Twombly* and *Iqbals's* impact on 12(b)(6) motions to dismiss rates.[85] Gelbach concluded that the "switch from *Conley* to *Iqbal* caused [motion to dismiss] movants to prevail—and thus plaintiffs to be negatively affected—on one or more claims in at least 21.5% of cases in which [motions to dismiss] were adjudicated . . . ."[86] Gelbach also found that "at least a fourth [15.4%] of the 61.1% of employment discrimination cases in which movants prevail in the *Iqbal* period had plaintiffs who were negatively affected as a result of

80. *Id.*
81. *Id.*
82. FJC 2, *supra* note 75, at 3.
83. *Id.* at 4.
84. *Id.* at 7.
85. Gelbach, *supra* note 74; *see also id.* at 2338 ("While others have pointed out the possibility of party selection effects, few observers of *Twombly* and *Iqbal* seems to have grasped the empirical importance of accounting for party selection when measuring the impact of changes in pleading standards.").
86. *Id.* at 2331.

the switch from *Conley* to *Twombly/Iqbal*."[87] In terms of civil rights cases, Gelbach found "at least a fourth [18.1% of the 68.1% of civil rights cases] in which movants prevailed under *Twombly/Iqbal* had [motions to dismiss] granted because of the switch from *Conley* to *Twombly/Iqbal*."[88]

Recognizing a gap in the literature, Alexander A. Reinert conducted a cohort study (or panel study) to determine if there was a "relationship between sparse pleading and the merit of a case (as measured by the case's ultimate outcome)."[89] To accomplish this goal, Reinert followed a three-step methodology: (1) "first, I looked to appellate cases decided during the years 1990 to 1999 to identify a set of cases in which the pleadings would likely be subject to dismissal under an *Iqbal/Twombly* standard, but which were considered sufficient under *Conely's* liberal rule;" (2) "second, I followed those cases after they had been remanded to the district court to determine their ultimate resolution, generating an estimate of the 'success' of thinly pleaded cases during this time period;" (3) "and third, I compared the rate of success in the thinly pleaded cases I identified with the success of all cases litigated during the same time period for which there are records supplied by the Administrative Office of the Unites States Courts . . . ."[90] Out of the 843 appellate decisions in which *Conley* was cited, Reinert found that only 745 of those cases involved decisions in which in a motion to dismiss was involved.[91] Out of the 745 decisions, the appellate court reversed the decision below in 303 of these cases.[92] Out of the 303 cases in which the appellate court reversed the decision below, 168 or 55.5% of the cases can be categorized as "*Conley*-based reversals."[93] Out of the 168 cases, 76 or 55.5% of the cases were classified as successful (defined as settlement, stipulated dismissal, and a verdict for the plaintiff, and other).[94] Overall Reinert found that "the rules of *Iqbal* and *Twombly* pose the potential to eliminate cases that have better than a 50% chance of being successful."[95] "In other words, had the cohort cases been litigated in a post-*Iqbal* era rather than in the *Conley* era, *the application of plausibility pleading standards would have screened out mostly meritorious cases, not meritless ones*."[96] Thus, Reinert concluded that "[r]ules that subject thin pleadings to greater

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87. *Id.* at 2332.

88. *Id.*

89. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 134 (2011); *see also id.* at 125 ("There is, however, no empirical basis supporting the assumption that heightened pleading standards—either the plausibility standard ushered in by *Iqbal* and *Twombly* or the closely related 'fact pleading' standard that has always lurked as a competitor to notice pleading—are more efficient filters than *Conley's* notice pleading standard.").

90. *Id.* at 134.

91. *Id.* at 140.

92. *Id.* at 140–41.

93. *Id.* at 143–44 (explaining that a *Conley*-based reversal is a reversal that rested on the broad reading of *Conely* that was rejected by *Iqbal* and *Twombly*).

94. *Id.* at 145.

95. *Id.* at 161.

96. *Id.* (emphasis added).

scrutiny and dismissal *do not do a better job than notice pleading of filtering out meritless claims*."[97]

Scott Dodson sought to correct at least two common flaws in the empirical literature regarding the impact of *Twombly* and *Iqbal* on dismissal rates.[98] The first common flaw was that previous studies did not distinguish between legal and factual sufficiency.[99] The second common flaw was that previous studies only coded whole cases rather than claims, which led many of the previous studies to include the ambiguous coding category of mixed dismissals.[100] To address these two flaws, Dodson "studied the impact of *Twombly* and *Iqbal* on dismissal rates in federal district courts using an original dataset with an eye toward exploring the detail left out of previous studies."[101] After excluding and discarding "irrelevant" opinions,[102] Dodson's results revealed an overall statistically significant increase in the dismissal rate of all claims subject to a Rule 12(b)(6) motion from 73.3% in the pre-*Twombly* era to 77.2% in the post-*Iqbal* era.[103] Dodson's results support previous studies, which have also found single-digit but significant increases in the overall dismissal rate of cases after *Iqbal*.[104]

Examining only a single set of post-*Iqbal* dismissals, William Janssen's study sought to determine if 264 pharmaceutical and medical device cases would have come out differently under the *Conley* standard.[105] After reading all 264 pharmaceutical, and medical device dismissals published on Westlaw during the fifteen-month period after *Iqbal* was decided, Janssen found that the outcome would have been different in 21.2% of the cases.[106] This finding led Janssen to conclude that "[t]he notion that *Iqbal* is ushering in a veritable torrent of new dismissals in pharmaceutical and medical device litigation is an untenable conclusion . . . ."[107]

97. *Id.* at 126 (emphasis added).

98. Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012).

99. *Id.* at 128.

100. *Id.* at 127–28.

101. *Id.* at 130.

102. *Id.* at 131 (explaining that Dodson excluded opinions that did not resolve a Rule 12(b)(6) motion to dismiss under Rule 8(a)(2), as well as opinions resolving only motions for summary judgment, Rule 12(c) motions, jurisdictional dismissals under Rule 12(b)(1) or (b)(2), venue dismissals, or motions to dismiss pursuant to the heightened pleading standard found in Rule 9(b) or the Private Securities Litigation Reform Act ("PSLRA")).

103. *Id.* at 132.

104. *Id.* at 128.

105. William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 543 (2011); *see also id.* at 588 (explaining the five categorizing rules that Janssen used to "determine whether the emergence of the *Iqbal* dismissal test made a decisional difference in each case").

106. *Id.* at 598.

107. *Id.*

Recognizing that many feared the heightened pleading standard of *Twombly/Iqbal* provided judges too much discretion,[108] Raymond H. Brescia and Edward J. Ohanian sought to "assess, empirically, whether the Court's introduction of the so-called 'plausibility standard' in the context of civil pleadings has had a disparate impact on civil rights claims, particularly in employment and housing discrimination cases."[109] In order to accomplish this task, Brescia and Ohanian examined a range of judicial characteristics[110] in 548 cases involving motions to dismiss in employment and housing discrimination claims.[111] Taken as a whole, Brescia and Ohanian found that the dismissal rate was 61% in the pre-*Twombly* period, 56% in the post-*Twombly* period, and 72% in the post-*Iqbal* period.[112] Of the motions decided by judges nominated by Democratic presidents, Brescia and Ohanian found the dismissal rate was 64% in the pre-*Twombly* period, 58% in the post-*Twombly* period, and 67% in the post-*Iqbal* period.[113] However, the differences in these outcomes were not statistically significant.[114] Of the motions decided by judges nominated by Republican presidents, Brescia and Ohanian found the dismissal rate was 61% in the pre-*Twombly* period, 54% in the post-*Twombly* period, and 74% in the post-*Iqbal* period.[115] These outcomes reveal a statistically significant difference in the dismissal rate across these time periods.[116] In addition, Brescia and Ohanian examined, amongst other things, the dismissal rate by gender and race of the deciding judge.[117]

### *C. Settlement Rate Studies*

The most noteworthy empirical study that assessed the settlement rate in civil case is Herbert M. Kritzer's 1985 study entitled *Adjudication to Settlement: Shading in the Gray*.[118] Looking at 1649 randomly selected cases in state and federal court, Kritzer found that 64% of the sampled cases settled.[119] Broken down by case type, Kritzer found that 75% of torts cases, 63% of contract/commercial cases, 58% of real property, 61% of domestic relations, 61% of business regulation, 43% of civil rights/civil

108. Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329, 338 (2014).
109. *Id.* at 332.
110. *Id.* at 333 (explaining that judicial characteristics include the party affiliation of the president appointing each judge, the judge's gender, and the race or ethnicity of the judge).
111. *Id.*
112. *Id.* at 353.
113. *Id.* at 368.
114. *Id.* at 356.
115. *Id.* at 368.
116. *Id.* at 357.
117. *Id.* at 357–59.
118. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986).
119. *Id.* at 164.

liberties/discrimination, 46% of government action and 10% of government benefits cases settled.[120] More specifically and relevant for the purposes of our study, Kritzer found that 57% of federal cases settled.[121] Broken down by case type, Kritzer found that 70% of federal torts cases, 60% of federal contract cases, and 53% of federal property cases settled.[122]

While many other empirical studies have been published that discuss the rates at which federal civil cases are settling, it seems that they all agree that the settlement rate of federal civil cases is somewhere between 60% and 70%.[123] For example, Gillian K. Hadfield found that 68.7% of federal civil cases settled in 2000.[124]

## IV. THEORY AND HYPOTHESES

Parties may choose to settle a case, as opposed to taking the matter to trial, for a number of intrinsic and extrinsic reasons. A party's decision to settle may also be directly affected by the heightened pleading standard required by *Twombly*. This link between the plausibility standard and settlements may be due to the economic underpinnings of litigation in the United States.[125] This economic gamesmanship in litigation has been described as a product of two competing asymmetries made more prevalent by the prevailing pleading standard.[126] Others have claimed that the economic gaming that led to the *Twombly* plausibility standard overly favored certain defendants and may cause a significant problem in access-to-justice—some have even declared the resulting 12(b)(6) dismissals unconstitutional.[127] Both theories—the economic game theory of litigation, and the procedural access-to-justice theory—assume that *Twombly's* heightened pleading standard has changed the way cases are terminated, and an empirical study of settlement rates may provide validation for one (or both) of these theories. These theories will provide the normative background for our research hypotheses.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 525 (1991) ("While it is true that most civil suits are settled, the figure is nowhere near the 90 to 95 percent figure that has passed into procedure folklore, and is more likely in the neighborhood of 60 to 70 percent.").

124. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 730 tbl.7 (2004).

125. *See* Galanter & Cahill, *supra* note 5; Stancil *supra* note 5; *see also* BONE, *supra* note 6.

126. Stancil, *supra* note 5, at 92.

127. *See* Miller, *supra* note 7; *Frivolous Cases*, *supra* note 7; *Unconstitutional*, *supra* note 7.

### A. *Why Parties Settle*

Settlement, as an institution, is not entirely well understood because settlement negotiations are often kept secret. However, the fact that most cases settle seems to be common knowledge and has been proven empirically.[128] *Why* litigants settle is a far more perplexing question. Comparing settlement to adjudication is often confounded by the fact that the settlement of a lawsuit is not really an independent and self-sustaining development.[129] Settlement negotiations are not a freestanding process, but rather the principles, precedents, arguments about fairness, utility, threats of adverse consequences, and economic realities are by necessity drawn contextually from the situation of the parties.[130] Galanter and Cahill have categorized the manifold reasons why parties and the courts may prefer settlement to adjudication.[131] Of these various reasons to settle, this study will focus on economic factors, as these are most often cited as benefits to settlement—indeed, even cited as such by the Supreme Court in *Twombly*.[132] Clearly, not all cases that do not go to trial or are dismissed by a court are settled (in the traditional meaning), but this study will—however imprecisely—assume that all unadjudicated cases have "settled."[133]

Some argue that a settlement may be of higher quality than adjudication because of the trial process' heavy transaction costs.[134] However, settlements may also be coercive and have nothing to do with the under-

128. *See, e.g.*, Kritzer, *supra* note 118, at 161–62.

129. Galanter & Cahill, *supra* note 5, at 1348.

130. *Id.* at 1349.

131. Galanter and Cahill's factors that favor settlement include: (1) Settlement (rather than adjudication) is what the parties seek; (2) Settlement allows for greater party satisfaction; (3) Settlement is more responsive to the needs of parties; (4) Settlement saves the parties time and resources, and avoids unwanted risk and aggravation; (5) Settlement saves courts time and resources and it reduces court congestion; (6) Settlement results in a compromise outcome between the parties' original positions; (7) Settlement is based on better knowledge of the facts and the parties' preferences; (8) Settlement is more principled and permits the actors to use a wider range of normative concerns; (9) Settlement allows a greater range of outcomes, more flexibility in solutions, and creaks more inventiveness in devising remedies; (10) Parties are more likely to comply with settlement disposition; (11) The settlement process qualitatively changes the participants; (12) "Information provided by settlements prevents undesirable behavior by affecting future actors' calculations of the costs and benefits of conduct;" (13) Settlements can influence estimates of rightness or feasibility of various sorts of behavior; (14) settlements can encourage or discourage future legal actors to make (or resist) other claims; (15) Settlements signal to various audiences about legal standards, practices, and expectations. *Id.* at 1350–51 tbl.1.

132. *Id.* at 1360; *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

133. There are many studies that measure how often cases settle or are dismissed for differing reasons, aside from full adjudication. For examples of different mechanisms and rationales for this measurement, see *supra* Part III.B and accompanying notes.

134. Galanter & Cahill, *supra* note 5, at 1361.

lying merit of the claim.[135] Assuming that settlement provides an otherwise comparable outcome to adjudication, the claimant receives the present value of the expected judgment, without the uncertainty, delay, and transaction costs of a trial.[136] Likewise, the defendant gives up the present value of the expected judgment (i.e., the amount paid in settlement proportionate to expected damages) with a discount for transaction costs and risk avoided as well as the elimination of uncertainty.[137] Thus, settlement may remove the barriers of cost, delay, and uncertainty from prospective litigation.[138]

When discussing the benefits or problems of *Twombly's* heightened pleading, academia has formed two camps:

The Efficiency camp, which includes the Supreme Court, tends to favor the heightened pleading standard as a means to conserve judicial resources and to eliminate frivolous cases. The Efficiency camp largely favors an economic theory of litigation and an asymmetry analysis to explain its position.

The access-to-justice camp disfavors the heightened pleading standard for fear it may be circumventing the Sixth and Seventh amendment obligations of the judiciary, particularly impairing the access-to-justice for cases where there is little parity between parties.

The key difference between the two camps is their disagreement as to settlement. Where the Efficiency camp favors settlement as a beneficial outcome for courts and litigants, the access-to-justice camp questions the true benefit of settlement for litigants.

### *B. Efficiency, the Asymmetric Economy of Litigation, and Settlement*

The efficiency argument in favor of the heightened pleading standard is largely based on an economic model of litigation and has the goal of conserving judicial resources. The Efficiency camp favors settlement as beneficial to courts and litigants, and is particularly concerned with eliminating frivolous cases. Therefore, pleading standards, as defined by the Supreme Court, may change the calculations done by litigants in choosing to settle or enter litigation.

Economic gamesmanship in litigation has been described as a product of two competing asymmetries.[139] An informational asymmetry favors

135. Reinert, *supra* note 89, at 138 ("Reliance on settlement as reflecting the merit of a lawsuit is not without its risks. There are many who argue that some percentage of settlements are coercive and not indicative of the underlying merit of the plaintiff's position.").

136. Galanter & Cahill, *supra* note 5, at 1361.

137. *Id.*

138. *Id.* This reasoning, however, rests on the fiction that parties in settlement negotiations will be rational actors with equal bargaining power. *See* Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 412 (1987); *see generally* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

139. Stancil, *supra* note 5, at 92; *see also* BONE, *supra* note 6, at 71–76.

defendants who often have the majority of relevant information critical to the plaintiff's claim—leading plaintiff's to favor a liberal pleading standard.[140] A cost asymmetry favors plaintiffs (despite the fact that plaintiffs have to bear significant costs in pursuing litigation), allowing them to shift the costs of litigation onto the defendant by filing frivolous claims in order to seek settlement.[141] The "American rule," the adversary system, judicial disengagement, and the summary judgment standard leads to a rise in defendant's pretrial costs.[142] Because U.S. litigation generally imposes greater cost burdens on defendants (and, in particular, defendants facing well-funded plaintiffs or plaintiffs who make frivolous claims), this has led many to favor a stricter pleading standard as a means of protecting defendants from savvy plaintiffs. This Note will call the practice of using discovery rules, pretrial motions, and claim posturing to compel or inhibit settlement "playing the Discovery Game."

Civil litigation in the United States heavily depends on competition between private parties, rather than judicial management or government enforcement.[143] Unfortunately, private parties' incentives do not always align with public policy interests, which may lead these parties to act on their self-interest during litigation.[144] Furthermore, the judiciary does not generally play an active role in arbitrating between parties because the Federal Rules of Civil Procedure do not require judges to take an active role in case management. Furthermore, judges and litigants have economic and social incentives to minimize judicial participation.[145] Parties, therefore, will tend to seek the judge's help only when the benefits are likely to exceed the costs.[146]

Thus, pleading standards and discovery rules have an increasingly important part in the U.S. legal system due to this party-driven system of litigation. The broader and less specific a plaintiff's pleadings, the less the judge will be able to limit or focus pretrial inquiry because judges tend not to be educated completely regarding the issues facing them early in litigation.[147] The judge's knowledge of a case is often limited to the pleadings, and she may be unable to limit the breadth or depth of plaintiff's

140. Stancil, *supra* note 5, at 92.
141. *Id.*
142. *Id.*
143. *Id.* at 96. Judicial oversight, however, is an important part of litigation, and judges have many tools at their disposal in order to move cases forward and limit certain behaviors. *See* Galanter & Cahill, *supra* note 5, at 1342–46.
144. Stancil, *supra* note 5, at 96.
145. *Id.* at 97; *see, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),* 3 SUP. CT. ECON. REV. 1, 2, 4–7, 20–22, 31 (1993). *But see* Galanter & Cahill, *supra* note 5, at 1342–46 (arguing in Part II that judges play a far greater role in settlements through direct intervention, case management, pretrial adjudication of motions, and settlement promotion). This study will assume that through randomized sampling, judicial intervention was not a major factor in settlement decisions. See *infra* Part VII.B on future studies for a discussion on how judicial intervention and ideology may be accounted for.
146. Stancil, *supra* note 5, at 98.
147. *Id.*

discovery until it reaches some aggregate critical mass, justifying summary judgment evaluation.[148] Notwithstanding the large number of tools that judges have available to them to limit discovery and curb costs, the economic theory focuses on litigant behavior only marginally affected by the judge's intervention. Therefore, concerns about discovery costs can overwhelm a defendant's concerns about the merits of the underlying claim; if a defendant faces high discovery costs which cannot be limited or avoided altogether, then the certainty of success on the merits may not matter, and settlement may be seen as the more favorable and cost effective outcome.[149]

Another economic factor facing litigants in the United States is the "American rule" of awarding costs.[150] Under this rule, parties operate on the assumption that they will bear their own costs, regardless of the outcome, and know that their opponents will bear whatever costs they can impose on them, regardless of the merits of the underlying claim.[151] The result of the "American rule" is that "in most litigated cases, the parties' expected pre-trial payoffs are driven in large part by their expected internal litigation costs."[152] This results in a pretrial analysis that may be largely dominated by cost arbitrage instead of substantive claims and defenses.[153]

Along with judicial indifference, liberal discovery, and the "American rule," summary judgment standards hold important strategic economic value for litigants. A defendant faced with a properly pleaded frivolous suit cannot typically move for summary judgment until there has been "adequate time for discovery."[154] For example, if a defendant knows with certainty that she is not liable for plaintiff's injuries, she still cannot file for summary judgment or dismissal before the plaintiff has had adequate time for discovery, which usually results in spending substantial sums of money responding to the plaintiff's discovery requests.[155] Thus, summary judgment standards, which are linked to pleading standards, are clearly part of the calculation done by litigants in determining whether to settle or litigate.

### *1. The Discovery Game*

The Discovery Game is the strategic use of claim postures, pretrial motions, and discovery requests and production (among other things) to

148. *Id.* at 98–99. *But see* Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652 (2013) (comparing the framework of civil procedure rules and nondispositive, judicial decisions that target problems of cost and delay).
149. Stancil, *supra* note 5, at 102.
150. *Id.*
151. *Id.* at 103.
152. *Id.*
153. *Id.* at 107.
154. *Id.* at 108; *see* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).
155. Stancil, *supra* note 5, at 108.

compel or inhibit settlement. The Efficiency camp's asymmetry analysis is based on an economic model of litigation where litigants choose to enter litigation or seek settlement depending on a cost-benefit analysis. Litigants are viewed as rational profit-maximizing parties seeking to gain the most money from the suit, depending on their relative bargaining positions.[156] This calculus is affected by the informational asymmetry—where one party holds the relevant information that will allow for success and the cost asymmetry—where one party has sufficient funds to play a game of attrition until the costs of litigation are greater than the benefits of success at trial. There is a clear link between the ability to use these asymmetries to compel settlement and the pleading standard.

During the *Conley* era, the pleading standard allowed most cases to overcome a motion to dismiss and move into discovery—allowing litigants to play the Discovery Game. Plaintiffs could shift the cost of litigation to defendants by making onerous discovery requests, and thus compel settlement. Defendants could likewise dump documents onto plaintiffs to inhibit settlement or reduce settlement amounts. The Discovery Game thus played an important part of the settlement calculus prior to *Twombly*.

Paul Stancil's game-theory model of economic-minded litigation attempts to predict when litigants will take steps to enter litigation. His model assumes that each litigant attempts to maximize its utility by maximizing its expected economic return. Notwithstanding irrational litigants or those who litigate based on principle, the great majority of litigants aspire to litigate as efficiently as possible.[157] The model treats each discrete case as a determined game where either party is only concerned about the fully realized economic consequences (internalizing all other costs).[158] Thus, a "rational, risk-neutral, profit-maximizing plaintiff will file a lawsuit only if she expects to benefit financially from its filing" and "she will file only if the expected value of the suit—either from trial or from settlement—exceeds the costs of filing and prosecuting the claim."[159]

Stancil's model predicts that the risk of cost arbitrage is highest when:

1. "The plaintiff's internal costs of litigation are lowest, as in claims in which the plaintiff has little discoverable information in its possession, custody, or control."

156. *See* BONE, *supra* note 6, at 209–14. This, of course, does not take into account occasions where parties bring suit for political, personal, or other reasons regardless of monetary gain.

157. Stancil, *supra* note 5, at 118.

158. *Id.* For example, defendants may be concerned that early settlement of objectively frivolous claims will yield additional costs from additional lawsuits; similarly, plaintiffs may be concerned that filing and subsequently losing a frivolous suit will affect her standing with a court. *Id.*

159. *Id.* at 120.

2. "The plaintiffs external costs of filing a frivolous suit are lowest, as in claims in which the plaintiff's attorneys are unlikely to be repeat players in the same court or against the same insurer/payer."
3. "The defendant's internal costs of litigation are highest, as in claims in which the defendant's discovery costs are high and cannot be filtered or sequenced to minimize expenditures."
4. "The defendant's external costs of settlement are lowest, as in claims in which there is little risk of reputational harm or copycat litigation and there is no insurance coverage."[160]

Therefore, the model predicts that there is a relatively low risk of opportunistic pleading in most types of civil claims because the most common forms of civil litigation—torts, contract, and intellectual property disputes—involve relative parity in pretrial costs or even disparity in favor of the defendant.[161] "In most cases, the cost incentives are such that plaintiffs are likely to file suit only if they believe the net expected value of their claim at trial to be positive."[162] "When cost disparity significantly favors the plaintiff, however, the expected trial value of [the] claim becomes irrelevant to [the] filing decision" and "the economic model predicts that a plaintiff may file suit—and the defendant may settle the claim—even when the plaintiff's claim is wholly frivolous."[163]

Post-*Iqbal*, the heightened pleading standard precludes the Discovery Game by dismissing cases that cannot plead sufficient facts. This change in the pleading rule may have had dramatic effects on litigation calculations. There is evidence that heightened pleading has not only deterred frivolous cases, but also affected both meritless and meritorious cases equally.[164] Furthermore, the court may have created new prefiling cost barriers for plaintiffs by compelling them to overcome heightened pleading.[165] Instead, the FJC studies, Reinart, and Gelbach have posited that litigants have changed their behavior to overcome the strictures of *Twombly* by engaging in further prefiling work, known as Party Selection Effects. In fact, the FJC, in a study that surveyed both plaintiffs' and defense attorneys across a range of practices areas between December 2009 and January 2010, demonstrated the strength of Party Selection Effects.[166] The FJC's conclusion was that "[m]ost attorneys have seen no impact of the *Twombly*/*Iqbal* cases in their own practice. Some reported

160. *Id.* at 132.
161. *Id.* at 132–33.
162. *Id.* at 133.
163. *Id.*
164. *See* Reinert, *supra* note 89.
165. Courts have been providing greater leniency in granting plaintiffs time to amend their complaints after failing to meet the heightened pleading and being dismissed on a Motion to dismiss. *See* FJC 1, *supra* note 75, at 13, 14 tbl.4. This leniency, however, may lead to greater costs for certain litigants who are discriminated by the informational asymmetry and who can no longer play the Discovery Game to compel discovery.
166. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 3–4 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf.

an increase in the number of motions filed without an increase in the likelihood that a motion would be granted. This activity has increased the costs of litigating their cases."[167] In addition, the FJC's study also concluded that "[a]lmost all of the attorneys report that they do not use notice pleading and that they prefer to plead enough facts to tell a coherent story to the judge."[168] Therefore, the Supreme Court in *Twombly* and *Iqbal* may have created a new cost barrier to litigation.

### C. *Access-to-Justice and Settlements*

While the economic analysis of litigation often casts settlement in a positive light, many have criticized that the *Twombly* and *Iqbal* decisions disproportionately consider the economic factors and negatively affect justice. Suja Thomas has derided these decisions, arguing that the Court placed too much focus on frivolous cases and the cost of litigation.[169] Indeed, it is the "frivolous case" scenario where court time and court resources are limited. As such, defendants might need to devote significant resources to defend these cases where the cost-shifting economic benefits of settlement are most prevalent.[170] The Court has stated that the "'firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.'"[171] Frivolous litigation is widely seen as problematic "'because it generates wasted litigation costs and unjustified wealth transfers,[172] and "'frustrate[s] settlement of legitimate suits.'"[173] Furthermore, the change in pleading standards may exacerbate the delicate settlement calculus in cases where there is great disparity in resources and bargaining power between the litigants. However, little empirical work has been done to determine what sorts of

167. *Id.* at 3.

168. *Id.*; *id.* at 28 ("Most interviewees said they avoided notice pleading. These attorneys offered reasons for what they typically asserted to be a long standing personal practice of pleading specific facts."). Some of the reasons provided were: "'[m]y complaints are detailed, for tactical reasons. I want to have the complaint tell the client's story clearly, and hopefully quickly as well. I want the reader, including the judge or more likely his clerk, to say to himself 'Well, if he can prove this, he wins.'" *Id.* "I have always thought it is a good idea to put as much detail as possible into a complaint so as to make a good first impression on the judge." *Id.* "We have always included more than is necessary for notice pleadings, and we are generally very specific about the facts." *Id.* "I have always done very fact-intensive pleading and could always add more facts if needed. I have one client and one story to tell." *Id.* at 29. "I always plead enough facts in a complaint. I plead to influence the court, assuming that the judge reads the complaint." *Id.* "I tend to put in too many facts and then regret that I have to attempt to prove them. I have never had a case dismissed for failure to state a claim." *Id.* "I plead facts based on the prescreening I do before filing a case. My work is done up front and I plead with specificity." *Id.*

169. *Frivolous Cases*, *supra* note 7, at 641.

170. Stancil, *supra* note 5, at 97; *see Frivolous Cases*, *supra* note 7, at 641.

171. *Frivolous Cases*, *supra* note 7, at 641 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982)).

172. *Id.* at 642 (quoting Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519, 576, 579 (1996)).

173. *Id.* at 642 (quoting Bone, *supra* note 172, at 597).

claims are frivolous or whether there truly is a serious problem with frivolous cases.[174]

*Twombly* and *Iqbal* are criticized as part of an increasingly restrictive change to litigation that has created expensive and time-consuming procedural blocks that lead to premature termination of cases, preventing claimants from reaching trial.[175] This may be because there has been too much attention paid to corporate defense interests and too little on citizen access-to-justice.[176] While the "costs to defendants—in particular, large corporate and government entities—have been decried frequently,"[177] litigation costs borne by plaintiffs may be overlooked.[178] *Twombly* justified creating a heightened pleading standard on assumptions about extortionate discovery costs for these groups and the threat of excessively large settlements.[179]

While *Twombly* explicitly discusses the possibility of extortionate settlements against defendants through expensive discovery, the opinion does not foresee that "the combination of economic costs of a more demanding pleading regime, increased grants of motions to dismiss, and summary judgment barriers may skew downward plaintiffs' valuations of their claims."[180] Because a plaintiff's bargaining position is related to gaining access to discovery and making a realistic threat to proceed to trial, *Twombly* and *Iqbal* may force plaintiffs to settle earlier and for less than the merits of their cases otherwise might dictate.[181]

In his *Twombly* dissent, Justice Stevens asserted that cost inappropriately influenced the decision.[182] Although private antitrust litigation can be enormously expensive, Justice Stevens did not think "that cost should justify the change in the motion to dismiss standard, including the far-reaching change . . . from a standard of legal sufficiency to one of factual sufficiency."[183] It is clear that costs (including costs in time spent by the litigants and the courts) were important to the rulings in *Twombly* and *Iqbal*. However, these cases were not the typical case and many—particularly those in the access-to-justice camp—argue that the rationale in those cases should not develop into a new standard for all cases where costs are not large.[184] Garth warns that "[l]istening only to the elite at any

174. *Id.*
175. Miller, *supra* note 7, at 2.
176. *Id.*
177. *Id.* at 61.
178. *Id.*
179. *Id.* at 62; *see* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
180. Miller, *supra* note 7, at 68.
181. *Id.*
182. Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 218.
183. *Id.*
184. *Id.* at 220–22.

particular time will distort the reform process" and will ultimately "only serve one vision of the federal courts."[185]

The settlement calculus clearly changes when disparities in bargaining power and resources exist. Simple "balancing of measurable costs and benefits that emanate from existing legal rules and their ambiguities" do not always provide economic benefit to a client in a settlement because important "[n]on-quantifiable factors are not pertinent to the analysis."[186] Power advantages can be used to cause delay or ill-will, frustrating the economic analysis that measures costs and benefits relative to time, where "immediate benefits are more valuable than the cost of future lost opportunities."[187]

Furthermore, the rational actor theory will often fail in terms of settlements when there is a power imbalance. If parties are "rational actors trying to make sensible predictions of what the courts will do, taking into account all the factors of judicial bias, legal philosophy, and strategy," then there will be strong incentives to settle any case where there is an imbalance "because the costs of litigation are high, and neither party has an interest in pursuing it unless there is a substantial probability of winning."[188] However, "[e]xperience and wealth also imply the capacity to be more selective in deciding which cases to appeal or defend" and thus which cases would be more advantageous to settle.[189] Wheeler et al. showed that there is a clear advantage that comes from having the ability to hire better lawyers with more resources, and this has a clear implication for settlements.[190] Wealth, and especially experience, seems to make a difference in successful litigation. Therefore, the question should be whether wealth and experience also lead to a difference in settlement rates. If there is a difference in settlement rates in cases where there is a power disparity, did the heightened pleading standard of *Twombly* and *Iqbal* change that?

*Twombly*'s heightened pleading standard has changed the way courts evaluate motions to dismiss and motions for summary judgment.[191] The change to the way these motions are ruled on has been justified on

185. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 610–11 (1998).

186. Henry Ordower, *Toward a Multiple Party Representation Model: Moderating Power Disparity*, 64 OHIO ST. L.J. 1263, 1291–92 (2003).

187. *Id.* at 1292.

188. Wheeler et al., *supra* note 138, at 412.

189. *Id.* at 441 ("As noted earlier, state and city governments, which were apparently selective about appealing, had the highest appellant success rate, 10 percentage points above those for individuals and proprietors, who typically were less experienced, 'one-shot' litigants. Another indicator of the importance of selectivity is that in criminal cases, business defendants succeeded in 42.1 percent of their appeals, compared to 36.7 percent for individual defendants, who, faced with the possibility of incarceration, presumably would be more likely to take 'long-shot' appeals.").

190. *Id.*

191. *See supra* Part I and accompanying text; *see also* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010) [hereinafter *The New Summary Judgment Motion*]; *Unconstitutional*, *supra* note 7.

the grounds of cost savings for the defendant.[192] If a court does not grant summary judgment, the defendant must either incur costs to go to trial or settle.[193] "If a court does not grant a motion to dismiss, the cost is less than when the court does not grant summary judgment; the defendant will pay for discovery but has another opportunity to request that the court dismiss the case before trial upon a motion for summary judgment."[194] However, not all cases create large cost asymmetries,[195] and the cost justification for the summary judgment and the motion to dismiss standard in those expensive cases seems inappropriate for much less costly cases.[196]

### *D. Hypothesis*

*Twombly's* new requirement that a complaint allege facts with sufficient specificity to state a claim for relief that is "plausible on its face" and not "merely conceivable," may affect the dismissal of certain claims under Rule 12(b)(6) and may, by extension, change the way parties weigh their options between continuing to litigate or settling. Regardless of whether this change is beneficial to the economic game theory of litigation, or a gross restriction of access-to-justice, empirical research on unadjudicated cases is beneficial to both theories. While previous research on *Twombly* and *Iqbal* has focused on the motion to dismiss, this empirical study will attempt to show how the pleading standards have affected settlement rates.[197]

Under *Twombly*, two specific types of cases might settle at a different rate than previously: the frivolous case and the meritorious case that cannot meet the new pleading standard.[198] The pre-*Twombly* cost-shifting (the Discovery Game) may not prove economical for frivolous case-filers. As more 12(b)(6) motions are filed and granted post-*Iqbal*,[199] fewer frivolous claims will reach discovery—or may not be filed at all—because the heightened pleading standard will only leave meritorious claims, reducing the number of settlements. However, defendants may also be more likely to settle claims despite perceived merit. Claims that survive motions to dismiss are at a greater bargaining position post-*Iqbal*, insist-

192. *The New Summary Judgment Motion*, *supra* note 192, at 39.

193. *Id.*

194. *Id.*

195. Stancil, *supra* note 5, at 132–33; *The New Summary Judgment Motion*, *supra* note 192, at 40 n.189.

196. *The New Summary Judgment Motion*, *supra* note 192, at 39–40.

197. See *supra* Part III for a discussion on the previous empirical research.

198. This assumes that the heightened pleading standard works as intended. Furthermore, the second type of case would generally only settle before motion practice since it would be dismissed if it cannot meet the heightened standard. Professor Thomas argues that "frivolous cases" are too often invoked in discussions of motions to dismiss and the *Twombly* standard. *See Frivolous Cases*, *supra* note 7.

199. FJC 1, *supra* note 75, at 9 tbl.1. *See supra* Part III.A.3 for a discussion on the findings of the two FJC studies.

ing on trial and therefore making settlement more attractive to defendants. Another possible outcome of the heightened pleading standard is that plaintiffs will spend significantly more money overcoming a motion to dismiss and therefore be more willing to settle to recoup the monies expended.

We tested this theory by attempting to falsify the following null hypothesis: the rates of settlements in civil suits in U.S. district courts will not change after *Twombly* and *Iqbal*. Our research hypothesis was twofold: first, we sought to indicate that the rates of settlements in civil suits in U.S. district courts will change (either increase or decrease) after *Twombly* and *Iqbal* and second, we tested to see if the probability of settlement rates in civil suits in U.S. district courts (as an independent variable) changed (either increase or decrease) with pre-/post-*Iqbal*, case type, plaintiff type, defendant type, merit, duration, relief sought, or circuit (as dependent variables).

## V. METHODOLOGY

### *A. Sample*

We took a random sample of cases filed in the two years prior to *Twombly* (2005–06) to be used as a control group and the two years following *Iqbal* (2010–11) as an experimental group.[200] Using Westlaw Docket Search, we created a database of every case filed in federal district court[201] across twenty-four randomly selected weekdays stratified across every month for both periods.[202] If the random date selected fell on a national holiday, the following weekday was selected in its place. This database included 20,721 cases filed in the pre-*Twombly* period and 32,982 cases filed in the post-*Iqbal* period.

This database only included cases, which were deemed relevant for this study. We specifically excluded several types of cases that were not relevant to the study that were too difficult to compare because of changes in law or that hindered ease of coding. Criminal cases,[203] prisoner's rights cases,[204] bankruptcy appeals,[205] immigration cases, and adminis-

200. *See generally* FJC 1, *supra* note 75, at 5.

201. We used the following Westlaw search parameters to create this database, selecting all District Courts: Advanced: DA(DATE) for each date.

202. The following dates were selected: Pre-*Twombly*: 01/12/2005, 02/03/2005, 03/25/2005, 04/18/2005, 05/10/2005, 06/01/2005, 07/28/2005, 08/19/2005, 09/12/2005, 10/04/2005, 11/23/2005, 12/15/2005, 01/20/2006, 02/13/2006, 03/07/2006, 04/26/2006, 05/18/2006, 06/09/2006, 07/03/2006, 08/29/2006, 09/20/2006, 10/12/2006, 11/03/2006, 12/25/2006; Post-*Twombly*: 01/05/2009, 02/24/2009, 03/18/2009, 04/09/2009, 05/01/2009, 06/22/2009, 07/21/2009, 08/12/2009, 09/03/2009, 10/23/2009, 11/16/2009, 12/08/2009, 01/13/2010, 02/04/2010, 03/26/2010, 04/19/2010, 05/11/2010, 06/02/2010, 07/22/2010, 08/20/2010, 09/13/2010, 10/04/2010, 11/24/2010, 12/16/2010.

203. Criminal cases do not use the Federal Rules of Civil Procedure—the subject of *Twombly* and *Iqbal*.

204. There is clearly some dissonance in removing this case type since *Iqbal v. Ashcroft* was a prisoner's rights case. Furthermore, the economic theory does apply to these cases; however, for the

trative filings were not included because they are not relevant to the economic theory of litigation.[206] The recession of 2008-2011 produced several changes to substantive law,[207] as well as public perceptions of certain corporate defendants,[208] sufficient to exclude antitrust cases,[209] securities cases, and banking/finance cases.[210] Finally, the large number of consolidated cases—particularly mass torts (e.g., asbestos claims) and product-liability cases (e.g., pharmaceutical claims)—which did not provide sufficient information as to merit and disposition of the substantive case, proved unwieldy and were excluded. Our database of filed federal district court cases was then randomized and 300 cases were sampled from each period.[211]

### *B. Coding*

Each sample (pre- and post-*Twombly*) was manually coded via a PACER docket review using BloombergLaw. Each case in the sample was first coded automatically using the Westlaw search parameters, which identified the case by name, filing date, district, docket number, and case type. Each case's docket was then located in BloombergLaw's Docket Search, and we coded for the following factors by pulling the information from the docket's list of documents and/or requesting specific documents (particularly useful were complaints and final rulings): the name of the judge, date concluded, duration in court, amount of money in controversy, type of plaintiff, type of defendant, number of plaintiffs, number of defendants, whether the case had concluded, how the case concluded, whether the case appealed, whether the case survived a

purpose of this study, including these cases would produce greater difficulty in coding for merit and economic factors. *See Frivolous Cases*, *supra* note 7, at 637–38 (discussing the Prison Litigation Reform Act).

205. Bankruptcy appeals come from the United States Bankruptcy Courts. Additionally, the authors do not have an opinion regarding the heightened pleading standard of *Twombly* & *Iqbal* and settlements in bankruptcy proceedings.

206. While excluding some of these cases is clearly valid (administrative filings for attorney admissions are not cases), excluding others may be relevant to the access-to-justice camp's theory of how the heightened pleading standards have limited access-to-justice. *See supra* Part IV.C.

207. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–41 (2012).

208. *See* PERSUASION STRATEGIES, CORPORATE AMERICA IN LEAN TIMES: DO TODAY'S JURORS HAVE SHALLOW SYMPATHY FOR DEEP POCKETS? (2009), *available at* http://www.persuasionstrategies.com/Docs/CorpAmericaLeanTimes.pdf.

209. *Bell Atlantic Corp v. Twombly* was an antitrust case, calling into question the exclusion of these cases. These cases may show the greatest asymmetries between litigants and therefore would provide important data to validate the economic theory of litigation; however, they were excluded for ease of analysis.

210. *See* FJC 1, *supra* note 75, at 7, 12.

211. The database was imported from Westlaw to Microsoft Excel and randomized by assigning each case a random number and then ordering the data by those randomly assigned number. The first 300 cases were coded. During coding, cases which were deemed unsatisfactory (due to consolidation or case types) were excluded and further cases were selected from the database according to this order.

12(b)(6) motion, whether discovery was limited,[212] whether the cases were consolidated, whether there was a settlement, whether an answer was filed, and, finally, what relief was sought.

Coding for merit and settlement was quite difficult because these factors had to be indirectly gleaned from the pleadings. Unlike the simple coding procedures for some other variables, merit cannot be seen in the docket and settlements may not be explicitly called for in terminating a case.[213] We implemented the use of proxies to code for each of these factors. Cases where an answer was filed and/or cases where a 12(b)(6) motion to dismiss was filed but not granted were coded as meritorious. Settlement was coded using three proxies: first, if the terminating instrument (i.e., final order) included the word "settlement;" second, if the terminating instrument was filed according to Federal Rule of Civil Procedure 41(a); third, if the terminating instrument was a joint motion for voluntary dismissal.[214] All other cases were coded as not settled.

Finally, for the purpose of analysis, further certain coded-for factors were consolidated using Excel and STATA. District court information was consolidated to federal circuit membership. Case type was also consolidated to produce seven major case types.[215]

### *C. Limitations*

The primary limitation of this study was the small sample size. Even though a sample of 300 (in each time period) was sufficient to test our primary hypothesis, moving away from raw settlement rates to the more granular analysis of plaintiff, defendant, and case type produced very small observations and few statistically significant results. The timeframe and resources available to complete this study were also inhibited by the sampling. The use of Westlaw in empirical research has been derided as inaccurate[216] (although it was merely used to produce a database in order to facilitate randomized sampling). The use of BloombergLaw docket

212. This might not be readily reflected in PACER. We coded for this by looking specifically for motions to limit discovery.

213. We may have underrepresented settlement because of our stringent coding. Professor Kritzer resolved the problem of ambiguous case terminations by coding for specific types of adjudications and creating a "not adjudicated" category which settlement falls in. Kritzer, *supra* note 118, at 164.

214. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 128 tbl.2 (2009). This may be an imperfect proxy for settlement as we would have to use contextual clues from the docket information to determine if the case was truly settled. *See* Kritzer, *supra* note 118, at 163. However, during coding we found that these determinations were much easier in practice.

215. Westlaw's case types are determined by the Administrative Office of U.S. Courts and the litigant's entry in the Civil Cover Sheet. However, the fine-grained case types were consolidated to seven types: Torts (including RICO cases), IP, Civil Rights, Contracts (including property disputes), Social Security, Labor/Employment, and Other.

216. The criticism is that not every filed case may be on Westlaw and therefore the sample we pulled may misrepresent what is actually filed. *See* FJC 1, *supra* note 75, at 2 (criticizing the use of Westlaw).

search instead of the traditional PACER service or the Administrative Office of the U.S. Courts data may likewise be faulty. While using direct PACER access to run a more thorough docket review may have slightly increased our accuracy in coding, the difficulty in attaining PACER access to facilitate this sort of research would have meant the study of only a few districts. Furthermore, the criticism against the use of commercial legal research tools does not outweigh their benefits (especially since BloombergLaw pulls its docket information directly from PACER with only a very limited number of cases unavailable on this service). Instead, this study chose to create a broad database using Westlaw in order to preserve broad randomized sampling. This randomization is meant to overcome some of the concerns of sampling bias.

The way our data was coded also limited the scope of this study. Particularly, the methods for coding for merit and settlement may not provide the most accurate representation of the cases. The coding for merit is invariably flawed in that it would be impossible to categorize a specific case as meritorious without factual knowledge of the claims. Furthermore, our coding of merit, which incorporated 12(b)(6) motions, may not be assessing merit so much as presumed merit. There were a number of omnibus categories added to most coded-for variables (the "other" case type was adopted from the Civil Cover Sheet, "legal entity" plaintiffs and defendants often included not only corporations etc., but also combinations of individuals and corporations, cases with ill-defined, or statutorily defined damages were placed in the "both" category) which might be defined more specifically. Coding procedures may also have introduced human error in that they were not double-coded, nor blindly coded to ensure accuracy. Finally, the exclusion of certain case types limited the discussion of settlement of those types, notwithstanding possible effect on antitrust or banking and finance cases.

## VI. PRESENTATION OF DATA AND ANALYSIS

The coded data was presented using Microsoft Excel and statistical analysis was completed using STATA statistical software. We first present the raw settlement rates before and after *Twombly* and *Iqbal* and descriptive statistics for five noteworthy independent variables: merit, plaintiff type, defendant type, case type, and duration. $\chi^2$, ANOVA, and t-tests were completed on resulting rates of settlement (overall and for individual factors). Several multivariate logistical regressions, including interaction variables, were conducted to determine relationships between settlement rates over time and the multiple factors, which we coded for.[217] We also present a second regression holding duration until settle-

217. A logit regression was necessary due to the binary independent variable (settlement). *See* ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 145–48 (2010) [hereinafter EMPIRICAL METHODS IN LAW].

ment as the dependent variable to show further relationships between settlement and time.

### A. *The Effect of* Twombly/Iqbal *on Settlement Rates*

Settlements in federal civil cases occurred at a higher rate in the post-*Iqbal* era as compared to the pre-*Twombly* era. However, the post-*Iqbal* increase was only marginal at 1.27%. Pre-*Twomby*, 45.6% of cases settled compared to 46.8% post-*Iqbal*. Our aggregate settlement rate (pre-*Twombly* and post-*Iqbal* combined) of 46.1% is smaller than the 60–70% average settlement rates described in the literature.[218] This difference can be attributed to the strict procedure used in this study to code for settlement, as compared as to how prior studies defined settlement.[219]

The results of the $\chi^2$ test presented in Table 1 show that the relationship between the rate of settlement and *Twombly/Iqbal* is not statistically significant ($\chi^2$: 0.0867, p-value: 0.768). With a p-value well above the 0.05 alpha level, we fail to reject our null hypothesis and posit that the rates of settlements in civil suits in U.S. district courts did not change after *Twombly* and *Iqbal*.[220] Furthermore, with a p-value very close to 1 (0.768), the results seem to suggest that *Twombly/Iqbal* and settlement rates are completely independent—suggesting that there is no relationship between them at all.[221]

218. Prior studies defined settled cases more broadly to include divorce decrees, withdrawn cases, etc. Many of these non-adjudicated cases were coded in our study as "dismissed" as opposed to "settled." See *supra* Part III.C for a discussion of prior settlement rate studies.

219. See *supra* Part V.B for a discussion of our methodology in coding settlement.

220. *See, e.g.*, EMPIRICAL METHODS IN LAW, *supra* note 217, at 234.

221. *See, e.g.*, *Chi-Square Tests*, U.N.C. WILMINGTON, http://people.uncw.edu/pricej/teaching/statistics/chisquare.htm (last visited Nov. 7, 2014).

TABLE 1: SETTLEMENT RATES

| Pre-Twombly | Frequency | Percent | Cummulative |
|---|---|---|---|
| No Settlement | 163 | 54.52 | 54.52 |
| Settlement | 136 | 45.48 | 100.0 |
| Total | 299 | 100.00 | |
| Post-Iqbal | Frequency | Percent | Cumulative |
| No Settlement | 131 | 53.25 | 53.25 |
| Settlement | 115 | 46.75 | 100.00 |
| Total | 246 | 100.00 | |
| Aggregate | Frequency | Percent | Cumulative |
| No Settlement | 294 | 53.94 | 53.94 |
| Settlement | 251 | 46.06 | 100.00 |
| Total | 545 | 100.00 | |
| Pearson chi2(1) = 0.0867 Pr = 0.768 | | | |

### *B. Merit*

Meritorious cases settle at a higher rate than nonmeritorious cases. 52% of meritorious cases settled where only 37% of nonmeritorious cases settled. Over time, merit affects the rate of settlement at even higher rates. Pre-*Twombly* 50% of meritorious cases settled and 38% of nonmeritorious cases settled as compared to the post-*Iqbal* 54% settlement rate for meritorious cases and 36% nonmeritorious settlements. This confirms our intuition that the settlement rate of meritorious cases should be higher than nonmeritorious cases.[222] This finding also suggests that our definition of "merit" is relevant and distinguishable as a category of cases.

The results of the $\chi^2$ test presented in Table 2 show that there is a statistically significant relationship between cases with merit and settlement rates ($\chi^2$: 11.05, p-value: 0.001). This relationship was not only relevant in the aggregate, but was true pre-*Twombly* ($\chi^2$: 4.29, p-value: 0.038) as well as post-*Iqbal* ($\chi^2$: 7.18, p-value : 0.007).

222. *See supra* Part IV.D.

TABLE 2: MERIT

| Pre-Twombly | Non-Meritorious | Meritorious | Total |
|---|---|---|---|
| No Settlement | 68 | 95 | 163 |
| Settlement | 41 | 95 | 136 |
| Total | 109 | 190 | 299 |
| Rate | 0.38 | 0.50 | 0.45 |
| Pearson chi2(1) = 4.2849 Pr = 0.038* | | | |
| **Post-Iqbal** | **Non-Meritorious** | **Meritorious** | **Total** |
| No Settlement | 63 | 68 | 131 |
| Settlement | 36 | 79 | 115 |
| Total | 99 | 147 | 246 |
| Rate | 0.36 | 0.54 | 0.47 |
| Pearson chi2(1) = 7.1765 Pr = 0.007* | | | |
| **Aggregate** | **Non-Meritorious** | **Meritorious** | **Total** |
| No Settlement | 131 | 163 | 294 |
| Settlement | 77 | 174 | 251 |
| Total | 208 | 337 | 545 |
| Rate | 0.37 | 0.52 | 0.46 |
| Pearson chi2(1) = 11.0544 Pr = 0.001* | | | |

* Statistically significant at the 0.05 alpha level

### *C. Case Type*

Rates of settlement for certain case types changed post-*Iqbal* and remained relatively constant for others. Rates of settlement changed for torts, intellectual property ("IP"), civil rights, and social security cases. For torts cases, the settlement rate decreased significantly from 49% to 24% after *Iqbal*. Settlement rates for IP cases increased significantly from 48% to 72%. Settlement rates for civil rights cases increased from 43% to 59%. For social security cases, the rate of settlement decreased from 12% to 0% post-*Iqbal*. This zero settlement rate post-*Iqbal* may simply be an artifact of not having enough time for these cases to settle (only 246 cases post-*Iqbal* had concluded as of December 2012; many of these may yet settle). However, this rate is likely accurate since the mean time for social security cases to settle pre-*Twombly* was 238 days (standard deviation 36.7) and only 6 of the non-concluded post-*Iqbal* cases were social security cases. While very low settlement rates are not sur-

prising[223] for social security cases due to the nature of these disputes,[224] the decrease in torts cases may be due to external factors, including the heightened pleading standard.

Settlement rates for contracts, labor/employment, and "other" cases stayed relatively constant. Contracts cases settled at 48% pre-*Twombly* and 47% post-*Iqbal*. Labor and employment cases settled at 58% pre-*Twombly* and 59% post-*Iqbal*. "Other" cases decreased only slightly over time from 51% to 47% settlement post-*Iqbal*.

The $\chi^2$ analysis for each group appended to Table 3 shows that the relationship between case type and settlement is statistically significant overall ($\chi^2$: 42.02, p-value : 0.00), pre-*Twombly* ($\chi^2$: 16.80, p-value: 0.01), and post-*Iqbal* ($\chi^2$: 36.98, p-value: 0.00).

223. *See* Kritzer, *supra* note 118, at 164.

224. Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709, 712 (2001).

TABLE 3: CASE TYPE

| Pre-Twombly | Torts | IP | Civil Rights | Contracts | Social Security | Labor/ Employment | Other |
|---|---|---|---|---|---|---|---|
| No Settlement | 26 | 14 | 31 | 34 | 27 | 15 | 16 |
| Settlement | 25 | 13 | 24 | 32 | 4 | 21 | 17 |
| Total | 51 | 27 | 55 | 66 | 31 | 36 | 33 |
| Rate | 0.49 | 0.48 | 0.43 | 0.48 | 0.12 | 0.58 | 0.51 |
| Pearson chi2(6) = 16.8019 Pr = 0.010* | | | | | | | |
| **Post-Iqbal** | **Torts** | **IP** | **Civil Rights** | **Contracts** | **Social Security** | **Labor/ Employment** | **Other** |
| No Settlement | 25 | 6 | 25 | 34 | 21 | 11 | 9 |
| Settlement | 8 | 16 | 37 | 30 | 0 | 16 | 8 |
| Total | 33 | 22 | 62 | 64 | 21 | 27 | 17 |
| Rate | 0.24 | 0.72 | 0.59 | 0.47 | 0.00 | 0.59 | 0.47 |
| Pearson chi2(6) = 36.9761 Pr = 0.000* | | | | | | | |
| **Aggregate** | **Torts** | **IP** | **Civil Rights** | **Contracts** | **Social Security** | **Labor/ Employment** | **Other** |
| No Settlement | 51 | 20 | 56 | 68 | 48 | 26 | 25 |
| Settlement | 33 | 29 | 61 | 62 | 4 | 37 | 25 |
| Total | 84 | 49 | 117 | 130 | 52 | 63 | 50 |
| Rate | 0.39 | 0.59 | 0.52 | 0.47 | 0.08 | 0.59 | 0.50 |
| Pearson chi2(6) = 42.0211 Pr = 0.000* | | | | | | | |

* Statistically significant at the 0.05 alpha level

### *D. Plaintiff and Defendant Type*

Rates of settlement changed across all plaintiff types after *Twombly*. Government plaintiffs settled 35% of cases pre-*Twombly* lowering to only 21% after *Iqbal*. Legal entities (corporations, partnerships, etc.) settled 49% of cases pre-*Twombly,* rising only slightly to 55% post-*Iqbal*. Individual plaintiff settlement rates remained constant with 44% of cases settling pre-*Twombly* and 45% post-*Iqal*. In the aggregate, government plaintiffs settled 29% of the time, which was less than both the 52% for legal entity plaintiffs and the 45% for individual plaintiffs.

Notwithstanding the fairly dramatic drop in settlement for government plaintiffs, statistical analysis showed that there is no statically significant relationship between plaintiff type and the rate of settlement pre-*Twombly* ($\chi^2$: 1.45, p-value: 0.490). However, the statistical analysis did show that post-*Iqbal* ($\chi^2$: 5.66, p-value: 0.059) and in the aggregate ($\chi^2$:

6.03, p-value: 0.049) a statistically significant relationship between plaintiff type and the rate of settlement existed at least marginally.

Settlement rates did not change as drastically by defendant type, but the change was even and consistent across all types. Government defendants settled 32% of cases pre-*Twombly* and 30% post-*Iqbal*. Legal entity defendants settled 48% of cases pre-*Twombly*, rising to 55% post-*Iqbal*. Individual defendants settled 50% of cases pre-*Twombly*, decreasing to 44% post-*Iqbal*. In the aggregate, government defendants settled 31% of cases, legal entity defendants 51%, and individual defendants 47%.

Statistical analysis showed that there is a statically significant relationship between defendant type and the rate of settlement pre-*Twombly* ($\chi^2$: 6.19, p-value: 0.045), post-*Iqbal* ($\chi^2$: 10.47, p-value: 0.005), and in the aggregate ($\chi^2$: 14.97, p-value: 0.001).

It should be no surprise that when the government is either a plaintiff or a defendant the rate of settlement is lower than when the plaintiff or the defendant is a legal entity or an individual.[225] Some scholars think "the government has proven to be a more formidable litigator than private parties . . . ."[226] Other scholars think a smaller settlement rate for cases where the government is a party (either plaintiff or defendant) is attributed to various barriers to settlement that private litigators simply do not face.[227] Some cases are hard or even impossible for the government to settle because the government is "pledged to fight for some principles despite the cost."[228] When the government is a defendant, the risk of copycat litigation is greater than for a private company, therefore the government cannot afford to pay a nominal amount to resolve certain lawsuits.[229] Furthermore, settlement is sometimes out of the question with the government for lawsuits that challenge the legitimacy of a government action.[230]

### *E. Duration*

Duration was calculated by taking the difference between the date the case was terminated (as determined in the case docket) and the date filed, in number of days. Cases which had not settled as of November 1, 2012, were not included in the sample. As shown in Table 3, the median duration was 280 days pre-*Twombly* and 237 days post-*Iqbal*. Median du-

225. Kritzer, *supra* note 118, at 164 tbl.2 (finding that the settlement rate in government action and government benefit cases to be 46% and 10% respectively).

226. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 749 (1988).

227. Marcus & Senger, *supra* note 224, at 710–12.

228. *Id.* at 712.

229. Settlement by the government may be seen as a sign of weakness to other potential plaintiffs. *Id.*

230. *Id.*

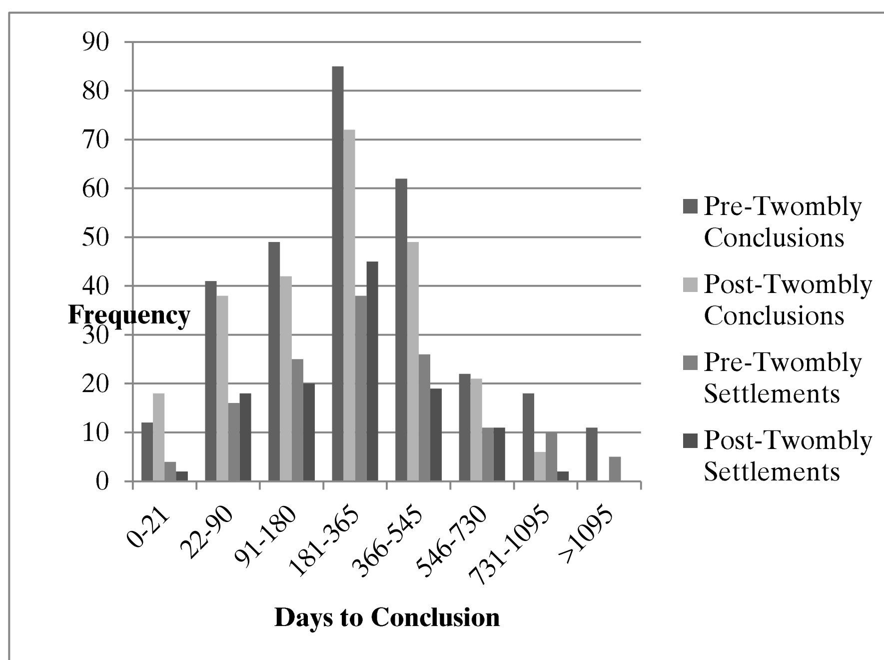
ration for settlements was 283 days pre-*Twombly* and 244 days post-*Iqbal*. This higher median value for settlement duration may be expected due to the Federal Rule of Civil Procedure 12(a) pleading timetable allowing a defendant 21, 60, or 90 days to file a response. Settlement negotiations often only begin in earnest following the filing of a complaint, and a defendant would be wise to analyze a complaint for merit as well as weigh the probability the case will survive a motion to dismiss. A defendant may only want to settle once she knows the full strength of the complaint. However, as the costs of litigation rises with discovery and other pretrial motions, the decision to settle may change.

TABLE 4: DURATION

| | **Pre-Twombly Conclusions** | **Post-Iqbal Conclussions** | **Pre-Twombly Settlements** | **Post-Iqbal Settlements** |
|---|---|---|---|---|
| **Mean** | 352.107 | 271.951 | 366.41 | 281.888 |
| **Median** | 280 | 237 | 283 | 244 |

The duration of both conclusions and settlements pre- and post-*Twombly* was not normally distributed. The distribution of pre-*Twomby* conclusion and settlement durations were both highly leptokurtic, while the post-*Iqbal* distributions showed little kurtosis. The duration distribution was skewed to the right, with pre-*Twombly* conclusions and settlements skewed further to the right than post-*Iqbal* durations. This greater skew in pre-*Twombly* cases may be ascribed to the fact that only 245 of the 300 post-*Iqbal* observations had concluded, as opposed to 299 pre-*Twombly*. Taking into account the pleading timetable, Chart 1 shows how very few cases settle within the first 21 days following filing. The chart also shows that the largest numbers of cases were concluding between 21 days and 1.5 years (545 days); the time frame that discovery is fully ongoing and the relative bargaining positions of the plaintiffs and defendants become more defined. Settlements, however, drop off precipitously after one year. The litigants' incentives for settlement decrease after the conclusion of discovery and rulings on pretrial motions because the informational asymmetries have been resolved and the cost asymmetries have been realized after the majority of pretrial costs have been expended.

CHART 1: DURATION




The duration data's skewed distribution was transformed to the natural log of duration in order to facilitate the statistical analysis. The transformed duration was included in the regression equation and paired t-tests showed that the relationship between duration and settlement was not statistically significant pre-*Twombly* (t-value: -1.19, p-value: 0.883), post-*Iqbal* (t-value: -2.78, p-value: 0.997), and in the aggregate (t-value: -1.19, p-value: 0.883).[231]

*F. Regression Analysis*

We conducted several regressions including a multivariate logistical regression ("logit"), and an ordinary least squares regression ("OLS") in order to determine if any of the coded-for variables had a significant relationship with our two dependent variables: (1) settlement and (2) duration to settlement. In the logit regression, all coded-for variables were included as independent variables and interaction variables were included for each independent variable with regard to *Twombly* in order to test for particular relationships with settlement rates across time (i.e., after *Twombly* and *Iqbal*).

The results of the logit regression show that *Twombly's* relationship with settlement is marginally significant overall (Coefficient: -2.22, p-value: 0.098). The regression predicted a 9.8 negative probability for set-

231. This was a standard unequal variance t-test.

tlement of cases filed after *Twombly/Iqbal* compared to cases filed before *Twombly/Iqbal*. These results are not inconsistent with the results of our chi-squared test in Table 1, which showed that the relationship between the rate of settlement and *Twombly/Iqbal* is not statistically significant ($\chi^2$: 0.0867, p-value: 0.768) because the logit regression, unlike the chi-squared test, controls for other variables (i.e., the other independent varibales). Therefore, once interpreted in the proper context the results of the chi-squared test in Table 1 and the results of the logit regression are not inconsistent.

Only certain other variables resulted in a statistically significant relationship. Meritorious cases (Coefficient: 0.707, p-value: 0.014), individual plaintiff cases (Coefficient: 0.991, p-value: 0.094), and social security cases (Coefficient: -2.102, p-value: 0.006) showed significant relationships with regard to settlement rate. The regression predicted a 67% positive probability for settlement of meritorious cases as compared to nonmeritorious cases, a 73% positive probability for settlement of individual plaintiff cases as compared to government cases, and an 11% negative probability for settlement as compared to contracts cases. These relationships validate our data, as it is predictable that meritorious cases will settle at a greater rate than nonmeritorious cases (as nonmeritorious cases are more likely to be disposed of in a pretrial motion). However, the fact that the probability of settlement only increases by 67% for meritorious cases demonstrates that nonmeritorious cases still have a significant chance of settling instead of being dismissed on a pretrial motion.[232] The fact that probability of settlement also increases for an individual plaintiff when compared to government plaintiffs is possibly due to the government's reluctance (or inability) to settle.[233] Likewise the lower probability that social security cases—as compared to contracts cases—will settle may have to do with the government's reluctance to settle as defendants (or the court's reliance on the administrative decisions below which may have lessened any impact of a cost or informational asymmetry).[234] The higher probability of settlement for individual plaintiffs may also be related to the lower probability of settlement for social security cases in that there may be overlap within these types.[235]

Interaction variables were included to find if there is a relationship between the coded-for variables and settlement over time (with *Twombly* as a reference). The only interaction variables, which resulted in statistically significant relationships were money damages cases (Coefficient 1.367, p-value: 0.043), as compared to cases where plaintiffs asked

232. *See* Reinert, *supra* note 89, at 162.

233. *See supra* notes 226–31 and accompanying text.

234. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

235. Social security cases are typically individual plaintiffs suing the Commissioner of the Social Security Administration for social security benefits.

for damages and injunctive relief, and IP cases (Coefficient: 2.350, p-value: 0.012), as compared to contracts cases.

The logit regression shows that, taking all the coded-for independent variables into consideration, the probability of settling after *Twombly* and *Iqbal* has decreased even though the rates of settlements themselves have increased. The raw rates of settlement increased only slightly from 46% to 47%, which was shown not to be statistically significant by the $\chi^2$ tests ($\chi^2$: 0.087, p-value: 0.77). The marginal statistical significance of the "Twombly" independent variable (p-value: 0.098) and negative coefficient signify a negative probability that settlement will occur after *Twombly*, i.e., a particular case is less likely to settle after *Twombly* and *Iqbal*. In particular, IP and civil rights cases are those that are especially likely to settle. [236]

Whether settlements are beneficial to the parties is unknowable to the investigator who has no access to settlement agreements.[237] Therefore, benefit of settlement is difficult to test empirically. Examining the duration to settlement, however, may provide some insight as to how parties are selecting to litigate after *Twombly*.[238] From the duration data above, we can see that most settlements occur during the middle (i.e., discovery) portion of the litigation process. This is an important finding because it is during the discovery portion of litigation that the relative bargained positions of the parties become more defined. Therefore, we ran an OLS regression with duration to settlement as the dependent variable to find if any of our coded-for variables have a statistically significant impact on when litigants settle. The regression shows that the relevant independent variables (e.g., *Twombly* and the interaction variables) are not statistically significant.[239] This result simply adds context to our

236. The logit regression analysis in the text is based on a regression where contracts cases were omitted (these were omitted due to the relative parity between the parties—which would mean a lower probability of informational asymmetry—as well as the consistency in settlement rates across time). We also ran another logit regression omitting torts cases (these cases were omitted because of the relative parity between the parties, but the fact that there was a significant change in settlement rates for torts cases, we chose to omit contracts instead for the main regression). In the logit regression that omitted torts, *Twombly* was statistically significant (Coefficient: -3.03, p-value: 0.042) with a predicted probability of 0.046 and the *Twombly*-Civil Rights interaction variable was significant as compared to torts (Coefficient: 3.17, p-value: 0.005).

237. Settlements may be considered a successful resolution for the plaintiff because the plaintiff has received something of value from litigation. Reinert, *supra* note 89, at 138 ("[S]ettlements, or stipulated dismissals are considered successful resolutions in this study, because in each of these circumstances there is the assurance (or the strong indication) that a plaintiff has received something of value through litigation.").

238. Rational profit-maximizing litigants will desire settlement when it will provide them the greatest amount of money (assuming they are only seeking monetary damages), relative to transaction costs. This occurs when their relative bargaining positions become more defined during discovery. *See generally* Stancil *supra* note 5. As time increases, discovery will increase transaction costs. Therefore, duration to settlement may proxy benefit to litigants as they choose to stem any more loss via transaction. Depending on when parties choose to settle, the regression may show that for certain cases (depending on the coded-for variables) settlement may provide a greater benefit to the litigants.

239. This regression contained the same variables as our main settlement regression, omitting contracts instead of torts.

logit regression that even though the probability of settlement is decreasing after *Twombly/Iqbal*, when settlement is occurring, has not changed after *Twombly/Iqbal* in a statically significant way.

## VII. CONCLUSION AND FUTURE STUDIES

### A. *Conclusion*

Our data and analysis show that the probability of settling after *Twombly* and *Iqbal* has decreased even though the rates of settlements themselves have increased. The rates of settlement increased but did not change significantly after *Twombly*. We also tested whether settlement rates changed dependent on a number of variables. The marginal statistical significance of the "Twombly" independent variable and negative coefficient in our regression analysis signified a negative probability that settlement will occur after *Twombly*, i.e., any particular case is less likely to settle after *Twombly* and *Iqbal*. In particular, IP and civil rights cases are those that are especially likely to settle.

Our data confirmed that meritorious claims settle at a higher rate than nonmeritorious claims. This may be a result of fewer frivolous cases being filed, or perhaps that the heightened pleading standard might simply make it harder for nonmeritorious cases to enter discovery and reach full adjudication, or some other change in the pleading behavior following *Twombly* and *Iqbal.* While the simple relationship between merit and settlement was significant, the regression showed that the probability of settling a meritorious claim showed no significant relationship over time (merit p-value: 0.014; merit-*Twombly* interaction p: 0.700). Because we could not determine the exact economic stances of these meritorious cases—and because the other factors which were meant to proxy the economic disparity between parties proved insignificant—this increase in probability of settlement may indicate that the heightened pleading standard may be restricting access to full adjudication of meritorious claims, encouraging those claims to settle at a higher rate. Whether this is to the satisfaction of the claimants is impossible to tell. It is also impossible to tell what kinds of cases litigants are choosing to file and how they are filing these cases. Given that 67% of pre-*Twombly* cases and 60% of post-*Iqbal* cases were meritorious, filing behavior after *Twombly* cannot be easily gleaned, and the more complicated issue of how the heightened pleading standard has changed litigation will require further study.

Parties to litigation may have adapted their behavior due to the heightened pleading standard of *Twombly* and *Iqbal.* While it may be impossible to determine why parties choose to proceed through the costly and time-consuming ardor of litigation, the empirical work on pleading standards and dismissal rates has shown that both plaintiffs and defendants have changed the way in which they approach litigation. This study attempts to further develop this body of work by highlighting litigants'

use of settlement as a strategy to maximize benefits (including the non-monetary goal of "justice") and hedge costs.

As a result of the heightened pleading standard, defendants have been shown to be more likely to file 12(b)(6) motions to dismiss.[240] Plaintiffs, on the other hand, may choose not to file meritorious cases or spend more time and money in order to plead sufficient facts to survive a motion to dismiss.[241] Judges have been more willing to grant 12(b)(6) motions with leave to amend and plaintiffs may therefore expend further costs in order to amend their complaints.[242]

*Twombly's* heightened pleading standard may favor either plaintiffs or defendants depending on whether settlement is seen as beneficial (and the terms of each settlement as influenced by timing, posture, and transaction costs). Since most settlement terms are kept secret, it is impossible for this study to declare that either party is truly benefited by the pleading standard. Furthermore, the normative theories disagree as to whether settlement, in and of itself, is a benefit to litigants.

If the rate of settlement has remained constant, yet the probability of settlement has decreased, then what is happening? Are more cases going to trial or are fewer cases being filed? Affirmative answers to either of these possibilities would have important implications for both normative camps. The Efficiency camp's goals of conserving judicial resources may have been circumvented by litigant behavior and the courts' readiness to allow for leave to amend a complaint, which has created new cost barriers, possibly new steps to litigation, and more cases going on to litigation. The access-to-justice camp's arguments may have also been challenged in that more cases are being adjudicated after *Twombly* instead of less; however, the changes in litigant behavior may still be inhibiting justice.

The economic theory of litigation, which espouses efficiency as a major goal for litigation, assumes that settlement is a good thing. Settlement effectively removes cases from court dockets and improves the resolution of cases; whether this resolution is better than litigation for either party is the pertinent question. If settlement is taken as beneficial, then *Twombly* favors plaintiffs in that it creates more definite pretrial goals that, if met, will likely lead to litigation. A plaintiff knows that she must plead a certain high level of specificity and if a motion to dismiss is overcome, either full litigation will ensue or the plaintiff will be in a more favorable bargaining position in settlement negotiations. Our regression analysis showed that cases are less likely to settle after *Twombly* and this may indicate that while the motion to dismiss hurdle is high, plaintiffs may be more willing to reach the end of the race instead of settling part way through.

240. *See* FJC 1, *supra* note 75, at 9 tbl.1.
241. *Id.* at 22–23.
242. *See* FJC 2, *supra* note 75, at 1.

Theoretically, cases with high informational asymmetry may not be able to meet the higher factual threshold and may be at a loss in terms of access-to-justice. While the efficiency theory suggests that *Twombly's* object is to screen out frivolous cases, meritorious cases where the plaintiffs simply cannot plead with sufficient facts may choose to settle early or not file at all because they will be screened out by *Twombly*. Reinert found that 55% of cases that would have been screened out under the *Twombly* standard, but would have gone forward to discovery and litigation under *Conley*, were meritorious.[243] If meritorious cases are still being filtered out of courts, then *Twombly* may be hurting the court's access-to-justice aims. Dodson further claims that *Twombly's* pleading standards may be hurting plaintiffs in that it may be raising costs of pleading sufficient facts while only successfully screening out a very small number of frivolous cases.[244] Therefore, *Twombly* may be decreasing efficiency in litigation while also inhibiting access-to-justice.

The ideal pleading standard is one that combines efficiency and access-to-justice. Unfortunately, the arguments in favor of and against the heightened pleading standard have too often been focused on only one of the two. Justice Souter's quote at the head of this Note highlights the Court's focus on efficiency without taking into account the possible negative effects in access-to-justice and efficiency itself. The Court promulgated a norm with the goal of increasing efficiency, yet the practical effects of the norm may not only inhibit access-to-justice, but fail in its goals of increasing efficiency. Producing an ideal pleading standard needs to be a chimerical endeavor where efficiency and access-to-justice are taken hand-in-hand and not as opposing factors.

The dichotomy that has emerged between the two camps and addressed by the courts may have been challenged by the behaviors of clients. Before *Twombly*, clients were playing the Discovery Game to achieve beneficial results, and after *Iqbal* they are using Party Selection Effects. The court's change in pleading standard may not have taken sufficient account of how litigant behavior would change to accommodate to the rule, and thus more investigation into litigant behavior is necessary when discussing any future pleading rule changes.

### *B. Future Studies*

Future empirical studies will continue to add relevance to the theories of why parties settle and will continue to support and challenge the normative theories of how the *Twombly* heightened pleading standard has effected litigation. A repetition of this study with an increased sample could determine if there is, in fact, a true zero (no effect) between the

243. *See* Reinert, *supra* note 89, at 143, 144 tbl.3.
244. SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? 112–19 (2013).

rates of settlement and the *Twombly* pleading standard. Future studies should also focus on a specific case type where the two asymmetries are more pronounced like torts, labor/employment, intellectual property, and civil rights cases. Future studies should also wait for more data, which would allow lower federal courts more time to understand the heightened pleading standard of *Twombly*. Future studies should also control for judicial ideology, because liberal judges may favor a more liberal pleading standard, *á la Conley*. A more accurate determination of merit would also be beneficial to future studies. This study coded a case with merit when a 12(b)(6) motion was denied without taking into account if the plaintiff was given leave to amend. Future studies should take a page out of the FJC's playbook[245] and determine what ultimately happened to each case. Future studies should also focus more attention of when settlements occurred. Chart 1 suggests that settlements are occurring in the middle of discovery, which is important because during discovery the relative bargaining positions of plaintiffs and defendants become more defined.[246]

245. FJC 2, *supra* note 75, at 3.
246. *See supra* Part IV.B–C and accompanying notes.