Statement of

The Honorable Jon Kyl

United States Senator
Arizona
December 2, 2009

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Senate Judiciary Committee
"Has the Supreme Court Limited Americans' Access to Courts?"

The assumption driving today's hearing is that the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal represent a sea change in how courts decide whether to dismiss a civil lawsuit under the Federal Rules of Civil Procedure. Critics of these recent decisions want to "return" to a standard articulated in Conley v. Gibson over 50 years ago. Under that standard, a federal court could not dismiss a civil complaint "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." But the assertion that Twombly and Iqbal were a dramatic departure from how courts have actually interpreted and applied Conley is simply an inaccurate characterization of those cases.

As former Solicitor General Garre points out in his testimony, the truth is that Conley's "no set of facts" standard was the source of much confusion, since it would seem, taken literally, to never permit the dismissal of a civil claim. It is almost always possible to imagine some set of facts that could, however implausible, support a cause of action. Justice Souter described the "no set of facts" standard this way: "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

What did courts do in the face of this "incomplete" and confusing standard? They adopted a number of principles to help weed frivolous claims from potentially meritorious ones. For instance, courts have long refused to entertain complaints based on "bald assertions," "unwarranted inferences," and the like. The Supreme Court's recent decisions simply reflect this reality and explicitly state what most already knew--that a plaintiff's claim should be "plausible on its face."

It is, frankly, astounding that there are those who want to jettison this common-sense approach and return to a "standard" that gave courts precious little guidance and that was applied inconsistently from one court to another. I am very concerned that this effort, if successful, would encourage frivolous lawsuits in which lawyers use the discovery process to go on a fishing expedition. At a time when our nation is reeling from the loss of jobs and high unemployment, it is irresponsible for us to even consider passing legislation that could substantially increase the amount of money that businesses would need to spend to fend off frivolous litigation. The result would be even more lost jobs.

There would also be national security implications with legislatively overturning the Supreme Court's recent decisions, as demonstrated by Iqbal. That case involved a Pakistani Muslim who had been charged with immigration-related crimes and detained in the immediate aftermath of 9/11. After he was convicted, served a sentence, and was deported, he filed a civil lawsuit against the Attorney General and FBI Director, claiming he had been discriminated against because of his religion. In its decision dismissing the plaintiff's claims, the Supreme Court noted that discovery in cases involving government officials "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." I agree. This is especially true in a national security context--those officials responsible for keeping us safe should not have to spend their limited time and departmental resources responding to the discovery requests of a plaintiff whose claims, like those in Iqbal, are implausible.

Finally, it is important to mention that this legislation is not only unwise, it is also premature. The Judicial Conference is conducting a thorough review of how courts are applying the Twombly and Iqbal decisions. If the Judicial Conference determines that courts are applying the cases in a way that is unfair to plaintiffs, it may, pursuant to the Rules Enabling Act, propose amendments to the federal rules to rectify the situation. But the legislation that has been introduced in this Congress would short circuit that process. Any effort to change existing law should at least be put on hold until the review has taken place and the Judicial Conference is permitted to make a recommendation.