

Questions for the Record for Greg Garre, submitted by Senator Sessions
Hearing Title: "Has the Supreme Court Limited Americans' Access to Courts?"

Judicial Conference Study

- 1) During your hearing, you referred to a memorandum drafted for the Federal Judicial Conference's Advisory Committee for Federal Rules of Civil Procedure as a 'study' of the case developments after the decision in *Ashcroft v. Iqbal*. Please explain your reference to the memorandum as a 'study,' including whether any component of the Federal Judiciary has referred to this memorandum as a study.

The memorandum – the November 25, 2009 Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee Concerning the “Application of Pleading Standards Post-*Ashcroft v. Iqbal*” – is discussed at pages 20-21 of my written testimony and available at <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>. As my testimony explains (p. 21), Ms. Kuperman is the Rules Law Clerk for the Honorable Lee H. Rosenthal, Chair of the Standing Committee on the Rules of Practice and Procedure. A “study” is “a careful examination or analysis of a phenomenon, development, or question.” *Webster’s New Collegiate Dictionary* 1447 (1981). This memorandum “addresses application of pleading standards” in the wake of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and was prepared as part of the Civil Rules Advisory Committee’s ongoing effort to “examin[e] the effect of these decisions.” Mem. at 1. The memorandum is more than 150 pages long and “review[s]” each appellate decision that has been issued since *Iqbal* that has “examined” or “discussed” *Iqbal*, along with scores of district court decisions examining or discussing *Iqbal*. *Id.* at 2 & n.2. In addition, the memorandum contains a three-page “summary of the case law” that sets forth various conclusions based on the case law that is examined by the memorandum, including that, “[o]verall, the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints.” *Id.* at 2. The Federal Judiciary’s own web site on the federal rules of practice, procedure, and evidence tellingly refers to the memorandum as a “Caselaw Study on Post-Iqbal Cases 11/25/09.” (Emphasis added.) See <http://www.uscourts.gov/rules/>.

The conclusions set forth in this memorandum are supported by the data provided to this Committee on December 9, 2009 by the Honorable Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, and the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure. Among other things, that data – which is drawn from docket entries from each of the 94 United States District Courts – confirms that *Iqbal* and *Twombly* have had a negligible impact as a general matter on the filing or adjudication of motions to dismiss. For example, the data

indicate that, in the four months before *Twombly* was decided, there were 71,711 new cases filed; 24,653 motions to dismiss filed; and 9433 motions to dismiss granted. Similarly, in the four months after *Iqbal* was decided, there were 84,398 new cases filed; 30,591 motions to dismiss filed; and 11,632 motions to dismiss granted. Those figures indicate that motions to dismiss were filed in about 34 percent of all cases before *Twombly* and in about 36% of all cases after *Iqbal*, and that courts granted motions to dismiss at about the same rate – *i.e.*, as to about 38% of all such motions – before *Twombly* and after *Iqbal*. The data also belie the suggestion that civil rights cases have been particularly affected by *Iqbal* and *Twombly*. For example, as to civil rights employment cases, in the four months before *Twombly*, motions to dismiss were filed in 51% of all such cases, granted in 20%, and denied in 8%. By contrast, in the four months after *Iqbal*, motions to dismiss were filed in 44% of all such cases, granted in 16%, and denied in 6.6%. The data indicate a similar pattern as to other types of civil rights cases. The data is attached to these responses and available at www.uscourts.gov/rules (see “Statistical Information on Motions to Dismiss re *Twombly/Iqbal*: Dec 2009”).

National Security

- 1) You testified that reversing *Iqbal* and *Twombly* could have a potentially devastating cost for government officials charged with keeping our country safe from attacks domestically and abroad. If the Notice Pleading Restoration Act (S. 1504) had been the applicable law at the time *Iqbal* was under review by the Supreme Court, what do you think would have been the outcome?

I believe that the case would have been decided in favor of Mr. Iqbal, which means that Mr. Iqbal would have been able to subject the former Attorney General of the United States and Director of the FBI to discovery demands on the basis of his conclusory and implausible allegations of wrongdoing by those high-ranking officials. What is more, as Second Circuit Judge Jose A. Cabranes observed, if Mr. Iqbal were successful in obtaining discovery from the former Attorney General and FBI Director based on his bare-bones complaint, then “little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.” 490 F.3d 143, 179 (concurring). And the threat of such litigation would, in turn, seriously “jeopardize[] the important policy interest Justice Stevens aptly described as ‘a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.’” *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (concurring in the judgment)).

The Supreme Court itself emphasized those same concerns in *Iqbal*, observing that “[l]itigation, though necessary to ensure that officials comply with the law, 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.” 129 S. Ct. at 1953. And, as the Court continued, “[t]he costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, ‘a national and international security emergency unprecedented in the history of the American Republic.’” *Id.*

- 2) Had discovery been allowed to proceed in the *Iqbal* case, would the plaintiff – a convicted felon who had been removed to Pakistan – have been able to rely on his implausible complaint to issue subpoenas for information about the federal government’s counterterrorism measures following the attacks of September 11, 2001? Please explain.**

Yes. If discovery had been allowed, Mr. Iqbal could have sought sensitive information concerning the federal government’s counterterrorism measures in the wake of the September 11 attacks, including, for example, the sources or methods that the FBI used in the course of its investigation into the attacks as well as sensitive discussions between the Attorney General of the United States and FBI Director about the appropriate response to the attacks. District court judges of course have discretion to entertain objections to discovery requests. But as Justice Souter wrote for seven Justices of the Supreme Court in *Twombly*, the “comment lament” has been that “the success of judicial supervision in checking discovery abuses has been on the modest side.” 550 U.S. at 559. And experience shows with respect to the habeas litigation brought by the Guantanamo detainees, for example, that litigants may seek to use the discovery process to obtain highly classified information concerning the government’s counterterrorism measures. See also *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (holding that information sought concerning the government’s response to the September 11 attacks, including names of detainees and reasons for their detention, was not subject to release under the Freedom of Information Act; observing that such “information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts”).

- 3) Where government officials fail to produce sensitive national security information, including on the basis of state secrets defenses, do they face potential discovery sanctions, see, e.g., *Al Haramain v. Obama*? Please explain.**

Yes. As *Al Haramain v. Obama* illustrates, courts may seek to impose discovery sanctions – including a finding of liability on the merits and potential money damages – on the government for refusing to comply with discovery demands for highly classified information including asserted state secrets. See *In re National Security Agency Telecommunications Record Litigation*, 2009 WL 1468792 (N.D. Cal. May 22, 2009). Cf. *Al-Adahi v. Obama*, 2009 WL 4724614 (D.D.C. 2009) (holding government in civil contempt for failing to videotape detainee’s testimony).

- 4) Are the types of national security concerns identified in your testimony limited to civil lawsuits brought by suspected terrorists against high ranking government officials?

No. While those concerns are particularly acute with respect to claims against high-ranking officials such as the Attorney General or Director of the FBI, they also exist with respect to law suits leveled against lower-level government officials and law-enforcement officers – including the agents serving as the front-line of defense in our cities and communities – who also enjoy qualified immunity from suit under the Supreme Court’s precedents and are critical to the government’s efforts to prevent and investigate national security threats and attacks.

- 5) In your view, could a legislative reversal of the *Iqbal* and *Twombly* decisions increase the litigation costs and discovery expenses of local governments and public officials outside of the national security realm, e.g., law enforcement and prison officials?

Yes. The same concerns – including the costs of diverting the time, attention, and resources of these officials and the threat of chilling decisive action – would extend to local law enforcement officials and officers outside the national security context, including police officers, prison guards, public school teachers, and other public employees performing discretionary functions. Lawsuits challenging the actions of such individuals may be brought in federal court – and thus be subject to the federal civil pleading standards – under the inferred *Bivens* cause of action, 42 U.S.C. 1983, or other federal statutes. The qualified immunity doctrine exists to protect such individuals from the burdens of vexatious and meritless litigation, including the burdens of discovery. See *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment) (“[A]voidance of disruptive discovery is one of the very purposes of the official immunity doctrine . . .”). Yet legislation overriding *Iqbal* and *Twombly* would subject such officials to burdensome discovery demands merely on the basis of conclusory and implausible allegations of wrongdoing.

Written Questions of Senator Tom Coburn, M.D.

Gregory G. Garre, Partner, Latham & Watkins, LLP

“Has the Supreme Court Limited Americans’ Access to Courts?”

Hearing before the U.S. Senate Committee on the Judiciary

December 9, 2009

1. Would the proposed legislation – S. 1504 – have any impact on the cost of health care in the country, particularly for small businesses that are struggling to stay in business?
 - a. If this Congress fails to pass meaningful medical malpractice reform, what will the relationship be between liberalized pleading standards and malpractice claims?

As I have explained in my testimony (pp. 33-37), the proposed legislation would at a minimum create substantial uncertainty and unpredictability over pleading standards and, if interpreted to provide for a literal application of the “no set of facts” language from *Conley v. Gibson*, 355 U.S. 41 (1957), would substantially liberalize the pleading standards by allowing conclusory and implausible allegations of wrongdoing to proceed to discovery. This would undoubtedly increase the costs and burdens imposed on small businesses (and other businesses) from baseless litigation because it would mean that a plaintiff could subject a defendant to the demands of discovery even on the basis of a bare-bones and implausible complaint of wrongdoing. Although the costs of discovery may vary from one case to the next, the thousands of dollars of attorney’s fees that may be entailed in responding even to relatively minor discovery requests no doubt would harm small businesses, particularly in the current economic climate – and, of course, the millions of dollars that can be quickly consumed by discovery in larger cases would unquestionably burden businesses. By liberalizing the pleading standards, Congress would also make it easier for plaintiffs to subject doctors and health care providers to the burdens of civil litigation by filing conclusory and bare-bone complaints. This, too, almost certainly would increase the litigation costs incurred by doctors and health care providers.

2. Can you elaborate on how reversal of the *Iqbal* decision will subject government officials to more civil litigation and the affect that it potentially has on jeopardizing our national security?

Second Circuit Judge Jose A. Cabranes said it best in his separate concurring opinion in the Second Circuit. As he explained, Mr. Iqbal sought to subject the former Attorney General and FBI Director to “inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American

Republic.” 490 F.3d 143, 179. If Mr. Iqbal had been allowed to obtain such discovery on the basis of his conclusory and implausible claims of wrongdoing against those high-ranking officials, then “little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.” *Id.* And the threat of such “vexatious discovery processes” and baseless litigation would jeopardize the compelling “national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.” *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in the judgment)). Thanks to the Supreme Court’s decision in *Iqbal*, that “blueprint” does not exist today and the officials who are on the watch during the next national security crisis need not fear such abuses.

3. You stated in your testimony that *Twombly* and *Iqbal* are “firmly grounded in decades of prior precedent.” Do you believe those who are advocating Congressional action in response to these Supreme Court decisions have any basis for characterizing the cases as departures from prior Supreme Court interpretations of the Federal Rules of Civil Procedure regarding pleading requirements?

The *Twombly* and *Iqbal* decisions clarified the civil pleading standards in important respects. In particular, in *Twombly*, Justice Souter – writing for a broad-based seven-Justice majority – explained that *Conley*’s “no set of facts” language “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.” 550 U.S. at 563. I disagree with critics who claim that the *Twombly* and *Iqbal* decisions represent a sudden departure from prior precedent. As I have explained in my testimony (pp. 11-20), in my judgment the decisions have deep roots in prior case law at the Supreme Court and appellate level, which has long recognized that a conclusory and implausible claim is not sufficient to state a claim for relief under the civil rules.

4. Are you aware of any “meritorious” lawsuit filed in the aftermath of *Iqbal* that you believe was improperly dismissed under Fed. R. Civ. P. 12(b)(6)?

Perhaps the clearest example is *Erickson v. Pardus*, 551 U.S. 89 (2007). In that case – which was decided in the wake of *Twombly*, which of course clarified the pleading standards applied in *Iqbal* – the Supreme Court reversed the dismissal of an inmate’s claim alleging the unconstitutional denial of medical treatment. To the extent that courts misapply *Twombly* and *Iqbal* and dismiss “meritorious” claims (*i.e.*, claims that satisfy the pleading threshold), then the courts of appeals may reverse such decisions and reinstate the claims. See, *e.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 212 (3d Cir. 2009) (reversing district court’s dismissal of employment discrimination claim; “[w]e have no trouble finding that Fowler has adequately pleaded a claim for relief under [*Twombly* and *Iqbal*].”)

5. You stated in your testimony that it is too early to determine the real impact of *Iqbal* and *Twombly* on civil litigation in federal courts. Would it be appropriate for Congress to delay any action on the issue of pleading requirements until everyone can better understand what, if any, impact *Iqbal* and *Twombly* have had on the lower courts' approach to pleading requirements?

Yes. At a minimum, Congress should defer any legislative action until more is known about the impact of those decisions on civil litigation in the federal courts. That is particularly true given that, as I have explained in my testimony (pp. 20-24) and my answers to the questions submitted for the record, (1) the case law and data thus far indicates that the decisions are *not* having a significant widespread impact on civil litigation in the federal courts and (2) the Judicial Conference is closely monitoring the situation and in the best position to respond if need be.

6. You indicated that allowing "conclusory and implausible allegations" to proceed to discovery would increase the likelihood that litigants with baseless claims would use discovery as a means to either "find a claim or, even worse . . . to harass a defendant." Are there sufficient rules in place to prevent abusive discovery or does the advent of electronic data make discovery abuse impossible to prevent?

As I explained in my testimony (pp. 29-33), the costs of civil discovery – and especially electronic discovery – are often enormous. As seven Justices recognized in *Twombly*, courts have not succeeded in "checking discovery abuses." 550 U.S. at 559; see *id.* ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if grounded, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."). Indeed, as Judge Frank Easterbrook has observed, "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves." *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989), *quoted in Twombly*, 550 U.S. at 559. The promise of "minimally intrusive discovery" therefore provides only "cold comfort" to defendants. *Iqbal*, 129 S. Ct. at 1954.

7. You noted in your testimony that the proposed legislation would, "at a minimum, cast doubt on" pleading standards contained in various statutes, such as the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(c)(2). Given that many prisoner lawsuits are brought *pro se*, what effect would the proposed legislation have on these lawsuits, which are already arguably subject to diminished judicial scrutiny at the pleading stage?¹

The Supreme Court has reiterated post-*Twombly* in the pleading context that "[a] document filed *pro se* is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S. 89,

¹ See, e.g., *Mayan v. Adm'r Waupun Corr. Inst.*, No. 08-C-0618, 2008 U.S. Dist. LEXIS 92392, at *4 (E.D. Wis. Oct. 31, 2008) ("The court is obliged to give the plaintiff's *pro se* allegations, however inartfully pleaded, a liberal construction.") (internal quotations omitted); *Tejada v. Mance*, No. 9:07-CV-0830 (NAM/GHL), 2008 U.S. Dist. LEXIS 85566, at *20 (N.D.N.Y. Sept. 12, 2008) ("pro se civil rights pleadings are to be construed with an extra degree of liberality") (magistrate report adopted at 2008 U.S. Dist. LEXIS 85558 (N.D.N.Y. Sept. 22, 2008)).

94 (2007). Nevertheless, even when liberally construed, a complaint may fail to state an adequate claim for relief. See, e.g., *Pugh v. Smith*, 333 Fed. Appx. 478 (11th Cir. 2009); *Garrison v. Braddock*, 229 F.3d 1151 (6th Cir. 2000) (Table) (“a *pro se* complaint, although liberally construed, does not require the court to conjure unplead allegations”) (citing *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989).) To the extent that the proposed legislation is interpreted to require a literal application of *Conley*’s “no set of facts” language, then prisoner lawsuits that previously would have been dismissed because they stated only conclusory and implausible allegations of wrongdoing (even when liberally construed) would be allowed to proceed.

8. Does the proposed legislation distinguish between the general pleading requirements applicable to most cases and the special, heightened pleading requirement in Federal Rule 9(b) applicable to claims of fraud?

No. As I explained in my testimony (p. 37), the proposed legislation therefore would appear to override or, at a minimum, cast doubt on the heightened pleading requirement in Fed. R. Civ. P. 9(b) for “fraud or mistake.”

- a. What would happen if we loosened the pleading requirements that are currently applicable to fraud cases?

As one court recently observed, “Rule 9(b) serves three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints ‘as a pretext for the discovery of unknown wrongs’; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to ‘prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). See also C. Wright & A. Miller, *Federal Practice and Procedure* § 1296 (A purpose of Rule 9(b) is to “guard[] against the institution of a fraud-based action in order to discover whether unknown wrongs actually have occurred”). Each of those important interests would be directly undermined by loosening the heightened pleading standards applicable to fraud-based claims.

- b. Before concluding your testimony, you described why judicial rulemaking is a superior vehicle for addressing any changes to pleading standards. In particular, you highlighted that judicial rulemaking “minimizes the risk of unintended consequences.” What, if any, unintended consequences do you foresee if changes to pleading standards are the product of legislative action?

As I explained in my testimony (pp. 38-40), the Judicial Conference and, in particular, the Advisory Committee on Civil Rules is comprised of judges and lawyers who are experts in federal practice and procedure. Any amendment to the Rules requires careful consideration of the interrelationship with other Rules as well as statutes and the potential practical ramifications of the amendment. The Judicial Conference occupies

an unmatched vantage point to make that complex and practice-based assessment. And, as explained in the December 9, 2009 letter to Ranking Member Sessions from the Honorable Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, and the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure, the Civil Rules Committee and Standing Committee “are at this moment deeply involved” in monitoring the case law in the wake of *Iqbal* and *Twombly* and fulfilling their statutorily directed function of providing a “neutral, independent, and thorough analysis of the rules and their operation.” (The December 9, 2009 letter and supporting data are included in this testimony and attached hereto.) Moreover, to the extent that the proposed legislation is intended to address a perceived departure from prior pleading standards and material increase in the dismissal of complaints or affect on civil litigation, as I have explained the case law and data compiled to date by the Judicial Conference indicates that *Iqbal* and *Twombly* have not had a significant impact on civil litigation in the federal courts. The proposed legislation nevertheless not only would create uncertainty and predictability over the gateway pleading requirements, but – especially if the legislation is interpreted to call for a literal application of *Conley*’s “no set of facts” language – substantially loosen the pleading standards that existed before *Twombly* and impose potentially devastating costs on government officials who face suits for actions allegedly carried out in the course of their duties, including those officials responsible for protecting the nation against terrorist attacks. It is difficult to believe that Congress would intend such unsettling and potentially devastating consequences.

ATTACHMENT

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
EVIDENCE RULES

December 9, 2009

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Sessions:

This letter briefly comments on the "Notice Pleading Restoration Act of 2009" (S. 1504) and the "Open Access to Courts Act of 2009" (H.R. 4115) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both S. 1504 and H.R. 4115 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes. We ask that this letter be made a part of the record of the hearing entitled "Has the Supreme Court Limited Americans' Access to Courts?" held by the Senate Committee on the Judiciary on December 2, 2009.

Both S. 1504 and H.R. 4115 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules – which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is available on the Rules Committees' website.¹ The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.² This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available. In addition, even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

¹<http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>

²<http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf>

Honorable Jeff Sessions

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Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,



Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure



Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Sheldon Whitehouse
Honorable Arlen Specter

Identical letter sent to: Honorable Patrick Leahy

MOTIONS TO DISMISS INFORMATION ON COLLECTION OF DATA

The following tables and graphs on motions to dismiss before and after *Twombly* and *Iqbal* are based on data collected electronically from the 94 district courts' docket entries. This information is not routinely included in the Administrative Office statistical reports for the courts. Though the data was reviewed for accuracy, some quality control steps that are part of the Administrative Office's reports were not applied. The electronically collected information is from the courts' docket entries, and the underlying docketed motions and orders were not read. As a result, if there are errors in the docket entry, those errors are in the data. The Federal Judicial Center is engaged in a study that will include reviewing underlying motions to dismiss and orders in a large number of randomly sampled cases, providing more information and an additional check on accuracy.

Certain information could not be collected electronically from the docket entries and is not reflected in the data. The data does not distinguish among the different types of motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Though most motions to dismiss are filed under Rule 12(b)(6) for failure to state a claim on which relief can be granted, motions to dismiss filed under Rule 12(b)(1-5) and (7) are included in the data. The assumption is that the rate of motions to dismiss under Rule 12(b)(1-5) and (7) has remained stable during the period. The Federal Judicial Center study will include this information.

The data does not reveal whether motions to dismiss were granted with or without leave to amend, and, if with leave to amend, whether the case continued with an amended complaint. The Federal Judicial Center study will also include this information.

The courts do not rule on a significant number of motions to dismiss, often because the case settles without court intervention. Although the data includes the filing of these motions, the data does not include the disposition of these motions.

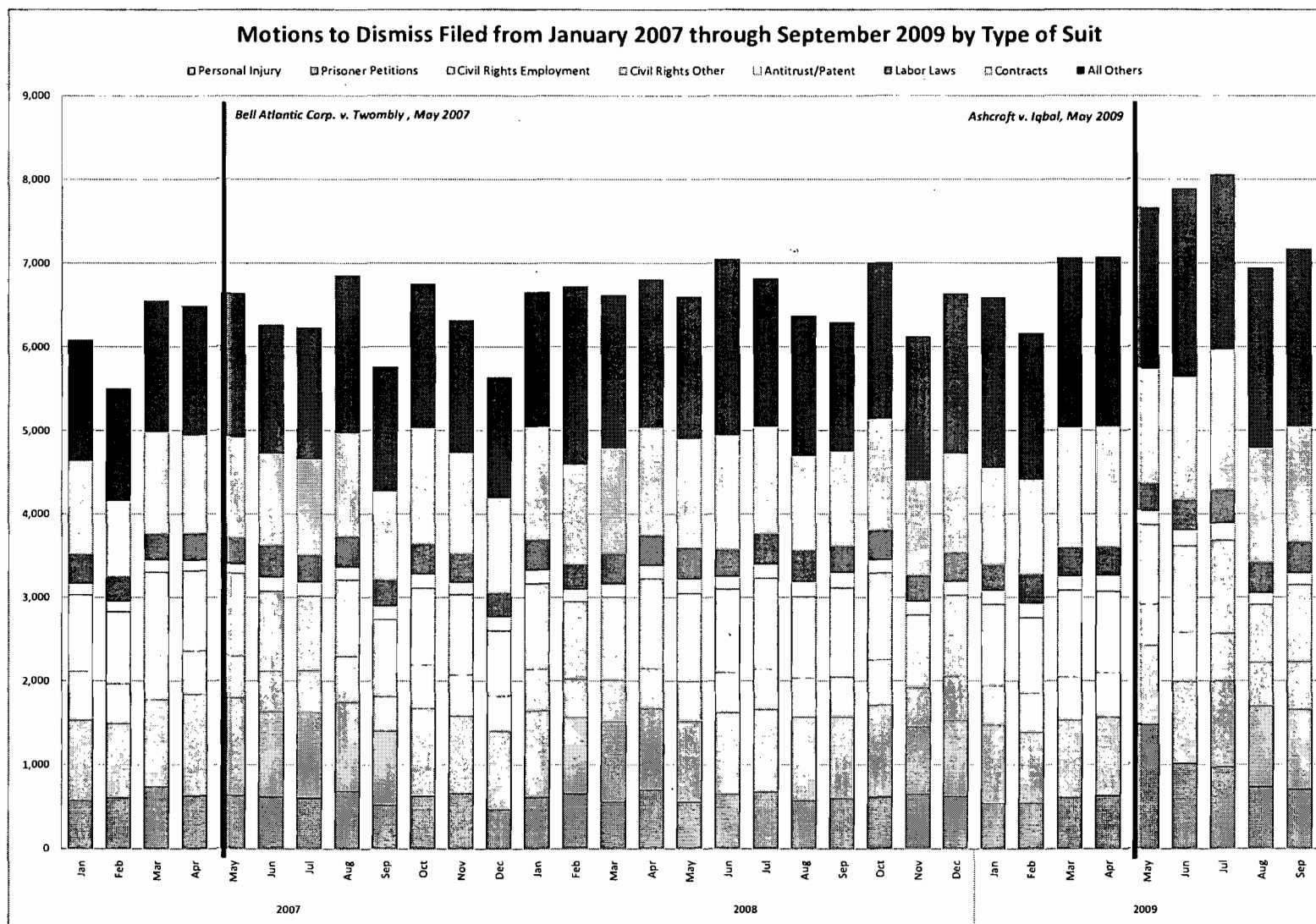
Finally, the data excludes Multi-District Litigation (MDL) cases.

Cases and Motions to Dismiss Filed From January 2007 through September 2009

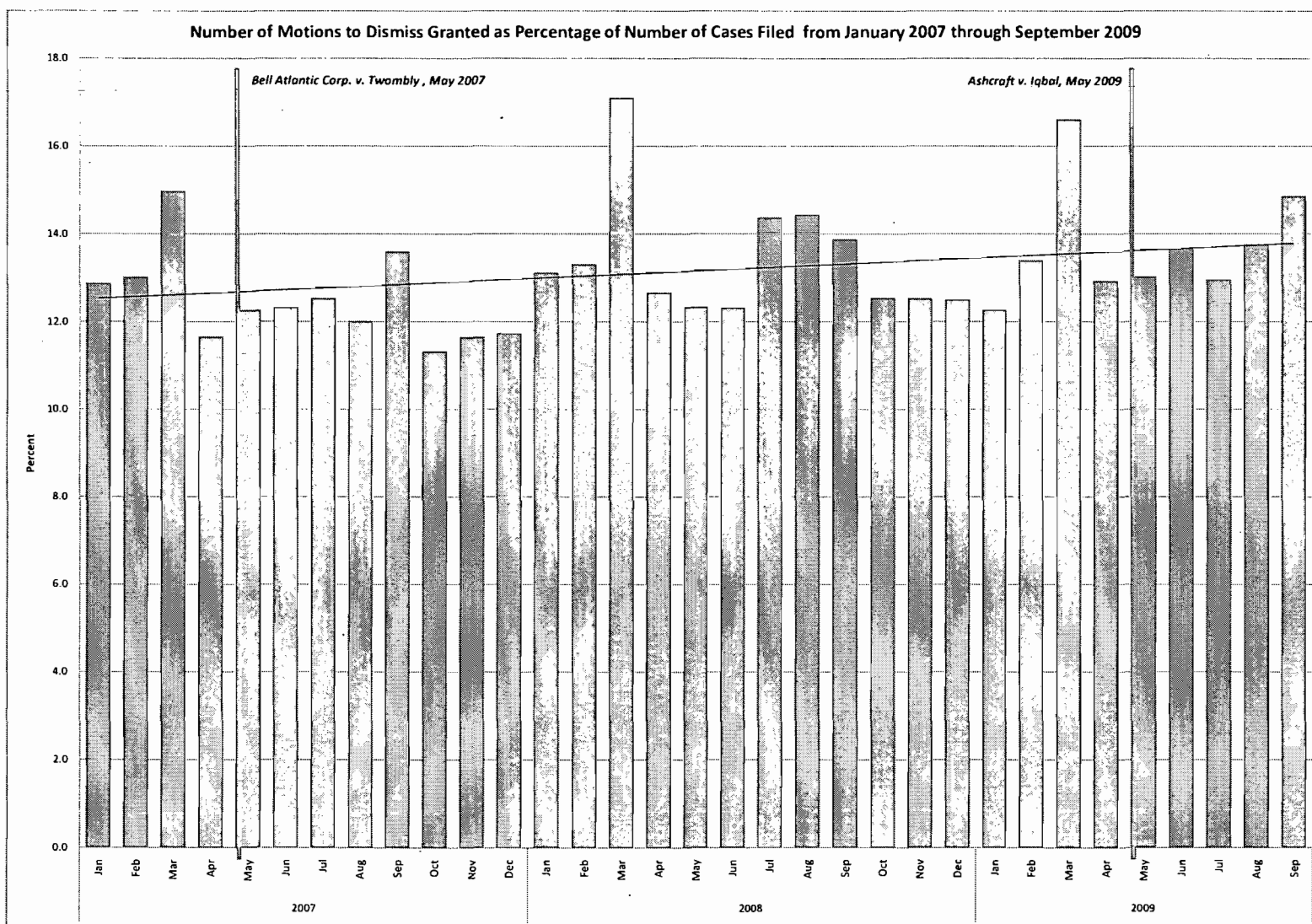
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MOOT	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep			
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Personal Injury	25	17	24	21	21	37	33	28	15	19	27	12	38	23	19	33	29	32	31	21	27	27	13	24	32	26	35	23	39	38	21	27	19			
Prisoner Petitions	24	36	29	22	16	15	23	35	32	35	23	14	36	35	41	26	32	37	32	28	35	26	18	21	27	19	32	32	38	28	38	27	49			
Civil Rights Employment	27	28	38	27	33	21	21	20	22	23	21	20	39	23	27	35	14	21	25	17	23	23	17	26	32	35	37	23	36	26	31	37	42			
Civil Rights Other	43	33	62	41	44	35	46	45	47	43	36	43	56	47	64	51	61	48	49	53	67	58	33	57	50	51	72	55	64	71	69	54	81			
Civil Rights ADA	3	3	10	2	2	2	7	6	4	2	3	1	1	3	4	2	7	4	1	6	3	3	3	2	7	4	1	8	1	2	3	2	6			
Antitrust	2	-	-	-	-	-	8	8	3	2	1	-	1	-	-	-	-	-	-	-	20	2	3	2	-	-	-	2	2	2	-	-	6			
Patent	13	6	2	1	4	-	5	14	4	3	3	4	2	2	4	7	1	2	7	1	11	5	5	6	6	11	4	3	2	3	14	16	3			
Labor Laws	12	11	23	17	21	13	9	17	18	11	9	12	9	21	13	18	17	11	14	18	13	22	27	16	23	20	17	31	14	20	25	29	29			
Contracts	47	45	62	47	40	50	39	68	34	53	36	45	60	55	48	121	66	42	63	39	47	42	33	52	48	45	84	62	59	72	81	52	95			
All Others	56	57	99	70	85	44	68	91	81	69	55	53	72	76	75	75	88	70	71	73	88	60	61	72	50	92	105	94	67	94	127	112	135			

GRANTED IN PART AND DENIED IN PART	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
Personal Injury	22	26	30	17	18	9	19	23	14	20	11	22	15	21	28	20	16	29	19	32	30	25	10	19	16	20	28	9	13	18	22	20	22
Prisoner Petitions	42	32	64	14	21	27	26	31	64	20	22	17	42	32	73	20	45	29	33	64	58	17	28	17	27	50	81	24	34	16	51	39	101
Civil Rights Employment	58	46	70	49	40	43	39	44	38	48	26	28	44	52	69	44	43	44	49	48	50	35	29	40	43	44	63	46	32	56	40	56	51
Civil Rights Other	73	50	153	55	97	74	65	72	74	60	74	52	54	69	122	58	52	65	58	63	91	72	55	59	70	77	152	58	62	100	84	77	91
Civil Rights ADA	6	6	6	1	2	5	2	8	5	3	3	4	9	3	12	7	5	3	6	2	7	9	5	5	9	3	20	8	7	3	8	5	8
Antitrust	3	3	3	2	3	3	-	5	3	1	3	-	-	1	3	-	1	1	2	11	2	2	3	-	5	3	4	3	2	3	-	3	1
Patent	5	3	2	5	-	3	3	4	6	5	6	1	3	5	5	3	5	4	6	20	7	9	5	11	5	6	5	6	3	5	3	8	10
Labor Laws	69	45	103	37	51	53	54	66	60	49	51	47	44	67	74	54	50	57	80	52	74	76	44	49	45	52	87	58	103	86	78	73	88
Contracts	25	11	26	15	21	7	19	15	21	20	19	12	14	19	20	12	17	19	19	13	18	14	17	17	17	16	30	16	11	15	31	23	32
All Others	68	41	127	55	55	70	71	88	101	58	71	43	72	65	139	78	91	64	70	84	133	71	75	141	66	100	116	58	109	106	116	132	153

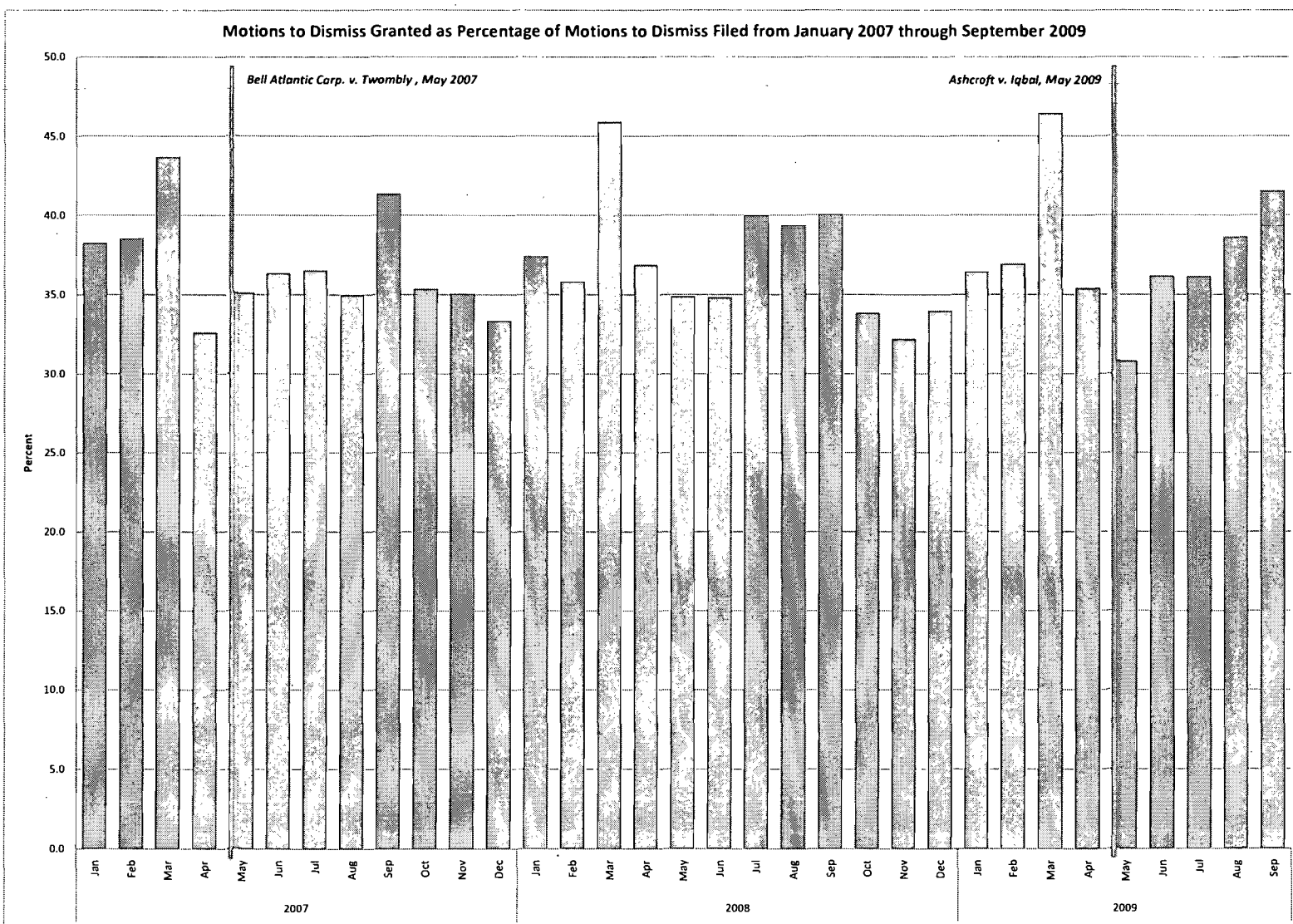
1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed from January 2007 through September 2009. Rule 12(b)(6) motions to dismiss cannot be broken out in this data.
2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
3. Data does not include MDL cases in either the total number of cases filed or the motions to dismiss.
4. The data were extracted directly from the text of 94 distinct court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.



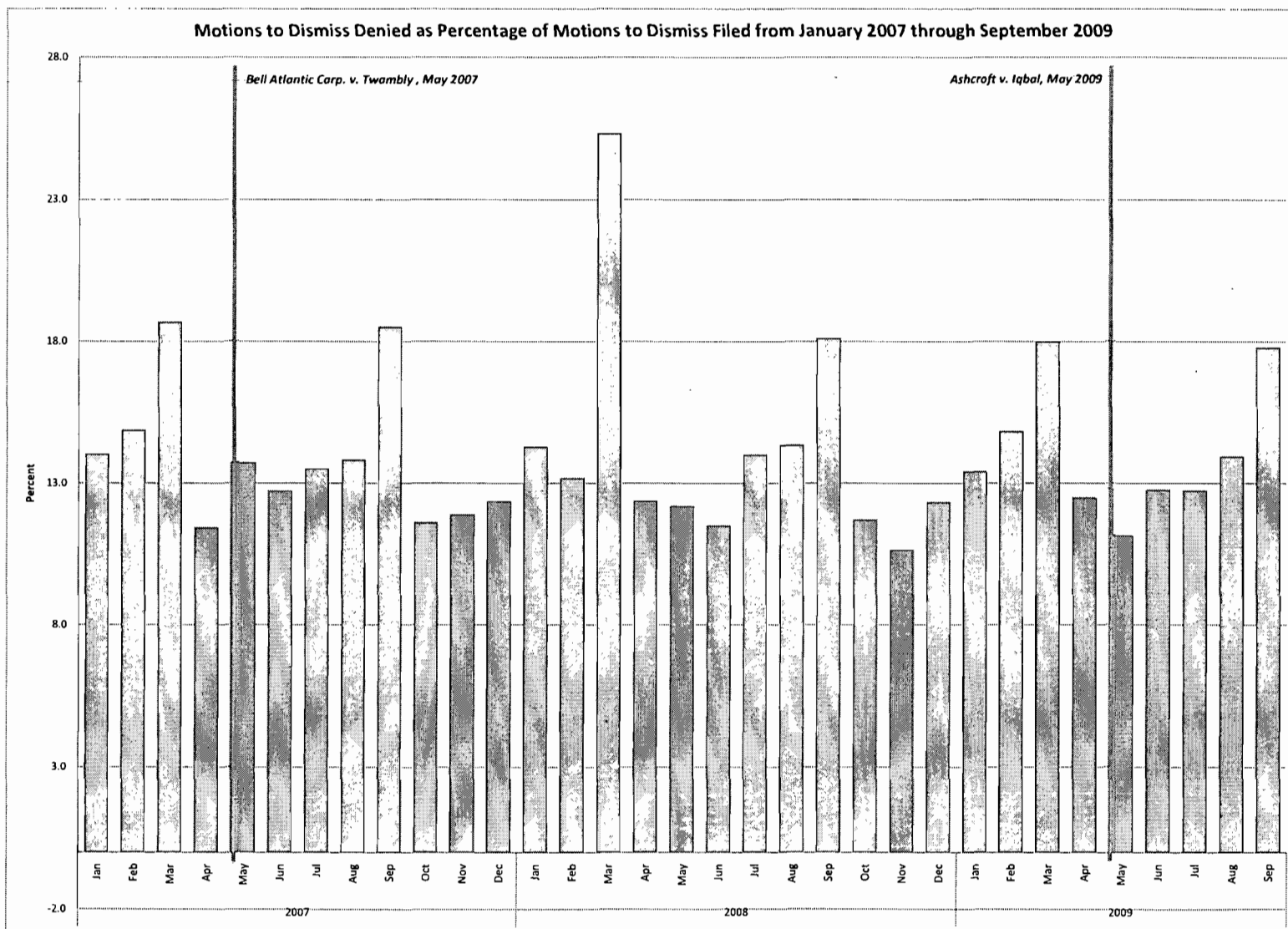
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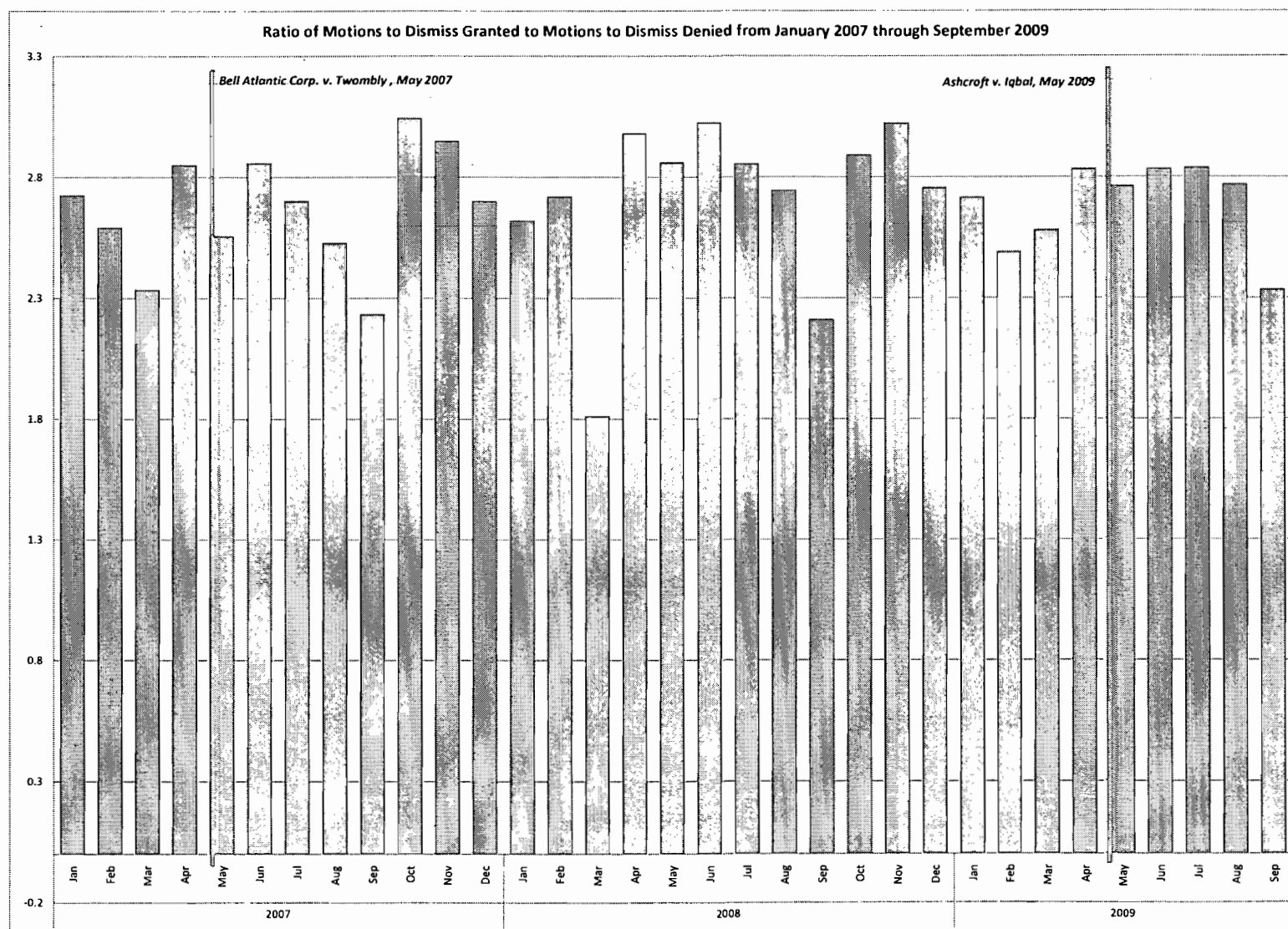
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MOTIONS TO DISMISS IN “CIVIL RIGHTS EMPLOYMENT CASES” AND “CIVIL RIGHTS OTHER CASES”
PRE-*TWOMBLY* (JANUARY - APRIL 2007) AND POST-*IQBAL* (JUNE - SEPTEMBER 2009)*

Civil Rights Employment Cases

Monthly Average for Four Months before *Twombly*

1,026 cases
525 motions to dismiss (51% of cases)
208 motions granted (20% of cases)
82 motions denied (8% of cases)

Monthly Average for Four Months after *Iqbal*

1,275 cases
561 motions to dismiss (44% of cases)
205 motions granted (16% of cases)
85 motions denied (6.6% of cases)

Civil Rights Other Cases

Monthly Average for Four Months before *Twombly*

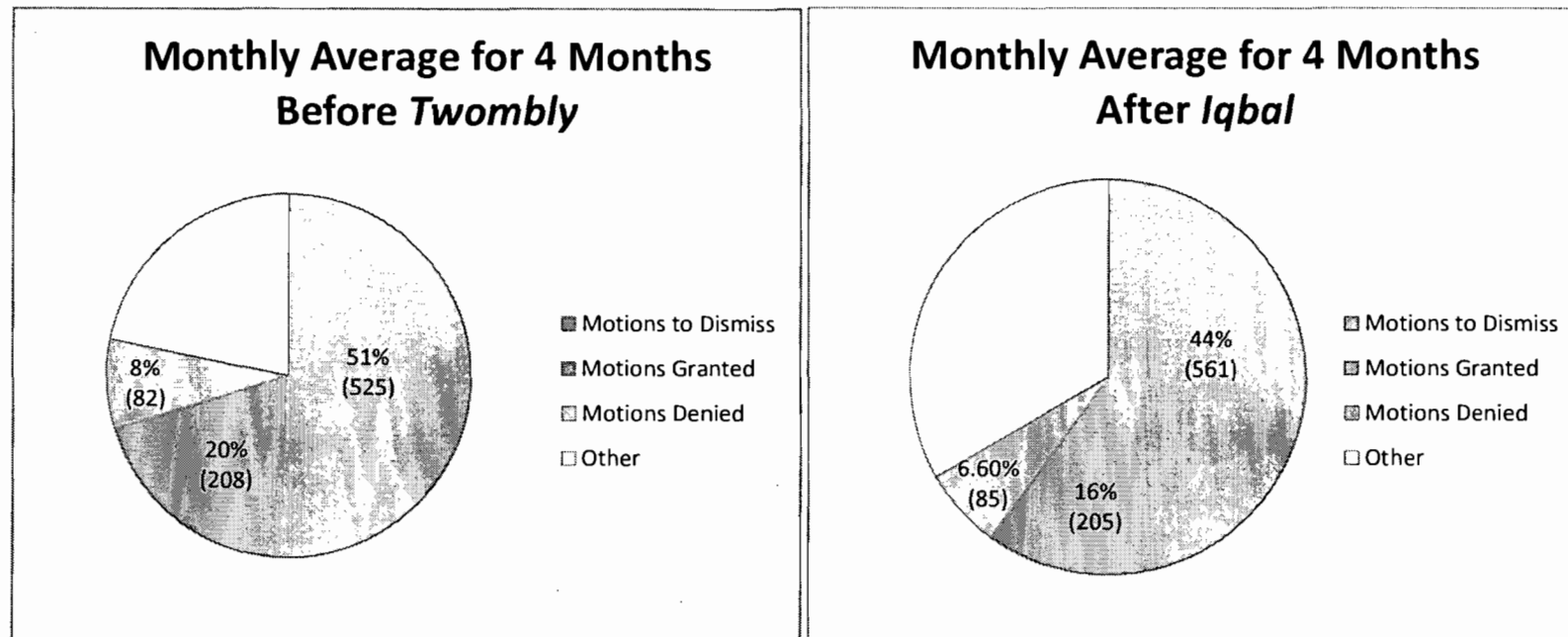
1,290 cases
937 motions to dismiss (73% of cases)
333 motions granted (26% of cases)
82 motions denied (6.4% of cases)

Monthly Average for Four Months after *Iqbal*

1,463 cases
941 motions to dismiss (64% of cases)
362 motions granted (25% of cases)
126 motions denied (8.6% of cases)

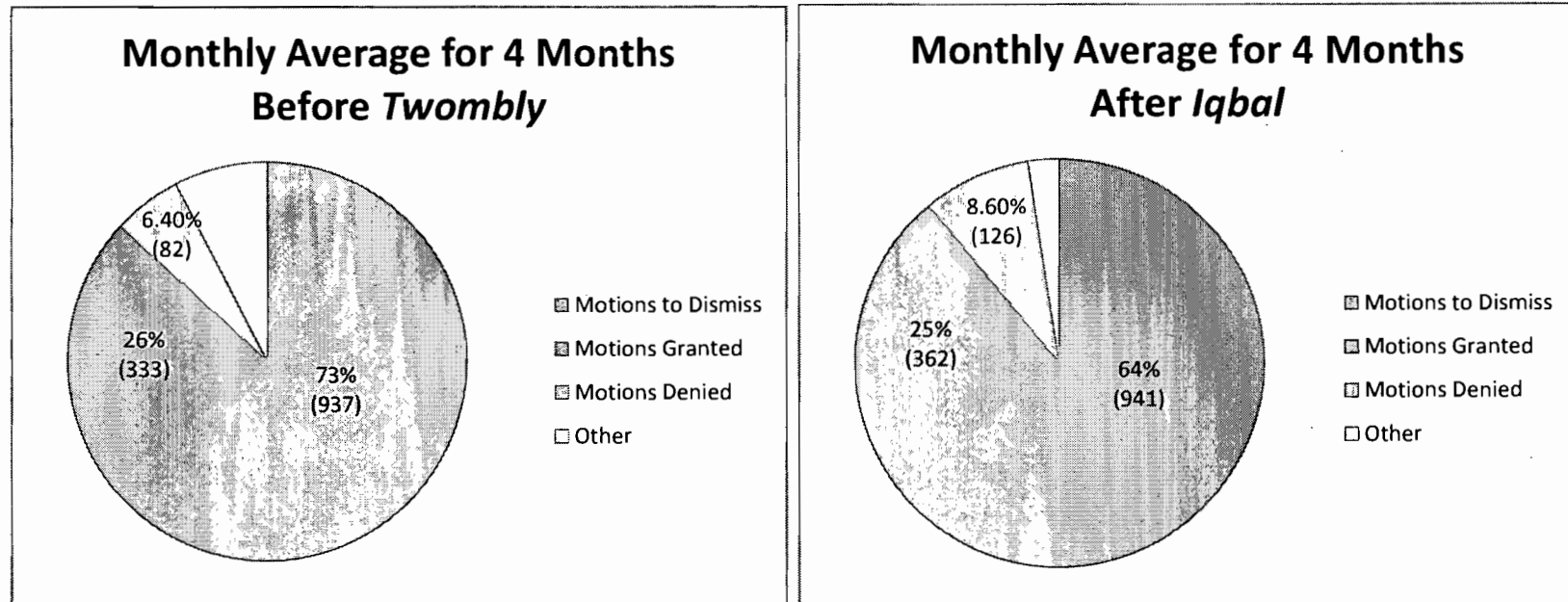
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- * 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
3. Data does not include motions to dismiss that were granted in part and denied in part.
4. Data does not include MDL cases in the number of motions to dismiss.
5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistical system, and they did not pass through all the quality controls of the statistics system.

Motions to Dismiss in “Civil Rights Employment Cases”
Pre-*Twombly* (January - April 2007) and Post-*Iqbal* (June-September 2009)¹



¹ 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
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Motions to Dismiss in “Civil Rights Other Cases”
Pre-*Twombly* (January - April 2007) and Post-*Iqbal* (June-September 2009)²



- ² 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed four months before *Twombly* and four months after *Iqbal*.
 2. Does not include data on whether motions to dismiss were granted with or without leave to amend.
 3. Data does not include motions to dismiss that were granted in part and denied in part.
 4. Data does not include MDL cases in the number of motions to dismiss.
 5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistical system, and they did not pass through all the quality controls of the statistics system