Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Senate Judiciary Committee
Hearing on "Has the Supreme Court Limited Americans' Access to Courts?"
Wednesday, December 2, 2009

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Access to the courts is critical to the fairness and integrity of our judicial system; it helps ensure that meritorious lawsuits are heard and litigants receive their day in court. Unfortunately, two recent decisions by the Supreme Court - Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal - have limited Americans' access to the courts by inappropriately raising the pleading standard for civil lawsuits. The Notice Pleading Restoration Act of 2009 fixes this problem by restoring the traditional pleading standard used in federal courts since the adoption of the Federal Rules of Civil Procedure in 1938 and detailed by the Supreme Court in Conley v. Gibson.

In Twombly, the Supreme Court held that a plaintiff must allege sufficient facts to state a "plausible" claim for relief in a civil complaint. This pleading standard is a significant change from Conley's well-established rule and places a serious burden on plaintiffs. In Iqbal, the Court further heightened the pleading standard by requiring courts to separate legal conclusions from factual allegations in a complaint before determining whether the factual allegations state a plausible claim for relief. This convoluted analysis grants too much discretion to trial judges and undermines the "short and plain statement of the claim" pleading standard created by the Federal Rules.

Together, Twombly and Iqbal have had an adverse impact on our civil justice system. The decisions shifted the responsibility for screening frivolous claims from the discovery and summary judgment stages of litigation to the pleading stage. While it is important for courts to dispose of cases efficiently and identify frivolous lawsuits, this objective can still be served using the traditional pleading standard. The heightened pleading standard established by Twombly and Iqbal permits dismissal of lawsuits that may prove meritorious, undermining our commitment to providing compensation for injury and equal access to justice.

In addition, these decisions obstruct the enforcement of federal law through private civil litigation. Private lawsuits are vital to our justice system because we cannot rely on the government alone to enforce environmental laws, civil rights laws, and other constitutional and statutory mandates. In order to proceed, these lawsuits often require plaintiffs to gain access to evidence in the possession of large, institutional defendants. This crucial evidence is only available through the discovery process. By dismissing these claims at the pleading stage under

Twombly and Iqbal and barring access to discovery, courts are inhibiting the enforcement of public law and preventing the protection of basic basic statutory and constitutional rights.

Furthermore, these Twombly and Iqbal decisions represent a circumvention of the legislative process. The Rules Enabling Act established a comprehensive process for amending the Federal Rules. If a change in the procedure for determining the adequacy of a complaint is needed, that amendment process should be used. When it decided to raise the pleading standard in Twombly and Iqbal, the Supreme Court sidestepped the amendment process.

The effects of this change have been widespread. Since Iqbal was decided in May, it has been cited more than 2,700 times by federal courts examining the adequacy of plaintiffs' complaints. States with rules of procedure based on the Federal Rules are beginning to incorporate Iqbal into their procedural analysis. Multiple civil rights cases have been dismissed using the heightened pleading standard established by Twombly and Iqbal.

I am proud to co-sponsor Sen. Specter's bill, the Notice Pleading Restoration Act, because I believe that it is critical to restore the pre-Twombly pleading standards. I am very open to alternative legislative approaches to accomplish the goal of this bill and look forward to hearing what the witnesses recommend. I want to thank the Chairman for holding this important hearing, and I look forward to working with the Committee on this issue.