

Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend

*Report to the Judicial Conference
Advisory Committee
on Civil Rules*

Joe S. Cecil, George W. Cort,
Margaret S. Williams, Jared J. Bataillon,
& Jacqueline G. Campbell

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Introduction

In our March 2011 report,¹ we indicated that following the Supreme Court decision in *Ashcroft v. Iqbal* (2009), Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim were granted more frequently with leave to amend the complaint. We also noted that the opportunity to amend the complaint may cure the defect and change the findings of the study.² The Advisory Committee asked that we follow the events in the study cases, determine the extent to which the respondents submitted amended complaints, and report the outcome of any subsequent motions to dismiss.

This follow-up study confirms the overall pattern of results presented in our March 2011 report. In brief, we found that an opportunity to amend a complaint reduces the extent to which movants prevail by approximately ten percentage points. Our conclusions remain the same. We found a statistically significant increase in motions granted only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated by such motions.

A word of caution is in order. We have recently discovered that we are missing some motions and orders that should be included in our analysis. We identified motions and orders using a new method that relies on CM/ECF codes entered by court staff. In verifying our findings we learned that in some districts we have not yet obtained all of the orders resolving motions to dismiss—this is the result of idiosyncratic coding practices by court staff. We are currently identifying missing orders using docket sheets and other means. We continue to stand by the findings of these studies and presently have no reason to believe that inclusion of the missing orders will change the findings of our study of outcomes of motions.³ We

1. Joe Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, March 2011), available at http://www.fjc.gov/library/fjc_catalog.nsf.

2. We examined orders responding to Rule 12(b)(6) motions that were resolved in January–June 2006 and January–June 2010. In 2010, 35% of the orders granted motions to dismiss with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006. *Id.* at 13–15.

3. We have no reason to believe the idiosyncratic coding practices are related to the outcome of the motions. So, while the number of orders included in the study will increase, we expect the missing orders to have the same percentages of motions granted in whole or in part, with or without leave to amend. We also limit the effect of such missing orders by controlling for distinctive effects of individual courts in the multinomial model. This circumstance differs from the effect of missing orders in the Westlaw database, because the missing orders in the Westlaw database are

expect our estimate of the rate at which motions are filed will increase in both 2006 and 2010 by an unknown amount. After locating the missing orders we will reanalyze the data to assess the accuracy of our earlier findings and the findings of this follow-up study.

more likely to deny motions to dismiss, thereby overstating the extent to which motions are granted. *Id.* at n.5.

Research Methodology

We examined docket sheets and documents in 543 cases from the previous study⁴ (143 cases from 2006; 400 cases from 2010) to determine the outcome of motions granted in whole or in part with leave to amend the complaint. We recorded any subsequent amended complaints, motions to dismiss, and orders resolving such motions.⁵ One or more amended complaints were submitted in 347 (64%) of the cases.⁶ Motions to dismiss for failure to state a claim were then filed in 209 of those cases, with follow-up motions being more likely to be filed in 2010.⁷ Such motions were unresolved in 57 of the 209 cases at the time we concluded our data collection, and motions in another 23 cases were granted with leave to amend. Cases in these two categories were removed from the analysis because of the uncertain outcome of the initial opportunity to amend the complaint. Motions were granted in whole or in part without leave to amend in 71% of the remaining 129 cases, with no statistically significant difference in grant rate in 2006 and 2010.

To determine whether the movant or respondent prevailed on the issues raised in the initial order, we then combined results of these follow-up cases with the previous results from cases in which the initial motion was denied or granted without leave to amend. We identified cases in which the movant prevailed as those in which the court granted the last motion to dismiss in whole or in part and no opportunity to amend the complaint remained. This included all cases in which the motion was granted with leave to amend, but no amended complaint was submitted during the time allowed. We identified cases in which the respondent prevailed as those in which the last motion to dismiss was denied, or in which the respondent submitted an amended complaint and the movant chose not to respond with an additional motion to dismiss.

4. Unlike the March 2011 study, the unit of analysis in this study is the individual case, not the order resolving the motion. Of the 1,921 orders examined as part of the initial study, we found that 52 of these orders responded to an earlier order also in the same case in the study that granted a motion with leave to amend, followed by an amended complaint, a motion to dismiss the amended complaint, and an order resolving the motion. We reclassified these orders to indicate that they represent a response to an earlier grant of a motion with leave to amend.

5. We included only those amended complaints and responses to those amended complaints that were responsive to the initial order.

6. Amended complaints were submitted in 61% of the 2006 cases and in 66% of the 2010 cases, a difference that was not statistically significant.

7. Motions were filed in response to 45% of the amended complaints in 2006 cases and in response to 65% of the amended complaints in 2010 cases ($p = 0.001$), a higher filing rate that is consistent with our previous findings. Cecil et al., *supra* note 1, at 8.

Findings

The findings of this follow-up study are consistent with the pattern of results presented in the March 2011 report and should be considered an extension of those findings. As indicated in the tables in Appendix A, the opportunity to present an amended complaint reduced the overall rate at which movants prevail (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 March 2011 study to 6.3% in this study). While this overall difference of 6.3% meets conventional levels of statistical significance, this difference is the result of the sizeable effect of the financial instruments cases. When the financial instruments cases are removed from the analysis, the overall difference drops to 2.5%, which does not meet conventional levels of statistical significance ($p = 0.331$). The multinomial model presented in Table A-2 of Appendix A confirms that after controlling for district court, type of case, and the presence of an amended complaint, only the financial instruments cases show a statistically significant increase in 2010 in the rate at which the movant prevails.⁸

We also examined the extent to which a motion that was granted without leave to amend denied all of the claims of at least one plaintiff. As indicated in the tables of Appendix B, the crosstabs indicate an overall statistically significant increase in 2010 in the likelihood that a granted motion will dismiss all of the claims by at least one plaintiff.⁹ However, we were unable to confirm this effect using the multinomial model to control for district court, type of case, and amended complaint.¹⁰

Lastly, we examined whether a case in which the movant prevailed was more likely to terminate within specified periods. As indicated in Table A-4, no statistically significant difference was detected in those 2006 and 2010 cases terminating within 30, 60, and 90 days of the resolution of the motion.

8. The “financial instruments” category of cases combines nature-of-suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and “other real property.” The great majority of these cases involve claims by individuals suing lenders and/or loan servicing companies over the terms of either an initial residential mortgage or a refinance of an existing residential mortgage.

9. The greatest increase is in contracts cases (12.7%), an increase that falls just outside the conventional 0.05 standard of statistical significance.

10. Both of these multilinear models include an additional interaction term (i.e., “Amended Complaint x 2010”) to take into account any indirect effects of the Supreme Court decisions on motion practice, using amended complaint as an intermediate variable. No significant effect for such an interaction was found in either of the models.

Conclusion

This follow-up study confirms the findings of the March 2011 study. After taking into account the outcome of motions to dismiss granted with an opportunity to amend the complaint, we found that the outcome of motions varies greatly by district court and type of case. As before, we found a statistically significant increase in the extent to which movants prevailed following *Iqbal* only in cases involving financial instruments. An apparent increase in the extent to which motions excluded all claims by one or more plaintiffs did not survive testing by the statistical models that control for district court, type of case, and the presence of an amended complaint.

These findings do not rule out the possibility that the pleading standards established in *Twombly* and *Iqbal* may have a greater effect in narrower categories of cases in which respondents must obtain the facts from movants in order to state a claim. Unfortunately, we were not able to restrict this study to motions that involve issues of the sufficiency of the factual pleadings, since we do not know how to identify comparable motions during the period before *Twombly*, when the sufficiency of factual pleading was not thought to be the basis for challenging a pleading. Nor were we able to take into account changes in pleading practice, or the fact that recent complaints are more likely to include a recitation of facts that support the claim. While we found no statistically significant increase in the likelihood that a motion would be granted in cases other than those involving financial instruments, we found in the previous study that motions to dismiss are more likely to be filed after *Iqbal*, and this increased filing rate may combine with the overall stable rate at which motions are granted to result in an overall increase in the percentage of cases in which motions are granted. Lastly, this study did not examine the substantive law that formed the basis of the court orders resolving the motions. The findings of this study must be interpreted in the context of ongoing development of the case law in both the Supreme Court and the lower courts.

Appendix A: Extent to Which Movants Prevail After Motions to Dismiss for Failure to State a Claim

Table A-1. Prevailing Party After Resolution of Motion to Dismiss for Failure to State a Claim

	Prevailing Party	2006	2006 No. of Orders	2010	2010 No. of Orders	Change Movant % (Probability)
Total	Respondent	43.6%	297	37.3%	414	+6.3% ($p = 0.008$)
	Movant	56.4%	384	62.7%	697	
Contract	Respondent	43.3%	78	45.3%	102	-2.0% ($p = 0.688$)
	Movant	56.7%	102	54.7%	123	
Torts	Respondent	38.6%	27	39.8%	41	-1.2% ($p = 0.871$)
	Movant	61.4%	43	60.2%	62	
Civil Rights	Respondent	41.4%	70	33.0%	69	+8.4% ($p = 0.092$)
	Movant	58.6%	99	67.0%	140	
Employment Discrimination	Respondent	39.1%	36	38.9%	44	+0.2% ($p = 0.978$)
	Movant	60.9%	56	61.1%	69	
Financial Instruments	Respondent	62.5%	10	20.5%	39	+42.0% ($p < 0.001$)
	Movant	37.5%	6	79.5%	216	
Other	Respondent	49.4%	76	43.9%	119	+5.5% ($p = 0.280$)
	Movant	50.6%	78	56.1%	152	

Table A-2. Binary Logit Model of Prevailing Party After Resolution of Motion to Dismiss for Failure to State a Claim

Variables*	Movant Prevails		
	Coefficient	Std. Error	$p > z $
District Variables			
Eastern District of Arkansas	-0.7651	0.4533	0.091
Eastern District of California	-0.4168	0.2689	0.121
Northern District of California	-0.4851	0.2393	0.043
District of Colorado	-0.6979	0.3816	0.067
District of the District of Columbia	-0.0712	0.4783	0.882
Middle District of Florida	-1.0467	0.2520	0.000
Northern District of Georgia	0.0087	0.3506	0.980
Northern District of Illinois	-0.7653	0.2727	0.005
Southern District of Indiana	-0.2924	0.3583	0.415
District of Kansas	-0.6230	0.3500	0.075
District of Massachusetts	0.1110	0.4279	0.795
District of Minnesota	-0.1280	0.3731	0.731
District of New Jersey	-0.1520	0.2839	0.592
Eastern District of New York	-0.1024	0.3129	0.743
Southern District of New York	0.2084	0.3707	0.574
Southern District of Ohio	-0.0066	0.3205	0.983
Eastern District of Pennsylvania	-0.6001	0.2965	0.043
District of South Carolina	-0.9991	0.4623	0.031
Northern District of Texas	-1.0095	0.3779	0.008
Southern District of Texas	-0.3689	0.3792	0.331
Case Type Variables			
Contract	-0.2184	0.2980	0.464
Other	-0.4504	0.3019	0.136
Civil Rights	-0.1177	0.2990	0.694
Financial	-0.8799	0.5867	0.134
Employment	-0.0016	0.3340	0.996
Amended Complaint	-0.0158	0.1610	0.922
Year 2010	0.0021	0.3440	0.995
Interaction Terms			
Contract x 2010	-0.0113	0.3875	0.977
Other x 2010	0.2836	0.3857	0.462
Civil Rights x 2010	0.4308	0.3918	0.272
Financial x 2010	1.8752	0.6505	0.004
Employment x 2010	0.0338	0.4392	0.939
Amended Complaint x 2010	-0.1183	0.2070	0.568
Constant	0.9178	0.3292	0.005
<i>N</i>	1,788		
Percent Correctly Predicted	61.74%		
PRE	4%		

* The baseline consists of tort cases decided in 2006 with no amended complaint in the District of Maryland, the Eastern District of Michigan, or the District of Rhode Island.

Table A-3. Predicted Probabilities

Variables	Movant Prevails	Confidence Interval	
Baseline	0.7114	0.5699	0.8328
District Variables			
Eastern District of Arkansas	—	—	—
Eastern District of California	—	—	—
Northern District of California	0.6085	0.4650	0.7351
District of Colorado	—	—	—
District of the District of Columbia	—	—	—
Middle District of Florida	0.4707	0.3300	0.6155
Northern District of Georgia	—	—	—
Northern District of Illinois	0.5402	0.3866	0.6889
Southern District of Indiana	—	—	—
District of Kansas	—	—	—
District of Massachusetts	—	—	—
District of Minnesota	—	—	—
District of New Jersey	—	—	—
Eastern District of New York	—	—	—
Southern District of New York	—	—	—
Southern District of Ohio	—	—	—
Eastern District of Pennsylvania	0.5813	0.4293	0.7271
District of South Carolina	0.4816	0.2606	0.7125
Northern District of Texas	0.4806	0.2857	0.6644
Southern District of Texas	—	—	—
Case Type Variables			
Contract	—	—	—
Other	—	—	—
Civil Rights	—	—	—
Financial	—	—	—
Employment	—	—	—
Amended Complaint	—	—	—
Year 2010	—	—	—
Interaction Terms			
Contract x 2010	—	—	—
Other x 2010	—	—	—
Civil Rights x 2010	—	—	—
Financial x 2010	0.8667	0.7911	0.9228
Employment x 2010	—	—	—
Amended Complaint x 2010	—	—	—

Table A-4. Percentage of Cases Terminated After Motion to Dismiss Granted for Failure to State a Claim (N = 1,067)

	Order Year		Probability
	2006 (N = 383)	2010 (N = 684)	
Terminate within 30 days	31.3%	36.1%	$p = 0.115$
Terminate within 60 days	35.8%	40.2%	$p = 0.154$
Terminate within 90 days	39.4%	42.5%	$p = 0.321$

Appendix B: Extent to Which Relief Is Granted by a Motion to Dismiss for Failure to State a Claim

Table B-1. Exclusion of Claims by a Motion to Dismiss for Failure to State a Claim

	Extent of Relief Granted	2006	2006 No. of Orders	2010	2010 No. of Orders	Change in % Dismiss Plaintiff (Probability)
Total	Dismiss claim(s) only	63.0%	242	55.8%	389	
	Dismiss plaintiff(s)	37.0%	142	44.2%	308	+7.2% ($p = 0.021$)
Contract	Dismiss claim(s) only	64.7%	66	52.0%	64	
	Dismiss plaintiff(s)	35.3%	36	48.0%	59	+12.7% ($p = 0.056$)
Torts	Dismiss claim(s) only	65.1%	28	67.7%	42	
	Dismiss plaintiff(s)	34.9%	15	32.3%	20	-2.6% ($p = 0.780$)
Civil Rights	Dismiss claim(s) only	56.6%	56	62.1%	87	
	Dismiss plaintiff(s)	43.4%	43	37.9%	53	-5.5% ($p = 0.387$)
Employment Discrimination	Dismiss claim(s) only	73.2%	41	62.3%	43	
	Dismiss plaintiff(s)	26.8%	15	37.7%	26	+10.9% ($p = 0.199$)
Financial Instruments	Dismiss claim(s) only	50.0%	3	43.0%	65	
	Dismiss plaintiff(s)	50.0%	3	57.0%	86	+7.0% ($p = 0.737$)
Other	Dismiss claim(s) only	61.5%	48	57.9%	64	
	Dismiss plaintiff(s)	38.5%	30	42.1%	152	+3.6% ($p = 0.595$)

Table B-2. Binary Logit Model of Exclusion of All Claims by One or More Plaintiffs by Motion to Dismiss for Failure to State a Claim

Variables*	Dismissed Claims and Plaintiffs		
	Coefficient	Std. Error	$p > z $
District Variables			
Eastern District of Arkansas	-0.7878	0.7071	0.265
Eastern District of California	-0.2126	0.3119	0.495
Northern District of California	0.3473	0.2815	0.217
District of Colorado	0.3242	0.5143	0.529
District of the District of Columbia	0.1128	0.5523	0.838
Middle District of Florida	-0.4045	0.3323	0.224
Northern District of Georgia	0.1162	0.4096	0.777
Northern District of Illinois	-0.0175	0.3470	0.960
Southern District of Indiana	-0.4290	0.4653	0.357
District of Kansas	0.3971	0.4438	0.371
District of Massachusetts	-0.1728	0.4806	0.719
District of Minnesota	-0.1777	0.4481	0.692
District of New Jersey	0.2509	0.3282	0.445
Eastern District of New York	0.1371	0.3626	0.705
Southern District of New York	0.6903	0.4100	0.092
Southern District of Ohio	-0.1786	0.3681	0.628
Eastern District of Pennsylvania	-0.4737	0.3989	0.235
District of South Carolina	-0.1912	0.6763	0.777
Northern District of Texas	-0.4658	0.5560	0.402
Southern District of Texas	-0.2686	0.4755	0.572
Case Type Variables			
Contract	-0.0261	0.3974	0.948
Other	0.0429	0.4072	0.916
Civil Rights	0.4001	0.3903	0.305
Financial	0.7845	0.8888	0.377
Employment	-0.4027	0.4500	0.371
Amended Complaint	-0.3546	0.2220	0.110
Year 2010	-0.0946	0.4505	0.834
Interaction Terms			
Contract x 2010	0.6118	0.5160	0.236
Other x 2010	0.3478	0.5189	0.503
Civil Rights x 2010	-0.1413	0.5087	0.781
Financial x 2010	0.2453	0.9475	0.796
Employment x 2010	0.5591	0.5861	0.340
Amended Complaint x 2010	-0.0011	0.2736	0.997
Constant	-0.4319	0.4125	0.295
<i>N</i>		1,079	
Percent Correctly Predicted		60.98%	
PRE		7%	

* The baseline consists of tort cases decided in 2006 with no amended complaint in the District of Maryland, the Eastern District of Michigan, or the District of Rhode Island.

Appendix C: Supplemental Analyses of Previously Excluded Types of Cases

The previous study excluded certain types of cases that we believed to present peripheral issues. Several commentators questioned the exclusion of such cases. We present cross-tabs for such cases below.

Table C-1. Crossclaims and Counterclaims: Outcome of Motion to Dismiss

	2006	2010
Respondent prevails	26 (38.2%)	41 (43.6%)
Movant prevails	42 (61.8%)	53 (56.4%)

$p = 0.494$

Table C-2. Non-Prisoner Pro Se Cases: Outcome of Motion to Dismiss

	2006	2010
Respondent prevails	18 (13.6%)	28 (14.6%)
Movant prevails	114 (86.4%)	164 (85.4%)

$p = 0.811$

Table C-3. Non-Prisoner Pro Se Cases: Effect of Grant of a Motion to Dismiss on Exclusion of Plaintiff(s)

	2006	2010
Dismisses only claims	39 (34.5%)	53 (32.3%)
Dismisses one or more plaintiffs	74 (65.5%)	111 (67.7%)

$p = 0.703$

Table C-4. Prisoner Cases: Outcome of Motion to Dismiss

	2006	2010
Respondent prevails	15 (14.3%)	33 (17.9%)
Movant prevails	90 (85.7%)	151 (82.1%)

$p = 0.424$

Table C-5. Prisoner Cases: Effect of Grant of a Motion to Dismiss on Exclusion of Plaintiff(s)

	2006	2010
Dismisses only claims	33 (36.7%)	68 (45.0%)
Dismisses one or more plaintiffs	57 (63.3%)	83 (55.0%)

$p = 0.204$

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