October 26, 2009

The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
U.S. House of Representative Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

We are writing to urge you to support legislation that would restore the legal standards required to bring federal court litigation that have been the law for half a century. In two recent cases, the U.S. Supreme Court fundamentally changed these standards and erected new barriers that may keep victims of unlawful conduct from getting into court to prove their claim, thereby immunizing lawbreakers from appropriate sanction and encouraging disrespect for the law.

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Court created a brand new requirement that federal complaints must meet in order to overcome motions to dismiss. The Court ruled that the complaint must state enough facts to persuade the presiding court that the claim is "plausible." Prior to *Twombly,* the Court had followed a standard set out in 1957 in *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should not be dismissed "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." The Court further said that the claimant does not need to "set out in detail the facts upon which he bases his claim." The Court cited the language of *Conley* in at least a dozen decisions in the half-century since the case was decided.

In *Twombly*, without benefit of any new rulemaking proceedings, new statutory language or any significant new empirical information, the Court discarded the *Conley* standard in favor of a new, subjective, "plausibility" standard. In May, the Court expanded on the new standard in *Ashcroft v. Iqbal*, _____ U.S. _____ (May 18, 2009), ruling that civil claimants must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that in making that determination a court is to "draw on its judicial experience and common sense." Through these two cases, the Court devised its own novel pleading standards, thus usurping the authority of Congress and the assigned legislative rule-making role of the Judicial Conference.

Operating under these vague and subjective new legal standards, defendants are increasingly urging federal judges to dismiss federal lawsuits, before the claimants have any opportunity to develop facts in support of their claims through discovery, on the basis that the factual allegations do not establish a "plausible" claim for relief. Because information about the details of wrongful conduct is often in the hands of the defendants,

many meritorious cases could be dismissed before the discovery process begins, and wrongdoers will then escape accountability. Indeed, meritorious cases have been thrown out of federal court under the new Iqbal standards because claimants were unable to identify nonpublic facts in their initial pleadings, such as the precise time, place and manner of the alleged misconduct.

The new standards substantially hamper access to the courts for people who are harmed by illegal conduct, undermine the fundamental right to a jury trial, and infringe the rights of civil plaintiffs to due process of law, fundamental fairness and their day in court. According to a September 21, 2009 article in the *National Law Journal* (attached), motions to dismiss based on *Iqbal* have already produced more than 1,500 district court and 100 appellate court decisions. The American Bar Association's *Litigation News* reported that, in the two years after *Twombly*, federal circuit courts relied on the new standards to dismiss federal lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, employment discrimination and the taking of private property.

The severe nature of the mischief *Iqbal* is creating is shown by a Third Circuit decision, *Fowler v. UPMC Shadyside*, __ F.3d __, 2009 WL 2501662 (3d Cir. Aug. 18, 2009) (No. 07-4285), which actually held that *Iqbal* silently overruled the part of the *Twombly* decision rejecting heightened pleading standards in employment discrimination cases.

Rule 8 of the Federal Rules of Civil Procedure requires claimants to file a "short and plain statement" of the claim. In the *Twombly* and *Iqbal* decisions, the Supreme Court unilaterally expanded the rule to require a factual basis that is "plausible" and "reasonable" in the subjective judgment of lower court judges. As long as this new standard is the law of the land, the doors to federal court can be slammed shut on many Americans harmed by serious wrongdoing. Congress should act swiftly to restore the legal standards that have kept the courthouse doors open for the last half-century.

Sincerely,

Alliance for Justice
American Antitrust Institute
American Association for Justice
American Civil Liberties Union
The Brennan Center for Justice at NYU School of Law
Center for Justice & Democracy
Christian Trial Lawyer's Association
Committee to Support the Antitrust Laws
Community Catalyst

Consumer Federation of America
Consumers Union
Earthjustice
Environment America
Essential Information
The Impact Fund
La Raza Centro Legal
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
Mexican American Legal Defense and Educational Fund
NAACP Legal Defense and Educational Fund
National Association of Consumer Advocates
National Association of Shareholder and Consumer Attorneys
National Consumer Law Center
National Consumers League
National Council of La Raza
National Crime Victims Bar Association
National Employment Lawyers Association
National Senior Citizens Law Center
National Whistleblowers Center
National Women's Law Center
Neighborhood Economic Development Advocacy Project
Public Citizen
Sierra Club
Southern Poverty Law Center
Taxpayers Against Fraud
U.S. Public Interest Research Group

cc:
Chairman John Conyers
Ranking Member Rep. Lamar Smith
Members of the House Judiciary Committee