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Tax Court Should Reject *Twombly/Iqbal* Plausibility Pleading

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The Supreme Court recently abandoned notice pleading in favor of a tighter plausibility pleading standard. The author argues that the Tax Court, which has its own rules, should continue to adhere to the notice pleading standard because of the Tax Court's much more limited jurisdiction and its large number of pro se petitions.

Introduction

Under Federal Rules of Civil Procedure (FRCP) Rule 12(b)(6), a district court defendant may bring a motion to dismiss a complaint for failure to state a claim on which relief can be granted. In 1957, in *Conley v. Gibson*,[1] the Supreme Court reaffirmed the FRCP's so-called notice pleading regime by holding that a complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) "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."[2]

In *Bell Atlantic Corp. v. Twombly*[3] and *Ashcroft v. Iqbal*,[4] the Supreme Court abandoned *Conley*'s notice pleading regime for a stricter regime requiring that a complaint be dismissed when it does not allege facts sufficient to make the asserted claim plausible on its face. Because district courts operate under the FRCP (and there is no exception to those rules for tax cases), complaints in tax-related suits for the last few years have been tested under the *Twombly*/*Iqbal* plausibility standard. I experienced that in *Sarmiento v. United States*,[5] a tax refund case that my clinic and I recently lost as a result of the government's filing a motion under Rule 12(b)(6).

The Court of Federal Claims, which hears tax refund suits under 28 U.S.C. section 1491, has its own Rule 12(b)(6). The *Twombly*/*Iqbal* plausibility standard has been held to apply to complaints in that court, as well.[6]

Section 7453 provides that the Tax Court may establish its own rules—that is, that it is not required to follow the FRCP. Tax Court Rule 40 provides that a defense of failure to state a claim on which relief can be granted may be asserted either in the answer or in a motion. A long time ago, the Tax Court chose to interpret its Rule 40 in conformity with FRCP Rule 12(b)(6) and *Conley*'s notice pleading regime. Since 2007, the Tax Court has continued to apply the notice pleading regime to its Rule 40 rulings without discussing whether it should instead follow the *Twombly*/*Iqbal* plausibility standard. I suspect that the omission to discuss these Supreme Court opinions—which did not arise in the tax context—is a bit of tax myopia by the Tax Court. I am not a fan of tax myopia,[7] but I can appreciate tax exceptionalism[8] if after

examination the reasons for a nontax rule do not make sense in the tax context. And sometimes, I am a fan of Tax Court exceptionalism.

The *Twombly*/*Iqbal* plausibility pleading regime has already caused an outpouring of law review articles, both pro and con.[9] A majority of the few state supreme courts that have considered the issue have rejected the newer standard. They long ago adopted the notice pleading regime in interpreting their own state rules for motions to dismiss for failure to state a claim on which relief can be granted, and they see insufficient reason in their court systems for making a similar change.[10]

In this article, I examine whether, in the context of the Tax Court's jurisdiction and the reasons that compelled the Supreme Court to change the district court pleading rules, the Tax Court should adopt the *Twombly*/*Iqbal* plausibility pleading regime. I conclude that the Tax Court's jurisdiction is too limited and its discovery landscape too restricted for there to be significant problems requiring the pleading rule change. Further, too many taxpayers petitioning the Tax Court are pro se, often drafting petitions that might fail under the higher standard. Without stepping into the debate over whether there is a big enough problem in the district courts to justify the higher pleading standards under the FRCP, there does not appear to be a problem in the Tax Court that would be solved by the *Twombly*/*Iqbal* pleading standards. Thus, the Tax Court should retain the *Conley* notice pleading regime.

FRCP Background

In *Conley*, black railroad employees who were discharged or demoted (and whose former jobs were filled by whites) brought an action in district court against their union and the unit of their union that had been designated their exclusive bargaining agent, seeking a declaratory judgment, injunction, and damages. The black employees alleged that their discharge or demotion violated a collective bargaining contract between the railroad and the union and that the union and its unit had violated the Railway Labor Act by failing to give them the same protection given to white employees. The district court dismissed the employees' complaint on the ground that under the Railway Labor Act, the National Railroad Adjustment Board had exclusive jurisdiction of the controversy. However, the Supreme Court found that the district court had jurisdiction. The Court then decided a non-jurisdictional motion under FRCP Rule 12(b)(6) to dismiss for failure to state a claim on which relief may be granted.

FRCP 8(a)(2) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The defendants in *Conley* argued that the complaint failed to set forth specific facts to support its general allegations of discrimination and that dismissal was therefore proper. The Supreme Court replied:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly

> the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[11]

Earlier in its opinion, the Court said that a complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) "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."[12]

Fifty years later came *Twombly*. In this putative class action antitrust suit brought by phone and Internet subscribers against the surviving regional Bell Telephone companies after the breakup of AT&T, the plaintiffs alleged a conspiracy in violation of section 1 of the Sherman Antitrust Act, arguing that the companies had behaved as if there were an agreement among them—that is, they exhibited some parallel behavior. The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[13] The Supreme Court expressed two major concerns about antitrust actions: that antitrust discovery can be expensive[14] and that there is an *in terrorem* effect of those suits that can lead to better settlements for the plaintiffs than merited.[15] The Court stated:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).
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> In applying these general standards to a section 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[16]

The Court went on to make some observations on *Conley*:

> Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in Theatre Enterprises, Monsanto, and Matsushita, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in Conley v. Gibson spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule

> that a complaint should not be dismissed for failure to state a claim 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." 355 U.S. at 45-46. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard.
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> On such a focused and literal reading of Conley's "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough.
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> . . .
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> *C*onley's "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the Conley Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.[17]

Iqbal involved a complaint brought in district court by a Muslim Pakistani-American who had been arrested and incarcerated in New York after September 11, 2001, and subjected to what he alleged was harsh treatment in violation of his First and Fifth Amendment rights. In addition to 51 others, his complaint named the former attorney general and director of the FBI, alleging that "each knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[18] The suit was one brought on account of constitutional violation under *Bivens v. Six Unknown Federal Narcotics Agents*,[19] which allows a nonstatutory suit for those types of violations against federal actors in limited circumstances. The attorney general and FBI director claimed qualified immunity and moved to dismiss the complaint for failure to state sufficient allegations to show their involvement in clearly established unconstitutional conduct.

The Court ultimately held that the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination against the officials. It remanded the case to the court of appeals to decide in

the first instance whether to remand to the district court so that Iqbal could seek leave to amend his deficient complaint. In concluding that some allegations in the complaint amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim"[20] and were "conclusory and not entitled to be assumed true,"[21] the Supreme Court clarified that *Twombly*'s plausibility pleading standard was not merely an antitrust pleading standard: "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[22] To Iqbal's argument that the appellate court could limit or "cabin" discovery to the other defendants initially, the Supreme Court stated:

> We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.[23]

Tax Court Rules and Practices

The Tax Court does not have a rule mirroring FRCP Rule 8's requirement of a "short and plain statement of the claim." However, the Tax Court's Rule 31 provides:

> (a) Purpose: The purpose of the pleadings is to give the parties and the Court fair notice of the matters in controversy and the basis for their respective positions.
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> (b) Pleading To Be Concise and Direct: Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading are required.

For Tax Court deficiency actions (the most common type of proceeding), Rule 34(b) provides that the petition shall contain "clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency" and "clear and concise lettered statements of the facts on which petitioner bases the assignments of error."

Tax Court Rule 40 provides that a defense for failing to state a claim on which relief can be granted may be asserted in either the answer or in a motion. It is odd that the Tax Court adopted that language from the FRCP, because its rules nowhere require the pleader to state a claim on which relief can be granted. While the petitioner in the Tax Court is told to provide a clear and concise assignment of every error committed by the IRS, that is not really the same thing as a complete, self-contained claim. Perhaps because of that slight but significant semantic difference, when the IRS moves to dismiss a petition for failure to state a claim on which relief can be granted, the Tax Court's practice is to issue an order directing the petitioner either to file an amended pleading complying with the language of Rule 34(b) or file a written response to the motion.[24]

Nevertheless, the Tax Court long ago chose to interpret its Rule 40 in conformity with FRCP Rule 12(b)(6) and *Conley*'s notice pleading regime. *Conley* has been cited by the Tax Court in about 50 memorandum opinions when either applying its Rule 40 or addressing other pleading issues.[25]

Since 2007, the Tax Court has continued to apply the notice pleading regime to its Rule 40. The most recent published Tax Court opinion citing *Conley* is its 2003 memorandum opinion in *Carskadon v. Commissioner*.[26]

Since 2003, the Tax Court, while not directly citing *Conley*, has occasionally cited other cases that do cite *Conley* and rely on the same notice pleading standard. The Tax Court addresses most motions for failure to state a claim on which relief can be granted in unpublished, non-precedential orders. Since June 17, 2011, the Tax Court has put those orders on its website and made them searchable. My research shows that of the more than 200 orders on motions to dismiss for failure to state a claim issued since then, none has cited *Conley*; indeed, most do not even indicate what standard is being applied. However, some orders cite other cases indicating the standard, including one issued by Chief Special Trial Judge Peter Panuthos in *Baker v. Commissioner*, No. 10394-11 (Sept. 15, 2011). Panuthos granted an IRS motion to dismiss for failure to state a claim, citing in part a Ninth Circuit case, *Hicks v. Small*.[27] *Hicks v. Small* itself cited another Ninth Circuit case, *Love v. United States*,[28] which quoted from *Conley*'s notice pleading standard.

The Tax Court is often quite generous to taxpayers in denying motions to dismiss under the notice pleading standard. For example, last year, Special Trial Judge Lewis R. Carluzzo refused to dismiss a tax protester's petition despite pages of objectionable rhetoric because the taxpayer did attach the list of adjustments to income from the notice of deficiency and claimed that he did "not owe this money." That was found sufficient to defeat the IRS's motion, "even if by the slightest margin."[29] However, Carluzzo ordered the taxpayer to file an amended petition complying with Rule 34(b), warning that this was his last chance to do so.[30]

As the director of a low-income taxpayer clinic, I am often called into pending Tax Court cases that have been filed by pro se taxpayers. The pro se petitions I see do not contain tax protester rhetoric, but are often not more detailed than the one faced by Carluzzo. Even if the complaints are filed on Form 2 (the Tax Court's simplified petition form), pro se petitions often say little more than "I don't owe this and can't pay this." Yet, that lack of detail does not trigger an order from the court to amend the petition to comply with the Rule 34(b) pleading rules and does not cause the IRS's lawyers to move to dismiss under Rule 40. I can't prove it, but I suspect that Rule 40 motions are usually brought against tax protesters. And I suspect that the Tax Court and the IRS lawyers assume that if a non-tax-protester pro se petition is submitted using a Form 2 and has attached to it the notice of deficiency (or other jurisdiction-triggering notice), the petitioner is contesting all adjustments despite not being precise on the issues or facts in dispute.

As far as I can tell, no published Tax Court opinion and only one order searchable on the Tax Court's website has ever cited or discussed *Twombly* or *Iqbal*.[31] That is an unfortunate omission by the court. Because the Tax Court issues about 200 orders a year in response to motions to dismiss for failure to state a claim on which relief can be granted, it is overdue to discuss whether the *Twombly*/*Iqbal* plausibility pleading standard applicable to FRCP Rule 12(b)(6) motions has superseded its Rule 40 application of the *Conley* notice pleading regime. This is particularly troublesome because motions are made in less than 1

percent of Tax Court dockets[32] and because most of those motions probably are directed at petitions filed by pro se petitioners. Those petitioners are unlikely to know that there are two alternate pleading standards that might be applicable and they usually are not informed by the court about what standard it is applying to their petitions. Reviewing appellate courts also should discuss which pleading regime the Tax Court applied when it granted the motion, even if a tax protester filed the petition.

Keeping *Conley* Notice Pleadings

The Tax Court should retain the *Conley* notice pleading regime when deciding motions to dismiss for failure to state a claim on which relief may be granted under its Rule 40.

First, it is hard to figure out how to apply the plausibility pleading standard to a Tax Court petition. Would the standard require the dismissal of a petition that did not get beyond boilerplate language in identifying errors committed by the IRS? Would a petition have to state legal theories, something the rules do not appear to require? On the fact side, would the standard require the dismissal of, say, an innocent spouse petition seeking equitable relief under section 6015(f) if the taxpayer did not allege facts going to each of the numerous factors normally considered by the IRS and the courts in making the determination?[33]

Second, district courts governed by the FRCP are courts of general jurisdiction and handle all kinds of cases. Many suits have the potential to be discovery nightmares or ones brought merely to trigger nuisance settlements (that is, where defendants pay out money simply to get rid of cases). Even if one believes that those suits need to be reined in as early as the complaint stage (a notion about which I am conflicted), those concerns do not extend to the Tax Court, which has very limited jurisdiction.[34]

The IRS is the only defendant in Tax Court cases. Those cases are on a very limited number of subjects: primarily (a) the amount of tax, penalties, or interest that should be assessed (see section 6213(a) (deficiency jurisdiction); section 6404(h) (interest abatement jurisdiction); and (b) tax collection issues (see section 6015(e) (innocent spouse jurisdiction); section 6330(d)(1) (collection due process appeals jurisdiction)).

Probably 99 percent of the Tax Court cases are brought in response to IRS-issued notices,[35] so the IRS can control its Tax Court caseload and prevent itself from being overwhelmed. Indeed, it is hardly an original observation that a Tax Court petitioner is more like a defendant in a lawsuit (as if responding to the IRS's complaint—that is, an IRS notice) than like the plaintiff that the Supreme Court was concerned might generate a doubtful suit in *Twombly* and *Iqbal*.

Next, the kinds of discovery concerns in *Twombly* and *Iqbal* do not exist in the Tax Court. Under FRCP Rule 26(a), parties to a district court suit first engage in non-court-supervised disclosure, which can be expensive when there are many potentially relevant documents. The parties then proceed to what can be rather extensive discovery under FRCP Rule 26(b). By contrast, the Tax Court rules do not provide for formal disclosure, and before any formal discovery may be had, Tax Court Rule 70(a)(1) states that "the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication." That led to the use of *Branerton* [36]letters and conferences in Tax Court cases before formal discovery may be pursued.

Discovery by deposition in district court cases—often an expensive process—has been tightened over the years. For example, under FRCP Rule 30(a)(2)(A), a plaintiff may, without leave of the court, orally depose no more than 10 nonparties when neither the defendant nor the deponent wishes the deposition to take place. Yet, in *Twombly*, the Supreme Court chided the dissent, saying, "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, 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."[37]

By contrast, under Tax Court Rule 74(b)(3), even if both parties agree to a deposition, a nonparty cannot be deposed without his consent without the party seeking the deposition first moving for an order that the proposed deponent attend. Further, a Tax Court judge's order is required under Rule 74(c) to take the deposition of an objecting nonparty in the absence of the parties' agreement, which the Tax Court rule calls "an extraordinary method of discovery." Unlike the district courts, the Tax Court is well-known for successfully policing excessive discovery requests.

Further, formal discovery in the Tax Court is usually sought only by the IRS, and only in large-dollar cases or rare cases involving recalcitrant taxpayers refusing to cooperate with *Branerton* requests. In nearly all cases,[38] it is the taxpayer, not the IRS, who has all the information and documents that may be relevant to the case. And when the taxpayer does not, chief counsel attorneys are usually willing to comply voluntarily with taxpayer requests for reasonably pertinent, non-privileged information and documents. Of nearly 300 Tax Court dockets in which I have been counsel of record over the past 30 years, I don't think I used formal discovery procedures against the IRS more than 10 times.

Another concern the Supreme Court had in *Twombly* and *Iqbal* was that plaintiffs would file complaints with boilerplate language (that is, ones stating legal conclusions, but giving few facts) in cases with little merit, and defendants would simply overpay to quickly settle the cases before expensive discovery commenced—that is, agree to nuisance settlements not reflective of the cases' merits. By contrast, in most Tax Court cases, the petitioner is not seeking money from the government; rather, the reverse is usually true.

The Tax Court does not have general refund suit jurisdiction. Under its deficiency jurisdiction, it may determine an overpayment only if the taxpayer petitioned it in response to a notice of deficiency for the same year.[39] And even when the Tax Court can find an overpayment (such as in a deficiency case or in an innocent spouse case under section 6015(e)), there is a limit on the overpayment based on the amount of money that the taxpayer actually paid to the IRS and a deemed-paid amount from a refundable credit (such as the earned income tax credit under section 32). Thus, the government will not be subjected to multimillion-dollar claims in the Tax Court unless it is being asked to return money a taxpayer previously paid to it, which is not remotely the situation in an antitrust or *Bivens* suit.

Finally, with approximately 1,600 chief counsel attorneys,[40] the IRS simply does not engage in nuisance settlements.

Even if none of the above can differentiate district court and Tax Court cases, there is one overriding reason why the Tax Court should retain the notice pleading standard: Almost 80 percent of the petitions filed in the Tax Court are filed pro se. Although neither the Tax Court nor the IRS publishes related figures, statistics are sometimes handed out at American Bar Association Section of Taxation meetings.

At the September 2010 meeting in Toronto, chief counsel presented tables showing that, excluding the few declaratory judgment petitions, in the fiscal year ending September 30, 2009, of 30,680 total Tax Court petitions, 23,837 were filed pro se (77.7 percent). Further, cases involving $ 50,000 or less[41] accounted for 84.5 percent of the Tax Court's docket that year. It is unlikely that those small-dollar cases would be the source of expensive discovery against the IRS. However, a heightened pleading standard could give rise to thousands of pro se taxpayers being denied the ability to challenge an incorrect proposed tax assessment. If they were dismissed from the Tax Court under its Rule 40 for failure to state a plausible claim on which relief could be granted, that would be a decision on the merits against them[42] and treated as res judicata for all future court proceedings. That would be a disaster.

Conclusion

Whatever the merits of the *Twombly*/*Iqbal* plausibility pleading standard in the district courts (on which I take no position here), there is no good reason for the Tax Court to adopt that standard for its own proceedings. Indeed, given the Tax Court's limited jurisdiction, the absence of discovery abuses therein, and the huge numbers of pro se Tax Court petitions that would potentially fail the plausibility standard—even if the Tax Court gave pro se taxpayers a chance to fix their pleadings—there are substantial reasons for the Tax Court to retain the *Conley* notice pleading standard for evaluating whether a petition fails to state a claim on which relief could be granted. The Tax Court is overdue to clarify what pleading standard it is applying when the IRS makes those motions to dismiss, and I would urge it to clarify that notice pleadings are sufficient.

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1 355 U.S. 41, 47 (1957).
2 *Id.* at 45-46.
3 550 U.S. 544, 554-563 (2007).
4 556 U.S. 662, 677-680 (2009).
5 812 F. Supp.2d 1137 (E.D.N.Y. 2011), *Doc 2011-18634, 2011 TNT 171-15*, *aff'd*, 678 F.3d 147 (2d Cir. 2012), *Doc 2012-9361, 2012 TNT 86-10* (both courts citing *Iqbal*). My clinic's loss was on substantive grounds, not because I failed to plead facts that if pleaded would have changed the outcome.
6 *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012).
7 *See* Paul L. Caron, "Tax Myopia, or Mama Don't Let Your Babies Grow Up to Be Tax Lawyers," 13 *Va. Tax Rev.* 517 (1994).
8 *See* my unsuccessful amicus brief cited by the Supreme Court in *Mayo Foundation v. United States*, 131 S. Ct. 704, 713 (2011), *Doc 2011-609*, *2011 TNT 8-10*.
9 *See, e.g.*, Alexander A. Reinert, "The Costs of Heightened Pleading," 86 *Ind. L.J.* 119 (2011); Victor E. Schwartz and Christopher E. Appel, "Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of *Twombly* and *Iqbal*," 33 *Harv. J.L. & Pub. Pol'y* 1107 (2010); Arthur R. Miller, "From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure," 60 *Duke L.J.* 1 (2010); Douglas G. Smith, "The Evolution of a New Pleading Standard: *Ashcroft v. Iqbal*," 88 *Or. L. Rev.* 1053 (2009); Kenneth S. Klein, "*Ashcroft v. Iqbal* Crashes Rule 8 Pleading Standards on the Unconstitutional Shores," 88 *Neb. L. Rev.* 261 (2009).
10 *Hawkeye Foodservice Distr. Inc. v. Martin Bros. Distr. Inc.*, No. 3:10-cv-161 (Iowa 2012); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.2d 422 (Tenn. 2011); *McCurry v. Chevy Chase Bank FSB*, 233 P.3d 861, 863-864 (Wash. 2010); *Roth v. Defelicecare Inc.*, 700 S.E.2d 183, 220, n.4 (W.Va. 2010). *But see Doe v. Bd. of Regents*, 788 N.W.2d 264, 278 (Neb. 2010).
11 355 U.S. at 47-48 (footnotes and citations omitted).
12 *Id.* at 45-46.
13 550 U.S. at 553.
14 *Id.* at 558.
15 *Id.*
16 *Id.* at 555-556 (footnotes and citations omitted).

[17] *Id.* at 560-563 (footnotes and citations omitted).
[18] 556 U.S. at 669.
[19] 403 U.S. 388 (1971).
[20] 556 U.S. at 681.
[21] *Id.*
[22] *Id.* at 684 (citations omitted).
[23] *Id.* at 686.
[24] *Bratcher v. Commissioner*, T.C. Memo. 1996-252, *Doc 96-16218*, *96 TNT 107-17, aff'd per unpublished order*, 116 F.3d 1482 (7th Cir. 1997), *Doc 97-18546*, *97 TNT 121-38*; *Arredondo v. Commissioner*, T.C. Memo. 1996-185, *Doc 96-11607*, *96 TNT 77-12*.
[25] *See, e.g.*, *Richardson v. Commissioner*, T.C. Memo. 1991-159.
[26] T.C. Memo. 2003-237, *Doc 2003-18337*, *2003 TNT 155-9*.
[27] 69 F.3d 967, 969 (9th Cir. 1995).
[28] 915 F.2d 1242, 1245 (9th Cir. 1990).
[29] Order in *Wilhelm v. Commissioner*, No. 1065-11S (June 22, 2011).
[30] *Id.*
[31] In an unpublished order issued by Carluzzo in *Cosby v. Commissioner*, No. 2517-12 (2012), the judge put in "see" citations to *Twombly* and *Hicks v. Small*, but did not discuss the competing standards.
[32] IRS Data Book, Table 27 (2011) shows that the lawyers in the IRS chief counsel's office participated in about 30,000 Tax Court dockets in the last fiscal year.
[33] *See* the factors in section 4.03(2)(a) of Rev. Proc. 2003-61, 2003-2 C.B. 196, *Doc 2003-17345*, *2003 TNT 143-10*.
[34] The Tax Court does not have jurisdiction to hear *Bivens* actions, and the district courts also have been barred by the courts of appeals from entertaining tax-related *Bivens* suits because there are adequate statutory remedies for violations of tax collection rights, such as section 7433 suits against the government for damages for wrongful collection actions. *See, e.g.*, *Kim v. United States*, 632 F.3d 713, 717 (D.C. Cir. 2011), *Doc 2011-1433*, *2011 TNT 15-30*; *Adams v. Johnson*, 355 F.3d 1179, 1185-1186 (9th Cir. 2004); *Judicial Watch Inc. v. Rossotti*, 317 F.3d 401, 408-413 (4th Cir. 2003); *Shreiber v. Mastrogiovani*, 214 F.3d 148, 152-152 (3d Cir. 2000).
[35] In rare cases, the taxpayer brings a Tax Court suit in the absence of an IRS notice, but even those cases are usually brought only when a taxpayer made a predicate filing with the IRS, which simply failed to act. For example, suit may be brought if the IRS fails to rule within a specific period under section 6015(e)(1) (innocent spouse) or section 7428(b)(2) (declaratory judgment on qualification for exempt status).
[36] Those letters and conferences are named after the opinion that required them, *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974). There, the Tax Court granted an IRS motion for a protective order against responding to formal discovery (interrogatories) because the parties had not met or conferred informally to obtain information and documents before the interrogatories were served.
[37] 550 U.S. at 559 (citation omitted).
[38] In section 6320 or 6330 CDP cases, the IRS possesses relevant documents, such as the administrative record, some of which (like the Appeals case activity report) the taxpayer has not seen. Yet I have never informally requested the entire administrative record in a CDP case and been refused by the IRS chief counsel attorney.
[39] Section 6512(b).
[40] IRS Data Book, Table 30 (2011).
[41] That is, those considered small tax cases ($ 50,000 or less per tax year) under the informal procedures of section 7463, and similar cases involving $ 50,000 or less in which the petitioners did not elect section 7463 procedures.
[42] Section 7459(d) provides: "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary."