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The Dynamic Allocation of Burden Doctrine as a Mitigation of the Undesirable Effects of Iqbal's Pleading Standard

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I. INTRODUCTION

The importance of the study and proper development of the procedural law doctrines is critical, as it "details the role of government, through public courts, in settling disputes, creating new substantive rules and policies, and implementing policies through law."[3]

In the context of the civil procedural rules, the structure and standards of the early dismissal alternatives and the way in which the pretrial stage of the judicial process is developed are strongly connected to the way in which Governments ensure access to justice to the population. According to Professors Clermont and Yeazell, the "early demise produces great social benefit if, in the end, the facts would not have supported a judgment for the plaintiff,"[4] and a "considerable social harm if, in the end, the facts would have supported such a judgment."[5]

Since 2004 the Ministry of Justice of the Chilean Government has

1. This article was presented by the author in the Third Annual Conference of The Younger Comparativists Committee of the American Society of Comparative Law, held in Portland, Oregon on April 4-5 2014 and hosted by the Lewis & Clark Law School.

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3. Mauro Cappelletti & Bryant G. Garth, *Ch. 1: Intro. – Policies, Trends and Ideas in Civil Procedure, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: 16 Civil Procedure 3 (Mauro Cappelletti ed., (1987).

4. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010).

5. *Id.*

been committed to the development of a Civil Procedural Reform.[6] The Reform includes a New Civil Procedural Code (NCPC) currently under discussion in the Chilean Congress, and different laws regarding related topics such as the Alternative Dispute Resolution Mechanisms, judicial fees, and court's structure.[7] When adopted, the NCPC will replace the Code that has been in force since 1903, representing a paradigm shift in terms of modernization of the judicial system and the due process component in judicial proceedings.[8]

One of the main features of the NCPC consists in the introduction of the *dynamic allocation of burdens doctrine.*[9] According to this principle, the court may, once the pleading phase has finished and the parties have offered their evidence, allocate the burden of proof between the parties, on grounds of the availability and feasibility of the evidence.[10] It is conceived as an *extraordinary* judicial power, with the purpose of addressing a procedural inequality caused by the asymmetry of information.

This would have a double positive effect. First, it would work as an *ex ante* incentive to the required party's commitment and cooperation to the process, strengthening the good faith principle as said party would know the effects of non-cooperation. The second effect is that it would contribute to reduce judicial error in the courts' decisions, as this tool improves the odds of delivering judgments more likely to reflect the "material truth" of the dispute.

In this article, I examine the pleading standard of the United States procedural system, analyzing from a critical perspective the changes adopted by the Supreme Court in *Twombly*[11] and *Iqbal,*[12] where the Supreme Court incorporated the plausibility criterion of the pleading standard. Then, I describe in a comparative way the Chilean Procedural Reform and its decisions concerning the pleading standard, including a description and analysis of the dynamic allocation of burden doctrine as

6. B. no. 8197-07 (Chile) (approved by the Chamber of Deputies, but under debate in the Senate), *available at* http://www.camara.cl/pley/pley_detalle.aspx?prmID=8596&prmBL=8197-07. However, the Chamber of Deputies did not approve this doctrine, and was withdrawn from the Bill that passed to the discussion at the Senate, stage that the Government may use to insist with this doctrine.

7. *Id.*

8. Cód. Civ. Biblioteca del Congreso Nacional de Chile/BCN [Chilean Library of Congress], *available at* http://www.leychile.cl/Navegar?idNorma=22740&idParte=0.

9. *Proposal to Reform Civil Procedure System of Chile,* Ministry of Justice of Chile, http://rpc.minjusticia.gob.cl/media/2013/04/Informe-Procesal-Civil-Foro.pdf.

10. B. no. 8197-07, *supra* note 6.

11. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

12. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

an alternative to mitigate the non-desirable effects of said pleading standard.

Therefore this article proceeds as follows. Part One provides a description of the U.S. pleading standard and discusses the current debate over the controversial decisions of the United States Supreme Court in *Twombly* and *Iqbal*. Part Two describes the Chilean Civil Procedural Process and highlights some features of its reform, with special analysis of the dynamic allocation of burden doctrine. Finally, the final Part contains a study and proposal of the incorporation of that doctrine to the Federal Rules of Civil Procedure.

II. MOTION TO DISMISS UNDER THE U.S. PROCEDURAL SYSTEM

A. Previous Rule: Description of the Pre-Iqbal Standard[13]

The main elements required to file a complaint in the United States are stated in Rule 8 of the Federal Rules of Civil Procedure (FRCP).[14] The critical requisite is specified in Rule 8(a)(2), which states that the complaint has to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[15]

Before *Twombly* and *Iqbal*, the case that illustrated the application of this rule was *Conley v. Gibson.*[16] In *Conley*, the United States Supreme Court ruled 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."[17] In other words, the plaintiff had to show to the court (i.e. it had to *appear* to the court) that his or her case was not clearly (i.e. *beyond doubt*) one in which he or she would not be able to prove any set of supportive facts that would entitle him or her to further relief.

This standard is clearly exemplified by the same drafters of the FRCP in its Form 11,[18] which, as stated in Rule 84, "suffice[s] under these rules [FRCP] and illustrate the simplicity and brevity that these rules contemplate."[19] Said form is worthy to be reproduced entirely, as it reflects what the words "short" and "plain" meant for the rule makers:

"(Caption—See Form 1.)

13. *Id.* As *Iqbal* confirmed and deepened *Twombly*'s pleading standard criteria, I will center the analysis only on that last case.
14. FED. R. CIV. P. 8.
15. FED. R. CIV. P. 8(a)(2).
16. *Conley v. Gibson*, 355 U.S. 41 (1957).
17. *Id.* at 45-46.
18. FED. R. CIV. P. Form 11.
19. FED. R. CIV. P. 84.

> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff.
>
> 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.
>
> Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.
>
> (Date and sign—See Form 2)."

This form contains only succinct and conclusory statements that prevent arguing "over the formulation of the grievance, but makes starting a lawsuit unsupported by evidence very easy."[20] With that standard one can criticize that it enables unscrupulous plaintiffs to easily meet that pleading requirement and file ungrounded suits for intimidation purposes that infringe upon the good faith principle and cause injury to the defendant.

Consequently, the core question to be analyzed is: how can such a broad pleading standard protect defendants from frivolous litigation? The drafters of the FRCP addressed that concern not inside the requisites of the complaint itself but in the design of the procedural system as a whole.[21] "The motivating theory [of having this low pleading standard] was that the stages subsequent to [the] pleading [phase]–disclosure, discovery, pretrial conferences, summary judgment, and [finally the] trial–could more efficiently and fairly handle functions such as narrowing issues and revealing facts, and, thus, the whole system could better deliver a proper decision on the merits."[22]

Therefore, the purpose of this "broad" pleading stage was nothing more than to "give fair notice of the pleader's basic contentions to the adversary,"[23] without any judicial assessment of the facts or of the merit of the allegations, and leaving to the remaining pretrial actions the task of gathering and evaluating the evidence needed to sustain a trial.[24]

In fact, the Federal Rules of Civil Procedure provide a judicial tool, in the words of the United States Supreme Court, "against a party

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20. Clermont & Yeazell, *supra* note 4, at 825.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Bell Atlantic*, 550 U.S. at 11; *see* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010); *see also Ramzi* Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1468-69 (2010).

who fails to make a showing sufficient to establish the existence of an element essential to that party's case:"[25] summary judgment.

Thus, the judicial procedural system was designed to preempt superfluous or uncontroversial claims from reaching trial (with the summary judgment), but at the same time, as noted above, was elaborated to assure everyone that his or her case would not be rejected if it states the claim shortly and plainly and shows its entitlement to relief.[26]

From the public policy perspective that sustained this pleading standard, two principles can be found in dispute: (i) the efficiency in the use of the public resources; and (ii) the substantial or material justice as the goal of the procedural system.[27] Observing these criteria, the U.S. procedural system, under the pre-*Iqbal* pleading standard, weighted justice over efficiency, leaving, mainly to the parties, the burden of the undesirable effects of ungrounded pretrial actions (i.e. the cost of the discovery proceeding).[28]

In addition, one can notice that it is an issue of proof availability: all the acts, procedures and rules that govern the pretrial phase were designed to provide the facts that may, or may not, enable the plaintiff to sustain a trial.[29] As it is described below, in *Twombly* and *Iqbal*, the Supreme Court allocated this goal of the pretrial phase into the very first stage of it, i.e. in the motion to dismiss; weighing the efficiency principle over justice, with all the potentially adverse effects to the judicial system.[30]

B. Current Standard: Plausibility

1. Description of the Standard

Two recent cases from the Supreme Court of the United States "have stirred the world of pleading civil litigation."[31] The first case was

25. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

26. *Id.*

27. *Celotex Corp.*, 477 U.S. at 329 (". . .to secure the just, speedy and inexpensive determination of every action."); Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1714, 1719, 1729 (2013) (Iqbal increases efficiency).

28. *See* Douglas Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. 1053, 1070-71 (2009).

29. *Bell Atlantic*, 550 U.S. at 545; Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2005 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010); *see* Kassem *supra* note 24, at 1468-1470 (allowing limited discovery could uncover necessary facts).

30. *Bell Atlantic*, 550 U.S. at 545; *Iqbal*, 556 U.S. at 678.

31. Robin J. Effron, *supra* note 29, at 51.

Bell Atlantic Corp v. Twombly (2007)[32] and the second was *Ashcroft v. Iqbal* (2009).[33]

Twombly was a class action case between multiple Internet and telephone subscribers and a few large telecommunications companies, where the plaintiffs claimed an illegal conspiracy in restraint of trade.[34] The plaintiffs described the parallel conduct in detail and further alleged the existence of an illegal agreement by defendant, but in conclusory terms as they had no proof in hand.[35] In this case, "the obvious concern. . .was that the claims opened the door to expensive discovery."[36] Consequently, "the Court upheld dismissal on a pre-answer motion,"[37] because the plaintiff failed to meet the admissibility standard by not showing the agreement amongst the competitors.[38] According to the Court in *Twombly*, asking for plausible grounds "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement;"[39] but in this case "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[40]

This case was controversial and, as noted above, represented a deep modification to the pleading stage of judicial proceedings.[41] It added the "plausibility" criterion to the pleading standard analysis and raised the level needed for a claim to survive a motion to dismiss.[42] In so ruling, the Court instituted the need for a "judicial inquiry into the pleading's convincingness."[43] Two years later, said turn would be reaffirmed and strengthened by the Supreme Court, when issuing *Iqbal*.

In *Iqbal*, a Pakistani Muslim sued numerous important federal officials, including a former Attorney General of the United States, alleging that they "adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of [his] race, religion or national origin."[44] Once the legal proceeding was initiated, the defendants moved to dismiss "for failure to state sufficient allega-

32. *Bell Atlantic*, 550 U.S. at 544.
33. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)12.
34. *See generally Bell Atlantic*, 550 U.S. at 544
35. *Id.* at 556.
36. Clermont & Yeazell, *supra* note 4, at 826.
37. *Id.*
38. *Id.*
39. *Bell Atlantic*, 550 U.S. at 556.
40. *Id.* at 566.
41. *Id.* at 545.
42. *Id.* at 560; Clermont & Yeazell, *supra* note 4, at 829-30.
43. Clermont & Yeazell, *supra* note 4, at 827.
44. *Iqbal*, 556 U.S. at 680.

tions to show their own involvement in clearly established unconstitutional conduct."[45]

Once the district court denied their motion, the defendants, invoking the collateral-order doctrine, filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit.[46] Said tribunal considered *Twombly's* applicability to this case, and concluded that *Twombly* called for "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[47] The court considered that this case did not present one of those contexts where amplification was needed, so it held plaintiff's complaint "adequate to allege petitioners' personal involvement in discriminatory decisions."[48] However, in his concurrence, Judge Cabranes urged the Supreme Court of the United States to "address the appropriate pleading standard 'at the earliest opportunity,"[49] and the Court granted *certiorari*.

The Supreme Court, in an opinion delivered by Justice Kennedy, reversed the judgment of the Court of Appeals and held that the plaintiff's complaint "fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination" against the defendants.[50] Contrary to *Conley*, which set forth the no-set-of-facts criteria to grant a motion to dismiss, in *Iqbal* even though "the plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully."[51]

In *Iqbal* the Court reaffirmed and explained the shift of *Twombly*. In words of Justice Kennedy:

> "Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint *is inapplicable to legal conclusions*. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but *it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that*

45. *Id*. at 669.
46. *Id.*
47. *Iqbal*, 556 U.S. at 662.
48. *Id.* at 670.
49. *Id*.
50. *Id.* at 687.
51. *Id*. at 678.

> *states a plausible claim for relief survives a motion to dismiss* . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2)."[52] [Emphasis added]

In other terms, there is a line from 'conceivability' (*Conley*) to 'plausibility' (*Twombly* and *Iqbal*) that the plaintiff must pass in order to survive a motion to dismiss.[53] Now, if a plaintiff wants his or her case to enter into the disclosure and discovery phases, he or she has to make plausible the existence of certain material facts that can sustain a judgment in his or her favor.[54]

2. *Iqbal* Scholars' Analysis

The impact of these cases in the judicial community was and still is of critical significance. Since its issuance by the Supreme Court in 2009, *Iqbal* has been cited in 71,190 cases, in 65,015 trial courts documents and in 9,457 appellate court documents.[55] In order to weigh those numbers, we have to compare them with other relevant cases, such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993)[56] regarding the admission of expert evidence, which was cited in 16,257 cases and in 60,635 trial court documents;[57] or Roe v. Wade (1973)[58] worldwide case regarding abortion and women rights, which has been cited in 3,828 cases, 1,143 trial court documents and in 3,832 appellate court documents.[59]

However, *Iqbal* caused a great impact not only to the judicial practice but to the academic analysis as well: 1,135 references in Law Reviews and 1,456 in other secondary sources only in 3 years.[60] Below is provided a brief description of the main arguments stated by the supporters and detractors of this new pleading standard.

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52. *Id.* at 678-79 (emphasis added).
53. Kassem, *supra* note 24, at 1449.
54. *Id.* at 1444.
55. According to KeyCite, West Law (February 25, 2014).
56. *Daubert v. Merrell Dow Pharms. Inc*., 509 U.S. 579 (1993).
57. According to KeyCite, West Law (February 25, 2014).
58. *Roe v. Wade*, 410 U.S. 113 (1973).
59. According to KeyCite, West Law (February 25, 2014).
60. According to KeyCite, West Law (February 25, 2014).

a. *Iqbal's* supporters

There are three main categories of the defenses to *Iqbal*'s pleading standard:[61] (i) those who believe that the decision is consistent with the intent of the Advisory Committee and with the inherent doctrine of the Rule; (ii) those who assure that it has not had any impact on the rate at which the grant of motion to dismiss has terminated cases; and (iii) those who esteem that it was a good shift in the pleading standard in terms of the efficiency of the system and good faith criteria.[62]

The first group of supporters believes that with this decision the Supreme Court did nothing but accept a long practice traditionally recognized by the courts regarding the legal conclusions in a claim.[63] For this position, the "plausibility standard of *Twombly* can be understood as equivalent to the traditional insistence that a factual inference be reasonable."[64] In other words, for the supporters of this interpretation, the requisites of the Rule 8(a)(2) have always implied a "plausibility" revision. This group also contains those scholars who believe that this was only a nominal change of the same pleading standard, and those who state that this recent decision did reaffirm the original sense of the Rule 8(a)(2).[65]

The second set of defendants of *Iqbal* sustains that "the effects of the revision to pleading standards ushered in *Twombly* and *Iqbal* have been negligible, meaning that concern over the change is much ado about little or nothing."[66] The supporters of this position provide two main reasons.[67] First, because the Court's decision does not represent a change but an alignment with preexisting lower court's pleading approaches, the impact will be minimal.[68] The second reason provided is that there are studies that show that there is no impact at all regarding the rate at which a grant of a motion to dismiss has terminated cases.[69] Therefore, as *Iqbal* and *Twombly's* pleading standard does not represent any change to the current procedural law, there is not a new challenge or

61. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1713 (2013).

62. *Id.* at 1713-14.

63. *Id.* at 1713

64. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010).

65. Spencer, *supra* note 61, at 1715-1720.

66. *Id.* at 1720.

67. *Id.* at 1721, 1725.

68. *Id.*

69. JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL (2011).

concern regarding the guarantees of the judicial system.

The third group of supporters sustains the efficiency defense.[70] The members of this group "not only recognize the change –they laud it."[71] The main issue here is the concern about the abuse of discovery that a lower standard may cause, with all the associated costs to the defendants.[72] They argue that this change represents a good orientation and decreases the risks associated to expensive discoveries.[73] Furthermore, they state that a low standard empowers frivolous litigation and promotes extortionate settlements.[74]As affirmed by Professor Bone, this argument basically states that "as the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases."[75]

Therefore, according to this position, neither the efficiency nor the fairness criterion is achieved in a system that allows claims with dubious merits to proceed, as it opens the gate to settlements not grounded on the merits of the dispute, but in the prospective costs of the defendant to continuing in that litigation.[76] In other terms, this perspective states that plaintiffs cannot access discovery "until they can pay the new price of admission –a demonstration of factual support sufficient to render their claims plausible."[77]

b. *Iqbal*'s detractors

It is not hard to infer that under *Iqbal's* criteria, a case that passes a motion to dismiss needs to be stronger than before.[78] If we understand the main words of Rule 8(a) (*short*, *plain* and *show*) in their common use and sense in light of the *Conley* interpretation of the Rule, then it is hard to assume in advance the plausibility requirement that came after *Iqbal*. Thus, the *plausibility* criterion of review is a new one and was affirmed by the Supreme Court in the cases under analysis.[79]

Consequently, the question that needed to be answered when increasing the standard is: how can a judicial system achieve its main

70. Spencer, *supra* note 61, at 1713-14, 1728.
71. , *Id.* at 1728.
72. *Id.*
73. *Id.*
74. Robert P. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009).
75. Smith, *supra* note 28, at 1055..
76. *Id.*
77. Spencer, *supra* note 61, at 1729.
78. *Id.* at 1732.
79. *Id.* at 1716.

purpose, which is to impart justice to people? When analyzing this issue, one has to take into account that for the plaintiff, "offering such facts [required in a complaint post-*Iqbal*] before discovery begins seems particularly problematic for claimants alleging concealed wrongdoing."[80]

But even without considering the strong question as to the discovery cost argument that makes more evident the inadequacy of this higher standard,[81] the system of justice has to be designed to achieve its main goal, which is, again, to deliver justice to everyone who requires it.

Therefore, in *Iqbal* the core goal of the judicial system is not traduced as the main principle of the system and their limitations as exceptions. By the contrary, with the *plausibility* standard, it seems that the rule is to preempt access to the system of justice and the exception is to survive a motion to dismiss.[82] *Conley* contains an important public policy view stating that the general rule of a complaint is not to 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."[83] (Emphasis added.) It is a strong pro access to justice rule that has a direct impact on society. It is important to take into account that "[h]ow much law regulates social behavior depends in large part on how the machinery of justice is constructed."[84]

In addition, the subjectivity of the plausibility standard is quite evident. According to Professor Kassem, "Iqbal seems to have transformed judicial gut instinct into a gate-keeping mechanism."[85] As there is not enough clarity about what plausibility means, each judge will ground his or her dismissal or non-dismissal decisions with different criteria.[86] That scenario entails a direct impact on the basic citizens' guarantees from the equal protection clause perspective and also from the economic perspective, as judicial uncertainty is not an incentive to preempt litigation but to encourage it.[87]

As the law professor and circuit judge Richard Posner has stated,

80. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188 (2010) [hereinafter *Iqbal and the Slide Toward Restrictive Procedure*].

81. Spencer, *supra* note 61, at 1729-33.

82. *Id.* at 1731-32.

83. *Conley*, 355 U.S. at 45-46.

84. Cappelletti & Garth, *supra* note 3, at 1-2.

85. *See* Kassem, *supra* note 24, at 1446.

86. *Id.* at 1447; *see* Kang & Bennett et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev., 1124, 1160 (2012).

87. Kassem, *supra* note 24, at 1481; Spencer, *supra* note 61, at 1724.

"The [Supreme] Court said in *Iqbal* that the 'plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[88] He goes on and expressly criticizes the ambiguity of the plausibility standard. Judge Posner states that "[t]his is a little unclear because plausibility, probability, and possibility overlap. . . The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; **the complaint must establish a nonnegligible probability that the claim is valid**."[89] (Emphasis added.)

Finally, I believe that this new standard, especially considering its ambiguity as stated above, implies some other due process concerns from the defendants' position as well. If a court in a civil case -where the common standard of proof is *preponderance of the evidence*[90]- decides, even without any discovery or disclosure proceeding, that the claimant's allegations are "plausible," how likely is it to change its opinion in the final judgment?

Moreover, if the court has found "plausible" certain allegations, how neutral is its interpretation of the evidence? Is it going to approach the evidence trying to confirm its previous decision or trying to decide in a completely independent way? As the proof standard in these cases is related to the likelihood of certain sets of facts instead of others, one can infer that the early "plausibility" decision of the court may turn practically into a final pronouncement over the likeliness of the evidence in the case, and therefore, into a strong "persuasion" of the direction of the final judgment. Among other effects, that situation can produce an important harm to the negotiation power of the defendant and it could strengthen disproportionately the plaintiff's bargaining power.

Professors Kang, Carbado, Casey, Dasgupta, Faigman, Godsil, Greenwald, Levinson and Mnookin, and Judge Bennett have analyzed the implicit bias in the Courtroom in multidisciplinary research.[91] When analyzing the effects of *Iqbal* and *Twombly*, they assert that in cases where we "lack sufficient individuating information -which is largely the state of affairs at the motion to dismiss stage- we have no choice but to rely more heavily on our schemas."[92] Then, they raise the applicability of the social judgeability theory to this case, which states that "there

88. *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. Ill. 2010).

89. *Id.* (emphasis added).

90. 42 C.F.R. § 93.219 (2005) (i.e. proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not).

91. *See generally* Kang et al., *supra* note 86, at 1124.

92. *Id.* at 1160.

are social rules that tell us when it is appropriate to judge someone."[93] According to the authors, since *Iqbal* made dismissals easier, we should see a growth in dismissal rates and with more inference of implicit or explicit bias.[94]

Now that I have described from a historical and critical perspective the U.S. pleading standard, in the next section, I will explain how it works in the projected Chilean civil procedure. There I will describe and explain how the dynamic allocation of burdens doctrine could be an interesting solution to some cases where the manifest asymmetry of information between the parties makes it impossible for the plaintiff to meet the *plausibility* standard.

III. CHILE'S PLEADING STANDARD UNDER THE NEW CIVIL PROCEDURAL CODE ("NCPC")

Since 2004, the Government of Chile has been designing a new set of codes, statutes, and institutions aimed at improving the standards of civil justice.[95] It constitutes a paradigm shift in the way in which civil and commercial cases are going to be developed and in terms of modernization of the judicial service as a whole.

A. Summary of the Current Chilean Civil Procedural System

The Chilean civil procedure has three main phases: the discussion phase; the evidence phase; and the judgment phase.[96] The *discussion phase* is initiated with the filing of the lawsuit or by the request of a prejudicial injunction.[97] Once the plaintiff has properly submitted the suit, he – at his own expense and through judicial official – has to notify the defendant, who then has 15, 18 or a maximum of 30 days (depending on his location) to oppose pre-answer motions or to respond to and sue the plaintiff on the same factual grounds (cross-claim). The pre-answer motions are procedural, (e.g. lack of court's jurisdiction, pending process, lack of formalities in the complaint[98]) and substantive (i.e.

93. *Id.*

94. *Id.* at 1163 ("[T]he more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.").

95. *See generally* Biblioteca del Congreso Nacional de Chile [Chilean National Library of Congress], Código de Procedimiento Civil [Civil Procedure Code] (2014), *available at* http://www.leychile.cl/Navegar?idNorma=22740&idParte=0 [hereinafter Chilean Library of Congress].

96. *See* Cód. Civ., *supra* note 8, at art. 253.

97. Chilean Library of Congress, *supra* note 95.

98. *See* Cód. Civ., *supra* note 8, at art. 303.

res judicata, transaction, prescription and payment[99]). If the court esteems that this last group of motions needed to be resolved after a sounding procedure, it may order the defendant to respond and would reserve the decision over these motions to the judgment of the case. Once the court's decision over the pre-answer motion has been made and the case has survived, the defendant has ten days to respond.[100]

Six days after the submission of the response by the defendant, the plaintiff has to reply.[101] Then, the defendant responds to the plaintiff's reply, and the court calls the parties to a Conciliation Conference and promotes the basis of a judicial agreement.[102] This conference has not shown good results in finishing cases through settlement.[103]

The second phase is the *evidence term*, which starts with a court resolution that indicates the controversial facts that need to be proven and which evidence is required.[104] This term is also developed in writing65F that thoroughly regulates each type of evidence that can be provided and the way in which the judge must evaluate it.[105] Each piece of evidence is presented to the court in writing and there are judicial conferences for the production of certain proof (i.e. witnesses' declaration and electronic documents).[106]

Finally, the procedure finishes with the *judgment stage*.[107] Once the evidence term is completed, which regularly has to be within twenty days after the opening of the evidence term plus ten days of parties' observation, no further evidence is accepted except those ordered by the judge, and the court has to dictate a resolution that "calls the parties to

99. *See id.* art. 304.

100. *Id.* art. 408; Chilean Library of Congress, *supra* note 95, at art. 308.

101. Cód. Civ., *supra* note 8, at art. 698.

102. *Id.*

103. *Ministerio de Justicia, Informe Final: Panel de Expertos Modelo Organico para la incorporacion de Sistemas Alternativos de Resolucion de Conflictos* [Final Report: Panel of Experts for the Incorporation of Alternative Dispute Resolution Systems], (2013), *available at* http://rpc.minjusticia.gob.cl/media/2013/07/Informe-Final-SARC.pdf (Chile) (The Conciliation Conference was adopted in an Amendment to the CPC made through the passing of Law No 19.334 on October 7, 1994. Its purpose was to promote the achieved settlements and to reduce the courts' workload. However, according to data from the Ministry of Justice, in 2010 out of 1,656,003 civil cases, only 1,127 were completed by this Conciliation Conference).

104. Cód. Civ., *supra* note 8, at art. 318.

105. The evidence is presented and produced in writing, with exception to the witnesses' declaration that is held in a conference in the tribunal. Also, there is a specific audience to debate over the veracity of electronic documents (Article 348 bis of the Cód. Proc. Civ.). It is in writing in terms of the communication between the judge and the parties and as a general rule of presenting and producing evidence.

106. *See* Cód. Civ., *supra* note 8, at art. 348.

107. *Id.* art. 158

hear judgment."[108] From the date of that resolution, the court has to issue the final judgment within sixty days.[109]

From a comparative perspective, the current Chilean civil procedural system has all the features attributed to the procedural *civil law tradition.*[110] First, it endorsed total predominance to the written component.[111] In the Chilean Civil Procedure the principle "*quod non est in actis non est in mundo,* (procedural acts not reduced to writing are null and void)" is entirely applicable as the tribunal is mandated to base its decision exclusively upon the written record.[112] Second, it is characterized by the so-called formal or legal system of proof: the assessment of evidence is accurately established in the law under almost mathematical rules.[113] Finally, it tends to discourage any direct contact between the tribunal and the parties, the witnesses or any other source of information.[114] The system is not designed to facilitate encounters of the parties with the judge, instead court officials almost always receive the witness' declaration, party confession and, in general, the evidence.[115]

B. Highlights of a Major Procedural Reform and Commonality with the U.S. Procedural System

The procedure briefly described above is stated in book two of the Chilean Civil Procedure Code.[116] The CPC was approved in 1903 -its drafting began in the 1890's- in the context of the necessities of a rather nascent society, with a commercial and legal situation much different from that of today.[117] As stated before, it is mainly in writing, contemplates rigid and time-consuming procedures, was designed under past procedural principles (e.g. the evidence stage is developed in writing, only certain evidence is accepted and its valuation is according to a plain measure stated in the CPC) and it is deployed under insufficient

108. *Id.* arts. 328, 572, 688.

109. *Id.* art. 162.

110. *See* Cappelletti & Garth, *supra* note 3, at 5.

111. *Id.*

112. *Id.* A translation could be "the elements that are not in the judicial record, are not in the world [of the judge]," which means that the Tribunal, when deciding the dispute, must consider exclusively the written record as stated in the judicial file of the case.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Ministerio de Justicia, Informe Final: Estudio de Analisis de Trayectoria de las Causas civiles en los tribunales civiles de Santiago* [Analytical Study of the Track record of civil causes in the civil courts of Santiago], (May 2011), *available at* http://rpc.minjusticia.gob.cl/media/2013/04/Estudio-Trayectorias-Causas-Civiles-en-Tribunales-Civiles-Santiago.pdf (Chile).

117. *See generally* B. no. 8197-07, *supra* note 6, at 3.

judicial technology and infrastructure.[118]

Even though one can notice that the timing of the judicial acts stated in the CPC is reasonable, according to a study conducted by the Chilean Ministry of Justice, on average, a civil claim in the courts of Santiago lasts 803 days from the file of the suit to the judgment of the inferior court.[119] However, if the duration of the appeal process is considered (that stays the execution of the judgment of the inferior court) the average final number of days *exceeds 1500***.**[120]

Therefore, since 2004 the Ministry of Justice of the Chilean Justice is dedicated to the design of a major Reform to the Civil Procedural System. Its keystones are the following:[121]

(i) A new *Civil Procedural Code* that brings an updated procedure developed mainly through hearings before a judge with improved case management powers, including the corresponding use of technologies in notifications, liberty in the presentation of evidence and grounded validation of them directly by the judge;

(ii) An *Alternative Dispute Resolution Network*, which facilitates the practice of professional mediation and arbitration in commercial and civil disputes;[122]

(iii) The subtraction of the enforcement of the judgments and other executive titles from the Judicature, settling it into independent sheriffs called "execution officials;"[123] and finally

(iv) The strengthening of the role of the Supreme Court as a warrant of the constitutionality of the judicial decisions of all other national courts, giving it discretion in the selection of cases and promoting its role as unifier of jurisprudence.

All these changes require a profound reform to the organic structure of the judicial power, which would mainly translate into an adequate instruction of judges and the required education of all the legal

118. Cód. Civ., *supra* note 8 at 43.

119. Estudio de Analisis de Trayectoria de las Causas civiles en los tribunales civiles de Santiago, *supra* note 117, at 106.

120. *Id.* at 9. In addition, said study states that there is an excessive extension of time between the communication of the claim to the defendant and the end of the discussion phase (237 days); and of the evidence term (315 days).

121. B. no. 8197-07, *supra* note 6, at 3.

122. B. no. 8197-07, *supra* note 6.

123. Ministerio de Justicia, Informe Final, *supra* note 103 (It is a model inspired in the "*Hussier de Justice"* of France.).

community.

The NCPC establishes a common civil procedure with a simple and clear structure. The process starts with a written pretrial or discussion phase, comprehended mainly by the suit and its response and/or its pre-answer motions. Afterwards, there is a preliminary conference, where the court prepares the trial by, among other things, addressing the pre-answer motions, defining the scope of the dispute and the evidence that is going to be rendered in trial and by proposing a basis for settlement. Then comes the trial, where the evidence is rendered and cross-examined to a public audience in front of the judge. Finally there is the judgment phase, where the judge has a limited time of 10 days (that can be increased in a few exceptions) to issue the judgment, subject to an *ipso iure* nullity of the trial and disciplinary sanctions.

As one can observe, this new process presents similarities to the U.S. procedural system, regarding the structure of the process and the role of the judge in the valuation of the evidence. The two processes are mainly developed through hearings in front of the judge, where the parties are free to introduce any evidence that may sustain their case, and it has to be analyzed and valuated by the judge in an oral trial that assures a proper cross-examination by the parties, under his own presence (something that is not guaranteed in the current Chilean system). All of those elements from an American legal tradition are essential features of civil litigation and are totally new to the Chilean civil system of Justice.[124]

Additionally, the NCPC contemplates the power to the Supreme Court to select the cases that it wants to hear; as long as it esteems that those cases are of *general interest* on two broad grounds stated in the former Article 409.[125] This power to select the cases and its role as unifier of jurisprudence, that is part of the essentials of the U.S. Legal System, was totally new to the Chilean system.[126]

124. Even though, those principles are not new to the Chilean Judicial System as a whole, as in the year 2000 the new Criminal Procedural Code was implemented, then in 2004 the new Family Justice system was deployed and finally in 2008 the same was done to the new Labor Justice System. All of those reforms introduced the modern procedural principles stated above and contributed to modernize the judicial system. Additionally, there is another similarity with the U.S. system in relation to the new role of the Supreme Court.

125. B. no. 8197-07, *supra* note 6, at 150.

126. However, in the final discussion at the Chamber of Deputies (May 2014), the representatives chose to reject that provision from the NCPC. The Ministry of Justice is currently studying its reincorporation at the Senate's discussion.

C. Pretrial Phase Under the NCPC

Article 253 of the NCPC states the requirements of the pleading.[127] Number 4 requires "the exposition of each point of fact that sustains the requests of the lawsuit, a direct indication of the evidence that will be used to prove the groundings of the case and of the laws that sustain the case."[128] In addition, when filing a complaint, the plaintiff must attach all the documents that he or she is about to use on trial as evidence and offer to join expert reports, witnesses statements and any other evidence.[129]

The Message of the NCPC states the reason of these requirements.[130] It argues that the Executive is convinced of the "need to require [in plaintiffs] seriousness and real grounds when deciding to file a judicial complaint, therefore the Bill demands . . . that the actor, along with the attachment of all the documentary evidence available and with the list of all the witnesses and experts that he will use on trial, must declare the rest of the evidence that he would use to prove, and request its completion."[131] Therefore, the principle here is to void frivolous litigation of ungrounded or disproportionable requests and irresponsible complaints filed only for settlement purposes.

Nonetheless, this claimant's requirement of submitting all the evidence with the lawsuit has three important mitigations. First, in contrast to *Iqbal* where the Court has to review the requisites of the complaint on a subjective basis, here not "plausibility" or pre evaluation on the merits is applicable.[132] The court's evaluation is objective. The issue here is that, as a general rule, the plaintiff only can use the evidence provided, requested or stated in his or her suit.[133]

However, and here is the second nuance, if a party does not have any document that he or she needs for Article 253 paragraph 4 purposes, the NCPC allows the party to require the Court to order the incorporation of the required documents to the file of the case.[134] Also, the parties can request the practice of several evidentiary diligences; and even the court can request itself the practice and incorporation of evidence into

127. B. no. 8197-07, *supra* note 6, at 104.
128. *Id.*
129. *Id*. at 104-105
130. *See generally id.* at 1-42.
131. *Id*. at 33-34.
132. *Id.* at 53; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
133. *See* B. no. 8197-07, *supra* note 6, at 104. With the few exceptions stated in the NCPC. E.g. evidence regarding new facts dated after the file of the suit or proven to be unknown by the party that wants to introduce it (Article 276 NCPC).
134. *Id*. at 104.

the process.[135] The focus of the NCPC is not in who introduces the evidence but with which guarantees that evidence is incorporated into the process (i.e. allowing a proper cross-examination and a public hearing in front of the judge).

Finally, as the third nuance to consider, one can find the *dynamic allocation of burdens* doctrine, which I will briefly develop below.

D. Dynamic Allocation of Burdens Doctrine

1. Description of the Doctrine[136]

One of the most interesting – and controversial – features of the NCPC is the incorporation of the *dynamic allocation of burdens* doctrine. The second paragraph of the Article 296 of the NCPC states as follows:

"The Court may allocate the burden of proof in accordance to the availability and feasibility of the evidence of each party, a decision that the Court shall notify to the parties with due anticipation [in the preliminary audience], in light of the consequences that the Court decision may have for the parties' obligation to present evidence."[137]

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135. *Id.* at 77-78.

136. At a comparative doctrine level, many different authors have contributed to the development of this doctrine. Some significant authors and their relevant works are: Leo Rosemberg, *La carga de la prueba*, Ediciones Jurídicas Europa América, Third Edition, (1956); Alvaro Luna Yerga, *Regulación de la carga de la prueba en la LEC. En particular, la prueba de la culpa en los procesos de responsabilidad civil médico-sanitaria*, InDret (2003); Osvaldo Gozani, *La presunción de inocencia. Del proceso penal al proceso civil*, Revista Latinoamericana de Derecho, III Year, No. 6, 155-179 (July - December 2006); Raquel Castillejo Manzanares, *La carga de la prueba en el proceso civil por responsabilidad médica*, Diario La Ley, No. 6563, XXVII Year (October 4, 2006); Jorge W. Peyrano & Inés Lépori White, *Cargas Probatorias Dinámicas*, (Rubinzal Culzoni ed., Buenos Aires, 2008); Julio Pérez Gil, *Probar la discriminación. Una mirada a las normas sobre la carga de la prueba en la ley de igualdad*, in *Oralidad y Escritura en un Proceso Civil Eficiente*, Carpi & Ortells Ramos Ed., t. II, Universitàt de València, 211-224 (2008); Michele Taruffo, *La prueba*, (Marcial Pons ed., 2008). Rolf Stürner, *La obtención de información probatoria en el proceso civil*, Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXX, 1º Semestre, 243 – 262 (2008); Diego Palomo Véliz, *Los deberes de aviso e información del juez y de esclarecimiento y colaboración de las partes*, in *Reforma procesal civil, oralidad y poderes del juez* (Legal Publishing ed., Colección Derecho y Proceso, 369-380, 2010); Hanns Prütting, *Carga de la prueba y estándar probatorio: La Influencia de Leo Rosenberg y Karl Hainz Schwab para el desarrollo del moderno Derecho probatorio*, 1 Ius et Praxis, 16 Year, 453 – 464 (2010); Guilermo Ormazábal Sánchez, *Discriminación y Carga de la Prueba en el Proceso Civil* (Marcial Pons ed., Madrid, 2011); Juan Montero Aroca, *Derecho jurisdiccional II. Proceso civil*, (Tirant lo Blanch ed., Valencia, 2009); Juan Montero Aroca, *La prueba en el proceso civil* (Editorial Civitas ed., Pamplona, 2011).

137. B. no. 8197-07, *supra* note 6, at 116 ("El tribunal podra distribuir de la prueba conforme a la disponibilidad y facilidad probatoria que posea cada una de las partes en el litigio lo que comunicará a ellas, con la debida antelación, para que asuman las consecuencias que les pueda generar la ausencia o insuficiencia de material probatorio que hayan debido aportar o no rendir la

It is conceived as an extraordinary power, needed in cases of asymmetry of information between the parties that can affect the equality principle.[138] It has to be understood in a judicial system designed to obtain the substantial truth of the case, which seeks a total application of the cooperation and good faith principles.[139] In that context and as stated above, it is not important who brings the evidence to the Court, but the way in which it is rendered (i.e. with cross-examination and in a public audience in front of the judge) and weighed by the court (i.e. according to the "*sound criticism*" or "*reasoned judgment*" of the court contrary to a fixed legal standard of proof).[140]

The 'dynamic' part of the name was adopted with the finality to oppose it to a static or fixed idea of valuation of the evidence and to show its ability to adapt to discrete cases.[141] Therefore, the dynamic allocation of burdens doctrine relies on the principle that the distributive rule of the burden of proof does not respond to inflexible principles: it must be adapted to each case, according to the nature of the alleged or denied facts and to the availability and feasibility to prove.[142]

An example is useful to illustrate this doctrine. A patient was injured in a medical procedure of a large hospital and wants to sue to recover damages for medical malpractice. All the video records of the operation, the names of the specialists that took part in the process and different details of the injury are known and stored only by the hospital.

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prueba correspondiente de que dispongan en su poder."). As noted above in supra note 9, this provision was withdrawn from the Bill by the Camber of Deputies, waiting for its inclusion by the Senate in the current discussion.

138. B. no. 8197-07, *supra* note 6, at 18 (The purpose of this doctrine is to correct eventual inequalities between the parties.).

139. *Id*. at 17, 44 (Article 13 of the NCPC states that the judge when applying the procedural rules "has to take into account that the purpose of the rules is the effectiveness of the rights stated in the substantive law, and that in the expeditious treatment of the judicial procedures and in the *just resolution of the conflicts* subject to its jurisdiction, the public interest is committed." In addition, the Message of the NCPC (§IV.1) states "the parties have to have access to the civil procedure in equality conditions, with the right to obtain a resolution over the grounds of the dispute, if not settled by other dispute resolution mechanism. A judgment that does not resolve the merits of the dispute because of procedural issues is a failure of the justice [system]".).

140. Those rules of valuating the evidence differ from the actual rules of the CPC, where the judge has to apply a legal valuation to each type of evidence according to and objective criteria stated by law. For example, Article 384 of the CPC expressly rules how judges have to valuate different situations that can be presented in a witness' declaration.

141. *See* Omar Luis Diaz Solime, *La Dinámica en la Carga Probatoria y la Conducta Procesal de las Partes* [*The Dynamic in the Burden of Proof and the Procedural Conduct of the Parties*], *in* Revista de Derecho Procesal 347, 374 (2009) (Editoriales de Derecho Reunidas ed., Madrid).

142. Maria de los Angeles Gonzalez, *La Carga Dinámica de la Prueba* [*The Dynamic Allocation of the Proof*], 22 REVISTA DE DERECHO PROCESAL [REV. DER. PROCESA] 263, 370 (2012). (The author has translated part of this source from Spanish to English for purposes of this article.)

According to the basic principle of the burden of proof, the patient that is seeking application of the rule has to prove that the injurer must pay damages to the injured and must provide sufficient evidence of facts that occurred. For a judicial action to succeed against the injurer, the patient must prove the negligence and capacity of the injurer, the existence of an injury, and the causal relationship between the action of the injurer and the injury suffered. If the hospital refuses to cooperate with the process and opt to pay the fine or other sanction for not cooperating, then how can the patient provide all of these records owned by the hospital? Or, from the court's perspective, how can it issue a judgment other than dismissing the case if no relevant evidence is provided?

According to the *dynamic allocation of burdens doctrine*, in this case, given that the hospital is the owner of the relevant evidence and because the evidence is *available*, the court could release the plaintiff from his obligation to prove and require instead the hospital to prove that it acted according to the law.[143] It represents a high level of difficulty to an ordinary patient to prove that the scientific or medical proceedings were conducted improperly.

However, this burden to prove a new fact does not mean that the other party (i.e. the plaintiff) is free from proving. Consequently, the party "who pretends the displacement of the burden of proof (. . .) has to have proved, even indirectly, that the other party is, or was, in better conditions to prove."[144]

2. Application of the Doctrine in Other Latitudes

This doctrine is not new at a comparative level, and it has had an interesting development, mainly in Latin-American countries.[145] We find similar regulation in different European countries and international conventions as well.[146] I believe that having a worldwide perspective of this theory contributes to a proper comprehension of the doctrine.

The Supreme Court of Colombia has adopted this doctrine in different cases.[147] In a decision issued on November 3, 1977, in a medical malpractice case, the Supreme Court of Colombia ruled that "if the patient dies (. . .) and its heirs submit that the medical professional had

143. LEY DE ENJUICIAMIENTO CIVIL (L.E. CIV.) (CODE OF CIVIL PROCEDURE) art. 217.7 (Spain).

144. *See* Gonzalez, *supra* note 142, at 380.

145. *See id.*

146. Cappelletti & Garth, *supra* note 3, at 62-63.

147. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. enero 30, 2001, M.P: J. Gomez, Expediente CCLXX-2509, Gaceta Judicial [G.J.] (No. 5507) (Colom.) [hereinafter CCLLXX-2509].

suspended or reduced the treatment, its the medic who has the burden to prove whether he did perform properly, whether he was legally excused to perform or whether if the practitioner would have performed the patient would have died anyway."[148] In another medical malpractice case the Court maintained its rule and argued that precisely in this sector of behavior that is connected to the required performance [in a medical malpractice case], it is not possible to establish absolute rules of burden to prove with no attendance to the discrete case.[149]

In addition, the Colombian Constitutional Court has adopted this institution mainly to cases of human rights violations and forced displacement.[150] In a decision drafted by Justice Triviño on January 16, 2009, ID T-006/09, the Constitutional Court ruled that the specific circumstances of the claimant, conduces to the reversal of the burden of proof, being a duty to the Government to prove that the assertions made by the claimant are not true and, therefore, there is not a situation of displacement.[151] The claimant was an extremely low-income citizen of María la Baja, Bolivar Department, Colombia; who claimed that he was denied from receiving a regular stipend from a social program of the Government when he was unjustly removed from the list of beneficiaries.[152] The Government argued that the claimant was removed because he did not comply with the requirements of the list, so he was not entitled to the benefit anymore.[153] As stated above, the Court ruled that, in attendance to the particular circumstances of the claimant and the relevance of the rights involved, the Government had the burden to prove that the claimant did not satisfy the requirements of the social benefit.[154]

Argentina has also incorporated this rule in a statutory level (in both state and federal law) and has been developing this doctrine at a jurisprudential level as well.[155] In addition to medical malpractice, it has been adopted in consumer right's cases, insurance, billing disputes, la-

148. Corte Suprema de Justicia [C.J.S.] [Supreme Court], Sala. marzo 11, 1977, M.P, Sentencia, Gaceta Juridica [G.J.] (No. 2398, p. 332) (Colom.).

149. C.S.J., *supra* note 148, at 22.

150. *See generally* Corte Constitucional [C.C.] [Constitutional Court], enero 16, 2009, Sentencia T-006/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2009/T-006-09.htm.

151. *Id.* at 13 (The author has translated part of this sentence for purposes of this article, and similar decisions of the Constitutional Court of Colombia can be found in the sentences T-1095, 2008 and T-719, 2008).

152. *Id.* at 2-3.

153. *Id.* at 3.

154. *Id.* at 6.

155. CÓDIGO PROCESAL CIVIL Y COMMERCIAL DE LA PROVINCIA DE LA PAMPA [CÓD. PROC. CIV. Y COM. LP] [CIVIL AND COMMERCIAL CODE OF THE PROVINCE LA PAMPA] (B.O. 1828) (Arg.).

bor law and bankruptcy. The leading cases are Acosta[156] in 1993 and Pinheiro[157] in 1997.

At the statute level, the Civil Procedural Code of La Pampa, Article 360 paragraph 4 states that, without prejudice to the main rule of burden of proof, it has the burden to prove the facts the party that, attending to the particular circumstances of the case, is, in terms of the tribunal, in better condition to arrive to the clarification of the facts.[158] The civil procedural codes of the provinces of Corrientes,[159] San Juan[160] and Santiago del Estero[161] have incorporated similar provisions.

Article 189 of the General Procedural Code of Uruguay mandates the maximum cooperation of the parties when incorporating the evidence to the process.[162] Article 189.3 states that if the required party denies to collaborate with the evidence after a judicial order, that negative shall be interpreted as a confirmation of the exactitude of the allegations over the facts that is sought to prove by the other party, unless there is evidence in the contrary.[163]

The Spanish Civil Procedure Act of 2001 adopted in its Article 217 this doctrine by stating different cases where the Defendant has the burden of proof (e.g. in case of unfair competition practices) and by stating that the tribunal, when allocating the burden of proof between the parties, "shall consider the availability and feasibility of the evidence of the parties to the dispute."[164]

The Article 17.3 of the UNIDROIT Principles of Transnational Civil Procedure, states that "[a]mong the sanctions [for failure or refusal to comply with obligations concerning the proceeding] that may be appropriate against parties are: **drawing adverse inferences**; (. . .); **rendering default judgment**; (. . .) and awarding costs in addition to those

156. Corte Suprema de Justicia de la Provincia de Buenos Aires [SCJ BAs] [Supreme Court of Justice of the Province of Buenos Aires], 4/8/1992, "Acosta, Ramón Teófilo y otro v. Clínica Indarte S.A. y otro / recurso extraordinario inaplicabilidad de la ley", Jurisprudencia Argentina [J. A.] (1993-IV-66) (Arg.).

157. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/12/1197, "Recurso de hecho deducido por la actora en la causa Pinheiro, Ana María y otro c/ Instituto de Servicios Sociales para el Personal Ferroviario" La Ley [L.L.] (Arg.).

158. CÓD. PROC. CIV. Y. COM. LP art. 360 (Arg.).

159. *Id.* art. 60.

160. CÓD. CIV. DE LA PROVINCIA DE SAN JUAN, art. 380 (Arg.).

161. CÓDIGO PROCESAL CIVIL Y COMMERCIAL [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 382 (B.D. 6910) (Arg.).

162. CÓD. GEN. DEL PROCESSO [General Procedural Code], LEY NO 15.982, art. 189.1 (1997) (Uru.).

163. *Id.* art. 189.3.

164. LEY DE ENJUICIAMIENTO CIVIL (L.E. CIV.) (CODE OF CIVIL PROCEDURE) art. 217.7 (Spain).

permitted under ordinary cost rules."[165] Also, Article 16.2 of the same corpus contains an interesting declaration that is applicable to the doctrine in analysis: "[i]t is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure."[166]

The Directive 2004/48/EC of the European Parliament and of the Council, regarding the "procedures and remedies necessary to ensure the enforcement of intellectual property rights,"[167] states that when there is required and specified certain evidence in control of the other party, "the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information."[168]

In Germany this doctrine has been applied on a case-by-case basis more than from a common objective rule. For instance, it has been applied mainly in cases of medical malpractice with grave wrongdoing by the faculty, in some consumers' rights issues, in labor law disputes, in banking contracts and in some environmental issues.[169]

In Italy, we find a specific statute provision that allows the judge to deduce proof arguments from the parties' behavior during the process. Article 116 of the Italian Civil Procedural Code states that "the judge can **imply arguments of evidence** from the answers given by the parties, (. . .) from their unjustified refuse to consent inspections ordered by the judge and, in general**, from the parties behavior showed in the context of the process."**[170]

In England we find the "pre-action protocols" that are required in certain types of actions. Those procedures have the purpose of facilitating the exchange of information and help to "allow [the parties] to understand each other's position and make informed decisions about settlement and how to proceed."[171] Regarding the sanctions for non-compliance, "[t]he court will look at the overall effect of non-compliance on the other party when deciding whether to impose sanctions,"[172] which include the stay of proceedings and the payment of the

165. American Law Institute, *UNIDROIT Principles of Transnational Civil Procedure*, 2004-4 UNIF. L. REV. 758, 790 (2004).

166. *Id.* at 788.

167. Council Directive 2004/48/CE., art. 1, 2004 O.J. (L 195) 16, 19.

168. *Id.* art. 6.1, 2004 O.J. (L 195) 16.

169. Los Angeles Gonzalez, *supra* note 142, at 375.

170. CODICE DI PROCEDURA CIVILE [C.p.c.][CIVIL PROCEDURAL CODE] art. 116 (It.).

171. *Practice direction, pre action motion* § 6.1(1), Ministry of Justice *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#1.1

172. *Id.* § 4.5.

associated costs.[173]

IV. THE DYNAMIC ALLOCATION OF BURDENS DOCTRINE AND THE US PLEADING STANDARD

At this final stage, I try to propose a rule in order to raise in a practical way some of the issues that have to be considered when analyzing the incorporation of this doctrine into the judicial system.

Therefore, for purposes of this analysis, let us assume that the following two modifications to the Federal Rules of Civil Procedure (FRCP) have been adopted:

First, adding the following new letter (g) to the Rule 37 "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions" of the FRCP Chapter V:

> **"(g) Dynamic Allocation of the Burden of Proof**
>
> In cases of manifest disproportionality between the parties' access to the core evidence of the case, the court may allocate the burden of proof to the uncooperative or powerful party in accordance with the availability or feasibility of the same. The court shall notify the parties of its decision to allocate the burden of proof in light of the consequences that the court decision may have on the parties' obligation to present evidence."

Second, stating as a new ground to deny a motion to dismiss: the fact that the plaintiff is comprehended in the situation of the new Rule 37(g). For instance, by adding as a new last paragraph of Rule 12(b)[174] of the FRCP the following:

"A motion asserted under any ground of this Rule may be denied if the plaintiff is in the condition stated in [new] Rule 37(g)."

A. Positive effects

With this new set of rules, the court does not need to change its general *plausibility* standard when deciding a motion to dismiss. In cases where the plaintiff that is facing a motion to dismiss argues the situation of the new Rule 37(g), the court does not have to say if the claim is or is not *plausible*. It just has to deny a motion to dismiss on grounds of the new paragraph of the Rule 12(b) if it believes that the conditions of Rule 37(g) are applicable to the plaintiff.

Therefore, these modifications do not change the current pleading standard as a general rule, but preempt the early dismissal of cases

173. *Id.* § 6.1.
174. FED. R. CIV. P. 12(b).

where the manifest asymmetry between the parties makes one party control the core evidence of the case. As stated by Professor Kassem, the issue here is not to evaluate the plausibility requirement of the complaint as "a factor of existential consequence."[175]

Furthermore, these proposals encourage the good performance of the parties regarding their discovery and disclosure duties. The party that has an advantage against the other party and controls the main evidence of the case will know in advance that if he or she does not cooperate, the court may apply this doctrine as stated in the new Rule 37(g). That previous knowledge would encourage full commitment of the parties with the process and is a good incentive to strengthen the good faith litigation principle.

Besides, we have to consider that this tool necessarily raises evidence that will help the jury in their fact-finding task. As stated by Morello, the efforts of the jurists [i.e. lawmakers] do not have to be centered in the allocation of the burden to prove, but in the court's due diligence task to find the facts, without considering what the parties are or are not doing.[176] Consequently, as the outcomes of the judicial system are going to be more accurate to the reality, the judicial error in the judgments is going to decrease, which will bring all the advantages that that means for the society.

Also, this rule contains an important improvement in terms of the way in which the Government assures the access to justice to the people regardless of their social or economic conditions and their power relationship. It is a court's tool designed to guarantee access to certain types of cases to receive a grounded pronouncement over the merits by a court. It reduces the cases that are won or lost because of procedural tricks and not on their merits.

Finally, given that it represents an important tool that has to be used only in certain cases, it is the judge who has to decide (not a plain rule) whether a certain case fulfills the requisites of "manifest disproportionality" regarding the proof availability, and then whether to apply or not this doctrine in such a case. The court is not mandated to use this institution; it is just a procedural mechanism that can be used.[177] This

175. Kassem, *supra* note 24, at 1446.

176. AUGUSTO MORELLO, LA PRUEBA. TENDENCIAS MODERNAS. HACIA una VISION SOLIDARIA de la CARGA de LA PRUEBA [The Proof, Modern Tendencies. Towards a Solidary Approach of the Burden of Proof] 55 (Abeldo Perrot ed., 1911); *see also* Los Angeles Gonzalez, *supra* note 142, at 372.

177. For the NCPC, and for almost all of the judicial systems abroad that have incorporated this doctrine, it is also considered as a power that the judge is not mandated to use, even if he esteems that the requisites are fulfilled.

feature is positive because it implements this tool in terms that do not promote frivolous or meritless litigation and promotes the possibility of being heard to grounded cases where it is impossible for the plaintiff to succeed in a motion to dismiss under the plausibility criterion. Also, by implementing this doctrine as optional, the exceptional nature of this judicial tool is reaffirmed.

B. Due Process and Dynamic Allocation of Burdens Doctrine

Although a constitutional analysis of this doctrine is both necessary and interesting, it is far beyond the scope of this paper. However, I would like to raise a few constitutional issues that one has to take into account when analyzing this doctrine from a due process perspective.

There are at least four aspects of the Due Process principle that are closely connected to the doctrine in analysis. First, the Due Process Clause of the Fifth Amendment is understood as a limitation on arbitrary authority and a guarantee against all unreasonable legislation, "which demands that all laws shall not be unreasonable, capricious, or arbitrary."[178] Second, as asserted by the U.S. Supreme Court, due process is not a technical conception with fixed content unrelated to time, place and circumstances; rather, it "is flexible and calls for such procedural protections as the particular situation demands."[179] Third, the central meaning of "procedural due process" is that "[p]arties whose rights are to be affected are entitled to be heard."[180] Finally, even though we are analyzing this doctrine from a civil procedural perspective, it is important to take into account another comprehensive principle of the due process standard: the non self-incrimination principle.[181] Therefore, any constitutional analysis has to consider, at least: whether the dynamic allocation of burdens doctrine implies an unreasonable delegation of powers that judges can use arbitrarily; whether it affects the constitutional right to be heard; and whether it implies a violation to the non self-incrimination principle.

Regarding the critique that the dynamic allocation of burdens doctrine may be against the adversarial system and that it may imply a non-desirable delegation of powers to the judge,[182] one can provide two lines

178. *Fela v. United States, Merit Sys. Prot. Bd.*, 730 F. Supp. 779, 783 (N.D. Ohio 1989); *see also W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

179. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

180. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

181. *See* Jonathan M. Rund, *McKune v. Lile: Evisceration of the Right Against Self-Incrimination Through the Revival of Boyd v. United States*, 12 Geo. Mason L. Rev. 409, 410 (2003).

182. B. no. 8197-07 §IV.6 (a)-(b), *supra* note 6, at 25.

of arguments. First, the use of this power has to be requested by the party in those exceptional cases of manifest asymmetry between the parties and where one of them has total control over the core evidence of the case. Besides, it is always up to the judge to apply this doctrine: the court can deny it with no further reason.[183] As described above, it is not conceived as a regular judge's power to all cases, but only to some of them where the requirements are met.[184] Second, by analyzing this doctrine by contrast to the current plausibility standard, one can raise the following questions. Is this a higher delegation of powers than the current one at the pleading phase? Is it not more "inquisitorial" to have courts with the authority to set aside a claim if found "not plausible" with no evidence, cross-examination nor any minimum debate?

Considering the constitutional right to be heard, I believe that this institution does not affect that guarantee but instead promotes it. This institution improves the opportunity to hear certain cases that under the current pleading standard are unable to pass a motion to dismiss. Moreover, the current pleading standard casts serious doubts over the protection of the right to be heard. Along with stating the right to notice and the opportunity to be heard, the Supreme Court has ruled that those requirements have to be applied in a "meaningful manner."[185] Does the current plausibility pleading standard fulfill the opportunity to be heard in a meaningful manner?

Additionally, the following argument addresses the assumption that with the application of this doctrine the court is obligating a party to prove against its own interests.[186] Notwithstanding that the U.S. Supreme Court has ruled "that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case."[187] I believe that even if said principle is applied to noncriminal cases, the doctrine in the analysis does not affect it. First, the court is never going to require a party to prove against himself, but instead to prove the correspondent's negative fact. Going back to the example of medical malpractice, the hospital need not prove that medical malpractice was committed, but instead must prove that it did not occur. Second, even though the borderline is not always clear, it is important to distinguish between the imposition to a party of the **obligation to prove** certain facts that affect its interests

183. *Id.* at 8197-07 §IV.4, §V.2(a), at 22.
184. *Id.* at 8197-07 §IV.1, §IV.4, §V.2(b), at 22, 35.
185. *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
186. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003).
187. *Id.* at 770.

and the imposition of the **obligation to present evidence** that may affect its interests. The first case clearly affects the Due Process rule, but the second evidently does not.

Finally, I would like to briefly mention the recent U.S. Supreme Court decision in *Medtronic, Inc. v. Mirowski LLC* (2014), where the main issue in dispute, from a procedural perspective, was the allocation of the burden of proof.[188] It is a patent law case where the Court reaffirmed its long held case law that "the burden of proving infringement generally rests upon the patentee."[189] However, for purposes of this article, the way it was decided is interesting.

Medtronic (licensee) and Mirowski (patentee) had a licensing agreement where the licensee agreed to pay a fee to practice certain Mirowski patents.[190] Later, the patentee notified the licensee of patent infringement by Medtronic, who then challenged that assertion of infringement in a declaratory judgment action. The District Court recognized that Mirowski was the defendant in the action, but concluded that Mirowski, as the party asserting the infringement, had the burden of proving infringement.[191] The Federal Circuit disagreed and then the Supreme Court reversed, upholding the District Court's decision on this issue.[192]

These recent and thought-provoking decisions should be analyzed in-depth in an exclusive paper. The Supreme Court ruled that the party (licensee) that alleged there was no infringement by seeking a declaratory judgment did not have the burden to prove the detailed facts that sustained its case (i.e. that he or she has not breached the license agreement), but the party against whom the action is served (patentee) regarding the existence of the infringement had the burden.[193] Did the Court's decision affect the defendant's due process guarantees by requiring him to bear the burden of proof? I believe it did not, because the core evidence of the case required to properly decide whether there is infringement, is on the defendant's (patentee's) side: where the evidence is more *available* and *feasible*. In the same way, neither does the dynamic allocation of burdens doctrine.

188. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S.Ct. 843, 844 (2014).

189. *Id.* at, 849.

190. *Id.* at 846.

191. *Id.* at 847.

192. In *Medtronic Inc. v. Bos. Sci. Corp.*, 695 F.3d 1266, 1276 (Fed. Cir. 2012), the Court of Appeals held that considering the particular circumstances of this case, a party "seeking a declaratory judgment of non-infringement," namely Medtronic, "bears the burden of persuasion."

193. *Id.* at 1274.

V. CONCLUSION

In *Twombly* and then in *Iqbal*, the Supreme Court of the Unites States changed the pleading standard, introducing the *plausibility* criteria. Above, I have briefly argued and analyzed the undesirable effects of that shift. Then I discussed in a comparative way the Chilean Procedural Reform and its decisions concerning the pleading standard, including an analysis of the *dynamic allocation of burden* doctrine. Finally, I have drafted an amendment to the Federal Rules of Civil Procedure that incorporates that doctrine, to then briefly analyze its effects and highlight its positive and negative concerns.

In the process of designing a procedural judicial system, all the effects and counter effects of every decision have to be balanced and put under permanent scrutiny. In the current scenario post *Twombly* and *Iqbal*, it seems to be very difficult for certain plaintiffs who claim justice with meritorious cases, to pass a motion to dismiss. That fact is a critical issue to every system of justice that seriously intends to grant fairness to its people.

In this context, the dynamic allocation of burdens doctrine is an institution that has to be considered, especially by those who think that the undesirable effects of *Twombly* and then of *Iqbal* need to be taken into account. As analyzed above, this judicial tool does not require changing the new *plausibility* rule; it only preempts the early dismissal of cases where the manifest asymmetry between the parties makes one party control the core evidence of the case; encourages good performance by the parties regarding their discovery and disclosure duties; and necessarily raises evidence that will help the court (or jury) in its fact-finding task, reducing judicial error.

The purpose of this paper is to bring attention to the current procedural injustice of the first phase of the U.S. civil procedure, and to briefly analyze an interesting antidote that, as noted above in section II, has been implemented in other latitudes. There are no absolute procedural rules to address the procedural inequalities that may affect the parties, and no absolute procedural rules to address every alternative that strengthens the compromise of the judicial system in granting justice to everyone who requires it. However, it has to be seriously taken into account.