SOME OBSERVATIONS OF COMPARATIVE INSTITUTIONAL ANALYSIS IN ACTION

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Legal practitioners should value comparative institutional analysis. This Article discusses two recurring issues in modern commercial litigation and how understanding the features of the adjudicative process can help shape legal arguments relating to those issues. The Article also describes how a comparative institutional perspective can aid practitioners in communicating with clients, opponents, and decision makers.

INTRODUCTION

I was asked to provide perspective on the role comparative institutional analysis plays in legal practice. My view comes from spending about fifteen years of practice in litigation departments of large firms, which are in one corner of what Professor Neil Komesar terms the adjudicative process. My clients have been big and medium-sized businesses in a variety of industries, and include auto part and electrical equipment manufacturers, chemical firms, and medical equipment and pharmaceutical companies.

In all candor, I have not cited *Imperfect Alternatives*[1] or any other of Professor Komesar's many publications since graduating law school. One reason for my lack of public reference is that his approach is challenging to apply and, despite the ever-growing body of scholarship and events like this Symposium, remains unfamiliar to many practitioners. In the expense-constrained and page-limited arena of

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1. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

private practice, it is hard to develop and present an argument that assesses the relevant institutions and evaluates their relative merits.[2]

But this lack of citation is no measure of the importance of Professor Komesar's work to my practice. Since sitting in his seminar almost twenty years ago, I have come to understand that litigation involves much more than writing briefs and arguing positions before a court. Much of the adjudicative process takes place outside the courtroom and, indeed, before any pleading is filed.

It is outside the courtroom, in thinking about issues facing my clients, and discussing those issues in meetings and conference calls, that I have relied on Professor Komesar's thinking and approach. There are simple and elegant elements of his approach that have become my shopworn tools. In this Article, I show the everyday utility of comparative institutional analysis by describing how it applies in two common and recurring issues in litigation.

SOME ADDITIONAL PERSPECTIVE

I have come to understand that litigators are called only when there is a problem. Clients seek our help where they have been harmed by another party, such as a supplier or competitor. Or clients call when a regulator, customer, or supplier claims that the client has done something wrong. In both situations, my work in the adjudicative process begins with an investigation. In this investigation, we seek answers from our client about the merits of the issue, including the who, what, when, and so forth. Equally important, from the inception, the adjudicative process requires us to answer questions that clients will have about resolving the dispute.[3]

Professor Komesar rightly attributes the expense of litigation to informational costs.[4] A considerable part of my work in the adjudicative process consists of overcoming informational hurdles by developing, explaining, and generally communicating positions. The early stages of a dispute require us to communicate on behalf of the "law," analyzing and then explaining to the client the position of the law on the issues involved. There may also be a communication from an opposing party or regulator, in the form of a demand letter or governmental notice of some

2. *See* NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 174–89 (2001) (acknowledging the "hard work" of conducting a thorough institutional comparison).

3. Most of my clients have been corporations or other legal entities. Thus, my communications with the client will be with one or more individuals who are managers of the entity. *See, e.g.*, ILL. RULES PROF'L CONDUCT R. 1.13 (2010) (lawyer retained by an organization represents the organization acting through its constituents).

4. KOMESAR, *supra* note 2, at 37.

type. We will work with the client to prepare a response and, many times, an exchange of letters resolves the dispute.

Should the letter writing fail, the parties may try to negotiate a resolution. There will be additional communications to and from the other side, or with a mediator, about each other's position. When matters cannot be resolved through negotiations, the dispute may be put in suit. Then the communicating of positions starts with the decision maker, whether an arbitrator, judge, or jury. It is at that point that the brief writing may begin. These communications then continue through the course of the dispute.

It is in connection with all of these communications that I have used certain core elements of comparative institutional analysis to my advantage. Without saying so, I have applied the tenet that there are three important features of the adjudicative process—the physical capacity of the courts, the competence of the decision maker, and the dynamics of litigation.[5] As I describe below, I have relied on this important foundation in analyzing issues on behalf of clients and communicating with clients about those issues.

A. The Twombly *and* Iqbal *Decisions*

When defending a lawsuit, the initial investigation can lead to a conclusion that the other side simply has no case. At this point, a decision must be made whether to file a motion to dismiss the case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,[6] or to answer the complaint, submit to discovery, and then bring a motion for summary judgment pursuant to Rule 56.[7] Two relatively recent decisions by the United States Supreme Court, *Bell Atlantic Corp. v. Twombly*[8] and *Ashcroft v. Iqbal*,[9] have changed this calculus of whether to move to dismiss or answer and, in my view, require an understanding of comparative institutional analysis to fully appreciate their impact.[10]

In these two decisions, the Court interpreted what was previously described as a "liberal" pleading standard of Rule 8 to include a

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5. *Id.* at 35.

6. FED. R. CIV. P. 12(b)(6).

7. FED. R. CIV. P. 56.

8. 550 U.S. 544 (2007).

9. 556 U.S. 662 (2009).

10. The standard of *Twombly* and *Iqbal* applies to federal practice, although the standard has also been adopted in many states. *See* A. Benjamin Spencer, *Pleading in State Courts after* Twombly *and* Iqbal, POUND CIV. JUST. INST. (2010), http://www.roscoepound.org/docs/2010%20judges%20forum/2010%20Pound%20Forum%20--%20Spencer%20Paper.pdf.

"plausibility" element.[11] In *Twombly*, the Court held that this plausibility requirement applied in antitrust claims and, in *Iqbal*, the Court held that this standard applied to all types of cases.[12]

The rule of *Twombly* is that a civil complaint can no longer contain only bare legal assertions.[13] Plaintiffs in civil actions must include in the complaint adequate facts to show that their claim is legally sufficient and plausible.[14] From my comparative institutional perspective, I view the critical element of this decision to be the Supreme Court's determination that the plausibility standard is "context-specific" and requires the judge to use her or his "experience and common sense."[15]

Twombly is believed to be a sea change. For defendants, the plausibility standard is taken as a long-awaited screening tool. This decision gave teeth to Rule 12(b)(6), so that a defendant can obtain dismissal of a weak case early and avoid the burden of discovery.[16] There certainly is evidence that *Twombly* has had some effect. Studies evaluating the number of cases filed and number of dismissals show a downward trend in filings and other effects which would suggest that *Twombly* motions are more effective than motions filed under the prior standard.[17]

Nonetheless, I have been skeptical that *Twombly*'s change in the pleading standard automatically means that motions to dismiss under Rule 12(b)(6) are more effective and worthwhile. One hurdle these studies face is analyzing the pre-*Twombly* period and accounting for situations where the plaintiff had enough information to prepare a complaint that met the plausibility standard but did not bother to do so.

Another issue *Twombly* statisticians face is accounting for *Twombly* motions that could be brought but are not. Taking a comparative institutional perspective, I have advocated a more considered approach.

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11. *Twombly*, 550 U.S. at 570.

12. *See* Karen Petroski, Iqbal *and Interpretation*, 39 FLA. ST. U. L. REV. 417, 424–25 (2012).

13. 550 U.S. at 556–57.

14. *Id.* at 570.

15. *Ashcroft v. Iqbal*, 556 U.S. 662, at 678–79 (2009) (describing the "working principles" of *Twombly*).

16. *See* Petroski, *supra* note 12, at 426–34 (identifying and categorizing commentary).

17. *See, e.g.*, HEATHER LAMBERG KAFELE & MARIO M. MEEKS, SHERMAN & STERLING LLP, ANTITRUST DIGEST: DEVELOPING TRENDS AND PATTERNS IN FEDERAL ANTITRUST CASES AFTER *BELL ATLANTIC CORP. V. TWOMBLY* AND *ASHCROFT V. IQBAL* 2, 19–20 (Apr. 2010), *available at* http://www.shearman.com/files/upload/AT-041910-Antitrust-Digest.pdf. I owe thanks to Professor William Eskridge who alerted me to a recent note during the Symposium discussions: Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE. L.J. 2270 (2012) (providing an informative and comprehensive assessment of past empirical studies).

What is sometimes missed in evaluating whether to bring a *Twombly* motion is how the standard allocates substantial authority to the trial judge. The Supreme Court instructed trial judges to take a harder look at the plausibility of the factual allegations in the complaint, yet the Court left that assessment in the hands of the trial judges and their collective "common sense."[18]

So despite statistics suggesting that a motion to dismiss has a greater probability of success, an appreciation of the institutional dynamics makes the decision whether to bring a *Twombly* motion far from an automatic "yes." An early dismissal of the case certainly is an attractive option to any civil defendant, but the *Twombly* standard increases the cost of losing the motion. A *Twombly* motion requires the trial judge to make a decision about the plausibility of the case based on the plaintiff's allegations and the judge's common sense. If the motion is denied, the individual trial judge has now decided that the plaintiff has a plausible case. This conclusion that the plaintiff's case is plausible can be difficult to overcome as the case continues. For example, if there is a dispute about the scope of discovery to which the plaintiff is entitled, the determination of plausibility can tilt in favor of allowing the plaintiff broader discovery. A decision that a claim is plausible can also be more difficult to overcome should the defendant later bring a motion for summary judgment.

B. E-discovery

One basis for *Twombly*'s plausibility standard was the Court's concern that without a more stringent standard, a plaintiff is able to impose "massive" discovery costs on defendants on the basis of bare legal allegations.[19] Although I have doubts that the *Twombly* standard resolves this concern, the Court was right in *Twombly* that the costs of civil discovery can be substantial. A complex commercial case can involve a tremendous volume of documents and data.[20] As I explain below, comparative institutional analysis has also aided my understanding of these issues.

When I began private practice in the late 1990s, business was still mostly done in paper and the size of a case was measured in bankers boxes. The rules of thumb were that a bankers box holds about 2500

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18. *Iqbal*, 556 U.S. at 679.

19. *Twombly*, 550 U.S. at 558–59 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)); *id.* at 593 (Stevens, J., dissenting).

20. *See* F. Matthew Ralph & Caroline B. Sweeney, *E-discovery and Antitrust Litigation*, ANTITRUST, Fall 2011, at 58 (quoting *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 283 (D. Del. 2008)).

pages of printed paper, an attorney could review a box of discovery materials in about a day, and big cases were measured as those having fifty boxes or more.

Today the disputes I work on involve business conducted after the turn of the century, so the majority of documents were originally created electronically and continue to be stored in electronic format. Cases are now measured by gigabytes of what the *Federal Rules of Civil Procedure* call "Electronically Stored Information."[21] There are now specialists who are brought to help collect electronic information without spoiling its metadata. There are also specialists who process the electronic information back into readable form. The most recent advances involve using computers to read the documents and conduct the document review once dreaded by young attorneys.

Litigation clients have two basic concerns with e-discovery. First, there is concern that the opposing party's deep search of a client's electronic records will disclose some unfortunate document, like a poorly worded, ambiguous e-mail. When produced, these few documents will be enough to prevent the case from being dismissed prior to trial. Second, even if no unfortunate documents are located, the search, processing, and review of electronic material will be enormously expensive.

When addressing these concerns, comparative institutional thinking has helped me understand and explain that these burdens, in practice, are much less than perceived. Electronically stored documents are easier to create and store, so the volume of potentially relevant documents to review may be greater. As a practical matter, however, technology has generally kept pace in that these records can be searched and the facts can be determined in an efficient manner. When I started practice, the initial phases of investigation sometimes required visits to the client's office to search through physical file cabinets. Now, the initial investigation can begin with a collection of the e-mail from the relevant individuals, which can be quickly searched with key words. Although unfortunate documents may be found using these new tools, these tools also locate helpful documents, and both classes of documents are located at a much earlier stage of the case.

In regard to costs, I have found them to be increasingly controlled by institutional dynamics. As Professor Komesar would predict, the courts have had difficulty with the transition from paper to electronically stored information. One of the simple elements of comparative institutional analysis is that while courts may be unbiased, they lack technical expertise.[22] Unlike the *Twombly* standard, which purports to allocate more authority to the trial judge, the courts allocating issues of

21. FED. R. CIV. P. 34(b)(2)(E)(ii).

22. KOMESAR, *supra* note 2, at 38–39.

e-discovery are left with the parties and their retained specialists. This is seen in local court rules that require each party to designate an employee (or hire a specialist) who is "knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology."[23]

Moreover, I have seen that the scope of e-discovery is also frequently left to the parties. In my commercial cases, the parties generally reach agreement (without the aid of the court) about the amount of financial investment to make in conducting e-discovery. These agreements consist of limits on the number of individuals whose files will be searched and key word terms to be used to conduct the search.

There are circumstances where the costs of e-discovery for each party may be disproportionate. For example, in a consumer class action, the plaintiff's electronic search and production costs may be very low relative to the defendant's because the plaintiff will have very few electronic documents that need to be collected and reviewed. But even where the costs may be disproportionate, a trend is emerging that reflects the courts' continuing hesitance to become involved in the complexity of e-discovery and the courts' inclination to leave the decision about the scope of e-discovery to the parties.

There is an increasing number of decisions in which the expenses of electronic discovery are treated as taxable costs under 28 U.S.C. § 1920.[24] This statute sets out a minor exception to the American rule that each party in the litigation pays its own expenses. Under this statute, the losing party pays for the "costs" of the case.[25] Historically, these have been limited to filing fees and deposition expenses. Some courts, however, have concluded that the costs of electronic discovery are also subject to this rule that the loser pays.[26]

Given my comparative institutional perspective, I find this trend to be unsurprising. This rule reinforces the allocation of decision making about e-discovery to the parties and balances the parties' respective interests in those circumstances where the parties' individual costs are

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23. *Model Standing Order Relating to the Discovery of Electronically Stored Information*, U.S. DIST. COURT FOR THE N. DIST. OF ILL., E. DIV., 3, http://www.ilnd.uscourts.gov/home/_assets/_documents/webdocs/brown/ESI%20discovery%20order.pdf (last visited Mar. 20, 2013).

24. 28 U.S.C. § 1920 (2006 & Supp. V 2011).

25. *Id.*

26. Kathleen P. Dapper, Comment, *Nothing Is Certain Except Death and Taxes: But in the District Courts, Not Even Taxes Are Certain for E-discovery Costs*, 80 DEF. COUNS. J. 74 (2013) (surveying recent decisions awarding costs of e-discovery to prevailing parties).

not equal. Even if one party's own costs may be low, that party faces the risk of having to pay the costs of the opponent.

CONCLUSION

As this Symposium demonstrates, Professor Komesar has convinced legal scholars of the importance of his model. By this short description of two issues I regularly face, I hope to have shown that his work can equally serve legal practitioners.