

# Advocate

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## Senator Specter Proposes Reforms to Securities Pleading and Liability Standards

By Takeo Kellar

United States Senator Arlen Specter (D-Pa.) recently issued two bills which would reverse recent Supreme Court decisions that limit plaintiffs' ability to bring civil lawsuits. On July 22, 2009, Senator Specter introduced a bill designed to return the pleading standard for civil lawsuits to what it was prior to 2007, when the Supreme Court handed down its ruling in *Bell Atlantic Corp. v. Twombly*. That case and another case, *Ashcroft v. Iqbal*, decided in May 2009, have raised the standard that a complaint must meet to avoid being dismissed, upending long-standing precedent. At issue is how specific a pleading must be under the Federal Rules of Civil Procedure. Rule 8 requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," while Rule 12 allows for the dismissal of complaints that are vague or that fail to state a claim. Under *Iqbal*, a 5-4 decision written by Justice Anthony Kennedy, many courts are now requiring plaintiffs to plead specific facts in order to prevail on motions to dismiss. However, such specific facts are often not available until formal discovery is allowed to commence under the Federal Rules — that is, after the motions to dismiss have been decided. When introducing the legislation, Senator Specter commented that "The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and

other laws that benefit the public will fall increasingly to private litigants." Senator Specter's bill directs federal courts to interpret the pleading rules as the Supreme Court did in its 1957 decision, *Conley v. Gibson* — often referred to as the "notice pleading" standards.

In a second bill, Senator Specter introduced legislation that would amend section 20 of the Securities Exchange Act of 1934 to allow private Rule 10b-5 actions against persons that knowingly or recklessly provide substantial assistance to primary violators, thus overturning the Supreme Court's rulings in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.* and *Central Bank of Denver v. First Interstate Bank of Denver*. Under these Supreme Court decisions, shareholders are barred from suing parties that only had an indirect role in a fraud, so-called "secondary actors." In his accompanying remarks, Senator Specter said that immunity under the two Supreme Court decisions has removed incentives for firms "to avoid complicity in and even help prevent securities fraud." Specter also said that a public company's auditors, bankers, business affiliates, and lawyers "all too often actively participate in and enable the issuer's fraud," citing cases of Tyco International Ltd., WorldCom Inc., Refco Inc. and Enron.

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*Takeo Kellar is an associate in BLB&G's California office. He can be reached at [takeok@blbglaw.com](mailto:takeok@blbglaw.com).*