December 1, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the undersigned companies and organizations, we write to express our strong opposition to S. 1504, the "Notice Pleading Restoration Act of 2009." This legislation would produce a revolutionary change in pleading rules, cause tremendous confusion over the applicable legal standards, and make it impossible for defendants to obtain dismissal of complaints that are legally insufficient under decades of well-settled case law. This drastic change in standards would impose enormous costs on already struggling businesses and further impede economic recovery. Further, the legislation may result in overwhelming the federal judicial system with frivolous lawsuits which will take months to sort out. Accordingly, we strongly urge you to oppose this bill and any other legislation with the same purpose.

The proposed legislation is intended to overrule two recent U.S. Supreme Court decisions: *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Proponents of the legislation contend that *Iqbal* and *Twombly* worked a dramatic change in pleading rules to the detriment of plaintiffs. In fact, however, these decisions simply collect and endorse principles long applied by the lower courts in determining whether a complaint's allegations are sufficient to defeat a motion to dismiss for failure to state a claim. Dozens of lower court decisions preceding *Iqbal* and *Twombly* have refused to sustain complaints containing only "bald assertions," "unsupported conclusions," or "legal conclusions," and they have refused to draw "unwarranted inferences" from a complaint's allegations.

S. 1504 would replace current pleading standards, not with a substantive principle, but with a bald statement that complaints cannot be dismissed under Rule 12(b)(6) or (e) "except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." Senator Specter's floor statement highlights the statement in *Conley* 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 that would entitle him to relief." Yet, such language will only reintroduce confusion in lower courts that have been applying a body of law developed over several decades. Seizing upon a general phrase from a Supreme Court decision, the bill would produce tremendous confusion over an issue that arises in many cases: the standard for determining whether a complaint's allegations are sufficient to survive a motion to dismiss.

Moreover, the proposed legislation would impose significant costs on already struggling businesses. To the extent the bill's language were interpreted to adopt the *Conley* standard literally, it would effectively eliminate motions to dismiss under Rule 12(b)(6) from the Federal Rules of Civil Procedure. Plaintiffs could engage the engines of discovery by filing complaints that contain only conclusory allegations of wrongdoing; for example, simply reciting the

language of a statute and asserting that it had been violated. Facing a complaint containing only bare legal assertions, a federal court would struggle to find that the plaintiff could prove "no set of facts" supporting his or her claim, and so any motion to dismiss would likely be denied. Additionally, federal courts rely upon the scope of the pleadings to determine the scope of discovery in which the litigants should engage. Filing complaints to engage in discovery "fishing expeditions," long prohibited by the Federal Rules, would become routine practice.

This bill is a "solution" in search of a problem. In the few months since *Iqbal* was decided, the experience of day-to-day litigation provides little reason to believe that the decision will limit access to the federal courts for plaintiffs with legitimate (or even colorable) claims. In fact, defendants citing *Iqbal* continue to lose motions to dismiss. Moreover, the well-established rule in federal courts that leave to amend must be freely granted prevents the permanent foreclosure of a plaintiff's claims in all but the most egregious circumstances. Indeed, the Court in *Iqbal* itself explicitly instructed the lower courts to consider whether the plaintiff should be permitted to modify his or her complaint to cure its deficiencies. If longer experience reveals that courts are in fact applying *Iqbal* in a way that produces a dramatic change in results, there is a well-established process for modifying the governing standard: the judicial rulemaking process already established in the Rules Enabling Act.

Finally, existing pleading standards perform an essential gatekeeping function, ensuring that the courts are not overwhelmed with frivolous cases and that defendants are not hauled into court on a whim. Because our system does not permit a victorious defendant to recover litigation costs—including electronic discovery costs—that reach millions of dollars in even routine cases, S.1504 will have a severe economic impact. By changing the rules to reduce courts' power to weed out unjustified claims, S. 1504 will force all businesses, including small businesses, to divert tens of millions—if not hundreds of millions—of dollars to pay greater litigation costs, resulting in significantly fewer resources to create the new jobs our economy so desperately needs.

For these reasons, *Iqbal* and *Twombly* have done little to affect potential plaintiffs' well-founded cases. The proposed "fix" of S. 1504, by contrast, would impose significant costs upon potential litigants, including small and large businesses alike. Adoption of the proposed legislation would impose a hefty "litigation tax" on the engines of our economic growth, diverting scarce resources to litigation rather than job creation and impeding economic recovery at the worst possible time. Accordingly, we urge you to oppose S. 1504.

Sincerely,

AEGON USA, LLC
Alabama Civil Justice Reform Committee
Allstate Insurance Company
American Council of Engineering Companies
American Insurance Association
American Tort Reform Association
ASFE/The Geoprofessional Business Association
AT&T
Caterpillar Inc.
Civil Justice Association of California

CNA Financial
Construction Industry Round Table (CIRT)
Deloitte LLP
Distributor Innovations and Benefit Savings Solutions
DRI
East Texans Against Lawsuit Abuse
Eli Lilly and Company
Exxon Mobil Corporation
Federation of Defense & Corporate Counsel
Ford Motor Company
GE Company
Honeywell
Illinois Civil Justice League
International Association of Defense Counsel
Lawyers for Civil Justice
Liberty Mutual Group
Mississippians for Economic Progress (MFEP)
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Federation of Independent Business (NFIB)
National Lumber and Building Material Dealers Association
New Jersey Lawsuit Reform Alliance
Oregon Liability Reform Coalition
Pennsylvania Chamber of Business and Industry
Pfizer, Inc.
Pharmaceutical Research and Manufacturers of America (PhRMA)
Property Casualty Insurers Association of America
Shell Oil Company
South Carolina Civil Justice Coalition
State Farm
Texas Civil Justice League
The Association of Independent Beverage Distributors
The Coca-Cola Bottlers' Association
The Dow Chemical Company
The Procter & Gamble Company
The State Chamber of Oklahoma
Unitrin, Inc.
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce
Verizon Communications Inc.
WellPoint, Inc.
Westfield Group

Cc: The Members of the Senate Committee on the Judiciary