

**Conley's Curious Retirement**



*What's the Deal with Motions to Dismiss  
in Federal, State and Territorial Courts?*

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**Effect of "Twiqbal":**

- 1. Federal Courts
- 2. State and Territorial Courts
- 3. So What?

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**I.**

**FEDERAL COURTS**

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**Federal Courts**

**RULE 12(b)(6):**

“Rule 12(b)(6) authorizes the Court to dismiss a complaint that fails ‘to state a claim upon which relief can be granted.’”

*Detling v. U.S.*, 2013 WL 2420860 (D. Haw. May 31, 2013).

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**Federal Courts**

**CONLEY v. GIBSON:**

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.”

*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

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**Federal Courts**

**CONLEY v. GIBSON:**

“ . . . the motion to dismiss for failure to state a claim was viewed with disfavor and was rarely granted. . . ”

5B Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2013).

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**Federal Courts**

**BELL ATLANTIC v. TWOMBLY (2007):**

Conley has been “questioned, criticized, and explained away long enough,”

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549 (2007).

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**Federal Courts**

**BELL ATLANTIC v. TWOMBLY (2007):**

“after puzzling the profession for 50 years, this famous observation **has earned its retirement.**”

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

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**Conley's Gold Watch**



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**Federal Courts**

**BELL ATLANTIC v. TWOMBLY (2007):**

A complaint must contain sufficient factual matter, accepted as true, to “state a claim for relief that is **plausible on its face.**”

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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**Federal Courts**

**BELL ATLANTIC v. TWOMBLY (2007):**

If “plaintiffs [do] not nudg[e] their claims across the line from conceivable to plausible, their complaint must be dismissed.”

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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**Federal Courts**

**ASHCROFT v. IQBAL (2009):**

“[O]ur decision in *Twombly* expounded the pleading standard for ‘**all civil actions** . . . .’”

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941, 1953 (2009).

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**Federal Courts**

*ASHCROFT v. IQBAL* (2009):

“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its **judicial experience and common sense.**”

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941, 1954 (2009).

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**Federal Courts**

“COMMON SENSE”:

“In the wake of the 2007 decision in *Twombly* and the 2009 decision in *Iqbal*, district judges are now permitted to consider ‘judicial experience’ and ‘common sense’ when deciding a Rule 12(b)(6) motion to dismiss.”

5B Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2013).

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**Federal Courts**

“TWIQBAL”

- “Set the civil procedure world abuzz.”
- “Fostered “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings . . . .”

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**Federal Courts**

**D. Guam 2013:**

“A court looks at whether the facts in the complaint sufficiently state a “plausible” ground for relief.”

*Arnold v. Melwani*, CV. 09-00030 DAE, 2013 WL 205430 (D. Guam Jan. 9, 2013) (per Tydingco-Gatewood, J.).

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**Federal Courts**

**D. Guam 2013:**

“A plaintiff must include enough facts to raise a reasonable expectation that discovery will reveal evidence and may not just provide a speculation of a right to relief.”

*Arnold v. Melwani*, CV. 09-00030 DAE, 2013 WL 205430 (D. Guam Jan. 9, 2013) (per Tydingco-Gatewood, J.).

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**Federal Courts**

**D. Guam 2013:**

“When a complaint fails to adequately state a claim, such deficiency should be ‘exposed at the point of minimum expenditure of time and money by the parties and the court.’”

*Arnold v. Melwani*, CV. 09-00030 DAE, 2013 WL 205430 (D. Guam Jan. 9, 2013) (per Tydingco-Gatewood, J.).

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**Federal Courts**

**Two Steps:**

1. Weed out the legal conclusions—  
“threadbare recitals of the elements;” and
2. “Presume the remaining factual allegations  
are true and determine whether the claim is  
plausible.”

*Hill v. Majestic Blue Fisheries, Inc.* Civ. Case No. 1:11-cv-00034 (Order and Opinion, D. Guam, April 12, 2013) (Per Tydingco-Gatewood, J.).

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**Federal Courts**

**D. Guam 2013:**

“If a court dismisses the complaint or portions thereof, . . . leave to amend should be granted ‘if it appears at all possible that the plaintiff can correct the defect.’”

*Arnold v. Melwani*, CV, 09-00030 DAE, 2013 WL 205430 (D. Guam Jan. 9, 2013) (per Tydingco-Gatewood, J.).

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**Federal Courts**

**Superlatives:**

1. Most cited cases in history.
2. “Sea change” in civil litigation.
3. “Sudden and radical departure”
4. “Judicial activism”
5. “ill conceived”
6. “Vague and uncertain” standard
7. “Beginning of end of access to courts”

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**Federal Courts**

**Uncertainties:**

Is pleading a *form* sufficient?

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**Federal Courts**

**Uncertainties:**

**Form 11:**

“On [date] at [place], the defendant negligently drove a motor vehicle against the plaintiff.”

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**Federal Courts**

**Uncertainties:**

**W.D. Pa.:**

“The . . . Supreme Court **did not impose a new heightened pleading requirement**, but reaffirmed that Rule 8 requires only a short and plain statement . . . not detailed factual allegations.”

Helkowski v. Sewickley Sav. Bank, 2009 U.S. Dist. Lexis 96134 (Oct. 15, 2009).

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**Federal Courts**

**Uncertainties:**

**E.D. Cal.:**

“ . . . [T]he minimal notice pleading requirements have changed. Since *Twombly*, the requirement for fact pleading has been significantly raised.”

*Pac. Marine Cntr., Inc. v. Silva*, 2009 U.S. Dist. Lexis 93731 (Oct. 7, 2009).

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**Federal Courts**

**Uncertainties:**

**Affirmative Defenses:**

“The majority of courts addressing the issue . . . have applied the heightened pleading standard announced in *Twombly* . . . to affirmative defenses.”

*Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009).

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**Federal Courts**

**Summary:**

1. *Conley*'s “no set of facts” standard retired.
2. Replaced with “Plausibility” standard.
3. “Vague and uncertain.”
4. *Twiquel* left many unanswered questions.
5. Judicial discretion and “common sense.”
6. Leave to amend usually granted.

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**II.**

**STATE AND  
TERRITORIAL COURTS**

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- State and Territorial Courts*
- Four Approaches:
1. **Reject** Federal Plausibility Standard
  2. **Adopt** Federal Plausibility Standard
  3. Adopt **Hybrid** Standard
  4. **Unsettled:** No State High Court Ruling Yet

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*State and Territorial Courts*

Rejected:

“For the most part, state high courts have declined to adopt the new standard announced in *Twombly* and *Iqbal*.”

Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.,  
812 N.W.2d 600, 608 (Iowa 2012).

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***Conley's Second Career***




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***State and Territorial Courts***

**Plausibility Rejected;  
Existing State Standard Reaffirmed:**

- Tenn.
- Wash.
- Iowa
- W.Va.
- Del.
- Az.
- Vt.

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***State and Territorial Courts***

**Rejected:**

“ . . . such a broad and sweeping change in the procedural landscape should come by operation of the normal rulemaking process, not by judicial fiat . . . ”

*Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011).

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**State and Territorial Courts**

**Rejected:**

“ . . . it must be remembered that we are addressing the standard in assessing the sufficiency of a single document filed at the very beginning of a case -- the complaint.”

*Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 437 (Tenn. 2011).

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**State and Territorial Courts**

**Rejected:**

“*Iqbal* and *Twombly* were “predicated on policy determinations specific to the federal trial courts.”

*McCurry v. Chevy Chase Bank, FSB*, 169 Wash.2d 96, 102, 233 P.3d 861 (2010).

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**State and Territorial Courts**

**Plausibility Standard<sup>†</sup> Adopted:**  
(S.D., Mass., Neb.)

“*Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery.”

*Doe v. Bd. of Regents*, 280 Neb. 492, 788 N.W.2d 264, 278 (2010).

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**State and Territorial Courts**

**GUAM HYBRID:**

“ . . . [A] plaintiff’s obligation to provide the grounds of his entitlement to relief ‘requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).”

*Core Tech Int’l Corp. v. Hanil Eng’.*, 2010 Guam 13, ¶52.

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**State and Territorial Courts**

**GUAM HYBRID:**

“ . . . 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.’ *Id.* at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Taitano v. Calvo Finance Corp.*, 2009 Guam 9 ¶ 6 . . . .”

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**State and Territorial Courts**

**CNMI:**

1. Rejected new “plausibility” standard.
2. Adopted reasoning of Tennessee Supreme Court in *Webb*.
3. Retained *Magofna* “fair notice” standard.
4. Retired *Conley*’s “no state of facts” language.

*Syed v. Mobil Mar. Islands, Inc.*, 2012 MP 20.

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**State and Territorial Courts**

**CNMI:**

“The *Magofna* standard has been the law in the Commonwealth for over twenty years and we see no compelling reason to discard it. . . .”

*Syed v. Mobil Mar. Islands, Inc.*, 2012 MP 20, ¶21.

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**State and Territorial Courts**

**CNMI:**

“While we reaffirm *Magofna*, we set aside our previous reliance on the ‘no set of facts’ language.”

*Syed v. Mobil Mar. Islands, Inc.*, 2012 MP 20, ¶20.

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**State and Territorial Courts**

**Summary:**

1. *Conley*’s second career.
2. Reluctance to adopt “Plausibility.”
3. Unsettled rules in many jurisdictions.
4. Hybrid standards confusing.
5. **Free for all:** Most jurisdictions now inconsistent with federal standard *and* with each other.

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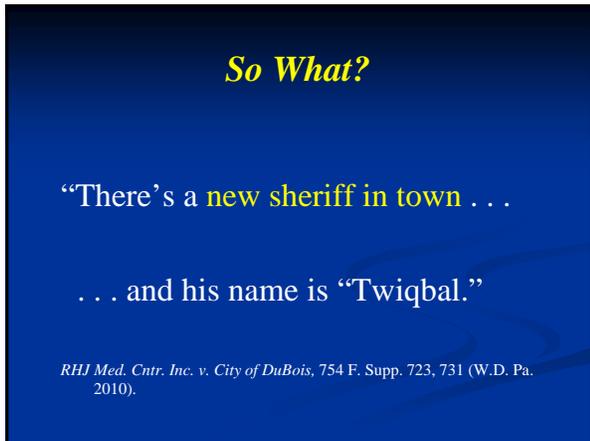
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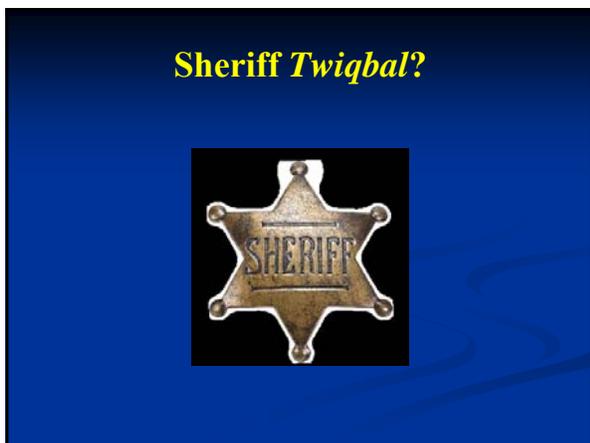
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**So What?**

“*Twombly* and *Iqbal* sounded the **death knell** for the rote recitation pleading that prevailed under *Conley* . . .”

*Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 738 F.Supp.2d 864, 865 (N.D. Ill. 2010); *Fowler v. UPMC Shadyside*, 578 F.3d 203(3<sup>rd</sup> Cir. 2009).

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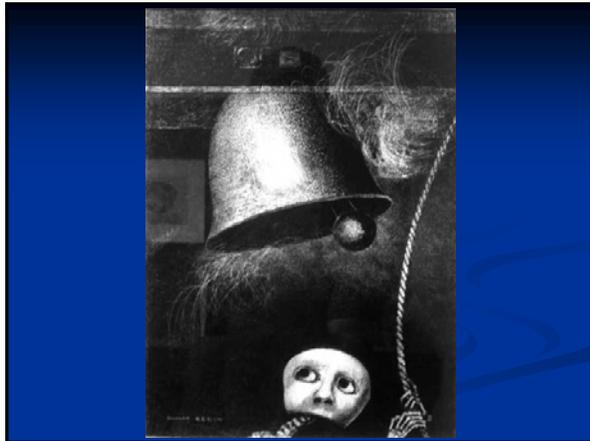
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**So What?**

“. . . and hammered the ‘**final nail in the coffin**’ for the “no set of facts” standard.”

*Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 738 F.Supp.2d 864, 865 (N.D. Ill. 2010); *Fowler v. UPMC Shadyside*, 578 F.3d 203(3<sup>rd</sup> Cir. 2009).

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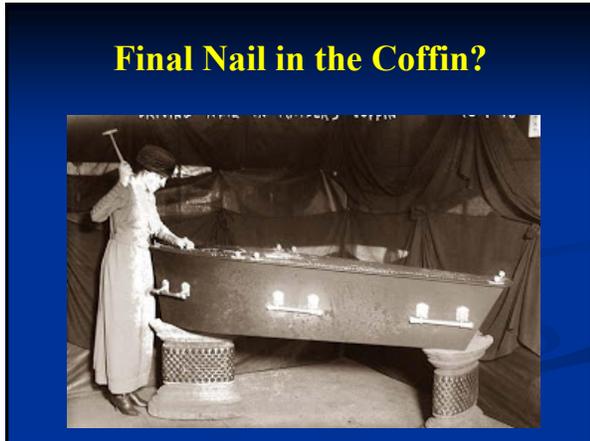
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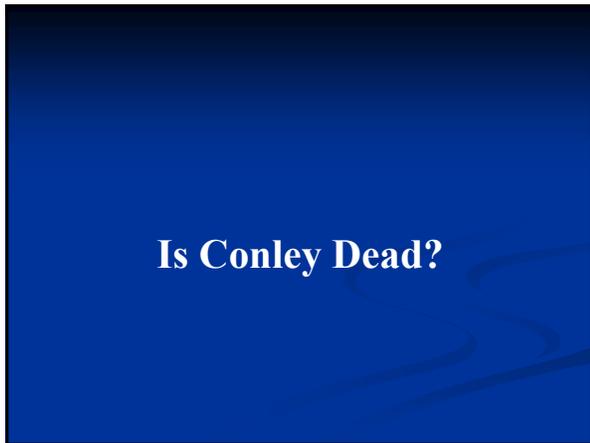
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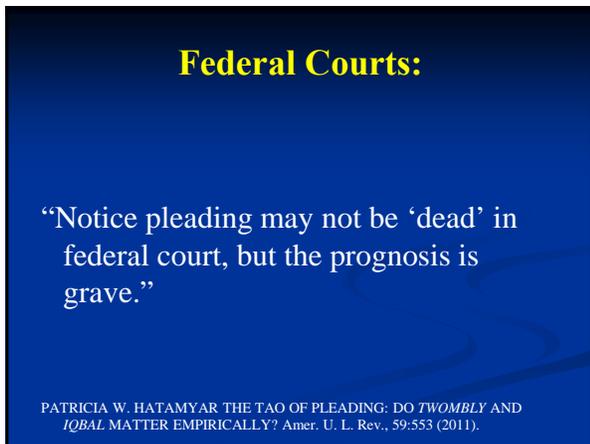
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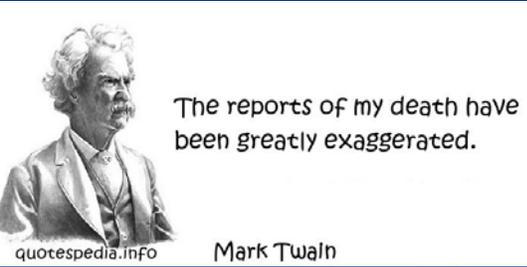
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**State and Territorial Courts:**



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**Empirical Study**

**Federal Judicial Center (2011):**

1. A significant increase in the rate at which defendants file motions to dismiss
2. No significant increase in the rate of grants of motions to dismiss without leave to amend; and
3. No significant increase in cases terminated by such motions.

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**Commentators**

1. Any increase in the rate of grants of motions to dismiss *offset by drop in cases dismissed on summary judgment*; and
2. Increase noted in dismissal of particular claims/parties but not terminating lawsuit.

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**Conclusions (Federal)**

1. *Conley*'s "no set of facts" language has been "retired" in the federal system.
2. **Uncertainty remains** over how to apply the new *Twiqbal* standard.
3. Significant **increase** in rate of *filing and granting* of motions to dismiss.
2. However, **leave to amend** is usually granted; so the effects of *Twiqbal* have been modest.

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**Conclusions (Federal)**

5. Rule 12(b)(6) is a "moving target."
  - a. Repeal or amendment by Congress.
  - b. Judicial refinement or reinterpretation.
6. Elements of "judicial experience and common sense" mean that **results will vary** depending on judge, court, and type of case.

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**Conclusions (State & Terr.)**

1. *Conley* gets a **second career**—"No set of facts" language remains on the job in many states and territories.
2. Motion to dismiss **standards confused and uncertain** in many states and territories.
3. **Lack of uniformity** with federal courts and among state courts could lead to forum shopping.

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**Overall Conclusions:**

“The Supreme Court’s new plausibility pleading standard has disrupted civil procedure as a whole and has large implications for civil actions in the years to come.”

Mark W. Payne, *The Post-Iqbal State of Pleading: An Argument Opposing A Uniform National Pleading Regime*, 20 U. Miami Bus. L. Rev. 245, 275-80 (2012)

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**Overall Conclusions:**

**Changing Rules  
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Changing Outcomes**

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**Predictions:**

- Big Impact in a Small Percentage of Cases.
- Small Impact in a Big Percentage of Cases.

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