THE SECRET ACTION TEST: A PROPOSED SOLUTION TO THE NEW PLAUSIBILITY PLEADING

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I. INTRODUCTION

In a civil action, access to the courts is initiated by the filing of a claim.1 The legal form of a claim stems from a reaction to the system of writs which developed in thirteenth-century England.2 The writ system evolved to be an excessively technical legal system, which at times worked in favor of procedure instead of justice, equity, or the merits of the claim.3 Over time, the American law developed a system known as notice pleading, which was codified in Rule 8 of the Federal Rules of Civil Procedure.4 Notice pleading requires at a minimum that the complaint of the plaintiff show a set of facts which, when taken as true and when all reasonable inferences are made in favor of the plaintiff, are consistent with the allegations in the complaint.5 The goal of notice pleading is simply to put the defendant on notice of the nature of the claim the plaintiff seeks to bring.6

In 2007 and 2009, the Supreme Court decided two cases, Bell Atlantic Corp. v. Twombly7 and Ashcroft v. Iqbal,8 which threw the accepted practice of notice pleading into disarray.9 Twombly stated that pleadings must now contain allegations sufficient to raise the “right to relief above the speculative level.”10 This new “plausibility” language raised concerns, but language in the decision suggested that its new framing of the pleading standard might apply only to anti-trust cases.11 The ambiguity in the decision was met with confusion by lower courts, and the Supreme Court clarified its position in Iqbal, stating affirmatively

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3 Id. at 10.
10 Twombly, 550 U.S. at 555.
11 Id. at 554–55 (“This case presents . . . the question of what a plaintiff must plead . . . under . . . the Sherman Act”).
that the Twombly holding covered all federal civil cases.\(^{12}\) The change in standards appears to be the product of the increasing complexity of society in general, and litigation in particular.\(^{13}\) The emergence of products liability, conspiracy, civil rights, and toxic tort claims have created perceived discovery and case management issues which alarmed the Supreme Court and may have influenced their decision to heighten the pleading standard.\(^{14}\)

The primary prudential factors in the Iqbal and Twombly decisions were concerns about burdensome and expensive discovery processes, concerns over the allocation of judicial resources, and fears that plaintiffs would bring ‘in terrorem’ litigation where the threat of the costs of litigation is sufficient to cause a settlement. All of these factors hold a great deal of relevancy for environmental claims.\(^{15}\) Although the true implications of Iqbal and Twombly have not yet been completely felt, 12(b)(6) and 12(c) motions to dismiss are being granted more often as a result of the two Supreme Court decisions.\(^{16}\) Toxic tort claims, and potentially other environmental claims, are being adjudicated under the new pleading standard, and these claims are frequently inadequate to live up to the new standard of plausibility.\(^{17}\) The potential fallout for plaintiffs in environmental cases is significant, and trial practitioners must be ready on two fronts; they must prepare arguments which will encourage judges to find exceptions, gaps, and less strict interpretations of the Iqbal and Twombly pleading rules, and they must work together to lobby legislative bodies and convince them to modify the Iqbal and Twombly pleading rules or institute special rules for environmental claims and other complex litigation.

The Court’s standard in Iqbal and Twombly is ambiguous, and clarifying that standard is a necessary first step to improving upon the pleading standard. Next, the scope of the problem must be outlined by examining the potential and actual effects of the new pleading standard on litigation in general and environmental litigation in particular.\(^{18}\) Third, I contend that the new standard’s deleterious effects on complex environmental litigation outweighs any benefits in reducing judicial workload and discovery. Finally, a solution is suggested, the “secret action rule,” that will correct the weaknesses inherent in the Iqbal and Twombly rules.

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\(^{12}\) Iqbal, 129 S. Ct. at 1953.


\(^{14}\) Id. at 1247–48.


\(^{17}\) See, e.g., Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010).

\(^{18}\) See id.; this case is the lens through which the new pleading standard will be examined.
II. UNDERSTANDING THE IMPACT OF TWOMBLY AND IQBAL

Before Twombly and Iqbal, Federal notice pleading was controlled largely by Conley v. Gibson, a case made famous for its ruling 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.” Although this holding had met with some reinterpretation, dissent, and disdain, it was foundational to the liberal pleading requirements in federal courts, and no case had driven the Supreme Court to express “any doubt as to the adequacy of the Conley formulation.” Twombly was appealed to the Supreme Court on grounds different than the 12(b)(6) motion, and neither the appellants nor the respondents had briefed very extensively on the issue. Nonetheless, the court took the opportunity to overturn the fifty years of precedent established by Conley and craft a new “plausibility” standard.

Twombly centered around a putative class action brought against Incumbent Local Exchange Carriers (“ILECs”), the splinters of AT&T’s monopoly. The plaintiffs brought suit against these “baby bells,” alleging that they had violated the Sherman Anti-Trust Act by conspiring to fix prices and remain outside of each other’s territories. The plaintiffs alleged in their complaint that the parallel actions of the ILECs were intentional, claiming an agreement could be inferred by the failure of the ILECs to meaningfully compete. The Court held that “a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions . . . factual allegations must be enough to raise a right to relief above the speculative level.” The Court rejected the “no set of facts” standard from Conley, saying that “this famous observation has earned its retirement. The phrase is best forgotten . . .” The Court changed the pleading standard to require “identifying facts that are suggestive enough to render [the claim] plausible . . .” The Court made little effort to define plausibility, and noted only that an alternative explanation for the noncompetition was “that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.” One can assume, although it was never stated, that the Court found this alternative explanation more “plausible” than a collusive explanation.

20 Id. at 45–46.
22 See generally id.
23 Id.
24 Twombly, 550 U.S. at 549.
25 Id. at 550.
26 Id. at 555.
27 Id. at 563.
28 Id.
29 Id. at 568.
Although met with some consternation, the legal world had their minds put at ease when the Supreme Court relied on the fair notice standard in Conley to decide Erickson v. Pardus less than a month after Twombly.\footnote{Erickson v. Pardus, 551 U.S. 89, 93 (2007).} The applicability of the Twombly standard remained speculative, and there were questions about the scope of the decision such as whether it applied to all civil cases or only in an antitrust context.\footnote{Mize, supra note 13, at 1247.} The Supreme Court laid these questions to rest when it decided Iqbal, which clarified that the plausibility standard applied to all civil claims.\footnote{Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).}

Iqbal was a case brought by a Pakistani Muslim who was arrested and detained shortly after the September 11, 2001 terrorist attacks.\footnote{Id. at 1943.} The plaintiff contended that he was denied his constitutional rights on the basis of his religion, race, and national origin, specifically alleging that he was placed in a maximum security prison without trial, kept in lockdown twenty-three hours a day, and handcuffed for the remaining hour.\footnote{Id. at 1944.} Iqbal accused his jailors of physically abusing him, strip searching him without cause, and refusing to let him pray.\footnote{Id.} Iqbal alleged that both Attorney General John Ashcroft and Robert Mueller, the Director of the Federal Bureau of Investigation, adopted, or at least knowingly ignored, the consequences of the policies which led to the violation of Iqbal’s constitutional rights.\footnote{Id.} Ashcroft and Mueller filed a 12(b)(6) motion in district court, which was rejected under the Conley standard.\footnote{Id.} Shortly after this district court decision, Twombly was decided.\footnote{Id.} The court of appeals considered Twombly, but rejected Ashcroft’s argument that it should apply broadly.\footnote{Id. at 1949.} The Supreme Court granted certiorari and cited Twombly, clarifying the rule: “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”\footnote{Id. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).} The Court expressly rejected the argument that Twombly should be limited to pleadings in an anti-trust dispute.\footnote{Id. at 1953.} The Iqbal Court did not provide a thorough examination or attempt to define the issue of plausibility.

To say that the Twombly and Iqbal decisions were controversial is an understatement. The Iqbal decision has been viewed as the most important Supreme Court decision of the 2008–2009 term and has been called the most important case decided in the decade.\footnote{Mize, supra note 13, at 1247.} Professor Robert G. Bone warned that Iqbal “takes Twombly’s plausibility standard in a new and ultimately ill-advised
Professors Clermont and Yeazell fear that the “entire system of civil litigation” has been destabilized by the invention of the new test. Even Congress, a body not known for its keen interest in civil procedure, has put forward two bills intending to change the law of *Iqbal* and *Twombly*. One witness in a House Judiciary Committee Meeting on October 27, 2009, entitled “Access to Justice Denied–Ashcroft v. Iqbal,” went so far as to say that “[a] person is now barred from entering the courthouse absent being able to drum up facts that convince a federal judge—someone who breathes fairly rarified air—that her claim is subjectively plausible.”

What has not emerged amidst the outcry is a settled explanation for what ‘plausibility’ really means. Scholars have claimed everything from a destabilization of civil litigation’s framework to an assertion that *Twombly* neither could have nor did actually change pleading standards. Cogent analysis has found that *Iqbal* clarified four rules from *Twombly*. First, is that “to survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face.” Second, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Third, is that the plausibility requirement is something less than probability but more than possibility. And fourth, it is not sufficient that the complaint pleads facts that are “merely consistent with” relief. The Court also ruled that while a court must take allegations of fact as true, “mere conclusory statements” should be ignored under the analysis. The Court also took the potentially radical step of instructing courts to use their “judicial experience and common sense” to determine pleading issues. The primary factors that the Court cited in re-interpreting Rule 8 were discovery costs and judicial economy.

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44 Mize, *supra* note 13, at 1247.

45 *Id.* at 1256 (citing Alison Frankel, *Mr. Iqbal Goes to Washington*, AM. LAW LITIG. DAILY, Oct. 28, 2009).

46 Bone, *supra* note 42.

47 Detterman, *supra* note 15, at 298 (“As the Court admits, a modification of generally applicable civil pleading standards can occur only through congressional amendment of the Federal Rules.”).


49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*


Court specifically worried that ‘in terrorem’ claims could drive settlements in even
the frailest of cases. 55

Although the ultimate rule that will arise out of Iqbal and Twombly is
unknown, what is certain is that the pleading standard in federal court has been
raised. This assertion is supported both by the claims of numerous academics and
by empirical evidence: approximately 46 percent of 12(b)(6) and 12(c) motions
were granted in the years prior to Twombly, but since Iqbal has been decided that
number has risen to approximately 56 percent. 56 These changes have created risks
for all litigators, but alarm is particularly appropriate amongst plaintiff litigators in
several areas—namely those which feature complex accusations and rely on
discovery to prove essential facts. A chief victim of the new pleading standards is
likely to be environmental plaintiffs, both those who bring statutory claims and
those who bring class action toxic tort claims. The complexity of these claims,
coupled with the way many of the actions which would tend to prove an
environmental plaintiff’s allegations are secret, internal communications not part
of the public record, combine to place the continued prosperity of environmental
litigation at severe risk.

III. ENVIRONMENTAL LITIGATORS SHOULD BE ALARMED

A certain ostrich-like, head-in-the-sand mentality has overtaken some
members of the legal community in regards to the effects of Iqbal and Twombly.
Those who suggest that the Court has not substantively changed the pleading
standard make two arguments: 1) that the Supreme Court lacks the power to
substantively change the pleading requirements; and 2) that the ambiguity present
in the plausibility standard will encourage courts to give lip service to the standard,
but still decide cases in accordance with the notice pleading standard. This is true
particularly in light of the historically harsh treatment pleading standards in
environmental cases have received. 57 Arguments against the overall impact of

55 Iqbal, 129 S. Ct. at 1953 (“Litigation . . . exacts heavy costs in terms of efficiency
 . . .”).
56 Hatamyar, supra note 16, at 556.
57 This principle is an important part of the argument in favor of rapid change, but
there is disagreement about the degree to which environmental claims are disfavored.
Toxic torts almost universally involve complex facts and attenuated consequences which
cannot always be clearly linked to particular wrongful acts. This ambiguity means that the
bite of more stringent pleading standards will be felt acutely by environmental litigators.
This is true regardless of whether or not the judiciary disfavors environmental claims, but
many commentators have noted that the trend of the judiciary is decidedly anti-
environment. See, e.g., Miller, Jeffrey, Theme and Variations in Statutory Preclusions
against Successive Environmental Enforcement Actions by EPA and Citizens Part Two:
Statutory Preclusions on EPA Enforcement, 29 HARV. ENV. L. REV. 1, 113 (2005) (noting
that courts “thwart subsequent enforcement [of EPA regulations] . . . by disregarding
several limitations Congress carefully drafted.”); Mank, Bradford, Standing and Statistical
that “the legislative and executive branches recognize a broader range of [environmental]
Iqbal and Twombly, as well as the impact on environmental litigation in particular, fail in the face of empirical and anecdotal evidence. Neither of these arguments stand up to analysis: more cases are being dismissed (with and without prejudice) for failure to state a claim than ever before, and these cases have leaked out into the environmental arena. In addition, prior history has shown that courts as a rule are harsher on environmental claims than on other types of claims, and there is no reason to believe that this trend will not continue. Indeed, a rational examination of the history of pleading requirements in environmental suits raises the specter of a pleading standard for environmental claims, which is even higher than that imposed upon other types of claims.

First, a minority of academics and the Supreme Court itself have argued that a true change to pleading standards can only occur through amendment of the Federal Rules of Civil Procedure. An argument can be made that while the court may have altered the language that it used in determining the outcome of a Rule 12(b)(6) motion, it lacked the power to actually change the analysis that goes into such a decision without amending the Rules through the legislative process. While this may be true in theory, it is not the case in fact. The Court does not, in either Iqbal or Twombly, offer to use the traditional 12(b)(6) analysis, which involves several elements and steps. Instead, the Court takes the 12(b)(6) elements apart and leaves only one element partially intact. Although the Court acknowledged that it did not have the authority to modify the rules, it exercised its authority to interpret the existing rules to the very limits of that authority’s flexibility. The ultimate result of this reinterpretation is a significantly heightened pleading standard. Whether the Court intended to change the rule, change the interpretation of the rule, or simply clarify the existing standard, the fact remains that claims are being dismissed at a higher rate than before. Whether the Court had the authority to change the rules or not, they appear to have done so, and environmental litigators must be prepared to deal with the consequences.


Regardless of the general disfavor towards environmental claims, courts have at least twice exhibited disfavor when it comes to the narrow issue of pleadings standards. See, e.g., Leatherman v. Tarrant County, 507 U.S. 163 (1993); Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002). Even if the judiciary has not historically disfavored environmental claims in general, recent history shows a strong trend toward attempting to carve out an exception to permissive pleading rules, making it harder for environmental litigants.

58 Id.
59 See Sheridan v. NGK Metals Corp., 609 F.3d 239 (3d Cir. 2010).
61 Hatamyar supra note 16, at 578.
62 Id. at 556.
Second, the plausibility standard is an ambiguous one, leaving plenty of leeway for judges to make the interpretations they find most equitable. *Iqbal* and *Twombly* expressly authorized the use of judicial experience and common sense in the determination of plausibility,63 and a court could simply state that ambiguous factual allegations are not plausible under the circumstances. Perhaps, a skilled and impassioned argument coupled with a friendly judge could reduce the standard to something approaching notice pleading in isolated instances. However, an environmental litigator who takes the position that such a situation will arise regularly enough to effectively lower the pleading standard is at best over-optimistic, and at worst choosing a ‘head in the sand’ approach. In light of the history of heightened judicial scrutiny of environmental claims, it is rational to assume that judges will apply the harshest of plausibility standards to these claims. Judges may even seek to use the ambiguity present in the plausibility standard to create an exceedingly strict standard of pleading that requires accurate and particular facts in complex environmental litigation claims.

The history of pleading in environmental law has been highlighted by the emergence of heightened pleading standards, followed by the subsequent rescue of the environmental plaintiff’s cause by the Supreme Court. In the absence of the Supreme Court’s controlling influence, there is a strong possibility that environmental pleading standards will spiral out of control. In *Cash Energy, Inc. v Weiner*,64 a heightened pleading standard was imposed for claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).65 Relying on the heightened requirements for civil rights pleadings, the court cited a concern over abusive litigation, high damages, and judicial efficiency as the rationale behind their heightened standards for CERCLA claims.66 The subsequent decisions of *Leatherman* and *Swierkiewicz* overturned that case and restored notice pleading.67 Notably, these cases also repudiated the principle of relying on prudential concerns as a justification for raising pleading standards.68

Under the *Conley* standard, an appellate court would hear cases in which a lower judge had seen fit to raise the pleading standard and invariably cut them down to size. Under the new system, judges who choose to impose a higher level of scrutiny than the Supreme Court intended may couch their decision behind the obscuring curtain of the ‘plausibility’ standard. By paying lip service to the standard and finding the plaintiff’s claims implausible, lower courts could effectively raise the pleading standard without incurring the attention or correction of higher courts. The willingness of courts to raise the pleading standards for particular claims is no longer protected by the Supreme Court. The Court has

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65 *Id.*; see also Detterman, *supra* note 15, at 311.
66 *Id.*
68 *Id.*
crafted a standard which not only permits a staggered standard of pleading requirements, depending on the nature of the claim brought, but encourages it by prompting judges to use their judgment and common sense in determining plausibility. The Court also did away with its repudiation of prudential concerns as a basis for calculating appropriate pleading standards when it relied upon such concerns itself to modify the pleading standards. A court would be completely in line with *Iqbal* and *Twombly* if it were to argue that the prudential concerns in environmental litigation required a ‘plausibility,’ which was closer to probability than in a simpler piece of litigation. One result of this would be courts making de-facto summary judgment decisions prior to discovery and under a standard of proof that so closely approached probability as to be indistinguishable from it; this means judging pre-trial 12(b)(6) motions by a standard that normally is not used until both discovery and trial have taken place. Given the history of discrimination against environmental claims and the lack of safeguards (or judicial will) to protect pleading standards for those claims, the ambiguity present in the plausibility requirement should be a cause for concern to environmental litigators, not a source of comfort.

Although toxic tort claims are not a high-volume area of law, a recent Third Circuit case highlights the dangers of *Iqbal* and *Twombly* as they relate to environmental law. In *Sheridan v. NGK Metals Corp.*, plaintiffs brought a class action alleging that the nearby manufacturing of beryllium-based products created such a high risk of injury and illness that the Pennsylvania statute enforcing such claims was triggered. NGK and other co-defendants filed motions to dismiss on multiple grounds, including a motion to dismiss under 12(b)(6) of the Federal Rules of Civil Procedure. The court considered the 12(b)(6) claim, cited *Iqbal* and *Twombly*, and then held that the plaintiffs had alleged no specific facts to show that the consulting firm which brought the 12(b)(6) motion had accepted an affirmative duty.

Environmental litigation is complex, and few areas are more complex than beryllium toxic tort claims. Beryllium is used in the production of advanced computer technologies, and has aerospace applications. A private sector market has also developed as it is used in the manufacturing of, among other uses, golf clubs, automobiles, and bicycles. While beryllium is useful, it is also highly toxic. When particles are breathed into the lungs over a long period of time, a small percentage of the population frequently develops chronic beryllium

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71 *Id.* at 244.
72 *Sheridan v. NGK Metals Corp.*, 609 F.3d 239 (3d Cir. 2010).
73 *Id.* at 244.
74 *Id.*
75 *Id.* at 263.
76 *Id.* at 244.
77 NGK, 609 F.3d at 244.
disease.78 Chronic beryllium disease, or CBD, results in inflamed lung sacs, which are flooded by white blood cells.79 These cells form granulomas, which eventually scar the lungs and lead to shortness of breath, chronic cough, fatigue, fever, loss of appetite, and potentially death.80 Not everyone who inhales beryllium develops CBD, and there is great scientific debate over whether the cause is purely from exposure to beryllium, if there is a genetic predisposition to the development of CBD, or if there is some other factor as yet unknown to science.81 These questions lead to significant complications in trial, with experts battling over the causes of CBD and the effects of beryllium inhalation.82 In NGK Metals, the statute under which the plaintiffs brought their claim against the consulting company, a medical monitoring statute, has seven elements, many of which require specific discovery.83 Three factors influence the prudential concerns in this case: first, the need for expert witnesses and complex fact patterns to prove varied elements; second, the nature of the plaintiffs, typically employees or individuals living around beryllium plants; and third, the nature of the defendants, typically large business with significant assets. These factors create an environment in which discovery costs can skyrocket gratuitously, judicial workload can become over-burdensome, and where there is an incentive for in terrorem litigation. In short, beryllium poisoning and CBD litigation is an area which raises the same prudential concerns alluded to in Twombly and Iqbal.

Amongst numerous other claims, the plaintiffs brought suit against a consulting company, Spotts, Stevens & McCoy, which was hired by other defendants to analyze and monitor beryllium levels emitting from the facility and to ensure compliance with state and federal regulations.84 The court stated that to succeed with a medical monitoring claim under Pennsylvania law, a plaintiff must “prove negligence, among other elements.”85 The motion to dismiss in this case hinged on whether the plaintiffs’ claim had established an affirmative duty under the law of negligence.86 The court cited Twombly’s language that “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”87 The court also noted Iqbal’s ruling, that “a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”88 With these two quotes in mind, the court ruled that the plaintiffs’

78 Id.
79 Id. at 244–45; it is worth noting, for the reader’s reference, that this disease represents itself similarly to asbestos poisoning.
80 Id. at 244.
81 Id. at 244–45.
82 NGK, 609 F.3d at 244–45.
83 Id. at 262.
84 Id. at 250.
85 Id. at 262.
86 Id. at 263.
87 NGK, 609 F.3d at 262 n.27.
88 Id. at 263.
allegations of a duty failed because the duty alleged in the complaint was not specific, stating that “[t]he flaw in the Amended Complaint is its failure to match an allegation of a specific duty owed to plaintiffs with an allegation of negligent performance of that duty.”

Under a notice pleading standard, the general claim that “Spotts, Stevens & McCoy was paid by the Reading Plant operators, defendants herein, to test, sample, analyze, and monitor . . . the levels of beryllium . . . [and] Spotts, Stevens & McCoy was responsible for advising defendants herein” would likely have passed muster. The pleading effectively placed Spotts, Stevens & McCoy on notice of the nature of the plaintiffs’ claims and created a situation in which a set of facts (for example, a communication from the consulting firm to the Reading Plant that they would inform them if beryllium reached unacceptable levels) would have established liability if proven. Under the new *Iqbal* standard, the court declared such a statement nonspecific and insufficient. The court could have eliminated the claim in other ways as well; they could have simply stated that the alleged claim was not plausible to common sense and in the judicial experience of the court, or that the allegation contained in the complaint was ‘conclusory.’ Any of these approaches would have defeated the claim under the new standard, but none would have been available under a notice pleading standard.

It is important to note that the claim against Spotts, Stevens & McCoy was not a frivolous or speculative one. The firm specialized in testing, sampling, and monitoring levels of beryllium, and they were hired by NGK Metals to perform that testing. It would have been a reasonable inference that NGK Metals expected Spotts, Stevens & McCoy to report to them in the event that beryllium levels exceeded what was allowable, and it seems highly likely that full discovery would have unearthed some document, or some witness who could have been deposed. Such a deposition would have shown that the duty to NGK Metals was not inferred or implied, but explicitly understood between the parties. Although there was no doubt a reasonable fear that the discovery costs of the entire litigation would be great, the costs of proving that Spotts, Stevens & McCoy had accepted an affirmative duty to NGK Metals was not where the majority of that burden would lie. Removing this specific claim had little perceivable effect on the discovery costs in this litigation. Although a court might fear the crippling discovery costs in beryllium poisoning and CBD litigation, this particular issue does not appear to raise the prudential concerns which led to the rise of the plausibility standard in *Iqbal* and *Twombly* because a relatively small amount of discovery would solve the affirmative duty problem.

Not only is there potential damage to the plaintiffs’ ability to undertake environmental litigation, but such damage is already occurring and may rapidly worsen. This conclusion is supported by the empirical evidence of a more stringent pleading standard, the history of heightened pleading standards being imposed

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89 Id. at 264.
90 Id. at 263 (citing Amended Complaint at 58).
91 Id. at 263–64.
upon environmental litigation by the courts, the de-construction of judicial safeguards against prudential considerations, and the evidence of the *Iqbal* standard in action. Environmental litigation plaintiffs and those who represent them must recognize that a swift response to the new pleading environment is necessary, lest the rights of defendants become entrenched and accepted, and the rights of plaintiffs minimized and trodden upon.

IV. THE PRUDENTIAL CONCERNS CITED BY *IQBAL* AND *TWOMBLY* DO NOT OUTWEIGHT THE EQUITABLE CONCERNS OF ENVIRONMENTAL PLAINTIFFS

A counter-argument to changing the plausibility standard, which springs from a different quarter altogether, is that the prudential considerations of the court are substantial enough to justify a new pleading standard. Defenders of *Iqbal* and *Twombly* cite the climbing costs of litigation and the rapidly increasing judicial workload, and suggest that stricter pleading standards are the only way to remedy this problem. The majority in *Twombly* discussed this issue a great deal worrying that “antitrust discovery can be expensive,” and maintaining that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”  

92 The Court rejected out of hand the idea that judicious case management might alleviate some of these concerns, simply stating that “judicial supervision in checking discovery abuse has been on the modest side.” 93 “Probably, then,” states the Court, “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence.’” 94

The most compelling rhetoric countering the prudential concerns of the majority comes from the four member dissents in *Iqbal* and *Twombly*. In Justice Breyer’s dissent to *Iqbal*, he notes that:

[T]he law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference . . . [They] can structure discovery in ways that diminish the risk of imposing unwanted burdens . . . Neither the briefs nor the Court’s opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. 95

Further responses to the prudential concerns of the Majority are raised by Justice Stevens in his dissent to *Twombly*. He states:

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93 *Id.* at 559.
94 *Id.* (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)).
Practical concerns presumably explain the Court’s dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive. . . . Those concerns merit careful case management. . . . They do not; however, justify the dismissal of an adequately pleaded complaint. . . . More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.96

Stevens goes on to contend that “[t]he merits of a claim would be sorted out during a flexible pre-trial process and, as appropriate, through the crucible of trial.”97

The concerns of the majorities in *Iqbal* and *Twombly* resonate with defendants in complex litigation, and with the general perception of the nature of litigation. But the arguments of the dissents are more logical and based in empirical truth. For example, two recent studies, one by the RAND Institute for Civil Justice and the other by the Federal Judicial Center, lend support to the point that the overwhelming number of cases do not incur significant discovery costs as they pass through the court system.98

The RAND analysis used a sample size of 5,222 cases in twenty federal districts, and questioned the lawyers and judges involved in those cases. The study determined that over half of the cases required little to no discovery, and that “fewer than 5% of the filings involved more than ten requests.”99 The Federal Judicial Center study used 1,000 cases and examined the costs of discovery by dollar amounts.100 The median costs reported was $13,000 per client, with the top 5 percent reporting a median cost of $170,000 per client.101 From these two studies, it can be concluded that only a very small subsection of cases leads to the outrageous discovery costs that the majorities feared in *Iqbal* and *Twombly*.102

Although measuring the effects of these cases is a very difficult statistical and analytical problem, the costs to justice and equity in the court system from the heightened pleadings standard set out by *Iqbal* and *Twombly* may be extremely severe. *NGK Metals* provides a good example of a case that was dismissed under the pleading standard, which could potentially have required only the precise application of discovery rules to ferret out the key issues. A single letter, e-mail, or contract between the consulting firm and the Reading Plant would have sufficed to establish duty, and a guided, pre-trial discovery process could have unearthed such a document. Had such a document existed, the necessary elements could have been

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96 *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).
97 *Id.* at 575.
98 Sullivan *supra* note 2, at 54.
99 *Id.* (citing James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 615 (1998)).
100 *Id.*
101 *Id.*
102 *Id.* at 55.
proved and the consulting company found liable for negligence, but the absence of
discovery precludes such an outcome. Even if this particular situation did not arise
from negligence, there are numerous circumstances in which justice would not be
done.

Numerous tools exist to allow judges to control frivolous, in terrorem, and
unfounded claims. Rule 27 of the Federal Rules of Civil Procedure gives courts
some leeway to enforce pre-trial discovery, and courts can also ramp up their usage
of Rule 11 claims to punish attorneys and plaintiffs who bring frivolous claims.
These tools form the crux of the arguments of the dissents in Iqbal and Twombly,
and are sufficient to handle the small number of cases which risk discovery abuse.
As Justice Stevens stated in Twombly, it is not wise to “rewrite the Nation’s civil
procedure textbooks and call into doubt the pleading rules of most of its States
without far more informed deliberation as to the costs of doing so.”103
Furthermore, the disdain for the other rules and procedures of civil litigation
expressed by the court is unsettling. These accusations about the inefficacy of the
current system rest on nothing more than the impressions of the Justices, who
operate in a court which is removed from day-to-day litigation. Although the
contentions of the majority may be true, neither the inefficacy of other Rules of
Civil Procedure, nor the unwillingness of lower courts to apply those rules, is a
reflection on the adequacy of the pleading standard. These accusations do not
justify a modification of the pleading standard. Even if the majority position
ultimately proves to have foundation, plaintiffs in complex litigation are at least
owed a full and fair debate on the subject before ‘plausibility’ becomes set in
stone.

The purpose of pleading, since the inception of the American legal system,
had been to allow cases to proceed provided that they had some legal foundation.
The very phrase “failure to state a claim upon which relief can be granted” does
not, in the plain reading, invoke concepts of the likelihood of a successful litigation
or concerns about burdensome discovery costs. The language itself evokes the
asking of a simple legal question: has this plaintiff stated a claim for which the
laws of the jurisdiction they bring it in provide some relief? The Supreme Court
has overstepped the boundaries of pleading and taken 12(b)(6) squarely into the
realm of adjudication, a strange place indeed for a pre-trial decision to lay.

The new plausibility standard is an unnecessary and imprecise application of
the law. It is based in an unfounded fear of costly litigation, rather than a studied
consideration of the consequences of the change. The standard itself is ambiguous
enough to invite abuse, and the nature of the standard does not allow for as much
correction of its application as may be necessary. The purpose of pleading has been
needlessly corrupted by this new standard, and objective analysis of the new
situation demands immediate and effective action to correct the inefficiencies of
the current system.

Given the risks to justice and equity and the ambiguity of the plausibility pleading standard, along with the effect of the plausibility standard on environmental litigation, it is necessary for environmental plaintiffs to take measures to enact a change of the pleading standard. The standard should change either back to notice pleading, or to some other formula, which protects the interests of justice and equity and creates applicable standards. Numerous avenues have been discussed to implement these changes from judicial, legislative, and procedural rule-making perspectives. Whatever form these changes take, they require four elements to a greater or lesser extent if they are to prove in the best interests of environmental litigation plaintiffs. These four factors are 1) a focus on the establishment of justice and equity, 2) a clarification of the standard to make it readily applicable, 3) an inclusion of environmental claims, and 4) that the change be able to occur reasonably soon.

One author has suggested five potential alternative avenues for changing the plausibility pleading standard. They include 1) the use of judicial discretion in defining plausibility; 2) definitive judicial action on phased or pre-trial discovery; 3) increased enforcement of Rule 11; 4) the amendment of the federal rules; and 5) the enactment of legislation. Of these five, the two which have the greatest potential to affect these four factors in a timely manner, are the passing of a federal law which modifies the pleading standard and the amendment of the rules of civil procedure.

Judicial discretion in defining plausibility cannot be relied upon to clarify the standards or to include environmental claims in those standards, nor can it be relied upon to make changes in a timely fashion. Phased and pre-trial discovery is more likely and could occur more quickly, but it is uncertain if it would be employed in the best interests of justice and if environmental litigation would be included in the rules formed by the court. Judicial enforcement of Rule 11 is unlikely to occur more than incrementally, and would likely have to be combined with an unlikely broad reduction in pleading standards. The amendment of the Federal Rules of Civil Procedure could occur quickly and clearly include environmental litigation and ensure justice and equity. However, there is some question of whether a process controlled by the Supreme Court will produce a standard contrary to their previous decisions. Legislative change would have similar effects, but the politics associated with environmental litigation may render it less likely that it would be incorporated under a protective legislative umbrella.

The first avenue for changing the *Twombly* and *Iqbal* pleading standard is judicial discretion in the interpretation of ‘plausibility.’ Such an approach is unlikely to meet the fourth factor of the change occurring quickly due to the

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104 See generally Mize, supra note 13.
105 Id.
106 Id. at 1263.
gradual nature of judicial remedies and the judicial attitude towards environmental litigation. While judicial discretion is likely over time, to improve the justice and equality of the standard, and perhaps to clarify the standard further, it is highly unlikely that judicial discretion by itself will incorporate environmental claims into its new rule. The judiciary has long sought avenues of increasing the pleading standards for environmental litigation plaintiffs, and a simple and elegant approach to this judicial goal would be to simply leave environmental litigation outside the boundaries of some new and more equitable pleading rule crafted by the court system. Courts would be more likely to leave environmental litigation to fight the higher pleading standard alone, and it is possible that the judicial distrust of environmental litigation would foment the creation of jurisprudence which requires a higher standard than plausibility for environmental litigation. In addition, this approach is not proactive, and there is no reason to believe that courts will actually take any action. Since judicial change is slow and uncertain, and since environmental litigation is likely to be left out of a new and more equitable rule, those who would modify the Iqbal and Twombly pleading standard should look to more proactive avenues if they seek effective change.

The second avenue for changing the Twombly and Iqbal pleading standard is definitive judicial action on phased or pre-trial discovery. Such action would alleviate the prudential concerns which prompted the new standard, and make judges more comfortable in applying a standard resembling notice pleading. This avenue would improve the odds of justice and equity and allow courts to return to the old, clear standard of notice pleading. However, this avenue has the real risk of leaving environmental litigation out due to the historical bias against the practice area. The larger problem, however, is timeliness. Definitive judicial action of phased or pre-trial discovery would help to alleviate the concerns about the cost of litigation and in terrorem claims, which spurred the Iqbal and Twombly decisions. But there is no guarantee that the Supreme Court would consider the issue again in a reasonable period of time, if ever. If courts move to correct the prudential concerns of the Iqbal and Twombly courts, they may be closing the proverbial barn door after the horse has left. This avenue of change relies upon the concept that when courts see that the prudential concerns, which underlie Twombly and Iqbal are eroding, they will proactively take steps to revoke the rules in those cases. This presumption is unlikely at best and wishful thinking at worst. Hoping that the courts will first correct the prudential concerns of Iqbal and Twombly and then revoke the rulings in those cases is not the best approach, especially if environmental litigants desire timely and effective change.

The third avenue for changing the plausibility pleading standard is increased enforcement of Rule 11 of the Federal Rules of Civil Procedure. Cracking down on frivolous claims would alleviate the prudential concerns of the Iqbal and Twombly majority, and lead to much the same results as phased or pre-trial discovery action.

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108 Id. at 1265.
Like phased discovery action, this avenue runs headlong into the problems of timeliness and effectively covering the environmental litigation area. These two incremental approaches have the appeal of leaving things in the hands of the judiciary, but they present so many drawbacks that they are not avenues on which environmental plaintiffs should rest their hopes. Because the judiciary branch is isolated from political pressures and exists in a fairly rarified atmosphere, these avenues are not truly in the control of environmental plaintiffs, and changes of this sort would have to be waited and lobbied for, rather than proactively implemented. Since these avenues are not timely, are unlikely to include environmental plaintiffs, and are extremely speculative in nature, environmental litigants should look elsewhere for relief from the over-burdensome standards of *Iqbal* and *Twombly*.

The fourth avenue for changing the plausibility pleading standard is the amendment of the Federal Rules of Civil Procedure. The ability to amend the Federal Rules of Civil Procedure finds its roots in the Rules Enabling Act, and has been interpreted to start with a Judicial Conference recommendation for change, move to consideration by an Advisory Committee, and through several other judicial committees before passing through Congress, who can either veto the rules or implicitly accept them by not acting. This process is distanced from the political arena, and deeply entwined with the court system. The Court has shown its strong bias against discovery and complex litigation, and it is reasonable to expect that such a bias will run throughout the committees which amend the rules. Such a bias could lead to environmental litigation being specifically excepted from looser pleading standards, or to a standard in which the court was instructed to consider prudential concerns as part of the 12(b)(6) calculus. The absence of politics could harm an effort to change the rules; the judiciary is a more independent body, resistant to pressure from lobbyists and other political agencies. Positives of the rule amendment process are speed and clarity; the rule could be changed within a year and drafted in such a way so as to leave no doubt as to the analysis courts are to undertake. This process could occur much more quickly than judicial discretion, and a well-formed rule would create clarity and justice, but judicial bias against environmental litigation might foment problems. Overall, this avenue of change presents some of the greatest promise of any of the five, although there are definitive hurdles to be overcome.

The fifth avenue is direct legislative change. Legislatures could draft a new pleading rule, except certain areas of the law from plausibility pleading, or simply revert to notice pleading. This process would be swift (at least as swift as the legislature can be), and would have a high probability of promoting clarity. The environmental lobby is a powerful one, and legislators may be influenced to support a rule which expressly or impliedly includes environmental plaintiffs. Big

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110 *Id.*
111 *Id.* at 1273.
112 *Id.*
business is another powerful political group, however, and since such businesses are often defendants in environmental litigation, there would be powerful political forces arrayed against the inclusion of environmental plaintiffs. These political concerns might create a situation in which justice is not the first priority, leading to a rule which is not as carefully or elegantly designed as a rule selected by a more independent body such as the committees which create and amend the Federal Rules of Civil Procedure. These concerns are not as severe as they are with other avenues of change, and legislative alteration of the pleading standard remains an attractive option for environmental plaintiffs. On balance, lobbying the legislature provides a legitimate opportunity for timely, equitable change which includes environmental litigation and creates a clear and workable rule.

Of these five areas, the two with the best opportunities for change are new pleadings legislation and a change in the Federal Rules of Civil Procedure. These two avenues are likely to provide, in a timely manner, a clear, just, and environmentally friendly rule for the standards of pleading in federal court. What the rule should be is debatable, but a well-framed rule will go some distance towards protecting defendants against frivolous claims. Whatever rule is eventually adopted it should still ensure that defendants cannot simply keep their illegal acts secret, or use heightened pleading standards as a way of avoiding legal culpability.

Whatever path change may take, it would be best if it occurred with the maximum efficiency. Concerns over the spread of in terrorem litigation should be addressed, but the rule should protect and assist plaintiffs who bring claims of secret and unlawful action against sophisticated defendants. The rule should quickly ensure the timely and precise application of justice and equity, should create an environment in which litigants are able to predict the outcome prior to filing suit, and must incorporate environmental litigation within its boundaries. A good rule, simply stated, is: a claim which is not plausible can nevertheless survive a 12(b)(6) motion if the part of the claim which lacks specificity accuses the defendant of a secret action upon which the liability of the defendant hinges and which, given the surrounding circumstances, a reasonable inference could be made that the secret action caused the plaintiff’s injury. This “secret action” rule has three elements: 1) The claim accuses the defendant, in part, of a secret action, 2) the liability of the defendant hinges on that action, and 3) the surrounding circumstances are sufficient to create a reasonable inference that the secret action was directly related to the plaintiff’s injury. The rule embodies the four factors, maintains protection against frivolous suit, and could easily be adopted by statute, by judicial decree, or by a modification of the Federal Rules of Civil Procedure.

Iqbal, Twombly, and NGK Metals would all pass the test of this rule, but a truly frivolous in terrorem action likely would not. In addition, complex cases heavily burdened with discovery, but in which the facts were largely known (for example, a patent infringement case), would not be covered under this exception and would be required to plead facts with particularity of the plausibility standard.

113 Mize, supra note 13, at 1276.
NGK Metals would have passed this test. First, there is a secret act, which is defined as an act likely to have discoverable evidence, where the plaintiff does not have the evidence and the defendant would have reason to conceal that evidence. Second, the liability of the defendant rests upon the secret act and third, it is reasonable to infer that the secret act occurred and is related to the litigation. In NGK Metals, the acceptance of an affirmative duty to report beryllium levels is likely to have discoverable evidence, the plaintiff did not hold such evidence, and the defendant would have good reason to conceal the evidence. Second, since the defendant could not be found liable without the existence of an affirmative duty, their liability rests on that act. Third, given that the defendant was responsible for monitoring, analyzing, and reporting on beryllium levels, it is reasonable to infer that the defendant had accepted an affirmative duty to report high beryllium levels.

Taking Iqbal and Twombly as additional examples, both would meet all three elements of the test. In each case, there was a secret act: In Iqbal, the secret action is the orders of Ashcroft authorizing or ordering the prison conditions under which the plaintiff suffered. In Twombly, the secret act is the existence of collusion between the various ILECs. In both cases, the liability of the defendant hinges on that action; Ashcroft could not have been found liable in the absence of evidence that he had ordered, or knew of the prison conditions Iqbal was subjected to. In Twombly, the ILECs could not have found liable in the absence of evidence of their collusion to fix prices. In each of these cases, it is reasonable to infer from the surrounding circumstances that the secret action was directly related to the plaintiff’s injury. In Iqbal, it is fair to infer that the prison was acting under the orders of some superior, and the high profile of the prison and important nature of the prisoners held there makes it reasonable to infer that Ashcroft at least should have known about the conditions, even if he did not order them. In Twombly, although the court may have determined that the free market was a more ‘plausible’ explanation, it is reasonable to infer that the ILECs had colluded to fix prices. What this third element required is not likelihood, but rather, if the facts as the plaintiff alleges them ‘fit’ with the circumstances surrounding the litigation.

The third element of the rule is the one which will serve to eliminate frivolous claims and protect, to some extent, the prudential concerns, which were cited by the majorities in Iqbal and Twombly. Although the other two elements will narrow the field somewhat, the third element is where cases will be decided. This element is envisioned as creating a standard which allows cases where there is sufficient evidence and circumstances for the plaintiff to have reasonably inferred that there was an actual basis for their litigation. Inherent in the element is that the litigation was not a ‘fishing expedition,’ or an attempt to find some wrongdoing on which to base a claim. What the element requires is that the plaintiff has a specific allegation in mind, and that the plaintiff’s inference that the elements of that allegation exist is reasonable under the circumstances. This protects defendants from frivolous in terrorem litigation while preserving the rights of plaintiffs to engage in discovery and determine the truth.

This rule thus presents a clear and unambiguous standard for judgment, respects the prudential concerns of Iqbal and Twombly, ensures that defendants
who plot illegal acts in secret will not be protected by the courts, incorporates environmental litigation into its standards, and acts to ensure the promotion of justice and equity in the court system. Although other rules are certainly possible, and debate on the topic desirable, this suggested rule presents a good model from which the courts, rule-making committees, or legislature could build a working, fair, and clear standard of federal pleading.

V. CONCLUSION

Iqbal and Twombly crafted a pleading standard which is ambiguous, invites injustice, and is unfriendly to complex litigation. The court relied upon the faulty presumption that discovery abuse is a problem that cripples the American legal system, and a rule built upon such a fragile foundation should not stand. In the year Conley was decided, Judge Clark wrote “that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings. . . . Experience has found no quick and easy short cut for trials in cases.”114 This lesson needs to be learned in our age as well.

The five avenues for changing this rule will likely need to work in concert to create a better, fairer rule. Judicial discretion should scale back the scope of the plausibility requirement, bringing it closer to notice pleading. Judges should begin to creatively apply discovery rules to allow some discovery before trial and reduce the costs of discovery for complex litigation. Judges should also ramp up the application of Rule 11 sanctions, an instrument that will further dissuade frivolous in terrorem suits. Finally, either the rule-making committees or Congress must act to craft a new, clearer, and fairer rule for pleadings. If the Conley standard is no longer adequate for complex litigation, than a complex litigation set of rules must be created that does not limit justice. The “secret act” rule is just such a measure, and would balance the interests of plaintiffs and defendants in all complex litigation, particularly the litigation of environmental claims.