ATTACHMENT D
Twombly & Iqbal — The Supreme Court’s Requirement of Drafting a Complaint with Sufficient Factual Allegations to Show Plausibility and Obtain the Right to Discovery: Navigating the Judicial Passage Between the Risk of Dismissal or Sanctions for Frivolous or Bad Faith Pleadings

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By

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I. Introduction: the Judicial Equivalent of Scylla and Charybdis Created by Twombly and Iqbal

According to Homer’s Ulysses, the hero in navigating his way home had to overcome many obstacles. One was navigating the passage between Scylla (a six-headed six-gullet monster living on the peak of a mountain and devouring one man for every gullet) on one side of the channel and, on the other, Charybdis, a sea monster engulfing sailors with a whirling maelstrom. For reasons of a different perspective, we can learn from the passage of Ulysses how to deal with the Twombly-Iqbal dilemma—involving two Supreme Court decisions essentially eliminating notice pleading, reinstating code pleading, and converting the 12(b) motion to dismiss into what has been referred to as a “new motion for summary judgment.” The result is creating a pleading dilemma impacting many cases, including environmental cases where

¹ The views expressed are solely those of the author and not his clients’ or law firm’s views or positions.
including environmental cases where pleading requirements are extremely important (as noted below). This impact is shown by analysis of the two cases.

In *Bell Atlantic Corp., et al. v. Wm. Twombly, et al.*, 127 S. Ct. 1955, 75 USL 4337 (2007) ("Twombly"), the U.S. Supreme Court reversed the Second Circuit for setting aside the District Court’s dismissal of a complaint for failure to state a claim for which relief could be granted. Justice Souter, writing the majority opinion for the Supreme Court, ruled that an allegation of parallel business failure was a legal conclusion lacking factual allegations sufficient to raise a right to relief above a speculative level. *Twombly*, at 1970, rejected the “fact” allegations, “although in form a few stray statements speak directly of an agreement” (emphasis added). The Court concluded the complaint might proceed in the absence of alleging specific facts, but legal conclusions could not be considered, and there was no plausibility.

Justice Souter sought “retirement” in *Twombly* of *Conley v. Gibson*, 355 U.S. 41, at 47 (1957) ("Conley"), which required “only a short and plain statement of the claims showing the pleader is entitled to relief to give fair notice.” The Court in *Twombly* (at 1968-69) specifically rejected the prior fair notice test set forth in *Conley*, and specifically scrapped *Conley’s* “no set of facts” language as a clause to be “retired” because it had “puzzled the profession for fifty years.”

The *Conley* formulation, rejected by Justice Souter in *Twombly*, had stated: “In appraising the sufficiency of the Complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to set aside a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” (*Conley, supra*, at 45-46.) Justice Souter, in *Twombly* (at 1968-70), referred to this as requiring courts to “conjure up unpleaded facts” and to “receive the benefit of the imagination”
and to "look for plausibility." Justice Souter created a reverse presumption concluding courts did not have to imagine plausibility and if they could not find plausibility they could dismiss.

Justice Stevens dissented in Twombly, stating in his opinion the complaint there was sufficient. Justice Stevens stated that while there had to be an allegation of parallel conduct resulting from a product of horizontal "agreement" among potential competitors: "Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of the answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion the charge is not 'plausible' provide a legally accepted reason for dismissing the Complaint? I think not." (Twombly at 1974.)

As a result, Justice Stevens felt that the then "recent" decision of the Supreme Court in Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002), precluded granting a 12(b) motion in Twombly.

In John D. Ashcroft, former Attorney General, et al., Petitioners, v. Javid Iqbal, et al., 129 S. Ct. 1937 (2009) ("Iqbal"), Justice Kennedy, for the majority, concluded that Twombly was not limited to antitrust cases but applied to all cases (Iqbal at 1953). Iqbal granted a motion to dismiss a complaint alleging that FBI officials discriminated against Iqbal solely on account of his race, religion and national origin, and also alleging the knowledge and deliberate indifference by Ashcroft and Mueller's own admission. The Court ruled these obligations were not sufficient to make them liable for the illegal action. The allegations were not plausible.

Justice Souter dissented in Iqbal and stated that, in Twombly, the Court had held that it had to assume factual allegations were true (which is ironic in view of his ignoring "stray facts in
Twombly"), and if that were done in view of Ashcroft and Mueller’s concession\(^2\) the Plaintiff in Iqbal had stated a ground for relief that was plausible.

Justice Souter stated that the allegations were sufficient, and the Court should not have reached the question of plausibility and “’Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations.’” Iqbal, 129 S. Ct. 1937, at 1959.

Justice Souter stated (Iqbal, at 1959) as to plausibility: “The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That’s not what we have here.”

II. Practical Impacts of Twombly and Iqbal

Twombly and Iqbal have now revolutionized pleadings and are now among the most frequently cited Supreme Court cases. Twombly is within the top ten most cited, and Iqbal is fast approaching Twombly, in edging out total references to other Supreme Court decisions.

Courts and scholars have concluded that there has been a revolution in pleading and that if ultimate conclusions of law are alleged, dismissal is appropriate because they are all to be ignored. Alternatively, if the factual allegations meet the standard of providing notice, if the nature of the claim is not “plausible,” there also can be dismissal.

The specific pleadings involved, and subject to Twombly-Iqbal analysis, include:

A. Complaints (counterclaims, third party claims)

As noted in Twombly and Iqbal new requirements for alleging claims are stated. In American Dental Association v. Cigna Corporation, 2010 WL 1930128 (11th Cir., May 14,

According to American Dental, supra, the Eleventh Circuit interpreted the Twombly and Iqbal rule as follows: "The Court suggested that courts considering motions to dismiss adopt a 'two pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where these are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement of relief."

B. Affirmative Defenses

Affirmative defenses have been stricken under the Twombly-Iqbal rule, including those raising the following issues (as dismissed with leave to amend in Hayne v. Green Ford Sales, Inc., 263 F.R.D. (D. Kan. 2009):

"2. Plaintiff's' action fails in that it was not commenced within the applicable statute of limitations.

3. Defendant states that if Plaintiff's were damaged as alleged, which is specifically denied, then all such damage was caused or contributed to be caused by the negligence or fault of others over whom Defendant has no control nor right to control, including but not limited to the Plaintiff's in this action, which should be compared to, diminish or bar Plaintiff's' recovery.

4. Defendant states that if Plaintiff's were damaged as alleged, which is specifically denied, then Plaintiff's failed to mitigate their damages.

5. Defendant states that Plaintiff's are barred from recovery because Plaintiff's assumed the risk of any injury they may have sustained.

6. Defendant states that if Plaintiff's were damaged as alleged, which is specifically denied, then all such injury or damage was caused or contributed to be caused by a superceding or intervening act or event.

7. Plaintiff's' claims are barred, in whole or in part, by the doctrine of waiver."
8. Plaintiffs' claims are barred, in whole or in part, because they did not use the products in the manner in which they were designed or intended.

9. Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel.”

C. Pleading under the new rules of procedure

According to Twombly-Iqbal, not just notice and ultimate conclusions of law should be alleged; there should also be sufficient allegations to show there are facts which can establish a claim which is plausible. This approach appears to reject the basic rules of procedure with regard to notice. This result requires that the decisions in Iqbal and Twombly be reviewed carefully as opposed to the forms in the Rules which may be less than the proper allegations of fact. See Rule 84 Forms. “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”

The implications for the motion to dismiss are that the motion to dismiss can be granted if there are not factual allegations pled, and if the allegations are not plausible, and that will eliminate the ability to obtain discovery.

Justice Souter (in Twombly, at 1967) warned against inability to weed out cases “early in the discovery process through ‘careful case management’” or to solve the problem “by ‘careful scrutiny of evidence at the summary judgment stage’” or “much less thorough instructions to juries.” He noted: “the threat of discovery expense will push cost-conscious defendants to settle even anemic claims before reaching those proceedings.”

Unlike a motion for summary judgment, which under the rules can be postponed or delayed until there is discovery (see Rule 56(f), “When Affidavits Are Unavoidable,” allowing for discovery), there is no provision in the motion to dismiss rule which allows a delay to enable discovery. Under Twombly-Iqbal, to the contrary, the Supreme Court has held that it intends to

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3 There are forms which just assert conclusions of law. See, e.g., Form 11—“Complaint for Negligence”; and, see, also, Form 30—“Answer Presenting Defenses Under Rule 12(b).”
eliminate "the high cost of discovery" which might otherwise hold defendants hostage to settlement demands which are unreasonable. *Twombly* at 1967.

In the past, motions to dismiss were generally denied based on the *Conley* "notice" pleading and courts tended to grant amendments liberally. Filing a motion to dismiss under *Conley* might merely alert a plaintiff as to an additional issue and cause an amendment to result in a stronger complaint, more difficult to set aside in a summary judgment motion. Often counsel filed answers to eliminate the ability of a pleader to amend without leave of court.

On occasion, if a matter were subject to a speedy hearing because injunctive relief sought, or the complaint were not corrected and the parties were in a trial, the court would be reluctant to allow an amendment and there were strategic advantages to an early answer (especially if a plaintiff failed to try to correct deficiencies until after discovery concluded, or at trial).\(^4\)

Under *Twombly-Iqbal*, a motion to dismiss might be granted, and the question of what a Judge might find to be plausible may create new defense options. In addition to having an increased chance of dismissal at an early stage, the motion may preclude discovery. That may shift the settlement power from the party filing a complaint, and threatening to take extensive discovery, to the responding party moving to dismiss. The Supreme Court specifically discussed, in *Twombly* and *Iqbal*, the elimination of discovery. Dissenters suggested that Iqbal and Twombly established a new type of summary judgment.

Case law does not yet establish whether the trial judge's determination of plausibility sets a standard that is to be given deference in appellate review. If the trial judge is a "gatekeeper," and the case law as it develops so states, then the prior rulings and philosophy of the trial judge may become increasingly important.

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\(^4\) See Rule 15(a) and (b).
Assuming that, even with the proper pleading of facts and notice, the Judge still has the determination as to whether a case is plausible. The result flips the subjective determination that existed under Conley. Under Conley, if the Judge could “imagine” any circumstance in which a claim might be stated, the motion to dismiss would be denied and the case would continue and discovery would be afforded.

Does “plausibility” mean that if the Judge cannot imagine a claim that is plausible, a matter should be dismissed? A leading law review which argues that there has been no change resulting from Twombly and Iqbal states that the Twombly result was probably due to the fact that the attorney for Twombly was in a law firm that was convicted of rounding up plaintiffs and that was known to the court, and in addition the alleged class in Twombly included 90% of the U.S., which seemed important to the author. The article also suggests that Iqbal involved a situation in which the government had to deal with 9/11, and that would be a circumstance that would explain the case and allow it to be limited. However, the very process of giving such reasons suggests that the author of the law review article was entrapped by looking at such issues as outside subjective considerations that were not “plausible” and acceptable explanations to the author, in a way that describes the very problem. See Adam M. Steinman, “The Pleading Problem,” Stanford Law Review, vol. 62, Iss. 5, p. 1293 (May 2010) (also cited as “Steinman”).

D. Professional Responsibility Obligations

The effects of Twombly and Iqbal create issues involving professional responsibility. The possibility of preventing discovery raises a Catch-22 situation which has been described in numerous articles. See, e.g., Steinman, supra. If you do not have the discovery to justify the pleading, then you cannot file the pleading; and, if you cannot file the pleading, you cannot obtain the discovery.
Assuming that evidentiary facts may not be available, "fact" allegations may be regarded as close to, or as, conclusions of law. You also have to assume that you may have to allege facts by doing more investigation and having affidavits. There are suggestions to circumvent problems below; but, Twombly-Iqbal standards create pleading barriers for attorneys. If they overplead to get past the motion to dismiss and obtain discovery and if they do not have the necessary backup, they may jeopardize the case and may be exposed to sanctions.

The Rules of Professional Responsibility differ from jurisdiction to jurisdiction. Nevertheless, there are some abiding principles, such as those which are set for in the Restatement of the Law Third, the American Law Institute, the Law Governing Lawyers. See Vol. 2, pp. 134-187, for illustrations of the responsibilities of attorneys when before a tribunal in terms of complying the applicable law and rules of procedure and the responsibilities of the lawyer to advance conclusions adequately supported by the attorney's analysis of the evidence, as well as prohibitions against frivolous advocacy.\footnote{Because jurisdictions in which counsel may practice may vary, listed below are illustrations from the Restatement of the Law Third:}

\begin{quote}
\begin{spacing}{0.8}
§ 105. Complying with Law and Tribunal Rulings
In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.

§ 106. Dealing with Other Participants in Proceedings
In representing a client in a matter before a tribunal, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that are prohibited by law.

§ 107. Prohibited Forensic Tactics
In representing a client in a matter before a tribunal, a lawyer may not, in the presence of the trier of fact:

\begin{enumerate}
\item state a personal opinion about the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but the lawyer may argue any position or conclusion adequately supported by the lawyer's analysis of the evidence; or
\item allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.
\end{enumerate}

§ 110. Frivolous Advocacy

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\item A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.
\item Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.
\end{enumerate}
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\end{quote}
There are varying rules in state courts with regard to frivolous motions and prohibitions against assertions that have no justification. In the federal courts, the Professional Responsibility Rules apply as well as Rule 11. The concept of Rule 11 establishes risk for attorneys who cannot justify the basis for certain pleadings. However, ironically Rule 11 is actually rather liberal compared with *Twombly* and *Iqbal*. This is because Rule 11 is not consistent with the idea that a complaint must identify every evidentiary support for its allegations. To the contrary, Rule 11(b)(3) states that the filer of the document certifies that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” The difficulty with Rule 11 is that an allegation is made by an attorney who has no justification, which might be allowed under notice pleading, Rule 11 may become a trap after discovery. This difficulty is compounded by *Twombly* and *Iqbal*.

This creates the type of dilemma discussed in the beginning, and the choice is similar to that which Ulysses faced when choosing between Scylla and Charybdis.

**III. Moving from Code Pleading to *Twombly-Iqbal* Pleading**

*Twombly* and *Iqbal* have been extensively cited. The shift from one style of pleading to another does require some analysis of the types of pleading.

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(3) A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable procedural requirements concerning discovery.

§ 111. Disclosure of Legal Authority

In representing a client in a matter before a tribunal, a lawyer may not knowingly:

1. make a false statement of a material proposition of law to the tribunal; or
2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

*Twombly* and *Iqbal* are among the most frequent United States Supreme Court decisions recently cited. The literature at the time of the drafting of this article indicated more than 9,000 case citations to *Twombly* (and *Iqbal* fast approaching) and more than 25,000 total citations to *Twombly* and *Iqbal*, including articles.
A. "Common Law" Pleading—In Law and Chancery

The process of pleading has always impacted practitioners. An illustration of responsibilities for attorneys at common law which were even greater than they are today was noted in the biography of Lincoln by David Herbert Donald. See *Lincoln* (Simon and Schuster, 1995) at page 71-72, noting:

But now, as a licensed attorney, usually operating without his partner or other associates, [Lincoln] had a much greater responsibility fully to master the forms and procedures of litigation, for even a minor, technical error could cause his client to lose his case. In bringing a case before the circuit court, a lawyer had first to decide whether to plead it "in law" or "in chancery"; the first referred to a highly formal set of proceedings and precedents derived from the British common law, while the second, sometimes called "equity" proceedings, followed somewhat more flexible and discretionary rules. In either case the attorney (and for clarity it will be assumed that he was representing the plaintiff) must first draft a praecipe, a brief request to the clerk of the court to issue a summons to the defendant; the praecipe included a brief statement of the nature of the controversy and the amount of the damages alleged. The plaintiff's lawyer then drafted what was called a declaration, indicating the form of action under which the suit was brought and setting forth the facts of the case.

In common law there were eleven major forms of action—trespass, trespass on the case, replevin, assumpsit, ejectment, etc.—each of which applied to different kinds of suits. An action for trespass, for example, rose when a plaintiff alleged that his person had been interfered with by assault or battery or that his land or property had been damaged, but an action for trespass or the case involved indirect or accidental damage or damage to intangible property. Thus a man who claimed a neighbor had stolen his cow would bring an action for trespass, while one who asserted that he had been slandered by his neighbor would bring one for trespass on the case. The lawyer who incorrectly identified the action he was bringing might have the case thrown out of court.

The declaration also included a full account of the plaintiff's version of the facts in the case. This had to be prepared with the utmost care. If it alleged facts that could not be proved in a trial, the plaintiff could lose, even if those facts were not necessary to sustain his case. If it alleged facts that differed from those presented at trial, his case could be thrown out. In one 1859 decision a case was dismissed because the amount of a promissory note stated in the declaration differed by half a cent from the amount of the note as proved in the trial.
B. Code Pleading

Under code pleading, the requirements were simplified but alleging facts were required. Code pleading was introduced in the 1850s in New York and California to abolish the distinction between law (suits “in law”) and equity (suits “in chancery”), and unify civil procedure rules. The focus shifted from pleading the right type of action, or procedure, to pleading the cause of action or claim. The required elements of each cause of action or claim had to be set forth and “ultimate facts” had to be alleged. The element of law and the alleged specific facts which, if proven at trial, constituted proof of that element, had to be alleged or the case would be dismissed. A defendant, or respondent, could in the absence of the correct allegations be able to successfully deny or demur to the complaint. Code pleading was criticized because it was too difficult to fully research all of the facts needed to bring a complaint before initiating the action.

C. Notice Pleading

Notice pleading was established by adoption of the Federal Rules of Civil Procedure in 1938. The Rules relaxed strict rules of code pleading and shifted the focus, from the cause of action or claim, to discovery. There were some exceptions to notice pleading, such as Rule 9(b) (“Fraud, or Mistake; Conditions of the Mind”), requiring that: “In alleging fraud, or a mistake, a party must state with particularity the circumstances constituting fraud or a mistake. Malice, intent, knowledge and other conditions of a person’s mind may be alleged generally.”

Conley is a classic notice pleading case, which involved a suit under the Railway Labor Act by black employees in a union, alleging the union was excluding the black employees’ participation because of racial prejudice. The result denied black employees a required duty of fair representation, and required relief in their favor. Justice Black in his opinion in Conley referred to the decision of the U.S. Supreme Court in Steele v. Louisville & Nashville R. Co., 323
U.S. 192, which had emphatically and repeatedly ruled that a union, as an exclusive bargaining agent under the Railway Labor Act, was obligated to represent all employees fairly, without discrimination because of race. The *Conley* case, as filed in the federal district court, alleged that: the black employees were discharged because the railroad purportedly abolished jobs, but those jobs were then filled by whites, except in a few instances; the union did nothing to protect the black employees; it failed to represent them equally and in good faith; and, as a result, such discrimination was a violation of the black employees' rights under the Railway Labor Act. The district court granted the motion to dismiss due to lack of jurisdiction because of agency jurisdiction. The Supreme Court reversed the federal district court's decision (and the affirming decision of the Fifth Circuit). The Supreme Court concluded that there was no agency jurisdiction over complaints of employees against their union or their employer for breach of a duty of fair representation. The Supreme Court concluded that the failure to join the railroad was also not a problem, because the initial relief sought was against the union, and the railroad could be joined later. There was an adequate claim for relief because of the "accepted rule" that a complaint should not be dismissed for failure to state a claim, once it appears to be beyond doubt that the plaintiff can prove no set of facts of his claim which would entitle him to relief. The Supreme Court held that the Federal Rules of Civil Procedure do not require a claim to set out in detail the facts upon which a claim is based, and, to the contrary, all that is required is a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The Supreme Court noted that illustrative forms attached to the Rules demonstrated this and that notice pleading was made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both the claim and the defense, and to define more narrowly the disputed
facts and issues related; and, the Court ruled that all pleadings shall be so construed as to do substantial justice. The Supreme Court concluded the Federal Rules rejected the approach that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Among other decisions Conley cited, to substantiate the proposition that pleadings were to be liberally construed, was a citation to a Second Circuit opinion; that is to be found in most procedure books, Dioguardi v. Durning, 139 F.2d 774 (2nd Cit. 1944). Judge Clark in Dioguardi concluded that a complaint "obviously home drawn" did not make clear what the basis of the facts were. He concluded that although plaintiff's amended complaint "with an obviously heightened conviction that he was being unjustly treated" reiterated the deficient claims, it should not be dismissed. The court noted that the pro se plaintiff came before the court "with increased volubility, if not clarity" and concluded "he has stated enough to withstand a more formal motion" since under the rules there was "no pleading requirement of stating facts sufficient to constitute a cause of action" but only that there be a "short and plain statement of the claim showing that the pleader is entitled to relief." The court noted that the plaintiff is not to be deprived of his day in court to show what he obviously so firmly believes, and the defendant could have, and should have, asked for a pretrial hearing, or moved for summary judgment with supporting affidavits. The court did note, regarding the remand, that the plaintiff (because of his limited ability to write and speak English and obvious deficiencies in his pleadings) needed some assistance in preparation of his case.

Twombly and Iqbal create what most commentators have been concerned with—a result inconsistent with most Supreme Court decisions and, contrary to the text of the Federal Rules of Civil Procedure, destructive of litigants' access to the federal courts. As one commentator put it,
“the current discourse, however, threatens to make Iqbal’s (and Twombly’s) effect on pleading standards a self-fulfilling prophecy. Iqbal’s critics excoriate the court for discarding the lenient pre-Twombly approach. Iqbal’s supporters praise the court for doing precisely that.” See Steinman at 1297. As noted, under the Twombly and Iqbal readings of most commentators, there is a “result-oriented” decision “designed to terminate at the earliest possible stage lawsuits that struck the majority as undesirable. See Steinman, suggesting it was irresponsible for the court to invite the controversial “plausibility” concept in the pleading doctrine “in a way that has led to such widespread confusion.” Steinman, supra. Some suggest that the Supreme Court’s unanimous decision five years before Twombly, in Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), was an endorsement of the notice pleading approach (in the opinion written by Justice Thomas—there were no dissents). There, an employment discrimination plaintiff alleged his age and national origin were motivating factors in the defendant’s decision to terminate his employment. The Supreme Court recognized that the plaintiff might need the discovery process to obtain the evidence to be used ultimately to support these allegations. For that reason, the plaintiff’s lack of supporting evidence at the time of the complaint was not fatal, and could be obtained through discovery. The Supreme Court recognized that such pleadings would allow lawsuits based upon conclusory allegations of discrimination to go forward, but ruled, as a practical matter, there was no heightened pleading standard for employment discrimination suits. Thus discovery would be allowed, because the approach was mandated by the language of Rule 8 of the Federal Rules, as opposed to judicial interpretation.

Some have also forcefully argued that this Twombly-Iqbal scenario is wrong but not desired or intended by the Supreme Court, and that the Court needs assistance to ensure its real objective can be met. See Steinman, supra.
The author of this outline disagrees; the Court intentionally created new pleading requirements. The realities are that:

A. Swierkiewicz was decided in 2002, before the Zubulake decisions, starting in 2003 through 2004. See e.g., Zubulake v. UBS Warburg LLC, et al., 220 F.R.D. 212 (S.D.N.Y 2003). These cases opened up new concepts relating to discovery obligations—which have progressively and exponentially increased.

B. The explosion of the internet and portable devices, such as BlackBerrys and cell phones and iPads and other electronic devices had not occurred in 2002, and there was not recognition of an increased ability to store information and to be responsible for obtaining discovery.

C. The explosion of litigation and the costs and reality that Judges do not have time to sort through the discovery issues (which sometimes eclipse the actual merits of the case) had not occurred and had not been fully appreciated by the courts in 2002. In today’s practice, attorneys raising discovery issues may litigate and obtain sanctions that impact on the ability to proceed with the litigation, regardless of the merits.

D. Not only conservative but, also, liberal Judges have accepted the proposition that there should be mechanisms to preclude cases, or move cases out of courts because of such reasons and legal defenses as: the failure to initiate available complaint systems; the ability to moot a case and to moot claims to attorneys’ fees; the ability to impose arbitration requirements; and, many other mechanisms that the U.S. Supreme Court has found are effective ways of curtailing litigation.⁷

⁷ See Joseph Z. Fleming, “ ‘Management Rights’ Created By The U.S. Supreme-Court Decisions: An Analysis Of Rights Created By Case Law And Recommendations For Employers Interested In Their Utilization In Wage And Hour, Disability, Labor, Employment, And, Also, Workplace Safety And Environmental Legal Matters (The Federal Common Law Of The Workplace In 2010)” (ALL-ABA Airline and Railway Labor and Employment Law, April 2010).
Since *Iqbal* in 2009, there has been an increase reported in dismissals of *pro se* cases and other complaints. While there is not conclusive empirical evidence that will enable clarity at this point, academics and others have suggested that the increased dismissals are due to the *Twombly-Iqbal* rules. See Suja Thomas, “The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*” (Electronic copy available at: http://ssrn.com/abstract=1494683 (at page 14 noting the increasing dismissals after *Iqbal*).

IV. Circumventing *Twombly* and *Iqbal* and Ulysses’s Judicial Navigation of Scylla and Charybdis

In a post-*Twombly-Iqbal* world, courts move from the general notice, which allows access to discovery to the need to consider unique and creative approaches.

An interesting illustration of stressing the value of a creative pleading strategy involves a type of a "Trojan Horse" approach; this is appropriate as a pun, because the best example of it occurred in the litigation involving admission of *Ulysses* — the book by James Joyce — into the United States. Random House wanted to publish the book. It had the ownership rights; but it was afraid to print thousands of books since *Ulysses* was banned in the United States as pornography. The attorneys for Random House decided that they would try to establish a test case by bringing one book into the country and litigating, so that they could establish that the book was not pornography. In a very creative approach to litigation, it was first suggested that Bennett Cerf of Random House write to Justice Oliver Wendell Holmes — since the Justice [at the time retired] had once sent an unsolicited note complimenting the Modern Library of Random House on its publication of a one volume edition of *The Philosophy of Spinoza*. The letter of Bennett Cerf to Justice Holmes speaks for itself as to the strategy:

"We want to publish James Joyce's *Ulysses*, complete and unabridged, in America, and with this end in view, have signed a contract with James Joyce, paying him a substantial advance royalty and agreeing to all the expenses of the legal battle that looms in the offing. We have engaged Mr. Morris Ernst as our counsel in our fight to legalize this great book, and all of us feel that now, if ever, is the time to remove the idiotic ban from one of the great works of literature of modern times.

We plan to open our legal battle by having a copy of *Ulysses* mailed to this country from Paris. We will notify the customs authorities that the book is coming, since it is imperative for our purpose that it be seized. We will then be able to fight for the book without having to go through the every expensive procedure of having it printed in America. If the book is once cleared by the
U.S. Court, we feel that we will be justified in going ahead with our plan.

If you will permit us to do so, I would like to have this Paris copy of Ulysses addressed to you. There is no man in the entire country whose name in connection with this case would be made helpful in swaying any member of the judiciary. By the same token, I feel that there is no man in this country more apt than you to be willing to lend his name to fight to win James Joyce the due that has so long been owing to him on ULYSSES in the United States.

If you are at all interested in hearing further about our plans for ULYSSES, I will be delighted to see you personally. I look forward anxiously to your reply.

Very sincerely yours,

Bennett A. Cerf
President
The Modern Library, Inc."

Justice Holmes unfortunately replied, through his secretary, that he preferred not to receive a copy of ULYSSES. His secretary indicated that:

"Regardless of his opinion of the book, the Justice thinks that taking part in the controversy over it, even so slightly as you suggest, would break in upon the complete withdrawal from affairs which he intended by his resignation from the Supreme Court."

Nevertheless, the creativity of Random House and Bennett Cerf (and his counsel) was unlimited. As a result, Random House imported a book through a representative and had it seized. After the victory was won, Bennett Cerf wrote a letter to the President of Columbia – in the process of sending the original book to the Columbia Library. He outlined the strategy, which was brilliant and fascinating, as follows:

"The reason that we chose to fight our case against the government through the expedient of importing a copy and having it seized by the Customs was for the purpose of economy. Had the government refused entry of the volume and had its claim been sustained by the courts, we would have been out only the cost of this single copy plus, of course, the advance that we had paid Mr. Joyce and legal fees. The other alternative was to set up the book in America and publish it and then wait for our tilt with the government. This, of
course, would have been a very expensive way of doing things.

Once we had decided to import a copy and have it seized, it became essential that the book actually be apprehended and not shipped through in one way or another. We therefore were forced to the somewhat ludicrous procedure of having our own agent at the steamer to make sure that our property was seized by the Government. The copy itself was a rather special one since inside its blue paper cover (Columbia blue, by the way) were pasted critical essays on the book by leading authors and critics of both England and France. Only by having these reviews pasted inside the copy were we able to quote from them when the case actually came before the court.

In due course Judge Woolsey tried the ULYSSES case with the results that you know. It was only in the courtroom that we got a second look at our copy of ULYSSES. The impeccable copy that we had imported was already in the tattered dog-eared condition in which you now find it. Obviously, everybody in the Customs department spent some time on this erudite volume. The District Attorney had also gone to the trouble of marking with a heavy cross every line of the book that he considered pornographic. This marking will undoubtedly be of great help to Columbia students who, I hope, will have a chance to examine this volume in the years to come.

I hope that this is the story that you wanted. I too enjoyed meeting you and Mrs. Lehmann-Haupt. I hope that I will see you both soon again.

Cordially yours,

Bennett A. Cerf
Random House"

For the references to the foregoing correspondence see THE UNITED STATES OF AMERICA V. ONE BOOK ENTITLED ULYSSES BY JAMES JOYCE: DOCUMENTS AND COMMENTARY -- A 50-YEAR RETROSPECTIVE (edited by Michael Moscato and Leslie LeBlanc, University Publications of America, Inc. 1984).

As noted at the outset, in environmental litigation pleading is important—because it can be dispositive of the right to standing (and access to the courts) as well as for many other
reasons. An environmental standing case demonstrated this; it involved a suit under the Clean Water Act to challenge the EPA Administrator's refusal to exercise a discretionary determination as to whether that Act required all sewage effluence to undergo secondary treatment, as opposed to a modification that the Administrator could exercise in the Administrator's discretion. See *Rite Research Improves the Environment, Inc. v. Costle, et al.*, 650 F.2d 1312 (5th Cir. 1981) ("Rite"). The court in *Rite, supra*, ultimately held that there was standing and the right to proceed and that the United States, State of Florida, and county governments had incorrectly blocked a project by asserting an absolute prohibitions of secondary treatment alternatives. After reviewing the record on motions, which involved a complaint with detailed attachments from the agency record (and no discovery), the Fifth Circuit ruled in favor of the plaintiff, noting that the city which had rejected the project was pressured between saving money or losing federal funds, in a way that caused it to be trapped "as it were between Scylla and Charybdis." The Fifth Circuit allowed the matter to be remanded, so that, among other results, the city could determine what it wanted to do. Ultimately, there was an amicable resolution and a partial experiment. But the key point involved in *Rite* was that by using the administrative processes and Freedom of Information Act materials, the complaint included voluminous attachments, so that most of the fact details were involved and described in the attachments to the complaint. The case suggests that the ability to use details in matters where there are administrative reviews, or right to sue requirements, or public information can enable a record that then can substantiate the allegations in a complaint and preclude motions to dismiss (and even motions for summary judgment) based on a record attached to a complaint (as the reviews were attached to the book, in the *Ulysses* case). This may be of particular value in complex matters such as environmental litigation.
Conclusion

Just as the case of *Ulysses* in court demonstrated that there are ways of navigating around complex problems, the reality is that to overcome *Twombly* and *Iqbal* problems new strategy approaches for pleading have to be carefully evaluated.