INSURMOUNTABLE BURDENS AND SLIPPERY SLOPES: A SOLUTION FOR PLEADING TOXIC TORTS IN THE PLAUSIBILITY ERA

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I. INTRODUCTION: WHY INSURMOUNTABLE BURDENS ARE INAPPOSITE TO PUBLIC SAFETY IN A MODERN SOCIETY

As society advances into the future, we are filled with hope that our children and ourselves will get sick less often, will be safer at work and at home, and will generally live longer, higher quality lives. Perhaps our faith in the future is sometimes misplaced. While technology has helped us achieve remarkable milestones, the industrial age has also seen an unprecedented rise in the use of potentially toxic chemicals in everyday products.[1] At least one commentator, citing a report from the 2009 President's Cancer Panel, asserted that over "80,000 synthetic chemicals [are] used in the U.S.," many of which may be harmful.[2] Americans are constantly exposed to Bisphenol-A (BPA) in plastic containers,[3] pesticides in food,[4] and parabens in everyday cosmetic products,[5] to name a few. Ubiquitous chemical exposure makes it imperative for the judicial system to maintain reasonable access to courts for would-be toxic tort plaintiffs. Potential liability creates a potent incentive for companies to ensure their products are not harmful to consumers or the environment, and society has a compelling interest in maintaining this incentive.[6] The days are gone when injury from chemical exposure was a rare and tragic occurrence in certain

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1 Jeffrey A. Hank, *Chemicals and Toxins in Consumer Goods: Cause for Concern?*, 89 MICH. B.J. 33, 33 (2010) ("[U]p to [forty-two] billion pounds of chemicals [are] being produced or imported daily in the United States."); *see also* Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L. REV. 875, 875-76 (2002).

2 Hank, *supra* note 1, at 33.

3 *Id.* at 34 (including baby bottles within the list of containers containing BPA and noting that the "Center for Disease Control study [] found that more than [ninety percent] of Americans tested positive for BPA in their blood").

4 *Id.*; *see also* Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of Courts*, 1 VILL. ENVTL. L.J. 355, 365-68 (1990).

5 Taylor L. Kraus, *Caring About Personal Care Products: Regulation in the United States, the European Union, and China in the Age of Global Consumption*, 33 WIS. INT'L. L.J. 167, 171 (2015).

6 *See* Conway-Jones, *supra* note 1, at 878.

niche industries; it is now a problem that has only just begun to plague the average American.[7]

Imagine the following hypothetical: John Doe worked for twenty years for company Y, a plastic manufacturer, where he was involved in the manufacturing of various plastics containing BPA. As a result of exposure to BPA over the years, Doe was eventually diagnosed with prostate cancer.[8] In an attempt to indemnify his loved ones of financial hardship, Doe filed suit against Company Y. In his claim, Doe alleged as follows: "Plaintiff developed prostate cancer after prolonged exposure to BPA in plastics manufactured by Company Y. Plaintiff was exposed while employed at company Y from 1990 - 2010."

Opposing counsel filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Applying a heightened plausibility standard, the court ruled the claim should be dismissed because Doe was unable to specifically identify the product that caused the harm. Although Doe was able to identify a specific class of products, as well as the specific time and place of exposure, he was unable to specifically identify the product. Over the course of twenty years, Doe worked with hundreds of different types of plastics, which rendered him unable to specifically identify the exact type of plastic that had caused his cancer. This is a scenario that is a common occurrence in the post-plausibility era, but is it just? Should severely injured plaintiffs be denied all access to courts when they are unable to specifically identify the products that harmed them? Did the Supreme Court intend this result when they decided *Twombly*[9] and *Iqbal*[10]? Or, is this phenomenon merely a side-effect of plausibility pleading's disparate impact on complex litigation?

In 1957, the Supreme Court decided the case of *Conley v. Gibson*.[11] The Court famously held that:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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.[12]

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7 Hank, *supra* note 1, at 33-34.

8 Hank, *supra* note 1, at 34 ("[I]n animal studies[,] early exposure to BPA is linked to prostate cancer, breast cancer . . . .").

9 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56 (2007).

10 Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009).

11 Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

12 *Id.* at 45-46.

This pleading standard became known as notice pleading, and it was the rule for fifty years. However, pleading standards were turned upside-down in 2007 with the Court's famous decision in *Bell Atlantic Corporation v. Twombly*.[13] The Court abrogated the pleading standard put forth in *Conley*, holding that, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face."[14] The new standard was firmly entrenched when the Court decided *Ashcroft v. Iqbal* in 2009. In that case, the Court confirmed that the standard was applicable to "all civil actions," not just pleadings in the antitrust context.[15] This change in pleading standards resulted in large-scale confusion in the lower courts.[16] Complex litigation, such as environmental claims and toxic torts, are particularly impacted by the new pleading standard.[17] With courts granting more motions to dismiss for failure to state a claim,[18] the repercussions for toxic torts plaintiffs who have been unjustly injured are dire.

The gravity of this problem for toxic torts plaintiffs is due in part to the fact that it is often difficult for plaintiffs to comply with heightened pleading standards by ascertaining enough facts to fulfill a heightened standard without the benefit of discovery.[19] On the other hand, some courts have applied plausibility pleading more loosely to complex litigation, undermining the policy considerations that were behind the Court's decision to abrogate *Conley*.[20] This problem necessitates a solution that complies with the requirements of plausibility while at the same time ameliorates the injustice that results from dismissal of meritorious claims when courts enforce an insurmountable burden on the plaintiffs in the name of plausibility. Such a solution shall be eligible for rapid incorporation in the judicial system, and it shall be unambiguous and easy to apply for both judges and plaintiffs. Finally, this solution must be in alignment with the most recent Supreme Court jurisprudence on plausibility pleading.

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13 *Twombly*, 550 U.S. at 561-63.

14 *Id.* at 570.

15 *Iqbal*, 556 U.S. at 684.

16 Nicholas Tymoczko, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 505-06 (2009).

17 Joseph I. Silverzweig, *The Secret Action Test: A Proposed Solution to the New Plausibility Pleading*, 31 UTAH ENVTL. L. REV. 481, 482 (2011).

18 *Id.*

19 *See, e.g.*, Bulanda v. A.W. Chesterton Co., No. 11 C 1682, 2011 WL 2214010, at *2 (N.D. Ill. June 7, 2011).

20 *See, e.g.*, Crotteau v. Dynegy, No. 06-C-672-S, 2006 WL 5952388, at *1 (W.D. Wis. Feb. 7, 2006) (noting it is not rear for a plaintiff "to have difficulty in determining with specificity the product which was manufactured" and concluding that such "concerns may be further addressed during the course of discovery").

This note proposes a two-pronged test for toxic tort claims that embodies all of the aforementioned characteristics. Section II is comprised of sub-subsections that are delineated by the letters A, B, C, D, and E. Subsections A and B provide the reader with the background necessary to understand the evolution of pleading standards. Subsection C describes some of the academic reactions to plausibility pleading in general. Subsection D consists of two parts delineated by the numbers 1 and 2. Part 1 illuminates how plausibility pleading has created problems for toxic torts and other complex forms of litigation. Part 2 analyzes the strengths and weaknesses of other related proposals. Subsection E is comprised of three parts delineated by the numbers 1, 2 and 3. The respective purpose of each of the parts is to introduce three judicial plausibility tests courts use for toxic torts pleadings.

Section III provides the analysis and proposal of the article. It is comprised of subsections A, B, and C. Subsection A highlights the shortcomings of the current and past judicial tests. Subsection B introduces and defends the proposal. Subsection C endows the proposal with further legitimacy by analyzing how it fits with current Supreme Court plausibility decisions. Finally, Section IV provides concluding remarks.

II. PLEADING STANDARDS FROM *CONLEY* TO *IQBAL*: A DYNAMIC HALF-CENTURY

In 2007, the Supreme Court retired *Conley* notice pleading in favor of a new plausibility standard.[21] For the past decade, courts and litigants alike have struggled to make sense of the new standard and academics have fiercely debated the requirements imposed by plausibility. In order to understand this debate, and assess what problems, if any exist, it is necessary to start at the beginning.

A. *Conley v. Gibson*: No Set of Facts?

Prior to *Conley*, courts adhered to a strict system of code pleading that "was conspicuously abolished when the Federal Rules [of Civil Procedure (FRCP)] were enacted in 1938."[22] In 1957, the Court provided its clear interpretation of FRCP 8(a)(2) in *Conley v. Gibson*.[23] Members of the Brotherhood of Railway and Steamship Clerks brought suit alleging their collective bargaining agent did not fairly represent them under the Railway Labor Act.[24] Although the lower court dismissed the claim on jurisdictional

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21 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).
22 *Id.* at 590.
23 Conley v. Gibson, 355 U.S. 41, 46-47 (1957).
24 *Id.* at 42-43.

grounds, the Court addressed the respondents' argument that the suit should also be dismissed for failure to state a claim.[25]

In assessing the claim, the Court concluded dismissal was unwarranted "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."[26] The Court's view of the Federal Rules of Civil Procedure and notice pleading was as follows:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require 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 . . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject 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.[27]

The "no set of facts" language and its resultant liberal access to discovery remained the rule for fifty years. However, rising concerns over frivolous claims and the astronomically increasing costs of discovery would bring the reign of notice pleading to an end in 2007.

B. *Twombly* and *Iqbal*: Pleading Standards Turned Upside-Down

Twombly was an antitrust case that presented the difficult question of whether to grant a motion to dismiss when the allegations assert unfair competition without evidence of an actual agreement.[28] The complaint specifically alleged that:

> "[the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high

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25 *Id.* at 45.
26 *Id.* at 45-46.
27 *Id.* at 47-48.
28 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548-49 (2007).

> speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another."[29]

The Court began its analysis by noting FRCP 8(a)(2) only requires "a short and plain statement . . . that the pleader is entitled to relief," such that it gives the defendant notice of the allegations.[30] However, the Court also opined it is not enough for the plaintiff merely to assert conclusory statements or recite the elements of the claim.[31]

In turning to its assessment of *Conley*, the Court held the "no set of facts" language had "earned its retirement."[32] Instead, the Court applied a plausibility standard to the claims while averring that requiring the claim to be plausible did not equate to a heightened standard to plead specifics.[33] Ultimately, the Court reversed the judgment of the Court of Appeals and held dismissal was proper because the plaintiffs had failed to plead enough facts to make their claim plausible.[34]

While it was clear the *Twombly* court had abrogated the "no set of facts" language from *Conley,* it remained unclear whether the Court had advocated an entirely new pleading standard, and, if so, how that standard was to be applied.[35] Many questioned whether the Court's holding was applicable only in the narrow context of antitrust suits.[36] The Court seemed to answer that question shortly after the *Twombly* decision in *Erickson v. Pardus*.[37]

Erickson involved allegations that prison officials violated a prisoner's Eighth and Fourteenth Amendment rights when they allegedly terminated his treatment for hepatitis C and put the plaintiff's life at risk.[38] In its decision, the Court admonished the lower court for applying a heightened pleading standard for a pro se plaintiff, and, quoting the FRCP and *Twombly,* reiterated that "[s]pecific facts are not necessary," provided the complaint put the defendant on "fair notice" of the allegations.[39] Members of the legal community who had feared the possibly disastrous repercussions of a heightened pleading standard breathed a collective sigh of relief.[40] The

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29 *Id.* at 551 (quoting Consolidated Amended Class Action Complaint, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220 (GEL)), 2003 WL 25629874).

30 *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

31 *Id.* (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

32 *Id.* at 563.

33 *Id.* at 570.

34 *Id.*

35 Tymoczko, *supra* note 16.

36 *Id.*

37 Erickson v. Pardus, 551 U.S. 89 (2007).

38 *Id.* at 89-90.

39 *Id.* at 93.

40 *See, e.g.*, Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U.L. REV. COLLOQUY 117, 122 (2007).

holding implied that those who had argued that *Twombly's* plausibility standard applied only in antitrust contexts were correct. Indeed, the word plausibility did not appear once in the *Erickson* decision.[41] However, this relief was short lived.

In 2009, the Court attempted to dispel the confusion regarding its new pleading standard and the seemingly contradictory holdings of *Twombly* and *Erickson* when it decided *Ashcroft v. Iqbal*.[42] Shortly after the 9/11 terrorist attacks on the World Trade Center, the plaintiff was arrested. His complaint alleged "that [Attorney General, John Ashcroft and FBI Director, Robert Mueller] adopted an unconstitutional policy that subjected [the plaintiff] to harsh conditions of confinement on account of his race, religion, or national origin."[43] The Court decided the case based on the narrow question of whether the complaint sufficiently alleged facts that, if true, gave rise to an inference of a constitutional violation.[44]

The Court noted the Court of Appeals had attempted to apply a heightened standard to the pleadings under *Twombly*.[45] Essentially, the Court of Appeals required the claimant to supply further support to certain pleadings when necessary to make "'the claim *plausible*.'"[46] In clarifying *Twombly*, the Court outlined the basic principles of its new pleading requirement.[47] First, a court is only obligated to accept the truth of allegations that are non-conclusory.[48] Second, when the non-conclusory allegations are taken as true, the claim must be plausible on its face.[49] The Court agreed with the Court of Appeals that the application of this test is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[50]

In applying this standard to the complaint, the Court commenced by dismissing the factual allegations of the complaint that were not entitled to veracity because they were conclusory in nature.[51] These included the allegations that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [plaintiff's] religion, race, and/or

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41 *See Erickson*, 551 U.S. at 89.
42 Ashcroft v. Iqbal, 556 U.S. 662 (2009).
43 *Id.* at 666.
44 *Id*.
45 *Id.* at 670.
46 *Id.* (quoting Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).
47 *Id.* at 678.
48 *Id*.
49 *Id.* at 679 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
50 *Id.* (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).
51 *Id.* at 680-81.

national origin and for no legitimate penological interest.'"[52] The Court also refused to accept as true the allegations that "Ashcroft was 'the principal architect,'" and "Mueller 'was instrumental'" in executing the policy.[53] The Court then moved on to the step of plausibility assessment, ultimately concluding the complaint was implausible because of the existence of exceedingly more likely possible explanations to explain the conduct.[54]

The plaintiff attempted to stave off the plausibility attack on his complaint by arguing the stricter requirements of plausibility in *Twombly* were meant only for antitrust suits.[55] The Court summarily rejected this contention and held plausibility was the new standard for "'all civil actions.'"[56] The Court also rejected the contention that implausible claims could be eliminated through the discovery process because the judiciary had been largely unsuccessful in policing discovery issues in the past.[57] Finally, the Court expressed concern over increasing costs and inefficiency of the modern discovery process.[58]

While the text of Rule 8(a)(2) has remained the same after the *Twombly* and *Iqbal* decisions,[59] the current requirements of the rule, after these decisions, are the following: (1) the court discards all conclusory allegations in the complaint and only assumes nonconclusory factual allegations to be true; and (2) the court determines whether, taking all sufficiently pleaded factual allegations as true, the claim is plausible.[60] *Iqbal* unambiguously demonstrated that this new standard applies to all civil actions.[61] The nature of the test lends itself to ambiguity, and *Iqbal* overtly instructs judges to employ their own subjective experiences in making plausibility determinations.[62] The policy reason for implementing this pleading standard is namely to promote efficiency by limiting the amount of frivolous claims

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52 *Id.* at 680 (quoting First Amended Complaint and Jury Demand, Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 WL 4483151 (E.D.N.Y. Oct. 3, 2006) No. 04 CV 1809 (JG)(JA), 2004 WL 3756442).

53 *Id.* at 680-81 (quoting First Amended Complaint and Jury Demand, Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 WL 4483151 (E.D.N.Y. Oct. 3, 2006) No. 04 CV 1809 (JG)(JA), 2004 WL 3756442).

54 *Id*. at 681-82.

55 *Id.* at 684.

56 *Id.* (quoting FED. R. CIV. P. 1).

57 *Id.* at 684-85 (citing Bell Atl. Corp. v. Twombly 550 U.S. 544, 559 (2007)) ("'It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.'").

58 *Id.* at 685.

59 *See* FED. R. CIV. P. 8(a)(2).

60 *Iqbal*, 556 U.S. at 678-79 (citing *Twombly*, 550 U.S. at 555-56).

61 *Id.* at 684.

62 *Id.* at 679 (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)) (noting the issue of plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").

that are brought.[63] Plausibility also supports the fiscal policy of limiting the exorbitant discovery costs that are especially characteristic of complex litigation in the modern era.[64] While *Iqbal* dispelled some of the confusion around plausibility, it ignited a firestorm of debate in the legal community over its possible effects and how it was to be implemented.[65]

C. Igniting the Firestorm: Reactions to Plausibility Pleading

In the wake of the *Iqbal* decision, a heated argument ensued in the legal community.[66] The controversy surrounding the *Twombly* and *Iqbal* decisions was so great that it caught the attention of Congress in 2009, and two bills were introduced that attempted to statutorily override the Court's new system by restoring notice pleading.[67] Both of these bills failed,[68] but the debate in the legal community continued. Some commentators argued the new plausibility standard did little to change the way the pleading system worked[69] while others argued fervently that the new system was deeply flawed.[70] The solutions proposed by these latter commentators, as well as many of the problems identified by them, were largely dismissed by the academics who viewed plausibility pleading in a positive light.[71] However, of these two schools of thought, those espousing the positive aspects of the new system are fewer in number.[72]

The plausibility favoring school of thought can be split into two sub-groups. The first of these argued the new system created little change in where plaintiffs file or how many claims were being dismissed under FRCP

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63 Silverzweig, *supra* note 17, at 482.

64 *Id.*

65 *See infra* notes 69-70 and accompanying text.

66 *See infra* notes 69-70 and accompanying text.

67 Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/senate-bill/1504; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009),https://www.congress.gov/bill/111th-congress/house-bill/4115?q=%7B%22search%22%3A%5B%22open+access+to+courts+act+of+2009%22%5D%7D&r=1.

68 *Id.*

69 *See, e.g.*, Alex D. Silagi, *Keep Calm and Plead on: Why New Empirical Evidence Should Temper Fears About Pleading Plausibility*, 44 SETON HALL L. REV. 247, 247-49 (2014); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 697-700 (2016); Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 336-37 (2016); Jill Curry & Matthew Ward, *Are* Twombly & Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH. L. REV. 827, 829 (2013).

70 *See, e.g.*, Silverzweig, *supra* note 17; Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN. ST. L. REV. 1191, 1194 (2010).

71 *See* Curry & Ward, *supra* note 69; Hubbard, *supra* note 69; Silagi, *supra* note 69.

72 Silagi, *supra* note 69, at 248.

12(b)(6).[73] One example can be found in the Texas Tech Law Review in which two commentators undertook an intricate study designed to determine whether there was any significant increase in removal rates to federal court after *Twombly* and *Iqbal*.[74] The study compared the removal rates in states that maintained more liberal pleading standards to removal rates in states that adopted stricter pleading standards in conformance with plausibility pleading.[75] Although the authors hypothesized the stricter pleading standards would result in higher removal rates in the states that adopted them, they ultimately concluded their data indicated no dramatic difference in the removal of cases in these two systems.[76]

The second group took a more interpretive approach, arguing while the new system could be interpreted to induce radical and detrimental change,[77] in practice it would be applied in a milder fashion that would not dramatically change anything.[78] One commentator argued for a minimal interpretation approach that would not result in the dismissal of meritorious claims.[79] A later commentator expanded on this interpretation and argued post-plausibility Supreme Court opinions supported this minimalist interpretation of plausibility.[80] This latter conclusion will be further explored in Section III of this article.

At the other end of the spectrum, and representative of the majority of reactions, were those critical of plausibility pleading.[81] The driving force behind this position was the desire to conserve the notice pleading system, characterized by its clarity and simplicity in application.[82] On the other hand, the new plausibility system was wrought with unknowns, not the least of which was the standard's inherent ambiguity.[83] One commentator quoted a district judge lamenting that the new system muddied the waters of a task that had previously been essentially judicial second nature.[84] Another commentator expressed apprehension over increased judicial activism and the possibility that judicial bias would unjustly lead to the dismissal of meritorious claims.[85] Of particular relevance to the current topic is the

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73 *See supra* note 71.
74 Curry & Ward, *supra* note 69, at 828-29.
75 *Id*.
76 *Id*.
77 Tymoczko, *supra* note 16, at 506.
78 Steinman, *supra* note 69, at 335-36.
79 Tymoczko, *supra* note 16, at 539.
80 Steinman, *supra* note 69, at 335-36.
81 *Id.* at 335.
82 Tymoczko, *supra* note 16, at 505.
83 *Id.* at 506.
84 *Id.* at 505.
85 Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After* Twombly *and* Iqbal, 44 CREIGHTON L. REV. 141, 146 (2010).

proposition some commentators have advanced that the directive from *Iqbal* for judges to employ their own common sense and experience in dismissing claims will disproportionately affect complex litigation, such as toxic tort claims.[86]

A logical conclusion that can be drawn from these diverse opinions is that there is no general consensus amongst those in the legal community about whether plausibility pleading is positive or negative, or how it should actually be applied. This article aligns itself with the majority of commentators in criticizing the application of plausibility pleading, but this critique is limited to the context of toxic torts and other complex litigation. As such, it is necessary to undertake a more detailed analysis of the possible negative repercussions and various solutions that have been proposed to apply plausibility pleading to these types of claims.

D. Toxic Torts and Plausibility: Prodigious Problems and Suboptimal Solutions

This sub-section seeks to identify some of the problems plausibility pleading has created or exacerbated in the context of toxic tort suits. It will also introduce a few of the solutions that various commentators proposed to these issues. Part 1 outlines the issues. Once these problems have been identified, some of the proposed solutions will be compared and contrasted in Part 2.

1. Prodigious Problems

The main problem with plausibility pleading as applied to toxic torts is that the effect of a heightened pleading standard generally has a disparate impact on any type of complex litigation, especially chemical based tort claims.[87] One commentator proclaimed the plausibility standard "invites injustice."[88] This injustice stems from the fact that plausibility pleading inevitably results in larger numbers cases being dismissed.[89] In the plausibility era, there has been around a ten percent increase in the amount

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86 *See* Marcia L. McCormick, *Implausible Injuries:* Wal-Mart v. Dukes *and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 729 (2013); *see also* Silverzweig, *supra* note 17.

87 Silverzweig, *supra* note 17, at 482.

88 *Id.* at 500.

89 *Id.* at 482.

of successful motions to dismiss for failure to state a claim and motions for judgment on the pleadings.[90]

As part of the policy concerns behind the implementation of plausibility pleading centered around combating the rising costs of litigation, particularly with regard to discovery, claims requiring an arduous discovery process are likely to be disproportionately impacted by motions to dismiss based on the new standard.[91] As toxic torts plaintiffs are often unable to identify with specificity exactly what product caused their injuries, or exactly when and how exposure occurred, it is no surprise these claims are particularly affected by heightened pleading standards.[92] Indeed, it is often the case that these causes of action "rely on discovery to prove essential facts."[93] Thus, while it is true the heightened pleading standards have barred many frivolous claims, thereby partially rectifying the issue of large classes utilizing threats of exorbitant discovery costs to leverage settlements in frivolous suits, it is also equally true the increased dismissal of claims at the pleading stage prohibits large numbers of meritorious claims with complex causes of action. In many cases, it may not be feasible for plaintiffs to obtain adequate facts to survive a motion to dismiss without the benefit of discovery.[94] When these litigants are denied the opportunity to utilize discovery to obtain the necessary facts to make their claims plausible, the injustice that results largely outweighs the prudential concerns that gave rise to plausibility pleading in the first place.[95]

To make matters worse for toxic torts claimants, one of the central features of plausibility pleading is ambiguity that requires subjective interpretation.[96] This invites judges to inject their personal views and biases into the decision-making process.[97] The result is an unpredictable pleading system in which judges are free to require stricter or more liberal standards as they see fit.[98] Although the approaches have varied, judicial interpretative leeway often spells disaster for toxic torts litigants. Considering the history of hostility towards toxic torts claims, largely due to their reliance on costly discovery processes, it is logical to assume many judges will employ this

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90 *Id.* at 486 ("[A]pproximately 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.").

91 *Id.* at 482; *see also* Ryan Mize, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1247-48 (2010).

92 *See, e.g.*, Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 228 (E.D. Pa. 1984); *see also* Conway-Jones, *supra* note 1, at 875-76.

93 Silverzweig, *supra* note 17, at 486.

94 Mize, *supra* note 91, at 1257.

95 *See* Silverzweig, *supra* note 17, at 492-93 (discussing the prudential considerations that underpinned the new pleading standard).

96 *Id.* at 488.

97 *Id.*

98 Mize, *supra* note 91, at 1257.

leeway as a means to enforce a stricter standard requiring specific facts that is particularly unfriendly to complex litigation.[99] As discussed further below, some commentators argue prudence requires defendants to exploit judicial subjectivity inherent to plausibility pleading in an attempt to enforce an even stricter pleading standard than intended by the Court.[100]

2. Suboptimal Solutions

There have been many different solutions proposed to the problems described above. One classification of solutions is those that call for a redrafting of the FRCP.[101] The Court noted in *Twombly* that any complete restructuring of pleading standards would require an amendment to the rules as opposed to a judicial interpretation of the current rules.[102] As the Court's decisions in *Twombly* and *Iqbal* have largely resulted in a heightened pleading standard as applied by the lower courts, especially in the context of toxic torts,[103] it makes sense that commentators have called for a restructuring of the rules. One solution, dubbed "the secret action rule," appeared in the Utah Environmental Law Review.[104] The proposed rule was:

> [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.[105]

This solution is fairly viable in the sense that it would allow plaintiffs in complex litigation involving "secret actions" to access discovery in order to ascertain the facts required to make their claim plausible. While many meritorious claims survive under this test, the author also argued frivolous claims would fail.[106]

The likely problem with this proposal, like other proposals to change the rules, is that it creates a rule that is dense and relatively difficult to apply.

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99 Silverzweig, *supra* note 17, at 488 ("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.").

100 *See generally* Neal S. Krokosky, *Putting the "Product" in "Products Liability": Pleading Product Identification in a Federal Toxic Tort Lawsuit*, 36 AM. J. TRIAL ADVOC. 307, 327-28 (2012).

101 Mize, *supra* note 91, at 1268.

102 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 595 n.14 (2007).

103 *See* McCormick, *supra* note 86; Silverzweig, *supra* note 17.

104 Silverzweig, *supra* note 17, at 498.

105 *Id.*

106 *Id.*

Other commentators have agreed that one advantage of a redraft of the rules would simplify application by creating a succinct and easily comprehensible rule.[107] Myriad problems would likely arise in the application of this rule that would only exacerbate many of the current pleading issues, such as lack of clarity and disparate application.

For example, what exactly are the "secret actions" that the rule targets? Certainly, it could include the alleged secret actions undertaken by the attorney general and others in *Iqbal*, but would it include the use of harmful parabens in everyday products, such as deodorant, when those chemicals are listed on the label? The issue is that these actions in the context of toxic torts are not necessarily secret; rather, the difficulty to meritorious plaintiffs lies in the complexity of their exposure to a typically varying array of harmful substances, an interplay between those substances, and a lengthy exposure period.[108] Thus, a rule allowing special treatment for plaintiffs alleging secret actions, while not without merit, would probably do very little to alleviate the plight faced by most plaintiffs in the arena of toxic torts suits. The debate would merely shift from whether the plaintiff could plead enough facts to establish a plausible claim to whether the plaintiff could plead enough facts to establish a secret action undertaken by the defendant.

Another group of commentators rest their hopes for reform on the legislature.[109] One commentator argued changes could come about either through laws mandating specific pleading standards for certain types of claims or legislation restoring notice pleading.[110] The first suggestion is attractive to toxic torts claimants in the sense that Congress could alleviate some of the burdens faced by complex litigants by making statutory exceptions to plausibility for judges to apply in these contexts.

However, there are several problems with this approach that limit its viability. First, enacting legislation is inherently slow. The problem of increasing rates of dismissals of meritorious claims creates a sense of urgency for reform. Elected representatives are also not exceedingly likely to campaign on pleading standard reform, a topic most of their constituents are unfamiliar with. Second, any statutory reform would probably suffer from the same density and application issues as the secret action test. A statutory solution may only serve to exacerbate the problems by adding a relatively uninformed directive that further complicates litigation that is already extremely complex.

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107 Mize, *supra* note 91, at 1270.

108 *See, e.g.*, Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 228 (E.D. Pa. 1984); *see also* Conway-Jones, *supra* note 1, at 879-80.

109 Mize, *supra* note 91, at 1272.

110 *Id.* at 1273.

The second Congressional solution to statutorily revert the pleading system to a notice-based system would certainly be embraced by toxic torts litigants, but this is not a feasible solution. First, as noted earlier in this article, two attempts have already failed in Congress.[111] The legislation and regulation that has been enacted has historically failed to protect consumers on a large scale.[112] Second, as plausibility has already become firmly entrenched in the judicial system, any drastic departure from plausibility would upset the system and would give life to the serious fiscal concerns regarding discovery costs that were behind the rise of plausibility.[113] While plausibility has its issues that must be addressed, there were cogent reasons for abrogating the old system, and hence there are also cogent reasons for it to stay in retirement.

The last category of solutions to be discussed here are judicially based. Some critics advocate for a "phased discovery" process.[114] One commentator proposed a two-stage hybrid pleading process in order to allow potentially meritorious plaintiffs access to a limited discovery process.[115] In this scenario, judges would screen a plaintiff's initial complaint based on a notice pleading standard.[116] The suit would then proceed to a "limited discovery phase," during which judicial discretion would be limited by a prescribed procedural standard for the limited discovery.[117] At the end of this limited discovery period, the plaintiff would then be required to submit another complaint that the judge would analyze under the more rigorous plausibility pleading standard.[118]

While this solution may be the most compelling of the aforementioned, it is not without problems. First and foremost, the Supreme Court addressed this issue to some extent in *Iqbal*. In his dissenting opinion, Justice Breyer advocated a similar limited discovery approach, which the Court declined to adopt.[119] This is not to mention that if the loose strictures of *Conley* were applied even at the initial stage of a toxic tort suit, the policy reasons that gave rise to plausibility pleading would be defeated by frivolous claimants leveraging settlement by threatening defendants with prodigious discovery

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111 Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/senate-bill/1504; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/house-bill/4115.

112 Kraus, *supra* note 5, at 169.

113 Campbell, *supra* note 70, at 1231.

114 Mize, *supra* note 91, at 1248.

115 Campbell, *supra* note 70, at 1245.

116 *Id.* at 1240.

117 *Id.* at 1241.

118 *Id.* at 1244.

119 Ashcroft v. Iqbal, 556 U.S. 662, 700 (2009) (Breyer, J., dissenting).

costs. Even at a limited discovery phase, these costs are substantial enough to force settlement with many defendants, especially those that are particularly susceptible due to lack of resources.[120]

The right of access to courts for citizens is one of the most important pillars of our society.[121] The problems created by plausibility pleading in the realm of toxic torts result in the denial of a day in court for many meritorious plaintiffs. The time is ripe for a viable solution to this problem, and it seems the most workable source for such a solution, at least in the short term, is the judiciary. Critics to this approach argue judges are disinclined to exercise discretion without a clearer direction from the Court.[122] However, the intrinsic ambiguity of plausibility pleading has already led to wide-spread judicial activism in interpreting what plausibility requires. The next step in formulating a viable solution is to identify and analyze the prominent categories of judicial application of plausibility to toxic torts.

F. Judicial Plausibility Tests: Quest for the Goldilocks Zone

The purpose of this sub-section is to identify and analyze the different plausibility tests employed by the district courts for toxic torts cases. Different commentators have described these tests in various ways,[123] but for the purposes of this note, there are essentially three tests ranging from stringent to plaintiff friendly. Part 1 analyzes the most stringent standard: specific identification.[124] Part 2 compares this approach to the least stringent: no specific identification.[125] Part 3 discusses the middle ground approaches that vary slightly in their application.

1. Specific Identification: An Insurmountable Impediment?

The first approach is dubbed specific identification because it requires the plaintiff to specifically identify the substance/product that caused his or her injury in order for their complaint to pass the plausibility standard.[126] This is the most defendant friendly approach that is currently used.[127] Its origins predate the rise of plausibility pleading. In 1984, the United States District Court for the Eastern District of Pennsylvania, in *Klein v. Council of Chemical Ass'ns.*, employed this approach in dismissing the plaintiff's claim

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120 Silverzweig, *supra* note 17, at 482.
121 Mize, *supra* note 91, at 1245.
122 *Id.* at 1263.
123 Krokosky, *supra* note 100, at 313-14 (dividing tests into four groups).
124 *Id.* at 313.
125 *Id.*
126 *Id.*
127 *Id.* at 320.

because he did not specifically identify the product in his complaint.[128] In *Klein*, the plaintiffs alleged that "[Plaintiff] contracted bladder cancer because he was exposed over a fifty-year period to certain carcinogens by 'inhaling the fumes, mists, fogs, vapors and dusts of the various commercial chemical products then commonly used in the . . . industry.'"[129] The court held because the plaintiff could not specifically identify the product or which defendant manufactured the product, the issue could not be corrected by allowing the plaintiffs to amend their complaint.[130] Under these circumstances, the court was unwilling to allow the plaintiffs to access discovery in order to ascertain the necessary facts because discovery would be burdensome on the defendant.[131]

In the post-plausibility era, this approach has been advocated by some courts and commentators as the only one that complies with the strictures of plausibility pleading.[132] In *Bulanda v. A.W. Chesterton Co.*, the decedent's estate brought a wrongful death and negligence suit against various defendants alleging they "caused Decedent to work with, and be exposed to, asbestos through their products and premises."[133] The court agreed with the defendant that the allegations were synonymous with those the Court sought to combat in creating the plausibility standard.[134] In dismissing the complaint for its failure to identify the offending product, the court departed from the rationale of *Klein* (which found the amendment of the complaint futile)[135] and dismissed the complaint without prejudice.[136]

2. No Specific Identification: A Slippery Slope?

At the other end of the spectrum, some courts in the pre-plausibility era allowed plaintiffs to access discovery without specifically identifying the product.[137] One example is *In re Asbestos Litigation*, in which the court denied the defendants' motions to dismiss, opining that under Florida law, a plaintiff did not need to specifically identify the harmful products.[138] The court reasoned imposing a specific identification requirement would unjustly

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128 Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 228 (E.D. Pa. 1984).
129 *Id.* at 216 (quoting Second Amended Complaint at ¶ 19(a)).
130 *Id.* at 221.
131 *Id.*
132 Krokosky, *supra* note 100, at 327.
133 Bulanda v. A.W. Charleston Co., No. 11 C 1682, 2011 WL 2214010, at *1 (N.D. Ill. June 7, 2011).
134 *Id.* at *2 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).
135 *Klein*, 587 F. Supp. at 221.
136 *Bulanda*, 2011 WL 2214010, at *3.
137 Krokosky, *supra* note 100, at 314-15.
138 *In re* Asbestos Litig., 679 F. Supp. 1096, 1098 (S.D. Fla. 1987).

present the plaintiff in this type of case with an "insurmountable burden."[139] Similarly, in *Crotteau v. Dynegy*, the court refused to dismiss a complaint that asserted as follows:

> Plaintiff during the course of his employment at various job sites was exposed to asbestos dust or fibers emanating from the asbestos products which were either sold, manufactured, distributed, packaged, installed or otherwise placed into commerce by the product defendants or at the premises of the premises defendants.[140]

Although the court acknowledged that the complaint failed to identify the harmful product, the opinion further stated that this deficiency was not out of the ordinary for this type of claim and the issue could be evaluated in discovery.[141]

3. The Middle Ground: Just Right?

In the plausibility era, courts that do not adhere to the specific identification requirement have adopted a slightly more lenient standard that varies depending on the district.[142] Some require only that the complaint identify a general class of products, while other districts require a general class along with some further detail.[143] *Singleton v. Chevron* involved a products liability claim for benzene exposure.[144] The defendants filed a motion to dismiss pursuant to 12(b)(6), asserting the claim did not satisfy the requirements for plausibility pleading because it failed to specifically identify the product, where the exposure occurred, and when the exposure occurred.[145] The plaintiff merely referred to the products as "'Valspar plastic primers, paints and thinners.'"[146] In denying the defendant's motion, the court held the shortcomings of the complaint did not render it implausible under *Iqbal*.[147] Under the court's interpretation of plausibility, the plaintiff was not required to plead specific details in the claim because such details could be ascertained during discovery.[148] The combination of alleging the defendants knowingly manufactured a class of products containing benzene

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139 *Id*.

140 Crotteau v. Dynegy, No. 06-C-672-S, 2006 WL 5952388, at *1 (W.D. Wis. Feb. 7, 2006) (quoting Complaint at ¶ 7) (order denying Defendants motion to dismiss).

141 *Id*.

142 Krokosky, *supra* note 100, at 313-14.

143 *Id*.

144 Singleton v. Chevron USA, Inc., 835 F. Supp. 2d 144, 145 (E.D. La. 2011).

145 *Id*. at 146.

146 *Id*. (quoting Rec. Doc. 1, at 4, ¶ 7).

147 *Id*. at 148.

148 *Id*.

and the fact that defendant had access to research that gave it actual or constructive knowledge of the danger posed by such products, equated to a plausible claim.[149]

In *Coene v. 3M Co.*, the plaintiff brought a products liability claim against defendants after being exposed to silica dust in "powder coatings."[150] The defendants filed a 12(b)(6) motion to dismiss for failure to "specifically identify the product[]."[151] The court denied the motion, asserting the FRCP obviated the need for plaintiffs to plead specific details in their claim.[152] The court continued that the complaint sufficiently put the defendants on notice of the allegations and that any specific factual details could be properly gleaned during discovery.[153]

In a related context, *Coleman v. Boston Scientific Corp.* involved a products liability claim for surgical mesh products allegedly manufactured and advertised as safe by the defendants.[154] In rejecting the defendants' contention that plausibility pleading required that the plaintiff specifically identify the product, the court asserted that a specific identification requirement imposes "an insurmountable pleading burden in some cases."[155] Nonetheless, the court granted the defendants' motion to dismiss, holding:

> Plaintiffs['] complaint must be amended to (1) state clearly whether Plaintiffs' claims are based on one defective device common to all Plaintiffs, or whether claims are asserted based on multiple mesh devices that share a common defect; and (2) state clearly the location where each Plaintiffs' respective procedure was performed.[156]

Essentially, these three categories of tests or some combination thereof, provide a synopsis of how courts approach the problem of applying pleading standards to toxic torts and other complex types of litigation. The ambiguity of plausibility pleading and the lack of guidance from the Supreme Court has resulted in various forms of judicial activism as the lower courts struggle to craft a workable solution to the problems posed by plausibility with regard to complex litigation. The synopsis of these tests results in a conclusion that any workable solution would (1) create uniformity in the lower courts, (2) be

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149 *Id.* at 148 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

150 Coene v. 3M Co., No. 10-CV-6546 CJS, 2011 WL 3555788, at *1 (W.D.N.Y. Aug. 11, 2011).

151 *Id.*

152 *Id.* at *3 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.3 (2007)).

153 *Id.*

154 Coleman v. Bos. Sci. Corp., No. 1:10-CV-01968, 2011 WL 1532477, at *1 (E.D. Cal. Apr. 20, 2011).

155 *Id.* at *3.

156 *Id.* at *6.

lenient enough not to impose an insurmountable burden of specific product identification on plaintiffs, (3) be stringent enough that it complies with the requirements of plausibility pleading and supports public policy considerations behind that standard in limiting frivolous claims and exorbitant discovery costs, (4) be simple and easily applicable in the context of toxic torts suits, and (5) be eligible for rapid incorporation into the system. The next logical step is to investigate and assert a proposal that will embody all of these factors and align itself with the most current interpretations of plausibility from the Supreme Court.

III. ANALYSIS

This section proposes a solution to the issue of how to plead toxic torts suits after the rise of plausibility pleading. Subsection A discusses the strengths and weaknesses of the judicial tests that are currently employed in the lower courts. Subsection B proposes a solution with an objective look at its pros and cons. Finally, Part C assesses some of the most recent Supreme Court decisions relating to plausibility pleading and discusses how the proposed solution aligns itself with the policies laid out in these decisions.

A. The Tragic Flaws of the Current Tests

Each of the judicial tests outlined above has its own strengths and weaknesses. The specific identification test is excellent in the sense that it successfully fulfills the policy goals behind plausibility. By dismissing claims that do not specifically identify the product or substance that caused the injury, the courts successfully bar most frivolous claims because the common strategy employed by plaintiffs in these types of cases is to generally identify a toxic substance that has some relationship to their injury, implead as many defendants as possible, and ally themselves with other similarly situated plaintiffs (typically by creating a large class action suit).[157] It is not uncommon for plaintiffs employing this tactic to increase the potential value of their claims by millions of dollars, even when they have little evidence to support their position.[158] When courts refuse to dismiss these types of claims, the plaintiffs can (oftentimes successfully) exert pressure on the defendants to settle quickly for fear of ruinous discovery costs and potential liability.[159] By requiring specific identification, the first step of

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157 *See* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEG. STUD. 521 (1997).

158 *See, e.g.*, Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001).

159 *See* Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POLICY 1107, 1131 (2010); *see also* Silverzweig, *supra* note 17, at 482.

the strategy is compromised, and plaintiffs in these frivolous suits will not only be unable to specifically identify the harmful substance, they will also be unable to form a coalition because there will be disagreement and difference of past experiences that prevent these large classes from coalescing around a specifically identified product.[160] This is not to mention that, by requiring specific identification, courts ensure that, taken as true, the nonconclusory facts presented in the complaint equate to a plausible claim.[161] Thus, they fulfill the core requirements of plausibility.[162]

Despite the beneficial aspects of this test, these strengths are largely eclipsed by the test's weaknesses. An intrinsic feature of toxic torts claims is that they often involve incredibly complex causation issues.[163] The cause of the plaintiff's harm may have taken place over the course of many years, while working for many different employers.[164] To complicate matters further, these claims often involve exposure to chemicals in many different types of products.[165] They may also involve an interplay between substances in these different products that caused the harm.[166] For these reasons, a plaintiff, reeling in the aftermath of a possibly devastating diagnosis, is often unable to discern the specific product that caused the injury. Thus, specific identification presents them with an "insurmountable burden" in many cases.[167]

The repercussions of this result are not limited to injustice to the plaintiff. In the modern age, exposure to toxic chemicals is ubiquitous.[168] The increase in the use of potentially harmful substances in everyday products equates to an increasingly compelling societal interest in holding companies and individuals responsible for harming people and the environment, regardless of whether they knowingly or negligently exposed the public.[169] Companies will inevitably catch on to any flaw in the judicial system that allows them to increase profits by limiting safety trials of chemicals prior to exposing the public.

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160 *See, e.g.*, Coleman v. Bos. Sci. Corp., No. 1:10-CV-01968, 2011 WL 1532477, at *5-6 (E.D. Cal. Apr. 20, 2011).
(Even with only three plaintiffs, there was difficulty assessing whether injury occurred from one product or multiple products with a similar defect).

161 Krokosky, *supra* note 100, at 325-27.

162 *Id.*

163 Silverzweig, *supra* note 17, at 486 n.57.

164 *See* Conway-Jones, *supra* note 1, at 879-81.

165 *Id.*

166 *Id.*

167 *In re* Asbestos Litig., 679 F. Supp. 1096, 1098 (S.D. Fla. 1987).

168 *See* Conway-Jones, *supra* note 1, at 875.

169 *Id.* at 877-78.

Although many companies unknowingly use dangerous substances in their products, historically, many have continued to do so without warning consumers or employees even once they understood the dangers these substances pose to their employees and consumers.[170] From a business perspective, this course of action makes sense when, for instance, these substances might be more readily available or cheaper. The allure of maintaining profits, even at public cost, is incredibly powerful; for a particularly cogent example, one need only review the tenacious efforts of big tobacco to mask the risks of cigarette smoking from the public for decades through the use of expert scientific opinions.[171] If this behavior was not pernicious enough, couple it with the fact that these companies were also intentionally gearing advertisement efforts towards children.[172] Unfortunately, the temptation to exercise willful blindness or outright public deception becomes particularly tantalizing if the companies are aware that heightened pleading standards will generally bar claims and prevent the judicial system from exacting justice for their wrongdoing.[173] The human cost of this type of behavior is obvious, and it far outweighs any advantage derived from strict adherence to specific identification in the name of plausibility pleading.

Considering the aforementioned strengths and weaknesses of the specific identification test, it should come as no surprise that any analysis of its antithesis, the plaintiff friendly no-specific-identification test, poses many of the same strengths and weaknesses in the opposite manner. The obvious strength of the plaintiff friendly test is it practically guarantees meritorious claimants will be able to access discovery in order to substantiate their claims. However, this benefit is again largely outweighed by the costs. The main issue with this test is that it simply does not comply with the requirements of plausibility pleading.[174] A general identification requirement alone would essentially assume as plausible any claim that could identify (1) some general substance or product and (2) harm from that product.[175] It would thus open the door to myriad frivolous claims adopting the general product/class action strategy discussed above. Without any check, these claims could potentially cripple the function of many beneficial companies or even put them out of business entirely.[176] The high success rate of the class action/settlement strategy is conspicuous evidence of this corporate

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170 *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973).

171 *See* Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1082 (2010).

172 *Id.*

173 *See* Conway-Jones, *supra* note 1, at 878.

174 *See* Krokosky, *supra* note 100, at 325.

175 *See, e.g.*, *In re* Asbestos Litig., 679 F. Supp. 1096, 1098-99 (S.D. Fla. 1987).

176 Priest, *supra* note 157, at 522.

nightmare scenario.[177] This would lead to a slippery slope of more plaintiffs seeing an easy payout and more suits being filed as a result. While this scenario may work to the benefit of attorneys, the policy considerations behind plausibility pleading were real and profound. They should not be swept under the rug in the context of toxic torts or any other type of suit.

With the two extremes discarded, the more difficult task is to assess the middle ground class of products plus approach. Part of the difficulty here stems from the fact that the approaches in the middle vary considerably.[178] Accordingly, one of the striking weakness of these approaches is their lack of uniformity. While *Singleton* seemed to imply the plaintiff could survive a motion to dismiss by pleading the general class of products plus the fact that the manufacturer knew or had constructive knowledge that the products posed a danger,[179] *Coleman* asserted the plaintiff must plead a class of products plus the exact location of the exposure, as well as whether each plaintiff in the class was exposed to the same product.[180] Aside from the fact that these two examples demonstrate the lack of uniformity characteristic of the class of products plus test, neither of the two tests is sufficient to adequately protect the policy interests behind plausibility pleading.

It is true the plus factor in both cases serves to discourage frivolous claims. However, in the first instance, merely alleging the defendant knew or should have known the product is dangerous, while a good method of supporting the policy of deterring companies from using harmful substances, will not adequately discourage implausible claims.[181] The burden on the plaintiff of alleging a general class plus knowledge or constructive knowledge is relatively slight, and the potential payoff is large enough that many implausible claims will still be brought if this test is adopted.[182]

The *Coleman* approach is slightly more viable. By requiring plaintiffs to allege the specific location of the exposure or harm, along with the general class of products or substances, courts can ensure that the claim is plausible.[183] Requiring classes to plead whether the exposure occurred from one product will also discourage the class action / leverage tactic described above. Again, however, with the incentive of a large settlement drawing in implausible claims, these safeguards will not be enough to ensure that potential defendants are adequately protected from implausible claims.

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177 *Id.* at 521.
178 *See generally* Krokosky, *supra* note 100, at 313.
179 Singleton v. Chevron USA, Inc., 835 F. Supp. 2d 144, 148 (E.D. La 2011).
180 Coleman v. Bos. Sci. Corp., 2011 WL 1532477, *6 (E.D. Cal. 2011).
181 *See generally* Krokosky, *supra* note 100.
182 *Id.*
183 *Coleman*, 2011 WL 1532477, at *5-6.

Requiring the plaintiff to plead the specific location, without more, is still too small of a burden to overcome the incentive presented.

B. Simple but Strict: The Specific Class, Timing, and Location Test

To resolve some of the problems with toxic torts and plausibility pleading, courts should apply the following two-pronged test to assess whether a claim is plausible enough under *Twombly* and *Iqbal* to survive a motion to dismiss: (1) determine whether the plaintiff pleads a specific class of products or substances and, if yes, (2) determine whether the plaintiff is able to plead where and when the exposure took place. To return to the introductory hypothetical complaint, which was tragically dismissed:

> Plaintiff developed prostate cancer after prolonged exposure to BPA in plastics manufactured by Company Y. Plaintiff was exposed while employed at company Y from 1990 - 2010.

Although unable to pass the specific identification test, the claim complies with the Specific Class, Timing, and Location Test. It specifically describes the toxic substance, the product containing the substance, and the location and time of exposure.

This test is not a perfect solution. It admittedly places a fairly high burden on toxic torts plaintiffs in adequately pleading their claims. However, courts must balance the interests of serving justice for injured plaintiffs, encouraging safe workplace environments and products against the prudential concerns of rising discovery costs and the burden of the increasing volume of complex litigation on the judicial system. If courts are left with this difficult balancing act, public policy considerations, as the Court averred in *Twombly* and *Iqbal*, strongly support a slight tilt in favor of a heightened standard, even if it means some meritorious claims will be unjustly dismissed. The benefits of uniformly implementing this new test outweigh these negative aspects, and the burden is not so high as to be dubbed insurmountable in most cases.

The first prong of the test is more plaintiff friendly, but it is not so lenient that it allows plaintiffs to access discovery simply by pleading a general class of products. For instance, it is not enough for the plaintiff to allege they were exposed to products containing BPA, a general class. Rather, for their claim to be plausible, they must allege a specific class of products: BPA contained in plastics manufactured by Company Y. While even this prong may bar some plaintiff's claims, the burden is not so great as to lock the doors of discovery to any plaintiff who cannot specifically identify the product. It is simply too difficult for many plaintiffs to identify specific serial numbers or product lines; however, it is reasonable to require plaintiffs

to at least identify the specific class of products that caused the harm without accessing discovery.

The second prong is slightly more defendant friendly. Requiring the plaintiff to plead a specific location and time of exposure may prove to be difficult enough that it bars some meritorious claims. Considering the issues that many toxic torts plaintiffs must confront, including the fact that exposure often took place over the course of years and in a variety of contexts, this prong of the test is stringent enough that it bars most frivolous suits that survive the first prong. Furthermore, even if this prong results in dismissal of some meritorious claims, the burden is not insurmountable and a large percentage of meritorious plaintiffs will be able to accurately plead the location and time of exposure.

This hybrid approach to toxic tort claims and plausibility establishes a balance between the competing concerns posed by plausibility vis-à-vis less stringent standards. It can be readily implemented through the judiciary. Although there are concerns about judicial activism, the inherent ambiguity of plausibility encourages some degree of judicial activism. A judicial implementation of this test is more efficient than waiting for a legislative solution or waiting for the Federal Rules of Civil Procedure to be redrafted to accommodate the problem. However, if the rules were redrafted in the future to accommodate this rule, it could be more uniformly implemented than it could by the judiciary alone. The best feature of this test is its simplicity. Judges can easily apply the unambiguous two-step approach. Time and money will be saved when plaintiffs can easily discern whether their claim will be plausible. Additionally, the structure of the test provides plaintiffs with an easy model to follow in drafting their complaints. The last question is whether this new test will comport with the Court's latest jurisprudence on plausibility.

C. Fitting the Square in the Triangle: Congruence is Key!

In recent years, the Supreme Court provided hints of guidance in a few decisions that addressed plausibility, albeit not in the specific context of toxic torts claims. *Fifth Third Bancorp v. Dudenhoeffer* was a securities case in which the plaintiffs alleged that the fiduciaries of their "employee stock ownership plan" (ESOP) breached their duty of prudence.[184] Specifically, they alleged said fiduciaries should have realized the company's stock was overvalued and sold it.[185] Instead, the fiduciaries continued to invest the

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184 Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2464 (2014).

185 *Id.* at 2464.

plaintiffs' money, and the stock subsequently plummeted in value by seventy-four percent, causing the loss of a substantial portion of the plaintiffs' retirement funds.[186]

The Court held claims that a fiduciary had a duty to ascertain stock market fluctuations solely on the basis of available public information are implausible in most situations.[187] However, the Court did not decide whether it would be possible for the plaintiffs to make the appropriate plausible allegations using "special circumstance[s]."[188] Furthermore, the Court explicitly rejected the defendants contention that plausibility required the plaintiffs to overcome a "presumption of prudence," because such a presumption would render potential plaintiffs incapable of stating a plausible claim absent extreme economic hardship on the part of the employer.[189] Thus, the pertinent question for these types of cases is whether a claimant can plausibly show that a fiduciary, faced with the same situation as the defendant, could not have decided that desisting purchases or making the public aware of inauspicious information would hurt the fund more than help it.[190]

The lesson that can be derived from this decision is that, at least in the context of securities, plausibility does not impose an impossibly high pleading standard. It is enough that the plaintiff "provide[s] the context necessary to show a plausible claim for relief."[191] Even if the plaintiff pleads a claim that is implausible on its face, *Dudenhoeffer* implies that such a claim could pass plausibility by pleading "special circumstances."[192]

In *Johnson v. City of Shelby*, the plaintiffs brought a claim for violation of their Fourteenth Amendment due process rights following termination from their jobs as police officers.[193] The district court granted summary judgment in favor of the defendants because the plaintiffs failed to cite to 42 U.S.C. § 1983 in their complaint.[194] The Supreme Court reversed: "Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief,'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim

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186 *Id*.

187 *Id*. at 2471.

188 *Id*. at 2472.

189 *Id*. at 2471-72.

190 *Id*. at 2472.

191 *Id*. at 2471 (citing Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554–63 (2007)); *see also* Allen v. GreatBanc Trust Co., 835 F.3d 670, 674 (7th Cir. 2016) (reversing the district court's grant of dismissal for failure to state a plausible claim, and declining to extend the *Dudenhoeffer* special circumstance rationale to private stock contexts).

192 *Dudenhoeffer*, 134 S. Ct. at 2471.

193 Johnson v. City of Shelby, 135 S. Ct. 346, 346 (2014).

194 *Id*.

asserted."[195] Therefore, a heightened pleading standard did not bar the plaintiff's claim for failure to cite the statute.[196] The Court cited a series of other cases that supported this position.[197]

The Court interpreted *Twombly* and *Iqbal* as requiring only that the plaintiff "must plead facts sufficient to show that her claim has substantive plausibility."[198] It was therefore improper to grant summary judgment in favor of the defendants because the plaintiffs adequately communicated the factual basis of their claim to the defendants. Plausibility did not mandate any further showing to survive dismissal.[199] As in *Dudenhoeffer*, the Court in *Johnson* reaffirmed the premise that plausibility is not meant to create an impossibly stringent standard, but it is rather more in alignment with the plain text of Rule 8(a)(2). As long as the plaintiffs are able to sufficiently plead the substantive factual basis for their claim, plausibility does not require dismissal for technical deficiencies.

The proposed two-pronged test is in concurrence with these recent Supreme Court decisions relating to plausibility. A specific identification rule would be similar in its effect to the presumption of prudence requirement that was rejected by the Court in *Dudenhoeffer* because it would similarly render it nearly impossible for plaintiffs in toxic tort cases to survive motions to dismiss. However, a general class pleading rule would not sufficiently state the substantive factual basis of the claim. The specific class of products prong is in between these two extremes, and the second prong, requiring specific location and temporal information, acts in a similar manner to the special circumstance approach that the Court alluded to in *Dudenhoeffer*. Despite the shortcomings of the test, the fact that it adheres to recent Supreme Court jurisprudence lends it legitimacy and separates it from other solutions that have been advocated but lack this relationship to the Court's recent plausibility interpretations.

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195 *Id. at* 346 (citation omitted) (quoting FED. R. CIV. P. 8(a)(2)).

196 *Id.*

197 *See* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993) (a federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability"); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (imposing a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)").

198 *Johnson*, 135 S. Ct. at 347.

199 *Id.*

IV. CONCLUSION

Since the abrogation of *Conley* notice pleading, controversy has been the mark of the new plausibility pleading standard. Reactions have encompassed a broad spectrum, ranging anywhere from identifying issues and proposing solutions, to arguing that the new system did not constitute a change in pleading standards to the point where any solution was required. The reality is that plausibility pleading has particularly affected the way that complex claims, like toxic torts, are pleaded. It has resulted in disproportionate dismissal of these claims and left courts and plaintiffs in bewilderment as they struggle to apply the plausibility test to complex litigation. By adopting a two-pronged approach that requires plaintiffs to identify the specific class of products, as well as plead the location and time of exposure, the confusion can largely be eliminated.

The approach is still stringent enough to comply with plausibility and support its policy considerations. At the same time, it is plaintiff friendly enough that large numbers of meritorious claims will no longer be dismissed for failure to comply with plausibility. The test can be adopted judicially at first, in order to alleviate the problem as quickly as possible, and, if it is adopted on a large scale, it will solve many of the issues with ambiguity and confusion for both judges and plaintiffs. Adopting plausibility pleading does not mean that ambiguity and injustice must prevail in the realm of toxic torts. The two-pronged test will save plaintiffs from insurmountable burdens and save the judicial system from the slippery slopes of hearing frivolous claims. In the modern age when we are exposed to hundreds of potentially toxic chemicals in myriad products on a daily basis, we adopt impossibly high pleading standards to society's detriment.