



Environmental Newsletter

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The Pleading Threshold in Environmental Cleanup Cases (*Twombly*, *Iqbal*, and What to Do)

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Long gone are the days of pleading a claim by simple recitation of the elements. In CERCLA and State Superfund cases, the level of detail required in a complaint is evolving. The general rule of thumb: the more specific facts included, the less vulnerable to attack a complaint will be.

Supreme Court Decisions on Pleading Standards (*Twombly* and *Iqbal*)

A defendant can move to dismiss a case before answering for failure to state a claim upon which relief can be granted. For decades, such a motion was granted only when it appeared beyond doubt that the plaintiff could prove “no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 46 (1957). But, in the landmark 2007 decision, *Bell Atlantic Corp. v. Twombly*, the Supreme Court retired the “no set of facts” language. The Supreme Court emphasized that pleaders must “show” they are entitled to relief. 550 U.S. 544, 563. To meet that burden, allegations must not just be possible but plausible. *Id.* at 555-561.

The Supreme Court went further in its 2009 decision, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, and introduced a two-step process for deciding motions to dismiss for failure to state a claim. First, a court discounts allegations in a complaint that amount to “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* at 1949. Second, the court examines the remaining allegations to determine whether they “state a plausible claim for relief.” A claim is plausible if its factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Twombly and *Iqbal* Played Out in the Context of Superfund

How the *Twombly* and *Iqbal* rules shake out in CERCLA and State Superfund contexts is still at question. Superfund cases often lend themselves to scant pleading: the site is a facility; hazardous substances were released; the defendant is liable as an arranger, transporter, or current or former owner/operator; and response costs were incurred consistent with the National Contingency Plan. In multi-party cleanup actions, where disposals are alleged to occur over generations, and by long defunct entities, producing the factual content to support allegations in the complaint can pose special challenges.

A pending CERCLA case in U.S. District Court in California has put the *Twombly* and *Iqbal* rules to test. See *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., et al.*, Case 5:09-cv-04485-JF (N.D. Cal. Jun. 23, 2010) (order granting motions to dismiss with leave to amend). Chubb is seeking reimbursement of response costs paid on behalf of its insured under CERCLA § 112(c). The court twice ordered Chubb to amend its complaint after multiple defendants moved to dismiss. The first time, the court rejected Chubb’s complaint as consisting mostly

of recitations of the statutory elements of CERCLA claims and as containing insufficient facts to support a plausible basis for relief. The **second time**, the court found Chubb's complaint to still lack sufficient specifics relating to the type of substances released, the defendants' activities that resulted in a release, and the nexus between defendants' release and the costs incurred. Chubb filed its **Second Amended Complaint** July 23 to allege significantly more facts, like specific dates, types of hazardous substances and modes of release, and results of sampling. On August 13, Chubb stipulated with several defendants to extend the time to file answers; that stipulation specifies that certain defendants may file a motion to dismiss the Second Amended Complaint. Whether defendants will move a third time to dismiss this complaint is yet to be seen.

Implications and Practice Tips

The Superfund plaintiff that makes barebones allegations must be wary of the likelihood that defendants will move to dismiss, move to strike, and/or move for more definite statement and that the court will grant the motion, sometimes with leave to amend. These defense costs can be avoided from the outset by following a general Who, What, When, Where, and How formula to include as much detail as possible:

- If a defendant is being sued for actions or inactions of a subsidiary, agent, or employee, assert specific facts to establish the defendant's control over the other's actions;
- Identify the type or types of hazardous substances released, and if possible, illustrative data;
- Include specific dates of ownership and operation, arrangements and transport for disposal, and if known, dates of actual releases;
- Identify the location where the particular hazardous substances have come to be located;
- Specify the activity or activities each defendant engaged in that resulted in a release; and
- Assert particular facts that establish a nexus between defendant's releasing activities and the response costs incurred.

This new rule enacts a particular waiver for many cleanup costs. It is frequently difficult to obtain, before discovery, detailed factual information about a defendant's operational history. Plaintiffs may want to consider securing expert reports and testimony **before** filing in order to provide the support needed to withstand a motion to dismiss.

If you have any questions about this Newsletter, please contact the author listed above or the Riddell attorney with whom you normally consult.

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