

10-1-2021

The Implausibility Standard for Environmental Plaintiffs: The Twiqbal Plausibility Pleading Standard and Affirmative Defenses

Celeste Anquonette Ajayi

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Common Law Commons](#), [Courts Commons](#), [Environmental Law Commons](#), [Jurisdiction Commons](#), [Law and Society Commons](#), [Legal Remedies Commons](#), [Litigation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Celeste Anquonette Ajayi, *The Implausibility Standard for Environmental Plaintiffs: The Twiqbal Plausibility Pleading Standard and Affirmative Defenses*, 96 Wash. L. Rev. 1113 (2021).

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

THE IMPLAUSIBILITY STANDARD FOR ENVIRONMENTAL PLAINTIFFS: THE *TWIQBAL* PLAUSIBILITY PLEADING STANDARD AND AFFIRMATIVE DEFENSES

Celeste Anquonette Ajayi*

Abstract: Environmental plaintiffs often face challenges when pleading their claims. This is due to difficulty in obtaining the particular facts needed to establish causation, and thus liability. In turn, this difficulty inhibits their ability to vindicate their rights. Prior to the shift in pleading standards created by *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, often informally referred to as “*Twiqbal*,” plaintiffs could assert their claims through the simplified notice pleading standard articulated in *Conley v. Gibson*. This allowed plaintiffs to gain access to discovery, which aided in proving their claims.

The current heightened pleading standard established by *Twiqbal*, also referred to as the plausibility pleading standard, serves as a gatekeeping mechanism that keeps environmental plaintiffs out of courts and away from justice by dismissing meritorious claims. Meanwhile, courts have repeatedly refused to apply the heightened pleading standard to defendants’ pleadings, namely affirmative defenses, resulting in a split across the circuit courts. This practice aids defendants at the expense of plaintiffs by allowing defendants to adhere to a less stringent standard, putting plaintiffs on unequal footing. The standard allows defendants to make conclusory assertions, which may effectively defeat a plaintiff’s case. Further, this practice increases the possibility of judicial bias because various courts across the United States apply different standards to both parties. If courts instead uniformly applied the heightened pleading standard to both plaintiffs and defendants alike and allowed environmental plaintiffs relaxed specificity requirements due to their limited access to information at the pleading stage, it could address some of the inequalities created as a result of *Twiqbal*.

This Comment examines the impact of the heightened pleading standard on environmental plaintiffs and proposes the circuit split be reconciled. Part I discusses the massive shift to the heightened pleading standard from *Conley* to *Twombly* and *Iqbal*. Part II explains three main critiques of the *Twiqbal* plausibility pleading standard. Part III discusses the unique attributes of environmental litigation that are in conflict with the heightened pleading standard. Part IV explains the conflict between the heightened pleading standard and environmental litigation through a case study of the different ways in which courts have inconsistently applied the heightened pleading standard to plaintiffs’ claims and defendants’ affirmative defenses. Finally, Part V argues that courts should apply the *Twiqbal* standard in a consistent manner to both plaintiffs and defendants, as well as provide flexibility to environmental plaintiffs’ pleadings to ensure plaintiffs have adequate access to the requisite information needed to sufficiently plead their cases and receive justice.

* J.D. Candidate, University of Washington School of Law, Class of 2022. I want to thank Professor Jeff Feldman for his guidance and perspective in the development of this Comment. I also want to thank my colleagues in *Washington Law Review* Notes & Comments Department for their dedication to and input into this Comment, particularly Kayla Ganir, Caroline Sung, and Zander Hoke.

INTRODUCTION

Prior to *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*,² the Federal Rules of Civil Procedure (FRCP) allowed plaintiffs to assert their claims through simplified notice pleading and prove their claims through facts obtained during the discovery process.³ Now, the plausibility pleading standard established in *Twombly* and *Iqbal* undermines this process and places additional burdens on plaintiffs seeking to bring environmental claims.⁴ If a toxic tort or contamination claim is an aggrieved party's only cause of action, justified plaintiffs may not be able to vindicate their rights in the court system at all.⁵

Environmental law is a unique area of law that often requires a basic understanding of the underlying science to recognize when there is an environmental harm.⁶ Since the shift to the plausibility pleading standard, environmental practitioners find asserting claims burdensome due to difficulty in obtaining the necessary facts to establish that the defendant caused their harm.⁷ These necessary facts tend to be extremely particularized but often unobtainable without discovery.⁸ As a result,

1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009).

3. See Conley v. Gibson, 355 U.S. 41, 45, 47 (1957).

4. Kevin T. Haroff, *Open or Shut—Pleading Federal Environmental Claims After Twombly and Iqbal*, 13 No. 2 ABA ENV'L LITIG. & TOXIC TORTS COMM. NEWSL. (Am. Bar Ass'n, New York, N.Y.), July 2012, at 3.

5. Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2261–62 (2015).

6. See Jeff Surtees, *What Is Environmental Law and Why Is it Hard to Understand?*, LAWNOW (Jan. 4, 2017), <https://www.lawnow.org/environmental-law-hard-understand> [<https://perma.cc/S9R9-FNL3>]; Eric Biber, *Environmental Law in Canada*, LEGAL PLANET (Apr. 30, 2012), <https://legal-planet.org/2012/04/30/environmental-law-in-canada/> [<https://perma.cc/2BTH-N5ZS>]. Both the United States and Canada have similar environmental laws, including the United States' National Environmental Policy Act and Canada's federal environmental review statute, thus a need for a basic understanding of the science underlying harm is relevant in both countries. Further, Canada's environmental laws are much less strict than the United States' laws.

7. See Scott Foster, *Breaking the Transsubstantive Pleading Mold: Public Interest Environmental Litigation After Ashcroft v. Iqbal*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 885, 903–04 (2011); *Causation in Environmental Law*, *supra* note 5, at 2261.

8. Foster, *supra* note 7, at 902. Foster discusses two cases—*Goliad Cnty. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688 (S.D. Tex. June 5, 2009), and *Env't World Watch, Inc. v. Walt Disney Co.*, No. CV 09-04045 DDP, 2009 WL 3365915 (C.D. Cal. Oct. 19, 2009)—where the importance of discovery was shown in environmental litigation. *Id.* In *Goliad County*, the court found that the plaintiff lacked sufficient factual allegations under *Iqbal* because they could not show intention of the defendant to contaminate water. *Id.* In *Environmental World Watch*, the court found that the plaintiffs' factual allegations were sufficient even though they were unable to show the toxicity level of Disney's Cr(VI) discharge. *Id.* Cr(VI) is “one of the valence states . . . of the element chromium,” which is often used in industrial processes and “known to cause cancer.” *Hexavalent*

pleading has become a gatekeeping mechanism that keeps environmental plaintiffs out of courts and away from justice.⁹ This is particularly evident in toxic tort and environmental contamination cases due to the slow-revealing nature of environmental harm.¹⁰ Meanwhile, defendants may simply assert a FRCP 12(b)(6) motion to dismiss to efficiently end a claim against them or assert affirmative defenses in a conclusory manner.

Various criticisms of the *Twombly* and *Iqbal* rulings have come to light as a result of the cases' establishment of the plausibility pleading standard. Three main criticisms are that the standard results in plaintiffs' inability to receive and access justice;¹¹ unfair burdens on plaintiffs;¹² and judicial bias leading to nonuniformity.¹³ These injustices must be addressed to ameliorate the harm that *Twiqbal* has caused.

Part I of this Comment discusses the shift in pleading standards from notice pleading set out in *Conley v. Gibson*¹⁴ to heightened pleading established by both *Twombly* and *Iqbal* and the circuit split that has occurred as a result. Part II explains three main critiques the *Twiqbal* plausibility pleading standard has generated. Part III discusses the unique

Chromium, U.S. DEP'T OF LABOR, <https://www.osha.gov/hexavalent-chromium> [<https://perma.cc/9DVA-QJJU>]. Both cases involved a missing fact, but the courts reached two different conclusions. Foster, *supra* note 7, at 902. *Goliad County* “represents an entire class of cases where potentially meritorious claims cannot move into discovery on the basis of pleading a fact that has not, but might, come to light.” *Id.* This shows not only the need for discovery, but also how the heightened pleading standard has disparate impacts. *Id.*

9. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010).

10. See *Causation in Environmental Law*, *supra* note 5, at 2261–62; Foster, *supra* note 7, at 903–04.

11. See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.–C.L. L. REV. 399, 405 (2011) (stating that *Twiqbal* “undercut[] the effectiveness of congressional statutes” that were intended to “compensate citizens for injury” and gave trial judges “enormous discretionary power to dismiss complaints,” even if the cases would have been meritorious).

12. See, e.g., Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22*, ABA J.: THE NAT'L PULSE (Jan. 1, 2011, 8:50 AM), https://www.abajournal.com/magazine/article/for_federal_plaintiffs_twombly_and_iqbal_still_present_a_catch-22 [<https://perma.cc/G4U3-A4M7>] (stating that *Twiqbal* created an unfair burden on plaintiffs without the tool of pre-trial discovery because if detailed facts are needed from the beginning, plaintiffs “may have to foot the bill to investigate on their own,” which creates a burden at best, “just to have [their] case heard on the merits” or at worst, that is a “complete barrier to the courthouse”).

13. See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 82 (2010) (stating that *Twiqbal* put an “emphasis on the conclusory nature of an allegation,” which now requires judges to make a distinction between conclusory and non-conclusory allegations. This emphasis creates a uniformity issue among courts because there has not been a “principled and uniform way” in which judges can make this distinction.).

14. 355 U.S. 41 (1957).

attributes of environmental litigation that are in conflict with the heightened pleading standard. Part IV explains the conflict between the heightened pleading standard and environmental litigation through a case study of the different ways in which courts have inconsistently applied the heightened pleading standard to plaintiffs' claims and defendants' affirmative defenses. Finally, Part V argues that courts should apply the *Twigbal* standard in a consistent manner to both plaintiffs and defendants and provide flexibility to environmental plaintiffs' pleadings to not only resolve the circuit split, but ensure plaintiffs have adequate access to the requisite information needed to sufficiently plead their cases.

I. THE MASSIVE SHIFT IN PLEADING STANDARDS

Pleading is a necessary step to initiate a civil suit that has evolved over time from the notice pleading established in *Conley v. Gibson* to the more stringent plausibility pleading standard created by *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. Generally, the person bringing suit, the plaintiff, must file a complaint that lays out their version of facts and the cause of action, "highlighting the factual and legal basis of the suit."¹⁵ The defendant then files an answer. This includes an explanation as to why the plaintiff should not prevail and may also include additional facts or an excuse for the defendant's actions.¹⁶ The defendant may also file a counterclaim, arising from the same facts, asserting that the plaintiff has caused them harm.¹⁷ Either the defendant or the plaintiff may have to file a reply answering new allegations in the pleadings.¹⁸

The Federal Rules of Civil Procedure (FRCP) govern the general rules of pleading for all parties to civil litigation. Under FRCP 8(a), a plaintiff's claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.¹⁹

Under FRCP 8(b)(1), a defendant responding to a pleading must:

15. *How Courts Work: Steps in a Trial: Pleadings*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleadings (last visited Aug. 4, 2021) [hereinafter *How Courts Work*].

16. *Id.*

17. *Id.*

18. *Id.*

19. Fed. R. Civ. P. 8(a).

“(A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party.”²⁰ Under FRCP 8(c), when responding to a pleading, a party must “affirmatively state any avoidance or affirmative defense.”²¹

There are two distinct types of defenses in civil litigation: factual defenses to a plaintiff’s claim and affirmative defenses. A factual defense is an “attack on a plaintiff’s prima facie case” and directly contradicts elements of the claim.²² These defenses “negate an element of the plaintiff’s claim” or state that the plaintiff cannot meet its burden of proof.²³ By contrast, affirmative defenses assert that, even if the factual allegations asserted in the complaint are true,²⁴ the defendant should avoid liability “based on additional allegations of excuse, justification or other negating matters.”²⁵

When reviewing the plaintiff’s complaint, the court will ignore conclusions of law and assume well-pleaded facts to be true.²⁶ These well-pleaded facts are not mere “recitals of the elements of a cause of action,” but are based upon factual information.²⁷ Then, the court will determine whether the claim is plausible. The claim is plausible when the factual content of the plaintiff’s complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁸ To meet the plausibility standard, the plaintiff must show it is more likely than not that the defendant is liable based on well-pleaded facts.²⁹ Although drawing inferences may be necessary, the defendant’s

20. *Id.* at 8(b)(1).

21. *Id.* at 8(c)(1). These affirmative defenses include, but are not limited to, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, res judicata, statute of frauds, statute of limitations, and waiver. *Id.*

22. Julianne M. Hartzell, *United States: ‘The Forgotten Pleading’ Serves as Guide to Determining Best Defense*, MONDAQ (Aug. 1, 2018), <https://www.mondaq.com/unitedstates/trials-appeals-compensation/724132/the-forgotten-pleading39-serves-as-guide-to-determining-best-defense> [<https://perma.cc/K4W7-ESD9>].

23. *Id.*

24. *Affirmative Defense*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_defense (last visited Aug. 18, 2021).

25. Hartzell, *supra* note 22; *see also How Courts Work*, *supra* note 15 (explaining that in a defendant’s answer to the plaintiff’s complaint, the defendant may “offer additional facts” or “plead an excuse”); *Sloan Valve Co. v. Zurn Indus., Inc.*, 712 F. Supp. 2d 743, 749 (N.D. Ill. 2010).

26. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

27. C. Kevin Marshall, *Pleading Facts and Arguing Plausibility: Federal Pleading Standards a Year After Iqbal*, JONES DAY (June 2020), <https://www.jonesday.com/en/insights/2010/06/pleading-facts-and-arguing-plausibility-federal-pleading-standards-a-year-after-iqbal> [<https://perma.cc/QK46-5MD4>] (quoting *Ashcroft*, 556 U.S. at 678).

28. *Ashcroft*, 556 U.S. at 678.

29. *Id.*

liability for misconduct must be more than a possibility, meaning the plaintiff must nudge the claim across the line from possible to plausible.³⁰ Plausibility has not been adequately defined by the courts, but *Twiqbal* established that allegations are not entitled to be deemed true solely because they are bare assertions, conclusory, or a formulaic recitation of the elements of a claim.³¹ This plausibility pleading standard established in *Twiqbal* shifted massively from the notice pleading standard set out in *Conley*.

A. *The Conley v. Gibson Notice Pleading Standard*

Pleading requirements shifted completely from the *Conley v. Gibson* notice pleading standard, which stood for fifty years, as a result of the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* cases. The term “notice pleading” was first introduced in *Conley* by the United States Supreme Court.³²

In *Conley*, African American railway employees alleged in their complaint that an exclusive bargaining agreement between the Railway and the Union under the Railway Labor Act (RLA) gave employees in the bargaining unit certain protections from discharge and loss of seniority.³³ The railroad claimed the union completely abolished forty-five jobs that were held by African American employees.³⁴ However, the plaintiffs alleged that the Railroad actually filled these forty-five positions with white employees as the African Americans were “ousted.”³⁵ *Conley* held that the FRCP do not require a claimant to set out in detail the facts upon which they base their claim and that a complaint should be dismissed only when it appears “beyond doubt that the plaintiff can prove no set of facts” that support their allegations.³⁶ Under *Conley*, the plaintiffs only needed to notify the defendants of the issues raised. Therefore, the Supreme Court held that the African American railway employees’ complaint was sufficient in alleging a breach of the union’s statutory duty under the RLA to represent all employees within the union fairly and without hostile discrimination.³⁷ If these allegations were proven, then there was a

30. *Id.*

31. Brandon L. Garrett, *Applause for the Plausible*, 162 U. PA. L. REV. 221, 221 (2014).

32. Robin J. Effron, *Putting the “Notice” Back into Pleading*, 41 CARDOZO L. REV. 981, 996 (2020).

33. *Conley v. Gibson*, 355 U.S. 41, 43 (1957).

34. *Id.*

35. *Id.*

36. *Id.* at 45.

37. *Id.* at 48.

“manifest breach of the Union’s statutory duty,” giving the petitioners a claim upon which relief could be granted.³⁸ Thus, there was sufficient evidence of a manifest breach because the complaint stated that they were wrongfully discharged and that the Union refused to protect them.³⁹ With liberal opportunity for discovery and other pretrial procedures established by the FRCP, this simplified “notice pleading” was long believed to be sufficient.⁴⁰ This standard stood for decades until *Bell Atlantic Corp. v. Twombly* was decided.

B. The Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal Shift to the Plausibility Pleading Standard

The notice pleading standard stood for decades until *Bell Atlantic Corp. v. Twombly* was decided. In 2007, Twombly, a subscriber of local telephone services, alleged that Bell Atlantic and other local telephone companies conspired to restrain trade by inflating charges for local telephone and high-speed Internet services.⁴¹ He further alleged that the companies engaged in parallel conduct in their service areas to inhibit growth of new companies.⁴² The Supreme Court held the complaint did not include facts to suggest that refraining from competition was in conflict with the companies’ economic interests or that the actions taken were because of a conspiracy.⁴³ This holding was due to the complaint’s conclusory statements and lack of particular facts.⁴⁴ After the *Twombly* ruling, plaintiffs now needed to plead in their complaint “something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”⁴⁵ This was a huge shift from the simple notice pleading suggested in *Conley* to a much more stringent and demanding standard that gives judges enhanced discretion.⁴⁶ The *Twombly* Court stated that courts must assess the pleadings’ sufficiency and determine if the claim crosses the line from “conceivable to plausible.”⁴⁷ The Court’s basis for inserting this plausibility requirement

38. *Id.* at 46.

39. *Id.*

40. *Id.* at 47.

41. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

42. *Id.*

43. *Id.* at 564–70.

44. *Id.*

45. *Id.* at 555 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004)).

46. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *DUKE L.J.* 1, 22 (2010).

47. *Twombly*, 550 U.S. at 570.

stemmed from the word “showing” in FRCP 8(a).⁴⁸ The Court believed a plaintiff must lay out detailed facts of a defendant’s behavior that directly *shows* a plaintiff’s entitlement to relief, rather than merely *any* set of facts that leave “open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”⁴⁹ This standard was further defined by *Ashcroft v. Iqbal*.

In 2009, Javaid Iqbal, a Muslim Pakistani pretrial detainee, filed suit against past and present government officials claiming that their actions against him were unconstitutional with regard to the harsh conditions of his confinement.⁵⁰ Iqbal’s complaint stated that former Attorney General John Ashcroft and Director of the Federal Bureau of Investigation (FBI) Robert Mueller designated him a “person of high interest” based on his race, religion, or national origin in violation of the First and Fifth Amendments.⁵¹ Iqbal asserted that Mueller directed the FBI to detain Arab Muslim men during its September 11 investigation and that Ashcroft was the “principal architect” of the agency’s discriminatory policy.⁵² Iqbal argued that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” him to harsh conditions in confinement as a policy matter.⁵³ Here, the Supreme Court held that Iqbal’s complaint was insufficient, because Iqbal’s various claims were conclusory, were not entitled to be assumed true, and Ashcroft and Mueller’s approval of the detention policy did not “plausibly” suggest that they purposefully discriminated based on race, religion, or national origin.⁵⁴

The Court in *Iqbal* extended the plausibility standard to all civil actions and took the pleading requirements of *Twombly* further,⁵⁵ stating that “recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁵⁶ To meet the plausibility standard, the plaintiff’s claim must contain factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” rather than a mere possibility.⁵⁷ *Iqbal* implemented a two-step process: (1) “identify the unadorned matter and discard it”; and (2) “take the remaining well-pleaded factual allegations,

48. *Id.* at 555.

49. *Id.* at 561.

50. *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

51. *Id.* at 669.

52. *Id.*

53. *Id.* at 680.

54. *Id.* at 683.

55. *Id.* at 684.

56. *Id.* at 678.

57. *Id.* at 663.

accept them as true, ‘and then determine whether they plausibly give rise to an entitlement to relief.’”⁵⁸ A court does not need to take facts as true if they are deemed conclusory. If facts are deemed conclusory, a court must ignore them.

C. *Twiqbal Split Across the Circuits*

Despite the Supreme Court’s *Twiqbal* rulings, federal district courts are divided on whether the heightened pleading standard applies to affirmative defenses.⁵⁹ This division means the standard is applied differently depending on the court in which the case is filed. Therefore, plaintiffs with similar harms receive “different treatment across jurisdictions.”⁶⁰ Further, the United States Circuit Courts continually avoid the question of whether the *Twiqbal* standard applies to affirmative defenses.⁶¹ As a result of this avoidance, the standard is applied differently across the circuits. In *Jones v. Bryant Park Market Events, L.L.C.*,⁶² the Second Circuit stated that it did not need to address the plausibility question because “even if [it] were to apply the *Iqbal-Twombly* standard to affirmative defenses,” it would not help the plaintiff.⁶³ Likewise, in *Depositors Insurance Co. v. Estate of Ryan*,⁶⁴ the Sixth Circuit stated that it was unnecessary for it to resolve the plausibility issue because the district court did not apply the standard to the appellants’ affirmative defenses.⁶⁵ Additionally, in *Herrera v. Churchill McGee, L.L.C.*,⁶⁶ the Sixth Circuit further stated that it had “no occasion to address, and express[ed] no view” regarding *Twombly* and *Iqbal* on affirmative defenses.⁶⁷ As a result, circuit and district courts have been inconsistent in applying the *Twombly* and *Iqbal* standard to affirmative defenses.⁶⁸

58. Matthew Schafer, *Ten Years Later: Pleading Standards and Actual Malice*, COMMC’NS. LAW., Winter 2020, at 1, 34 (quoting *Ashcroft*, 556 U.S. at 679).

59. See *infra* Part IV.

60. Deborah Beim, *Intercircuit Splits*, UNIV. OF MICH. COLL. OF LITERATURE, SCI., & THE ARTS, <https://sites.lsa.umich.edu/dbeim/research/intercircuit-splits/> [<https://perma.cc/XKR5-HYLJ>].

61. See *infra* notes 62–68.

62. 658 F. App’x 621 (2d Cir. 2016).

63. *Id.* at 624.

64. 637 F. App’x 864 (6th Cir. 2016).

65. *Id.* at 869.

66. 680 F.3d 539 (6th Cir. 2012).

67. *Id.* at 547 n.6.

68. See Jonathan M. Herman, Jaime Stilson & Kaleb McNeely, *Plausibility in the Eye of the Beholder: Circuits Address How to Read Twombly*, 32 ANTITRUST 32, 35 (2017).

II. ISSUES WITH THE *TWIQBAL* HEIGHTENED PLEADING STANDARD

Since the *Twombly* and *Iqbal* rulings, various criticisms have come to light as a result of the cases' establishment of the plausibility pleading standard. Three main criticisms of the pleading standard among scholars include plaintiffs' inability to receive and access justice, unfair burdens on plaintiffs, and judicial bias leading to nonuniformity.⁶⁹ *Iqbal* is criticized for rewriting FRCP 8 to immunize executive officials at the expense of plaintiffs.⁷⁰ Further, the ruling portrays *Twiqbal*'s impact on access to justice and fairness as a result of the highest court's susceptibility to bias.⁷¹

A. *Plaintiffs' Inability to Receive and Access Justice*

The *Twiqbal* shift created concern about the inability of plaintiffs to access justice for their meritorious claims.⁷² *Iqbal* created a roadblock to the courts for many types of plaintiffs by sustaining the belief that the government may legally rely on "race, religion, or national origin in the wartime context."⁷³ The commitment to allow plaintiffs full and equal

69. See *supra* notes 11–13.

70. Cara Shepley, Note, *Ashcroft v. Iqbal: How the Supreme Court Rewrote Rule 8 to Immunize High-Level Executive Officials from Post-9/11 Liability (A Plausible Interpretation)*, 69 MD. L. REV. ENDNOTES 69, 101 (2010).

71. Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEORGETOWN L.J. 379, 439 (2017). Sinnar criticizes the court's presentation of *Javaid Iqbal* without adequate consideration of the roles of race and religion in detentions after September 11, calling the court "[o]blivious" to *Iqbal* as a person, "blind" to race and religion with regard to post-September 11 detentions, and "indifferent" to the harm of the practices it legitimized. *Id.* While the court majority believed that the detention decisions were based on neither racial or religious criteria, or that use of such criteria was "rational and justified," the process of detainee identification and classification may have heavily relied on these factors regardless of the lack of connections these individuals had to terrorism. *Id.* at 419–25. See also Shepley, *supra* note 70, at 96–100 (discussing that while Justice Kennedy believed that Ashcroft's actions regarding the September 11 detention policy showed legitimate and necessary security measures after a homeland attack, Justice Souter came to a nearly opposite conclusion). Shepley argues that the contrast between Kennedy and Souter's opinions show the inherent subjectivity given to the judicial branch and criticizes the subjectivity displayed in *Iqbal* as shifting away from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which held that judicial review is saying what the law is rather than what it should be. *Id.* at 114. The Supreme Court seems to have effectively decided what Federal Rule of Civil Procedure 8 is rather than adhering to congressional intent of the FRCP. *Id.* at 117.

72. See Burbank & Subrin, *supra* note 11; Gordon, *supra* note 12; Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1568 (2016).

73. Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 505 (2010).

access to the courts has been repudiated.⁷⁴

Scholars and members of Congress worry that the heightened pleading standard has and will continue to diminish plaintiffs' ability to effectively bring suit against their wrongdoers.⁷⁵ While defendants have the ability to bring FRCP 12(b)(6) motions to dismiss "without ever filing a pleading," plaintiffs "will be left out in the cold" because of the heightened burden on pleadings.⁷⁶ This is especially true in toxic tort and discrimination cases, where discovery is essential to establish the facts.⁷⁷ Without discovery, obtaining the facts needed to comply with the heightened pleading standard is extremely difficult.⁷⁸

In environmental cases, the plaintiff now must plead a "factually plausible case" without access to the "tools of discovery to uncover the kind of evidence that would make their claim plausible."⁷⁹ Defendants "inherently possess[] all the factual information," especially in cases regarding toxic chemicals and pesticides, because they have the ability to conceal this evidence.⁸⁰ In these cases, it is difficult to determine the cost of remedial measures resulting from pollutants and trace the specific harm with the specific chemical, source, and party responsible.⁸¹ This is because harms may not appear until years after the exposure and the harmed person "may have been exposed to a variety of potentially harmful substances" caused by multiple actors.⁸² Consequently, tracing the harm to the specific responsible actor to establish causation, which is required to prove that the defendant actually caused the harm, may not be possible

Although the Supreme Court sustained this belief, the resulting procedural roadblocks for various types of plaintiffs do not all directly relate to an individual's race, religion, or national origin. *See also* Malveaux, *supra* note 13, at 82; Gordon, *supra* note 12; Gilles, *supra* note 72, at 1568.

74. *See* Heather Buchanan, *The Promise and Reality of Equal Access to Justice*, INST. FOR THE ADVANCEMENT OF THE AM. L. SYS. (Nov. 8, 2018), <https://iaals.du.edu/blog/promise-and-reality-equal-access-justice> [<https://perma.cc/X928-L2GT>]; Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 72 (2018).

75. *See Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the H. Subcomm. on the Const., C.R., & C.L.*, 111th Cong. 1 (2009) (statement of Rep. Jerrod Nadler, Chairman, Subcomm. on the Const., C.R., and C.L.) [hereinafter *Access to Justice Denied*]; Malveaux, *supra* note 13.

76. Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 580 (2012).

77. *Id.*

78. Zachry Sandifer, *Insurmountable Burdens and Slippery Slopes: A Solution for Pleading Toxic Torts in the Plausibility Era*, 43 S. ILL. U. L.J. 435, 437 (2019).

79. WILLIAM FUNK, THOMAS OWEN MCGARITY, SIDNEY A. SHAPIRO & JAMES GOODWIN, PLAUSIBILITY PLEADING: BARRING THE COURTHOUSE DOOR TO DESERVING CLAIMANTS 10 (2010).

80. *Id.*

81. *See* David T. Buente Jr., Thomas G. Echikson & James L. Connaughton, *The "Civil" Implications of Environmental Crimes*, 23 ENV'T L. REP. 10589, 10597 (1993); *Causation in Environmental Law*, *supra* note 5, at 2259.

82. *Causation in Environmental Law*, *supra* note 5, at 2259.

in an environmental suit.⁸³ One scholar has gone as far as calling the *Twiqbal* standard “indefensible” if one “cares about enabling private litigants” in their right to assert substantive law violations through the court system.⁸⁴ This scholar argues that the pleading requirements were redefined in *Iqbal* to protect government defendants, as well as corporate ones, at the expense of plaintiffs.⁸⁵

Other scholars argue that the *Twiqbal* standard simply helps secure the “just, speedy, and inexpensive” resolution of each action and proceeding provided for in FRCP 1.⁸⁶ They argue that the requirements inserted by *Twiqbal* ensure plaintiffs are justified when “invoking the coercive power of the state.”⁸⁷ However, others describe the rulings as diminishing democracy for plaintiffs.⁸⁸ These scholars argue that the Court effectively replaced the “system of notice pleading”⁸⁹ and turned the dismissal motion, which was initially intended to only handle “rare complaints that lacked a valid legal theory,” into an efficient attack on complaints that are seen as “counterintuitive” by judges without the benefit of discovery.⁹⁰ Motions to dismiss under FRCP 12(b)(6) are given “life-or-death significance,”⁹¹ as successful motions are “more than twice as likely” under the plausibility pleading standard.⁹²

B. *Unfair Burdens on Plaintiffs*

Some scholars argue that the *Twiqbal* shift results in unfair burdens on plaintiffs and, as a result, skews the scale of justice in favor of defendants. One scholar asserts that if plaintiffs are expected to present “detailed facts from the outset,” rather than acquiring these facts through the discovery process, they may have to “foot the bill” to find the facts on their own.⁹³ This scholar states that at best, this creates an unfair burden, and at worst,

83. *Id.*

84. A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1735 (2013).

85. *Id.* at 1737.

86. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 643 (2018); see Fed. R. Civ. P. 1.

87. Wilkinson III, *supra* 86, at 643.

88. Burbank & Subrin, *supra* note 11, at 405–08.

89. *Id.* at 403.

90. *Id.* at 407.

91. Miller, *supra* note 74, at 72.

92. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. UNIV. L. REV. 553, 621 (2010).

93. Gordon, *supra* note 12.

creates “a complete barrier to the courthouse.”⁹⁴

This barrier may also inhibit low-income litigants from obtaining adjudication. If the low-income population is no longer allowed access to court, neither are its “contributions, voices, and perspectives.”⁹⁵ Another scholar calls this a “potentially high cost to both the affected groups and society more broadly.”⁹⁶ As a result, low-income groups are essentially barred from accessing the civil justice system simply due to their income level. This is unfair and antithetical to the notion of justice.⁹⁷ Even if plaintiffs are justified in bringing suit, they may face unreasonable litigation expenses, which will slow their case and result in excessive, and expensive, lawyer involvement.⁹⁸ This relates to a low-income litigant’s ability to receive justice, as only the elite have adequate access to the court because *Twiqbal* effectively serves as a gatekeeping mechanism.⁹⁹ For plaintiffs, the more stringent plausibility pleading standard creates “significantly higher and more resource-consumptive procedural barriers.”¹⁰⁰ This resulting impact on civil suits runs contrary to many of the values underlying the FRCP, including fairness.¹⁰¹ Judicial decisions applying the plausibility standard to plaintiffs ultimately aid defendants at plaintiffs’ expense, which has been criticized as “contemptuous of history, rules, statutes, the Constitution, and principles of fairness.”¹⁰² These are rights that should be supported, but “cannot be without discovery.”¹⁰³

Other scholars argue that holding defendants to the same pleading standard as plaintiffs is unfair due to the “limited time and knowledge”

94. *Id.*

95. Gilles, *supra* note 72, at 1568.

96. *Id.*

97. See Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 198 (2016) (arguing that plaintiffs with “potentially meritorious claims” cannot access the courthouse due to a “liquidity problem”: plaintiffs who “lack the capital necessary to pursue a claim” cannot pay for the various fees involved in litigation, including “court fees, lawyers’ fees, bond requirements, and expert witness fees,” leaving them with little resources to right the wrongs against them); Ian Weinstein, *Coordinating Access to Justice for Low- and Moderate-Income People*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 501, 504–05 (2017) (explaining that the justice system is intended for all, but there is a gap between the wealthy, who have “ready access to lawyers, courts, and alternative dispute resolution fora,” and low-income households, who have lower access to lawyers or courts yet more legal problems than even those of only “moderate means”).

98. Miller, *supra* note 74, at 78–79.

99. Clermont & Yeazell, *supra* note 9, at 823; see Nichols, *supra* note 97, at 198.

100. Miller, *supra* note 46, at 2.

101. *Id.*; Fed. R. Civ. P. 1.

102. Subrin, *supra* note 76, at 581.

103. *Id.*

possessed by the parties during the pleading stage.¹⁰⁴ While it is true that, as a result of *Twiqbal*, more cases never reach discovery and dockets are less cluttered,¹⁰⁵ this approach favors efficiency over fairness. Before *Twiqbal*, a plaintiff did not need to “set out in detail the facts upon which [they] base [their] claim,” but only needed to give the defendant fair notice of the claim.¹⁰⁶ For example, an environmental plaintiff asserting a claim that the defendant intentionally failed to disclose the extent of soil and groundwater contamination before the plaintiff purchased the land likely would not need to lay out specific facts depicting the harm and the defendants’ state of mind in order to have sufficient pleadings. Under *Twiqbal*, the plaintiff’s pleadings now must contain sufficient particularity. This environmental plaintiff would likely need to plead more specific facts that directly link the defendant’s actions to the particular contaminant to avoid having their claim deemed conclusory by the court. However, this would be more difficult because they may not have access to the necessary facts without great expense.

C. *Judicial Bias Leading to Nonuniformity*

Judicial bias exists while determining plausibility because it is a subjective task. As a result, these decisions often lead to nonuniformity.¹⁰⁷ Determining plausibility and whether a complaint is conclusory is “[e]lusive and [p]roblematic.”¹⁰⁸ It requires that judges use significant discretion in distinguishing between conclusory and non-conclusory allegations without a concrete framework that creates a conscientious and uniform analysis.¹⁰⁹

Iqbal is criticized as being a highly biased decision. According to one scholar, the Justices in *Iqbal* offered “their own version of activism in service of” their own general hostility to litigation and “challenges to government authority in particular.”¹¹⁰ One views the Court as treating “clearly factual allegations” as conclusory purely based on the fact that the Court does not believe them without further supporting information.¹¹¹ They attribute the Court’s skepticism in regard to certain factual

104. Nathan Pysno, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633, 1659 (2011).

105. *Id.* at 1666.

106. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

107. *See infra* Part IV.

108. Malveaux, *supra* note 13, at 82.

109. *Id.*

110. A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 201 (2010).

111. *Id.*

allegations to the Justices' own "worldview and perspective as societal elites with various presumptions."¹¹² This suggests that evidence may be appraised in a biased manner by judges. Another scholar argues that we often can "construct our social world to avoid hearing certain types of claims."¹¹³ This scholar argues that when dismissal is abused, it "breaches our duty to listen to our fellows and does not respect members of marginalized communities as epistemic agents."¹¹⁴ Reasonable people can view the same objective facts differently based on their personal biases. Each Justice's worldview allows them to "create conditions" where they feel justified in dismissing potentially meritorious claims.¹¹⁵

People, even Supreme Court Justices, may fall victim to their own individual biases. The subjective and broad requirements of the *Twiqbal* pleading standard may result in judicial decisions based upon a biased review of factual assertions. While adjudicating claims requires a great deal of discretion, inserting a broad standard may lead to more biased opinions due to differences among judges' personal perceptions paired with the lack of a concrete framework in applying the standard. In *United States v. Halliburton Energy Services, Inc.*,¹¹⁶ the United States District Court for the Southern District of Texas held the plaintiffs' Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹⁷ arranger claim met the *Twiqbal* pleading standard.¹¹⁸ The plaintiffs in that case asserted that the defendant sent radioactive materials for repair, storage, and disposal.¹¹⁹ Under CERCLA, one who arranges for the disposal or treatment of hazardous material is liable for its subsequent release into the environment.¹²⁰ In contrast, the Ninth Circuit in *Hinds Investments, L.P. v. Angioli*¹²¹ held that the plaintiffs asserting a CERCLA arranger claim did not meet the *Twiqbal* pleading standard.¹²² In *Hinds*, the plaintiffs asserted that the defendants contributed to the disposal of hazardous waste by distributing manuals that instructed operators "to dispose of waste water down the drain and

112. *Id.*

113. David Schraub, *Deliberation and Dismissal*, 22 U. PA. J. CONST. L. 1319, 1386 (2020).

114. *Id.*

115. *Id.*

116. No. H-07-3795, 2008 WL 656475 (S.D. Tex. Mar. 6, 2008).

117. 42 U.S.C. §§ 9601–75.

118. *Halliburton*, 2008 WL 656475, at *1.

119. *Id.*

120. 42 U.S.C. § 9607(a)(2).

121. 445 F. App'x 917 (9th Cir. 2011).

122. *Id.* at 919.

into the sewer.”¹²³ The court stated that the plaintiffs had not “alleged facts showing [d]efendants sold dry cleaning equipment for the purpose of disposing of perchloroethylene or that [d]efendants exercised control over the disposal process”¹²⁴ These two courts came to opposite conclusions when presented with similar assertions. While it is not possible to eliminate all bias in decision-making, becoming aware of personal bias and holding oneself accountable is feasible.¹²⁵

III. ENVIRONMENTAL LITIGATION

Environmental law is unique and complex in that the field is heavily grounded in science and critical thinking. One generally needs a basic understanding of the science to recognize there is a problem.¹²⁶ Environmental law must be able to adapt to “developing ecological threats, evolving societal attitudes, and changing world circumstances,” but has failed to do so.¹²⁷ This creates a higher burden for plaintiffs when attempting to plead an environmental claim.

The current environmental laws are lengthy, detailed, and some set out a process rather than substantive standards. It is difficult to understand how to bring an environmental lawsuit, and to comprehend which statute is relevant. Environmental laws, such as the National Environmental Policy Act (NEPA),¹²⁸ generally inform an individual of the steps required to initiate a lawsuit, but do not pre-judge an outcome.¹²⁹ This means that the statutes do not automatically determine the outcome. Contrastingly, the Resource Conservation and Recovery Act (RCRA)¹³⁰ sets out firm definitions of the solid and hazardous waste it aims to regulate, as well as specific requirements for the categories of those who qualify for

123. *Id.* at 920.

124. *Id.* at 919.

125. Lindsay Northon, *Become Aware of Personal Bias, and You'll Improve Ethical Practice*, SHRM (July 12, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/ethical-practice/pages/become-aware-of-personal-bias-and-improve-ethical-practice.aspx> [<https://perma.cc/6HXB-A9NX>]; Sharon Youmans & Elizabeth Ozer, *Strategies to Address Unconscious Bias*, UNIV. OF CAL., S.F. OFF. OF DIVERSITY & OUTREACH, <https://diversity.ucsf.edu/resources/strategies-address-unconscious-bias> [<https://perma.cc/7DRP-J35H>].

126. Surtees, *supra* note 6; Biber, *supra* note 6.

127. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 225 (2004).

128. 42 U.S.C. §§ 4321–70.

129. *Id.* § 4321 (stating that NEPA established a “national policy” to generally “encourage productive and enjoyable harmony between man and his environment” but does not dictate how a case will result if a violation occurs).

130. 42 U.S.C. §§ 6901–92k.

regulation.¹³¹ Each environmental law statute has its own individual enforcement provisions, civil penalties, and criminal penalties.¹³² This field is detailed, complex, and plaintiffs must understand both the science and the laws in order to sufficiently assert a claim.

To bring a civil suit under federal environmental acts, there are certain allegations plaintiffs should assert to constitute sufficient pleadings. Two things in particular are expected even though they are difficult to obtain. These are “the dates during which the conduct, action or inaction occurred or should have occurred” and the “facts necessary to relate the defendant with the conduct or inaction complained of.”¹³³ Adding to this difficulty, some environmental statutes require even greater detail. For example, with respect to the Clean Air Act’s citizen suit provision, plaintiffs are expected to “cite the specific [National Ambient Air Quality Standards, or] NAAQS[,] pollutant at issue” and ensure the court can “determine proper compliance with the requisite notice.”¹³⁴ Many plaintiffs do not have adequate access to these details when initially asserting their claim.¹³⁵

Despite the increasing threat that environmental harms like climate change pose, some environmental practitioners have found pleading these claims “onerous” under *Iqbal*,¹³⁶ due to the difficulties in obtaining the necessary facts to establish causation and *Iqbal*’s requirement for specificity.¹³⁷ Some scholars believe that trends in legal doctrines and case law “influence [a] potential plaintiff’s incentives and decisions” on what they should plead, or if they should sue at all.¹³⁸ Few toxic torts claims are successfully asserted due to the difficulty in satisfying the burden of proof at the pleading stage.¹³⁹ Federal regulatory causes of action have become much more popular. This illustrates the need for plaintiffs to adjust “to the difficulties involved in proving”¹⁴⁰ toxic tort claims where the plaintiff

131. *Id.* §§ 6903, 6921.

132. Paul Tanaka, Michael Saretsky, Donna Ni, Maddy Foote & Matthew Swanson, *Environmental Law and Practice in the United States: Overview*, in PRACTICAL LAW § 2 (Thomas Reuters ed. May 1, 2021).

133. Ronald B. Robie, Diane R. Smith & Summer L. Nastich, CALIFORNIA CIVIL PRACTICE ENVIRONMENTAL LITIGATION § 6:23 (2021).

134. *Id.* (citing *Chun v. Simpson*, CIVIL 15-00102 LEK-RLP, 2015 WL 8492025 (D. Haw. Dec. 9, 2015)).

135. FUNK ET AL., *supra* note 79, at 10.

136. Foster, *supra* note 7, at 903.

137. *Id.*; see also *Causation in Environmental Law*, *supra* note 5, at 2261–62.

138. Juscelino F. Colares & Kosta Ristovski, *Pleading Patterns and the Role of Litigation as a Driver of Federal Climate Change Legislation*, 54 JURIMETRICS 329, 358 (2014).

139. *Id.* at 363.

140. *Id.* at 343.

“has been injured after exposure to hazardous substances or chemicals.”¹⁴¹ Toxic tort or contamination claims “may not become apparent until many years after the polluting event(s) took place,” making it difficult for plaintiffs to pinpoint exact dates or specific facts.¹⁴²

Additionally, the “diffuse nature” of climate change in general and its “widespread effects” make it hard for plaintiffs to show that emissions from a specific facility should be lowered or that the operator of the specific facility should be held liable for harms resulting from the emissions without the benefit of discovery.¹⁴³ Pollutants are often fungible with many point sources, further showing the diffuse nature of environmental harms.¹⁴⁴ This uncertainty creates a barrier to determining which specific source caused which specific harm.¹⁴⁵ When a defendant does not follow environmental statutory requirements, a plaintiff’s ability to prove the defendant’s non-compliance is less complicated than proving causation in toxic tort claims.¹⁴⁶ Thus, regulatory causes of action occur more often not only because they are simpler to assert, but because they tend to require lower litigation costs.¹⁴⁷ By contrast, tort claims occur less frequently because they have high expenses for depositions, discovery, and other related costs.¹⁴⁸ Plaintiffs choose to select causes of action that “can be supported with detailed facts” partially due to *Twigg*, and this may have resulted in fewer environmental causes of action brought and fewer rights vindicated.¹⁴⁹

Due to these limitations, plaintiffs have fewer options for selecting a cause of action in environmental litigation. Such particularized facts,

141. *Examples of Toxic Torts*, DICKMAN L. OFF. P.S.C., <https://www.dickmanlawoffice.com/personal-injury/examples-toxic-torts/> [<https://perma.cc/3YGG3-ZKD5>].

142. *Pleading Standards in Environmental Cases Following the Supreme Court’s Decisions in Twombly and Iqbal*, A.B.A. (Nov. 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2012_13/november_december/pleading_standards_environmental_cases_following_supreme_courts_decisions_twombly_and_iqbal/ [<https://perma.cc/2238-3TV6>] [hereinafter *Pleading Standards in Environmental Cases*].

143. Colares & Ristovski, *supra* note 138, at 343.

144. *Id.* at 349.

145. *Id.*

146. *Id.*; see also *Why Toxic Torts Are Hard to Litigate and Win*, A.B.A. J. (Nov. 1, 2018, 12:15 AM), https://www.abajournal.com/magazine/article/toxic_torts_litigate_win [<https://perma.cc/8LH9-WWT2>] (describing how proving causation in toxic torts is complicated because showing that the defendant knew a harm would occur requires discovery that can drag out for years as well as the need for jurors that are “willing and able to consider complex scientific evidence”).

147. Colares & Ristovski, *supra* note 138, at 342–43.

148. *Id.* at 343.

149. *Id.* at 363.

which are unobtainable without discovery, make pleading a more complicated step in filing an environmental claim. In *Chubb Custom Insurance Co. v. Space Systems/Loral, Inc.*,¹⁵⁰ the plaintiff brought suit under CERCLA § 107(a) to recover insurance costs made to the company's insured from the prior property owners that were incurred on the owner's behalf in response to releases or threatened releases of hazardous substances on or near the property.¹⁵¹ CERCLA § 107(a)(4) requires that the insurance company have actually incurred "response costs" in relation to the removal or remediation of the site.¹⁵² Defendant Ford Motors argued that Chubb did not plead facts indicating that the current owner of the property incurred response costs "or that Ford is liable under CERCLA."¹⁵³ Although the plaintiff explained the amount of money incurred remediating the contamination, the parties who caused the contamination, and "generally when and how" the hazardous substances were released, the court agreed with the defendant and dismissed the plaintiff's claim.¹⁵⁴ The claim was dismissed because the plaintiff could not pinpoint exact details.¹⁵⁵ This case highlights the impact of *Twiqbal*'s heightened requirements on environmental litigation.

IV. CONFLICT BETWEEN ENVIRONMENTAL LITIGATION AND THE HEIGHTENED PLEADING STANDARD

Asserting environmental claims after the massive shift to the *Twiqbal* pleading standard has proven onerous due to the nature of environmental harms and information asymmetry between the plaintiff and the defendant. Because it is no longer sufficient for a plaintiff to simply meet the "no set of facts" standard set out in *Conley*, the shift to *Twombly* and *Iqbal* resulted in "potentially dire consequences" for environmental plaintiffs, among others.¹⁵⁶ The impact of *Twombly* and *Iqbal* may be most evident in toxic tort and "long-tail" environmental contamination claims

150. No. C 09-4485 JF (PVT), 2010 WL 689940 (N.D. Cal. Feb. 23, 2010).

151. *Id.* at *1.

152. 42 U.S.C. § 9607(a)(4).

153. *Chubb*, 2010 WL 689940, at *8.

154. *Id.* at *10; *see also Pleading Standards in Environmental Cases*, *supra* note 142 (discussing *Chubb* to illustrate how pleading has changed in environmental cases after *Twiqbal*).

155. *Chubb*, 2010 WL 689940, at *3-4.

156. Haroff, *supra* note 4, at 3; *see also Access to Justice Denied*, *supra* note 75 (quoting Representative Johnson of the 111th Congress explaining that as a result of *Twiqbal*, "we are now beginning to see fewer instances of wrongful conduct being addressed" and that even "one case being thrown out due to insufficiency of pleadings . . . is justice denied"); Foster, *supra* note 7, at 903 (stating that "pleading climate change actions may be very onerous under *Iqbal*").

due to the slow-revealing nature of environmental harms.¹⁵⁷ When years pass before damages are apparent, or when the defendant possesses most of the necessary information, the plaintiff's ability to obtain specific details sufficient to meet the *Twiqbal* standard is inhibited. A plaintiff's initial complaint must include sufficient factual allegations showing their claim is plausible.¹⁵⁸ In contrast, discovery allows the parties to obtain and share evidence, and this provides the plaintiff an opportunity to obtain the necessary facts to prove their claim.¹⁵⁹ The *Twiqbal* standard often stops a case before the plaintiff can use the tools of discovery because asserting a simple Federal Rules of Civil Procedure 12(b)(6) motion to dismiss is the most efficient way for a defendant to respond to an environmental claim.¹⁶⁰ A defendant may assert a motion to dismiss, which will be granted by the court if there is a "failure to state a claim upon which relief can be granted."¹⁶¹ Alternatively, a defendant may assert an affirmative defense to negate their liability.¹⁶²

Further, information asymmetry as a result of environmental harms' slow-revealing nature is very common in environmental litigation.¹⁶³ Information asymmetry is when one party has information to which the other party does not have access.¹⁶⁴ This makes it hard for plaintiffs to meet their burden of proof.¹⁶⁵ In a civil suit, this could mean the defendant in an environmental suit has access to pertinent information regarding a contamination that the plaintiff does not have access to prior to discovery. This asymmetry may end the plaintiff's case before it gets to discovery or

157. Gregory M. Gotwald & Brianna J. Schroeder, *Pleading Standards in Environmental Cases Following the Supreme Court's Decisions in Twombly and Iqbal*, 44 NO. 2 A.B.A. TRENDS 16, 17 (2012). "Long-tail" harm is harm that is "attributable to continuous or repeated exposure over time" or harm that has "a long latency period," meaning the harm is not immediately apparent. Jennifer Morinigo, Tom Baker & Kyle D. Logue, *Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies*, THE ALI ADVISOR (Apr. 25, 2018), <https://thealiadviser.org/liability-insurance/allocation-in-long-tail-harm-claims-covered-by-occurrence-based-policies/> [<https://perma.cc/GZT5-88XZ>].

158. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

159. *How Courts Work*, *supra* note 15.

160. Haroff, *supra* note 4, at 3.

161. Fed. R. Civ. P. 12(b)(6).

162. Legal Information Institute, *Affirmative Defense*, CORNELL L. SCH., https://www.law.cornell.edu/wex/affirmative_defense [<https://perma.cc/H6WU-5ZXA>].

163. *See* FUNK ET AL., *supra* note 79, at 10.

164. *See id.* *See generally* J. Barkley Rosser Jr., *A Nobel Prize for Asymmetric Information: The Economic Contributions of George Akerlof, Michael Spence and Joseph Stiglitz*, 15 REV. POL. ECON. 3 (2003) (discussing information asymmetry in the context of economics where one party has information the other does not, and how changes in this information can affect outcomes).

165. *See* FUNK ET AL., *supra* note 79, at 10.

trial.¹⁶⁶ *Twiqbal* has made this issue worse. Some scholars believe the *Twiqbal* pleading standard “exacerbate[s] the negative consequences that flow from information asymmetries” that characterize environmental cases.¹⁶⁷

Prior to *Twombly* and *Iqbal*, the FRCP curtailed this asymmetric information through the simplified notice pleading standard and the process of discovery. The plausibility pleading standard set forth by *Twiqbal* undermines this and places additional burdens on plaintiffs seeking to bring environmental claims because tracing the harm to a single actor to establish causation may not be possible without discovery.¹⁶⁸ If a toxic tort or contamination claim is a plaintiff’s only cause of action, justified plaintiffs may not be able to have their rights vindicated in the court system at all. In addition to placing additional burdens on plaintiffs, courts have been fairly inconsistent in applying the *Twiqbal* standard to affirmative defenses.¹⁶⁹ While plaintiffs are expected to plead specific details that may not be available without great cost before discovery, defendants can generally assert affirmative defenses without providing the same factual detail.¹⁷⁰ Common affirmative defenses within environmental litigation include *res judicata*, collateral estoppel, exhaustion of administrative remedies, laches, sovereign immunity, lack of ripeness, mootness, non-reviewable discretionary action, and statutory conflict or exemption.¹⁷¹ This Part further examines the ways in which courts have applied the heightened pleading standard.

A. *Courts that Applied the Heightened Pleading Standard to Environmental Plaintiffs’ Pleadings*

In cases where the heightened pleading standard has been applied to environmental plaintiffs, these parties have often faced successful FRCP 12(b)(6) motions to dismiss or roadblocks in asserting their claim in the first place.

For example, in *Midshore Riverkeeper Conservancy, Inc. v.*

166. *Id.*

167. *Id.*

168. See *Causation in Environmental Law*, *supra* note 5, at 2258.

169. Although this Comment focuses on environmental litigation, courts have been inconsistent in applying affirmative defenses in non-environmental cases as well. See Herman et al., *supra* note 68, at 35.

170. See *infra* section IV.B.

171. Annotation, *Affirmative Defenses in Actions Challenging Omission or Adequacy of Environmental Impact Statement Under § 102(2)(c) of National Environmental Policy Act of 1969* (42 U.S.C.A. § 4332(2)(c)), 63 A.L.R. Fed. 18 § 2 (2021).

Franzoni,¹⁷² Riverkeepers, a nonprofit organization, filed an amended complaint against Franzoni seeking to enforce § 7002(a)(1)(B) of Resource Conservation and Recovery Act (RCRA) and § 301 of the Clean Water Act (CWA)¹⁷³ in the District Court of Maryland.¹⁷⁴ Franzoni then filed a motion to dismiss, which the court granted in part.¹⁷⁵ Franzoni argued that the plaintiff's allegations that the defendant's abandoned clay target fragments were causing "imminent and substantial endangerment to health and the environment" and were the source of Polycyclic Aromatic Hydrocarbons (PAHs) were insufficient because it was not in the notice sent to the defendant.¹⁷⁶ The court agreed and granted the motion to dismiss in part, stating that, although the notice did contain references to clay debris, it did not "describe abandoned clay target fragments as an independent source of pollution, and makes no reference to PAHs whatsoever."¹⁷⁷ Although Riverkeepers included specific details about the harm endured, the court held it was not sufficient because the plaintiff did not directly link the clay fragments to the PAHs.¹⁷⁸ If they had been able to conduct discovery, Riverkeepers may have been able to obtain access to information that would have linked the clay fragments to the PAHs.

Additionally, in *OBG Technical Services, Inc. v. Northrop Grumman Space & Mission Systems Corp.*,¹⁷⁹ environmental consulting firm OBG brought suit in the District Court of Connecticut alleging that property owner Northrop Grumman failed to disclose the extent of the soil and groundwater contamination before OBG purchased the land, and that the new owner failed to prevent pollutants from migrating to OBG's parcels of land.¹⁸⁰ OBG also asserted contract-based claims alleging that Northrop failed to indemnify OBG for migratory contaminants-related costs under its obligations in the Purchase Agreement.¹⁸¹ In 2000, OBG contacted Northrop Grumman to renegotiate the Purchase Agreement, and OBG alleged that Northrop Grumman previously stated they were open to renegotiating the agreement on multiple occasions.¹⁸² However, in 2005,

172. 429 F. Supp. 3d 67 (D. Md. 2019).

173. 33 U.S.C. §§ 1251–1387.

174. *Midshore Riverkeeper Conservancy*, 429 F. Supp. at 71.

175. *Id.*

176. *Id.* at 72.

177. *Id.* at 75.

178. *Id.*

179. 503 F. Supp. 2d 490 (D. Conn. 2007).

180. *Id.* at 497.

181. *Id.* at 502.

182. *Id.*

Northrop stated that it would neither indemnify OBG nor renegotiate the agreement.¹⁸³ The court stated the facts in the complaint were not alleged with sufficient particularity and that OBG simply recited the legal conclusion in a conclusory manner.¹⁸⁴ The court stated that OBG's claim that the defendant's "intentional failure to disclose the true nature and condition of [the property] was a self-concealing violation because without the concealment . . . the violation against OBG could not have taken place" was an insufficient factual allegation.¹⁸⁵ The court subsequently denied OBG's attempt to toll the statute of limitations.¹⁸⁶ Ultimately, the court granted Northrop's motion to dismiss for failure to state a claim.¹⁸⁷ The court made this decision even though OBG did not immediately realize the extent of the contamination due to the nature of environmental harm.¹⁸⁸

These cases illustrate the detrimental impact of the *Twigbal* standard on environmental plaintiffs. The application of this standard often results in the plaintiff's pleadings being deemed insufficient and the case being dismissed. Plaintiffs are forced to meet the heightened pleading standard while defendants often do not bear such a burden.

B. Courts that Did Not Apply the Heightened Pleading Standard to Defendants' Affirmative Defenses in Environmental Litigation

Courts are fairly consistent in their refusal to apply the heightened pleading standard to defendants in environmental litigation. As a result, defendants may successfully assert conclusory affirmative defenses without satisfactory factual support, even though affirmative defenses are pleadings subject to the same requirements as complaints.¹⁸⁹

For example, in *Davis v. Sun Oil Co.*,¹⁹⁰ the Davises brought a federal action against their vendor under the citizen suit provision of RCRA, which was reviewed by the Sixth Circuit.¹⁹¹ The plaintiffs' complaint alleged that by leaving gasoline buried in the property, Sun Oil contributed to and caused the disposal of solid or hazardous waste which

183. *Id.*

184. *Id.* at 508.

185. *Id.*

186. *Id.* at 510.

187. *Id.* at 497.

188. *Id.* at 510.

189. *Brooklyn Union Gas Co. v. Exxon Mobil Corp.*, 478 F. Supp. 3d 417, 425 (E.D.N.Y. 2020) (stating that affirmative defenses are pleadings subject to the same standard).

190. 148 F.3d 606 (6th Cir. 1998).

191. *Id.* at 608.

may present an “imminent and substantial endangerment to health or environment” on the property.¹⁹² Two years prior in state court, the plaintiffs were awarded compensatory damages for breach of contract and specific performance to clean up the site.¹⁹³ The district court held that Sun Oil’s “general invocation of ‘res judicata’ in its amended answer” was a sufficient assertion of this defense and granted summary judgment in their favor.¹⁹⁴ Res judicata may be asserted as an affirmative defense to bar “the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions” that could have, but were not, raised in the initial suit.¹⁹⁵ A motion for summary judgment will be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁹⁶ This means the court enters a judgment for the movant and there is no trial.¹⁹⁷ Sixth Circuit Judge Boggs, in his partial concurrence and partial dissent, argued that Sun Oil’s general invocation did not suffice to overcome their “acquiescence in the maintenance by Davis of concurrent actions in state court and federal court.”¹⁹⁸ Judge Boggs asserted that Sun Oil’s generally stated defense that “[p]laintiff’s claims [were] barred by the doctrine of res judicata” was not a sufficient one to object to the Davises’ claim-splitting under sections 24 and 26 of the Restatement (Second) of Judgments.¹⁹⁹

Additionally, in *Ohio ex rel. Dewine v. Globe Motors, Inc.*,²⁰⁰ plaintiffs brought claims in the Southern District of Ohio seeking cost recovery under § 107(a) of CERCLA from Globe Motors, Inc. and Northrop Grumman Systems Corporation.²⁰¹ The plaintiff, State of Ohio, moved to strike a number of the defendants’ affirmative defenses and sought to extend the *Twombly* and *Iqbal* pleading standard to affirmative defenses.²⁰² The plaintiffs contended the defendants had not “specified which defenses apply to which claims,” and that the defenses asserted

192. *Id.*

193. *Id.*

194. *Id.* at 613 (Boggs, J., concurring in part and dissenting in part).

195. *Res Judicata*, BLACK’S LAW DICTIONARY (11th ed. 2019).

196. Fed. R. Civ. P. 56(a); see also *Material Fact*, BLACK’S LAW DICTIONARY (11th ed. 2019) (stating that a material fact is a “fact that is significant or essential to the issue or matter at hand; esp., a fact that makes a difference in the result to be reached in a given case.”).

197. *Motion for Summary Judgment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/motion_for_summary_judgment [<https://perma.cc/QPB7-TFE9>].

198. *Davis*, 148 F.3d at 613 (Boggs, J., concurring in part and dissenting in part).

199. *Id.*

200. No. 3:18-cv-142, 2019 WL 3318354 (S.D. Ohio July 23, 2019).

201. *Id.* at *1.

202. *Id.*

failed to meet the *Twiqbal* plausibility standard.²⁰³ The court declined to apply the *Twiqbal* standard to affirmative defenses, stating that the defendants do not need to “lay out the detailed basis” for such defenses.²⁰⁴ The district court followed the Sixth Circuit’s standard that a pleading should only be stricken when “the pleading to be stricken has no possible relation to the controversy.”²⁰⁵ “No possible relation”²⁰⁶ is a far less stringent standard to meet than the “plausibility” standard laid out for pleadings in *Twiqbal*.²⁰⁷ In this case, the court stated that because “it cannot be said that these defenses have ‘no possible relation to the controversy,’” it would not be appropriate to strike them.²⁰⁸

Further, in *Suncoast Waterkeeper v. City of Gulfport*,²⁰⁹ plaintiffs brought a cause of action in the Middle District of Florida under the citizen suit provisions of the Federal Water Pollution Control Act, alleging that the defendant violated § 301(a) of CWA by: “(1) discharging pollutants into the waters of the United States without National Pollution Discharge Elimination System (‘NPDES’) Permit authorization and (2) violating the terms of its NPDES Permit . . . through these discharges.”²¹⁰ The defendant asserted a series of affirmative defenses, which the plaintiff argued should be stricken due to their conclusory nature and lack of sufficient specific factual support.²¹¹ The court rejected the plaintiff’s argument because “no prejudice” to the defendant had been shown by the “allegedly insufficient pleading.”²¹² Further, the court stated that the defendant could seek the factual details to support the defenses through discovery.²¹³ Here, the defendants were held to a less stringent standard and had the privilege of asserting general claims without detailed factual support as opposed to the heightened pleading standard applied to plaintiffs. The court even recognized that the defendants would have access to the benefit of discovery to flesh out their defenses.

Similarly, in *Borough of Edgewater v. Waterside Construction*,

203. *Id.*

204. *Id.* at *3 (quoting *King v. Taylor*, 694 F.3d 650, 657 (6th Cir. 2012)).

205. *Globe Motors*, 2019 WL 3318354, at *1 (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953)).

206. *Id.*

207. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

208. *Globe Motors*, 2019 WL 3318354, at *2.

209. No. 8:17-cv-35-T-24 MAP, 2017 WL 3328398 (M.D. Fla. Aug. 3, 2017).

210. *Id.* at *1.

211. *Id.* at *2.

212. *Id.* at *4.

213. *Id.*

L.L.C.,²¹⁴ Edgewater brought suit against corporate defendants, who were associated with Waterside Construction, L.L.C., in the District Court of New Jersey.²¹⁵ Edgewater sought remediation costs under CERCLA, the New Jersey Spill Act,²¹⁶ and New Jersey common law to clean up Veteran's Field after plaintiffs began the Veteran's Field Project.²¹⁷ Plaintiff contended that the defendants' affirmative defense of fraud was insufficiently pled.²¹⁸ The affirmative defense stated that the "[c]ross-claims [were] barred or subject to reduction by Alcoa's misrepresentations and/or fraud in the inducement of contract."²¹⁹ The defendants contended that because they asserted fraud as an affirmative defense, they did not need to meet the *Twiqbal* standard.²²⁰ Although the court did not reach the *Twiqbal* issue because Alcoa did "not move[] to strike Defendants' affirmative defense pursuant to Rule 12(f)," and thus allowed the affirmative defense to remain while denying the plaintiff's motion for partial judgment on the pleadings, the court nevertheless stated that courts in the district "have generally found the *Iqbal/Twombly* plausibility standard inapplicable to the pleading of affirmative defenses."²²¹

Finally, in *Dixon Lumber Co. v. Austinville Limestone Co.*,²²² Dixon sought to hold Austinville Limestone Company (ALC) responsible for environmental liabilities due to limestone tailings from a mining operation under CERCLA in the Western District of Virginia.²²³ Dixon argued that all of ALC's affirmative defenses were conclusory and moved to strike them.²²⁴ One of the defendant's affirmative defenses simply stated that "[t]he 2013 releases and threatened releases of hazardous substances at the Site were caused solely by an act of God."²²⁵ The court affirmed that the plausibility standard in a plaintiff's pleadings required more than a "sheer possibility that a defendant has acted unlawfully."²²⁶ However, the court did not apply this standard to ALC, stating that its affirmative

214. No. 14-5060, 2016 WL 7256873 (D.N.J. Dec. 14, 2016).

215. *Id.* at *2.

216. N.J. REV. STAT §§ 58:10-23.11 to -50 (2021).

217. *Borough of Edgewater*, 2016 WL 7256873, at *1-2.

218. *Id.* at *8.

219. *Id.*

220. *Id.*

221. *Id.*

222. No. 7:16-cv-00130, 2017 WL 4933053 (W.D. Va. Oct. 31, 2017).

223. *Id.* at *1.

224. *Id.* at *5.

225. *Id.* at *6.

226. *Id.* at *2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

defenses were “validly pleaded.”²²⁷ The court applied an extremely broad and lenient standard to the defendant’s assertions, stating that “affirmative defenses may not be pled ‘so cryptically that their possible application will remain a mystery until unearthed in discovery.’”²²⁸

As shown by these cases, defendants are frequently successful in asserting conclusory claims. Meanwhile, plaintiffs are left to deal with the burden of affirmative defenses at trial *if* their own pleadings are deemed sufficient. However, some courts have elected to apply the *Twiqbal* standard to these defenses.

C. *Courts that Applied the Heightened Pleading Standard to Defendants’ Affirmative Defenses in Environmental Litigation*

In a few instances, courts have applied the heightened pleading standard to defendants’ affirmative defenses in environmental litigation, which resulted in a fairer trial.

For example, in *Brooklyn Union Gas Co. v. Exxon Mobil Corp.*,²²⁹ the Eastern District of New York stated that the Second Circuit made it clear that the *Twiqbal* plausibility standard applied to all pleadings, including affirmative defenses.²³⁰ The court struck inadequate defenses that did not meet the threshold, and allowed other defenses that met the standard.²³¹ Applying the standard to both parties in litigation holds both the defendant and the plaintiff to the same standard in their pleadings. While the court in *Brooklyn* admitted that plaintiffs have the statute of limitations period to gather facts and defendants have the twenty-one-day interval, the defendants must still meet the plausibility standard and not prejudice the plaintiff.²³² The court struck defenses that were either duplicative of other defenses, were not alleged with sufficient specificity, or on primary jurisdiction grounds.²³³

Further, in *United States v. Brink*,²³⁴ the United States brought suit in the Southern District of Texas to enforce the CWA against landowners Brink and Kalter, near the La Para Creek and the Nueces River.²³⁵ The plaintiff claimed that the landowners placed pollutants or fill material in

227. *Dixon Lumber Co.*, 2017 WL 4933053, at *5.

228. *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001)).

229. 478 F. Supp. 3d 417 (E.D.N.Y. 2020).

230. *Id.* at 425.

231. *Id.* at 434–35.

232. *Id.* at 425–26.

233. *Id.* at 428–29, 431.

234. No. C–10–243, 2011 WL 835828 (S.D. Tex. Mar. 4, 2011).

235. *Id.* at *1.

the creek when they constructed a dam near the river.²³⁶ The defendants raised various affirmative defenses, including waiver and estoppel.²³⁷ The plaintiffs moved to dismiss these defenses because the defendants had not alleged that they obtained a permit before constructing the dam by contacting or consulting with the Corps of Engineers.²³⁸ The court stated that affirmative defenses must also satisfy the pleading standard set out in *Twiqbal*.²³⁹ The court proceeded to dismiss the defendants' affirmative defense of estoppel and waiver because the defendants had not "alleged any affirmative misconduct on the part of the Government" and had not "asserted in their answer that they contacted or communicated with the Corps of Engineers prior to constructing a dam in La Para Creek."²⁴⁰ Here, the court did not allow the defendants to raise affirmative defenses lacking factual support.

Brooklyn and *Brink* highlight how applying the *Twiqbal* requirements to all pleadings, including affirmative defenses, results in a fairer trial where both parties are on more equal footing because they are held to the same standard.

V. COURTS SHOULD SHIFT THEIR APPLICATION OF *TWIQBAL*

Because overturning *Twiqbal* is unpromising, courts should apply a uniform pleading standard to both plaintiffs and defendants alike. Additionally, courts should allow deference for environmental plaintiffs' pleadings. Judicial discretion remains a core function of the court system and would allow courts to give environmental plaintiffs much needed flexibility.²⁴¹ *Twiqbal*'s implementation of the plausibility standard in all civil suits turned judicial discretion into a gatekeeping mechanism that prevents access to the courts and denies plaintiffs' right to a fair trial, especially for low-income litigants.²⁴² *Twiqbal* impacts all litigation, but especially environmental litigation because the particularized facts needed to survive a motion to dismiss are often unobtainable without

236. *Id.*

237. *Id.*

238. *Id.* at *4.

239. *Id.*

240. *Id.* at *5.

241. Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMP. L. REV. 1075, 1075 (2006).

242. Clermont & Yeazell, *supra* note 9, at 823–24.; *see also* Nichols, *supra* note 97, at 198–99 (discussing the increased financial burden on plaintiffs post-*Twiqbal* as a result of "expensive pre-filing investigations to meet the heightened pleading standard," which leads to decreased access to justice).

discovery.²⁴³ The injustice that stems from the *Twiqbal* standard requires an adequate solution that both respects the current plausibility requirements and “ameliorates the injustice that results from dismissal of meritorious claims when courts enforce” this pleading burden solely on plaintiffs.²⁴⁴

A. *The Perfect Solution*

In a more just world, the Supreme Court would overrule *Twiqbal*, and the judicial system would return to simplified notice pleading. In *Iqbal*, the Supreme Court completely disregarded the roles of race and religion in the detentions after September 11, 2001.²⁴⁵ The Court was “indifferent to the harm of the practices it . . . legitimized.”²⁴⁶ The detention of *Iqbal* was deemed “rational and justified.”²⁴⁷ However, the identification and classification of potential-detainees heavily relied on factors of race, religion, and national origin, regardless of these individuals’ lack of connection to terrorism.²⁴⁸ Rather than adhering to congressional intent, the Supreme Court effectively decided what FRCP 8 meant while relying on a foundation of racism. This foundation has resulted in injustice throughout the judicial system. Simplified notice pleading was considered efficient for a long time. It allowed plaintiffs to sufficiently bring their claims to court and gain access to the tools of discovery to prove them.²⁴⁹ The Supreme Court shifted to a heightened pleading standard at *Javaid Iqbal*’s expense, justifying racism and keeping future plaintiffs with meritorious claims out of court and away from justice. Unfortunately, the Supreme Court is unlikely to reverse the stringent standard it has set.²⁵⁰ Thus, courts should apply *Twiqbal* to all parties and give deference to environmental plaintiffs due to the nature of their harms.

B. *The Twiqbal Pleading Standard Should Apply to All Parties*

The *Twiqbal* standard may provide for a faster and less expensive

243. See Foster, *supra* note 7, at 903; *Causation in Environmental Law*, *supra* note 5, at 2261.

244. Zachry Sandifer, *Insurmountable Burdens and Slippery Slopes: A Solution for Pleading Toxic Torts in the Plausibility Era*, 43 S. ILL. U. L.J. 435, 437 (2019).

245. Sinner, *supra* note 71, at 439.

246. *Id.*

247. *Id.* at 419.

248. *Id.*

249. Shepley, *supra* note 70, at 79.

250. See Amanda Shendruk, *Fewer than 2% of Supreme Court Rulings Are Ever Overturned*, QUARTZ (May 22, 2019), <https://qz.com/1326096/despite-its-pending-hard-right-turn-the-supreme-court-is-unlikely-to-overturn-roe-vs-wade/> [https://perma.cc/NC5B-9L57].

resolution of each action and proceeding provided for in FRCP 1, but it fails to provide just resolutions, which are also called for in the same statute.²⁵¹ The current standard favors efficiency over fairness and justice.²⁵²

Defendants can assert affirmative defenses without providing the same factual detail that is required of plaintiffs.²⁵³ The *Twiqbal* standard fails to provide a concrete framework in defining plausibility and leaves too much discretion to judges. This often leads to unfairly biased opinions based merely on a judge's own convictions. As shown in *Iqbal*, even Supreme Court Justices succumb to their own individual prejudices.²⁵⁴ The evidence presented in that case was appraised in a highly biased manner. Javaid Iqbal's claim was dismissed because his unnecessarily harsh detention was justified by the Justices based on his race, religion, and national origin. Because Javaid Iqbal was a Muslim Pakistani man, Mueller's directions to detain Arab Muslim men during the FBI's September 11 investigation were deemed "rational and justified," even though the identification and classification process likely heavily relied on those identity factors.²⁵⁵ This determination was often made without any link between the plaintiff and terrorist activities.²⁵⁶ The Court was indeed "oblivious" to Iqbal as a person and "blind" to race and religion with regard to post-September 11 detentions, as well as dismissive of the discriminatory experience of Arab Muslim men in the aftermath of September 11.²⁵⁷ The racist foundation of *Iqbal* and its resulting injustices must be remedied. Because it is unlikely that the Supreme Court will overturn its ruling in *Iqbal*, courts must apply the standard equally to all parties in litigation.

It is far too easy for courts to dismiss plaintiffs' claims before they have the chance to engage in discovery. Defendants can assert conclusory statements as affirmative defenses with ease, but these defenses deserve the same *Twiqbal* treatment the complaints receive. For example, in *Suncoast Waterkeeper*, the defendants were held to a much less stringent pleading standard than the plaintiffs and had the privilege of asserting

251. See generally Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed, administered, and employed" by both courts and parties in a lawsuit "to secure the just, speedy, and inexpensive determination" of every suit).

252. Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

253. See *supra* section IV.B.

254. See A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 201 (2010).

255. Sinnar, *supra* note 71, at 419.

256. *Id.* at 420.

257. *Id.* at 439.

generalized claims with no factual support.²⁵⁸ The court asserted the defendant could seek the factual details needed to support their defenses through discovery, but did not give the same deference to the plaintiffs.²⁵⁹ In *Dixon Lumber Co.*, the court stated that defendants' affirmative defenses "may not be pled 'so cryptically that their possible application will remain a mystery until unearthed in discovery.'"²⁶⁰

These cases illustrate that defendants are consistently given the benefit of discovery after asserting baseless defenses, while plaintiffs are left facing unreasonably high burdens. This significant discretion in the application of the heightened pleading standard harms plaintiffs at the aid of defendants. While defendants can bring a motion to dismiss "without ever filing a pleading," or assert an affirmative defense with almost no factual support, most plaintiffs are effectively barred from bringing suit against their wrongdoers.²⁶¹ This is especially true when discovery is necessary to establish the highly specific facts required, like in environmental cases.²⁶² *Twiqbal* tipped the scale of justice in favor of defendants.

However, applying the standard to defendants' affirmative defenses can help plaintiffs properly establish their claims by refusing to accept defendants' conclusory assertions. For example, in *Brooklyn Union Gas Co.*, the court chose to hold both the plaintiff and defendants to the same standard of plausibility.²⁶³ This resulted in a fairer trial, where the court adhered to the policy of not prejudicing the plaintiff.²⁶⁴ This trial was fairer because both parties needed to allege their claims with the same particularity. The defendant was unable to assert merely conclusory or duplicative defenses that would ultimately harm the plaintiff without cause.²⁶⁵

It is clear that applying the heightened standard across the board would result in more uniform and fair adjudication across jurisdictions. If defendants must assert their affirmative defenses with sufficient particularity, plaintiffs may not find it necessary to bring further motions

258. *Suncoast Waterkeeper v. City of Gulfport*, No. 8:17-cv-35-T-24 MAP, 2017 WL 3328398, at *4 (M.D. Fla. Aug. 3, 2017).

259. *Id.*

260. *Dixon Lumber Co. v. Austinville Limestone Co.*, No. 7:16-cv-00130, 2017 WL 4933053, at *5 (W.D. Va. Oct. 31, 2017) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001)).

261. *See Subrin, supra* note 76, at 580.

262. *Id.*

263. *See Brooklyn Union Gas Co. v. Exxon Mobil Corp.*, 478 F. Supp. 3d 417, 425–26 (E.D.N.Y. 2020).

264. *Id.*

265. *Id.* at 428–29, 431.

against these defenses, saving both courts and plaintiffs time and money.

C. Flexibility Should Be Given to Environmental Plaintiffs

Regardless of whether the *Twiqbal* standard is uniformly applied to pleading requirements for both plaintiffs and defendants, environmental plaintiffs should be given deference in regard to the specific factual allegations necessary to establish a plausible cause of action.²⁶⁶ They should be given this deference because of the inherent information asymmetry in these types of cases and the diminishment of democracy.

Under the current standard, plaintiffs need detailed facts from the beginning. This leaves the burden on them to fund premature discovery prior to filing their complaint. This allows defendants to further take advantage of the present asymmetry in information. Furthermore, it hinders low-income litigants from gaining access to the courts and allows only wealthy plaintiffs to obtain justice.²⁶⁷ A plaintiff's case may easily end before they get to discovery or trial, showing that the *Twiqbal* standard has exacerbated the consequences of both the mismatch of information and the wealth of the plaintiff. This is especially so in environmental cases.

A plaintiff's ability to obtain sufficient specific details at the pleading stage is inhibited by the current standard because environmental cases are often immersed in science and the damages are not immediately apparent. Additionally, determining a defendant's state of mind is nearly impossible. This is especially apparent in contamination cases, where the defendant may have willfully released a toxic chemical. Such particularized facts make pleading a more complicated step because it is difficult for plaintiffs to pinpoint exact details without discovery.²⁶⁸ There is inequitable access to the scientific information needed, which raises litigation costs for plaintiffs before the case has even begun. The unreasonably high litigation expenses in ascertaining the necessary facts result in expensive lawyer fees and delay a plaintiff's case. Many litigants, especially low-income litigants, cannot afford the expenses of high-priced lawyers and the many billable hours required to satisfy the heightened pleading. This diminishes access to the courts, which diminishes

266. While this Comment focuses on environmental plaintiffs, there is no question that there are other classes of plaintiffs deserving of flexibility in pleading. Particularly in discrimination cases, where it is hard to prove the defendants' state of mind and only the defendants have the necessary facts to prove a claim.

267. See Nichols, *supra* note 97, at 198–99.

268. See, e.g., *Goliad Cnty. v. Uranium Energy Corp.*, No. V–08–18, 2009 WL 1586688, at *10 n.7 (S.D. Tex. June 5, 2009) (finding the plaintiff lacked sufficient specific facts under *Iqbal* to plausibly show the defendant's intention to contaminate water).

democracy. Under the current application, environmental rights are not protected. Pleadings are intended to provide notice to the parties, whereas discovery is intended to give the parties the opportunities to find the necessary facts required to establish the merit of their claims.

As long as environmental plaintiffs provide adequate notice to defendants, courts should not require such specific facts. While we may lose efficiency through more pleadings and trials, affording environmental plaintiffs deference in regard to factual allegations will allow more plaintiffs to vindicate their rights and effectively bring suit against their wrongdoers. Obtaining efficiency at the expense of justice is not the answer. If courts are sensitive to the nature of environmental harm, more meritorious claims may finally see the light of day.

CONCLUSION

Applying the plausibility pleading standard to all parties and giving environmental plaintiffs deference would be a start to rectifying the injustice that has resulted from the *Twiqbal* rulings. Environmental law is a particularly unique area of law that requires a basic understanding of the science behind it to understand when a harm has occurred. Since the shift to the plausibility pleading standard, environmental practitioners have found asserting claims burdensome due to the difficulty in obtaining the necessary and very particular facts to establish causation. Pleading has become a gatekeeping mechanism that prevents environmental plaintiffs from bringing their claims and receiving justice by dismissing potentially meritorious claims and allowing defendants to make general, conclusory assertions. The plausibility pleading requirement undermines access to courts and fairness. It also increases the possibility of judicial bias while by placing new burdens on plaintiffs that seek to bring environmental claims. Applying the heightened pleading standard to defendants and allowing environmental plaintiffs deference at the pleading stage may address some of the inherent inequalities that have arisen as a result of *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.

