A "Plausible" Defense: Applying *Twombly* and *Iqbal* to Affirmative Defenses

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Abstract

The United States Supreme Court's decisions in Twombly *and* Iqbal *radically altered the environment in which federal complaints are filed by creating a "plausibility" requirement where the Federal Rules before required only a "short and plain statement" providing "notice" of a claim. The lower federal courts have just now begun to deal with the* Twombly-Iqbal *fallout. This Article addresses whether the new plausibility pleading standard applies only to plaintiffs' complaints, or whether it also applies to affirmative defenses raised in defendants' answers.*

I. Introduction

The United States Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] have created a firestorm of legal commentary.[3] Often referred to as the *Iqbal-Twombly* standard, the

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

[2] 129 S. Ct. 1937, *remanded to* 574 F.3d 820 (2009).

[3] *See* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997 (2010); Alison Kato & Nicolette Rowe, *Plausibility of Notice Pleading: Hawaii's Pleading Standards in the Wake of* Ashcroft v. Iqbal, 32 U. HAW. L. REV. 485 (2010); Robert E. Kohn, *Why* Iqbal *and* Twombly *Won't Fix the Real Disaster*, 57-MAY FED. LAW. 39 (2010); John G. McCarthy, *An Early Review of* Iqbal *in the Circuit Courts*, 57-MAY FED. LAW. 36 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Robert D. Owen & Travis Mock, *The Plausibility of Pleadings after* Twombly *and* Iqbal, 11 SEDONA CONF. J.

holdings from those cases set forth the "plausibility standard" of pleadings.[4] This standard requires that a complaint establish a plausible claim for relief in order to survive a motion to dismiss.[5] Scholars and legal practitioners have recently been faced with the question of whether the pleading standards enounced in *Twombly* and *Iqbal* apply to pleadings filed by either party to a suit, or whether they apply only to a plaintiff's filings.[6] To date, no court beyond the district level has ruled on the issue.[7]

Although some courts argue that *Twombly* and *Iqbal* enounce a new plausibility standard for a plaintiff's complaint to survive a motion to dismiss,[8] others have held that the standard must also be applied to defensive pleadings.[9] Courts espousing the view that the *Iqbal-Twombly*

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181 (2010); Richard J. Pocker, *Why the* Iqbal *and* Twombly *Decisions are Steps in the Right Direction*, 57-MAY FED. LAW. 38 (2010); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L & PUB. POL'Y 1107 (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

[4] *Twombly*, 550 U.S. at 556; *Iqbal*, 129 S. Ct. at 1952.

[5] *Iqbal*, 129 S. Ct. at 1949-50.

[6] *See* sources cited *supra* note 3.

[7] *See* Francisco v. Verizon S., Inc., No 3:09cv737, 2010 WL 2990159 (E.D. Va. July 29, 2010). "Since *Twombly* and *Iqbal*... neither the Fourth Circuit nor any other court of appeals has ruled on the question presented: whether *Twombly* and *Iqbal* extended the federal pleading requirements to a defendant's affirmative defenses." *Id.* at *6.

[8] *See* Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907 (D. Ariz. July 15, 2010) (order denying plaintiff's motion to strike affirmative defenses); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092 (M.D. Tenn. Mar. 18, 2010); Holdbrook v. SAIA Motor Freight Line, No. 09-cv-02870-LTB-BNB, 2010 WL 865380 (D. Colo. Mar. 8, 2010) (order denying plaintiff's motion to strike affirmative defenses); Charleswell v. Chase Manhattan Bank, No. 01-119, 2009 WL 4981730 (D.V. I. Dec. 8, 2009) (denying plaintiff's motion to strike affirmative defenses).

[9] *See* Racick v. Dominion Law Assocs., 270 F.R.D. 228 (E.D.N.C. Oct. 6, 2010); Castillo v. Roche Labs., Inc., No. 10-20876-CIV, 2010 WL 3027726 (S.D. Fla. Aug. 2, 2010); *Francisco*, 2010 WL 2990159, at *7-8; Bradshaw v. Hilco Receivables, 725

standard applies only to a plaintiff's complaint highlight the fact that neither Supreme Court opinion contemplates application of the standard to defensive pleadings.[10] Courts concluding that the *Iqbal-Twombly* standard should be applied to plaintiffs and defendants alike argue that common sense, fairness, and litigation efficiency requires uniform standards to be applied to all parties to the litigation.[11]

This Article analyzes the Supreme Court's decisions in *Twombly* and *Iqbal* as together providing guidance for the plausibility standard and its application to other forms of pleading. This Article should not be viewed as taking a position or offering a critique of the Supreme Court's decisions in *Twombly* or *Iqbal*. Rather, the authors seek to narrowly focus on whether the new *Iqbal-Twombly* standard should apply to defensive pleadings. While some district courts have held that the *Iqbal-Twombly* standard applies only to a plaintiff's complaint,[12] a majority of district courts have held that the standard governs defensive pleadings as well.[13]

This Article argues that, in viewing the *Twombly* and *Iqbal* decisions together, the plausibility standard is most logically and fairly applied when enforced upon pleadings by both plaintiffs and defendants. Part II offers background information on the pleading standards of the Federal Rules of Civil Procedure and the Supreme Court opinions in *Iqbal* and *Twombly*. Part III discusses the split: courts concluding that the *Iqbal-Twombly* standard applies to defensive pleadings and those holding that it does not. Part IV analyzes the arguments of each side and concludes that the *Iqbal-Twombly* standard should be applied uniformly to all litigants.

F. Supp. 2d. 532 (D. Md. 2010); Topline Solutions v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836 (D. Md. July 27, 2010); Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010); Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d. 1167 (N.D. Cal. 2010); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687 (N.D. Ohio 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647 (D. Kan. 2009); *In re* Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438 (Bankr. N.D. Ill. Sept. 9, 2009).

[10] *See* discussion *infra* Part III.B.

[11] *See* discussion *infra* Part III.A.

[12] *See, e.g.*, *McLemore*, 2010 WL 1010092, at *12-14.

[13] *See, e.g.*, *Francisco*, 2010 WL 2990159, at *7-8.

II. Background

A. The Federal Rules of Civil Procedure: "Notice Pleading"

The Federal Rules of Civil Procedure were first adopted in 1937.[14] With the enactment of these Rules, the drafters hoped to do away with the prior code pleadings.[15] Code pleadings replaced the rigid writ system, but failed to provide an adequate explanation of the requirements of a complaint: "a plain and concise statement of the facts constituting each cause of action (defense or counterclaim) without unnecessary repetition."[16] In application, "cause of action" was seen as too ambiguous, possibly requiring pleadings similar to the recently rejected writ system, or perhaps a simple statement concluding that the pleader should prevail.[17] As a result, code pleadings were severely criticized as "at best wasteful, inefficient, and time-consuming."[18] In response to the downfalls of the code pleadings, the Federal Rules of Civil Procedure sought to deemphasize the technicalities of pleadings in favor of a new, more flexible "notice pleading" standard.[19]

Rule 8 of the Federal Rules of Civil Procedure requires only a "short and plain statement" of the court's jurisdiction, the claim, and the grounds for relief.[20] The simplicity and brevity of the pleading requirements

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[14] *See* FED. R. CIV. P. 1 advisory committee's note.

[15] Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003). For background information on code pleadings, see generally WILLIAM E. BURBY, LAW REFRESHER: CODE PLEADING (2d ed. 1958); GEORGE L. PHILLIPS, AN EXPOSITION OF THE PRINCIPLES OF CODE PLEADING (2d ed. 1932); CHESTER H. SMITH, SMITH'S REVIEW OF CODE PLEADING (1964).

[16] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.4 (4th ed. 2005) (citing N.Y. Laws 1851, c. 479, § 1).

[17] *Id.*

[18] Fairman, *supra* note 15, at 990 & n.13 (quoting Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943)).

[19] *Id.* at 990.

[20] FED. R. CIV. P. 8(a) ("A pleading that states a 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

emphasize the new goal in federal pleading of focusing on the merits of the case.[21] Form 11 to the Federal Rules of Civil Procedure provides an example of a complaint that would suffice under Rule 8.[22] There, the drafters of the Federal Rules suggest that a well-pleaded complaint for negligence may simply include:

> (Caption . . .)
> 1. (Statement of Jurisdiction . . .)
> 2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.
> 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.
>
> Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.
> (Date and sign . . .).[23]

However, the Federal Rules also anticipated that in some circumstances a "short and plain statement" may not suffice to give notice to the defending party.[24] Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[25] The heightened pleading standard for this narrow group of cases indicates the much lower pleading standards that were intended to apply to all other cases.[26] This fact is also demonstrated by statutes that impose heightened pleading requirements in certain types of cases, such as with securities litigation.[27] However, Congress

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and plan 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.").

[21] Fairman, *supra* note 15, at 990-91.

[22] FED. R. CIV. P. Form 11.

[23] *Id.*

[24] Fairman, *supra* note 15, at 991.

[25] FED. R. CIV. P. 9(b).

[26] *Compare* FED. R. CIV. P. 8(a), *with* FED. R. CIV. P. 9(b).

[27] *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004).

has chosen not to require a heightened pleading standard for the vast majority of cases.[28] While there is some argument that the inclusion of this heightened pleading standard in Rule 9(b) is a result of historical accident,[29] there is also a strong argument supporting the theory that it relates to the concept of "notice pleading,"[30] especially in light of the fact that the Rule has never been amended to remove the direction for heightened pleading.

The application of "notice pleading" standards is evident in many cases before the decisions in *Ashcroft v. Iqbal*[31] and *Bell Atlantic Corp. v. Twombly*.[32] In *Conley v. Gibson*, for example, the Supreme Court applied a liberal interpretation of Rule 8 in a suit between railroad employees and their collective bargaining agents.[33] African-American railroad employees of the Texas and New Orleans Railroad sued the Brotherhood of Railway and Steamship Clerks, of which they were members, claiming that they had not been represented fairly by the union.[34] The employees claimed that the union had either purported to abolish their jobs and instead filled their positions with white employees, or had demoted them and filled the senior positions with white employees, both actions in violation of their union contract and the Railway Labor Act.[35] The union agents moved to dismiss the complaint for failure "to state a claim upon which relief could be given."[36] The district court granted the motion and the Fifth Circuit affirmed.[37]

The Supreme Court reversed, holding that the complaint sufficed under the standards enounced by the Federal Rules of Civil Procedure.[38] Ex-

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[28] *Id.*

[29] William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965-67, 985 (1987).

[30] Fairman, *supra* note 15, at 991.

[31] 129 S. Ct. 1937, *remanded to* 574 F.3d 820 (2009).

[32] 550 U.S. 544 (2007).

[33] 355 U.S. 41, 42 (1957), *abrogated by Twombly*, 550 U.S. 544.

[34] *Conley*, 355 U.S. at 42-43.

[35] *Id.* at 43.

[36] *Id.*

[37] *Id.* at 43-44.

[38] *Id.* at 45-48.

plaining its interpretation of the Rules, the Court stated it followed "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[39] The Court cited Rule 8, explaining that a complaint need not set forth the factual details supporting its claim.[40] Quoting the "short and plain statement" language of Rule 8, the Court stated that the simple requirements of notice pleading were possible because of the opportunity for broad discovery and pretrial procedures designed to provide litigants with more detailed information, such as Rule 12(e)'s motion for a more definite statement.[41] In sum, the Court found the complaint set forth a claim that gave the defendants fair notice of the grounds for relief.[42]

In 2002, in *Swierkiewicz v. Sorema N.A.*,[43] the Supreme Court appeared to echo the liberal pleading standards it announced forty-five years earlier in *Conley*. The Court in *Swierkiewicz* found the liberal pleadings standards described in *Conley* applied to employment discrimination suits.[44] Akos Swierkiewicz, a native of Hungary, worked for Sorema N.A. as a senior vice president and chief underwriting officer.[45] After nearly six years of service, François M. Chavel, Sorema's Chief Executive Officer and a French citizen, demoted Swierkiewicz and transferred most of his underwriting responsibilities to Nicholas Papadopoulo, also a French citizen.[46] One year later, Chavel stated that he sought to "energize" the department and promoted Papadopoulo to the position of chief underwriting officer.[47] Swierkiewicz claimed that Papadopoulo had only

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[39] *Id.* at 45-46.

[40] *Id.* at 47-48.

[41] *Id.* at 47 & n.9.

[42] *Id.* at 48. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.*

[43] 534 U.S. 506 (2002).

[44] *Swierkiewicz*, 534 U.S. at 512-15.

[45] *Id.* at 508.

[46] *Id.*

[47] *Id.*

one year of underwriting experience and was thus unqualified for the position.[48] Swierkiewicz sued Sorema, claiming discrimination on the basis of his national origin and age.[49]

The district court dismissed Swierkiewicz's complaint, stating that the complaint had not "adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination."[50] The Second Circuit affirmed this ruling, stating that a plaintiff in an employment discrimination suit must allege facts which constitute a prima facie case of discrimination.[51] Justice Thomas, writing for the Supreme Court, reversed and found Swierkiewicz's complaint sufficient under Rule 8.[52]

The Court noted it had previously rejected the claim that an employment discrimination complaint "requires greater 'particularity,' because this would 'too narrowly constric[t] the role of the pleadings.'"[53] Further, the Court stated that, "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case" and found that imposing any pleading standard beyond Rule 8(a)'s requirement of "'a short and plain statement'" was disallowed by Rule 8(a) and the employment statutes.[54] The Court concluded by reiterating that Rule 8(a) standards applied to all civil actions, absent a few exceptions set forth in Rule 9(b) or in particular congressional enactments, none of which applied to Swierkiewicz's complaint.[55] "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpreta-

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[48] *Id.*

[49] *Id.* at 509.

[50] *Id.*

[51] *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), *remanded to* 390 F. Supp. 501 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102 (8th Cir. 1976)).

[52] *Id.* at 514-15.

[53] *Id.* at 511 (alteration in original) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11, *remanded to* 540 F.2d 219 (5th Cir. 1976)).

[54] *Id.* at 511-12 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)).

[55] *Swierkiewicz*, 534 U.S. at 513.

tion.'"[56] The complaint set forth detailed facts of the discriminatory events alleged, which satisfied the Court that fair notice had been given to Sorema.[57] In sum, the Court found that the pleading standards set forth in Rule 8(a) applied to all claims not listed in Rule 9(b) or described in particular statutory provisions, and that the possibility of success on the merits had no bearing on the adequacy of pleading.[58]

B. The Rise of "Plausibility Pleading"

Although the Supreme Court had applied the standards of "notice pleading" in a very liberal and flexible way for nearly seventy years,[59] the Court's interpretation of Rule 8(a) began to shift to a standard that arguably includes a consideration of the merits.[60] Through *Twombly* and *Ashcroft v. Iqbal*, the Court began applying a standard of plausibility to its application of Rule 8.[61]

1. *Bell Atlantic Corp. v. Twombly*

In 2007, the Supreme Court decided the case of *Bell Atlantic Corp. v. Twombly*.[62] William Twombly and Lawrence Marcus sued Bell Atlantic and other communications providers, collectively referred to as "Incumbent Local Exchange Carriers" or "Baby Bells," on behalf of a class of telephone and internet subscribers.[63] Twombly and Marcus

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[56] *Id.* at 515 (quoting Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168, *remanded to* 993 F.2d 1177 (5th Cir. 1993)).

[57] *Id.* at 514.

[58] *Id.* at 515. "'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'" *Id.* (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *cert. denied*, 435 U.S. 924 (1978)).

[59] *See id.* at 513-14.

[60] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 575 (2007) (citing *Swierkiewicz*, 534 U.S. at 514).

[61] *See Twombly*, 550 U.S. at 555-56; *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, *remanded to* 574 F.3d 820 (2009).

[62] 550 U.S. 544 (2007).

[63] *Twombly*, 550 U.S. at 550.

claimed the Baby Bells engaged in acts that violated section 1 of the Sherman Antitrust Act.[64] Specifically, the plaintiffs alleged that the Baby Bells "engaged in parallel conduct" in market areas to prevent upstart businesses from competing,[65] and that the Baby Bells agreed not to compete with each other.[66]

Although the Court did not address how the Baby Bells came about, their creation is important to understanding the case. "In 1984, the American Telephone & Telegraph Company . . . was ordered to divest its local telephone business" and break into numerous local providers.[67] As AT&T began to break apart, the smaller, local providers, the Baby Bells, created government-sanctioned monopolies.[68] These Baby Bell monopolies were regulated heavily by the federal government and were forbidden from competing with other Baby Bells in markets other than those to which each was designated, including the long-distance market.[69] Not long after the Baby Bells were established, however, the regulations changed.[70]

The Telecommunications Act of 1996 required the Baby Bells to share their networks with upstart local companies trying to enter the market.[71] In exchange for allowing the local companies access to their networks, the Baby Bells were permitted to compete in other regional markets and the long-distance market, contrary to the regulations following AT&T's break-up.[72] The plaintiffs in *Twombly* claimed that when the prohibition against competing in other markets was lifted, the Baby Bells adopted common measures to prevent the upstart local companies from taking

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[64] *Id.*

[65] *Id.*

[66] *Id.* at 551.

[67] Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 879 (2009).

[68] *Id.*; *see also* Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 510 (2009).

[69] Tymoczko, *supra* note 68, at 510.

[70] *Id.*

[71] Bone, *supra* note 67, at 879; Tymoczko, *supra* note 68, at 510.

[72] Tymoczko, *supra* note 68, at 510.

hold and agreeing not to compete outside of their respective markets.[73] According to the plaintiffs, the Baby Bells collectively restrained trade in such a way that allowed them to charge inflated prices, which created a price controlled market as existed under AT&T.[74]

The United States District Court for the Southern District of New York dismissed the plaintiffs' claim.[75] It stated that although the plaintiffs alleged that the Baby Bells engaged in parallel business activities, proof of that alone would not suffice as a Sherman Act claim; the parallel business activities must have been intentional and part of a conspiracy.[76] Similarly, the district court found that the plaintiffs' complaint did not "'alleg[e] facts . . . suggesting that refraining from competing in other territories . . . was contrary to [the Baby Bells'] apparent economic interests, and consequently [does] not rais[e] an inference that [the Baby Bells'] actions were the result of a conspiracy.'"[77] On appeal, the Second Circuit reversed the district court's finding that the complaint was insufficient.[78] The Supreme Court then granted certiorari.[79]

In reviewing the case, the majority stated: "'The crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'"[80] It explained that an agreement to engage in anticompetitive action must be proven, and that even "conscious parallelism" would not suffice as proof of such an agreement.[81] Turning to issues of pleading standards, the Court reiterated

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[73] Bone, *supra* note 67, at 879-80.

[74] Tymoczko, *supra* note 68, at 510-11.

[75] *Twombly*, 550 U.S. at 552.

[76] Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y 2003) (citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954)), *vacated*, 425 F.3d 99 (2nd Cir. 2005), *cert. granted*, 548 U.S. 903 (2006), *and rev'd*, 550 U.S. 544 (2007).

[77] *Twombly*, 550 U.S. at 552 (alterations in original) (quoting *Twombly*, 313 F. Supp. 2d at 188).

[78] *See id.* at 553.

[79] *Id.*

[80] *Id.* (quoting *Theatre Enters.*, 346 U.S. at 540). Section 1 of the Sherman Act "'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy.'" *Id.* (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, *remanded to* 753 F.2d 1076 (7th Cir. 1984)).

[81] *See id.* at 553-54.

that Federal Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[82] Mere "labels and conclusions" or recitation of the elements of the cause of action are insufficient to meet the standards of notice pleading.[83] The Court relied on these general standards to state that a complaint setting forth a claim under the Sherman Act must include "enough factual matter (taken as true) to suggest that an agreement was made."[84] In the Court's view, antitrust claims fell within the basic pleading requirements of Rule 8(a)(2), meaning that a plaintiff could "sho[w] that the pleader [was] entitled to relief" only by offering some evidence that there was in fact an agreement to engage in anticompetitive actions.[85]

The plaintiffs argued that claims falling just below this standard would be dismissed by a court employing "careful case management" in discovery proceedings.[86] The Court, however, rejected this argument, expressing its dissatisfaction with relying on careful judicial scrutiny to prevent abuse of discovery.[87] The plaintiffs also argued that this finding would be in conflict with the prior holding in *Conley v. Gibson*.[88] Recall that in *Conley*, the Court stated "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[89] However, the Court in *Twombly* stated that this passage from *Conley* has been consistently misinterpreted by courts and commentators and has been read out of context of the *Conley* case.[90] In fact, the Court

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[82] *Id.* at 555 (quoting FED. R. CIV. P. 8(a)(2)) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by Twombly*, 550 U.S. 544).

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

[84] *Id.* at 556. The Court stated the "general standards" applied, and in a footnote stated that "[t]he dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether." *Id.* at 556 n.3.

[85] FED. R. CIV. P. 8(a)(2); *see Twombly*, 550 U.S. at 556-57.

[86] *Twombly*, 550 U.S. at 559.

[87] *Id.*

[88] *Id.* at 560-61 (citing Conley v. Gibson, 355 U.S. 41, 41 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)).

[89] *Id.* at 561 (quoting *Conley*, 355 U.S. at 45-46).

[90] *See id.* at 561-62.

stated that the passage makes sense only when read in conjunction with the opinion's discussion of the fact that the complaint had already stated an adequate claim for relief.[91] Recognizing the confusion caused by this passage, the Court announced that the phrase should no longer be considered authoritative precedent for pleadings.[92] The Court stated that *Conley* "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[93]

Finally, turning to an analysis of the plaintiffs' complaint, the Court concluded that the complaint failed to meet the basic pleading standards when alleging the Baby Bells' conspiracy to restrain trade.[94] It found that the complaint was conclusory and failed to sufficiently allege the plausibility of a conspiracy.[95] The Court concluded its analysis by stating that the facts proffered by the complaint failed to set forth a valid claim under section 1 of the Sherman Act since no antitrust conspiracy was sufficiently suggested.[96] Justice Thomas, who penned the Court's opinion in *Swierkiewicz v. Sorema N.A.* applying the notice pleading standard,[97] joined the majority opinion here.[98]

The Court stated in a closing footnote: "In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . . ."[99] This standard is arguably different from the Court's own precedent.[100] Although many courts and commentators continue to view the *Twombly*

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[91] *See id.* at 562-63.

[92] *Id.* at 563. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.*

[93] *Id.*

[94] *Id.* at 564.

[95] *Id.* at 565-66 (stating "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway").

[96] *Id.* at 569.

[97] *Id.* at 570 (citing *Swierkiewicz*, 534 U.S. 506).

[98] *Twombly*, 550 U.S. 544.

[99] *Id.* at 569 n.14.

[100] *See Swierkiewicz*, 534 U.S 506; *Conley*, 355 U.S. 41.

holding as creating a heightened pleading standard, the Court explained that its "concern is not that the allegations in the complaint were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."[101] The Court found that the evidence offered by the plaintiffs failed to suggest even the plausibility that similar business actions of the Baby Bells constituted more than coincidence or the normal market trend, and such limited proof was an insufficient basis for an antitrust claim.[102]

Justice Stevens dissented, offering a narrative of Rule 8(a)(2)'s formation.[103] He stated that the "no set of facts" formulation offered in *Conley* "permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process."[104] Justice Stevens expressed his dissatisfaction with the majority's discard of *Conley*, stating that the purpose of the Federal Rules is to codify the pleading standard, not to require or invite pleading of facts.[105] He also disagreed with the majority by stating that the standard set forth in *Conley* pertains to "what a complaint *must* contain, not what it *may* contain."[106] In sum, Justice Stevens argued that the complaint should not be dismissed unless it is found that the theory of relief is completely implausible.[107]

Following the *Twombly* decision, the legal community was unsure as to the scope of its application.[108] By March 2008, hundreds of lower federal courts began applying the plausibility standard to cases beyond those grounded in antitrust law,[109] and within the first six months after *Twombly* was published, the case had been cited in over 2000 district

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[101] *Twombly*, 550 U.S. at 569 n.14 (citing *Swierkiewicz*, 534 U.S. at 515).

[102] *Id.* at 566-68.

[103] *Id.* at 573-78 (Stevens, J., dissenting).

[104] *Id.* at 577.

[105] *Id.* at 580.

[106] *Id.*

[107] *Id.* at 580-81 (citing *Conley*, 355 U.S. at 45-46).

[108] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

[109] *See id.* at 458 & n.150.

court opinions and more than 150 circuit court opinions.[110] However, commentators also acknowledged that the full application of the new plausibility standard was murky.[111] Courts and commentators speculated as to the meaning of the Court's decision, noting that,

> [b]ecause *Twombly* is so widely cited, it is particularly unfortunate that no one quite understands what the case holds. Depending on how one reads it, the *Twombly* decision might have radically changed one of the iconic rules of civil procedure, while overturning or modifying [*Conley v. Gibson*,] one of the most often cited cases in the United States Reports.[112]

As the Supreme Court threw "courts into disarray with its *Twombly* decision," three interpretations of its scope began to emerge.[113] *Twombly* was interpreted as having overruled *Conley* and imposed a new "pleading standard for (1) all cases not already subject to 'heightened' pleading under Rule 9(b) . . . ; (2) all conspiracy cases; or (3) antitrust conspiracy cases only."[114] It was not until the decision in *Iqbal* that the full scope of the *Twombly* decision became clear.

2. *Ashcroft v. Iqbal*

In 2009, the Supreme Court heard the case of *Ashcroft v. Iqbal*.[115] Javaid Iqbal, a citizen of Pakistan, was arrested in the United States by federal officials on criminal charges following the September 11, 2001 terror attacks on the United States.[116] Iqbal alleged that he was deprived of constitutional protections and sued John Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the FBI.[117]

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[110] Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852 (2008).

[111] *Id.* at 852-53.

[112] *Id.* at 852.

[113] *Id.* at 858.

[114] *Id.* (footnotes omitted).

[115] 129 S. Ct. 1937, *remanded to* 574 F.3d 820 (2d Cir. 2009).

[116] *Iqbal*, 129 S. Ct. at 1942.

[117] *Id.*

In the months following September 11, 2001, the FBI began an in-depth investigation into a number of suspected terrorism links.[118] Iqbal was arrested in November 2001 on charges of "fraud in relation to identification documents and conspiracy to defraud the United States."[119] Nearly 200 suspected individuals who were detained on immigration charges, including Iqbal, were considered of high interest to the September 11 attacks investigation and were prevented from communicating with others in the prison and the outside community.[120] While awaiting trial, Iqbal was imprisoned at the Metropolitan Detention Center in New York, and in January of 2002, he was moved to the Administrative Maximum Special Housing Unit of the detention center.[121] Prisoners in this unit were kept in lockdown twenty-three hours a day and were allowed only one hour outside of their cells, under the condition that they were accompanied by four officers and restrained with handcuffs and leg irons.[122] Iqbal alleged that he was kicked and beaten by his jailers, unnecessarily strip-searched, and prevented from praying.[123]

Iqbal pleaded guilty to the government's charges and was deported to Pakistan after serving a term of imprisonment.[124] He then filed a *Bivens* action[125] against some fifty-three federal officials, including Ashcroft and Mueller, alleging that his treatment while confined to the maximum security section of the prison was a result of the government's classification of him as a person of high interest based on his "race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution."[126]

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[118] *Id.* at 1943.

[119] *Id.* (citing Iqbal v. Hasty, 490 F.3d 143, 147-48 (2d Cir. 2007)).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1944.

[124] *Id.* at 1943.

[125] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (holding that an implied cause of action existed against the federal government based on federal officials' violation of the Fourth Amendment).

[126] *Iqbal*, 129 S. Ct. at 1943-44.

Ashcroft and Mueller moved to dismiss the complaint "for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct."[127] The district court denied the motion to dismiss, stating that "'it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against' petitioners."[128] Ashcroft and Mueller then filed an interlocutory appeal to the Second Circuit Court of Appeals.[129] While the appeal was pending, the Supreme Court handed down its decision in *Bell Atlantic Corp. v. Twombly*.[130] The Second Circuit concluded that *Twombly* established a flexible pleading standard grounded in plausibility, requiring the complaint to support a claim with "'some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.'"[131] The circuit court held that Iqbal's pleading was sufficient to withstand Ashcroft and Mueller's motion to dismiss.[132]

After granting certiorari, the Supreme Court considered Iqbal's complaint in light of the newly-explained *Twombly* pleading standard.[133] Using a two-pronged analysis, the Court found that Iqbal's complaint was insufficient.[134] Setting forth the standard, the Court stated (1) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,"[135] and (2) "only a complaint that states a plausible claim for relief survives a motion to dismiss."[136] Summarizing the approach courts should take, the Court stated that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions,

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[127] *Id.* at 1944.

[128] *Id.* (alterations in original) (quoting First Am. Compl., No. 04-CV-1809 (JG)(JA), at 136a-137a).

[129] *Id.*

[130] 550 U.S. 544 (2007).

[131] *Iqbal*, 129 S. Ct. at 1944 (quoting Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).

[132] *Id.* (citing *Iqbal*, 490 F.3d at 174).

[133] *Id.* at 1949-54.

[134] *Id.* at 1950-51.

[135] *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

[136] *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556).

are not entitled to the assumption of truth."[137] The Court stated that when factual allegations are sufficiently pleaded, the court should take them as true and decide whether they would *plausibly* entitle the pleader to relief.[138]

First, the Court stated that Iqbal's complaint included bare assertions that did no more than recite the elements of a constitutional discrimination claim; specifically, the Court referred to the pleadings concerning Ashcroft and Mueller's knowledge and agreement to subject Iqbal to unnecessary confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[139] The Court, although clarifying that it did not believe the allegations were unrealistic, held that such conclusory assertions, without more, did not give rise to a presumption of truth when determining a motion to dismiss.[140]

Second, the Court considered whether the factual allegations in Iqbal's complaint "plausibly suggest[ed] an entitlement to relief."[141] Iqbal alleged that Mueller and the FBI had detained thousands of Arab Muslim men in its investigation into the terrorist attacks, and that the policy of placing these individuals in the restrictive area of the prison was approved by both Ashcroft and Muller.[142] While acknowledging that, if taken as true, these allegations were consistent with the government's purpose of detaining those "of high interest," the Court said that they were insufficient when considering more likely explanations.[143]

Iqbal challenged the policy of holding the detainees in the maximum security restrictive areas of the prison, not his arrest or detention.[144] To prevail on the claim against the detention policy, Iqbal would be required

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[137] *Id.*

[138] *Id.*

[139] *Id.* at 1951.

[140] *Id.* ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

[141] *Iqbal*, 129 S. Ct. at 1951.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1952.

to plead facts showing the plausibility of the adoption of a policy designed to classify individuals as of high interest based on their race, religion, or national origin.[145] The Court stated that, even if the allegation was taken as true, the complaint would fail to establish that the individuals were purposefully detained in the maximum security area because of their race, religion, or national origin.[146] Concluding that Iqbal failed to sufficiently plead any cause of action that could plausibly entitle him to relief, the Court remanded the case to the court of appeals for a determination of whether Iqbal should be given leave to amend his complaint.[147]

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer, from the majority's conclusion that the complaint failed the pleading standards of Federal Rule of Civil Procedure 8(a)(2).[148] The dissent specifically disagreed with the majority's application of the standard of plausibility.[149] According to Justice Souter, "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be."[150]

Justice Souter noted that the difficulty in *Twombly* was that the actions complained of were consistent with the conspiracy claimed by the plaintiffs, but that rational business strategies in line with the market would just as easily explain the defendants' actions.[151] Here, in contrast, Justice Souter found that Iqbal's allegations could not be explained as "consistent with legal conduct."[152] Souter explained that he believed the

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[145] *Id.*

[146] *Id.*

[147] *Id.* at 1954.

[148] *Id.* at 1954-55 (Souter, J., dissenting).

[149] *Id.* at 1959.

[150] *Id.* (citing *Twombly*, 550 U.S. at 555; Neitzke v. Williams, 490 U.S. 319, 327 (1989)). Justice Souter also stated that "[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here." *Id.* (Souter, J., dissenting).

[151] *Iqbal*, 129 S. Ct. at 1959 (citing *Twombly*, 550 U.S. at 554).

[152] *Id.* at 1960. "The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge

majority understood the plausibility standard in the same way as him, but that the majority erroneously concluded that Iqbal's allegations were impermissibly conclusory.[153] He stated that the two allegations discussed by the majority [154] would alone be insufficient to state a claim that plausibly would entitle Iqbal to relief, but that the majority failed to consider other non-conclusory statements present in the complaint.[155] Justice Souter concluded that, had the majority considered all of the relevant allegations together, they would not have erroneously found the complaint deficient.[156]

Although the Court dismissed Iqbal's claims and found that his assertions were implausible, declassified government memoranda have since suggested that Iqbal's claims were more plausible than the Court's majority believed.[157] These documents have revealed that "high-ranking government officials adopted, as official policy, torture and other harsh techniques of interrogation that violated international and domestic law."[158]

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and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. Iqbal's complaint therefore contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

[153] *Id.*

[154] *Id.* The majority stated that officers "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," and that this produced "a disparate, incidental impact on Arab Muslims." *Id.* at 1951-52.

[155] *Id.* at 1960 (Souter, J., dissenting). Souter stated that "the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates," and noted the following specifics:

> Ashcroft was the "principal architect" of the discriminatory policy; Mueller was "instrumental" in adopting and executing the discriminatory policy; Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

Id. (alteration in original) (citations omitted).

[156] *Id.* at 1960-61.

[157] *See* Michael C. Dorf, Iqbal *and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 219 (2010).

[158] *Id.* (citing JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (1st ed. 2008); PHILIPPE

III. Circuit Split

After *Twombly* and *Iqbal*, district courts began facing the issue of whether affirmative defenses would be held to the same plausibility standards as set forth by *Twombly* and *Iqbal*. Among the courts which have determined whether the plausibility pleading standard requires similar pleading of affirmative defenses, two opposing schools of thought have emerged. First, a majority of courts have found that the standard created by *Twombly* and *Iqbal* applies to affirmative defenses.[159] Second, a minority of courts have found that, regardless of the plaintiff's pleading standard, there is no heightened standard of plausibility applied to affirmative defenses.[160]

A. "Plausibility Pleading" Applies to Affirmative Defenses

In July 2010, in *Francisco v. Verizon South, Inc.*, the United States District Court for the Eastern District of Virginia was confronted head-on

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SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (1st ed. 2008); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (1st ed. 2007)).

[159] *See* Racick v. Dominion Law Assocs., 270 F.R.D. 228, 233 (E.D.N.C. 2010); Castillo v. Roche Labs., Inc., No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010); Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *6 (E.D. Va. July 29, 2010); Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532, 536 (D. Md. 2010); Topline Solutions, Inc. v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010); Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010); Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 270 F.R.D. 488, 493 (N.D. Cal. 2010); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 651 (D. Kan. 2009); *In re* Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438, at*6 (Bankr. N.D. Ill. Sept. 9, 2009).

[160] *See* Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010); Holdbrook v. SAIA Motor Freight Line, LLC, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010); Charleswell v. Chase Manhattan Bank, N.A., No. 01-119, 2009 WL 4981730, at *4 (D.V.I. Dec. 8, 2009).

with the issue of whether affirmative defenses in a case applying the plausibility pleading standards must also be plead with increased specificity.[161] Amy Francisco filed a complaint against her former employer, Verizon South, alleging racial discrimination and intimidation in the workplace, resulting in unlawful retaliation and termination.[162] Francisco, an African-American woman, alleged that in 2006 she discovered that her pay was below her position's minimum salary requirement.[163] When Francisco met with Debra Nuckles, her supervisor and a white Verizon South employee, Nuckles did not respond to Francisco's request for a pay adjustment.[164] It was not until after Francisco's third request for a pay adjustment to the appropriate amount that Nuckles corrected Francisco's salary.[165] More than eight months lapsed between Francisco's first request for a pay adjustment and the ultimate correction of her pay.[166]

While Francisco was awaiting her salary correction, she became interested in the company's position of District Diversity Lead and submitted a request for consideration for the position to Nuckles.[167] However, Nuckles did not forward Francisco's request to the managers responsible for filling the position, and Francisco was not considered.[168] During this time, Francisco also began to receive negative performance review evaluations, and in 2007 Nuckles placed Francisco on a performance development plan.[169] Nuckles stated that she "no longer viewed Francisco as a team player."[170]

In October of 2007, Verizon South held a conference for first- and second-level managers, and Francisco attended.[171] During one session

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[161] No. 3:09cv737, 2010 WL 2990159, at *6-10 (E.D. Va. July 29, 2010).

[162] *Francisco*, 2010 WL 2990159, at *1.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* (internal quotation marks omitted).

[171] *Id.*

at the conference, a speaker requested a volunteer to hold up cards for the audience.[172] An African-American manager was chosen, and during the presentation the manager dropped a card.[173] When the manager picked up the card, she revealed the card's back to the audience.[174] The back of the card depicted "a photograph of a lynching noose," and the African-American managers who witnessed the incident, including Francisco, "perceived it as a racist symbol and were offended by its display."[175] In January of 2008, Francisco requested that the noose incident at the conference be investigated.[176] However, when Francisco called to follow up on the investigation, Louise Shutler, a Verizon South employee, revealed to Francisco that she had forgotten to forward the complaint to the Ethics Group.[177] The following week, Francisco again called to follow up on the investigation and was informed that she would later receive a phone call from Kenna Ashley, also a Verizon South employee.[178] Francisco was later informed by Ashley that the completion of the investigation would take between two weeks and four months.[179]

Francisco was informed on March 6, 2008 that she would be laid off and was advised in a termination letter that she had roughly one month to find another position within the company.[180] Three days later, Francisco discovered that another employee was attempting to transfer to a different department within Verizon South, although Francisco was never informed of the available position.[181] Francisco was unable to secure another position and was terminated on March 17, 2008.[182] On

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[172] *Francisco*, 2010 WL 2990159, at *1.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* at *2.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Francisco*, 2010 WL 2990159, at *2.

that day, Francisco received a call from Ashley stating that the noose incident investigation was completed.[183]

Francisco sued Verizon South, alleging unlawful retaliation.[184] Verizon South answered, raising fifteen affirmative defenses.[185] Francisco filed a motion to strike, asserting that the affirmative defenses raised by Verizon South did not meet the federal pleading requirements set forth by the Supreme Court cases of *Bell Atlantic Corp. v. Twombly*[186] and *Ashcroft v. Iqbal*[187] because "[n]owhere in the pleadings does [Verizon South] allege a single fact in support of its defenses."[188] For example, Verizon South offered defenses such as: "Verizon South has not proximately caused any of the damages Francisco alleges in the Amended Complaint"; "Verizon South's actions relating to Francisco were based on legitimate, nondiscriminatory business reasons"; and "Francisco is not entitled to any of the relief she seeks."[189]

Francisco asserted that the standard set forth by *Twombly* and *Iqbal* extended Federal Rule of Civil Procedure 8 pleading requirements to defendants and plaintiffs alike, so that Verizon South's affirmative defenses did not meet the specificity requirements and should be stricken.[190] Although Francisco cited a case from the United States District Court for the Western District of Virginia which recently held

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[183] *Id.*

[184] *Id.*

[185] *Id.* at *3. Verizon South's affirmative defenses included, among others: failure to state a claim; good faith belief that no law was violated; failure to exhaust corrective opportunities within the company; no damages proximately caused by defendant; waiver, estoppel, and unclean hands; legitimate nondiscriminatory basis for business actions; failure to mitigate; and after-acquired evidence doctrine. *Id.* at *3-4.

[186] 550 U.S. 544 (2007).

[187] 129 S. Ct. 1937, *remanded to* 574 F.3d 820 (2d Cir. 2009).

[188] *Francisco*, 2010 WL 2990159, at *4.

[189] *Id.* at *3-4. These quoted passages restate affirmative defenses 5, 8, and 12 in their entirety.

[190] *Id.* at *4. Verizon South also proffered an *Ellerth-Faragher* affirmative defense that Francisco challenged; however discussion of this defense is omitted here as not relevant to our discussion. *Id.* at *4 n.2 (citing Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998)).

that affirmative defenses were held to the *Iqbal-Twombly* standard,[191] Verizon South responded that the standard did not apply to its affirmative defenses.[192]

In determining whether plausibility pleading standards applied to affirmative defenses, the district court noted that a majority of courts have held that the *Iqbal-Twombly* standard applied both to a plaintiff's and a defendant's pleadings.[193] The court acknowledged that the United States District Court for the Western District of Virginia recently held that the standard established by *Iqbal* and *Twombly* applied to affirmative defenses, following the majority trend.[194] Following its sister court, the court held that plausibility pleading standards are required for defendants when asserting affirmative defenses.[195]

To reach its decision, the court focused on a number of policies and goals underlying the plausibility pleading standard in general.[196] These reasons can be broken into three main arguments supporting plausibility pleading standards for defendants.[197] First, the court stated that "'the considerations of fairness, common sense and litigation efficiency' dictate that litigants articulate complaints and affirmative defenses according to the same pleading standards."[198] The court found this objective consistent with the underlying goal of plausibility pleading: specific facts alleged in pleadings give the opposing party clear notice of the legal dispute giving rise to the controversy.[199] Moreover, the court stated that fact-

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[191] *Francisco*, 2010 WL 2990159, at *5; *see* Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010).

[192] *Francisco*, 2010 WL 2990159, at *2.

[193] *Id.* at *6 & n.3 (listing district courts holding that the pleading standard applies to affirmative defenses). The court also acknowledged that many courts have, to the contrary, found that heightened pleading standards apply only to a plaintiff's claims. *See id.* at *6 n.4.

[194] *Id.* at *7 (citing *Palmer*, 2010 WL 2605179, at *5-7).

[195] *Id.* at *7-8.

[196] *Id.* at *7-9.

[197] *Id.*

[198] *Id.* at *7 (quoting *Palmer*, 2010 WL 2605179, at *5).

[199] *Id.* (citing Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (order granting motion to strike and leave to amend affirmative defenses)).

specific pleading enabled discovery narrowly tailored to the legal issue involved in the case.[200] In sum, the court found that the reasons requiring the plaintiff to meet a plausibility pleading standard in a particular situation apply equally to the defendant's pleadings, and that the benefits a defendant receives from a plaintiff's plausibility pleading should be reciprocated.[201]

Second, the court highlighted the minimal facts required by plausibility pleading standards and a court's general tendency to liberally grant leaves to amend.[202] The court recognized that the plausibility pleading standard presents problems for defendants that are different from plaintiffs.[203] The court acknowledged that defendants have only twenty-one days to formulate a response, whereas plaintiffs are only limited by the statute of limitations.[204] However, the court stated that *Twombly* and *Iqbal* require only slightly elevated pleadings that would not disadvantage a defendant already constrained by time.[205] It stated that the heightened standard requires "only minimal facts establishing plausibility," and that those facts would be easily apparent to the drafting party since knowledge of those facts would be necessary to proffer the defense in the first place.[206] This standard is coupled with Rule 15 of the Federal Rules of Civil Procedure, which encourages courts to liberally grant motions for leave to amend pleadings.[207] The court suggested that requiring defendants to include minimal facts to support their affirmative defenses would not disadvantage them in terms of time limits, and that anything that is erroneously omitted may be later amended with leave from the court.[208]

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[200] *Id.* (citing Burget v. Capital W. Sec., No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009)).

[201] *Id.*

[202] *Francisco*, 2010 WL 2990159, at *8 (citing *Palmer*, 2010 WL 2605179, at *5); *see* FED. R. CIV. P. 15.

[203] *Francisco*, 2010 WL 2990159, at *8.

[204] *Id.* (citing *Palmer*, 2010 WL 2605179, at *4).

[205] *Id.*

[206] *Id.*

[207] *Id.*; *see* FED. R. CIV. P. 15.

[208] *See Francisco*, 2010 WL 2990159, at *8.

Third, the court looked to Rule 84[209] of the Federal Rules of Civil Procedure and its appended Form 30.[210] Form 30 offers examples of defensive pleadings that satisfy the pleading requirements.[211] The example listed under "Affirmative Defense—Statute of Limitations" states: "The plaintiff's claim is barred by the statute of limitations because it arose more than __ years before this action was commenced."[212] The court stated that Form 30 supports the application of plausibility pleading standards to defensive pleadings because the provided example includes factual assertions.[213]

Finding that these reasons support a rule requiring plausibility pleading by a defendant, the court applied the standard to the affirmative defenses proffered by Verizon South.[214] The court found that the majority of affirmative defenses offered by the defense failed to meet the standard, including: defense 5, "Verizon South has not proximately caused any of the damages Francisco alleges in the Amended Complaint;" defense 8, "Verizon South's actions relating to Francisco were based on legitimate, nondiscriminatory business reasons;" and defense 12, "Francisco is not entitled to any of the relief she seeks."[215] Consequently, it struck all but four of the affirmative defenses set forth by Verizon South that were reviewed by this standard.[216] Of the four defenses allowed, the court found that defenses 9 and 13 already met a plausibility pleading standard,

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[209] FED. R. CIV. P. 84. Rule 84 states, "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." *Id.*; *Francisco*, 2010 WL 2990159, at *8 n.7.

[210] *Francisco*, 2010 WL 2990159, at *8.

[211] FED. R. CIV. P. Form 30.

[212] *Id.* ¶ 6.

[213] *Francisco*, 2010 WL 2990159, at *8.

[214] *Id.* (applying the standard specifically to affirmative defenses 2, 4, 5, 6, 7, 8, 10, 11, 12 and 14).

[215] *Id.* at *3-4, *8.

[216] *Id.* at *8-9. The court also did not strike affirmative defenses 3 and 15 because of reasons relating to the *Ellerth-Faragher* defense, which is not relevant here. The *Ellerth-Faragher* defense comes from two seminal United States Supreme Court decisions regarding Title VII sexual harassment claims: *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

as they set forth the necessary minimal facts supporting Verizon South's arguments.[217]

In sum, the district court found that fairness, necessity, and the Federal Rules of Civil Procedure all required that plausibility pleading standards apply when necessary, and that application of the *Iqbal-Twombly* standard was required for both plaintiffs and defendants.[218]

B. "Plausibility Pleading" Does Not Apply to Affirmative Defenses

Although courts such as the United States District Court for the Eastern District of Virginia have held that the *Iqbal-Twombly* standard applies to defensive pleadings, other courts have refused to extend plausibility pleading beyond a plaintiff's complaint.[219] The United States District Court for the Middle District of Tennessee has held that plausibility pleading standards do not require heightened pleading of affirmative defenses.[220] In *McLemore v. Regions Bank*, the court concluded that plausibility pleading standards apply only to pleadings by plaintiffs.[221] Barry Stokes was the owner and operator of 1Point Solutions, LLC (1Point), a company that served as a third-party administrator for employee benefit plans.[222] Stokes and 1Point held a number of personal

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[217] *Francisco*, 2010 WL 2990159, at *9. Affirmative defense 9 stated that "Francisco failed to mitigate her damages because she did not apply for a single Verizon job within the thirty-day window after being notified that she had been selected for a Reduction in Force and before being taken off the payroll." *Id.* (internal quotation marks omitted). Affirmative defense 13 stated that Francisco's recovery would be "barred by the after-acquired evidence doctrine because Francisco [lied] during a Security Investigation and in leaving work early in order to work at a second job." *Id.* (internal quotation marks omitted). These two defenses were deemed sufficient by the court. *Id.*

[218] *Id* at *8-9.

[219] *See* McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010).

[220] *McLemore*, 2010 WL 1010092, at *13.

[221] Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13-14 (M.D. Tenn. Mar. 18, 2010).

[222] *McLemore*, 2010 WL 1010092, at *1. These plans included: 401(k) retirement plans, health savings accounts, flexible spending accounts, and dependent care ac-

and fiduciary accounts at Regions Bank.[223] Third-party administrators (TPAs) such as 1Point normally provide services, such as record-keeping and assistance in money transfers, and most TPAs do not themselves handle money related to the funds.[224] However, 1Point directly opened at least fifty-eight accounts at Regions Bank to hold its clients' funds.[225] Although 1Point initially intended to set up separate accounts under each client's tax identification number, Regions Bank allegedly required 1Point to create each account under 1Point's tax identification number, distinguishing the accounts from one another by names that included the names of the clients.[226] In total, Stokes and 1Point deposited approximately $51 million into these accounts.[227]

The plaintiffs alleged that, over several years, Stokes improperly transferred money from client fiduciary accounts into his personal accounts.[228] Additionally, the plaintiffs alleged that in early 2006, 1Point transferred the accounts to Fifth Third Bank, but that Fifth Third closed most of the accounts after observing improper account activity.[229] After those accounts were closed by Fifth Third, 1Point transferred them back to Regions Bank and subsequently filed for bankruptcy.[230] When Stokes and 1Point entered bankruptcy, the bankruptcy trustee, John McLemore, along with several former 1Point clients, sued Regions Bank.[231]

According to the court in *McLemore*, under federal banking laws enforced by the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), banks must establish procedures to ensure

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counts, which "held pre-tax funds that employees could spend on qualifying health- or childcare-related expenses." *Id.* The plans are collectively referred to as "cafeteria plans." *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.* (giving an example of an account name as "1Point FSA Metro Government Account").

[227] *See id.*

[228] *Id.* at *1-2.

[229] *Id* at *2.

[230] *Id.*

[231] *McLemore*, 2010 WL 1010092, at *1.

compliance with banking regulations, such as establishing an automated computer monitoring system for their accounts.[232] The plaintiffs alleged that Regions Bank never implemented any monitoring system, and that Stokes's and 1Points's account activities were so unusual that Regions Bank should have been alerted to its duty to investigate the account activities in compliance with FinCEN's banking regulations.[233] The Trustee attached documents to his complaint proving that in 2004, the Department of Treasury found that in the preceding four years, AmSouth (Regions Bank's predecessor) "failed to: (1) implement policies sufficient to capture suspicious account activity; (2) report suspicious activity in a timely manner because of these systemic deficiencies; and (3) respond to instances of accounts being used for embezzlement and fraud."[234]

The plaintiffs alleged that Regions Bank failed to remedy the AmSouth violations, as evidenced by the current action.[235] They asserted that the unusual account activity should have alerted Regions Bank to the FinCEN violations.[236]

Regions Bank asserted several affirmative defenses.[237] It claimed that the plaintiffs' damages were caused by the comparative fault of the plaintiffs, that the plaintiffs' comparative fault was greater than Regions Bank's, that Regions Bank was entitled to a reduction in the award because of the plaintiffs' comparative fault, and that the plaintiffs' damages were a result of the plaintiffs' failure to supervise and control Stokes and 1Point.[238] After Regions Bank pleaded the affirmative defenses, it filed two motions for judgment on the pleadings stating that its affirmative defenses warranted dismissal of all claims.[239] In response, the plaintiffs

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[232] *Id.* at *1-2.

[233] *Id.* at *2.

[234] *Id.*

[235] *Id.*

[236] *Id.* "Stokes withdrew hundreds of thousands of dollars from the 1Point 401(k) account in cashier's checks made payable to himself. He frequently transferred money among 1Point's and his own accounts, and various accounts were often overdrawn." *Id.*

[237] *Id.* at *12.

[238] *Id.* (listing affirmative defenses 1, 4, 6, and 7).

[239] *Id.* at *3 (citing FED. R. CIV. P. 12(c)).

filed a joint motion to strike defendant's affirmative defenses or, in the alternative, for more definite statement of defenses,[240] believing that the affirmative defenses were insufficiently pleaded. To analyze the sufficiency of Regions Bank's defensive pleadings, the court referenced both *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[241]

The plaintiffs argued that pleading standards applicable to a plaintiff's complaint applied likewise to a defendant's affirmative defenses, "making conclusory statements of comparative negligence insufficient to raise such a defense."[242] The court stated that the recently decided cases of *Iqbal* and *Twombly* together held that "'a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[243] Acknowledging that some courts have found that affirmative defenses must be held to the plausibility standard,[244] while others have found that standard inapplicable to defensive pleadings,[245] the court stated that "*Twombly* and *Iqbal* did not change the pleading standard for affirmative defenses."[246]

The court explained that because *Twombly* referenced only Rule 8(a)(2) and its requirement of "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" the plausibility pleading requirements, on the face of *Twombly*, applied only to complaints.[247] It

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[240] *Id.* (citing FED. R. CIV. P. 12(f)).

[241] *Id.* "The court must assume that all of the plaintiff's factual allegations are true, even if they are doubtful in fact." *Id.* (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "In contrast, legal conclusions are not entitled to the assumption of truth." *Id.* (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950, *remanded to* 574 F.3d 820 (2d Cir. 2009)).

[242] *McLemore*, 2010 WL 1010092, at *12.

[243] *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570)).

[244] *Id.* at *13 (citing Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150, at *6-7 (W.D.N.Y. Sept. 30, 2009); United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007); Home Mgmt. Solutions, Inc. v. Prescient, Inc., No. 07-20608-CIV, 2007 WL 2412834, at *2 (S.D. Fla. Aug. 21, 2007)).

[245] *Id.* (citing First Nat'l Ins. Co. of Am. v. Camps Servs., No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009)).

[246] *Id.*

[247] *Id.* (quoting *Twombly*, 550 U.S. at 555 (quoting FED. R. CIV. P. 8(a)(2))).

highlighted the fact that the *Twombly* and *Iqbal* opinions fail to even mention affirmative defenses and do not discuss any other subsection of Rule 8.[248]

The court acknowledged that Rule 8(b) requires a defendant to plead its defenses "in short and plain terms," and agreed that the language is similar to the "short and plain statement" language of Rule 8(a)(2).[249] However, the court stated that the similarity in language between the two provisions did not equate to application of the same pleading standards.[250] Instead, the court announced that in the Sixth Circuit, "'[a]n affirmative defense may be pleaded in general terms and will be held to be sufficient . . . as long as it gives plaintiff fair notice of the nature of the defense.'"[251] Applying its announced "fair notice" standard and finding that the plausibility standard of *Twombly* and *Iqbal* did not apply to affirmative defenses, the court concluded that Region Bank's answer, which included its affirmative defense of comparative negligence, gave sufficient notice of the nature of its defense.[252]

IV. Analysis

The issue of whether the *Iqbal-Twombly* standard applies to affirmative defenses has yet to reach beyond the trial court level.[253] Until such appellate decisions begin to emerge, district courts are left to their own interpretations of what they believe the standard should be for affirmative

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[248] *Id.*

[249] *Id.*

[250] *Id.* (citing Pollock v. Marshall, 845 F.2d 656, 657 n.1 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988)). Although the court does not explicitly acknowledge that *Pollock* was decided nineteen years before *Twombly* and twenty-one years before *Iqbal* until one page later in its opinion, it does offer a citation to *Montgomery v. Wyeth*, 580 F.3d 455, 467-68 (6th Cir. 2009), which implies that the "Rule 8(b)(1) standard applies to a statute-of-repose defense." *Id.*

[251] *McLemore*, 2010 WL 1010092, at *13 (quoting Lawrence v. Chabot, 182 F. App'x 442, 456 (6th Cir. 2006)). The decision in *Lawrence* also pre-dates *Twombly* and *Iqbal*.

[252] *Id.* at *14.

[253] *See* Francisco v. Verizon S. Inc., No. 3:09cv737, 2010 WL 2990159, at *6 (E.D. Va. July 29, 2010).

defenses. Proponents of the application of the *Iqbal-Twombly* standard to affirmative defenses state that common sense, fairness, and litigation efficiency require standards to be uniform among plaintiff and defendant parties.[254] Those disfavoring applying the *Iqbal-Twombly* standard to defensive pleadings point out that neither opinion from those cases even makes mention of defensive pleadings or Rule 8(b).[255] After considering the arguments both for and against applying plausibility pleading to affirmative defenses, it becomes clear that fairness, litigation efficiency, and legal precedent require defendants to be held to the same pleading standards as plaintiffs.

A. Arguments Favoring a Plausibility Standard for Defensive Pleadings

The United States District Court for the Eastern District of Virginia's opinion in *Francisco v. Verizon South, Inc.* sets forth the main arguments espoused by many courts favoring application of the *Iqbal-Twombly* standard to defensive pleadings.[256] The standard this court proffered supporting this view can be broken down into three main arguments. First, the court found that "'considerations of fairness, common sense and litigation efficiency' dictate that litigants articulate complaints and affirmative defenses according to the same pleading standards."[257] Second, it stated that defendants who are required to plead minimal facts supporting their claims are not disadvantaged in terms of time or discovery.[258] Third, the court said that Rule 84 of the Federal Rules of Civil Procedure and its appended Form 30 support the contention that defensive pleadings must include enough factual evidence to make the claim plausible.[259] Taken together, the court, along with others across

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[254] *See, e.g.*, *Francisco*, 2010 WL 2990159, at *7-8.

[255] *See, e.g.*, *McLemore*, 2010 WL 1010092, at *13.

[256] No. 3:09cv737, 2010 WL 2990159, at *7-8 (E.D. Va. July 29, 2010).

[257] *Francisco*, 2010 WL 2990159, at *7 (quoting Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010)).

[258] *Id.* at *8.

[259] *See id.*

the country,[260] concluded that these reasons support application of the *Iqbal-Twombly* standard to both plaintiffs and defendants alike.

The *Francisco* court considered the fairness of requiring both parties to plead according to the same standard.[261] First, however, the court set the foundation for this argument by setting forth basic notions of notice pleading.[262] It stated that notice pleading is used to "'provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case.'"[263] The court used this argument as evidence that fairness required identical pleading standards.[264] Quoting from an Oklahoma decision, the court stated that "'[a]n even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.'"[265] In the *Francisco* court's view, the benefits derived from fact-specific pleading for the defendant to formulate his defense should be reciprocated by the defendant including fact-specific defenses.[266] Together, these factual assertions present in pleadings by both plaintiff and defendant will set the way for efficient and tailored discovery.[267]

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[260] *See* Racick v. Dominion Law Assocs., 270 F.R.D. 228, 234 (E.D.N.C. 2010); Castillo v. Roche Labs., Inc., No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010); Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532, 537 (D. Md. 2010); Topline Solutions, Inc. v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010); *Palmer*, 2010 WL 2605179, at *5; Barnes v. AT&T Pension Benefit Plan-Nonbargained Prog., 718 F. Supp. 2d 1167, 1172 (N.D. Cal. June 22, 2010); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650-51 (D. Kan. 2009); *In re* Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438, at *6 (Bankr. N.D. Ill. Sept. 9, 2009).

[261] *Francisco*, 2010 WL 2990159, at *7-8.

[262] *Id.* at *7.

[263] *Id.* (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009)).

[264] *See id.*

[265] *Id.* (quoting Burget v. Capital W. Sec., Inc., No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009)).

[266] *See id.*

[267] *See id.*

However, the *Francisco* court did not consider that plaintiffs already have a factual understanding of the case. When a plaintiff files a complaint which meets the requirements of plausibility pleading, that plaintiff has included enough detail to make his recovery plausible.[268] It may be argued that a defendant's answer would encompass the same factual details as set forth in the plaintiff's complaint. If true, it would be unnecessary for a defendant to formulate an answer to meet the plausibility standards.

The *Francisco* court also considered whether holding defendants to such pleading standards would unjustly disadvantage them, finding that it would not.[269] It acknowledged that plaintiffs may formulate their arguments for a great length of time, the statutes of limitation being their only deadline, whereas defendants must respond to a complaint within a twenty-one-day window.[270] However, the court also recalled that Rule 15 of the Federal Rules of Civil Procedure calls for liberal granting of motions to amend pleadings.[271] This fact, the court concluded, adequately prevents a defendant from being prejudicially disadvantaged by a heightened pleading standard.[272] However, the court failed to acknowledge that leave to amend is granted only at the discretion of the court, and that nothing guarantees a defendant leave to amend.

Finally, the *Francisco* court turned to Form 30, appended to the Federal Rules of Civil Procedure.[273] Form 30 provides the strongest argument in favor of applying plausibility standards to defendants. This form offers an example of defensive pleadings that would be found adequate under the Rules, and the court claimed that factual assertions provided in the example Form support the argument that defendants and plaintiffs be held to the same standard.[274] Form 30, paragraph 6 states, under the heading of "Affirmative Defense—Statute of Limitations":

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[268] *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954, *remanded to* 574 F.3d 820 (2009).

[269] *See Francisco*, 2010 WL 2990159, at *8.

[270] *Id.* (citing United States v. Gwinn, No. 5:06-cv-00267, 2006 WL 3377636, at *2 (S.D. W. Va. Nov. 20, 2006)).

[271] *Id.* (citing *Palmer*, 2010 WL 2605179, at *5; *see also* FED. R. CIV. P. 15).

[272] *Id.*

[273] *Id.*

[274] *Id.*

"The plaintiff's claim is barred by the statute of limitations because it arose more than __ years before this action was commenced."[275] Form 30 requires that a defendant state not only that the claim is barred by the statute of limitations, but also that it is barred *because* it arose a specific number of years before the action.[276] The *Francisco* court also noted that Rule 84 of the Federal Rules of Civil Procedure states that such forms serve as examples of the simplicity required by the Rules themselves.[277] Taken together, the court concluded that such reasons weigh in favor of applying the *Iqbal-Twombly* pleading standard to affirmative defenses.[278] Based on Form 30, it appears that a defendant would not be unduly prejudiced if held to plausibility standards because the standards do not require factual allegations heavy in detail.[279]

B. Arguments Against a Plausibility Standard for Defensive Pleadings

Other courts have disagreed with the *Francisco* court's analysis and conclusion, instead finding that *Iqbal* and *Twombly* do not require defendants to plead according to the same standards as plaintiffs.[280] The United States District Court for the Middle District of Tennessee offered an argument in its opinion of *McLemore v. Regions Bank* that is echoed by many other courts.[281] Courts supporting this view offer only one argu-

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[275] FED. R. CIV. P. Form 30, ¶ 6.

[276] *See* Joseph Seiner, Twombly, Iqbal, *and the Affirmative Defense* 17 (Soc. Sci. Research Network, Working Paper no. 1721062, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721062.

[277] *See Francisco*, 2010 WL 2990159, at *8.

[278] *Id.* at *7-9.

[279] *See* FED. R. CIV. P. Form 30, ¶ 6.

[280] *See* Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010); Holdbrook v. SAIA Motor Freight Line, LLC, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010); Charleswell v. Chase Manhattan Bank, No. 01-119, 2009 WL 4981730, at *4 (D.V.I. Dec. 8, 2009).

[281] Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010).

ment: because neither *Twombly* nor *Iqbal* even mention defensive pleadings in their opinions, the standard is meant to apply only to plaintiffs.[282]

The *McLemore* court held that the absence of discussion of defensive pleadings in the *Iqbal* and *Twombly* decisions meant that those cases did not change the pleading standards as applied to defendants, citing cases that pre-dated both *Iqbal* and *Twombly* for support.[283] It stated that "the Sixth Circuit has consistently used 'fair notice' as the standard for whether a defendant has sufficiently pleaded an affirmative defense. *Twombly* and *Iqbal* did not change this."[284] However, the *McLemore* court failed to take account of the Supreme Court's language in *Twombly* explaining that its opinion served only to further clarify the requirements of Rule 8.[285] In *Twombly*, the Supreme Court stated that "[i]n reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'"[286]

Whether *Twombly* can be interpreted as failing to create a heightened pleading standard may be debatable, but the Court's statement that it has not changed pleading requirements is telling.[287] In *Twombly*, the Court stated that pleadings require enough factual allegations to render the assertion *plausible*.[288] The *Twombly* decision was framed in the context of a Sherman Act claim and made no specific mention of other forms of action.[289] However, the Court appeared to have intended its decision in

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[282] *See McLemore*, 2010 WL 1010092, at *13.

[283] *Id.* (citing Lawrence v. Chabot, 182 F. App'x 442, 456 (6th Cir. 2006) (stating that an affirmative defense pleading need only "'give[] plaintiff fair notice of the nature of the defense'" (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1274 (3d ed. 2008)); Pollock v. Marshall, 845 F.2d 656, 657 n.1 (6th Cir.) (stating that "Rule 8(b) does not apply when a defendant asserts an affirmative defense"), *cert. denied*, 488 U.S. 897 (1988))).

[284] *McLemore*, 2010 WL 1010092, at *14 (citation omitted).

[285] *See id.* at *13; Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).

[286] *Twombly*, 550 U.S. at 569 n.14 (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).

[287] *See id.*

[288] *Id.* at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

[289] *Id.* at 553-70.

Twombly to be a broad rule applicable to pleadings in general.[290] In fact, it stated in *Iqbal* that although *Twombly* was analyzed through the framework of an antitrust action, its holding was simply the result of the application of Rule 8, which sets forth the standard which applies "'in all civil actions and proceedings in the United States district courts.'"[291] The Court further stated that its "decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[292]

Even if one were to argue that *Twombly* and *Iqbal* do create a heightened pleading standard, despite what the Court itself says,[293] viewing *Twombly* and *Iqbal* together suggests that the absence of discussion on defensive pleadings is not dispositive of the standard's effect on defendants.[294] The *McLemore* court failed to acknowledge that *Twombly* was not limited to its facts, and although no mention of discrimination suits was made in its opinion, the Court clearly believed in *Twombly*'s applicability to other causes of actions; as evidenced in its opinion in *Iqbal*.[295] Applying this same logic to the question of whether the *Twombly* plausibility standard applies to defensive pleadings, one can reach the same result.[296] Although the Court does not mention defensive pleadings in its decisions, it clearly states that the *Twombly* standard set forth the pleading standard for "'all civil *actions* and *proceedings* in the United States district courts.'"[297] The Court did not limit its holding to plaintiffs' pleadings, just as it did not limit its holding to antitrust actions.[298] Under this reasoning, the *McLemore* court's only argument against applying the standard to defensive pleadings loses merit.[299]

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[290] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, *remanded to* 574 F.3d 820 (2009).

[291] *Id.* at 1953 (quoting FED. R. CIV. P. 1).

[292] *Id.* (citing *Twombly*, 550 U.S. at 555-56 & n.3).

[293] *Twombly*, 550 U.S. at 569 n.14.

[294] *See generally Iqbal*, 129 S. Ct. 1937; *Twombly*, 550 U.S. 544.

[295] *See McLemore*, 2010 WL 1010092, at *12-14; *Iqbal*, 129 S. Ct. at 1953 (citing *Twombly*, 550 U.S. at 555-56).

[296] *See Twombly*, 550 U.S. at 555-56 (holding that the plausibility standard applies to all civil actions).

[297] *Iqbal*, 129 S. Ct. at 1953 (emphasis added) (quoting FED. R. CIV. P. 1).

[298] *See id.*

[299] *See McLemore*, 2010 WL 1010092, at *12-14.

However, other arguments may be made against applying the *Iqbal-Twombly* standard to affirmative defenses. Federal Rule 8(a) requires plaintiffs to plead "a short and plain statement of the claim *showing* that the pleader is entitled to relief",[300] whereas Rule 8(c) requires only that defendants "affirmatively *state* any avoidance or affirmative defense."[301] The requirement that plaintiffs *show* their claims while defendants *state* their claims can be interpreted as calling for less stringent standards for defendants.[302] However, the Supreme Court has applied the same pleadings standards to plaintiffs and defendants before the rise of the plausibility standard,[303] and the Court stated in *Twombly* that its decision did not amount to heightened pleading.[304]

Furthermore, as acknowledged by the court in *Francisco v. Verizon South, Inc.*, defendants are limited by time in ways that plaintiffs are not.[305] While plaintiffs may take as long as the statutes of limitation allow to draft and file a complaint, often up to three years, defendants must file any response within twenty-one days of receiving the complaint.[306] Because defendants have a vastly smaller window in which to file an answer, the "fairness" of requiring both parties to plead according to the same standards that the *Francisco* court argued appears undermined if defendants are required to draft specified pleadings in only a few short weeks. Furthermore, although the *Francisco* court argued that this perceived unfairness would be remedied by liberal amendments to pleadings,[307] a motion for leave to amend still falls within the discretion of the court and, no matter how "liberally" granted, will not always result in leave to amend. Therefore, requiring defendants to plead according

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[300] FED. R. CIV. P. 8(a)(2) (emphasis added).

[301] FED. R. CIV. P. 8(c)(1) (emphasis added).

[302] Seiner, *supra* note 276, at 8-9.

[303] Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same pleading requirements as is the complaint.").

[304] *Twombly*, 550 U.S. at 569 n.14.

[305] No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010).

[306] *Francisco*, 2010 WL 2990159, at *8 (citing Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010)).

[307] *Id.*

to the plausibility standard may, in practice, flout the fairness called for by the *Francisco* court.[308]

C. Proposal for Application of the Plausibility Standard to Defensive Pleadings

Courts should apply the plausibility standard set forth by the decisions in *Twombly* and *Iqbal* uniformly to all parties to litigation. This proposal does not take a position on the overall issue of *Twombly* and *Iqbal*, or the value or correctness of the plausibility pleading standard itself. Instead, this proposal suggests that if courts impose a plausibility standard on plaintiffs, they should impose an identical standard on defendants. By holding parties to the same pleading standards, the courts can proceed through pleadings to the discovery stage fairly and without delay.

Applying plausibility standards to all pleadings will ensure efficiency and fairness, as explained by the *Francisco* court.[309] Tailored discovery, cited as one reason for plausibility pleading by plaintiffs, will also result from the factual allegations included in affirmative defenses that meet plausibility standards.[310] Furthermore, by applying the same standards to all parties, courts can avoid confusion or ambiguity as to a party's actual role. For instance, in complex litigation involving multiple claims and counter-claims, requiring plausibility pleading for all parties avoids litigation as to whether the original plaintiff is considered a plaintiff for all pleadings, or whether the original plaintiff becomes a defendant if the opposing party files a counter-claim. Avoiding this problem by requiring all parties to meet the same standard preserves court resources and avoids wastes of time in litigation.

However, courts' treatment of affirmative defenses before 2007 is most illustrative. Prior to *Twombly* and *Iqbal*, the "notice pleading" standards were applied to all pleadings, without consideration for whether they were

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[308] *See id.* at *7.

[309] *Id.*

[310] *See id.* (citing Burget v. Capital W. Sec., No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009)).

filed by a plaintiff or defendant.[311] Since the Supreme Court stated in *Twombly* that its decision did not change the pleadings standards,[312] it follows that it has not removed defendants from application of the rule. Therefore, courts should continue holding defendants to the same standards as plaintiffs.

V. Conclusion

Although no appellate court has yet decided whether the *Iqbal-Twombly* standard should be applied to defensive pleadings,[313] imposing identical standards on all parties to litigation embodies the ideals of fairness, efficiency, and common sense.[314] The Supreme Court has stated that the plausibility pleading standard from *Twombly* and *Iqbal* does not represent "heightened" pleading,[315] but rather that it clarifies the original meaning of Rule 8(a).[316] Regardless of whether or not this is true, courts should hold all litigants to the same standard.

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[311] Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same pleading requirements as is the complaint.").

[312] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard . . . .").

[313] *See generally Francisco*, 2010 WL 2990159.

[314] *See id.* at *7.

[315] *Twombly*, 550 U.S. at 569 n.14.

[316] *See* FED. R. CIV. P. 8(a).