Should *Twombly* and *Iqbal* Apply to Affirmative Defenses?

I. INTRODUCTION

In 2007, the U.S. Supreme Court promulgated a new pleading standard in *Bell Atlantic Corp. v. Twombly*, specifically holding that complaints must state a claim to relief that is "plausible on its face."[1] The *Twombly* decision retired[2] the well-established and more lenient pleading regime that reigned since the Court's 1957 decision in *Conley v. Gibson*.[3] Two years after *Twombly*, the Supreme Court confirmed in *Ashcroft v. Iqbal*[4] that neither the reach of the new plausibility standard nor the death of *Conley* was exaggerated. "Labels and conclusions" are now insufficient, as are "naked assertions devoid of further factual enhancement" and "unadorned the-defendant-unlawfully-harmed-me accusation[s]."[5] "Plausibility" pleading is now required in all cases, not just antitrust cases like *Twombly*.[6]

Twombly and *Iqbal* have already generated a substantial body of legal scholarship on the impact and wisdom of the plausibility pleading standard.[7] Likewise, practitioners and courts have struggled

1. 550 U.S. 544, 570.

2. *Id.* at 562–63 (declaring that after "puzzling the profession for 50 years," *Conley*'s "no set of facts" language had "earned its retirement").

3. 355 U.S. 41.

4. 129 S. Ct. 1937 (2009).

5. *Iqbal*, 129 S. Ct. at 1949 (internal citations and quotation marks omitted).

6. *Id.* at 1953.

7. *See, e.g.*, Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1063 (2009) ("No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.").

to understand how to conform their pleadings and their decisions, respectively, to the dictates of the new plausibility, or fact, pleading standard.[8]

Twombly and *Iqbal* have also raised questions regarding how and when courts should apply the new pleading standard.[9] One such question is whether the heightened plausibility pleading standard should, or in fact does, apply to the pleading of affirmative defenses. Defendants must "affirmatively state" affirmative defenses in response to a pleading.[10] If proven, an affirmative defense defeats a plaintiff's claim and bars or limits recovery even if the plaintiff also proves his or her claim.[11] Filed as part of the answer, the pleading of affirmative defenses is similar to a plaintiff's complaint; it is the defendant's first opportunity to notify the plaintiff of the defenses he plans to raise against the plaintiff's claim.[12] Generally, pleadings of affirmative defenses must provide notice of the defense and an opportunity for the plaintiff to rebut it.[13] Amidst all of the thorny questions and potential problems that have captured the attention of scholars, courts, and practitioners, the issue of whether the new standard will apply to affirmative defenses has, until recently, received relatively little notice.

The first published piece solely dealing with the issue is a five-page article in the *Florida Bar Journal* by Manuel John Dominguez, William B. Lewis, and Anne F. O'Berry.[14] In addition to providing a

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8. *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) ("The Court had an opportunity to clarify the meaning and scope of its *Twombly* standards in *Iqbal*, but instead it exacerbated confusion about pleading standards."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 121 (2011) ("The shift from *Conley* to *Iqbal/Twombly* pleading has created controversy and confusion . . . ."); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) ("[I]t was irresponsible for the Court to invite the controversial 'plausibility' concept into pleading doctrine in a way that has led to such widespread confusion.").

9. Notably, scholars have wondered whether the plausibility standard applies transsubstantively even after *Iqbal*. *See* Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 91 (2010) ("With *Twombly* and *Iqbal*, it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 459–60 (2008) (calling *Twombly* a "fluid, form-shifting standard" that "may require different levels of factual detail depending on the substantive context").

10. FED. R. CIV. P. 8(c)(1).

11. BLACK'S LAW DICTIONARY 482 (9th ed. 2009).

12. *See generally* FED. R. CIV. P. 8(c)(1).

13. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971).

14. Manuel John Dominguez, William B. Lewis & Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, 84 FLA. B.J. 77 (2010).

brief survey of the district court opinions on both sides of this issue, the article warns that practitioners should be aware of uncertainty around the pleading of affirmative defenses and plead accordingly.[15] A recent note by Anthony Gambol was the first piece of significant length to discuss the issue, concluding that the *Twombly* standard should not be extended to affirmative defenses for reasons of "procedure, precedent, and policy."[16]

Several more pieces on this topic are forthcoming. Professor Joseph Seiner has proposed applying *Twombly*'s and *Iqbal*'s plausibility standard to affirmative defenses.[17] A recent short article by Tom Tinkham and Eric Janus similarly argues in favor of applying the plausibility standard to affirmative defenses.[18] In addition, Melanie A. Goff and Professor Richard A. Bales support applying the plausibility standard to affirmative defenses, relying heavily on the fairness of having uniform pleading standards.[19] Others have mentioned the problem briefly,[20] most notably Professor Arthur Miller, whose recent article also discusses a number of the inconsistencies and problems with the Court's holdings in *Twombly* and *Iqbal*.[21]

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15. *Id.* at 80.

16. Anthony Gambol, *The* Twombly *Standard and Affrmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2177 (2011).

17. Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721062.

18. Thomas Tinkham & Eric S. Janus, *Plausible Answers and Affirmative Defenses*, 79 U.S.L.W. 2271 (2011).

19. Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. (forthcoming 2011), *available at* http://ssrn .com/abstract_ id=1737805.

20. *See* Miller, *supra* note 9, at 101 & n.391 (2010) (noting the problem and suggesting that district judges who apply *Twombly* and *Iqbal* to affirmative defenses interpret the decisions as clarifying what information is necessary to provide fair notice to the other party while those who refuse to apply the decisions to affirmative defenses interpret them as strict clarifications of Rule 8(a)(2)'s "showing" requirement); *see also* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1359 (2010) (discussing the notion that "*Twombly-Iqbal* applies to all parts of all pleadings" (capitalization altered) as one of the myths and arguing that *Twombly* and *Iqbal* should not apply to affirmative defenses "without a further pronouncement from the Court itself"); John S. Summers & Michael D. Gadarian, *Imagine the Plausibilities: Life after* Twombly *and* Iqbal, 37 LITIG., Winter 2011, at 35 (noting the uncertainty following the decisions and advising practitioners on both plaintiffs' and defendants' sides to use the decisions to their advantage); Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1260–61 (2010) (discussing various impacts of *Iqbal*, noting the district court split on treatment of affirmative defenses, and briefly suggesting that they should be held to the new plausibility standard).

21. *See generally* Miller, *supra* note 9.

Although this Note arrives at the same conclusion Gambol reached,[22] this Note contributes to the legal scholarship regarding the plausibility standard and affirmative defenses in several ways. First, it includes a robust analysis of the practical goals of *Twombly* and *Iqbal* and views the question of whether their plausibility standard should apply to affirmative defenses in light of those goals. Second, it recognizes the practical purposes of affirmative defenses and the way those purposes suggest different requirements for pleading. Acknowledging that interpretations of the text of Rule 8 of the Federal Rules of Civil Procedure produce reasonable arguments on both sides of the issue, this Note also focuses on the practical implications of applying the plausibility standard to affirmative defenses. Finally, this Note considers possible solutions that allow courts to treat affirmative defenses differently than claims, while still recognizing the Supreme Court's practical justifications in *Twombly* and *Iqbal*.

None of the U.S. Courts of Appeals has ruled on the issue, and the Supreme Court did not mention affirmative defenses in either decision. Federal district courts are split, with many U.S. district courts choosing to apply *Twombly* and *Iqbal* to affirmative defenses, others refusing to apply the new pleading standard to affirmative defenses, and one court taking a hybrid approach.[23]

The district court split has created confusion and uncertainty for practitioners.[24] The unpredictable and uneven application of *Twombly* and *Iqbal* is costly and unfair to defendants who plead affirmative defenses, as well as to plaintiffs who must consider whether to file motions to strike affirmative defenses under Rule 12(f),[25] without knowing how the district court will treat the defenses under the new pleading standard for claims. This confusion contributes to inconsistent administration of the law and incentivizes plaintiffs to forum shop for jurisdictions that treat affirmative defenses less favorably, two areas which have been of longstanding concern to the federal courts.[26] The concern about uneven

22. *See generally* Gambol, *supra* note 16.

23. Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872 (D. Mass. Aug. 6, 2009) (finding that the affirmative defenses enumerated in Rule 8(c)(1) fall under the *Conley* standard while *Twombly* and *Iqbal* should apply to all others).

24. Dominguez et al., *supra* note 14, at 80 (advising practitioners of the uncertainty surrounding the pleading of affirmative defenses); Jane Perkins, *Pleading Standards After* Iqbal *and* Twombly, 43 CLEARINGHOUSE REV. 507, 513–14 (2010) (advising plaintiffs' attorneys that some district courts believe conclusory pleadings of affirmative defenses to be insufficient).

25. *See* FED. R. CIV. P. 12(f) (allowing courts to strike insufficient defenses).

26. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 468 (1965) (finding that addressing those two concerns are the "twin aims" of the *Erie* Doctrine).

administration of laws is particularly pronounced, because many districts within the same circuit have issued conflicting rulings on whether the plausibility standard applies to affirmative defenses.[27] In a few instances, judges in the same district have treated the problem differently, creating confusion.[28]

This Note argues that the courts that refuse to apply *Twombly* and *Iqbal* to affirmative defenses have it right. The plausibility standard articulated in *Twombly* and *Iqbal* should not apply to affirmative defenses, because it places defendants at a tactical disadvantage due to restrictions on their knowledge and time to respond. More importantly, applying the heightened pleading standard[29] is not necessary to achieve the practical objectives of those decisions, to reduce potential discovery costs by keeping weaker cases out of federal court. Defendants' limited knowledge and time might not provide enough of an opportunity to investigate, or even realize the possibility of, an affirmative defense that they must plead to a point of plausibility.[30] Imposing the *Twombly* and *Iqbal* plausibility standard on affirmative defenses does not further the primary practical justification for the *Twombly* and *Iqbal* decisions—to reduce the cost of litigation.

Before this Note concludes that the plausibility standard should not apply to affirmative defenses, Part II provides background information, beginning with a discussion of the "no set of facts" pleading regime prior to *Twombly*, set forth in *Conley v. Gibson*. It

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27. For example, compare *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (applying *Twombly* and *Iqbal* to affirmative defenses), with *Henson v. Supplemental Health Care Staffing Specialists*, No. Civ-09-0397-HE, 2009 U.S. Dist. LEXIS 127642, at *3–4 (W.D. Okla. July 30, 2009) (refusing to apply) for a district court split within the Tenth Circuit. For a Sixth Circuit example, compare *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007) (applying), with *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (refusing).

28. *Compare* Pavlik v. FDIC, No. 10 C 816, 2010 WL 3937621, at *4 (N.D. Ill. Oct. 5, 2010) (St. Eve, J.) (applying *Twombly* and *Iqbal* to affirmative defenses), *with* Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010) (Marovich, J.) (refusing to apply).

29. Although few would argue that *Twombly*'s plausibility standard is not stricter than *Conley*'s "no set of facts" standard grounded in notice pleading, the Supreme Court insisted that it was not imposing a "heightened" pleading standard. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007). *But see* Miller, *supra* note 9, at 49–53 (questioning that assertion).

30. This possibility could be particularly damaging to the defendant, because, as a general rule, failure to plead an affirmative defense amounts to waiver of the defense. *See* First Union Nat'l Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 622 (8th Cir. 2007) ("Generally, failure to plead an affirmative defense results in a waiver of that defense."); Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs, 41 F.3d 600, 604 (10th Cir. 1994) ("Failure to plead an affirmative defense results in a waiver of that defense.").

then reviews the *Twombly* and *Iqbal* decisions and their rationales, from their technical reading of Rule 8 to their pragmatic justifications. The Note then briefly examines the pleading of affirmative defenses prior to *Twombly*. Part III analyzes the district court split on the application of the plausibility standard to affirmative defenses, with a survey of the major arguments that the federal district courts have used to justify their positions on the issue. Part III also discusses the *Kaufmann* decision[31] that refused to take either approach. Part IV analyzes the district courts' positions and provides arguments district courts have rarely employed in their discussion of the problem. Part V concludes by recommending that the new pleading standard should not apply to affirmative defenses, avoiding unfairness to defendants while staying sensitive to the practical purposes of *Twombly* and *Iqbal*.

II. BACKGROUND: A BRIEF HISTORY OF PLEADING STANDARDS

Rule 8 of the Federal Rules of Civil Procedure requires a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[32] Rule 8's destructive twin, Rule 12(b)(6), entitles defendants to file a motion to dismiss a claim for "failure to state a claim upon which relief can be granted."[33] A necessary tension, a give-and-take, exists between the degree of the "showing" required in Rule 8 and what would be dismissed under Rule 12(b)(6). If a greater showing is required, more cases will fail to state a claim and vice versa.

A. Pleading Under Conley

In *Conley*, Justice Hugo Black, writing for a unanimous Court, declared very little factual detail was required for a sufficient Rule 8 "showing." The case involved black railroad workers suing for fair representation by their union under the Railway Labor Act.[34] The railroad fired or demoted forty-five black workers, claiming to abolish their jobs.[35] In reality, the railroad had not abolished those positions

31. Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872 (D. Mass. Aug. 6, 2009).

32. FED. R. CIV. P. 8(a)(2).

33. FED. R. CIV. P. 12(b)(6).

34. Conley v. Gibson, 355 U.S. 41, 42 (1957).

35. *Id.* at 43.

and had actually filled them with white employees.[36] The union "did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees."[37] Specifically, the plaintiffs alleged that, after the company fired them, the union refused to protect their jobs or assist them in filing grievances, as it did for white employees.[38] Alleging that the union had discriminated against them and failed to represent them in good faith, the employees sued in the Southern District of Texas seeking damages as well as injunctive and declaratory relief.[39]

The defendant union moved to dismiss on three grounds: (1) that the National Railroad Adjustment Board had exclusive jurisdiction; (2) that the employer railroad was a necessary party that had not been joined; and (3) that the complaint failed to state a claim upon which relief could be granted.[40] The district court dismissed on the first ground, finding that the administrative agency had exclusive jurisdiction.[41] The Fifth Circuit affirmed.[42]

The Supreme Court reversed the lower court findings on jurisdiction, holding that the Railroad Adjustment Board did not have exclusive jurisdiction.[43] The Court then found 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."[44] It added, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim,"[45] and ultimately found that the plaintiffs would be entitled to relief if they could prove the allegations contained in their complaint.[46]

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, the code and common law pleading systems came to "require

36. *Id.*
37. *Id.*
38. *Id.* at 46.
39. *Id.* at 43.
40. *Id.*
41. *Id.* at 43–44.
42. *Id.* at 44.
43. *Id.* (finding that the dispute was between employees and their union, not employees and their employer).
44. *Id.* at 45–46.
45. *Id.* at 47.
46. *Id.* at 46.

allegations of ultimate facts and to forbid conclusions of law."[47] A major criticism of the code pleading approach was its insistence that factual allegations and legal conclusions could, and must, for pleading purposes, be separated.[48] The notion of a "clear, easily drawn and scientific distinction between . . . 'statements of fact' and 'conclusions of law' [when] there is none" was confusing and led to inconsistent rulings.[49] Professor Walter Wheeler Cook argued that the difference between factual allegations and legal conclusions was really one over the degree of factual specificity.[50] In light of this critique, Professor Robert Bone notes, "Conclusions of law [are] simply statements of fact pitched at too high a level of generality."[51] The Federal Rules acknowledged reality—"factual allegations included legal content, and legal conclusions conveyed factual information."[52] Pleading under the Rules focused on notice and placed less of an emphasis on detailed factual allegations.[53]

The Supreme Court's decision in *Conley* followed the notification aim of the Rules while attempting to avoid the harsh distinction between factual allegations and legal conclusions that existed under code pleading. *Conley* required a claim simply to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[54] With sufficient notice pleading, the Court seemed content to permit parties to discover greater factual detail later in litigation.[55] This rather forgiving pleading standard led courts to dismiss few cases under Rule 12(b)(6).[56] Additionally, the

47. Robert Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 862 (2010) (internal quotation marks omitted) (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 138, 150, 153–55 (1928)).

48. *See id.* at 862–63 (citing Walter Wheeler Cook, *"Facts" and "Statements of Fact"*, 4 U. CHI. L. REV. 233, 238–44 (1936); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417–21 (1921) [hereinafter Cook, *Pleading Under the Codes*]).

49. *Id.* at 863 (quoting Cook, *Pleading Under the Codes*, *supra* note 48, at 417).

50. Cook, *Pleading Under the Codes*, *supra* note 48, at 421.

51. Bone, *supra* note 47, at 864.

52. *Id.*

53. *See* FED. R. CIV. P. 8(a)(2) (requiring a claim pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief"); Miller, *supra* note 9, at 3–5.

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

55. *See* Miller, *supra* note 9, at 4 (citing *Conley*, 355 U.S. at 47–48) ("Fact revelation and issue formulation would occur later in the pretrial process.").

56. Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 768 (2005) (observing that motions to dismiss under Rule 12(b)(6) were rarely granted); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1045 (2006) ("Motions to dismiss for failure to state a claim are rarely granted, and even more rarely upheld on appeal."); *see also* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE

Court later determined that, when considering whether a pleading states a claim upon which relief can be granted, courts must "accept as true all of the factual allegations contained in the complaint,"[57] thereby further reducing possible dismissals, even in cases where a plaintiff's factual allegations did not seem credible.

B. The New Era of Pleading

The *Conley* pleading regime ended in 2007 with the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*. The case was a class action in which the plaintiffs, a class of telephone and high-speed internet subscribers, alleged that certain large telephone companies (the incumbent local exchange carriers or "Baby Bells") conspired to restrain trade in violation of the Sherman Act.[58] The complaint alleged that these companies acted in concert to prevent upstart telephone companies from gaining a foothold in the market.[59] It also alleged that the companies agreed not to compete against each other.[60] The Southern District of New York dismissed the complaint under Rule 12(b)(6) because the allegations of parallel business conduct were insufficient to state a claim for relief under the Sherman Act.[61] The Second Circuit reversed the dismissal, finding that plaintiffs pleaded a "factual predicate" of illegal conspiracy and that dismissal therefore required the court to find "no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[62]

The Supreme Court granted certiorari and reversed the Second Circuit, finding that Twombly's complaint contained insufficient factual matter to plausibly suggest that the defendants participated in an illegal conspiracy.[63] The Court stated that the plausibility requirement "reflect[ed] the threshold requirement of Rule 8(a)(2) that the plain statement possess enough heft to show that the pleader is

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FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY: REVISION OF REMARKS AT A FEDERAL JUDICIAL CENTER WORKSHOP, JANUARY 20, 1984, at 7–8 (1984) ("[H]ave you ever looked at the batting average of rule 12(b)(6) motions? I think it was last effectively used during the McKinley Administration.").

57. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002).

58. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 548–50 (2007).

59. *Id.* at 549–51

60. *Id.*

61. *Id.* at 552.

62. Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

63. *Twombly*, 550 U.S. at 556.

entitled to relief."[64] Claims now require "further factual enhancement" to avoid falling "short of the line between possibility and plausibility."[65] A literal reading of *Conley*, like the Second Circuit's, permits "a wholly conclusory statement of [a] claim" to avoid dismissal based on the possibility of some as-yet undisclosed facts coming to light.[66] The Court found that such a reading conflicted with Supreme Court precedent. It had previously held that, unlike factual allegations, a court considering a motion to dismiss need not accept conclusory statements as true.[67] After a half-century of criticism,[68] *Conley's* "no set of facts" pleading standard "ha[d] earned its retirement."[69] The Court reinstated the trial court's dismissal, stating that the plaintiffs failed to "nudge[] their claims across the line from conceivable to plausible."[70] While the Court did not require "heightened pleading of specifics," claims were now required to contain "enough facts to state a claim to relief that is plausible on its face."[71]

The Supreme Court cited an important policy reason—the high cost of discovery—for overruling the longstanding *Conley* standard and advocating a stricter reading of Rule 8. While the *Conley* standard largely relied on viewing Rule 8 as an administrative tool to inform

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64. *Id.* at 557 (internal alterations and quotations marks omitted).

65. *Id.*

66. *Id.* at 561.

67. *See* Papasan v. Allain, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.").

68. In *Twombly*, the Court noted uncertainty among lower courts regarding how to apply the "no set of facts" standard. *Twombly*, 550 U.S. at 562 (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (noting tension between *Conley*'s "no set of facts" requirement and its acknowledgement that a complaint must allege the "grounds" upon which it is founded); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) ("*Conley* has never been interpreted literally.")). The Court also cited scholarly disapproval of *Conley*. *Twombly*, 550 U.S. at 562 (citing Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–65 (1986) (noting confusion surrounding the *Conley* standard)).

69. *Twombly*, 550 U.S. at 562–63.

70. *Id.* at 570.

71. *Id.* Some have argued that the new standard amounts to a restoration of code pleading. *See* Devon J. Stewart, Note, *Take Me Home to* Conley v. Gibson*, Country Roads: An Analysis of the Effect of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *on West Virginia's Pleading Doctrine*, 113 W. VA. L. REV. 167, 199 (2010) (suggesting that *Twombly* and *Iqbal* "signal a detour" back toward code pleading); *see also* John M. Landry, *Fact Pleading After* Ashcroft v. Iqbal*: The Implications for Section 1 Cartel Cases*, 9 ANTITRUST SOURCE 1, 4 (2009) (arguing that *Twombly*'s distinctions between fact and law "harken[] back" to code pleading). *But see* Steinman, *supra* note 8, at 1342 n.283 ("Twombly and Iqbal's insistence on factual allegations should not be read to impose what was traditionally known as fact pleading or code pleading." (internal citations and quotation marks omitted)).

the parties of the claims, the *Twombly* decision argued that the increasingly high costs of discovery necessitated that the Rule (and the motion to dismiss) also serve as a gatekeeping mechanism to keep spurious claims out of court.[72] The Court reasoned that a higher pleading standard than *Conley's* was required to prevent "largely groundless claim[s]" from imposing costs on defendants in the form of both the time and expense of dealing with the lawsuit and the threat of "an *in terrorem*" settlement.[73] A deficient complaint should "be exposed at the point of minimum expenditure of time and money by the parties and the court,"[74] that is, at the pleading stage. The Court noted the concern over costs was especially important in *Twombly*, because discovery in antitrust cases is very expensive.[75]

Given the dramatic shift in pleading standard that *Twombly* created, some scholars wondered whether its sweeping language was limited to antitrust actions.[76] Two years later, the Supreme Court's decision in *Ashcroft v. Iqbal* confirmed it was not.[77] The plaintiff, Javaid Iqbal, after being arrested in the wake of the September 11, 2001, terrorist attacks, alleged that his arrest was part of an unconstitutional policy promulgated by Attorney General John Ashcroft and FBI Director Robert Mueller to imprison persons based on their race, religion, or national origin.[78] The defendants moved to dismiss for failure to provide sufficient factual allegations showing the

72. *See Twombly*, 550 U.S. at 557–58.

73. *Id.* (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

74. *Id.* at 558 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)).

75. *Id.* at 558–60 & n.6.

76. *See supra* note 9 for a look at scholars who have discussed the transsubstantive nature of the *Twombly* standard. Even the Court of Appeals that heard *Iqbal* was left confused by *Twombly*. *See* Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (recognizing that the Supreme Court "intended to make some alteration in the regime of pure notice pleading" but finding that "[t]he nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals . . . .").

77. In the time between *Twombly* and *Iqbal*, the Supreme Court decided *Erickson v. Pardus*, which reversed a lower court dismissal of a prisoner suit claiming that the prison's refusal to treat him violated the Eighth Amendment. 551 U.S. 89, 89–90 (2007). The per curiam opinion seemed to cast doubt on the impact of *Twombly*, stating that the lower court had wrongfully "depart[ed] from the liberal pleading standards set forth by Rule 8(a)(2)" and recalling that the rule requires "only a short and plain statement . . . giv[ing] the defendant fair notice" of the grounds for the claim. *Id.* at 93–94 (quoting FED. R. CIV. P. 8(a)(2)) (internal quotation marks omitted). The Court also insisted, "Specific facts are not necessary." *Id.* at 93.

78. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

defendants' involvement in the challenged unconstitutional conduct.[79] The U.S. District Court for the Eastern District of New York denied the motion, and the Second Circuit affirmed on interlocutory appeal.[80]

In a 5–4 decision, the Supreme Court stated that, while its decision in *Twombly* did not require Rule 8 pleadings to contain "detailed factual allegations," the pleadings must be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[81] The Court reiterated: "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' "[82] Similarly, a complaint containing "naked assertions devoid of further factual enhancement" or "threadbare recitals of the elements of a cause of action" is deficient.[83] *Iqbal* clarified the two-pronged approach in *Twombly*.[84] First, the Court noted that conclusory allegations are not entitled to the presumption of truth.[85] Second, the Court examined the complaint's factual allegations "to determine if they plausibly suggest[ed] an entitlement to relief."[86] The Court held that Iqbal failed to plead sufficient facts to state a claim for relief plausibly.[87] Importantly, the Court clarified that the standards espoused in *Twombly* and *Iqbal* apply to "all civil actions," including antitrust and discrimination cases.[88] The Court recalled the cost concerns it discussed in *Twombly*, noting that "[l]itigation . . . exacts heavy costs

79. *Id.* at 1942, 1944; *see also* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007) (describing the procedural posture and summarizing the decision to affirm the denial of the dismissal based on qualified immunity).

80. Iqbal v. Hasty, 490 F.3d at 147.

81. Ashcroft v. Iqbal, 129 S. Ct. at 1949.

82. *Id.* (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

83. *Id.* (citation omitted).

84. *See id.* at 1950.

85. *Id.* at 1951.

86. *Id.* The Supreme Court suggested that offering a more likely alternative explanation to that alleged in the plaintiff's complaint creates a strong inference against the plausibility of complainant's allegations. *Id.* at 1951–52. In *Iqbal*, the Court said that "[i]t should come as no surprise" that a policy of attempting to detain those thought responsible for the September 11, 2001, terrorist attacks, which were perpetrated by Muslims from Arab nations, would focus on Arab Muslims even absent any discriminatory intent. *Id.* at 1951. In *Twombly*, the Court supposed that aligned economic interests, and not an unlawful conspiracy or agreement, was the motivation for the incumbent local exchange carriers' similar conduct. *See Twombly*, 550 U.S. at 567–69 (describing that allegations of conspiracy were implausible and an "obvious alternative explanation," such as similar economic interests, was more likely to have motivated the defendants' behavior).

87. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

88. *Id.* at 1953 (citing *Twombly*, 550 U.S. at 555–56 & n.3).

in terms of efficiency and expenditure of valuable time and resources."[89]

C. Affirmative Defenses Before Twombly

Prior to *Twombly* and *Iqbal*, there was widespread agreement that affirmative defenses were governed by *Conley*'s pure notice pleading standard, even though *Conley* dealt strictly with the pleading of claims under Rule 8(a)(2).[90] Although the Supreme Court never decided the issue, nearly all of the federal courts of appeals agreed that the pleading standard for affirmative defenses would be the same as that for claims.[91] Just as Rule 12(b)(6) provides a mechanism for dismissing insufficient claims, Rule 12(f) permits the court to strike "an insufficient defense" from a pleading either *sua sponte* or by motion of the parties.[92]

In practice, application of the liberal notice pleading standard to affirmative defenses meant that Rule 12(f) motions to strike affirmative defenses were rarely successful.[93] Affirmative defenses that parties pleaded in very general terms, with little or even no factual specificity, frequently survived motions to strike.[94] Courts took

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89. *Id.* Note that the Court is referring to the government as a litigant here.

90. Conley v. Gibson, 355 U.S. 41, 47 & n.8 (1957).

91. *See, e.g.*, 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."); Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998) (noting that defendant's single-sentence pleading of an affirmative defense provided sufficient notice to plaintiff and would be allowed); Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) ("Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure."); Salcer v. Envicon Equities Corp., 744 F.2d 935, 939 (2d Cir. 1984) ("A motion to strike an affirmative defense . . . will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." (internal quotation marks omitted)); Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.").

92. FED. R. CIV. P. 12(f).

93. Dominguez et al., *supra* note 14, at 78 (citing *Woodfield*, 193 F.3d at 362 ("[I]n some cases, merely pleading the name of the affirmative defense . . . may be sufficient.")). There are several likely reasons for this. First, motions to strike under Rule 12(f) are disfavored. *See infra* note 100. Second, because many affirmative defenses are listed in Rule 8(c), courts may have felt that simply pleading the names of these defenses provided sufficient notice. Third, *Conley*-era courts rarely granted even motions to dismiss, so motions to strike affirmative defenses were similarly unlikely to be granted because they were evaluated under the same pleading standard. *See supra* notes 56 (discussing the low success rates of motions to dismiss under *Conley*) and 91 (collecting cases showing that claims and affirmative defenses were held to the same standard under *Conley*).

94. 5 WRIGHT & MILLER, *supra* note 74, § 1274 ("[A]n affirmative defense may be pleaded in general terms . . . as long as it gives the plaintiff fair notice of the nature of the defense."); *see*

the "notice" aspect of notice pleading literally when considering the pleading of affirmative defenses; merely pleading the name of an affirmative defense provided sufficient notice. This practice was therefore widely accepted, with motions to strike providing a poor shield against boilerplate pleading of affirmative defenses.[95]

III. AFFIRMATIVE DEFENSES AFTER *TWOMBLY* AND *IQBAL*: THE DISTRICT COURT SPLIT

As discussed above, there has never been a definitive standard for pleading affirmative defenses, either from the Supreme Court or in the Federal Rules. Nonetheless, after *Twombly* radically altered[96] the pleading standard for claims, the proper standard for pleading affirmative defenses is in doubt for two main reasons. First, affirmative defenses were held to the same pleading standard (or an even looser one) as claims in the *Conley* era.[97] A change in the pleading standard for claims, therefore, would seem to also alter the pleading standard for affirmative defenses. Second, *Twombly*'s proscription against pleadings that consist merely of "labels and conclusions"[98] and that are devoid of sufficient "factual enhancement"[99] seems to implicate the prevailing method for pleading affirmative defenses under *Conley*, which tolerated affirmative defenses pleaded in exactly that manner. With *Twombly* rejecting

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also Ingraham v. United States, 808 F.2d 1075, 1079 (5th Cir. 1987) ("A defendant should not be permitted to lie behind a log and ambush a plaintiff with an unexpected defense." (internal citation and quotation marks omitted)). Some courts did not even require notice of the defense to be included as part of the proper pleadings or motions. *See* Hewitt v. Mobile Research Tech., Inc., 285 F. App'x 694, 696 (11th Cir. 2008) ("When a plaintiff has notice that an affirmative defense will be raised at trial, the failure of the defendant to plead the affirmative defense does not prejudice the plaintiff, and it is not error for the district court to hear evidence on the issue.") (citing Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir. 1988)); Williams v. Ashland Eng'g Co., 45 F.3d 588, 593 (1st Cir. 1995) (finding that plaintiffs received sufficient notice of an affirmative defense because defendant had mentioned it in an informal communication to plaintiffs prior to the close of discovery and both parties briefed the issue in cross motions for summary judgment).

95. *See* Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at *2 (E.D. Mich. Apr. 21, 2009) (observing that boilerplate pleading of affirmative defenses has been widely employed and tolerated). Boilerplate pleading of affirmative defenses was perhaps even more acceptable because the Federal Rules of Civil Procedure enumerated many common and widely known affirmative defenses such as duress, contributory negligence, and statute of limitations. *See* FED. R. CIV. P. 8(c)(1) (listing eighteen affirmative defenses).

96. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 573 (2007) (Stevens, J., dissenting) (calling the *Twombly* decision a "dramatic departure from settled procedural law").

97. *See supra* note 91 and accompanying text.

98. *Twombly*, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

99. *Id.* at 557.

"barebones" pleading for claims, plaintiffs have sought to resurrect Rule 12(f) motions to strike,[100] since the *Twombly* decision may now provide a powerful weapon for combating affirmative defenses.[101] District courts are currently grappling with the new standard of pleading claims under *Twombly* and *Iqbal* and are divided on whether those cases should apply to affirmative defenses as well.

District courts have adopted three different ways of treating affirmative defenses. The majority of federal district courts have held that the *Twombly* and *Iqbal* standard should apply to affirmative defenses ("applying courts"[102]). A minority of district courts have refused to apply the new pleading standard to affirmative defenses ("refusing courts"). One district court has adopted a hybrid approach, applying the heightened standard for the pleading of some affirmative defenses, but ruling it not necessary for others ("the hybrid court").[103]

A. The Applying Courts

The district courts that have applied *Twombly* and *Iqbal* to affirmative defenses rely on three major rationales: (1) that it is unfair to apply different pleading standards to the different parties to a litigation; (2) that *Twombly*'s and *Iqbal*'s interpretations of pleading claims under Rule 8(a) also apply to pleading defenses under Rule 8(b) and affirmative defenses under Rule 8(c); and (3) that applying *Twombly* and *Iqbal* is consistent with the practical purposes of those decisions, namely to try to reduce the costs of discovery.[104]

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100. These motions have traditionally been disfavored and considered an extreme measure. *See* Stanbury Law Firm, P.A. v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000) ("[S]triking a party's pleadings is an extreme measure, and, as a result . . . motions to strike . . . are viewed with disfavor and are infrequently granted." (internal quotation marks omitted)); United States v. Kramer, 757 F. Supp. 397, 409 (D.N.J. 1991) (motions to strike are disfavored because of their "dilatory character"); Clement v. Am. Greetings Corp., 636 F. Supp. 1326, 1332 (S.D. Cal. 1986) (motions to strike are "generally viewed with disfavor"); 5 WRIGHT & MILLER, *supra* note 74, § 1380 ("Both because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic, numerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted." (internal citations omitted)).

101. *See* Dominguez et al., *supra* note 14, at 78 ("[L]itigants are now filing 12(f) motions to strike affirmative defenses with increasing frequency . . . .").

102. I will use the same terminology for describing the groups of district courts as Dominguez et al., *supra* note 14, at 77.

103. Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872 (D. Mass. Aug. 6, 2009).

104. *See generally* Dominguez et al., *supra* note 14, at 78–79 (briefly discussing these rationales and some cases that applied them).

1. Applying Courts Find That Holding Plaintiffs and Defendants to the Same Standard Achieves Fairness

The most frequently cited justification for applying the *Twombly* standard to affirmative defenses is the argument that having two different sets of pleading standards—one for plaintiffs' claims and one for defendants' affirmative defenses—is nonsensical, or at least unfair.[105] For the fifty years between *Conley* and *Twombly*, parties pleaded both claims and defenses under the uniform *Conley* notice pleading standard.[106] Many judges, practitioners, and scholars now believe it would be unfair to allow defendants to plead under a more forgiving pleading standard than that for plaintiffs. The argument essentially invokes the "whole rule" canon.

Many courts have argued that a unified pleading standard for both plaintiffs and defendants serves the interest of fairness. The U.S. District Court for the Eastern District of Michigan held in *Shinew v. Wszola* that, with the retirement of the *Conley* pleading standard, *Twombly*'s interpretation of Rule 8(a)(2) was now effectively the pleading standard for all manners of pleading.[107] Because *Twombly* interpreted Rule 8(a), the court asked whether that interpretation should also apply to defenses and affirmative defenses under Rules 8(b) and (c), respectively.[108] Relying on a declaration by Professors Wright and Miller that predated the *Twombly* decision that "[t]he general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c),"[109] as well as other recent decisions in the same district,[110] the court found that *Twombly*'s interpretation of Rule 8(a) should indeed apply to affirmative defenses. Additionally, several other recent cases agree that *Twombly*'s interpretation of Rule 8(a) applies to affirmative defenses.[111]

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105. *See id.* at 78 ("The reasoning most frequently advanced by applying courts is that *Twombly*'s interpretation of Rule 8(a) applies to all pleadings, including affirmative defenses."). Dominguez et al. also cite many cases in support of this proposition. *See id.* at 78 n.27.

106. *See supra* note 91 and accompanying text.

107. Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at *2–3 (E.D. Mich. Apr. 21, 2009) (Scheer, J.).

108. *Id.* at *3.

109. 5 WRIGHT & MILLER, *supra* note 74, § 1274.

110. *Shinew*, 2009 WL 1076279, at *4–5 (citing Safeco Ins. Co. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008) (Cleland, J.); United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213 (E.D. Mich. Dec. 6, 2007) (Pepe, Mag. J.)).

111. *See, e.g.*, *In re* Montagne, Bankr. No. 08-10916, 2010 WL 424224, at *4 (Bankr. D. Vt. Feb. 1, 2010) (finding that affirmative defenses are subject to the general pleading requirements of Rule 8(a)); OSF Healthcare Sys. v. Banno, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan.

An overarching fairness rationale is often present in cases that argue for a single, uniform pleading standard. For example, in *Nixson v. The Health Alliance*,[112] the U.S. District Court for the Southern District of Ohio explained uniform pleading as a matter of fairness. In that case, the plaintiff made claims under Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, and state law against his former employer.[113] The defendant pleaded seventeen affirmative defenses in boilerplate form and the plaintiff moved to strike them.[114] The court first noted that a district court split had emerged on the pleading standard for affirmative defenses and then came down on the side of the applying courts.[115]

The court believed that pleadings of claims and defenses should be treated similarly because they have the same purpose: to provide notice of the nature of the claim and some plausible factual underpinning for asserting it.[116] The complaint and answer may have similar goals, but they serve different roles in the early phase of litigation. The complaint sets up the initial parameters of the entire action, setting out the claim or claims and making factual allegations that support those claims. With the burden of proof on the plaintiff, the answer's function is largely to deny the plaintiff's allegations, as well as to raise any affirmative defenses. Because both plaintiffs and defendants share the same purpose in pleading, the *Nixson* court held that they should be subject to the same standard.[117]

2. Applying Courts Find That the Interpretation of Rule 8(a) in *Twombly* and *Iqbal* Also Applies to the Rules Governing the Pleading of Defenses and Affirmative Defenses

The next argument in favor of the application of *Twombly* and *Iqbal* to affirmative defenses is more specific. It argues that the interpretation of Rule 8(a) under *Twombly* specifically applies to defenses under Rule 8(b) and affirmative defenses under Rule 8(c), as

29, 2010) (holding that affirmative defenses, as pleadings, are subject to Rule 8(a)(2)'s requirement of a short and plain statement showing that the pleader is entitled to relief).

112. No. 1:10-CV-0038, 2010 WL 5230867 (S.D. Ohio Dec. 16, 2010).

113. *Id.* at *1.

114. *Id.*

115. *Id.* at *1–2.

116. *Id.*

117. *See id.*

opposed to the previously discussed argument, which more generally states that Rule 8(a) applies to all pleadings regardless of type.[118]

For example, in *Hayne v. Green Ford Sales, Inc.*, the U.S. District Court for the District of Kansas acknowledged that Rule 8(c) does not contain the same language as Rule 8(a)(2), which was the rule interpreted in *Twombly* and *Iqbal*.[119] The court held that Rule 8(b)(1)(A) (which governs defenses generally) still requires "a defendant to state in short and plain terms its defenses to each claim."[120]

It ruled that Rule 8's requirement of a short and plain statement applies to claims and defenses, including affirmative defenses.[121] It also found that Rule 8 implies that "the pleading requirements for affirmative defenses are essentially the same as for claims for relief."[122] Moreover, the court found that the purpose of pleading is to provide notice of the claim or defense and the factual basis for such assertion.[123] Therefore, the court reasoned, "[i]t makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses" because the goals of pleading are the same for both.[124] Because *Twombly* expressly interpreted Rule 8(a), the court found that it logically follows that, if Rule 8(a) applies to affirmative defenses, so does the new interpretation of the rule in *Twombly*. The court struck eight of the defendant's affirmative defenses as insufficiently pleaded under *Twombly* but granted it leave to amend them.[125]

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118. While the applying courts would certainly have the plausibility standard apply to affirmative defenses as well as claims, it is not immediately clear that they would apply them to all types of pleadings. Few courts, probably, have had occasion to consider the question with regard to pleadings other than the answer and the complaint. It makes sense that counterclaims and crossclaims would be held to the plausibility standard because they seek relief and are essentially similar to the plaintiff's claims. *See infra* Part IV.B. There is also a question of whether the plausibility standard applies only to legal claims and defenses or if it would also apply to the pleading of jurisdictional issues. *See generally* Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627 (2009) (considering whether *Twombly* imposes stricter pleading standards for jurisdictional questions and arguing that it does).

119. 263 F.R.D. 647, 650 (D. Kan. 2009).

120. *Id.* (citing FED. R. CIV. P. 8(b)(1)(A)) (internal quotation marks omitted); *see generally* FED. R. CIV. P. 8.

121. *Hayne*, 263 F.R.D. at 649.

122. *Id.* at 650.

123. *Id.*

124. *Id.*

125. *Id.* at 651–52.

3. Applying Courts Find That Requiring Parties to Plead Affirmative Defenses Under the Heightened Standard Best Serves *Twombly* and *Iqbal*'s Policy Goals

In addition to arguing that a technical reading of Rule 8 under *Twombly* applies to the pleading of affirmative defenses, some courts have advanced practical policy reasons for holding affirmative defenses to the same standard as claims. These arguments implicate the major pragmatic justification for *Twombly* and *Iqbal*, that is, reducing the expense of litigation by disallowing potentially expensive discovery of implausible claims.[126]

One example of this type of case is *Burget v. Capital West Securities, Inc.*, in which the Western District of Oklahoma stated that "the desire to avoid unnecessary discovery (and the time and expense associated therewith)" requires a pleading standard that does not permit "boilerplate affirmative defense assertions" that "lack any factual basis and are not viable."[127] It also reasoned that "[a]n even-handed standard . . . 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."[128] The court went on to strike a number of the defendant's affirmative defenses and to deny leave to amend them because they were "legally insufficient."[129]

The Eastern District of Michigan in *Safeco Insurance Company of America v. O'Hara Corp.* was concerned not only with private parties' discovery and litigation costs but also with the court's role in helping the parties to narrow the issues and the additional burden that could be created by dubious affirmative defenses. It stated, "[T]he court requires attorneys to accept a continuing obligation to eliminate unnecessary boilerplate in their pleadings."[130] This admonition applied equally to claims and defenses. The court asked parties to "attempt to narrow the issues in advance" through "the elimination of frivolous claims or defenses,"[131] explaining that "[b]oilerplate defenses

126. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (discussing how a heightened pleading standard will help to reduce unnecessary discovery costs); *supra* notes 72–75 and accompanying text.

127. No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009) (internal citation omitted).

128. *Id.*

129. *Id.* at *4.

130. Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008).

131. *Id.*

clutter the docket and, further, create unnecessary work."[132] It feared that "such defenses" could obscure the truly important defenses and issues on which parties should focus.[133] While acknowledging that defendants might fear losing the ability to plead a defense if not pleaded early (apparently before access to plausible factual backing), the court noted that "only a limited class of defenses . . . are waived if not immediately asserted" and that Rule 15 allows parties to amend pleadings.[134] The *Safeco* court sought to focus on important issues by requiring an aggressive pleading practice, saying that "[t]he court expects action on affirmative defenses where possible (*e.g.* a Rule 12(b)(6) affirmative defense should ordinarily generate an immediate motion to dismiss, not the mere boilerplate recitation among a list of possible defenses)."[135]

The Northern District of Ohio recently agreed that applying *Twombly* and *Iqbal* to affirmative defenses is consistent with the cost-cutting and discovery-limiting purposes of those cases.[136] It reasoned that "boilerplate affirmative defenses . . . can have the same detrimental effect on the cost of litigation as poorly worded complaints."[137] These courts concluded that affirmative defenses could be costly and burdensome and that the goals of *Twombly* and *Iqbal* were best served by holding them to the heightened plausibility standard.

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132. *Id.*

133. *See id.* ("Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution.").

134. *Id. See also* Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010) (noting that pleading boilerplate affirmative defenses due to "an abundance of caution" creates significant unnecessary discovery) (quoting *Safeco*, 2008 WL 2558015, at *2–3).

135. *Safeco*, 2008 WL 2558015, at *1. This is something of a bizarre requirement. A 12(b)(6) motion to dismiss is for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). However, an affirmative defense, if proven, will defeat a plaintiff's claim even if all of the plaintiff's allegations are true and the plaintiff proves her case. BLACK'S LAW DICTIONARY 482 (9th ed. 2009). Thus, the defendant's pleading of an affirmative defense does not necessarily indicate that the plaintiff has not stated a claim upon which relief can be granted. In fact, the defendant may well admit that the plaintiff has stated a claim, and may even admit that the plaintiff can prove that claim, but will assert that the defendant's affirmative defense will still defeat the plaintiff's claim. Moreover, because the defendant must prove her affirmative defense, it is likely that some discovery will be required. The defendant generally will not be able to prove the affirmative defense and defeat the plaintiff's claim until a motion for summary judgment at the earliest, and only very rarely at the motion-to-dismiss phase of a suit.

136. HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (finding that *Twombly* and *Iqbal* "were designed to eliminate the potential high costs of discovery associate with meritless claims").

137. *Id.*

B. The Refusing Courts

Like the arguments in favor of applying *Twombly* and *Iqbal* to affirmative defenses, the arguments advanced by courts that refuse to apply the heightened standard to affirmative defenses cover both textual readings of the Federal Rules of Civil Procedure and the practical aspects of pleading. Most refusing courts first begin with a reading of Rule 8 but take a narrower approach in concluding that *Twombly* and *Iqbal* do not touch the pleading of affirmative defenses. A second important rationale for refusing to apply the plausibility standard is that defendants have strict time limits in which they must file their answers. Furthermore, there are other practical reasons for refusing to apply. Courts using these pragmatic arguments note that the practical goals of *Twombly* and *Iqbal* are not frustrated by the current, looser pleading standard for affirmative defenses.

1. Refusing Courts Find That *Twombly* and *Iqbal* Do Not Apply to Affirmative Defenses Because the Supreme Court Did Not Say That They Do

Courts that have refused to apply *Twombly* and *Iqbal* to affirmative defenses have largely done so because neither case explicitly stated that the new pleading standard applied to affirmative defenses. Courts generally lay out this argument as a syllogism: (1) the pleading of claims is governed by Rule 8(a); (2) the pleading of affirmative defenses is governed by Rule 8(c)(1); (3) *Twombly* and *Iqbal* explicitly interpret only Rule 8(a)(2); and (4) therefore, *Twombly* and *Iqbal* do not apply to Rule 8(c)(1).[138] Essentially, the refusing courts reject the application of *Twombly* and *Iqbal* to affirmative defenses because the Supreme Court did not say, explicitly and directly, that they are required to do so.

In *First National Insurance Company of America v. Camps Services, Ltd.*, the Eastern District of Michigan observed that *Twombly* "raised the requirements for a well-pled complaint under [Rule 8(a)'s] short and plain statement requirement."[139] The court also

138. *See* Dominguez et al., *supra* note 14, at 79 (discussing the arguments employed by the refusing courts). Early courts that had occasion to consider whether *Twombly* and *Iqbal* apply to affirmative defenses, and refused to rule that they do, largely used only this syllogistic argument. Indeed, it is the only line of reasoning for refusing courts identified by Dominguez et al. *See id.* Recently, district courts have started to employ practical arguments in favor of refusing with greater frequency.

139. No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (internal citation omitted).

noted that "[s]imilar, though not identical, language appears in Rule 8(b)'s requirement that a defendant's answer 'state in short and plain terms its defense to each claim asserted against it.' "[140] However, because that similar language does not appear in Rule 8(c), which governs affirmative defenses, the court held that *Twombly*'s "analysis of the 'short and plain statement' requirement of Rule 8(a) is inapplicable . . . under Rule 8(c)."[141]

The Western District of Pennsylvania agreed in *Romantine v. CH2M Hill Engineers, Inc.*, finding that *Twombly* interpreted the pleading requirements of Rule 8(a)(2).[142] Like the court in *Camps Services*, the court dismissed the plaintiff's argument that similar language is found in Rule 8(a), governing claims, and Rule 8(b), covering defenses, by saying that "[t]his fails to address the fact that affirmative defenses are not governed by 8(b) but by 8(c)."[143] The court concluded that *Twombly* was not intended to apply to either defenses or affirmative defenses.[144]

Several other district court cases have also advanced this argument. The Southern District of Alabama found that neither Rule 8(b) nor Rule 8(c) "expresses a requirement that the answer 'show' the defendant is entitled to prevail on its affirmative defense."[145] It concluded, "*Twombly* was decided under Rule 8(a) and the plaintiff has identified no case extending it to Rule 8(b) or (c)."[146] While most district courts have referred specifically to *Twombly*, which first advanced the new heightened pleading standard, one district court arguing against *Twombly*'s application to affirmative defenses noted, "*Iqbal* also focused exclusively on the pleading burden that applies to plaintiffs' complaints."[147]

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140. *Id.* (quoting FED. R. CIV. P. 8(b)(1)(a)).

141. *Id.*

142. No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009).

143. *Id.* at *1 n.1.

144. *Id.*

145. Westbrook v. Paragon Sys., Inc., 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007).

146. *Id.* (internal citation omitted).

147. McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010); *see also* Hahn v. Best Recovery Servs., LLC, No. 10-12370, 2010 WL 4483375, at *2 (E.D. Mich. Nov. 1, 2010) ("[T]his Court is not convinced that *Twombly* or *Iqbal* set forth the pleading requirements for affirmative defenses.").

2. Refusing Courts Find That the Plausibility Standard Should Not Apply Because of Fairness and Timing Concerns

The second major rationale cited by the refusing courts is that it would be unfair to force defendants to plead to a heightened standard given the time constraint imposed on them by the Federal Rules of Civil Procedure. The Rules require the defendant to serve an answer within twenty-one days of being served with a complaint.[148] The concern is that three weeks is insufficient time for defendants to investigate possible affirmative defenses in order to plead them with adequate factual backing to meet the standard of plausibility. On the other hand, as the U.S. District Court for the District of Minnesota explained, "a plaintiff has months—often *years*—to investigate a claim before pleading that claim in federal court."[149] Therefore, the plausibility requirement of *Twombly* and *Iqbal* is "more fairly imposed on plaintiffs who have years to investigate than on defendants who have 21 days,"[150] because "[p]laintiffs and defendants are in much different positions."[151] Another court reasoned that "a plaintiff has the length of the statute of limitations to investigate claims and ensure that it has sufficient facts" while "[a] defendant, on the other hand, has only twenty one days."[152]

The Western District of Virginia agreed, noting that "[p]leading standards that account for the differences between the pleading of claims and defenses make sense."[153] The court said that "[k]nowledge at the pleading stage is often asymmetrical, disproportionately favoring . . . a plaintiff who has had the opportunity to time its filing" and to "conduct an investigation before filing the complaint."[154] The defendant, however, "must respond quickly after being served" because of Rule 12(a)(1)(A).[155] The court noted this asymmetry of information and time reflected a fundamental difference between the function of pleading for plaintiffs and defendants.[156] It argued, "The primary purpose of Rule 8(c) is to ensure that the plaintiff has

148. FED. R. CIV. P. 12(a)(1)(A)(i).

149. Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010).

150. *Id.*

151. *Id.*

152. Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010).

153. Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721, 726 (W.D. Va. 2010).

154. *Id.*

155. *Id.*

156. *Id.*

adequate notice that a defense will be raised . . . and not to 'show' the court or the plaintiff that the defendant is entitled to the defense."[157] The court believed that the significant difference in available time and knowledge supports a system of different pleading purposes and different pleading standards.

Admittedly, asymmetries of information (and resources) are often more harmful to plaintiffs than defendants. Professor Arthur Miller and Professor Stephen Burbank have argued that the plausibility standard will likely make it harder on plaintiffs who suffer from limited knowledge and means.[158] These criticisms, however, have been, and are, properly aimed at the *Twombly-Iqbal* standard itself. Holding defendants who assert affirmative defenses to the same standard will not remedy these problems—two wrongs will not make a right.

Defendants also differ from plaintiffs in that they are held to a strict time constraint. Unlike disparities in resources, which are largely beyond the control of Congress or the courts, the twenty-one day time constraint on time in which to file an answer is imposed by Rule 12(a). Imposing equivalent burdens on defendants will not lighten the burdens on plaintiffs.

Besides timing, there are important pragmatic reasons to not extend the plausibility standard to affirmative defenses. *Leon v. Jacobson Transportation Co.*,[159] a 2010 case in the Northern District of Illinois, argued first that "[t]he point [of *Twombly* and *Iqbal*] was to reduce nuisance suits filed solely to obtain a nuisance settlement."[160] The court surmised that "[t]he [Supreme] Court, though, has never once lost sleep worrying about defendants filing nuisance affirmative defenses" and considered the risk of them doing so to be minimal.[161] Second, the court said that there are certain affirmative defenses, such as mitigation of damages, that a defendant would have no way of

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157. *Id.* (citing Hewitt v. Mobile Research Tech., Inc., 285 F. App'x 694, 696 (11th Cir. 2008)); *cf.* FED. R. CIV. P. 8(a) (requiring a complaint to "show[]" that the pleader is entitled to relief).

158. *See* Burbank, *supra* note 8, at 118 ("Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries."); Miller, *supra* note 9, at 43 ("It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant . . . .").

159. No. 10 C 4939, 2010 WL 4810600 (N.D. Ill. Nov. 19, 2010).

160. *Id.* at *1.

161. *Id.*

investigating before discovery.[162] Thus, the court might be left in the position of "having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains additional information that would support those affirmative defenses."[163] The court also warned of disputes occurring as parties sought to discover or prevent discovery of issues that were not raised in the answer.[164] Therefore, the *Leon* court concluded, "It is to everyone's benefit to have defendant plead its affirmative defenses early, even if defendant does not have detailed facts."[165]

C. The Hybrid Approach

In August 2009, the U.S. District Court for the District of Massachusetts proposed a new, compromise approach to the problem of determining the pleading standard for affirmative defenses after *Twombly*.[166] In a two-paragraph decision, the court opined that Rule 8's purpose is to give "fair notice" of the nature of a defense.[167] It also argued that Rule 8(c)(1) "designates by name certain 'general' defenses" and held that "the designation of a listed defense is sufficient notice to a plaintiff of its basic thrust," because these defenses are commonplace and well-understood. The court also borrowed a page from the applying courts, saying that greater factual detail was required "[t]o the extent that [the defendant] raises defenses other than those listed in Rule 8(c)(1)."[168] Thus, according to the District of Massachusetts, boilerplate pleading is acceptable for the affirmative defenses enumerated in Rule 8(c)(1), but *Twombly* and *Iqbal* apply to the pleading of other defenses.

IV. PLAYING APPELLATE JUDGE: ANALYZING THE ARGUMENTS OF THE DISTRICT COURTS FOR AND AGAINST APPLYING *TWOMBLY* AND *IQBAL*

Three main arguments emerge on both sides of the debate regarding whether to apply *Twombly* and *Iqbal* to affirmative defenses. First, both applying and refusing courts start with a close

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872 (D. Mass. Aug. 6, 2009); Dominguez et al., *supra* note 14, at 80 (noting that the *Kaufmann* standard "offers a middle ground between the divergent positions of the applying and refusing courts").

167. *Kaufmann*, 2009 WL 2449872, at *1.

168. *Id.*

textual reading of Rule 8. They diverge over whether *Twombly*'s interpretation of Rule 8(a) should extend to defenses or affirmative defenses under Rules 8(b) and (c), respectively, or whether *Twombly* and *Iqbal* modified the standards for Rule 8(a) alone. Second, many courts on both sides have considered arguments about litigation costs and the expense of discovery, realizing that those practical concerns were at the heart of the Supreme Court's decisions. Generally, applying courts see the application of *Twombly* to affirmative defenses as helpful to *Twombly*'s goal of reducing discovery costs, while refusing courts are more cynical, doubting that applying *Twombly* would make much of a difference. The refusing courts claim, even if it did make a difference, the benefits of applying *Twombly* would not outweigh the burden on defendants. Third, both sides offer arguments about fairness in pleading. Applying courts believe that fundamental fairness is best achieved by application of a unified pleading standard that treats plaintiffs and defendants the same. Refusing courts conclude that defendants' unique position of having limited time and knowledge compared to plaintiffs' position justifies a less stringent pleading standard.

A. Textual Arguments

A crucial battle wages over the question of which textual reading of Rule 8 to adopt.[169] On its face, each subsection of Rule 8 governs a different type of pleading. Rule 8(a) unquestionably covers the plaintiff's initial complaint.[170] Its language also indicates that it covers only a "pleading that states a claim for relief."[171] Because affirmative defenses do not "state a claim for relief," it seems inapt to apply Rule 8(a) even on its face. Rule 8(b) covers the defendant's answer, which requires the defendant to "state in short and plain terms its defenses to each claim" and to "admit or deny the allegations asserted."[172] Effectively, Rule 8(b) governs the defendant's response to the complaint, admitting or denying parts of the complaint, leaving the affirmative pleading of defenses to Rule 8(c). Rule 8(c) explicitly covers affirmative defenses and requires the defendant to "affirmatively state" them.[173] Rule 8(d) is the only subrule whose language plainly indicates applicability to plaintiffs and defendants,

169. Gambol discusses similar arguments. *See* Gambol, *supra* note 16, at 2205–06.

170. FED. R. CIV. P. 8(a).

171. *Id.*

172. FED. R. CIV. P. 8(b).

173. FED. R. CIV. P. 8(c).

offering "general" requirements and explicitly mentioning both "claims and defenses."[174] Several courts have agreed that the "showing" requirement of a Rule 8(a) "claim for relief" is more demanding than the requirement that a defendant "affirmatively state" defenses.[175]

The above-discussed Rule 8 sections are similar but govern different types of pleading and have different purposes. Both 8(b) and 8(c) deal with defendants' pleadings. Rule 8(b) involves only admissions or denials of plaintiffs' claims, and Rule 8(c) requires defendants to plead any affirmative defenses. Perhaps some of the tendency toward boilerplate pleading of affirmative defenses is due to the common and strategic single-word answers that defendants often offer as part of Rule 8(b) answers.[176] While this tendency may "bleed" into the pleading of affirmative defenses, offering more than sparse pleading of affirmative defenses makes sense because, unlike admissions and denials, defendants must affirmatively prove their affirmative defenses.[177] Ultimately, each of the three parts of Rule 8, namely Rule 8(b), (c), and (d), can stand on its own because each serves a different pleading purpose.

Because the different parts of Rule 8 each address a different type of pleading, it does not naturally follow that *Twombly*'s interpretation of Rule 8(a)(2)'s provision that the plaintiff must make a statement "showing that the pleader is entitled to relief" should necessarily apply to parts (b) and (c).[178] The refusing courts, such as the Eastern District of Michigan in *First National Insurance Company* and the Western District of Pennsylvania in *Romantine*, were correct in finding that *Twombly*'s interpretation of Rule 8(a)(2) has no impact on affirmative defenses, which are entirely governed by Rule 8(c).[179]

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174. FED. R. CIV. P. 8(d)(1), (3) (requiring "simple, concise, and direct" pleadings and permitting alternative statements and inconsistent claims or defenses).

175. *See, e.g.*, Falley v. Friends Univ., No. 10-1423-CM, 2011 WL 1429956, at *2 (D. Kan. Apr. 14, 2011) (finding the requirement in Rules 8(b) and 8(c) "markedly less demanding than that of Rule 8(a)").

176. Generally just "admitted" or "denied," or a statement disavowing any knowledge of the allegation. Another reason for this may be that many affirmative defenses are listed in Rule 8(c).

177. *See infra* Part V for suggestions of remedies for insufficient pleading of affirmative defenses that are less harsh than the plausibility standard. Specifically, courts could treat affirmative defenses under a "true" *Conley* standard, requiring them to provide adequate notice of the defense. This would be a compromise position between minimal boilerplate pleading and the strict *Twombly* standard.

178. FED. R. CIV. P. 8(a)(2).

179. *See generally supra* Part III.B.

B. The Distinct Purposes of Claims and Defenses

Because affirmative defenses have a different purpose in litigation than claims, the manner of their pleading should reflect their distinct role. Affirmative defenses accept as true all of the plaintiff's factual allegations.[180] Affirmative defenses are not denials; they do not purport to offer a version of the facts that is different from that alleged by the plaintiff. The defendant's pleading of affirmative defenses can, and must, use the plaintiff's factual basis as its own. Affirmative defenses are descended from the common law defensive plea of "confession and avoidance," in which the defendant admitted the plaintiff's case but nonetheless offered a defense that would bar plaintiff's recovery despite his or her successful establishment of a prima facie case.[181] Wright and Miller note that an affirmative defense normally required the defendant to "allege additional new material that would defeat the plaintiff's otherwise valid cause of action."[182] However, brief pleading of simple, commonplace affirmative defenses, such as statute of limitations or various immunity doctrines, should suffice to provide notice to the plaintiff. In those cases, even boilerplate pleading would adequately notify plaintiffs of the defense. This is especially true for those affirmative defenses, such as statute of limitations or immunity, that are purely legal in nature, rather than those, such as failure to mitigate damages or duress, that require a more fleshed-out factual underpinning.

This understanding reflects a key difference between claims and affirmative defenses: claims must allege sufficient facts to establish a prima facie case, while affirmative defenses merely use those same alleged facts to show why the action should be unsuccessful regardless. Rule 8(a)(2)'s "showing" requirement reflects this reality and establishes a gatekeeping test.[183] It would be harsh and odd to have a gatekeeping mechanism work against defendants, who do not choose to be in court in the first place.[184]

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180. BLACK'S LAW DICTIONARY 482 (9th ed. 2009).

181. WRIGHT & MILLER, *supra* note 74, at § 1270.

182. *Id.*

183. *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 829 n.34 (2010) ("The Court [in *Twombly* and *Iqbal*] was construing the word 'showing' in Rule 8(a)(2) governing claims, which does not appear in Rule 8(b) or (c) on answers, and was establishing a gatekeeping test for people trying to get into court, which does not bear on the opposing party.").

184. *See* Gambol, *supra* note 16, at 2177 ("A defendant does not select to be haled into court . . . .").

To a certain degree, some applying courts may be reading Rule 8 in a more holistic way in order to justify maintaining the equal pleading standards that they were accustomed to for fifty years under *Conley*. It is possible that, had the notion of a unified pleading standard not been ingrained, these courts would have a different view of Rule 8 today. At the very least, applying courts should explain why a uniform standard is fair and superior and should not just rely on tradition or inertia to justify imposing it.[185]

Ultimately, however, one cannot fault those courts for reading Rule 8(c) *in pari materia* with Rule 8(a). Good textual arguments exist on both sides of the affirmative defenses debate, with reasonable people differing and no clear precedential preference, as Magistrate Judge James G. Welsh observed in *Palmer v. Oakland Farms, Inc.*[186] Professor Miller has also suggested that reasonable minds disagree on the question.[187] Given strong textual arguments on both sides, it makes sense to look at practical considerations, starting with the explicit pragmatic concern in *Twombly*—litigation costs.

C. Cost Concerns

The *Twombly* court explicitly expressed concern about litigation costs. There is little doubt that reducing expense in discovery is a necessary and prudent goal of modern litigation practices and standards. However, further consideration of these issues shows that applying a higher pleading burden to affirmative defenses would ameliorate very few of the concerns regarding the increasing cost of litigation. Many of the arguments do not apply to affirmative defenses at all.

1. Undeserved Settlements

The Supreme Court in *Twombly* justified a heightened pleading standard on the grounds that "largely groundless claim[s]"

185. *See infra* Part IV.C for a discussion of why a uniform pleading standard unfairly harms defendants.

186. *See* Palmer v. Oakland Farms, Inc., No 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010) ("With well-reasoned case law authorities on both sides of the issue, neither party's argument can be dismissed as ill-considered or easily rejected.").

187. Miller, *supra* note 9, at 101 & n.391 (noting that district judges who apply *Twombly* and *Iqbal* to affirmative defenses interpret the decisions as clarifying what information is necessary to provide fair notice to the other party while those who refuse to apply the decisions to affirmative defenses interpret them as strict clarifications of Rule 8(a)(2)'s "showing" requirement).

could nonetheless produce *in terrorem* settlements.[188] A similar phenomenon occurs in the class-action context, where defendants are likely to settle a case even if they are very likely to win because a potential judgment at trial could be very large.[189] Courts have used a variety of methods to reduce the likelihood of such settlements and the coercive power of such suits. For example, in *In re Rhone-Poulenc Rorer, Inc.*, the Seventh Circuit considered a class-action suit filed against certain manufacturers of blood solids by hemophiliacs who alleged that they contracted AIDS as a result of using the manufacturers' products.[190] The court noted that thirteen cases had been tried individually under the same facts, with the defendants prevailing twelve of those times and the plaintiff winning just once.[191] The court feared that the defendants would "be under intense pressure to settle" and would be "induced by a small probability of an immense judgment in [] class action 'blackmail settlements.' "[192] In response, the Seventh Circuit decertified the class.[193]

The Supreme Court had similar concerns about the specter of costly discovery being used to strong-arm defendants into undeserved settlements in *Twombly*. The Court argued that the high costs of antitrust litigation would frighten defendants into settling even "anemic cases."[194] The fear of *in terrorem* settlements motivated the Supreme Court to increase the pleading standard for all claims,[195] not merely for claims in areas of law where discovery costs actually are considerable, such as class-action and antitrust litigation.

The fear of high discovery costs inducing undeserved settlements is simply not present in the case of affirmative defenses. As the Northern District of Illinois noted in *Leon*, "[t]he [Supreme]

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188. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)). *In terrorem* settlements come about when a defendant is willing to enter in a settlement even in the face of a weak claim because of his or her fear of highly expensive discovery costs and other litigation expenses. *See generally infra* notes 189–94 (discussing sources that explain discovery costs and *in terrorem* settlements).

189. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)) (arguing that defendants will be under intense pressure to settle and will be induced by a small probability of an immense judgment in class action blackmail settlements).

190. *Id.* at 1294.

191. *Id.* at 1296.

192. *Id.* at 1298 (quoting FRIENDLY, *supra* note 189, at 120).

193. *Id.* at 1304.

194. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

195. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (confirming that "*Twombly* expounded the pleading standard for all civil actions" (internal citation omitted)).

Court, though, has never once lost sleep worrying about defendants filing nuisance affirmative defenses."[196] A defendant cannot possibly scare a plaintiff into a settlement by merely pleading an affirmative defense.[197] Unlike claims, counterclaims, or crossclaims, affirmative defenses do not demand any relief from the party they are asserted against. An affirmative defense, unlike a counterclaim, does not threaten to take anything from the plaintiff when it is pleaded. The best-case scenario for a defendant's affirmative defense is that it defeats the plaintiff's claim or claims. A plaintiff is certainly aware of the possibility of not recovering anytime an action is brought, whether because of failure to prove her own case or because the defendant is able to prove an affirmative defense. Plaintiffs are also well aware that prosecuting a lawsuit will entail discovery costs. Therefore, the introduction of a defendant's affirmative defense cannot, unlike a plaintiff's claim, produce a coercive settlement from the other party.[198] Lawsuits involve plaintiffs seeking relief from defendants, not the other way around. Pleading an affirmative defense, even in boilerplate form, does not change this fundamental relationship.

2. Cost of Discovery of Unsubstantiated Defenses

Even without the fear of unwarranted settlements, a heightened pleading standard also performs a gatekeeping role by keeping spurious cases from taking up the time and resources of the judiciary and the parties themselves.[199] Although *Iqbal* confirmed that *Twombly*'s heightened pleading standard applies to all civil suits,[200]

196. Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010).

197. This is not to say that affirmative defenses will not impose expenses on plaintiffs, or that they cannot be abused as a delaying or cost-inducing mechanism. Tactics for dealing with abusive affirmative defenses, such as sanctions under Rule 11, are discussed in Part V of this Note.

198. A strong and meritorious affirmative defense, of course, could have the effect of reducing a case's settlement value. If the affirmative defense were strong, however, we would not consider its power to reduce the settlement value a coercive one. Weak affirmative defenses are unlikely to frighten the plaintiff or change the settlement value by much. It is possible that a "grocery list" of affirmative defenses could reduce the settlement value of a case even if none of those affirmative defenses were strong because the plaintiff would worry about the cost of litigating all of them. *See infra* Part V for possible solutions to this problem.

199. Professor Miller has argued that judicial gatekeeping was successful prior to *Twombly* and *Iqbal*. Miller, *supra* note 9, at 52–53 ("For years before *Twombly* and *Iqbal*, the Rule 12(b)(6) dismissal rate had been rising. Judicial gatekeeping seemed to be working.").

200. *Iqbal*, 129 S. Ct. at 1953.

Twombly itself was concerned with the significant cost of discovery, specifically in antitrust cases.[201]

Discovery of affirmative defenses will often overlap with discovery that the parties have already conducted in conjunction with discovery of the claim, because both the claim and the affirmative defense involve discovery of many of the same facts. Therefore, discovery of affirmative defenses will add little incremental discovery cost that would not have been undertaken in order to complete discovery of the claim's merits. For example, an affirmative defense of contributory negligence in a toxic tort case might include fact-specific findings such as when the plaintiff recognized an injury and what remedial steps he or she took. It might include extensive depositions, review of records, and discovery of medical evidence and testimony. While expensive, much of this discovery would have been necessary in order to prove the plaintiff's case. Neither party would choose to embark on costly discovery that merely duplicates that which has already occurred, because the discovery process ideally ensures that both sides receive the same information. The pleading of an affirmative defense that involves facts in common with the claim will add little additional expense to the case.

Moreover, pleading an affirmative defense imposes discovery costs equally on both plaintiffs and defendants.[202] In those instances, an affirmative defense that was pleaded with little specificity would create no additional cost for the plaintiff, as long as the pleading provided notice of the nature of the affirmative defense. Some scholars have suggested that *Twombly*, in fact, was an unusual case with uncommonly high discovery costs and that applying a heightened pleading standard to ordinary cases, such as garden-variety employment discrimination suits, is not necessary.[203]

3. Judicial Economy

Judicial economy also provides a reason to hold claims to a higher pleading standard than affirmative defenses. An implausible

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201. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (citing two Supreme Court cases, an article by now-Chief Judge Frank Easterbrook of the Seventh Circuit, and the MANUAL FOR COMPLEX LITIGATION, among other sources, for the proposition that antitrust litigation is particularly expensive).

202. *See id.* at 596 (Stevens, J., dissenting) (arguing that discovery necessarily places a burden on both parties to the litigation).

203. *See* Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 216 (2011) (arguing that *Iqbal* and *Twombly* were "oddball" cases with "massive costs and significant asymmetry of costs").

claim filed by the plaintiff that is dismissed creates a burden for both parties and for the court from the time it is filed until its dismissal. Holding claims to a heightened pleading standard makes sense because it prevents the court and litigants from spending resources on spurious claims. Affirmative defenses, on the other hand, do not dispose of the lawsuit if they are unsuccessful. If one is dismissed, or more accurately, struck by a Rule 15 motion, the parties will still litigate the surviving claims and defenses and the case will stay in court. Thus, any time or resources expended on the surviving parts of the case remain useful. In the end, having a higher pleading standard for claims than for affirmative defenses saves more judicial resources because a lawsuit will remain on the docket even if an affirmative defense fails.

Many courts and observers have argued that an enhanced pleading standard actually causes greater strain on judicial resources as parties spend additional time filing and contesting motions. If defendants are held to that higher standard for pleading affirmative defenses, the court will have to take the time to consider a defendant's motions to amend its answer as it learns more about the case.[204] Litigants themselves will also expend time and resources arguing and answering such motions, as Justice Stevens indicated in his dissenting opinion in *Twombly*.[205] A plausibility standard for pleading may increase the likelihood of motions to dismiss or to strike pleadings, as the plausibility standard is uncertain.[206] Litigation expenses seem to have increased because of the new *Twombly* standard, with plaintiffs being required to file longer complaints and defendants, in turn, required to respond with longer answers.[207] Requiring defendants to

204. *See* Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010).

205. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting) (arguing that "the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery").

206. Gambol refers to this process as "strike, amend, repeat." Gambol, *supra* note 16, at 2208. If the standard were definite, then litigants would presumably choose to save resources by not contesting affirmative defenses that were clearly on the acceptable side of the line. Without such a line being drawn, litigants will not know what an acceptable defense looks like and may seek to challenge a greater proportion of them. *See generally id.* (discussing repeated motions to strike).

207. *See* Thomas, *supra* note 203, at 222 n.40 (citing EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 11–12 (2010)) ("In some ways costs appear to have generally increased due to *Twombly*. Plaintiffs will file longer complaints, and defendants possibly will file longer answers.").

submit even more extensive pleadings of their affirmative defenses would only exacerbate this problem.

D. Timing and Fairness

Another compelling argument in this debate is that holding defendants' affirmative defenses to a heightened pleading standard is unfair because of the twenty-one day time constraint on defendants to serve an answer. Although several other courts insist that a uniform pleading standard is fairer, these courts fail to consider that plaintiffs and defendants are in very different positions from an informational standpoint. Judge Kyle of the District of Minnesota correctly states that a pleading standard is unfair if it treats a party that had years to investigate a claim the same as one that had just three weeks.[208] This disparity in time is mirrored by a similar disparity in knowledge, as Judge Wilson of the Western District of Virginia argued. Judge Wilson noted, "While the plaintiff often can conduct an investigation before filing the complaint to ensure its allegations are adequately supported, the defendant must respond quickly after being served."[209] This "disproportionately" favors the plaintiff,[210] and this unfairness would only be exacerbated if defendants were held to the higher pleading standard.

The *Leon* court also correctly pointed out that the defendant would have no knowledge of certain affirmative defenses at the time he or she would be required to file an answer.[211] This is especially true of affirmative defenses based on the plaintiff's conduct, such as failure to mitigate damages or contributory negligence, because the discovery process may not have yet brought certain facts to light.[212] Therefore, it would be unfair to require defendants to plead with specificity affirmative defenses about which they are uninformed. The

208. *See* Wells Fargo & Co. v. United States, No. 09-CV-2764, 2010 WL 4530158, at *2 (D. Minn. Oct. 27, 2010) ("Whatever one thinks of *Iqbal* and *Twombly*, the 'plausibility' requirement that they impose is more fairly imposed on plaintiffs who have years to investigate than on defendants who have 21 days.").

209. Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, No. 7:10-cv-00361, 2010 WL 4781065, at *4 (W.D. Va. Nov. 24, 2010).

210. *Id.*

211. *See* Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010) (noting that a defendant "has no practical way of investigating" certain affirmative defenses before discovery).

212. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery in a Digital Age*, 58 DUKE L.J. 889, 908 n.90 (2009) (discussing the difficulty of discovery when a defendant's defenses are based on the plaintiff's conduct).

alternative is allowing defendants to amend their answers, leave for which must be liberally granted according to the Federal Rules of Civil Procedure.[213] However, this imposes additional costs on both parties, as they must deal with motions to amend and potential motions in opposition. It also imposes a further burden on the courts in considering and adjudicating these motions.

E. Heightened Pleading Generally

Many have questioned whether the Court's articulation of a transsubstantive plausibility standard was necessary given that the traditional reasons for heightened pleading are absent in most cases.[214] The same observation is true for affirmative defenses. Rule 9 of the Federal Rules of Civil Procedure imposes a heightened pleading standard on suits for fraud.[215] The justifications for the Rule 9 heightened standard are "protection of reputation, deterrence of frivolous or strike suits, defense of completed transactions, and providing adequate notice."[216] The first and third reasons are specific to the tort of fraud and are plainly inapplicable to affirmative defenses. The second reason is not a concern when dealing with affirmative defenses. Even without heightened, or even plausibility, pleading, affirmative defenses must provide adequate notice.[217] Similarly, the Private Securities Litigation Reform Act imposes a heightened pleading standard,[218] primarily because private securities fraud suits were frequently frivolous.[219] As described above, potentially frivolous affirmative defenses are less costly and worrisome than frivolous complaints.[220]

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213. *See* FED. R. CIV. P. 15(a) (stating that "the court should freely give leave" to amend).

214. *See, e.g.*, Miller, *supra* note 9, at 40 ("[W]hat was the reason—and the motivation—for the Court's extension of plausibility to all cases, the vast majority of which do not raise the concerns articulated to justify the need for heightened pleading?").

215. FED. R. CIV. P. 9(b).

216. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 563 (2002).

217. *See infra* note 226 and accompanying text (discussing striking affirmative defenses that would not survive even pre-*Twombly* pleading standards).

218. Private Securities Litigation Reform Act, 15 U.S.C. § 78u–4 (2010) (requiring the complaint to state facts with particularity).

219. *See* Fairman, *supra* note 216, at 600 ("[M]otivation for enacting the PSLRA was . . . [that] private securities fraud litigation was seen as largely frivolous.").

220. *See supra* Part IV.C.

V. SOLUTION: COURTS SHOULD NOT HOLD AFFIRMATIVE DEFENSES TO THE PLAUSIBILITY STANDARD

With reasonable textual arguments on both sides of the debate, this Note proposes a solution that finds the superior practical arguments in its corner. Holding affirmative defenses to the *Twombly* pleading standard would be unfair to defendants who have limited time and knowledge at the pleading stage. Allowing a less stringent pleading standard for affirmative defenses does not harm *Twombly*'s practical goal of reducing litigation cost because discovery costs for affirmative defenses would not be extraordinary, and the possibility of judicial blackmail is nonexistent. Besides a heightened pleading standard, courts have several other tools at their disposal to deal with affirmative defenses that are improperly before the court.

First, a court can strike affirmative defenses that are not actually affirmative defenses—that is, arguments or defenses that the defendant calls affirmative defenses in his or her answer but that do not meet the actual definition of the term. In *Leon*, an employment discrimination case, the court considered the following affirmative defenses: (a) that the defendant had a legitimate, nondiscriminatory reason for its employment action; and (b) that the defendant did not act with malice or reckless indifference to the plaintiff's rights.[221] The court struck these two affirmative defenses under Rule 12(f), because they were not "true affirmative defenses."[222] Another court, seeing "fluff in the defendant's listing of affirmative defenses," told the defendant to narrow down its pleading of affirmative defenses to those legitimately at issue.[223] This does not mean that courts should strike any affirmative defenses not found in Rule 8(c), but only that courts have the ability to act as the gatekeeper, striking "affirmative defenses" that do not actually meet the definition of affirmative defense.

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221. Leon v. Jacobson Transp. Co., No. 10 C 4939, 2010 WL 4810600, at *2 (N.D. Ill. Nov. 19, 2010).

222. *Id.* These two arguments may not be affirmative defenses, but they are still litigated as part of the burden-shifting case-in-chief. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (establishing the burden-shifting framework for employment discrimination cases). Though they are still litigated, moving them out of the pleading stage would help to avoid unnecessary wrangling over the pleadings. *See supra* notes 206–07 and accompanying text (discussing the costs of challenges to pleadings and the resulting necessity of longer pleadings).

223. Westbrook v. Paragon Sys., Inc., 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *3 (S.D. Ala. Nov. 29, 2007); *see also* Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll., 77 F.3d 364, 367 (11th Cir. 1996) (noting that the striking of affirmative defenses that are "incomprehensible" in the context of the case is proper).

Second, if courts do not apply *Twombly* and *Iqbal* to affirmative defenses, then the *Conley* notice pleading standard still governs. Courts therefore can, and should, strike affirmative defenses that do not even meet that lower threshold for pleading.[224] If an affirmative defense does not provide sufficient notice, then a court should strike it or, at the very least, require it to be pleaded with greater specificity in an amended pleading so that it does provide notice to the plaintiff. While boilerplate pleading of affirmative defenses had become common,[225] many courts still applied *Conley* to affirmative defenses and were willing to strike those that did not measure up.[226] A more muscular application of the *Conley* notice pleading requirement would ensure that plaintiffs receive actual notice of affirmative defenses being raised without placing too great a burden on defendants. This middle-ground approach avoids both barebones boilerplate pleadings and cluttered pleadings with major factual detail that could impose costs on plaintiffs, defendants, and courts at the outset of a lawsuit.

This solution has the additional advantage of acknowledging "that all affirmative defenses are not created equal."[227] Professor David H. Taylor notes that some affirmative defenses, such as statute of limitations or release, "would be rather cut and dried with all relevant facts known" to the parties, while some, such as fraudulent procurement, are more ambiguous and fact-specific.[228] The *Kaufmann* court, which accepted notice pleading as adequate for defenses listed in Rule 8(c) but required more specific pleading for other affirmative defenses, also recognized that some affirmative defenses may require

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224. While this rarely happened under *Conley*, courts could start requiring a level of pleading that satisfies *Conley* but is more stringent than the formerly ubiquitous boilerplate pleading. Even under *Conley*, courts routinely struck certain affirmative defenses if not sufficiently pleaded. *See* Topline Solutions, Inc. v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836, at *2 (D. Md. July 27, 2010) ("[E]ven before *Twombly* and *Iqbal*, the defenses of waiver, estoppel and laches were consistently struck when pled without reference to some facts."); Ruffin v. Frito-Lay, Inc., No. 09-CV-14664, 2010 WL 2663185, at *4 (E.D. Mich. June 10, 2010) (striking an affirmative defense that met neither the *Conley* notice standard nor the *Twombly*/*Iqbal* plausibility standard).

225. *See supra* Part II.C.

226. *See* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("[B]aldly 'naming' the broad affirmative defenses of 'accord and satisfaction' and 'waiver and/or release' falls well short of the minimum particulars needed to identify the affirmative defense in question and thus notify [the plaintiff]."); Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.").

227. David H. Taylor, *Filing With Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, yet Waivable, Affirmative Defense?*, 47 SYRACUSE L. REV. 1037, 1047 (1997).

228. *Id.* at 1047–48.

more robust pleading than others.[229] A regime of notice pleading for affirmative defenses that uses a sliding scale,[230] requiring only brief pleading for obvious, simple, and well-known affirmative defenses, and more elaborate pleading for more complex or obscure affirmative defenses, would properly balance the competing interests of notice, fairness, and judicial economy.

Third, in extreme situations where it appears that defendants are pleading affirmative defenses for nuisance or harassment reasons, or in bad faith, the court can impose sanctions under Rule 11.[231] In his dissenting opinion in *Twombly*, Justice Stevens suggested that the court's broad authority to sanction under Rule 11 would provide a sufficient shield against *in terrorem* suits.[232] Courts could just as easily make use of this tool in cases where an affirmative defense was meant to delay, annoy, or harass. Justice Stevens noted that Rule 16, giving judges discretion over "the control and scheduling of discovery," was a particularly important tool that judges could use to restrict and tailor discovery in order to reduce expenditures of time and expense.[233]

Courts have other tools at their disposal to handle inappropriate affirmative defenses, even without increasing the standard for pleading them. It would be unfair to defendants and would not help achieve the cost-saving goals of *Twombly* and *Iqbal* to hold that their heightened pleading standard for claims also applies to affirmative defenses.

VI. CONCLUSION

Twombly and *Iqbal* have changed the established pleading regime, but in many respects have left more questions than answers, such as whether their dictates apply to all types of pleadings. While the ingrained system of having identical standards for pleading

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229. *See* Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009); *supra* Part III.C (discussing the *Kaufmann* court's hybrid approach).

230. Basically, a possible solution is that affirmative defenses should not be held to a transsubstantive pleading standard. As discussed earlier, several scholars have argued that the plausibility standard should not be applied transsubstantively to claims. *See, e.g.*, Spencer, *supra* note 9, at 459 (suggesting that *Twombly*'s plausibility standard might allow for "different levels of factual detail depending on the substantive context"); Thomas, *supra* note 203, at 216 (arguing against application of the plausibility standard in employment discrimination cases).

231. Gambol suggests this as well. *See* Gambol, *supra* note 16, at 2206.

232. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1962 (2009) (Breyer, J., dissenting) (arguing that judicial case-management tools are sufficient for limiting abusive discovery).

233. *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting); FED. R. CIV. P. 16(c)(2)(F).

plaintiffs' claims and defendants' affirmative defenses is long-held and logical on its face, this Note argued in favor of allowing affirmative defenses to be pleaded under a less stringent standard. Though a close examination of the text of Rule 8 has been the focus of many courts that have considered the issue, this Note also considered several practical arguments for and against applying *Twombly* and *Iqbal* to affirmative defenses, with an eye on the pragmatic purposes of those decisions. *Twombly* and *Iqbal* should not apply to affirmative defenses because the result is unfair to defendants. Given defendants' limited time and knowledge, a heightened pleading standard will not achieve the objectives that those decisions sought.

Nathan Pysno[*]

* Candidate for Doctor of Jurisprudence, May 2012, Vanderbilt University Law School. I would like to thank Professor Alistair Newbern for her guidance and advice during the writing process. I am grateful to the editors and staff of the VANDERBILT LAW REVIEW for their suggestions and editing assistance.