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The Twombly Standard and Affirmative Defenses: What is Good for the Goose is Not Always Good for the Gander

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THE TWOMBLY STANDARD AND AFFIRMATIVE DEFENSES: WHAT IS GOOD FOR THE GOOSE IS NOT ALWAYS GOOD FOR THE GANDER

Anthony Gambol*

The United States district courts disagree as to whether the plausibility pleading standard for claims first described by the United States Supreme Court in Bell Atlantic Corp. v. Twombly also extends to affirmative defenses pled by defendants in federal courts. The divergent opinions result from conflicting interpretations of the language of the Federal Rules of Civil Procedure, standards of preferred practice, and notions of fairness.

This Note examines the district courts' arguments in deciding whether the Twombly standard extends to affirmative defenses. It identifies the quiddities of the courts' reasoning through an analysis of their decisions and, based upon this review, argues that the courts should not extend the Twombly standard to affirmative defenses. This Note shows how this conclusion adheres to the text and intention of the Federal Rules, as well as the holding and public policy considerations of Twombly itself. Moreover, it acknowledges that simple injustice would befall defendants on account of an extension of the Twombly standard.

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INTRODUCTION

In early 2009, Michael and Diane Wszola were in a dispute with their former neighbors, the Shinews, over the use of their shared lakefront property.¹ The Shinews had moved and sued, seeking judgment that they were entitled to rent out the land.² The property had been a point of contention before; both the Wszolas and the Shinews had been parties to a state court litigation that had defined the property's ownership rights and its authorized users.³

1. See Complaint for Declaratory Judgment and Jury Demand at 8, *Shinew v. Wszola*, Civil Action No. 08-14256, 2009 WL 1076279 (E.D. Mich. Oct. 6, 2008), 2008 U.S. Dist. Ct. Pleadings LEXIS 8317, at *5–6.

2. See *id.* at 4–7.

3. See Motion for Summary Disposition at 4–6, *Shinew v. Wszola*, Civil Action No. 08-14256, 2009 WL 1076279 (E.D. Mich. Feb. 19, 2009), 2009 WL 3834473.

Through inadvertence, the Wszolas forgot to add a few affirmative defenses to their responsive pleading.⁴ The time within which they could amend their pleadings by right had passed, so they needed to move the court for leave to do so.⁵ They set forth a list of affirmative defenses that they wished to rely upon, including a res judicata defense that may have precluded the federal action, because the question had already been settled in state court.⁶ The Shinews opposed the motion, arguing that the affirmative defenses were insufficiently pled.⁷

The Wszolas could not have imagined that their motion would be denied. *Davis v. Sun Oil Co.*,⁸ the relevant precedent in the district, had allowed a succinctly pled affirmative defense to stand. While the Supreme Court had increased the specificity with which claims had to be pled in *Bell Atlantic Corp. v. Twombly*,⁹ just a few months earlier the district in which the Wszolas were sued had concluded in *First National Insurance Co. of America v. Camps Services, Ltd.*¹⁰ that *Twombly* did not extend to affirmative defenses.

The *First National* court acknowledged that *Twombly* “raised the requirements for a well-pled complaint” under Federal Rule of Civil Procedure 8(a), but distinguished the language of Rule 8(c), the “applicable rule for affirmative defenses.”¹¹ As such, the court found that *Twombly*’s analysis of the Rule 8(a) requirements was inapplicable to Rule 8(c).¹² The court accordingly applied the pleading standard for affirmative defenses articulated in *Davis* and allowed the defendant’s succinct affirmative defense to stand.¹³

It must have then come as a surprise to the Wszolas when the district court in its opinion criticized the Wszolas’ proposed affirmative defenses as a “grocery list.”¹⁴ The court conceded that “the assertion of affirmative defenses in that manner is not uncommon” and had been “widely employed

4. See Motion To Amend Pleadings at 2, *Shinew v. Wszola*, Civil Action No. 08-14256, 2009 WL 1076279 (E.D. Mich. Apr. 21, 2009), 2009 U.S. Dist. Ct. Motions LEXIS 5756, at *1.

5. See FED. R. CIV. P. 15(a) (explaining that parties in federal court have twenty-one days to make amendments to their pleadings as of right, after which time a party may amend its pleading only with the opposing party’s consent or leave of the court).

6. See Motion To Amend Pleadings, *supra* note 4, at 4 (“Plaintiffs claims are barred by waiver, laches, estoppel, res judicata, collateral estoppel, the applicable statute of limitations, and the statute of repose.”).

7. See Plaintiffs’ Brief in Opposition to Defendants’ Motion To Amend Pleadings at 7–9, *Shinew v. Wszola*, Civil Action No. 08-14256, 2009 WL 1076279 (E.D. Mich. Apr. 21, 2009), 2009 U.S. Dist. Ct. Motions LEXIS 5757, at *10–13.

8. 148 F.3d 606 (6th Cir. 1998).

9. 550 U.S. 544 (2007).

10. No. 08-cv-12805, 2009 WL 22861 (E.D. Mich. Jan. 5, 2009).

11. See *id.* at *2.

12. See *id.*

13. See *id.* (“The affirmative defenses laid out by Camps in this case are similar to those in *Davis*, and provide adequate notice to First National.”).

14. See *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at *2 (E.D. Mich. Apr. 21, 2009).

(and tolerated) as a form of ‘notice pleading.’”¹⁵ However, the court believed that the dissent in *Davis* presaged the application of the pleading standard for claims described in *Twombly* to defensive pleadings.¹⁶ Moreover, the court believed that the problem of discovery costs contemplated by *Twombly* was applicable to both claims and defenses.¹⁷ Accordingly, the court held that the *Twombly* standard extended to affirmative defenses.¹⁸ Thereupon, the court found that the Wszolas’ proposed affirmative defenses were insufficiently pled¹⁹ and denied them leave to amend.²⁰

As the Wszolas’ problem suggests, the district courts are divided as to whether the plausibility pleading standard for claims originally described in *Twombly* and clarified in *Ashcroft v. Iqbal*²¹ also extends to defendants’ affirmative defenses. The issue usually arises in the context of Rule 12(f) motions to strike an affirmative defense.²² The tension between an extension of the *Twombly* standard and the language of the Federal Rules of Civil Procedure (Rules) has resulted in some creative jurisprudence.²³ A bounty of “well-reasoned case law” exists on both sides, with the decisions turning upon the structure of the Federal Rules as well as “relevant policy considerations and principles of fairness.”²⁴ No circuit court has yet ruled on the issue.²⁵

15. *See id.* at *2 (downplaying as “clearly dicta” precedent which holds that Rule 8(b) does not apply when a defendant asserts an affirmative defense).

16. *See id.* at *3–4.

17. *See id.* at *4.

18. *See id.* (“[T]he Supreme Court has established a general standard of pleading matters upon which the pleader assumes the burden of proof.”).

19. *See id.* at *4 (“The proposed amended pleading offered by Defendants in this case is the very essence of the boilerplate ‘labels and conclusions’ which the court in *Twombly* found insufficient.”).

20. *See id.* at *5–6 (“Fed.R.Civ.P. 15(a)(2) provides that a court should freely grant leave to amend a pleading ‘when justice so requires.’ The party requesting the amendment bears the burden of establishing that the standard is met.”).

21. 129 S. Ct. 1937 (2009).

22. *See, e.g.,* First Nat’l Ins. Co. of Am. v. Camps Servs., Ltd., No. 08-cv-12805, 2009 WL 22861, at *1 (E.D. Mich. Jan. 5, 2009). The other common context in which the issue arises is a contested Rule 15(a) motion to amend the pleadings where an affirmative defense is offered for inclusion. *See, e.g.,* *Shinew*, 2009 WL 1076279, at *1.

23. *See, e.g.,* Kaufmann v. Prudential Ins. Co. of Am., Civil Action No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) (attempting to reconcile its disposition to extend the *Twombly* standard to affirmative defenses with both common practice and the Federal Rules of Civil Procedure (Rules) by developing a hybrid standard under which only those affirmative defenses that are not listed under Rule 8(c)(1) must have factual support because those affirmative defenses which are listed under Rule 8(c)(1) are so commonly used and spartanly pled that they inherently provide sufficient notice to satisfy the *Twombly* standard simply by being stated).

24. *See* Palmer v. Oakland Farms, Inc., Civil Action No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010).

25. *See* Francisco v. Verizon S., Inc., Civil Action No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *16 (E.D. Va. July 29, 2010) (“[N]either the Fourth Circuit nor any other court of appeals has ruled on the question presented: whether *Twombly* and *Iqbal* extended the federal pleading requirements to a defendant’s affirmative defenses.”).

A defendant does not select to be haled into court; a policy that limits recourse to a full and vigorous defense deserves careful scrutiny. This Note explores district courts' arguments in determining whether the *Twombly* standard extends to affirmative defenses. Based on those considerations, this Note argues that courts should not extend the *Twombly* standard to affirmative defenses. In Part I, this Note explores the procedural rules and pleading standards for claims and affirmative defenses in federal courts, including the modification of the pleading standard for claims articulated in *Twombly* and *Iqbal*. In Part II, this Note examines the conflicting arguments relied upon by the district courts in deciding that the *Twombly* standard does or does not extend to affirmative defenses. Finally, in Part III, this Note argues on grounds of procedure, precedent, and policy that courts should not extend the *Twombly* standard to affirmative defenses.

I. PROCEDURE AND POLICY: PLEADINGS IN THE FEDERAL COURTS

Part I of this Note explores the federal procedural rules and pleading standard. Part I.A introduces the Federal Rules and gives a brief account of their purpose in federal courts, as well as the process through which they may be amended. Part I.B traces the evolution of the pleading standard for claims in federal courts from the promulgation of the Rules to the present day, including the Supreme Court's landmark decisions in *Twombly* and *Iqbal*, and discusses the rationale and impact of the modern pleading standard. Then, Part I.C discusses the pleading of affirmative defenses by defendants before *Twombly* and outlines the standard by which the sufficiency of an affirmative defense was determined in a motion under Rule 12(f)—when a plaintiff moves to strike an affirmative defense from the pleadings.

A. *The Federal Rules*

The Federal Rules govern procedure in all civil actions and proceedings in the United States district courts.²⁶ With the passage of the Rules Enabling Act (Act), Congress vested the Supreme Court with the authority to prescribe the Rules and described processes through which such prescriptions would be enacted.²⁷ Congress passed the current Act “to modernize the current statutory provisions relating to the Federal judiciary’s role in promulgating amendments to . . . various rules of procedure applicable to the Federal courts.”²⁸

26. See FED. R. CIV. P. 1.

27. See Rules Enabling Act, 28 U.S.C. §§ 2072–74 (2006) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”); see also Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1045–46 (1993).

28. See H.R. REP. NO. 100-889, pt. 3, at 26 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5986.

Congress believed that the Court had overstepped the bounds of its rulemaking authority in the years immediately preceding the passage of the current Act and, accordingly, limited the scope of the Court's rulemaking authority to those areas within its particular area of competence.²⁹ Specifically, Congress ensured that the Rules promulgated by the Court would be strictly procedural in nature.³⁰ Because the Federal Rules are ultimately statutory, changes can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation."³¹ Even so, the Federal Rules are frequently updated and amended, including a substantial revision in 2007 for the purposes of "clarifying and simplifying the rules, making them easier to use and understand, without changing substantive meaning."³²

B. The Federal Pleading Standard for Claims: From Conley to Twombly and Iqbal

When they were first adopted, the Rules were meant to institute a procedural form that was more accessible than the earlier forms of pleading

29. See H.R. REP. NO. 99-422, at 22 (1985) ("So viewed, proposed section 2072 leaves to the Supreme Court primary responsibility for prospective federal regulation of matters peculiarly within the competence of judges. It reserves to Congress decisions concerning prospective federal regulation of matters peculiarly within its competence, having regard to Congress' representative nature and to its experience in prospective lawmaking that variously affects its constituencies in their out-of-court affairs. Further refinement of the scope of delegation will undoubtedly prove necessary. The Committee believes, however, that such refinement should come in the first instance from those responsible for proposing rules. Conscientious attention to the purposes of, and limitations on, the delegation should prevent controversy of the sort that has plagued federal supervisory court rulemaking in recent years.").

30. See 28 U.S.C. § 2072(b) ("[The Federal Rules] shall not abridge, enlarge or modify any substantive right."); see also H.R. REP. NO. 99-422, at 21-22 ("[T]he bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law. The protection extends beyond rules of substantive law, narrowly defined, however. At the least, it also prevents the application of rules, otherwise valid, where such rules would have the effect of altering existing remedial rights [It] is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily and obviously require consideration of policies extrinsic to the business of the courts").

31. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993)); see also *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning"). But see Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 94 (2010) ("The Supreme Court's bypass of the rulemaking process in *Twombly* raises the question: what is the purpose of today's elaborate statutory process, given the Court's willingness to revise important aspects of the Rules on its own rather than follow its existing precedents?").

32. See ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 19 (2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2006.pdf>.

that preceded it.³³ In particular, Rule 8 “embodie[d] this major shift in approach.”³⁴ Rule 8 describes the requirements for pleadings in federal courts.³⁵ The pleadings in a lawsuit set forth the parties’ contentions in the

33. See Hon. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943) (“Strict pleading produces a reaction, because people will not tolerate the denial of justice for formalities only. That, as we should do well to recall, was the history of common-law pleading, as well as of some of the later misapplications of code pleading.”); see also LINDA J. SILBERMAN ET AL., *CIVIL PROCEDURE: THEORY AND PRACTICE* 540 (3d ed. 2009) (“The modern pleader is at much lesser risk of losing his rights through a technical pleading mistake.”).

34. See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J. L. & PUB. POL’Y 1107, 1118 (2010).

35. See FED. R. CIV. P. 8 (“Rule 8: General Rules of Pleading

(a) Claims for Relief. A pleading that states a claim for relief must contain:

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

(b) Defenses; Admissions and Denials.

- (1) In General. In responding to a pleading, a party must:
 - (A) state in short and plain terms its defenses to each claim asserted against it; and
 - (B) admit or deny the allegations asserted against it by an opposing party.
- (2) Denials—Responding to the Substance. A denial must fairly respond to the substance of the allegation.
- (3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
- (4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
- (5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.
- (6) Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

- (1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver.
- (2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

- (1) In General. Each allegation must be simple, concise, and direct. No technical form is required.
- (2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.
- (3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings.

Pleadings must be construed so as to do justice.”).

suit; they are usually composed of the plaintiff's complaint (containing claims) and the defendant's answer to the complaint (containing denials, admissions, and defenses).³⁶ Generally, plaintiffs must prove their claims and defendants must prove their defenses.³⁷

The legal sufficiency of a claim is challenged by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.³⁸ This motion posits that even if the factual allegations in the plaintiff's complaint are true, the law does not grant the plaintiff a right to relief.³⁹ Even with Rule 12(b)(6) in place, the Supreme Court did not define the standard of pleading necessary to display the legal sufficiency of a claim for nearly twenty years after the first Rules were promulgated.

This section introduces the pleading standard for claims in the federal courts. First, it describes the long-standing *Conley* decision and the pleading standard that *Conley* implemented. Then, it explores *Twombly*'s abrogation of the *Conley* standard and the adoption of the plausibility pleading standard for claims, which is clarified in *Iqbal*.

1. The *Conley* Standard

In 1957, the standard for pleading a complaint in the federal courts was described in *Conley v. Gibson*.⁴⁰ The action in *Conley* was brought as a class suit under the Railway Labor Act.⁴¹ The plaintiffs, African American railway workers, alleged that their union did not represent them equally and in good faith compared to their white counterparts.⁴² The lower courts had dismissed the action for lack of jurisdiction, but the Supreme Court rejected that conclusion and ruled that the action could proceed.⁴³ Because the lower courts had not considered the other arguments offered on account of the jurisdictional dismissal, the Court addressed those arguments before remand.⁴⁴ Among others, the union defendants argued that the plaintiffs had failed to state a claim for which relief could be granted and that the complaint failed to set forth specific facts to support its general allegations of discrimination.⁴⁵

The Court appraised the sufficiency of the complaint by following "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁴⁶ To this end, the Court found that the "decisive answer" was in the Federal Rules, which do not require a claimant to set out in detail the facts upon which he

36. See SILBERMAN ET AL., *supra* note 33, at 535.

37. See *id.* at 556–57.

38. See FED. R. CIV. P. 12(b)(6).

39. See SILBERMAN ET AL., *supra* note 33, at 595–96.

40. 355 U.S. 41 (1957).

41. See 45 U.S.C. § 151 (2006).

42. See *Conley*, 355 U.S. at 42–43.

43. See *id.* at 43–45.

44. See *id.* at 45–48.

45. See *id.* at 45, 47.

46. *Id.* at 45–46.

bases his claim.⁴⁷ Rather, a complaint needed only to contain “a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁴⁸ The Federal Rules suggested this “notice pleading” in their discovery and other pretrial procedures to “disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”⁴⁹ Accordingly, the Court found that plaintiffs in *Conley* had adequately set forth a claim and gave the respondents fair notice of its basis.⁵⁰ In holding that the plaintiffs had adequately stated a claim, the *Conley* Court maintained that the Federal Rules “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”⁵¹

“*Conley* quickly became the dominant case interpreting modern pleading doctrine.”⁵² A plaintiff satisfied *Conley* if it provided a defendant with fair notice of the claim.⁵³ For fifty years, the Supreme Court defended the language of the Federal Rules and the practice of “notice” pleading described by *Conley*’s “no set of facts” language from encroaching requirements of greater particularity in pleading claims, despite some criticism.⁵⁴ That changed with the Supreme Court’s 2007 decision in *Twombly*.⁵⁵

2. The *Twombly* Standard

Twombly replaced *Conley*’s notice pleading standard with the more demanding “plausibility” pleading standard for claims.⁵⁶ As will be explored later in this Note, district courts deciding whether to extend the

47. *See id.* at 47.

48. *Id.* (internal quotation marks omitted).

49. *Id.* at 47–48 & n.9 (pointing to Rule 12(e) (motion for a more definite statement), Rule 12(f) (motion to strike a portion of a pleading), Rule 12(c) (motion for judgment on the pleadings), Rule 16 (pre-trial procedure), Rules 26–37 (rules for depositions and discovery), Rule 56 (motion for summary judgment), and Rule 15 (right to amend) as Rules that allow for inquiry into the basis of pleadings and to narrow the dispute).

50. *See id.* at 48.

51. *Id.*

52. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 111 (2009).

53. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300–02 (2010).

54. *See, e.g.,* *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993) (“We think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules.”). *But see* *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (noting the tension between *Conley*’s “no set of facts” language and its averment that a plaintiff must display the “grounds” upon which its claim rests).

55. *See, e.g.,* *Gaines v. Lawrence*, No. 07-3212-SAC, 2010 WL 3829467, at *3 n.7 (D. Kan. Sept. 22, 2010) (“[T]he accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” as stated in *Conley v. Gibson*, was abrogated in *Twombly*.” (citing *Conley*, 355 U.S. at 45–46)).

56. *See* Schwartz & Appel, *supra* note 34, at 1108–09.

Twombly standard to affirmative defenses rely heavily upon the language and meaning of *Twombly* and its sister case, *Iqbal*.⁵⁷ Accordingly, these cases will be discussed in detail.

a. *Plausibility Conceived*: Bell Atlantic Corp. v. Twombly

The controversy in *Twombly*⁵⁸ entailed a putative class action⁵⁹ brought on behalf of local telephone and high speed Internet users over a seven-year period.⁶⁰ The complaint alleged conspiracy in restraint of trade under the Sherman Act⁶¹ on the part of incumbent local exchange carriers (ILECs), the regional phone and internet service monopolies.⁶² The complaint theorized that the ILECs illegally agreed to hinder smaller carriers' access to their markets and maintain artificially high prices for consumers by not competing with one another.⁶³

The Court, through Justice David H. Souter, noted that conscious parallelism⁶⁴ is not, in itself, unlawful and that such actions may be "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."⁶⁵ Accordingly, the Court stated that the plaintiff must display evidence that tended to "exclude the possibility of independent action" by the ILECs.⁶⁶

The Court concluded that the antecedent question was what a plaintiff needed to plead to state a claim under § 1 of the Sherman Act.⁶⁷ Citing *Conley*, the Court interpreted Rule 8(a)(2) as requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."⁶⁸ To survive a Rule 12(b)(6) motion to dismiss, a claim did not need detailed factual allegations, but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."⁶⁹ The facts pled must be sufficient "to raise a right to relief above the speculative level . . . on the assumption that

57. See *infra* Part II.

58. 550 U.S. 544 (2007).

59. See FED. R. CIV. P. 23 (allowing members of a group (class) to sue or be sued on behalf of all members).

60. See *Twombly*, 550 U.S. at 550.

61. 15 U.S.C. § 1 (2006).

62. See *Twombly*, 550 U.S. at 550.

63. See *id.* at 550–51.

64. See *id.* at 553–54 (describing "conscious parallelism" as a knowingly shared, but not explicitly agreed to, course of action maintained because it is in each party's best economic interest).

65. *Id.* at 554.

66. See *id.*

67. See *id.* at 554–55.

68. *Id.* at 555 (quoting FED. R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (internal quotation marks omitted).

69. *Id.* (alteration in original).

all the allegations in the complaint are true.”⁷⁰ In reaching this conclusion, the Court reasoned that “Rule 8(a)(2) . . . requires a ‘showing’ . . . of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”⁷¹

Applying these “general standards” to the pleading at hand, the Court explained that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”⁷² Further, the Court expounded that this requirement at the pleading stage for “allegations plausibly suggesting” an agreement between the ILECs “reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”⁷³ The Court found that allegations detailing parallel conduct got “close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of ‘entitle[ment] to relief.’”⁷⁴

For the sake of time and money of both the parties and the courts, the Court instructed that a deficient complaint should be excised at the earliest convenience.⁷⁵ While acknowledging a sense of caution inherent in dismissing a claim before discovery has occurred, the Court highlighted the expense involved in an antitrust discovery process: “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”⁷⁶ The Court did not believe that judicial supervision and case management, however careful, could successfully defend against abusive discovery practices or groundless claims that fall just shy of plausible entitlement to relief.⁷⁷ “Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence.”⁷⁸

The plaintiffs in *Twombly* argued that *Conley*’s standard for evaluating motions to dismiss precluded the application of the “plausibility standard” at the pleading stage.⁷⁹ The Court admitted that the “no set of facts” language, when read in isolation—a “focused and literal reading”—would

70. *Id.* at 555–56 (citation omitted).

71. *Id.* at 555 n.3.

72. *Id.* at 556.

73. *Id.* at 557 (alteration in original).

74. *Id.* (alteration in original).

75. *See id.* at 558.

76. *Id.* (citing *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

77. *See id.* at 559 (lamenting that the threat of discovery expenses will compel defendants to settle even unmeritorious cases).

78. *Id.* (alteration in original) (internal quotation marks omitted) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

79. *See id.* at 560–61.

allow a “wholly conclusory” claim to survive a motion to dismiss when the pleading left open the possibility of later establishing some set of undisclosed facts to support recovery.⁸⁰ Describing how the *Conley* “no set of facts” language had been generally misinterpreted, the Court decided that that “famous observation has earned its retirement.”⁸¹

The Supreme Court then, applying its interpretation of Rule 8(a)(2) and *Conley*, found that the plaintiffs’ complaint came up short.⁸² “We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy,” due to “obvious alternative explanation[s].”⁸³ The Court clarified that it did not require heightened factual specificity, but only enough facts “to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”⁸⁴

Justice John Paul Stevens argued in dissent that judicial opinion regarding the plausibility of a claim was an insufficient justification for dismissal.⁸⁵ Justice Stevens agreed with the Court that parallel conduct on the part of the ILECs was consistent with the absence of an agreement between them, but also noted that that conduct was consistent with the presence of an illegal agreement.⁸⁶ Justice Stevens attributed the Court’s decision to practical concerns: private antitrust litigation can be very expensive and jurors might mistakenly infer agreement from evidence of parallel conduct.⁸⁷ Justice Stevens insisted, however, that the remedy for those problems was “careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries,” not dismissal or an interpretation of Rule 12(b)(6) that “seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.”⁸⁸ Criticizing the majority’s decision as being in tension with both Rule 8 and Rule 9,⁸⁹ Justice Stevens noted that the majority opinion

80. *See id.* at 561.

81. *Id.* at 563 & n.8 (“The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”).

82. *See id.* at 564.

83. *Id.* at 566–67 (finding that the economic incentives of individual incumbent local exchange carriers (ILECs) are sufficient to explain their conduct and, accordingly, there is no reason to infer that the ILECs agreed among themselves to do what was already in their own best interest).

84. *Id.* at 570. The Court squared its holding with Rule 9, which delineates specific instances in which pleadings must be pled with specificity. *See* FED. R. CIV. P. 9; *Twombly*, 550 U.S. at 569 & n.14.

85. *See Twombly*, 550 U.S. at 571 (Stevens, J., dissenting).

86. *See id.* at 572–73.

87. *See id.* at 573.

88. *Id.*

89. *See id.* at 573–76 & n.3; *see also* FED. R. CIV. P. 9 (requiring that some allegations, not including states of mind, be pled with specificity); *supra* note 35.

was the first by the Court to express “any doubt as to the adequacy” of the *Conley* standard.⁹⁰ Moreover, Justice Stevens implied that the majority’s creation of the new standard might exceed the Court’s authority under the Rules Enabling Act.⁹¹

Justice Stevens argued that the pleading standard codified in the Federal Rules “does not require, or even invite, the pleading of facts,” and that, despite the majority’s reinterpretation, the *Conley* standard reflected what a complaint must contain, not what it may contain.⁹² Justice Stevens criticized the majority’s new standard as inappropriate at the pleadings stage, especially in antitrust cases where pre-pleading discovery is difficult and Congress encourages private litigation.⁹³ Justice Stevens further contended that even if the claim, due to its lack of specificity, does not give the notice that Rule 8 requires, the appropriate remedy “for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement.”⁹⁴ As to the majority’s policy concern about the burdens of discovery and litigation, Justice Stevens emphasized the district court’s case management arsenal, with which it may control the proceedings before it.⁹⁵

Justice Stevens acknowledged the potential for a dramatic shift in the pleading standard for claims.⁹⁶ Whereas *Conley* had asked only that a plaintiff be able to display some set of facts to support its recovery,⁹⁷ *Twombly* seemed to require a plaintiff to show sufficient facts to convince a court that its claim was plausible.⁹⁸ For a while, however, the reach of the Court’s decision in *Twombly* was unclear due to its grounding in antitrust law.⁹⁹ Further, the Court’s continued reliance upon the “notice pleading”

90. See *Twombly*, 550 U.S. at 577–78 & n.4 (Stevens, J., dissenting) (listing the sixteen Supreme Court decisions in which the Court had cited to *Conley*’s “no set of facts” language).

91. See *id.* at 579.

92. See *id.* at 580, 588 n.8 (“Here, the failure the majority identifies is not a failure of notice—which ‘notice pleading’ rightly condemns—but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of notice but of proof, it should not be answered without first hearing from the defendants (as apart from their lawyers).”).

93. See *id.* at 585–87.

94. *Id.* at 590 n.9.

95. See *id.* at 593 n.13 (citing Rule 12(e) motions for a more definite statement, Rule (7)(a) court-ordered plaintiff’s replies to answers, Rule 23 class certification motions’ “rigorous analysis” by courts, Rule 16’s court sanctioning powers and pretrial proceedings control, including “elimination of frivolous claims or defenses” and “the control and scheduling of discovery,” Rule 26’s court control over discovery, especially Rule 26(c)’s specific permission for a court to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense” caused by discovery, and the sanctions allowed by Rule 11 for improper or frivolous claims and arguments).

96. See *id.* at 596 (“Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”).

97. See *supra* text accompanying note 46.

98. See *supra* note 83 and accompanying text.

99. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) (“[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with

standard described in *Conley* implied that it had not fully abandoned that precedent.¹⁰⁰ However, the intended scope of *Twombly* became clearer in 2009 with *Iqbal*,¹⁰¹ which clarified the plausibility pleading standard and extended it to all claims pled in federal court.

b. Plausibility Defined: Ashcroft v. Iqbal

The controversy in *Iqbal* concerned the dismissal of respondent plaintiff Javaid Iqbal's complaint against defendant petitioners former Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller.¹⁰² Iqbal, a Pakistani Muslim, was detained on immigration charges following the September 11th attacks and was deemed to be of high interest to the investigation into that incident.¹⁰³ Accordingly, he was moved into restrictive conditions in a maximum security unit, where he was allegedly subjected to serious mistreatment.¹⁰⁴ Iqbal pled guilty to his immigration charges and was deported to Pakistan.¹⁰⁵ Iqbal brought *Bivens* actions¹⁰⁶ for violations of his First and Fifth Amendment rights against more than fifty federal officials at all levels of government.¹⁰⁷ At issue in the instant case, however, were only those claims against Ashcroft and

some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”), *rev'd*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Temple v. Circuit City Stores, Inc.*, Nos. 06 CV 5303(JG), 06 CV 5304(JG), 2007 WL 2790154, at *3 (E.D.N.Y. Sept. 25, 2007) (noting the confusion resultant from the *Twombly* decision and suggesting that the plausibility pleading standard applies only in the context of antitrust litigation); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN'S L. REV. 849, 851–52 (2008) (“All of the references in *Twombly* to a ‘plausibility’ requirement are couched in relation to allegations of antitrust conspiracy, and not to the pleading of claims generally. . . . [T]he opinion expresses the requirement of ‘plausibility’ only in the course of ‘applying these general standards to a § 1 [of The Sherman Act] claim’ . . .”).

100. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (“Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 555)); *see also Evaluating the Supreme Court's Decisions in Twombly and Iqbal: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 6 (2009) (statement of Gregory G. Garre, Partner, Latham & Watkins LLP, former Solicitor General of the United States, United States Department of Justice), available at <http://judiciary.senate.gov/pdf/12-02-09%20Garre%20Testimony.pdf> (“[I]t is worth emphasizing that the Court did not *overrule* the *Conley* decision in *Twombly*. It simply clarified that a particular *phrase* in *Conley*—the ‘no set of facts’ language—was ‘an incomplete, negative gloss on an accepted pleading standard.’ In doing so, the Court in *Twombly* observed that the civil rights complaint in *Conley* ‘amply’ stated a claim under the proper pleading standard, making the ‘no set of facts’ language an unnecessary part of the Court’s decision.”).

101. 129 S. Ct. 1937.

102. *See id.* at 1942.

103. *See id.* at 1942–43.

104. *See id.* at 1943–44.

105. *See id.* at 1943.

106. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (finding an implied cause of action allowing for recovery of monetary damages from federal agents who violate a claimant’s constitutional rights).

107. *See Iqbal*, 129 S. Ct. at 1943–44; *see also* U.S. CONST. amends. I, V.

Mueller.¹⁰⁸ The claim alleged that petitioners “‘each knew of, condoned, and willfully and maliciously agreed to subject’ respondent to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’”¹⁰⁹

At trial, Ashcroft and Mueller moved to dismiss the claims against them with defenses of qualified immunity¹¹⁰ and lack of personal involvement, but were rejected by the court, which applied *Conley*’s “no set of facts” standard.¹¹¹ Invoking the collateral-order doctrine, which allows for appeals of final determinations related to claims of right separable from an underlying cause of action, they appealed to the U.S. Court of Appeals for the Second Circuit.¹¹² While the appeal was pending, the Supreme Court decided *Twombly*.¹¹³ Thereupon, the Second Circuit applied its interpretation of the *Twombly* standard to the petitioners’ appeal and affirmed the district court’s rejection of their argument.¹¹⁴ Ashcroft and Mueller appealed this decision.

Justice Kennedy wrote for a five-Justice majority.¹¹⁵ The Court first established that, to overcome qualified immunity, *Iqbal* must have pled petitioners’ individual unconstitutional actions because government officials may not be held liable for a subordinate’s act.¹¹⁶ Further, the pleading must have displayed discriminatory purpose—that a course of action was taken because of, and not merely in spite of, adverse effects upon an identifiable group.¹¹⁷ Accordingly, the Court examined the complaint to see if it had been sufficiently pled.

The Court reaffirmed its holding in *Twombly* that, under Rule 8(a)(2), a pleading does not require detailed factual allegations, but demands more than an unadorned accusation.¹¹⁸ A complaint must contain enough factual matter to state a claim to relief that is plausible on its face.¹¹⁹ A claim is facially plausible when the plaintiff has pled sufficient facts to allow the court “to draw the reasonable inference that the defendant is liable for the

108. *See Iqbal*, 129 S. Ct. at 1944.

109. *Id.* (alteration in original).

110. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[Qualified immunity means] that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

111. *See Iqbal*, 129 S. Ct. at 1944.

112. *See Iqbal v. Hasty*, 490 F.3d 143, 152 (2007).

113. *See Iqbal*, 129 S. Ct. at 1944.

114. *See id.*; *see also Hasty*, 490 F.3d at 157–58, 166, 174–76.

115. *See Iqbal*, 129 S. Ct. at 1942–54.

116. *See id.* at 1948.

117. *See id.* (citing *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)).

118. *See id.* at 1949 (“A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” (alteration in original) (citation omitted) (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 555, 557)).

119. *See id.*

misconduct alleged.”¹²⁰ The Court maintained that this was not a probability requirement; however, it does require enough factual support to suggest “more than a sheer possibility that a defendant has acted unlawfully.”¹²¹

The Court described two “working principles” that underlay *Twombly*.¹²² First, when deciding a motion to dismiss, a court must suppose as true all of the factual allegations of the complaint, but not the legal conclusions.¹²³ Rule 8 did not “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”¹²⁴ Second, only a complaint that contained a plausible claim for relief can survive a motion to dismiss.¹²⁵ The plausibility of a claim for relief is a “context-specific” determination which requires the deciding court to rely upon “judicial experience and common sense.”¹²⁶ Where the factual content of a complaint does not allow for the court to infer more than the “mere possibility of misconduct,” the complaint has not shown that the pleader is entitled to relief.¹²⁷ These principles translate into a two-step process of review for Rule 12(b)(6) motions to dismiss. First, a court must identify those claims which are not entitled to the assumption of truth because they are unsupported by factual allegations and are “no more than conclusions.”¹²⁸ A court must then assume the truth of the remaining allegations and decide whether they plausibly gave rise to an entitlement to relief.¹²⁹

Applying this process, the Court found that Iqbal’s pleading was insufficient. First, most of the allegations were not entitled to the assumption of truth.¹³⁰ Next, the well-pled factual allegations did not give rise to a plausible inference that Iqbal was entitled to relief.¹³¹ The allegations were consistent with a discriminatory course of action by the petitioners, but because “more likely explanations” existed, they did not “plausibly establish this purpose.”¹³² Accordingly, the complaint was not pled with the requisite specificity.¹³³

120. *Id.*

121. *Id.* (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 557)).

122. *See id.*

123. *See id.* at 1949–50 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

124. *Id.* at 1950.

125. *See id.*

126. *See id.*

127. *See id.* (citing FED. R. CIV. P. 8(a)(2)).

128. *See id.*

129. *See id.*

130. *See id.* at 1950–51 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”).

131. *See id.* at 1951–52 (finding that Iqbal’s complaint did not show that petitioners purposefully housed detainees in the maximum security unit on account of race, religion, or national origin, but rather that they sought “to keep suspected terrorists in the most secure conditions available” until they were cleared).

132. *Id.* at 1951 (explaining that the September 11 attacks were perpetrated by Arab Muslims and that a “legitimate policy” of law enforcement relating to individuals with

Iqbal contended that the *Twombly* standard only applied in antitrust cases.¹³⁴ The Court, however, found that reading inconsistent with both *Twombly* and the Federal Rules: “[*Twombly*] was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’ Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’”¹³⁵ Iqbal further contended that the Court’s reading of Rule 8 should be softened where the district court had received instructions to cabin discovery so as to preserve petitioners’ qualified immunity.¹³⁶ The Court, however, again held that the question presented by a motion to dismiss did not turn on the controls placed upon the discovery process.¹³⁷ Finally, Iqbal argued that the Federal Rules allowed him to allege the petitioners’ discriminatory intent generally, based on the language of Rule 9(b).¹³⁸ The Court, however, rejected that “generally” equates with “conclusory”—as it had described Iqbal’s allegations—and instead explained that “generally” in the context of Rule 9 was a relative term used for comparison to the stricter pleading standards of that Rule; a general claim must still comport with the requirements of Rule 8.¹³⁹

Justice Souter wrote for a four-Justice dissent.¹⁴⁰ The dissent first stressed the petitioners’ concession that actual knowledge of subordinate misconduct and deliberate indifference to it would expose them to liability.¹⁴¹ With this concession, the dissent argued, the “complaint satisfie[d] Rule 8(a)(2).”¹⁴² Instead, the petitioners had a fundamental misunderstanding of *Twombly*: “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.”¹⁴³ Rather, the question was, assuming the truth of the factual allegations, whether the plaintiff had stated a plausible ground for relief.¹⁴⁴ The purpose of *Twombly* was to dispense with complaints that alleged conduct consistent

suspected links to the attacks would produce a “disparate, incidental impact” on Arab Muslims, even though the policy was intended to target “neither Arabs nor Muslims”).

133. *See id.* at 1952.

134. *See id.* at 1953.

135. *Id.* (citations omitted) (quoting FED. R. CIV. P. 1).

136. *See id.*

137. *See id.* at 1953–54 (“Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”).

138. *See id.* at 1954; *see also* FED. R. CIV. P. 9(b) (“Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

139. *See Iqbal*, 129 S. Ct. at 1954 (“Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”).

140. *See id.* (Souter, J., dissenting).

141. *See id.* at 1954–57 (“Lest there be any mistake, . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.”).

142. *Id.* at 1957–59.

143. *Id.* at 1959.

144. *See id.*

with both wrongdoing and lawful action; but here, the allegations reported activity that was “no[t] consistent with legal conduct.”¹⁴⁵

The dissent did not believe that the majority had applied *Twombly* correctly.¹⁴⁶ Rather, it argued that all allegations must be read in the context of an entire complaint.¹⁴⁷ Further, it criticized the majority’s inability to articulate what was and was not a conclusory statement, arguing that the examples of sufficiently factual allegations selected by the majority were indistinguishable from other, more “conclusory” allegations.¹⁴⁸

In a separate dissent, Justice Stephen Breyer wrote for himself to defend the other procedural tools available to trial courts.¹⁴⁹ “Neither the briefs nor the Court’s opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us.”¹⁵⁰

Since *Iqbal*, the Supreme Court has not given further clarification as to the scope and meaning of *Twombly*’s holding. Regardless of the dissents’ criticisms, *Iqbal* unequivocally extended the *Twombly* plausibility standard to all civil actions.¹⁵¹ The lower courts quickly began to apply this standard in a variety of proceedings before them, although not consistently.¹⁵² Following the *Iqbal* two-step analysis, federal courts now sometimes dismiss complaints for lacking sufficient factual allegations to show a plausible entitlement to relief.¹⁵³

145. *See id.* at 1960.

146. *See id.* at 1959–60.

147. *See id.* at 1960–61.

148. *See id.* at 1961.

149. *See id.* (Breyer, J., dissenting).

150. *Id.* at 1962.

151. *See supra* text accompanying note 135.

152. *See, e.g.,* *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007) (“In the wake of *Twombly*, courts and commentators have been grappling with the decision’s meaning and reach.”); *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (“Plausibility, in this view, is a relative measure.”); Schwartz & Appel, *supra* note 34, at 1126–27 (acknowledging that plausibility pleading is in its “formative stages” and arguing that the courts would benefit from a consistent framework to help them determine the plausibility of a claim); Steinman, *supra* note 53, at 1357–60 (displaying the quick pace at which *Twombly* and *Iqbal* have been cited since their decision); 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, 1261 (2010) (“The primary disadvantages of current pleading doctrine are the inconsistency with which it is applied, its general lack of clarity, and its divergence from traditional liberal notice pleading. The inconsistency leaves litigants guessing how the judiciary will construe ‘plausibility’ as to the allegations of their complaint.”). *See generally* Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

153. *See, e.g.,* *Inst. for Dev. of Earth Awareness v. People for Ethical Treatment of Animals*, No. 08 Civ. 6195(PKC), 2009 WL 2850230, at *3–4 (S.D.N.Y. Aug. 28, 2009); *Kregler v. City of New York*, 646 F. Supp. 2d 570, 574–75 (S.D.N.Y. 2009), *vacated and remanded*, 375 F. App’x 143 (2d Cir. 2010); *Willey v. J.P. Morgan Chase, N.A.*, No. 09 Civ. 1397(CM), 2009 WL 1938987, at *4 (S.D.N.Y. July 7, 2009).

The plausibility standard has received mixed reviews.¹⁵⁴ The main public policy consideration underlying *Twombly* and *Iqbal* is the Court's perception that notice pleading is insufficient to protect defendants against the high costs associated with modern discovery and litigation; in essence, notice pleading is no longer an efficient procedural tool.¹⁵⁵ Some commentators support that policy,¹⁵⁶ while others strongly rebuke it.¹⁵⁷ Congress has even been presented with bills designed to reinstate the *Conley* standard.¹⁵⁸

154. See generally Mark Herrmann et al., Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (displaying arguments in support of and criticizing the *Twombly* standard).

155. See Schwartz & Appel, *supra* note 34, at 1121 (“Integral to the Court’s new direction was that the public policy underlying traditional notice pleading no longer provided the appropriate balance necessary to promote justice and curb frivolous or highly speculative litigation.”); see also FED. R. CIV. P. 26(b) (permitting a party to engage in discovery relating to any matter pertaining to its claims or defenses).

156. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 484–86 & n.62 (2010) (arguing that *Twombly* and *Iqbal* are not dramatically out of line with previous precedent); Schwartz & Appel, *supra* note 34, at 1139–42 (“In the modern litigation world, the role of judges to screen the sufficiency of a complaint and ensure that juries are not led astray by misleading or immaterial information has never been more critical. *Twombly* and *Iqbal* recognize that judges must be empowered to manage litigation at the pretrial level just as they are throughout other phases of litigation. . . . The distinguishing benefit of tightening controls at the pretrial stage is that it removes unsubstantiated claims at the most efficient point in the litigation process, namely the beginning.”); cf. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (supporting the “thin screening” model articulated in *Twombly* but arguing that the two-prong test of a pleading’s sufficiency described in *Iqbal* is more demanding and threatens to screen out meritorious claims, and further arguing that the Supreme Court is ill-equipped to design a stricter pleading standard—such a task should be conducted through the formal Rules Enabling Act process).

157. See, e.g., Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 274–84 (2009) (arguing that the plausibility standard threatens to violate the Seventh Amendment right to a jury trial by removing assessments of factual matters from a jury to the judge); Roger M. Michalski, *Assessing Iqbal*, HARV. L. & POL’Y REV. (Dec. 8, 2010, 5:44 AM), <http://hlpronline.com/2010/12/assessing-iqbal> (bemoaning the post-*Iqbal* legal landscape as one that keeps socially beneficial litigation out of the courts and contains an increased level of subjectivity comparable to the period before the plausibility standard came into effect); Miller, *supra* note 31, at 10–64 (“[*Twombly* and *Iqbal*] mark[] a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth. . . . [T]he decisions have unmoored our long-held understanding that the motion to dismiss simply tests a pleading’s notice-giving and substantive-law sufficiency. . . . Although discovery can be enormously expensive in a small percentage of federal cases, *Twombly* and *Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. For the great body of litigation, *Twombly*’s and *Iqbal*’s cure may be counterproductive and worse than the supposed disease.”).

158. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1504>; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4115>.

C. Affirmative Defenses

Rule 8, which *Twombly* interprets, does not only discuss the requirements for claims; it also discusses affirmative defenses.¹⁵⁹ “An affirmative defense, under the meaning of Fed. R. Civ. P. 8(c), is a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven.”¹⁶⁰ This section introduces the pleading standard for affirmative defenses in federal court, as it existed before *Twombly*. It first discusses how defendants have traditionally pled affirmative defenses. Then, it describes the standard to which affirmative defenses are held when they are challenged by Rule 12(f) motions to strike them from the pleadings.

1. The Traditional Manner of Pleading Affirmative Defenses

Prior to *Twombly*, generally stated affirmative defenses were usually sufficient so long as they provided fair notice of the nature of the defense.¹⁶¹ Courts held affirmative defenses to a flexible standard, which tended to resemble the *Conley* standard for claims.¹⁶² Nevertheless, most courts also respected the independence of Rule 8(c) in governing the pleading of affirmative defenses.¹⁶³ Accordingly, defendants frequently pled simple lists or recitations of their defenses.¹⁶⁴ For instance, the court

159. *See supra* note 35.

160. *Roberge v. Hannah Marine Corp.*, No. 96-1691, 1997 U.S. App. LEXIS 21655, at *7 (6th Cir. Aug. 13, 1997).

161. *See Clem v. Corbeau*, 98 F. App’x 197, 203 (4th Cir. 2004); *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.”); *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *2 (N.D. Okla. June 9, 2010) (citing many decisions to so hold); *see also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1274 (3d ed. 2004) (“[A]n affirmative defense may be pleaded in general terms and will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives the plaintiff fair notice of the nature of the defense.”).

162. *See, e.g., Woodfield v. Bowman*, 193 F.3d 354, 362 & n.27 (5th Cir. 1999) (citing Rule 8(e)’s language that “requir[es] all pleadings to be ‘simple, concise, and direct’” to conclude that its pleading standard for affirmative defenses is the same standard to which claims are held); *FSP, Inc. v. Societe Generale*, No. 02CV4786GBD, 2005 WL 475986, at *8 (S.D.N.Y. Feb. 28, 2005) (asserting that an affirmative defense should not be struck unless it seems certain that the plaintiffs will prevail “despite any state of facts which could be proved in support of the [affirmative] defense”—effectively the same standard used to examine claims under *Conley*).

163. *See, e.g., Pollock v. Marshall*, 845 F.2d 656, 657 n.1 (6th Cir. 1988) (“Rule 8(b) does not apply when a defendant asserts an affirmative defense”); *Bernal v. Daewoo Motor Am., Inc.*, No. CV09-1502 PHX-DGC, 2009 WL 3837195, at *2 (D. Ariz. Nov. 16, 2009) (“Rule 8(b), however, does not apply to affirmative defenses. . . . The Court will not strike [defendant’s] affirmative defenses on the ground that they do not comply with Rule 8(b).”); *Gen. Electric Capital Corp. v. Lanmann*, No. 2:05-CV-1130, 2006 WL 2077103, at *2 (S.D. Ohio July 24, 2006) (“[I]t is settled that ‘Rule 8(b) does not apply when a defendant asserts an affirmative defense.’” (quoting *Pollock*, 845 F.2d at 657 n.1)). *But see Shinev v. Wszola*, Civil Action No. 08-14256, 2009 WL 1076279, at *2 (E.D. Mich. Apr. 21, 2009).

164. *See Romantine v. CH2M Hill Eng’rs, Inc.*, Civil Action No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009); *Miller, supra* note 31, at 101 (“[D]efensive

in *Woodfield v. Bowman*¹⁶⁵ stated that a defendant must plead an affirmative defense with “enough specificity or factual particularity to give the plaintiff ‘fair notice’ of the defense that is being advanced;” however, in some instances, “merely pleading the name of the affirmative defense . . . may be sufficient.”¹⁶⁶ The courts may have allowed the liberal pleading of affirmative defenses because a defendant risks waiving any affirmative defense that it does not plead.¹⁶⁷

For an example of how the federal courts handled affirmative defenses before *Twombly*, consider *Davis v. Sun Oil Co.*,¹⁶⁸ a U.S. Court of Appeals for the Sixth Circuit decision from 1998. *Davis* involved a dispute over a sale of land by defendant Sun Oil to the Davises, which land was formerly used as a gasoline filling station.¹⁶⁹ Sun Oil did not properly remove underground equipment before the sale and the Davises brought actions in both state and federal court on account of the omission.¹⁷⁰ The federal action for environmental damage was stayed pending the state action for breach of contract and fraud, in which the Davises were victorious.¹⁷¹

The Sixth Circuit found that Sun Oil did not acquiesce to the Davises’ claim splitting and thereby waive its res judicata defense in the federal action, because Sun Oil had stated in its answer that “[p]laintiffs’ claims are barred by the doctrine of res judicata.”¹⁷² The majority held that Sun Oil could rely upon that succinctly stated affirmative defense; the plaintiffs had not been treated unjustly and had been given fair notice of the defense.¹⁷³

Judge Danny Julian Boggs, however, dissented in part from the majority’s decision based on his belief that Sun Oil’s pleading of res judicata was insufficient.¹⁷⁴ The dissent noted the boilerplate nature of the defense.¹⁷⁵ Conceding that there was no technical form of pleading required, the dissent argued that pleading in an “intelligible manner” is not formalism.¹⁷⁶ Sun Oil’s “cloudy answer” did not suffice to supply fair

pleading[s] typically are alleged in a formulary, conclusory, and uninformative fashion along the style illustrated in Form 30 [of the Federal Rules].”).

165. 193 F.3d 354 (5th Cir. 1999).

166. *Id.* at 362 & n.27 (citing *Am. Motorists Ins. Co. v. Napoli*, 166 F.2d 24, 26 (5th Cir. 1948) (“Under our very liberal rules of pleading . . . [a] plea that simply states that complainant was guilty of contributory negligence, as in the case at bar, is sufficient.”)).

167. *See* *Francisco v. Verizon S., Inc.*, Civil Action No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *19–20 (E.D. Va. July 29, 2010); *see also* *Wanamaker v. Albrecht*, No. 95-8061, 1996 WL 582738, at *5 (10th Cir. Oct. 10, 1996) (“While counsel often plead vast numbers of affirmative defenses without being sure whether the facts will ultimately support the defenses, such pleading is done precisely so that the defenses will be preserved should discovery or further proceedings reveal factual support.”); *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010).

168. 148 F.3d 606 (6th Cir. 1998).

169. *See id.* at 608.

170. *See id.*

171. *See id.* at 608–09.

172. *See id.* at 612 (internal quotation marks omitted).

173. *See id.* at 612–13.

174. *See id.* at 613 (Boggs, J., dissenting).

175. *See id.* at 614.

176. *See id.*

notice of its objection to the Davises' separate state and federal actions.¹⁷⁷
 "The prejudice to the Davises is obvious."¹⁷⁸

2. Judicial Assessment of the Sufficiency of Affirmative Defense Pleadings: Rule 12(f) Motions To Strike

The Federal Rules do provide some recourse to plaintiffs who wish to remove inappropriate affirmative defenses from an answer. Rule 12(f) allows a party to move the court to strike affirmative defenses from an opponent's pleading.¹⁷⁹ This can allow the court and parties to avoid spending time and money litigating spurious issues.¹⁸⁰

Traditionally, the courts grant motions to strike when the plaintiff would succeed despite any pled or inferable set of facts in support of the challenged defense.¹⁸¹ In other words, an affirmative defense is insufficient if it is not recognized as a valid defense against the claim.¹⁸² However, when reviewing a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader.¹⁸³ An affirmative defense will not be struck unless its insufficiency is clearly apparent, it does not present relevant questions of law or fact, and its retention is prejudicial to the moving party.¹⁸⁴ Prejudice may be displayed if the answer does not clearly articulate to which claim an affirmative defense applies, or if an affirmative defense has no possible relation to the controversy.¹⁸⁵

177. *See id.*

178. *Id.*

179. *See* FED. R. CIV. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.").

180. *See* *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010); *Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 402 (D. Del. 2009) ("Motions to strike serve 'to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.'" (quoting *McInerney v. Moyer Lumber & Hardware, Inc.*, 244 F. Supp. 2d 393, 402 (E.D. Pa. 2002))); *Fogel v. Linnemann (In re Mission Bay Ski & Bike, Inc.)*, No. 07 B 20870, No. 08 A 55, 2009 Bankr. LEXIS 2495, at *8-9 (Bankr. N.D. Ill. Sept. 9, 2009) ("Motions to strike can be useful, however, as a way to remove unnecessary clutter from the case, and then they serve to expedite, not delay." (internal quotation marks omitted)).

181. *See* *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989); *United States v. Pennsalt Chems. Corp.*, 262 F. Supp. 101, 101 (E.D. Pa. 1967).

182. *See* *Huertas v. U.S. Dep't of Educ.*, No. 08-3959 (RBK/JS), 2009 WL 2132429, at *1 (D.N.J. July 13, 2009).

183. *See* *Clark v. Milam*, 152 F.R.D. 66, 71 (S.D. W. Va. 1993).

184. *See id.* at 70; *see also* *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986), *rev'd on other grounds*, 505 U.S. 504 (1992); *Palmer*, 2010 WL 2605179, at *2; *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009); 5C WRIGHT & MILLER, *supra* note 161, § 1381.

185. *See* *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953); *Francisco v. Verizon S., Inc.*, Civil Action No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *14 (E.D. Va. July 29, 2010); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 689 (N.D. Ohio 2010); *Benjamin v. Esso Standard Oil Co.*, 1:08-cv-101, 2009 U.S. Dist. LEXIS 48677, at *1-2 (D.V.I. June 4, 2009); *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *2 (W.D. Wis. Sept. 25, 2008) ("Failing to

Rule 12(f) motions to strike are generally disfavored, and courts frequently characterize them as “time wasters” that potentially serve only to delay a proceeding.¹⁸⁶ Moreover, a motion to strike is a drastic remedy and should not be used frequently, in part because of the difficulty of deciding cases without a factual record,¹⁸⁷ as well as the strong policy favoring resolution on the merits.¹⁸⁸ Accordingly, a defendant whose defense has been struck is normally granted leave to amend.¹⁸⁹

II. DOES THE *TWOMBLY* STANDARD EXTEND TO AFFIRMATIVE DEFENSES?

As this Note discussed earlier, the courts in *Shinew*¹⁹⁰ and *First National*¹⁹¹ both use *Davis*¹⁹² as precedent, but to very different results.¹⁹³ After *Twombly*, the continued validity of the traditional manners of pleading affirmative defenses and determining their sufficiency are in doubt. Building upon the discussion in Part I of the Federal Rules and pleading standards, Part II explores the arguments presented by the district courts for either extending the *Twombly* standard to affirmative defenses or not. First, it considers those courts that have decided that the *Twombly* standard does extend to affirmative defenses. Part II.A.I discusses the notions of fairness presented by these courts in extending *Twombly*. Part II.A.2 discusses the policy justifications for extending the *Twombly* standard, including preventing discovery abuse and limiting boilerplate defensive pleadings. Finally, Part II.A.3 describes the efforts of these courts to temper the potential harshness of their rulings to extend the *Twombly* standard by allowing leave to amend. This part then considers those courts that have decided that the *Twombly* standard does not extend to affirmative defenses. Part II.B.1 discusses these courts’ reading of Rule 8, upon which they heavily rely in their decisions not to extend *Twombly*. Part II.B.2 discusses the other Federal Rules, policy considerations, and notions

properly notify is prejudice.”); *Westbrook v. Paragon Sys., Inc.*, Civil Action 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2–3 (S.D. Ala. Nov. 29, 2007).

186. See *Greenheck*, 2008 WL 4443805, at *1 (“[A] motion to strike pleadings or affirmative defenses is generally disfavored because it consumes scarce judicial resources, and potentially serve[s] to delay” (alteration in original) (citation omitted) (internal quotation marks omitted)); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *1 (S.D. Fla. May 29, 2008) (listing many decisions to so describe); 5C WRIGHT & MILLER, *supra* note 161, § 1380.

187. See *Brown & Williamson Tobacco Corp.*, 201 F.2d at 822 (“Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice.” (citation omitted)); *Knit With v. Knitting Fever, Inc.*, Civil Action Nos. 08-4221, 08-4775, 2009 WL 973492, at *6 (E.D. Pa. Apr. 8, 2009).

188. See *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).

189. See *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 232 (E.D.N.C. 2010); *Francisco*, 2010 U.S. Dist. LEXIS 77083, at *15; *Palmer*, 2010 WL 2605179, at *2.

190. See *supra* notes 1–7, 14–20 and accompanying text.

191. See *supra* notes 10–13 and accompanying text.

192. See *supra* text accompanying notes 168–78.

193. See *supra* notes 8–20 and accompanying text.

of fairness that influence these courts' reasoning. Lastly, Part II.B.3 addresses those courts that have remained silent on the issue, but whose silence implies reluctance to extend the *Twombly* standard to affirmative defenses.

A. *The Twombly Standard Does Extend to Affirmative Defenses*

The majority of courts that have considered the question have found that the *Twombly* standard does extend to affirmative defenses.¹⁹⁴ However, this is not to say that they have all ruled similarly; even within this subset, there is some variation. For example, where an affirmative defense must display multiple elements to prove eventually successful, some courts have not required each of those elements to be supported with factual allegations, while other courts have dismissed affirmative defenses composed of many elements for failure to support each.¹⁹⁵

This section describes the major points upon which the district courts that extend the *Twombly* standard to affirmative defenses rely. First, it discusses judicial notions of fairness in decisions to extend the standard. Next, it addresses the use of the *Twombly* standard to prevent discovery abuse and boilerplate defensive pleadings. Finally, it describes judicial liberality in allowing defendants to amend insufficient defensive pleadings.

1. What Is Good for the Goose Is Good for the Gander

The seeming unfairness of applying a different standard of pleading to claims and affirmative defenses drives many courts to reason that the two standards should be the same.¹⁹⁶ Because affirmative defenses are pleadings, they are subject to the same requirements as any other pleading.¹⁹⁷ To reach this conclusion, some courts rely upon precedent that

194. See *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. June 22, 2010). At least one commentator supports extension. See Mize, *supra* note 152, at 1260–61.

195. Compare *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *8 (E.D. Tex. Mar. 16, 2009) (“As Plaintiff points out, a successful claim of laches or equitable estoppel requires many elements. However, at the pleading stage, the burden is far less; Defendant need only meet the requirements of Rule 8.” (citation omitted)), with *T-Mobile USA, Inc. v. Wireless Exclusive USA, LLC*, No. 3:08-CV-0340-G, 2008 WL 2600016, at *3 (N.D. Tex. July 1, 2008) (“The defendants have failed to sufficiently allege the fourth element [of an antitrust anti-tying affirmative defense]; consequently, the defense is insufficient as a matter of law and is stricken . . .”).

196. See *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 234 (E.D.N.C. 2010); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *4–5 (W.D. Va. June 24, 2010).

197. See *OSF Healthcare Sys. v. Banno*, No. 08-CV-1096, 2010 U.S. Dist. LEXIS 7584, at *2–3 (C.D. Ill. Jan. 5, 2010) (“[Affirmative defenses] are subject to all pleading requirements of the Federal Rules of Civil Procedure. Affirmative defenses thus must be set forth in short and plain statement[s] . . . showing that the pleader is entitled to relief. . . . [*Twombly* and *Iqbal* are] equally applicable to affirmative defenses, given that affirmative defenses are subject to those same pleading requirements.” (alteration in original) (citations omitted) (internal quotation marks omitted)); *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) (“Because affirmative defenses are pleadings, they are governed by Rule 8’s requirement of a short and plain

suggests that affirmative defenses are judged by the same pleading requirements as complaints.¹⁹⁸ “[T]he purpose of pleading requirements is the same. . . . [The] standard simply means that [sic] that it be pleaded in a way that is intelligible, gives fair notice, and is plausibly suggested by the facts.”¹⁹⁹ “[W]hat is good for the goose is good for the gander”²⁰⁰

The courts’ problem with some tersely phrased affirmative defenses is that they do not provide plaintiffs with fair notice of the defenses.²⁰¹ It is not the responsibility of the court or the opposing party to interpret what a defendant meant by tersely worded affirmative defenses.²⁰² “An even-

statement of the defense.” (citing *Heller Fin., Inc. v. Midwehy Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (holding that because the Rules “require affirmative defenses to be pleaded” then the “pleading specificity standard” articulated by *Twombly* applies); *Fogel v. Linnemann (In re Mission Bay Ski & Bike, Inc.)*, No. 07 B 20870, No. 08 A 55, 2009 Bankr. LEXIS 2495, at *15–16 (Bankr. N.D. Ill. Sept. 9, 2009) (“Affirmative defenses are pleadings and so are subject to all pleading requirements under the Federal Rules. That means affirmative defenses must meet the notice-pleading standards of Rule 8(a) as the Supreme Court recently interpreted them in [*Twombly* and *Iqbal*].” (citations omitted)).

198. See *Cosmetic Warriors Ltd. v. Lush Boutique, L.L.C.*, No. 09-6381, 2010 U.S. Dist. LEXIS 16392, at *4 (E.D. La. Feb. 1, 2010) (“The Fifth Circuit held in *Woodfield v. Bowman* that an affirmative defense is subject to the same pleading requirements as the Complaint.” (citing *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999)); *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (citing *FSP, Inc. v. Societe Generale*, No. 02CV4786GBD, 2005 WL 475986, at *8 (S.D.N.Y. Feb. 28, 2005) (suggesting that a motion to strike an affirmative defense under Rule 12(f) is governed by the same standard as a motion to dismiss a claim under Rule 12(b)(6) by asserting that an affirmative defense should not be struck unless it seems certain that the plaintiffs will prevail “despite any state of facts which could be proved in support of the [affirmative] defense”—effectively the same standard used to examine claims under *Conley*); *Solvent Chem. Co. v. E.I. Dupont De Nemours & Co.*, 242 F. Supp. 2d 196, 212 (W.D.N.Y. 2002) (stating that “[t]he standard for striking an affirmative defense is the mirror image” of that which is used to determine whether a pleading has failed to state a claim)); *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (citing *Woodfield* in a manner similar to *Cosmetic Warriors*); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008) (relying upon *Societe Generale* in a manner similar to *Tracy*); *Stoffels*, 2008 WL 4391396, at *1 (citing *Woodfield* in a manner similar to *Cosmetic Warriors*); *T-Mobile USA*, 2008 WL 2600016, at *2 (using *Woodfield* in a manner similar to *Cosmetic Warriors*).

199. *Palmer*, 2010 WL 2605179, at *5 (“Such a requirement is in no way inconsistent with Rule 8(a)(2)’s ‘short and plain statement of the claim’ language. Likewise, is neither inconsistent with Rule 8(b)(1)(A)’s requirement that a defendant ‘state in short and plain terms its defenses to each claim’ nor with Rule 8(d)(1)’s requirement that all pleadings be ‘simple, concise, and direct.’”); see also *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (“In both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case.”).

200. *Racick*, 270 F.R.D. at 233.

201. See *Burget v. Capital W. Sec., Inc.*, No. CIV-09-1015-M, 2009 WL 4807619, at *3 (W.D. Okla. Dec. 8, 2009); see also *FDIC v. Bristol Home Mortg. Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009) (“Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff ‘fair notice’ of the nature of the defense and the grounds upon which it rests.”); *Greenheck*, 2008 WL 4443805, at *2.

202. See *CTF Dev., Inc. v. Penta Hospitality, LLC*, No. C 09-02429 WHA, 2009 WL 3517617, at *7 (N.D. Cal. Oct. 26, 2009).

handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.”²⁰³ Because the rationale of *Twombly* impacts both parties to a dispute, it makes sense to extend the standard.²⁰⁴

Furthermore, the similarities in language between Rule 8(a) and Rule 8(b) indicates to some courts that the pleading standard of affirmative defenses is the same as that for complaints.²⁰⁵ To these courts, the language of Rule 8(c) is not independent of the other sections of Rule 8, but rather imposes additional requirements upon the pleading of affirmative defenses on top of those imposed by Rule 8(b)’s “short and plain terms” language.²⁰⁶

2. Discovery Abuse and Boilerplate Pleadings

In addition to reliance upon notions of simple fairness, courts that decide to extend the *Twombly* standard to affirmative defenses frequently do so “[b]ecause of the widespread abuse of affirmative defenses and related judicial acquiescence at times in such practices.”²⁰⁷ These courts tend to pursue two objectives: the prevention of unnecessary discovery and the streamlining of boilerplate defensive pleadings.²⁰⁸

Some district courts have hearkened to the “underlying rationale” of *Twombly* in their decisions to extend the *Twombly* standard to affirmative defenses.²⁰⁹ To these courts, *Twombly* is designed to eliminate the potential high costs of discovery associated with meritless claims, and “[b]oilerplate affirmative defenses . . . can have the same detrimental effect

203. *Burget*, 2009 WL 4807619, at *2.

204. *See* *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *17 (E.D. Va. July 29, 2010).

205. *See, e.g.*, *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010); *see also supra* note 35.

206. *See* *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (“Fed.R.Civ.P. 8 is consistent in at least inferring that the pleading requirements for affirmative defenses are essentially the same as for claims for relief. Although Rule 8(c) for affirmative defenses does not contain the same language as 8(a)(2), requiring ‘a short and plain statement of the claim,’ 8(b)(1)(A) nevertheless does require a defendant to ‘state in short and plain terms its defenses to each claim.’ The sub-heading for Rule 8(b)(1), moreover, is ‘Defenses; In General.’ Rule 8(c)(1) provides a helpful laundry list of commonly asserted affirmative defenses to emphasize that avoidances and affirmative defenses must indeed be pleaded to be preserved. Applying the standard for heightened pleading to affirmative defenses serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.”).

207. *See* *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at *6 (E.D. Mich. Dec. 6, 2007).

208. *See* *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010) (“‘[B]oilerplate defenses clutter the docket and . . . create unnecessary work’ and extend[] discovery.” (quoting *Safeco Ins. Co. of Am. v. O’Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008))).

209. *See* *HCRI TRS*, 708 F. Supp. 2d at 691; *see also supra* note 155 and accompanying text.

on the cost of litigation.”²¹⁰ In this view, if an affirmative defense is unnecessary, then discovery in support of it is wasteful and, therefore, a plaintiff should not have to wait to find out whether it has merit.²¹¹ Just as *Twombly* considered the burdens of discovery related to non-meritorious claims, these courts considered the burden of discovery related to non-meritorious defenses.²¹²

Similarly, these courts take a practical approach to their decisions, using the *Twombly* standard as a tool through which they might clear their dockets or improve the quality of the pleadings before them.²¹³ These courts require attorneys before them to “accept a continuing obligation to eliminate unnecessary boilerplate in their pleadings.”²¹⁴ Claims and defenses not currently sustainable under Rule 11 are “frivolous” and should be stricken.²¹⁵ These courts “require[] more than the assertion of any and all defenses that *may* apply. Such defenses fall within the ambit of *Twombly* and [these courts’] preferred practice”²¹⁶

3. Amending Pleadings

The courts that extend the *Twombly* standard to affirmative defenses for fairness and policy reasons usually permit amendment of the answer²¹⁷ to

210. *HCRI TRS*, 708 F. Supp. 2d at 691.

211. *See* *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010) (“[Plaintiffs should] not be left to the formal discovery process to find-out whether the defense exists and may, instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense.”); *FDIC v. Bristol Home Mortg. Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009) (““On the other hand, weeding out legally insufficient defenses at an early stage of a complicated lawsuit may be extremely valuable to all concerned in order to avoid the needless expenditures of time and money in litigating issues which can be seen to have no bearing on the outcome.” (quoting *First Specialty Ins. Corp. v. GRS Mgmt. Assocs.*, No. 08-81356-CIV, 2009 WL 2169869, at *2 (S.D. Fla. July 20, 2009))).

212. *See, e.g.*, *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *23–24, *27 n.8 (E.D. Va. July 29, 2010) (“This manner of pleading serves to narrow the issues for discovery and propels the litigation forward so that the Court may swiftly and efficiently hear the merits of a plaintiff’s claims.”); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (finding prejudice to the plaintiff in the continued existence of the affirmative defenses in the pleadings, because the plaintiff would need to conduct discovery that would be “expensive and potentially unnecessary and irrelevant”).

213. *See, e.g.*, *Safeco*, 2008 WL 2558015, at *1 (“Boilerplate defenses clutter the docket and, further, create unnecessary work. 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. The court is aware of only a limited class of defenses that are waived if not immediately asserted. Rule 15 allows for appropriate amendments and counsel should therefore feel no need in this court to window-dress pleadings early for fear of losing defenses later.”).

214. *Id.*

215. *See id.*

216. *Id.* (extending the *Twombly* standard to affirmative defenses without analysis).

217. *See supra* note 5.

allow defendants the opportunity to satisfy the more rigorous standard.²¹⁸ The liberal application of Rule 15 motions to amend is designed to “soften[] any painful blow” caused by the extension.²¹⁹ The courts recognize that parties do not always know all the facts relevant to their claims or defenses until discovery has occurred.²²⁰ While that is not usually enough to overcome a Rule 12(f) motion to strike,²²¹ the Federal Rules contemplate such circumstances by allowing for amendment upon the acquisition of additional relevant information.²²²

B. The Twombly Standard Does Not Extend to Affirmative Defenses

A sizable minority of courts that have considered whether the *Twombly* standard extends to affirmative defenses have found that it does not.²²³ This section discusses the most common arguments of these courts. First, it explores judicial interpretation of Rule 8. Next, it considers other Rules, policy, and judicial concepts of fairness that influence courts’ reasoning. Finally, it examines those courts that have selected not to rule upon the controversy when presented with the opportunity, but whose refusal to rule suggests that they are reluctant to extend the *Twombly* standard.

1. Rule 8 Differentiates Between Claims and Affirmative Defenses

The most prevalent argument against extending the *Twombly* standard to affirmative defenses is based upon the language and structure of Rule 8.²²⁴ Rule 8(a) governs the pleading of complaints and requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”²²⁵ In contrast, Rule 8(c) specifies “only that affirmative defenses be ‘set forth

218. *See, e.g., Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 652 (D. Kan. 2009) (“The majority of cases applying the *Twombly* pleading standard to affirmative defenses and striking those defenses have permitted the defendant leave to amend.”).

219. *See Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *25 (E.D. Va. July 29, 2010).

220. *See Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *8 (E.D. Tex. Mar. 16, 2009) (declining to strike an affirmative defense of limitation of damages because, at that point in the litigation, the plaintiff had not provided any details regarding his damages); *see also Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *2 n.3 (W.D. Tex. Sept. 22, 2008) (declining to strike an affirmative defense of statute of limitations and suggesting that the court was persuaded by defendant’s argument that it could not provide detailed factual allegations in its pleading because plaintiffs had not specifically alleged when the claim had occurred). The *Stoffels* court noted that the statute of limitations affirmative defense “is largely self-explanatory and is sufficient to give plaintiffs fair notice” of the asserted defense. *See id.* at *2. In similar scenarios, other courts have stricken the affirmative defense with leave to amend. *See, e.g., Hayne*, 263 F.R.D. at 651–52. However, some courts have not. *See, e.g., Burget v. Capital W. Sec. Inc.*, No. CIV-09-1015-M, 2009 WL 4807619, at *3–4 (W.D. Okla. Dec. 8, 2009) (striking with prejudice an affirmative defense of statute of limitations, despite defendant’s argument that it had insufficient information regarding plaintiff’s claims to determine whether they were time-barred).

221. *See supra* Part I.C.2.

222. *See Hayne*, 263 F.R.D. at 651.

223. *See Francisco*, 2010 U.S. Dist. LEXIS 77083, at *19–21.

224. *See supra* note 35 (reproducing FED. R. CIV. P. 8).

225. *See supra* note 35.

affirmatively.”²²⁶ Rule 8(c) does not require that the answer “show” that the defendant is entitled to prevail on his affirmative defense.²²⁷ Moreover, *Twombly* was decided under Rule 8(a) and its language does not suggest that its standard was intended to extend to affirmative defenses under Rule 8(c).²²⁸ Accordingly, both the structure and language of the Federal Rules contemplate different treatment of claims and affirmative defenses. Many courts have used similar reasoning to conclude that the *Twombly* standard does not extend to affirmative defenses.²²⁹

For example, the court in *Charleswell v. Chase Manhattan Bank, N.A.*²³⁰ held for largely textual reasons that the *Twombly* standard did not extend to affirmative defenses:

Twombly interpreted Rule 8(a)(2), which states that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(c)(1), which provides for affirmative defenses, states only that “a party must affirmatively state any avoidance or affirmative defense.” There is no requirement under Rule 8(c) that a defendant “show” any facts at all.²³¹

226. *Westbrook v. Paragon Sys., Inc.*, No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007) (quoting FED. R. CIV. P. 8(c)). Although *Westbrook* quoted a previous version of Rule 8(c), the substance remains the same. See *supra* text accompanying note 32.

227. See *Wells Fargo & Co. v. United States*, No. 09-CV-2764 (PJS/AJB), 2010 U.S. Dist. LEXIS 114983, at *4–5 (D. Minn. Oct. 27, 2010) (highlighting that an affirmative defense is not a claim for relief and that no Federal Rule requires a defendant to plead “facts ‘showing’ that the plaintiff is *not* entitled to relief”); *Westbrook*, 2007 U.S. Dist. LEXIS 88490, at *2.

228. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 & n.3 (2007); *Westbrook*, 2007 U.S. Dist. LEXIS 88490, at *2.

229. See, e.g., *Lopez v. Asmar’s Mediterranean Food, Inc.*, No. 1:10cv1218 (JCC), 2011 WL 98573, at *2 (E.D. Va. Jan. 10, 2011) (“Such policy considerations [as relied upon by courts to extend the *Twombly* standard] may be compelling, but whether this Court agrees with them or not, it is first bound to apply the relevant rules of civil procedure as written.”); *Ameristar Fence Prods., Inc. v. Phoenix Fence Co.*, No. CV-10-299-PHX-DGC, 2010 U.S. Dist. LEXIS 81468, at *3–4 (D. Ariz. July 15, 2010) (stressing the individuality of Rule 8(c) in its governance of affirmative defenses, emphasizing that that Rule requires only that a party “state” an avoidance or affirmative defense, and declining to extend the *Twombly* standard to affirmative defenses, leaving such an action “to the Supreme Court or this Circuit”); *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 U.S. Dist. LEXIS 25785, at *42–49 (M.D. Tenn. Mar. 18, 2010) (discussing how the *Twombly* and *Iqbal* decisions only concerned themselves with plaintiffs’ complaints and Rule 8(a)(2), and holding that affirmative defenses are not required to plead supporting facts); *Romantine v. CH2M Hill Eng’rs, Inc.*, No. 09-973, 2009 WL 3417469, at *1 & n.1 (W.D. Pa. Oct. 23, 2009) (reasoning that, despite any similarities between the language of Rule 8(a) and 8(b), affirmative defenses are governed by Rule 8(c), and holding that the Supreme court in *Twombly* was interpreting the pleading requirements for claims under Rule 8(a)(2) only); *Am. Res. Ins. Co. v. Evoleno Co.*, No. 07-0035-WS-M, 2007 U.S. Dist. LEXIS 55181, at *6 n.7 (S.D. Ala. July 30, 2007) (emphasizing that the “showing” element of Rule 8(a) is that which requires some factual allegation, while neither Rule 8(b) nor Rule 8(c) requires the answer to “show” that the defendant is entitled to prevail on its affirmative defense).

230. No. 01-119, 2009 WL 4981730 (D.V.I. Dec. 8, 2009).

231. *Id.* at *4 (citations omitted).

Under this interpretation of the law, the court upheld all of the defendants' challenged affirmative defenses, finding that a defendant is not required to allege facts in support of an affirmative defense.²³²

2. Other Rules, Policy Considerations, and Fairness

The language of Rule 8 is not the only concern for those district courts that have declined to extend the *Twombly* standard to affirmative defenses. Courts have also relied upon other Federal Rules, policy considerations, and notions of simple fairness to defendants in their decisions not to extend the *Twombly* standard.

The Federal Rules provide plaintiffs with several protections from defendants who poorly craft affirmative defenses. Harkening to Justice Stevens' dissent in *Twombly*,²³³ the court in *Holtzman v. B/E Aerospace, Inc.*²³⁴ reasoned that when an affirmative defense does not provide enough facts to give fair notice of the claim for the plaintiff to respond properly, a motion to strike under Rule 12(f) is not the appropriate remedy.²³⁵ The court suggested that if a pleading fails to specify allegations so as to provide sufficient notice or does not contain enough information to allow for a responsive pleading to be framed, the proper motion to file is a Rule 12(e) motion for a more definite statement.²³⁶ While the court did apply *Twombly* to the affirmative defenses before it, it only did so as far as its interpretation of that standard reconciled with notice pleading of affirmative defenses, denying plaintiff's motion to strike and granting in the alternative a motion for a more definite statement.²³⁷ In other words, the Federal Rules already provided a means of questioning the language of an affirmative defense.

Similarly, the Federal Rules require that factual contentions made to a court have evidentiary support or will likely so have after "reasonable opportunity for further investigation or discovery."²³⁸ Failure to satisfy these conditions can result in sanctions for attorneys, law firms, and parties.²³⁹ Both parties must make "an inquiry reasonable under the circumstances" before making presentations to the court.²⁴⁰ However, the time that is available to make these inquiries differs for a plaintiff, under the

232. *See id.* at *5–6.

233. *See supra* text accompanying note 94.

234. No. 07-80551-CIV, 2008 WL 2225668 (S.D. Fla. May 29, 2008).

235. *See id.* at *2.

236. *See id.*; *see also* FED. R. CIV. P. 12(e) ("A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.").

237. *See Holtzman*, 2008 WL 2225668, at *2.

238. FED. R. CIV. P. 11(b)(3).

239. *See id.* 11(c).

240. *See id.* 11(b).

applicable statute of limitations, and for a defendant, under the Federal Rules.²⁴¹ District courts have reasoned that these differences justify different treatment of plaintiffs and defendants at the pleading stage.²⁴² To these courts, it is unfair to extend the *Twombly* standard to defendants when a plaintiff has months or years to investigate a claim before pleading, while a defendant “typically has [twenty-one] days to serve an answer.”²⁴³

Practical considerations have also influenced courts’ decisions not to extend the *Twombly* standard. Because of the limited time available to them, defendants have frequently simply listed their affirmative defenses in their answer.²⁴⁴ Some courts view these listings as tools of the trade and would select not to penalize defendants by striking pleadings that are allowed under the Rules.²⁴⁵ In a typical case, it becomes apparent which affirmative defenses are not viable, and the parties disregard them; “[n]o judicial intervention is necessary.”²⁴⁶ Extending the *Twombly* standard to affirmative defenses may compel defendants to move the court more frequently for permission to amend its answer after discovery to add affirmative defenses.²⁴⁷ Plaintiffs would naturally resist those motions, and this could lead to another round of motion practice, in many cases “increasing the burdens on the federal courts, and adding expense and delay for the parties.”²⁴⁸

241. *See id.* 12(a)(1)(A) (“A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint . . .”).

242. *See, e.g.,* *Holdbrook v. Saia Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 U.S. Dist. LEXIS 29377, at *4 (D. Colo. Mar. 8, 2010) (“[I]t is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.”).

243. *See Wells Fargo & Co. v. United States*, No. 09-CV-2764 (PJS/AJB), 2010 U.S. Dist. LEXIS 114983, at *5 (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.”).

244. *See supra* notes 161–67 and accompanying text.

245. *See Wells Fargo*, 2010 U.S. Dist. LEXIS 114983, at *5 (arguing that extending the *Twombly* standard would “radically change” federal civil practice, because affirmative defenses are almost always simply listed in answers).

246. *Id.* at *6; *see also* *Westbrook v. Paragon Sys., Inc.*, No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *3 (S.D. Ala. Nov. 29, 2007) (“The Court fully expects the defendant to isolate those defenses that are truly affirmative and that are legitimately at issue without wasting the time of the Court or the plaintiff.”).

247. *See Wells Fargo*, 2010 U.S. Dist. LEXIS 114983, at *6.

248. *Id.*; *see also* *Miller, supra* note 31, at 89, 102–03 (“Once again, sounding a pragmatic note, there are potential litigation cost and delay consequences to these amendment questions. If Rule 15 does survive unscathed, the growing number of dismissal-motion grants will generate additional amendment requests and grants of leave to replead, and in many instances a second motion to dismiss following that repleading. On the other hand, if the application of Rule 15 is narrowed, more judgments following Rule 12(b)(6) dismissals will be entered and additional appeals from denials of dismissals and leave to replead are likely to result. . . . In reality, any increase in the burden of pleading . . . the plausibility of denials and affirmative defenses, also would cause cost and delay consequences that would have to be considered in determining whether efficiency and cost savings actually were being realized from the shift to plausibility pleading.”).

3. Courts Have Been Reluctant To Extend the *Twombly* Standard to Affirmative Defenses

Subsequent to *Twombly* and *Iqbal*, some district courts, faced with an opportunity to decisively rule on the issue of this Note, have declined to do so.²⁴⁹ The reasoning of these courts frequently suggests that they do not believe that the *Twombly* standard should extend to affirmative defenses in a Draconian way.²⁵⁰

For example, in *Voeks v. Wal-Mart Stores, Inc.*,²⁵¹ the court was asked to decide a motion to strike a laundry list of affirmative defenses. The plaintiff argued that the *Twombly* standard applied and the defendant, citing *Woodfield*,²⁵² claimed that a succinctly stated affirmative defense could provide appropriate notice.²⁵³ The court, however, did not agree that there was an issue in controversy on this point at all: “Despite the arguments of the parties to the contrary, the pleading requirements outlined in *Twombly* and *Woodfield* are not materially different.”²⁵⁴

Specific facts, the court found, were not necessary under either standard, and both existed only to give fair notice; the factual specificity required to give notice, “if any,” depended on the circumstance of the parties and the specific pleading.²⁵⁵ The court upheld several affirmative defenses, despite a lack of detail in the pleading, because they were “largely self-explanatory.”²⁵⁶ Next, the court upheld affirmative defenses that “sufficiently inform[ed]” the plaintiff of the issues raised because “[i]t would not be reasonable to expect the defendant to have detailed information about [the affirmative defenses] at this early stage of the litigation.”²⁵⁷ The court did strike several equitable affirmative defenses

249. See, e.g., *Del-Nat Tire Corp. v. A to Z Tire & Battery, Inc.*, No. 2:09-cv-02457-JPM-tmp, 2009 WL 4884435, at *2 (W.D. Tenn. Dec. 8, 2009) (declining to address the issue); *Schlottman v. Unit Drilling Co.*, No. Civ-08-1275-C, 2009 WL 1764855, at *1 (W.D. Okla. June 18, 2009) (declining to address whether the *Twombly* standard extends to affirmative defenses); *Knit With v. Knitting Fever, Inc.*, Nos. 08-4221, 08-4775, 2009 WL 973492, at *10–11 (E.D. Pa. Apr. 8, 2009) (selecting not to address *Twombly*’s applicability to affirmative defenses despite plaintiffs’ motion to strike an affirmative defense on grounds of “factual insufficiency,” but rather applying a traditional standard of review for a Rule 12(f) motion to strike and concluding that the court could not find that there existed no set of facts under which the affirmative defense could succeed—an application of the *Conley* standard).

250. See, e.g., *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010) (deciding on defendant’s contested motion to amend without holding that *Twombly* is the correct standard by which affirmative defenses are to be judged); *Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 402, 407 n.8 (D. Del. 2009) (acknowledging that the parties’ contentions present an opportunity for the court to resolve the issue, but declining to apply the *Twombly* standard to the contested affirmative defenses while instead effectively applying the notice standard).

251. No. 07-C-0030, 2008 WL 89434 (E.D. Wis. Jan. 7, 2008).

252. See *supra* notes 165–66 and accompanying text.

253. See *Voeks*, 2008 WL 89434, at *6.

254. *Id.*

255. See *id.*

256. See *id.* (denying motions to strike affirmative defenses of statute of limitations, mistake, no damages, speculative damages, insufficient intent, and standing).

257. *Id.* (denying motions to strike affirmative defenses of offset and failure to mitigate).

for failing to provide the plaintiff with fair notice, because the allegations in the answer did not support each element of the defenses.²⁵⁸ On these affirmative defenses, the court granted leave to amend.²⁵⁹ By ruling in such a manner, the *Voeks* court allowed itself to continue using its pre-*Twombly* standard for determining the sufficiency of affirmative defenses.

III. COURTS SHOULD NOT EXTEND THE *TWOMBLY* STANDARD TO AFFIRMATIVE DEFENSES

The previous part examined the major arguments put forward by the courts in deciding whether to extend the *Twombly* standard to affirmative defenses. This part shows that those courts that have decided not to extend the *Twombly* standard have plotted the better course. First, it demonstrates how the language and structure of the Federal Rules do not support an extension. Next, it shows how the precedents relied upon by those courts selecting to extend the *Twombly* standard are insufficient to justify their decisions. Then, it explains how an extension of the standard will increase the costs and time associated with litigation. Finally, this part argues that simple fairness does not warrant an extension of the *Twombly* standard to affirmative defenses.

A. *The Rules Do Not Follow*

The Federal Rules themselves, in both structure and language, contemplate different treatment of pleadings by claimants and defendants. Rule 8, governing the general rules for pleadings, explicitly differentiates between claims for relief and affirmative defenses.²⁶⁰

The arguments justifying the extension of the *Twombly* standard to affirmative defenses under Rule 8(c) based upon the sparse similarity between the language of Rule 8(a)(2) and Rule 8(b)(1) are incoherent.²⁶¹ While Rule 8(b)(1) does share the words “short and plain” with Rule 8(a)(2), Rule 8(c) does not contain such language.²⁶² Even if Rule 8(b) describes a general pleading standard that also applied to affirmative defenses under Rule 8(c), that congruence does not implicate *Twombly*. The argument that it does ignores the condition in Rule 8(a)(2) that the “short and plain” statement of the claim must “show[] that the pleader is entitled to relief.”²⁶³ This “showing” condition in Rule 8(a) is interpreted in *Twombly* (and *Conley* before it)²⁶⁴ as necessitating that a claim display

258. *See id.* at *7 (striking the affirmative defenses of laches, waiver, estoppel, consent/acquiescence, plaintiff’s fault, fault of others, and unclean hands). *But see* Baum v. Faith Techs., Inc., No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010) (refusing to strike the equitable defense of unclean hands).

259. *See Voeks*, 2008 WL 89434, at *7.

260. *See supra* note 35.

261. *See supra* notes 205–06 and accompanying text.

262. *See supra* note 35.

263. *See supra* note 35.

264. *See supra* text accompanying note 48.

the “grounds” upon which it rests.²⁶⁵ The language of Rules 8(b) and 8(c) does not require that a defendant show anything relating to the asserted defenses, affirmative or otherwise.²⁶⁶ As such, there is no requirement in the Federal Rules that a defendant must display any grounds upon which its affirmative defenses rest. Rule 8(c) only requires that a defendant “affirmatively state any avoidance or affirmative defense.”²⁶⁷

The *Charleswell* court’s well-phrased argument to this effect has not been countered by any court extending the *Twombly* standard to affirmative defenses.²⁶⁸ Many such courts have been at pains to do so, usually neglecting to mention Rule 8(c) in their analyses or glossing over the particularities of *Twombly*’s language.²⁶⁹ Moreover, the Federal Rules require that a defendant plead any affirmative defense that it has.²⁷⁰ The penalty for failure to so plead is the risk of losing any affirmative defenses not pled.²⁷¹ It is procedurally unjust to penalize defendants for asserting affirmative defenses in the manner required by the Federal Rules, but this is what an extension of the *Twombly* standard entails.

Such stretched readings of the Federal Rules are, if nothing else, unnecessary. The Rules already give recourse to plaintiffs to defend themselves against poorly supported affirmative defenses.²⁷² Even if the threat of sanctions under Rule 11 is not sufficient to defend against terse and ambiguous defenses, the Federal Rules also supply a more tailored remedy to the problem: Rule 12(e) motions for a more definite statement.²⁷³ These rules are more appropriate remedies for insufficient pleading of affirmative defenses than an extension of the *Twombly* standard.

Moreover, the Federal Rules are statutory and have a defined amendment process.²⁷⁴ Despite perceived expediencies of different rules, it is not within the authority of the district courts to change the scope or meaning of the Rules. An application of the Rules that contravenes or obfuscates their plain meaning violates both the purpose of the Rules and the function of their most significant recent amendments.²⁷⁵ This application treads closely toward violating the Rules Enabling Act.²⁷⁶

265. See *supra* text accompanying notes 68–71.

266. See *supra* note 227 and accompanying text.

267. See *supra* note 35.

268. See *supra* text accompanying notes 230–32.

269. See *supra* notes 197–206 and accompanying text.

270. See FED. R. CIV. P. 8(c) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense”); FED. R. CIV. P. 12(b) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.”).

271. See *supra* note 167 and accompanying text.

272. See *supra* notes 233–40 and accompanying text.

273. See *supra* notes 94, 233–35 and accompanying text.

274. See *supra* note 31 and accompanying text.

275. See *supra* notes 32–33 and accompanying text.

276. See *supra* notes 29–30, 91 and accompanying text.

B. Extending the Twombly Standard to Affirmative Defenses Is Unprecedented (Even in Twombly)

The Supreme Court conspicuously couched *Twombly* and *Iqbal* in the structure and language of Rule 8(a).²⁷⁷ In fact, there is no precedent requiring the district courts to extend the *Twombly* standard to affirmative defenses under Rule 8(c).²⁷⁸ The precedents relied upon by those courts that extend the *Twombly* standard to affirmative defenses are weak at best, and even tend to allow for succinctly pleaded affirmative defenses to stand.

Twombly itself did not fully overrule *Conley*, but rather only *Conley*'s "no set of facts" language.²⁷⁹ The remainder of *Conley* remains good law.²⁸⁰ *Conley* emphasized the primacy of the Federal Rules and the other procedural tools available to the courts to "disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."²⁸¹ Similarly, the frequently cited *Woodfield* precedent plainly allows for the mere naming of an affirmative defense.²⁸² A succinctly phrased affirmative defense should survive either of these standards. However, this has not prevented the careful parsing of precedent by courts to extend the *Twombly* standard.²⁸³

The action within the district courts presents a very real danger of snowballing, wherein a court notices a majority position on the issue and is influenced to rule on the same side.²⁸⁴ Because the policy arguments espoused by courts extending the *Twombly* standard are indicative of exhaustion and a heavy workload, courts should reconsider the value of persuasive precedent that evinces a court's own frustrations.²⁸⁵ The easy way out is not necessarily the right way, and the courts should not sacrifice the interests of justice on account of their own docket loads.

277. See *supra* notes 68–74, 118–27 and accompanying text.

278. See *supra* notes 25, 249 and accompanying text.

279. See *supra* notes 80–81 and accompanying text.

280. See *supra* note 100 and accompanying text.

281. See *Conley v. Gibson*, 355 U.S. 41, 48 (1957); see also *supra* notes 47–49 and accompanying text.

282. See *supra* notes 165–67, 198 and accompanying text.

283. See *supra* note 198 and accompanying text.

284. See *supra* note 194 and accompanying text.

285. See *supra* notes 207–16 and accompanying text. Seven decisions referenced in this Note that extend the *Twombly* standard to affirmative defenses cite as persuasive the decision in *Safeco Insurance Co. of America v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008), which is written by an obviously frustrated judge. See *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 n.1 (E.D.N.C. 2010); *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *17 n.3 (E.D. Va. July 29, 2010); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 n.2 (N.D. Ohio 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 n.15 (D. Kan. 2009); *Burget v. Capital W. Sec., Inc.*, No. CIV-09-1015-M, 2009 WL 4807619, at *2 n.1 (W.D. Okla. Dec. 8, 2009); *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at *4–5 (E.D. Mich. Apr. 21, 2009); *Fogel v. Linnemann (In re Mission Bay Ski & Bike, Inc.)*, No. 07 B 20870, No. 08 A 55, 2009 Bankr. LEXIS 2495, at *16 (Bankr. N.D. Ill. Sept. 9, 2009).

C. Strike, Amend, Repeat

It is unclear, however, that the courts' dockets would be cleared by an extension of the *Twombly* standard. While the standard may offer some efficiencies relating to discovery, it would also burden all parties and the court with dramatic increases in costly and time-consuming motion practice.²⁸⁶ While the expense of litigation may have been a motivating factor in establishing the *Twombly* standard for claims, perhaps counter-intuitively, it weighs against extending that standard to affirmative defenses.²⁸⁷

First, Rule 12(f) motions to strike will arise more frequently because courts will be perceived as more receptive to them.²⁸⁸ However, striking affirmative defenses is still a drastic remedy, even after *Twombly*.²⁸⁹ If motions to strike continue to be granted more liberally after the *Twombly* standard has been extended to affirmative defenses, then every policy consideration against motions to strike weighs equally against an extension.²⁹⁰ Moreover, when motions to strike are successful, the liberal policy of amendment for deficient affirmative defenses paves the way for even further cost and delay.²⁹¹

In most cases, the colorable defenses of cost-conscious defendants will surface, and those that are not will either be discarded or will be summarily handled at trial.²⁹² Courts should remember in the first instance that the burden of proof remains with the defendant to support his affirmative defenses; there is no threat that justice will be hindered by the inclusion of more affirmative defenses.²⁹³

As a near-aside, the policy of liberally granting leave to amend is insufficient to protect defendants from the harshness of an extension of the

286. See *supra* notes 246–48 and accompanying text; see also *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1175–76 (N.D. Cal. 2010) (“On a final note, the court reminds the parties that the court’s time is valuable and motions to strike are disfavored. While it appears that the defendant made an attempt to resolve this dispute by proposing to stipulate to an amended answer, the court is disappointed that the parties were unable to come to an agreement. It is the court’s opinion that while plaintiff partially succeeded on the merits of his motion, the issues raised would not have been difficult to address solely between the parties. The parties should be reminded that the filing of a second motion to strike would be extraordinary and the parties might be well served by rereading Federal Rule of Civil Procedure 11 before making such a motion.”); *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *4 n.9 (N.D. Okla. June 9, 2010) (“The utter lack of meaningful prejudice leaves the Court with the distinct impression that the parties need to step back and take a deep breath before filing motions. The parties are encouraged to attempt to resolve their technical disputes between themselves, and are advised that sharp litigation practices are disfavored. The parties are also advised that the mischaracterization of authority is not helpful.”); *Miller*, *supra* note 31, at 61–71.

287. See *supra* notes 155–56 and accompanying text.

288. See *supra* notes 179–80 and accompanying text.

289. See *supra* notes 186–88 and accompanying text.

290. See *supra* notes 186–88 and accompanying text.

291. See *supra* notes 189, 217–22 and accompanying text.

292. See *supra* note 246 and accompanying text.

293. See *supra* text accompanying note 37.

Twombly standard.²⁹⁴ Those motions are frequently contested.²⁹⁵ Some facts in support of affirmative defenses may only come out during discovery, and the scope of discovery is limited to the pleadings.²⁹⁶ The defendant may not be allowed to discover the facts necessary to assert defenses it would otherwise have pled and runs the risk of waiving those defenses.²⁹⁷ Finally, motions to amend are sometimes denied and a defendant is left to suffer the consequences.²⁹⁸

D. What Is Good for the Goose Is Not Always Good for the Gander

Procedure, precedent, and policy have all discouraged the extension of the *Twombly* standard to affirmative defenses. Simple fairness does as well.

First, it should be noted that the general criticisms of the *Twombly* standard as it applies to claims are equally applicable to its extension to affirmative defenses.²⁹⁹ While some commentators argue the necessity of extending the standard for fairness' sake,³⁰⁰ simply put, two wrongs will not make a right. One cannot remedy any inequalities imposed upon federal pleading by *Twombly* by extending its standard even further.

A defendant is at a gratuitous disadvantage in the acquisition of factual material at the pleading stage.³⁰¹ A blanket standard that does not account for this discrepancy shocks the conscience. Shocking, too, is the inconsistency with which the district courts apply the standard, even where it has been extended.³⁰² A defendant is left to guess whether a court will apply the standard at all and, if so, the standard's parameters. The federal pleading standard for defenses ought not to formalize such inequalities; where large sums of money and reputations may be on the line, defendants should be accorded every opportunity to defend themselves. In all such considerations, the courts should remember the imperative of Rule 8(e): "Pleadings must be construed so as to do justice."³⁰³

CONCLUSION

The Supreme Court reinvented the federal pleading standard for claims in *Twombly* by abrogating *Conley's* "no set of facts" language, which had determined the sufficiency of a pleaded claim for fifty years. Because of *Twombly's* scale, it is not surprising that there have been disagreements as to its scope. Many district courts have found that *Twombly* extends beyond the bounds of what a simple reading of its text would suggest and have applied its reasoning and conclusion to the pleading of affirmative defenses.

294. See *supra* notes 217–22 and accompanying text.

295. See *supra* notes 7, 247–48, 250 and accompanying text.

296. See *supra* notes 155, 187–88, 220 and accompanying text.

297. See *supra* note 167 and accompanying text.

298. See *supra* notes 20, 220 and accompanying text.

299. See *supra* notes 154, 157, 248 and accompanying text.

300. See *supra* note 194.

301. See *supra* notes 240–43 and accompanying text.

302. See *supra* note 195 and accompanying text.

303. See *supra* note 35.

Such a tack is far from universal, however, as many other district courts have found that the standard for pleading claims articulated in *Twombly* is inapplicable to affirmative defenses. The resolution of this conflict has the potential to impact every affirmative defense asserted in a federal court.

Both sides of the issue rely heavily on the Federal Rules, preferred practice, and notions of fairness in coming to their conclusions. However, as this Note has shown, procedure, precedent, and policy heavily support not extending the *Twombly* standard to affirmative defenses. This conclusion assures that district courts will not disregard the text and intentions of the Federal Rules. Moreover, this conclusion hews closer to *Twombly* itself. It does this first by respecting the language of *Twombly* and the other precedents with which it interacts. Second, it adheres more closely to the overt public policy consideration of *Twombly* by pursuing judicial efficiency and avoiding several rounds of unnecessary motion practice. Abandoning the Federal Rules, precedent, and judicial efficiency by extending the *Twombly* standard to affirmative defenses would cause great injustice to the involuntary parties to federal actions, as defendants would be disallowed the benefits of a full and vigorous defense.