



Message from the Editors



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Dear Friends of the Trial Practice Committee,

We are pleased to bring you the Summer 2017 edition of the Trial Practice Committee's newsletter, *Trying Antitrust*. This edition contains three articles that we hope are useful to your practice. Our first two articles summarize the DOJ's challenges to two proposed health insurance mergers in 2016. Our first article, by Preston Miller, discusses the Anthem-Cigna case, in which the D.C.C. blocked the proposed \$54 billion combination. Mr. Miller examines how a contentious relationship between merging parties can impact the litigation and trial outcome. In our second article, David Edmon writes about the proposed \$37 billion Aetna and Humana deal, which the D.C.C. also blocked. Mr. Edmon provides an in-depth summary of the district court's 156-page opinion and also highlights themes and findings of interest to trial practitioners. Mr. Edmon's insights are especially interesting because he attended the 13-day trial, which began in November of last year. In our final article, Richard Benenson and Justin Cohen examine the pleading standard for affirmative defenses. No federal appellate court has addressed whether the *Twombly/Iqbal* "plausibility" standard applies to affirmative defenses; Messrs. Benenson and Cohen gather district court authorities on both sides of the issue.

If you are interested in writing an article for our Fall 2017 edition, please contact us with your article idea.

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AFFIRMATIVE DEFENSES AND THE PLAUSIBILITY PENDULUM

By: Richard B. Benenson & Justin L. Cohen¹

At the heart of the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), was its focus on Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court unequivocally held that under Rule 8 a plaintiff must plead in the complaint sufficient facts to show that a claim is "plausible on its face." *Twombly*, 550 U.S. at 547, 570; *Iqbal*, 556 U.S. at 678, 697. What the Court did not address was whether the heightened "plausible on its face" pleading standard also applies to a defendant's affirmative defenses.

Immediately following the Court's application of the heightened pleading standard to Rule 8, federal district courts began grappling with the issue of whether the heightened standard also applies to a defendant's affirmative defenses. A majority of district courts initially applied the heightened pleading standard to affirmative defenses, routinely granting plaintiffs' motions to strike defendants' affirmative defenses. *See, e.g., Dilmore v. Alion Sci. & Tech. Corp.*, No. 11-72, 2011 WL 2690367, at *5 (W.D. Pa. July 11, 2011) ("[T]he emerging majority of district courts apply the *Twombly/Iqbal* standards to at least affirmative defenses."); *Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11-2416, 2011 WL 5118325, at *4 (D. Md. Oct. 24, 2011) (granting motion to strike affirmative defenses and noting that, "although *Twombly* and *Iqbal* specifically addressed the sufficiency of a complaint under Rule 8(a), the Court likely did not intend to confine its holdings to complaints alone"); *Barnes v. AT & T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (applying heightened pleading standard and striking certain affirmative defenses).

In the minority were district courts that held that the Court never intended for *Twombly/Iqbal* to apply to any pleading other than the complaint. *See, e.g., Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1259 (D. Kan. 2011) ("[T]he court determines that the pleading standards of *Twombly* and *Iqbal* should be limited to complaints—not extended to affirmative defenses."); *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010) ("[T]he better-reasoned approach is that taken by other district courts that have declined to [extend the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses].").

The Supreme Court has yet to address this issue and no court of appeals has either. Accordingly, nearly a decade after *Iqbal*, district courts are still split between these viewpoints. Indeed, even courts within the same district have issued inconsistent

opinions. *Compare Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 533 (D. Md. 2010) (applying the heightened plausibility standard to affirmative defenses) with *Lockheed Martin Corp. v. United States*, 973 F. Supp. 2d 591, 595 (D. Md. 2013) (declining to apply the heightened plausibility standard to affirmative defenses).

More recently, the trend of requiring defendants to plead affirmative defenses under the *Twombly/Iqbal* standard has ebbed, and courts appear to apply the prior majority position less and less often applied. *See, e.g., U.S. Commodity Futures Trading Comm'n v. U.S. Bank, N.A.*, No. 13-CV-2041-LRR, 2014 WL 294219, at *10 (N.D. Iowa Jan. 27, 2014) ("At first, the majority of district courts extended the pleading standard articulated in *Twombly* and *Iqbal* to affirmative defenses, but this is now the minority position."); *Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at *14 n.4 (D. Utah Apr. 19, 2012) ("[A] growing number of district courts are declining to extend the *Twombly/Iqbal* pleading standard to affirmative defenses, and it is unclear whether that approach is still a majority position.").

Regardless of which position is most often applied, the split remains and practitioners should be prepared to either draft and file a motion to strike a defendant's affirmative defenses or respond to the same, depending on the district in which their case is located (or even the particular judge).

I. Arguments for Applying the Heightened Pleading Standard to Affirmative Defenses

District courts holding defendants' affirmative defenses to the heightened pleading standard have relied on a number of justifications. More often than not, these courts find that principles of fairness and notice require that a plaintiff's complaint and a defendant's answer be treated under the same standard. *See Hayden v. United States*, 147 F. Supp. 3d 1125, 1128 (D. Or. 2015). They note that "it neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case." *Palmer v. Oakland Farms, Inc.*, No. 5:10-cv-00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010). Courts further note that nothing in Rule 8 or the Advisory Committee Notes "suggests the drafters intended a complaint be treated differently from an answer." *Hayden*, 147 F. Supp. 3d at 1129.

Second, courts applying the heightened pleading standard to affirmative defenses point to the language in Rule 8. Rule 8 is titled "General Rules of Pleading[.]" suggesting that its requirements generally apply to complaints and answers, since both filings are considered pleadings under Rule 7(a). Rule 8 also uses "identical language to govern the content of both complaints and answers." *Id.* Specifically, Rule 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(b)(1)(A) provides that in responding

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to a pleading, a defendant must “state in short and plain terms its defenses to each claim asserted against it.” Courts note that the use of the same language in both provisions – *i.e.*, “short and plain” – dictates that the same standard must be applied to both claims and defenses. *See HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010).

And while Rule 8(c), which expressly governs affirmative defenses, does not contain the same “short and plain” language, courts have found that Rule 8(c)(1) is simply a “helpful laundry list of commonly asserted affirmative defenses[,]” which are nevertheless defenses that fall under Rule 8(b)(1), the subheading of which is “Defenses; In General.” *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009); see also 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1274 (3d ed. 2017) (“The general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c).”). Courts have also noted that, notwithstanding the lack of the “short and plain” language in Rule 8(c), a defendant bears the burden of proof on an affirmative defense, just “as the plaintiff does on a claim for relief,” leading to the conclusion that “*Twombly*’s rationale of giving fair notice to the opposing party would seem to apply as well to affirmative defenses given the purpose of Rule 8(b)’s requirements for defenses.” *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 10-945 CW, 2012 WL 1746848, at *4 (N.D. Cal. May 16, 2012) (internal quotation marks omitted).

Finally, courts applying the heightened pleading standard opine that the standard promotes Rule 1’s goal of a speedy and inexpensive determination of civil litigation. They note that application of the *Twombly* and *Iqbal* standard – which serves a gate-keeping function – will discourage defendants from asserting “boilerplate affirmative defenses” that lead to cluttered dockets and that are “based upon nothing more than some conjecture that [they] somehow apply.” *Bradshaw*, 725 F. Supp. 2d at 536 (alteration in original) (internal quotation marks omitted). They also liken discovery on plaintiffs’ claims for relief to discovery on defendants’ affirmative defenses, which “can be every bit as costly and time-consuming, and fact-intensive, as discovery on plaintiffs[’] claim.” *Hayden*, 147 F. Supp. 3d at 1131. Thus, weeding out affirmative defenses lacking factual support promotes litigation efficiency.

II. Arguments Against Applying the Heightened Pleading Standard to Affirmative Defenses

District courts that have declined to apply *Twombly* and *Iqbal* to affirmative defenses also employ a number of sound arguments. Almost all of these courts, just like courts that have chosen to apply the heightened standard, rely on the language in Rule 8. *See, e.g., Owen v. Am. Shipyard Co., LLC*, No. 1:15-CV-413 S, 2016 WL 1465348, at *2 (D.R.I. Apr. 14, 2016); *Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122 (D. Mass. 2012). These courts highlight the fact that, although both Rule 8(a)(2) and Rule 8(b)(1)(A) contain the language “short and plain,” the rest is not identical. Whereas Rule 8(a) provides that a “pleading that states a claim for relief must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief[,]” Rule 8(b) only

requires that a responsive pleading “*state* in short and plain terms its defenses.” Fed. R. Civ. P. 8(a)(2), (b)(1)(A) (emphasis added). Further, Rule 8(c) provides that a party need only “affirmatively *state* any avoidance or affirmative defense.” Fed. R. Civ. P. 8(c)(1) (emphasis added).

Courts point to these “key differences” in the language to find that offensive claims for relief in a complaint require more factual support than defenses. *Owen*, 2016 WL 1465348, at *2; *see also, e.g., Hansen*, 287 F.R.D. at 122 (noting “key textual differences between the sub-parts of Rule 8” and declining to apply heightened pleading standard to affirmative defense); *Falley*, 787 F. Supp. 2d at 1258 (“Because of the differing languages in Rule 8(a), (b), and (c), the court determines that the rationale of *Twombly* does not apply to subsections (b) or (c)—where the pleading party bears no burden of showing an entitlement to relief.”); *Traincroft, Inc. v. Ins. Co. of Pa.*, No. 14-10551-FDS, 2014 WL 2865907, at *3 (D. Mass. June 23, 2014) (suggesting that a lower bar applies to responses).

Second, in addition to the legal rationale described above, courts have declined to create a new, heightened pleading standard for affirmative and other defenses because of the realities involved in defending a lawsuit. “[W]hile plaintiffs have the statute of limitations period to gather facts for their complaint, defendants have only 21 days to research, draft and file their answer.” *Owen*, 2016 WL 1465348, at *2. “This relatively short turnaround time puts defendants at a disadvantage with regard to their ability to gather sufficient facts to support potential defenses under *Iqbal* and *Twombly*[.]” which, if not pled in the first responsive pleading, may be waived. *Id.* These courts therefore believe that it is both fair and “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 given only 21 days to respond to a complaint and assert its affirmative defenses. *Michaud v. Greenberg & Sada, P.C.*, No. 11-cv-01015-RPM-MEH, 2011 WL 2885952, at *3 (D. Colo. July 18, 2011) (quoting *Holdbrook*, 2010 WL 865380, at *2).

III. Conclusion

The debate over the application of *Iqbal* and *Twombly* to affirmative defenses has not abated. Indeed, the majority position immediately following the Court’s decisions may now be the minority position. Even if not, the time is ripe for federal appellate courts to take up this issue – which affects almost every single case. Absent express direction, defense lawyers must exercise care in crafting affirmative defenses and be cognizant of whether the presiding judge or a district court in the circuit have decided a motion to strike affirmative defenses based on the heightened plausibility standard. Plaintiffs’ attorneys should likewise be ready to seize on affirmative defenses lacking factual support.