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A 'Plausible' Outcome?: Twombly, Iqbal, and The Unforeseen Impact on Affirmative Defenses

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Comment

A 'PLAUSIBLE' OUTCOME?: *TWOMBLY*, *IQBAL*, AND THE UNFORESEEN IMPACT ON AFFIRMATIVE DEFENSES

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Between July 1, 2012 and June 30, 2013, there were 284,604 civil cases filed, 300,485 pending, and 255,260 terminated among the federal district courts.[1] Out of the civil cases terminated, 171,973 were terminated before pretrial and 25,816 were terminated during or after pretrial.[2] Only 1.2% of the terminated cases actually went to trial and of that fraction, 31% of those cases were still decided by nonjury means.[3] This data illustrates an overall trend in the decline of trial rates for civil cases and a prevalence for adjudication during the early stages of litigation.[4]

The rise in pretrial adjudication results in an emphasis on the *Federal Rules of Civil Procedure* ("Federal Rules") to administer these cases during the early stages of litigation.[5] The Supreme Court of the United States

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1. *Table 4.1-U.S. District Courts-Civil Cases Filed, Terminated, and Pending, Judicial Facts and Figures 2013*, USCOURTS.GOV, http://www.uscourts.gov/statistics/table/41/judicial-facts-and-figures/2013/09/30 (last updated Sept. 30, 2013).

2. *Table 4.10-U.S. District Courts-Civil Cases Terminated, by Action Taken, Judicial Facts and Figures 2013*, USCOURTS.GOV, http://www.uscourts.gov/statistics/table/410/judicial-facts-and-figures/2013/09/30 (last updated Sept. 30, 2013). Additionally, 54,153 cases resulted in no court action. *Id.*

3. *Id.* Of the 3,129 cases that went to trial, 977 were decided by nonjury means.

4. In 1995, 3.2% of civil cases reached trial; in 2000, 2.2% reached trial; in 2005, 1.4% reached trial, and in 2011, 1.1% reached trial. *Id.*

5. *See* Emery G. Lee, III, *Early Stages of Litigation Attorney Survey: Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER 1–2 (Mar. 2012), http://www.fjc.gov/public/pdf.nsf/lookup/leeearly.pdf/$file/leeearly.pdf (examining the use of certain Federal Rules during the pretrial stage in terminated cases, specifically FED. R. CIV. P. 26(f) and 16(b)); *see also* Joe S. Cecil, et. al, *Trends in Summary Judgment Practice: A Preliminary Analysis*, FEDERAL JUDICIAL CENTER 1, 3–4 (Nov. 2001), http://www.fjc.gov/public/pdf.nsf/lookup/summjudg.pdf/$file/summjudg.pdf (noting the decrease

ultimately prescribes the Federal Rules,[6] however, the Court often interprets the Rules within the confines of a particular case.[7] As such, the impact of this judicial interpretation within the greater scheme of the litigation process may not be fully addressed or envisioned at the time.[8] The effect of a specific judicial interpretation can have drastic effects on the use of certain Federal Rules as tools of litigation.[9]

In a pair of decisions, *Bell Atlantic Corp. v. Twombly*[10] and *Ashcroft v. Iqbal*,[11] the Supreme Court purposively amended the standard for complaint pleading under Federal Rule 8(a), ushering in a new "heightened" plausibility standard and removing the requirement that courts accept the truth of conclusory statements.[12] While *Twombly* and *Iqbal* specifically addressed the pleading standard for complaints, the impact of these decisions extends beyond complaints.[13] Federal district courts are split as to whether this "heightened" plausibility standard should also apply to responsive pleadings, specifically with affirmative defenses.[14] While a majority of the federal district courts extend the plausibility standard to affirmative defenses,[15] a number of federal district courts also expressly reject the application of the plausibility standard to affirmative defenses.[16] As the Supreme Court did not address the universality of the *Twombly* and

in trials for civil cases over the past three decades and one possible cause being the increase in dispositive motions, specifically motions for summary judgments).

6. "The Rules Enabling Act, 28 U.S.C. §§ 2071–77, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts." *Laws and Procedures Governing the Rulemaking Process*, USCOURTS.Gov, http://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0 (last visited Jan. 7, 2016).

7. *See generally* Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1552–56 (2013) (discussing the interplay between the Supreme Court and Advisory Committees, especially the difficulty caused by Supreme Court decisions interpreting Federal Rules).

8. Richard Vetter, et. al., *The Law of Unintended Consequences Revisited: The Case of* Ricci v. DeStefano, CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY 2 (March 2009), http://files.eric.ed.gov/fulltext/ED536275.pdf ("Legislative actions as well as executive and judicial decisions of governments often have unintended consequences—results not foreseen or wanted at the time of the initial policy action. On occasion, these unforeseen results clash with the intent of policies as originally formulated.").

9. *See generally* Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 239–40 (2011) (discussing the effect of the Supreme Court trilogy of decisions on the practice and use of summary judgment: Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

10. 550 U.S. 544 (2007).

11. 556 U.S. 662 (2009).

12. FED. R. CIV. P. 8(a); *see infra* Part I.B.

13. *See infra* Part I.C.

14. *See infra* Part I.C.

15. *See infra* Part I.C.1.

16. *See infra* Part I.C.2.

Iqbal decisions, it remains uncertain if the "heightened" plausibility standard also governs the requirements for affirmative defense pleadings.[17]

The "heightened" plausibility standard adopted by the Supreme Court in *Twombly* and *Iqbal* had the unintended consequence of "destabilizing" pleading practices, specifically the pleading standard for affirmative defenses.[18] This Comment will explore the application of the "heightened" plausibility standard in relation to the underlying motivations that prompted the standard, in order to demonstrate that federal district courts should not extend this standard to affirmative defenses.[19] Specifically, this Comment will examine the United States District Court for the District of Maryland as a microcosm to analyze the two views that currently split federal courts.[20]

As the Supreme Court only addressed the pleading standard for complaints in *Twombly* and *Iqbal*, district courts should refrain from applying the heightened plausibility standard to affirmative defenses in order to maintain a consistent standard while preserving fairness and efficiency in the litigation process.[21] District courts inconsistently apply the "heightened" plausibility standard to affirmative defenses; creating an unstable standard, dependent on the preference within a specific jurisdiction or even the preference of a specific judge.[22]

In addition, affirmative defenses do not raise the same fairness concerns underlying the Supreme Court's adoption of the "heightened" plausibility standard, as the defendant is inherently limited by such a stringent pleading requirement in advance of discovery.[23] Moreover, the "heightened" plausibility standard produces ill-fitting results when applied to affirmative defenses; namely cost and delay resulting from the likely increased use of motions to strike.[24] The more appropriate avenue for determining the answer to this question is to follow the Rules Enabling Act and leave this decision to the Supreme Court.[25]

I. BACKGROUND

The history of pleading standards in American jurisprudence reveals a shift in the understanding of the fundamental role of the judicial officer and

17. *See infra* Part I.C.

18. *See generally*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on The Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (Oct. 2010) (arguing that *Twombly* and *Iqbal* destabilized both pleading and motion to dismiss practices).

19. *See infra* Part II.A.

20. *See infra* Part I.C.

21. *See infra* Part II.A.

22. *See infra* Part II.A.1.

23. *See infra* Part II.A.2.

24. *See infra* Part II.A.3.

25. *See infra* Part II.B.

court within the litigation process.[26] The Federal Rules were adopted in the spirit of making courts more accessible for the average citizen and pursuing a decision on the merits of a case.[27] The subsequent decision in *Conley v. Gibson*[28] reiterated this reasoning by instituting a liberal notice pleading standard.[29] In contrast, the adoption of the "heightened" plausibility standard by the Court in *Bell Atlantic Corp. v. Twombly*[30] and *Ashcroft v. Iqbal*[31] focused mainly on administrative concerns, specifically promoting efficient case management within the judiciary.[32] The resulting split among the federal courts regarding the pleading standard for affirmative defenses illustrates these competing stances.[33]

A. Notice Pleading: Opening the Door to Plaintiffs and Looking to the Merits

The common law precursor and succeeding "code" pleading regime instituted a rigid, technocratic formula for pleading complaints.[34] The standard was obscure in practice and theory, drawing ambiguous distinctions between "ultimate facts" and "conclusions of law."[35] The shift to notice pleading sought to remove this distinction and introduce a more flexible standard.[36] This Section will discuss the change to notice pleading introduced by the Federal Rules and the ensuing decisions by the Supreme Court affirming this standard.

1. Enactment of the Federal Rules of Civil Procedure

Introduced in 1938, the *Federal Rules of Civil Procedure* replaced the strict code pleading system with a more reasonable notice pleading system.[37] The drafters intentionally removed any reference to "facts," "conclusions," or "evidence" in order to distance notice pleading from the

26. *See infra* Part I.A and I.B.

27. *See infra* Part I.A.

28. 355 U.S. 41 (1957).

29. *Id.* at 48; *see infra* Part I.A.

30. 550 U.S. 544 (2007).

31. 556 U.S. 662 (2009).

32. *See infra* Part I.B.

33. *See infra* Part I.C.

34. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 573–75 (Stevens, J., dissenting) (noting the English used the hyper-technical Hilary rules of 1834 and the United States relied on the New York Code of 1848, developed by David Dudley Field).

35. *Id.* at 574 ("[T]he Field Code and its progeny required a plaintiff to plead 'facts' rather than 'conclusions,' a distinction that proved far easier to say than to apply." (citing Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957)).

36. *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957) (discussing the intent of the Federal Rules to adopt a "simplified" standard aimed to get to the merits of the claim).

37. *Twombly*, 550 U.S. at 573–75 (Stevens, J., dissenting).

prior rigid code pleading regime.[38] Under the Federal Rules, the "idea was not to keep litigants out of court but rather to keep them in."[39] The Federal Rules focused on pleadings to serve "the task of general notice-giving," after which "the merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."[40] Reflecting this sentiment, under Rule 8(a), a plaintiff need only plead a "short and plain statement of the claim showing that the pleader is entitled to relief."[41] Likewise the standard for responsive pleadings emphasized this short and plain statement requirement; when pleading an answer, the defendant must "state in short and plain terms its defenses" and "admit or deny any allegations asserted against it."[42] Finally with affirmative defenses, Rule 8(c) also simply requires a party to affirmatively state any defense.[43]

2. Affirmation of Notice Pleading with Conley*'s "No Set of Facts" Requirement*

Following the enactment of the Federal Rules, courts regularly upheld notice pleading, emphasizing the objective to prevent cursory dismissals of complaints and reach an outcome on the merits.[44] The most notable Supreme Court decision, *Conley v. Gibson*, established the complaint pleading standard which governed for the next fifty years.[45]

The *Conley* Court endorsed the language of Rule 8(a), reiterating that the plaintiff is only required to plead a "short and plain statement of the claim."[46] As such, the pleading standard for complaints did not "require a claimant to set out in detail the facts upon which he bases his claim."[47] The Court noted this standard served the purpose of providing fair notice to the

38. *Id.* at 575.

39. *Id.*

40. *Id.*

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

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

43. FED. R. CIV. P. 8(c) provides:

> 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; 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."

Id.

44. The Court of Appeals for the Second Circuit, in one of the first cases to uphold notice pleading, noted the prior standard resulted in "judicial haste which in the long run makes waste." Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

45. Conley v. Gibson, 355 U.S. 41 (1957) (unanimous decision).

46. *Id.* at 47 (citing FED. R. CIV. P. 8(a)(2)).

47. *Id.* "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." *Id.* at 48.

defendant "of what the . . . claim is and the grounds upon which it rests" without imposing an undue burden on the plaintiff at the initial pleading stage.[48] Furthermore, the Court stated that a complaint should survive the initial pleading stage and proceed to discovery to "disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."[49]

The *Conley* Court then articulated the pleading standard for complaints: "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."[50] The Supreme Court routinely reaffirmed the *Conley* standard and twenty-seven jurisdictions subsequently adopted it as their standard for dismissal of complaints.[51] As recently as 2002, the Supreme Court again endorsed the standard in *SEC v. Zandford*,[52] noting that the court must "assume the allegations contained therein are true and [dismiss a complaint] only if no set of facts would entitle petitioner to relief."[53]

B. Twombly *and* Iqbal*: Plausibility as the Gatekeeper to the Federal Courts*

Beginning with *Twombly* and culminating in *Iqbal*, the Supreme Court departed from the standard espoused in *Conley* and introduced plausibility as the standard for pleading complaints. *Twombly* and *Iqbal* not only represent a change in the complaint pleading standard, but also a shift in the understanding of the role of pleading and access to courts.[54] The underlying concern of the Court in both *Twombly* and *Iqbal* centered on administrative functions, namely upholding an efficient and meritorious admission process to the federal courts.[55]

48. *Id.*

49. *Id.*

50. *Id.* at 45–46.

51. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 577 n.4 (2007) (Stevens. J., dissenting) (listing sixteen Supreme Court decisions citing to *Conley* as authority); *see also id.* at 578 n.5 (identifying twenty-six States and the District of Columbia adopting the *Conley* standard as their standard for dismissal of complaints).

52. 535 U.S. 813 (2002).

53. *Id.* at 818 (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993) (Scalia, J., concurring in part and dissenting in part)). The Supreme Court overturned the prior decision by the Court of Appeals for the Fourth Circuit because the court applied the wrong standard when determining whether to dismiss a complaint. *Id.*

54. *See infra* Part I.B.1.b.

55. *See infra* Part I.B.1.b.

1. Bell Atlantic Corp. v. Twombly*: A Move to Plausibility*

The *Twombly* Court repudiated notice pleading, stating that conclusory statements and the "formulaic recitation of the elements of a cause of action" were insufficient.[56]

a. Application of the Conley *Standard*

The plaintiffs in *Twombly* alleged a violation of Section One of the Sherman Act[57] against certain Incumbent Local Exchange Carriers ("ILECs").[58] The complaint alleged that the companies "conspired to restrain trade" with local telephone and high-speed internet services by "engag[ing] in parallel conduct" and entering into agreements to "refrain from competing against one another."[59] The United States District Court for the Southern District of New York initially dismissed the complaint for failure to state a claim upon which relief can be granted.[60] The district court concluded that to meet a conspiracy claim under the Sherman Act, the plaintiffs "must allege additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'"[61] The Court of Appeals for the Second Circuit reversed, finding the district court should have examined the complaint under *Conley* and dismissed the complaint only if "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[62]

b. Development of the Plausibility Standard

The Supreme Court found that the plaintiffs did not provide any factual allegations demonstrating evidence of anything more than independent, parallel conduct and as such, the complaint did not sufficiently

56. *Twombly*, 550 U.S. at 555.

57. *Id.* at 550 ("[W]hich prohibits [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." (citing 15 U.S.C. § 1)).

58. *Id.* at 549–50.

59. *Id.* at 551. The complaint stated that the ILECS "allegedly control ninety percent or more of the market for local telephone service in the forty-eight contiguous States," *id.* at 550 n.1, and alleged that the ILECs "engaged in parallel conduct . . . to inhibit the growth of upstart CLECs [Competitive Local Exchange Carriers]" by making unfair agreements with the CLECs that provided "inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLEC's relations with their own customers." *Id.* at 550.

60. *Id.* at 552. The District Court stated that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement" but "this circumstantial evidence . . . [of] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003).

61. *Twombly*, 313 F. Supp. 2d at 179.

62. *Twombly*, 550 U.S. at 553 (emphasis added) (quoting Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114 (2d Cir. 2003)).

allege conspiracy in violation of the Sherman Act and was dismissed.[63] Discussing the standard that should apply to complaints, the *Twombly* Court expressed that "bare assertions" or "mere[] legal conclusions" could not suffice for factual allegations because something more was needed to demonstrate not just that the plaintiffs' allegations were probable, but plausible.[64] As such, the Court developed the plausibility standard, which requires a plaintiff to plead enough facts to "state a claim for relief that is plausible on its face."[65] The Court further argued that the plausibility standard better reflects the *showing* requirement for complaints articulated in Rule 8(a)(2) which requires that "the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[66]

The *Twombly* Court emphasized several administrative purposes prompting the adoption of the plausibility standard, namely discouraging frivolous lawsuits, preventing discovery abuse, and effectively managing caseloads.[67] The Court reasoned that this "heightened" plausibility standard better prevented frivolous lawsuits by exposing the deficiency of a complaint at the "point of minimum expenditure of time and money by the parties and by the court."[68] In addition, the Court worried that these baseless claims proceeding past the complaint stage would constitute a threat of litigation prompting defendants to reach settlements in order to avoid the cost of litigation.[69] This potential for discovery abuse required the Court to "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[70] The *Twombly* Court also questioned the capability of a judge to truly weed out frivolous cases via case management.[71] Since the parties develop the legal claims and

63. *Id.* at 566. The conduct of the ILECs could be "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy." *Id.* at 554.

64. *Id.* at 555—57.

65. *Id.* at 570. The Court further clarified that it did not require "heightened fact pleading of specifics," but just enough facts to demonstrate that a complaint is plausible on its face. *Id.*

66. *Id.* at 557 (quoting FED. R. CIV. P. 8(a)(2)).

67. *Id.*

68. *Id.* at 558 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1216 at 233–34 (3d. ed. 2004)). This deficiency includes not only complaints which do not allege enough factual matter to determine if entitlement to relief is plausible, but also complaints whose factual allegations, although true, could not "raise a claim to entitlement of relief." *Id.*

69. *Id.* at 557–58. Particularly in the context of antitrust cases, like that in *Twombly*, the Court worried that these baseless claims would be allowed "to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 558 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

70. *Id.* at 558 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983)). An additional concern regarding discovery abuse ties into the issue of case management, that the "success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

71. *Id.* at 559.

conduct discovery themselves, the judge is often not aware of all of the details of the case that will be presented.[72] This leaves the judge unable to "prevent what [he] cannot detect," and thus unable to prevent abusive discovery because he lacks the "essential information" of the case.[73]

The Court finally retired *Conley's* "no set of facts" language, stating that the phrase is "best forgotten as an incomplete, negative gloss on an accepted pleading standard."[74] The *Twombly* Court further suggested that the "literal terms" of *Conley* were never accepted nor intended as a complaint pleading standard.[75] The Court concluded that *Conley* described the "breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[76]

c. Concern Regarding the Adoption of the Plausibility Standard

Justice Stevens authored a strong dissent, in which he expressed concern with the departure from existing precedent and possible consequences emanating from the shift to the plausibility standard.[77] He addressed the break from precedent, noting the majority's sudden retirement of *Conley* as the "dramatic departure from settled procedural law."[78] Justice Stevens also called into question the majority's account of *Conley* as "puzz[ling] the profession for [fifty] years."[79] He noted that *Conley* is cited as authority in a dozen Supreme Court decisions[80] and deemed this "opinion [as] the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation."[81]

Next, Justice Stevens argued that *Conley* must be read in light of the Federal Rules and the subsequent evolution from code pleading to notice

72. *Id.* "The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find." *Id.* at 560 n.6 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)).

73. *Id.* at 560.

74. *Id.* at 563.

75. *See id.* at 562 (noting many judges and commentators "balked" at the literal interpretation of *Conley* as a pleading standard).

76. *Id*. at 563. The Court also argued that this reading of *Conley* is more in line with prior Supreme Court precedent. *Id*. at n.8.

77. *Id.* at 570–97 (Stevens, J., dissenting).

78. *Id.* at 573. Justice Stevens also noted that "[p]etitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of the petitioners." *Id*. at 579.

79. *Id.* at 577 (quoting *id.* at 563 (majority opinion)).

80. *Id.* at 577 n.4 (Stevens, J., dissenting) (listing sixteen Supreme Court opinions and four separate writings that cited to *Conley* as authority).

81. *Id.* at 578.

pleading.[82] "*Conley's* language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts."[83] Justice Stevens suggests that the *Conley* standard already accomplishes precisely what the Court attempts to do with plausibility; it describes "the minimum standard of adequate pleading to govern a complaint's survival."[84]

Resolute in defending the *Conley* standard, Justice Stevens declared "[i]f *Conley's* 'no set of facts' language is to be interred, let it not be without a eulogy."[85] He emphasized that a large number of jurisdictions, twenty-six states, and the District of Columbia adopted the language of *Conley* as their standard for dismissal of a complaint.[86] Inherent in Justice Stevens's dissent is the concern regarding the implications of this sudden shift in pleading standards. In light of the extensive and long-standing precedent with *Conley*, Justice Stevens lamented that "[he] would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so."[87]

The *Twombly* decision marked the beginning of a departure from the established notice pleading regime and *Conley* standard. The *Twombly* Court focused on ensuring that only meritorious claims would make it to the courtroom through effective case management, and thus adopted a new standard of plausibility for complaints.[88] As a result, plaintiffs must now plead enough factual allegations within the complaint to "state a claim for relief that is plausible on its face."[89]

2. Ashcroft v. Iqbal*: Clarification and Expansion of Plausibility*

Two years later, in *Iqbal*, the Supreme Court affirmed the plausibility standard for pleading complaints established in *Twombly* and further clarified the standard by articulating a two-prong method of analysis.[90]

a. A Request for Clarification

The plaintiff in *Iqbal* faced charges of fraud in relation to his identification documents and was under investigation as a person of "high

82. *Id.* at 573–83. "[A]s the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts." *Id.* at 580.

83. *Id.* at 583.

84. *Id.* at 580 (quoting *id.* at 563 (majority opinion)).

85. *Id.* at 577.

86. *Id.* at 578 n.5 (listing the twenty-six state opinions that adopted the *Conley* standard for dismissal of a complaint).

87. *Id.* at 579. Justice Stevens further notes that there is an existing process to make these sorts of revisions through Congress and 28 U.S.C. §§ 2072–74. *Id.*

88. *See supra* note 68 and accompanying text.

89. *See supra* note 65 and accompanying text.

90. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

interest" in relation to the September 11, 2001 attacks.[91] The plaintiff claimed that while he was being investigated he was subject to harsh conditions of confinement, based solely on account of his "religion, race, or national origin."[92] The plaintiff brought claims against a number of government officials for alleged deprivations of constitutional protections while in federal custody.[93]

In the United States District Court for the Eastern District of New York, the defendants filed a motion to dismiss the complaint for failure to state sufficient allegations demonstrating their personal involvement in the treatment of the plaintiff in order to defeat a defense of qualified immunity.[94] The district court denied the motion, and, relying on *Conley*, found the plaintiffs "alleged sufficient facts to warrant discovery as to the defendants involvement."[95] The defendants then filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit.[96] The Supreme Court decided *Twombly* while this appeal was pending, thus the Court of Appeals for the Second Circuit first considered how to apply the *Twombly* plausibility standard.[97] The court of appeals concluded that *Twombly* set out a "flexible plausibility standard" and only required a pleader to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[98]

The court of appeals found that the "context" of the appeal in this case did not require amplification and thus held that the plaintiff's complaint adequately alleged the defendants personal involvement.[99] However, the court of appeals urged the Supreme Court to "address the appropriate pleading standard 'at the earliest opportunity.'"[100] The Supreme Court

91. *Id.* at 667.

92. *Id* at 668–69. The plaintiff's claims included being physically accosted by federal corrections officers who prevented him from practicing his religion, by refusing to let him pray. *Id*. at 668.

93. *Id.* at 668. The plaintiff "filed a *Bivens* action in the United States District Court for the Eastern District of New York against thirty-four current and former federal officials and nineteen 'John Doe' federal corrections officers." *Id.* The plaintiff further named the former Attorney General of the United States, John Ashcroft, and the Director of the Federal Bureau of Investigations, Robert Mueller, in the complaint and alleged they "knew of, condoned, and willfully and maliciously agreed to subject" plaintiff to the harsh conditions during his detention. *Id.*

94. *Id.* at 669 (quoting Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 LEXIS 21434, *51–52 (S.D.N.Y. Sept. 25, 2005)).

95. *Elmaghraby*, 2005 LEXIS 21434, at *68. The Court also noted the "[p]laintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants' involvement is peculiarly within their knowledge." *Id*.

96. *Iqbal*, 556 U.S. at 669.

97. *Id.* at 669–70.

98. *Id.* at 670 (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).

99. *Id.* (quoting *Iqbal*, 490 F.3d at 174).

100. *Id.* (citing *Iqbal*, 490 F.3d at 178 (Cabranes, J., concurring)).

granted certiorari to clarify the plausibility standard articulated in *Twombly*.[101]

b. Further Articulation of the Plausibility Standard

The Court first clarified the *Twombly* standard by providing a clearer understanding of the meaning of "plausibility." For a claim to have facial plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[102] A complaint must plead facts that are more than "'merely consistent with' a defendant's liability" in order to cross the line from probability to plausibility that the "defendant has acted unlawfully."[103] Finally, the Court further confirmed that the decision in *Twombly* "expounded the [complaint] pleading standard for 'all civil actions.'"[104] With that, the *Iqbal* Court put the final nail in the coffin for *Conley's* "no set of facts" standard.

Next, the Court provided a two-prong approach to determine the sufficiency of a complaint under the plausibility standard.[105] First, a court must distinguish between well-pleaded factual allegations and legal conclusions.[106] As only factual allegations are entitled to the "presumption of truth," "legal conclusions can provide the framework of the complaint, [but] they must be supported by factual allegations."[107] Second, a court must determine whether the factual allegations "plausibly give rise to an entitlement of relief."[108] The Court clarified that this is a "context-specific task," which requires "the reviewing court to draw on its judicial experience and common sense" to determine if the complaint rises to this level.[109]

Akin to the reasoning articulated by the *Twombly* Court, the Court in *Iqbal* relied on the Federal Rules and case management concerns to support

101. *Id.*

102. *Id.* at 678 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). In this case, the Court found that the complaint did not "contain any factual allegation sufficient to plausibly suggest [defendants'] discriminatory state of mind." *Id.* at 684.

103. *Id.* (quoting *Twombly*, 550 U.S. at 557). Rather, the Court determined the complaint's "only factual allegation against [defendants Ashcroft and Mueller] accuses them of adopting a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were cleared by the FBI." *Id.* at 683. The complaint did not provide factual content to "nudge his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

104. *Id.* at 684. The Court made clear that the plausibility standard was not limited solely to claims of antitrust or discrimination suits like those seen in *Twombly* and *Iqbal*. *Id.*

105. The Court provided this analysis in the context of what is necessary for a complaint to survive a motion to dismiss. *Id.* at 678–79.

106. *Id.* at 679 (citing Iqbal v. Hasty, 490 F.3d. 143, 157–78 (2d Cir. 2007)).

107. *Id.* at 679. The Court further stated that courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555).

108. *Id.* at 679.

109. *Id.* at 678–79.

the plausibility standard.[110] The Court confirmed that the *Twombly* decision was "based on our interpretation and application of Rule 8," which requires a showing that the pleader was entitled to relief.[111] Again, the Court rejected the "careful-case-management approach," arguing that a "motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."[112] Further supporting concerns of effective case management, the Court again noted the limited role and success of judicial supervision in averting discovery abuse.[113]

c. Apprehension Regarding the Practical Application of the Plausibility Standard

Justice Souter authored a dissent in which he argued the majority misapplied the *Twombly* pleading standard.[114] Justice Souter contended that *Twombly* does not require a court to consider whether the allegations in the complaint are probably true, but rather "that a court must take the allegations as true, no matter how skeptical the court may be."[115] He articulated that "[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[116]

Justice Breyer joined in Justice Souter's dissent, but wrote separately to voice his concern over the emphasis the majority placed on preventing "unwarranted litigation" from interfering with the work of the Government.[117] He noted that trial courts have "other legal weapons designed to prevent unwarranted interference."[118] Justice Breyer concluded that he is not convinced by the majority opinion that these "alternative case-

110. *Id.* at 684–87.

111. *Id.* at 678–79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

112. *Id.* at 684–85. The plaintiff argued that the court of appeals instructed the district court to conduct minimally invasive discovery in order to "preserve the [defendant's] defense of qualified immunity" while determining the defendant's personal involvement in the treatment of the plaintiff. *Id.* at 684.

113. *Id.* at 685 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007)).

114. *Id.* at 687–99 (Souter, J., dissenting).

115. *Id.* at 696. Justice Souter ultimately determined "there is no principled basis for the majority's disregard of the allegations linking [defendants] Ashcroft and Mueller to their subordinates' discrimination." *Id.* at 698.

116. *Id.*

117. *Id.* at 699 (Breyer, J., dissenting). Justice Breyer found the majority incorrectly interpreted *Twombly* and Federal Rule 8 to prevent unwarranted litigation in the context of this case, with government officials. *Id.* at 699–700.

118. *Id.* at 700. Specifically, the trial court can "structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." *Id.*

management tools [are] inadequate, either in general or in the case before us."[119]

C. The Unknown Extent of the Plausibility Standard in the Universe of Pleadings

In the wake of *Twombly* and *Iqbal*, federal courts regularly apply the plausibility standard to complaints.[120] Courts have not, however, consistently applied the plausibility standard to affirmative defenses.[121] Neither the Supreme Court nor any court of appeals has yet to address this issue.[122] Presently, there is no consensus on the issue among the lower courts; a split exists within some circuits[123] and even within individual district courts.[124] The United States District Court for the District of Maryland ("U.S. District Court for Maryland") demonstrates this split, with the inconsistent application of the "heightened" plausibility standard to affirmative defenses.[125] Part I.C.1 discusses what is considered the "majority approach" within the U.S. District Court for Maryland, which applies the standard to affirmative defenses.[126] Part I.C.2 discusses the "minority approach," which declines to extend the standard to affirmative defenses.[127]

1. The Majority Stance: The Plausibility Standard Applies to Affirmative Defenses

The majority approach within the U.S. District Court for Maryland applies the reasoning of *Twombly* and *Iqbal* to require the heightened standard for affirmative defense pleadings.[128] First, the majority argues that

119. *Id.*

120. Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532, 535 (D. Md. 2010); LBCMT 2007-C3 Urbana Pike, LLC v. Sheppard, 302 F.R.D. 385, 387 (D. Md. 2014); Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 119, 121 (D. Mass. 2012); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 690 (N.D. Ohio 2010).

121. *See infra* notes 123–124 and accompanying text.

122. *Hansen*, 287 F.R.D. at 122; EEOC v. Joe Ryan Enters., 281 F.R.D. 660, 662 (M.D. Ala. 2012); *LBCMT 2007-C3 Urbana Pike*, 302 F.R.D. at 387.

123. *Compare* Racick v. Dominion Law Assocs., 270 F.R.D. 228, 234 (E.D.N.C. 2010) (applying *Twombly* and *Iqbal* to affirmative defenses), *with* Lockheed Martin Corp. v United States, 973 F. Supp. 2d, 591, 595 (D. Md. 2013) (declining to apply *Twombly* and *Iqbal* to affirmative defenses).

124. *Compare Bradshaw*, 725 F. Supp. 2d at 533 (finding *Twombly* and *Iqbal* apply to affirmative defenses), *with Lockheed Martin Corp.*, 973 F. Supp. 2d at 595 (holding *Twombly* and *Iqbal* do not apply to affirmative defense pleadings); *LBCMT 2007-C3 Urbana Pike, LLC*, 302 F.R.D. at 387 (finding *Twombly* and *Iqbal* do not apply to affirmative defenses).

125. *See supra* note 124 and accompanying text.

126. *See infra* Part I.C.1.

127. *See infra* Part I.C.2.

128. Hammer v. Peninsula Poultry Equip. Co., Civil Action No. 12-1139, 2013 WL 97398 (D. Md. Jan. 8, 2013); *Bradshaw*, 725 F. Supp. 2d at 532; Aguilar v. City Lights of China Rest., Inc.,

the plausibility standard better addresses administrative concerns, most notably efficient case management.[129] Second, in the context of affirmative defenses, the plausibility standard better ensures fairness in the litigation process.[130] Third, in light of Rule 8, the plausibility standard should extend to all pleadings in order to provide a consistent standard.[131]

Courts adopting this approach argue that extending the "heightened" plausibility standard promotes litigation efficiency by discouraging the assertion of boilerplate affirmative defenses.[132] Furthermore, that prevention of boilerplate affirmative defenses will minimize discovery abuse.[133] In *Aguilar v. City Lights of China Restaurant*[134] the defendant pleaded five affirmative defenses[135] in response to the complaint, without any articulation of the factual basis for the defenses.[136] The court struck four of the defenses, noting specifically that the majority of the defenses set "forth conclusory legal statements wholly devoid of any supporting factual content."[137] The court noted that the effect of these boilerplate defenses is to "clutter the docket and . . . create unnecessary work," which then results in opposing counsel conducting "unnecessary discovery."[138] Requiring some statement of the ultimate facts underlying the defense promotes litigation efficiency, while preventing the "unnecessary discovery that troubled the Supreme Court in *Twombly* and *Iqbal*."[139]

Tied with this concern of boilerplate assertions is the interest of fairness to the plaintiff. Notably, one of the fundamental purposes of

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Civil Action No. 11-2416, 2011 WL 5118325 (D. Md. Oct. 24, 2011); Ulyssix Techs. Inc. v Orbital Network Eng'g, Inc., Civil No. 10-02091, 2011 WL 631145 (D. Md. Feb. 11, 2011); Barry v. EMC Mortgage, Civil No. 10-3120, 2011 WL 4352104 (D. Md. Sep. 15, 2011); Blind Indus. and Serv. of Md. v. Route 40 Paintball Park, Civil No. 11-3562, 2012 WL 2946688 (D. Md. July 17, 2012); Alston v. Equifax Info. Serv., LLC, Civil No. 13-934, 2014 WL 580148 (D. Md. Feb. 11, 2014); Topline Sol., Inc. v. Sandler Sys., Inc., Civil No. L-09-3102, 2010 WL 2998836 (D. Md. July 27, 2010).

129. *See infra* note 132 and accompanying text.

130. *See infra* notes 142–144 and accompanying text.

131. *See infra* text accompanying note 145.

132. *Bradshaw*, 725 F. Supp. 2d at 536 ("The application of the *Twombly* and *Iqbal* standard to defenses will also promote litigation efficiency and will discourage defendants from asserting boilerplate affirmative defenses.").

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

134. Civil Action No. 11-2416, 2011 WL 5118325 (D. Md. Oct. 24, 2011) (Chasanow, J.).

135. Including (1) accord and satisfaction; (2) estoppel, (3) laches, (4) payment/offset, and (5) fraud. *Id.* at *1.

136. Answer at 3, Aguilar v. City Lights of China Rest., Inc., No. 8:11-CV-02416 (D. Md. Sept. 22, 2011).

137. *Aguilar*, 2011 WL 5118325 at *4. The Court struck the fraud defense because it failed to satisfy the pleading standard set forth under Rule 9(b). *Id.* at *4.

138. *Id.* at *2 (alteration in original) (quoting *Bradshaw*, 725 F. Supp. 2d at 536).

139. *Id.* at *4.

pleading is to provide notice.[140] As such, applying the plausibility standard to affirmative defenses provides the opposing party with notice of the factual basis for the assertion.[141] Furthermore, disclosing the factual basis at this juncture provides "proper notice of defenses in advance of the discovery process and trial."[142] This approach suggests that the plausibility standard better promotes the interests of fairness and consistency by allowing the plaintiff to shape litigation strategy and discovery within the framework of this defense.[143] Additionally, courts adopting this approach argue that the interest of fairness is not achieved when different standards result in different requirements for each party, specifically, where the plaintiff is required to operate under one standard, while the defendant is permitted to "operate under a different, less stringent standard."[144]

The majority further supports the extension of the plausibility standard to the entirety of Rule 8, noting that "although *Twombly* and *Iqbal* specifically addressed the sufficiency of a complaint under Rule 8(a), the [Supreme] Court likely did not intend to confine its holdings to complaints alone."[145] In *Barry v. EMC Mortgage*,[146] the court noted that while the language of Rule 8(a) and 8(b) are not identical, there is "important textual overlap, with both subsections requiring a 'short and plain statement' of the claim or defense."[147] The *Barry* court found that five of the defendant's affirmative defenses failed to meet these requirements because "[e]ach of those defenses set forth conclusory legal statements wholly devoid of any factual content to support them."[148] The court concluded the defenses did not "set forth in 'short and plain' terms the nature of the asserted defense and [thus] violate[d] Rule 8's general pleading requirements."[149] Based on the similar language within the subsections of Rule 8 and interpretation of pleading practices under this Rule in *Twombly* and *Iqbal*, the majority contends the plausibility standard should extend to all of Rule 8, including affirmative defenses.

140. *See supra* Part I.A.

141. *Bradshaw*, 725 F. Supp. 2d at 536.

142. *Id.* The Court also noted that "the extension of these pleading requirements will not unduly hamstring a party's ability to mount a thorough and vigorous defense." *Id.*

143. *Id.*

144. Topline Sol., Inc. v. Sandler Sys., Inc., Civil No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010).

145. Aguilar v. City Lights of China Rest., Inc., Civil No. 11-2416, 2011 WL 5118325, at *4 (D. Md. Oct. 24, 2011).

146. Civil No. 10-3120, 2011 WL 4352104 (D. Md. Sep. 15, 2011) (Chasanow, J.).

147. *Barry*, 2011 WL 4352104 at *3.

148. *Id.* at *5. The affirmative defenses included (1) good faith compliance, (2) estoppel, (3) release, (4) statute of frauds, and (5) waiver. *Id.* at *4–5.

149. *Id.* at *5.

2. The Minority Stance: Declining to Extend the Plausibility Standard to Affirmative Defenses

An outspoken minority within the U.S. District Court for Maryland have declined to extend the plausibility standard to affirmative defenses.[150] Their approach notes a principal concern with overextending the *Twombly* and *Iqbal* decisions and thus overstepping the Supreme Court.[151] Furthermore, the minority approach argues the concerns articulated in *Twombly* and *Iqbal*, regarding effective case management and fairness to the parties, do not apply in the realm of affirmative defenses.[152] Finally, the minority relies on the plain language of Rule 8 to further demonstrate that complaints and affirmative defenses should not be held to the same standard.[153]

The minority approach emphasizes the concern that *Twombly* and *Iqbal* only address the pleading standard for complaints under Rule 8(a)(2).[154] As such, extending the plausibility standard to the rest of the subsections of Rule 8 and all pleadings goes beyond the holdings of these decisions.[155] In *Lockheed Martin Corp. v. United States*,[156] the court argued it was "unlikely that the Supreme Court 'would have ushered in such a radical change in legal landscape *sub silentio.*'"[157] Thus, the lack of any discussion of affirmative defenses within *Twombly* or *Iqbal* led the *Lockheed* court to determine that the Supreme Court did not intend, nor consider, whether the "heightened" plausibility standard applied to affirmative defenses.[158]

Additionally, the minority approach argues the policy concerns articulated in *Twombly* and *Iqbal* are not furthered by the application of the "heightened" plausibility standard to affirmative defenses. The differences between the functions of an initiatory pleading, such as complaints, and a responsive pleading, such as affirmative defenses, implicate distinctive

150. It is interesting to note that while there are fewer decisions by the U.S. District Court for Maryland declining to apply *Twombly* and *Iqbal* to affirmative defenses, these decisions are more recent and contain a greater number of published decisions. *Compare* Lockheed Martin Corp. v. United States, 973 F. Supp. 2d 951 (D. Md. 2013); LBCMT 2007-C3 Urbana Pike, LLC v. Sheppard, 302 F.R.D. 385 (D. Md. 2014) (declining to extend *Twombly* and *Iqbal* to affirmative defenses), *with* cases cited *supra* note 128 (concluding *Twombly* and *Iqbal* do apply to pleading affirmative defenses).

151. *See infra* text accompanying notes 154–155.

152. *See infra* text accompanying note 159.

153. *See infra* text accompanying notes 169–175.

154. *See* text accompanying *supra* note 66.

155. *Lockheed Martin Corp.*, 973 F. Supp. 2d at 594.

156. 973 F. Supp. 2d 591 (D. Md. 2013) (Williams, Jr., J.).

157. *Id.* at 594 (quoting Rosa v. Bd. of Educ. of Charles Cty, Md., Civil Action No. 8:11-cv-02873, 2012 WL 3715331, at *10 (D. Md. Aug. 27, 2012)). *Sub silentio* meaning "under silence; without expressly being mentioned." BLACK'S LAW DICTIONARY 1656 (10th ed. 2014).

158. *Lockheed Martin Corp.*, 973 F. Supp. 2d at 594.

approaches when addressing these policy concerns.[159] First, with affirmative defenses, the minority approach argues the concerns regarding effective case management and preventing frivolous litigation are better dealt with through discovery and existing procedural safeguards.[160] The court addressed this incompatibility in *Lockheed Martin Corp.*, suggesting that discovery is the more appropriate venue for case management concerns with affirmative defenses.[161] The *Lockheed* Court noted that "while the presence of boilerplate affirmative defenses could make more material relevant to a party's claim or defense, courts presumably could consider a defense's conclusory nature when ruling on the discovery request."[162] The Court further concluded "judicial economy and equity depend on screening complaints more than they do on screening affirmative defenses."[163] Moreover, this approach notes the existence of safeguards like Rule 11,[164] which discourages the pleading of boilerplate affirmative defenses since defendants "are still held to a basic standard of accountability for the contents of their court papers."[165]

Second, courts argue that the concerns regarding fairness for the plaintiff in the majority approach preclude any consideration of the interests of fairness to the defendant. Federal Rule 12 provides a twenty-one day window of time in which the defendant must answer the complaint.[166] This shorter window of time puts defendants at a disadvantage to "determine and plead affirmative defenses" in contrast to the longer amount of time that plaintiffs have "to develop the facts that should be pled to support their complaint."[167] The minority approach suggests that applying the plausibility standard and requiring a defendant to assert factual allegations

159. *Id.* at 595 ("[A]ffirmative defenses do not invoke the jurisdiction of the court and, at least technically, do not expose plaintiffs to liability.").

160. *Id.*

161. *Id.* at 594–95.

162. *Id.* at 595.

163. *Id.* at 595 (citing Tiscareno v. Frasier, No. 2-07-CV-336, 2012 WL 1377886, at *15 (D. Utah Apr. 19, 2012)).

164. FED. R. CIV. P. 11 governs representations made to the court and requires that: "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). The rule also requires that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3).

165. LBCMT 2007-C3 Urbana Pike v. Sheppard, 302 F.R.D. 385, 388 (D. Md. 2014).

166. FED. R. CIV. P. 12(a)(1)(A).

167. *Lockheed Martin Corp.*, 973 F. Supp. 2d at 594 (quoting Sprint Nextel Corp. v. Simple Cell, Inc., No. 13-617, 2013 WL 3776933, at *9 n.6 (D. Md. Apr. 19, 2012)). "Rule 8(a)'s more demanding principle is better applied to claimants who have had significant time to craft their claims." *LBCMT 2007-C3 Urbana Pike*, 302 F.R.D. at 387.

to support the stated defense "unfairly places on them too substantial a burden too early in the litigation process."[168]

Finally, courts argue the textual differences between the provisions of Rule 8 cannot support the application of one standard to all the provisions.[169] The Court in *LBCMT 2007-C3 Urbana Pike v. Sheppard*[170] stated "it is reasonable to interpret the wording of Rule 8(b) and (c) . . . differently from the interpretation given by the Supreme Court to the distinctive wording of Rule 8(a) applicable to claims for relief."[171] Rule 8(a)(2) requires a "short and plain statement *showing* the plaintiff is entitled to relief."[172] While Rule 8(b) requires a party to "state in short and plain terms its defenses" and "admit or deny the allegations."[173] Similarly, under Rule 8(c)(1) when pleading an affirmative defense, a party is only required to "affirmatively state any avoidance or affirmative defense."[174] The court in *Lockheed Martin Corp.* declared "[i]t would be anomalous if Rule 8(b) allowed parties to generally deny the allegations in the complaint yet [under Rule 8(c)(1)] required them to plead facially plausible affirmative defenses."[175] This approach relies on the differences in the language between pleading standards for complaints and defenses to illustrate the incompatibility between the "heightened" plausibility standard and affirmative defenses.[176]

II. ANALYSIS

As economist Frédéric Bastiat once noted, there is a crucial distinction between effects that are "seen" and those that are "unseen:"

> Of these effects, the first only is immediate; it manifests itself simultaneously with its cause—*it is seen*. The others unfold in succession—*they are not seen*: it is well for us if they are *foreseen* . . . this constitutes the whole difference—the one takes account of the *visible* effect; the other takes account both of the

168. *LBCMT 2007-C3 Urbana Pike*, 302 F.R.D. at 387.

169. *Id.*

170. 302 F.R.D. 385 (D. Md. 2014) (Bredar, J.).

171. *Id.* at 387.

172. FED. R. CIV. P. 8(a)(2) (emphasis added). As noted by the Court in *Twombly*, "showing" is the key term, indicating that the plaintiff must provide factual allegations demonstrating that the pleader is entitled to relief. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).

173. FED. R. CIV. P. 8(b)(1). The *Lockheed* court also noted that although FED. R. CIV. P. 8(b)(3) does not mention affirmative defenses, a party is allowed to generally deny all the allegations of a pleading. Lockheed Martin Corp. v. United States, 973 F. Supp. 2d 591, 594 (D. Md. 2013).

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

175. *Lockheed Martin Corp.*, 973 F. Supp. 2d at 594.

176. *Id.*; *LBCMT 2007-C3 Urbana Pike*, 302 F.R.D. at 387.

> effects which are *seen* and also of those which it is necessary to *foresee*.[177]

As Justice Stevens recognized, the adoption of the plausibility standard lacked examination of the unseen and thus "call[ed] into doubt the pleading rules . . . without far more informed deliberation as to the costs of doing so."[178] The cost in this case is the destabilization of pleading practices as demonstrated by the divide amongst the lower courts over the appropriate standard for affirmative defenses.[179]

In application, extending the "heightened" plausibility standard to affirmative defenses does not achieve the objectives articulated by the Court in *Bell Atlantic Corp. v. Twombly*[180] and *Ashcroft v. Iqbal*.[181] This extension to affirmative defenses resulted in a number of unintended consequences within pleading practices in the federal courts. First, there is a state of confusion regarding the governing standard causing uncertainty for defendants when pleading an affirmative defense.[182] Second, it hinders fairness in the litigation process by blocking defendants' access to discovery in order to completely develop the factual basis for these defenses.[183] Third, the heightened plausibility standard arguably causes an increase in wasteful pleading practices by engendering the use of "retaliatory" motions to strike.[184]

Furthermore, the decision to extend the "heightened" plausibility standard to affirmative defenses violates the Rules Enabling Act.[185] The federal district courts should refrain from extending the "heightened plausibility" standard without clarification from the Supreme Court.[186] As the Supreme Court and Rules Committees can provide clear guidance for all federal courts, the decision is better left to that venue.[187]

177. M. FREDERIC BASTIAT, *That Which Is Seen and That Which Is Not Seen, reprinted in* ESSAYS ON POLITICAL ECONOMY 49, 49 (New York, G.P. Putnam & Sons 3d ed., 1874).

178. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 579 (2007) (Stevens, J., dissenting).

179. *See supra* Part I.C.

180. 550 U.S. 544 (2007).

181. 556 U.S. 662 (2009).

182. *See infra* Part II.A.1.

183. *See infra* Part II.A.2.

184. *See infra* Part II.A.3.

185. *See infra* Part II.B.

186. *See infra* Part II.B.

187. *See infra* Part II.B.

A. The Application of Twombly *and* Iqbal *to Affirmative Defenses: An Ill-Fitting Result*

1. The Lack of a Consistent Standard Results in an Unclear Expectation for Defendants

The standard for pleading affirmative defenses varies, both by jurisdiction and even by judicial preference, making it difficult for defendants to knowledgably plead affirmative defenses. Furthering this confusion and uncertainty is the noted fluctuation in which approach is predominantly endorsed by courts.[188] In the immediate aftermath of *Twombly* and *Iqbal*, the majority of federal courts that addressed this issue decided in favor of the application of the plausibility standard to affirmative defenses.[189] However, a number of courts[190] and scholars[191] recently noted a shift in the trend of which approach is favored. For instance, in the U.S. District Court for Maryland, early decisions adopted the majority approach and favored extending the standard to affirmative defenses, but a number of recent decisions adopted the minority approach and declined to apply the standard.[192]

An additional factor muddying the waters for defendants is the impact of judicial preference in determining whether the standard applies.[193] As most opinions on the issue acknowledge, neither the Supreme Court nor any Court of Appeals have addressed this issue, leaving judges without established precedent to follow.[194] Thus, judges exercise their own

188. *See infra* notes 189–192 and accompanying text.

189. *See* Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d. 532, 536 (D. Md. 2010) (noting a "growing majority" of district courts apply *Twombly* and *Iqbal* to affirmative defenses); *see also* Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152, 165 (2013) (stating that the "emerging majority view" favors application of the standard to affirmative defenses).

190. *See* EEOC v. Joe Ryan Enters., 281 F.R.D. 660, 662 (M.D. Ala. 2012) (noting the growing minority of district courts to hold that *Twombly*/*Iqbal* does not apply to affirmative defenses); *see also* Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 119, 122 (D. Mass. 2012) (citing that a "majority of early cases applied the heightened standard, [but] this is now the minority approach").

191. *See* Peter M. Durney & Jonathan P. Michaud, *Fending off the Use of a Rule 12(f) Motion to Strike Affirmative Defenses*, DEF. COUNS. J., 438, 444 n.47 (Oct. 2012) (noting that an "increasing" number of district courts are declining to apply the standard to affirmative defenses); *see also* Stephen Mayer, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275, 275 (2013) (noting that initially a majority of district courts applied the plausibility standard, "but recently the courts that have declined to extend the plausibility standard have gained majority status").

192. *See supra* note 150.

193. *See* Miller, *supra* note 18, at 101 n.391 (noting that "[t]he main factor in determining whether a particular district court judge applies the plausibility standard to affirmative defenses appears to be his or her interpretation of *Twombly* and *Iqbal*").

194. *See supra* note 122 and accompanying text.

predilection regarding which standard applies.[195] This fluctuation and judicial predilection does not provide the defendant with a clear expectation when pleading an affirmative defense.

2. Promoting Fairness: Discovery Is the More Appropriate Venue to Shape the Bases of Affirmative Defenses

The interest in fairness demonstrates another area where the concerns espoused in *Twombly* and *Iqbal* do not align when applying the "heightened" plausibility standard to affirmative defenses. Critics of the minority approach argue that not extending the plausibility standard to affirmative defenses creates one pleading standard for plaintiffs and a less stringent pleading standard for defendants. However, this criticism again ignores the differences between initiatory and responsive pleadings. A primary purpose of pleading, specifically with complaints, is to provide "the defendant fair notice of what the claim . . . is and the grounds upon which it rests."[196] The pleading system inherently places a higher pleading burden on the plaintiff because the complaint invokes the jurisdiction of the court, exposing the defendant to liability and both parties to the time and expense of litigation.[197] In addition, existing procedures act as fail-safes and protect the plaintiff during the discovery process.[198] Affirmative defenses are still subject to review during the discovery process and, as with any defense that is baseless or has no merit, "there will be nothing . . . to discover or to litigate."[199]

Furthermore, the application of *Twombly* and *Iqbal* to affirmative defenses "discounts the fact that defendants usually have considerably less time to develop affirmative defenses than plaintiffs do claims for relief."[200] The Federal Judicial Center conducted a study analyzing the effect of *Twombly* and *Iqbal* on pleading practices.[201] The results show that

195. *See* Lockheed Martin Corp. v. United States, 973 F. Supp. 591, 593 (D. Md. 2013) (discussing how specific judges decided on the issue); *see also* LBCMT 2007-C3 Urbana Pike, LLC v. Sheppard, 302 F.R.D. 385, 387 (D. Md. 2014) (deciding to not apply the standard, in part, because of the reasoning of Judge Williams in *Lockheed Martin*).

196. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

197. *See supra* note 159 and accompanying text (discussing the functional difference between pleading complaints and defenses).

198. The court stated that parties can seek protective orders in response to "onerous discovery requests." Lockheed Martin Corp. v. United States, 973 F. Supp. 2d 591, 595 (D. Md. 2013). Additionally, defendants are still held to the standard of FED. R. CIV. P. 11, under which reciting a "litany of irrelevant and unsupported affirmative defenses" constitutes sanctionable conduct. LBCMT 2007-C3 Urbana Pike, LLC v. Sheppard, 302 F.R.D. 385, 387 (D. Md. 2014).

199. Sprint Nextel Corp. v. Simple Cell, Inc., Civil No. 13-617, 2013 WL 3776933, at *9 (D. Md. July 17, 2013).

200. *Lockheed Martin Corp*., 973 F. Supp. 2d at 594.

201. *See* Lee, III, *supra* note 5.

practitioners changed their pleading practices to conduct "[m]ore factual investigation prior to filing", include "more factual details in [the] complaint," and "[s]creen cases more carefully."[202] These changed practices imply more time necessary to complete these tasks before filing the complaint. In contrast, under Federal Rule 12, the defendant is given twenty-one days to develop the factual bases for the affirmative defenses, formulate the response, and submit the answer.[203]

When answering this critique of the shortened time frame for defendants to respond, courts that extend the plausibility standard to affirmative defenses rely on the availability of Rule 15.[204] Under Rule 15, a defendant may amend its pleading once as a matter of course within twenty-one days of serving it.[205] After the twenty-one day window passes, a defendant must seek consent from the opposing party or leave from the court to further amend its pleading.[206] These courts argue that under Rule 15, "a defendant may seek leave to amend its answers to assert any viable defenses that may become apparent during the discovery process."[207] Moreover, "trial courts liberally grant such leave" provided it does not result in "unfair prejudice to the opposing party."[208]

However, courts' focus on Rule 15 ignores the interplay of Rule 26 and the ability of the defendant to access worthwhile discovery materials to amend its defenses.[209] Under Rule 26(f), the parties are required to meet as soon as possible to confer about discovery.[210] The parties may not seek discovery until a Rule 26(f) conference takes place.[211] Yet, the defendant is still subject to Rule 12, which requires a defendant to answer within twenty-one days, and Rule 15(a)(1), which only grants leave to amend as a matter of course within twenty-one days after serving the answer.[212] As such, within this short timeframe created by Rule 12 and 15(a)(1), the Rule 26(f) conference may not have occurred, or if it has, little discovery exists for the

202. *Id.* at 8, 16.

203. FED. R. CIV. P. 12(a)(1)(A).

204. *See* Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532, 536–37 (D. Md. 2010) (stating the availability of Rule 15(a) allows a defendant to amend and add affirmative defenses as the factual bases becomes apparent during discovery).

205. FED. R. CIV. P. 15(a)(1)(A).

206. FED. R. CIV. P. 15(a)(2).

207. *Bradshaw*, 725 F. Supp. 2d at 536.

208. *Id.* at 536–37 (citing Zenith Radio Corp., v. Hazeltine Research, Inc., 401 U.S. 321 (1971)).

209. *See* Mayer, *supra* note 191, at 293–96 (discussing issues created by the application of the plausibility standard to affirmative defenses, regarding discovery and accordance with the Federal Rules of Civil Procedure).

210. And at least twenty-one days before the Rule 16(b) scheduling conference. FED. R. CIV. P. 26(f)(1).

211. FED. R. CIV. P. 26(d)(1). FED. R. CIV. P. 26(a)(1)(A) provides limited exceptions to this provision.

212. FED. R. CIV. P. 12; FED. R. CIV. P. 15(a)(1).

defendant to access and use in amending the answer.[213] Thus for the defendant to genuinely amend the answer, by incorporating the necessary factual basis to meet the plausibility standard for affirmative defenses, it is more likely defendants will be forced to request leave from the court under Rule 15(a)(2). In comparison to the time that plaintiffs may have to develop the factual basis for their complaints, without interference from the Court or in the face of opposition from the future defendant, the time frame allotted to the defendants is minimal.[214] The reliance on Rule 15 to ensure fairness for the defendant rings hollow in its practical application.

3. Incorporation of Plausibility with Affirmative Defenses Will Result in Cost and Delay Due to a Likely Increase in Motions to Strike

The application of the plausibility standard to affirmative defenses will likely lead to an increase in "retaliatory" motions to strike for failure to plead according to this standard. It is unclear if these "retaliatory" motions to strike will be successful as courts seem to focus more on demonstrating prejudice to the plaintiff than to the affirmative defense pleading standard when assessing a motion to strike.[215] The resulting increase in these motions illustrates how the efficiency concerns voiced in *Twombly* and *Iqbal* are not achieved by the application of the "heightened" plausibility standard to affirmative defenses.

a. The Likely Increase in Motions to Strike Will Lead to Inefficient Expenditure of Resources

With the application of *Twombly* and *Iqbal* to affirmative defenses, courts will likely experience a rise in the number of related dispositive motions, particularly motions to strike.[216] A motion to strike, under Rule 12(f), is a "procedural vehicle" for the plaintiff to attack affirmative defenses.[217] In the wake of major Supreme Court decisions, which establish

213. It is only after this Rule 26(f) conference that parties must make disclosures within fourteen days at or after the conference. FED. R. CIV. P. 26(a)(1)(C).

214. Lockheed Martin Corp. v. United States, 973 F. Supp. 2d 591, 594 (D. Md. 2013) ("For instance, in this case, Plaintiff requests a refund for taxes paid in 2004–2008. Yet Plaintiff did not file suit until 2013. Once Plaintiff filed suit, Defendant technically had sixty days to respond to the complaint.").

215. See *infra* Part II.A.3.b.

216. FED. R. CIV. P. 12(f) provides that: "[t]he 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."

217. *See* St. Eve & Zuckerman, *supra* note 189 at 170–71 (discussing the basis for a plaintiff to utilize a motion to strike an affirmative defense, including "(1) misdesignations (e.g. pleading a negative defense as an affirmative defense); (2) defective pleading (e.g. failure to comply with

a new understanding of dispositive motion standards, courts often see an increase in the filing of these motions thereafter.[218] This increase in motions practice creates "expensive and time-consuming procedural stop signs," inevitably causing more cost and delay.[219]

In the context of pleading practices, a major concern after *Twombly* and *Iqbal* was the impact on the use of motions to dismiss for failure to state a claim.[220] This concern prompted a study by the Federal Judicial Center to determine the impact of *Twombly* and *Iqbal* on the use of Rule 12(b)(6) motions.[221] The study found that motions to dismiss were more common after *Twombly* and *Iqbal*.[222] Additionally, the study estimated that the probability of a motion to dismiss being filed in an individual case increased, from 2.9% in 2006 to 5.8% in 2010.[223] While we await studies regarding the effect of *Twombly* and *Iqbal* on Rule 12(f) motions to strike, the likely result is the "proliferation of litigation under Rule 12(f)."[224]

The subsequent rise in motions to dismiss after *Twombly* and *Iqbal* also lead the judiciary to develop techniques to deal with this increased motions practice. For example, the Honorable Mark A. Goldsmith in the Unites States District Court for the Eastern District of Michigan noted that many motions to dismiss are "only fencing exercises" which result in the opposing party being granted leave to amend.[225] The result of this exercise is that parties spend "precious time and money briefing the issues and the

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Rules 8 and 9); and (3) legally insufficient pleading (e.g. pleading an affirmative defense that is not cognizable under the governing law)").

218. *See* Cecil, *supra* note 5 (finding an increase in motions for summary judgment in the wake of the Supreme Court trilogy of Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

219. *See* Miller, *supra* note 18, at 2, 49–53 (discussing the effects of *Twombly* and *Iqbal* in relation to the Federal Rules and function of the federal courts).

220. FED. R. CIV. P. 12(b)(6). Specifically, one author noted concern that the plausibility standard would result in greater use of motions to dismiss for failure to state a claim and cause meritorious claims to fail to reach discovery. Joe S. Cecil, et. al, *Motions to Dismiss for Failure to State a Claim After Iqbal, Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER 1 (Mar. 2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

221. *See* Cecil, *supra* note 220, at 1.

222. There was a 2.2% increase in filings of 12(b)(6) motions from 2005–2006 to 2009–2010. *Id.* at 8.

223. *Id.* at 10.

224. *See* St. Eve & Zuckerman, *supra* note 189, at 170. *Compare* Miller, *supra* note 18, at 103 n.396 (writing in 2010, that "[a]lthough affirmative defenses could be the subject of a Rule(f) motion to strike, plaintiffs rarely challenge them at the pleading stage. That could change, however"), *with* St. Eve & Zuckerman, *supra* note 189, at 171 (writing, in 2013, that "federal courts have seen a surge in litigation involving the second category—pleading defects—given the uncertainty about whether the plausibility test applies to affirmative defenses").

225. Hon. Mark A. Goldsmith, *Trial Practice: A Judicial Response To The* Iqbal *Revolution*, 94 MICH. B.J. 56, 56 (Sept. 2015).

court will have devoted its own limited resources addressing the motion."[226] Judge Goldsmith adopted his own practice to deal with motions to dismiss based on *Twombly* and *Iqbal*.[227] Even before a response is filed, he issues a preemptive order "giving the plaintiff leave to amend the challenged pleading within a specifi[ed] period."[228] While Judge Goldsmith's practice may help to conserve the time and resources of his court, it highlights the inefficient procedural game-playing that occurs with increased motions practice.

Similarly, this inefficient procedural game-playing will continue with the likely increase in motions to strike. Any increase in the burden of asserting an affirmative defense causes "cost and delay consequences" that must factor into any realization of efficiency with the plausibility standard.[229] In *Sprint Nextel Corp. v. Simple Cell*,[230] the plaintiff filed two motions to strike the defendants' nineteen affirmative defenses.[231] The court stated that going through the process of striking the defenses and giving the defendant leave to amend the answer to more completely state the basis of each defense, "will only delay the inevitable litigation of the merits."[232] The application of *Twombly* and *Iqbal* to affirmative defenses is inefficient, both from a case management perspective and for the resources expended to deal with the "retaliatory" motion to strike.

b. The Prejudice Required to Prevail on a Motion to Strike Is Not Met by Failure to Plead to the Plausibility Standard

The motion to strike is also generally disfavored, with "a relatively strict standard" and "liberal" leave to amend, suggesting its purpose as a "fencing exercise," rather than as a tool of effective case management.[233] In the Fourth Circuit, Rule 12(f)[234] motions are viewed with disfavor "because striking a portion of the pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic."[235] To prevail on a motion to strike an affirmative defense, "plaintiffs must demonstrate that they will

226. *Id.*

227. *Id.*

228. *Id.*

229. *See* Miller, *supra* note 18, at 102–03.

230. Civil No. 13-617, 2013 WL 3776933 (D. Md. July 17, 2013).

231. Answer to Complaint at 12–13, Sprint Nextel Corp. v. Simple Cell, Inc., No. 1:13-CV-0617 (D. Md. Mar. 20, 2013).

232. *Simple Cell*, 2013 WL 3776933 at *9.

233. Certain Underwriters at Lloyd's, London v. RJ Wilson Assocs., No. 11-1809, 2012 WL 2945489, at *5 (D. Md. July 17, 2012).

234. FED. R. CIV. P. 12(f). Federal Rule 12(f) states that a "court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Id.*

235. Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, 647 (2d ed. 1990)).

be prejudiced if the defense is not stricken."[236] Although the Court has "wide" discretion to strike an affirmative defense "in order 'to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial,'" "when affirmative defenses are stricken, the defendant should normally be granted leave to amend."[237]

When reviewing a motion to strike, courts seem to place emphasis on a showing of prejudice by the plaintiff, rather than the appropriate pleading standard for affirmative defenses.[238] In *Haley Paint Co. v. E.I. du Pont de Nemours & Co.*,[239] the court concluded *Twombly* and *Iqbal* applied to affirmative defenses and stated that a "defense may be excised if it does not meet the pleading requirements of Rules 8 and 9."[240] However, the *Haley* court still denied the motion to strike because the plaintiff did not articulate any prejudice that would occur from the denial of their motion.[241] In *Miller*, the court refrained from even considering if *Twombly* and *Iqbal* applied to affirmative defenses and denied the motion to strike because the plaintiff did not demonstrate prejudice.[242] Similarly, in *Certain Underwriters at Lloyd's, London v. RJ Wilson Associates*,[243] the court stated that "[e]ven if the [*Twombly*/*Iqbal*] pleading standards do apply, [the plaintiff] has not demonstrated prejudice in the event that this court denies their motion to strike."[244] Given this focus on whether prejudice will occur to the plaintiff, there is less emphasis on whether the defendant met the applicable pleading standard for affirmative defenses. The use of the pleading standard as the basis of a motion to strike an affirmative defense seems to be more of "dilatory tactic" than an effective procedural tool.[245]

B. District Courts' Extension of Twombly *and* Iqbal *to Affirmative Defenses Violates the Rules Enabling Act*

The Rules Enabling Act[246] empowers the Supreme Court to prescribe rules of practice and procedure in the federal courts.[247] The Act "delegated

236. Miller v. Live Nation Worldwide, Inc., Civil No. TDC-14-2697, 2015 WL 235553, at *3 (D. Md. Jan. 15, 2015).

237. Haley Paint Co. v. E.I. du Pont de Nemours & Co., 279 F.R.D. at 336 (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649 (D. Kan. 2009)).

238. *See infra* notes 241–244 and accompanying text.

239. 279 F.R.D. 331 (D. Md. 2012).

240. Haley Paint Co. v. E.I. du Pont de Nemours & Co., 279 F.R.D. 331, 336 (D. Md. 2012).

241. *Id.* at 337.

242. *Miller*, 2015 WL 235553, at *3.

243. No. CCB-11-1809, 2012 WL 2945489 (D. Md. July 17, 2012).

244. Certain Underwriters at Lloyd's, London v. RJ Wilson Assocs., Ltd., No. CCB-11-1809, 2012 WL 2945489, at *5 (D. Md. July 17, 2012).

245. Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001); *see supra* note 233 and accompanying text.

246. 28 U.S.C. §§ 2071–77.

247. *Id.* at § 2072(a).

the essential rulemaking function" to the Supreme Court.[248] Additionally, the provisions of the Act created a detailed process to make or amend a rule of practice.[249] The decision by district courts to extend the "heightened" plausibility standard beyond the arena of complaints as established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[250] and *Ashcroft v. Iqbal*[251] violates the Act. Additionally, the Supreme Court is a more appropriate venue for deciding this question and providing a uniform standard for all federal courts.

The Supreme Court in *Twombly* and *Iqbal* established the heightened plausibility standard for pleading complaints.[252] The Court interpreted the language of Rule 8(a)(2) "a short and plain statement of the claim *showing* that the pleader is entitled to relief" to require some factual basis within the pleading.[253] However, Rule 8(b)(1)(A) only requires a party to "state in short and plain terms its defenses to each claim asserted against it."[254] By extending this "heightened" pleading standard to defenses, specifically under Rule 8(c) for affirmative defenses, district courts have essentially rewritten the rule to include the "showing" language stated in Rule 8(a)(2).[255] The extension of the heightened plausibility standard to affirmative defenses interprets Rule 8(c) in a manner not deliberated by the Supreme Court in either *Twombly* or *Iqbal* and thus violates the Rules Enabling Act.[256]

"The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes."[257] The Rules Enabling Act contains provisions to create various committees to oversee the rulemaking process and ensure thorough

248. *Laws and Procedures Governing the Work of the Rules Committees*, *supra* note 6.

249. *Overview for the Bench, Bar, and Public*, USCOURTS.GOV, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Jan. 8, 2016).

250. 550 U.S. 544 (2007).

251. 556 U.S. 662 (2009).

252. *See supra* text accompanying notes 65, 90.

253. FED. R. CIV. P. 8(a)(2) (emphasis added). *See supra* text accompanying note 66.

254. FED. R. CIV. P. 8(b)(1)(A).

255. *See* Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10-CV-1218-JCC, 2011 WL 98573, at *2 (E.D. Va. Jan. 10, 2011) (finding the *Twombly* Court interpreted the language of Rule 8(a)(2) and therefore the *Lopez* court would not import that language to a "different rule that lacks that language"); *see also* Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 119, 122 (D. Mass. 2012) (determining the "drafters used different language in the sub-sections" of Rule 8 and the court was therefore "hesitant" to extend the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) to Rule 8(c)).

256. EEOC v. Joe Ryan Enters., 281 F.R.D. 660, 663 (M.D. Ala. 2012) ("The judiciary is commissioned to interpret the Rules as they are written, not to re-draft them when it may be convenient.").

257. *Overview for the Bench, Bar, and Public*, *supra* note 249.

review of any proposed amendments.[258] The Judicial Conference "continuously stud[ies] the operation and effect of the general rules of practice and procedure in the federal courts."[259] The Advisory Committee, meanwhile, evaluates proposals for amendments to rules and proposes drafts of amendments.[260] The decision regarding the scope of *Twombly* and *Iqbal* in the realm of pleadings is better left to these committees to analyze the effects on pleading in federal courts and propose suggestions to the Supreme Court.[261] As discussed, *supra*, two theories regarding the role, and access to, courts animate the dialogue regarding pleading standards.[262] As Arthur Miller, a prior member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, noted: "[u]ltimately, the Advisory Committee will have to reconcile the continuing viability of the values of 1938 with the realities of 2010, and find a way to uphold the principle of access and the other policy objectives underlying the original Rules while adjusting to contemporary litigation conditions."[263] Due to the significance of this decision, endorsing a particular theory regarding the role of courts and influencing subsequent judicial policies, the Supreme Court should provide resolution to the question of whether the plausibility standard extends to affirmative defenses or not.

III. CONCLUSION

The question of whether the "heightened" plausibility standard applies to affirmative defenses currently divides the lower federal courts. The inconsistent application of the standard to affirmative defenses results in a state of uncertainty regarding the pleading standard, and exemplifies an unforeseen consequence stemming from the adoption of this standard by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[264] and *Ashcroft v. Iqbal*.[265]

In the absence of clear guidance from the Supreme Court, lower courts should refrain from extending this standard to affirmative defenses in order to maintain a reliable standard, while also upholding fairness and efficiency

258. *Laws and Procedures Governing the Work of the Rules Committees*, *supra* note 6.

259. *Governance and the Judicial Conference*, USCOURTS.GOV, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Jan. 8, 2016).

260. *How the Rulemaking Process Works*, USCOURTS.GOV, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Jan. 8, 2016).

261. Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

262. *See supra* text accompanying notes 27–33.

263. *See* Miller, *supra* note 18, at 104.

264. 550 U.S. 544 (2007).

265. 556 U.S. 662 (2009).

in the litigation process. Leaving this question to the discretion of each individual district court results in a fluctuating standard, which constitutes a significant drawback for defendants when pleading affirmative defenses.[266] The ensuing back and forth to determine the appropriate standard and deal with any "retaliatory" motions to strike only serves to increase cost and time delays for defendants and courts.[267] The extension of the "heightened" plausibility standard to affirmative defenses also discounts the time constraints facing defendants and places a substantial burden to articulate the factual basis for any affirmative defense without adequate discovery.[268] The continuing application of the standard by the district court violates the Rules Enabling Act, permitting courts to essentially rewrite the pleading standard for affirmative defenses to include a plausible factual basis.[269] Resolution to this question is best left to the Supreme Court, to speak with one voice and provide a uniform standard for affirmative defense pleadings among all of the federal courts.

266. *See supra* Part II.A.1.
267. *See supra* Part II.A.3.
268. *See supra* Part II.A.2.
269. *See supra* Part II.B.