

Applying New Plausibility Standards for Plaintiffs



BY DARL H. CHAMPION, JR.

Using the New Federal Pleading Standard Against Defendants to Attack Their Affirmative Defenses

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² have been widely hailed as the death knell for notice pleading in federal court. Although plaintiffs' attorneys have widely criticized these cases, defense attorneys and their clients have embraced them, using the new pleading standard established by these cases to breathe new life into Rule 12(b)(6).

But while the defense bar has been busy trying to deny plaintiffs their day in court, attorneys on both sides have largely failed to recognize that these two cases can be used to benefit plaintiffs because the pleading standard for claims for relief is the same for affirmative defenses.³ Consequently, plaintiffs in federal court can use the new pleading standard to move to strike conclusory affirmative defenses from defendants' answers.

For the 50 years before *Twombly* and *Iqbal*, the *Conley v. Gibson*⁴ "no set of facts" standard governed pleading in federal court. Under that standard, a complaint would not be dismissed for failure to state a claim unless it appeared beyond doubt that the plaintiff could prove no set of facts that would entitle him to relief.⁵ In 2007, the Supreme Court in *Twombly* unexpectedly altered this well-entrenched pleading standard.

In *Twombly*, the Supreme Court was confronted with the issue of whether the plaintiff's complaint

The national trend among district courts has been in favor of applying the new plausibility standard to affirmative defenses. Plaintiffs' attorneys should be aware that they can use it to their advantage to narrow and clarify the legal issues in their cases.

adequately stated a claim for relief under § 1 of the Sherman Antitrust Act.⁶ In its discussion of the applicable pleading standard, the court criticized *Conley's* no set of facts language, stating that the phrase had “earned its retirement” as it was “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”⁷ To adequately state a claim, the court held that a complaint must contain enough factual matter that, taken as true, states a claim for relief that is plausible on its face.⁸ “[A] formulaic recitation of the elements of a cause of action will not do.”⁹

Initially, some courts and practitioners believed that *Twombly's* holding did not create a new pleading standard, but was instead strictly limited to the antitrust context.¹⁰ Most courts, including the Eleventh Circuit, saw things differently and applied the so-called *Twombly* standard to all federal civil actions.¹¹ In 2009, the Supreme Court in *Iqbal* settled this debate and held that the *Twombly* plausibility standard applied to all civil cases.¹² In addition to providing this clarification, *Iqbal* provided a two-step process for district courts to employ when applying the new pleading standard on a motion to dismiss: first, the court should accept all well-pleaded factual allegations as true and ignore all legal conclusions; second, the court should then determine whether the well-pleaded factual allegations plausibly suggest an entitlement to relief.¹³

Twombly and *Iqbal* did not specifically address the pleading standard for affirmative defenses, but many courts have long held affirmative defenses to the same standard as claims for relief.¹⁴ And while no circuit courts have addressed the applicability of the new plausibility standard to affirmative defenses, the vast majority of district courts that have confronted the issue have held that it does apply.¹⁵ These courts have recognized that there is no principled justification for requiring plaintiffs to meet a higher standard, while permitting defendants to meet a lower one. As the District Court of Kansas reasoned in *Hayne v. Green Ford Sales*:

It makes no sense to find that a heightened pleading standard applies to claims but not affirmative defenses. In both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case. Moreover, Fed. R. Civ. P. 8 is consistent in at least inferring that the pleading requirements for affirmative defenses are essentially the same as claims for relief.... Applying the standard for heightened pleading to affirmative defenses serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.¹⁶

Courts that have adopted the majority view have also relied on the policy

Plaintiffs in federal court can use the new pleading standard to move to strike conclusory affirmative defenses' answers.

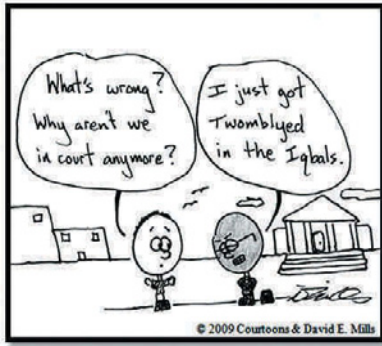
consideration of litigation efficiency that underlies the reasoning in *Twombly* and *Iqbal* because removing boilerplate defenses narrows the issues and promotes efficiency in the discovery process.¹⁷

Defense attorneys seldom plead facts to support their defenses. To the contrary, they frequently plead every possible affirmative defense in conclusory terms without any regard to whether the defenses could possibly even apply to the case. Plaintiffs' attorneys are then left to wonder which defenses

the defendant actually intends to pursue, and what facts support which defenses. The plausibility standard is far from a bright line rule, and due to its ambiguous nature, the requisite level of factual detail varies from case to case and judge to judge. At a minimum, however, this standard requires that defendants do more than simply state the affirmative defenses that may apply. For example, merely reciting the defenses of laches, statute of limitations, estoppel, and unclean hands fails to meet the standard.¹⁸ Similarly, pleading the defenses of assumption of risk and contributory negligence, without any supporting facts, is insufficient.¹⁹

When faced with an answer that contains the usual litany of boilerplate affirmative defenses, a motion to strike is the appropriate procedural vehicle for challenging the defenses.²⁰ This can be used as an important strategic tool to narrow the legal issues and the scope of discovery by removing inapplicable and factually unsupported defenses from the case. It can also provide a clarification of the factual basis for the defenses as a defendant, either on its own or in response to the court's ruling on the motion, may attempt to amend its answer to include the requisite facts.

Whether a motion to strike is appropriate in any given case will require the consideration of various factors. Perhaps the most important is the particular judge before whom your case is pending. As there is no binding case law requiring the judge to apply the plausibility standard to affirmative defenses, it would probably be unwise to file a motion to strike in a case where the judge has a reputation for being hostile to plaintiffs. Not only is there an increased chance your motion will be denied, but the judge's order could create bad law for other cases. Another important consideration is whether your complaint is susceptible to a Rule 12(b)(6) attack. If you have doubts as to whether your own complaint contains sufficient factual detail, it would be risky to try to point out the same infirmities in the defendant's answer.



If you are going to file a motion to strike, you must be prepared to do so shortly after the answer is served. Rule 12(f) states that a motion to strike must be filed within 21 days after service of the answer. Although some courts have interpreted other language in the Rule as allowing courts to consider a motion to strike at any time,²¹ others apply a more restrictive interpretation of the Rule and require that the motion be filed within 21 days of the answer.²² In your motion, make sure that you do more than simply cite the numerous district courts that have applied *Twombly* and *Iqbal* to affirmative defenses. Because there is no binding authority that requires the judge to follow those district courts, explain the reasoning behind the majority view and why the court should adopt it. Last, since the plausibility standard governs complaints, be careful to avoid exaggerating the amount of factual content necessary to meet the standard. Not only could the opposing party turn your arguments around and use them against you to attack your own complaint, but the court's acceptance of your exaggerated assertions could be used as precedent to attack complaints in other cases.

It remains to be seen whether district courts in Georgia will be receptive to applying the new plausibility standard to affirmative defenses, but the trend among district courts around the country

has been in favor of this application. Although plaintiffs' attorneys generally view the new federal pleading standard with considerable disdain, they should be aware that they can use it to their advantage to narrow and clarify the legal issues in their cases. ●

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Notes

¹ 550 U.S. 544, 127 S. Ct. 1955 (2007).

² 129 S. Ct. 1937 (2009).

³ 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1274 (3d ed. 2010) (collecting cases); see, e.g., *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999); *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989); *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979); *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002).

⁴ 355 U.S. 41, 78 S. Ct. 99 (1957).

⁵ *Id.* at 45-46, 78 S. Ct. at 102.

⁶ *Twombly*, 550 U.S. at 554-555, 127 S. Ct. at 1964.

⁷ *Id.* at 562-63, 127 S. Ct. at 1969.

⁸ *Id.* at 556, 570, 127 S. Ct. at 1965, 1974.

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⁹ *Id.* at 555, 127 S. Ct. at 1964-65.

¹⁰ See, e.g., *Pace v. Swerdlow*, 519 F.3d 1067, 1075 n.1 (10th Cir. 2008) (Gorsuch, J. concurring in part and dissenting in part) (discussing debate about *Twombly*'s scope); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 Nw. U. L. Rev. Colloquy 117 (2007).

¹¹ See, e.g., *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008); *Giarratano v. Johnson*, 521 F.3d 298, 302-04 (4th Cir. 2008).

¹² 129 S. Ct. at 1953.

¹³ *Id.* at 1949-50.

¹⁴ See *supra* note 3; see also, e.g., *Marine Overseas Svcs., Inc. v. Crossocean Shipping Co., Inc.*, 791 F.2d 1227, 1233 (5th Cir. 1986); *Sprint Comms. Co. L.P. v. TheGlobe.Com, Inc.*, 233 F.R.D. 615, 618 (D. Kan. 2006). *Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005).

¹⁵ See, e.g., *Francisco v. Verizon South, Inc.*, No. 3:09CV737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010); *Bradshaw v. Hilco Receivables, LLC*, No. RDB-10-113, 2010 WL 2948181, at *3 (D. Md. July 27, 2010); *Palmer v. Oakland Farms, Inc.*, No. 5:10CV00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010); *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, No. 08-04058, 2010 WL 2507769, at *4 (N.D. Cal. June 22, 2010); *HCRI TRS Acquirer, LLC v. Iwer*, No. 3:09-CV-2691, 2010 WL 1704236, at *3 (N.D. Ohio April 28, 2010); *Carretta v. May Trucking Co.*, 2010 WL 1139099, at *2 (S.D. Ill. Mar. 19, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan.

2009); *CTF Dev., Inc. v. Penta Hospitality, LLC*, No. C-09-02429-WHA, 2009 WL 3517617, at *7-8 (N.D. Cal. Oct. 26, 2009); *Tracy ex rel. v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at *7-8 (W.D.N.Y. Sept. 30, 2009); *FDIC v. Bristol Home Mortg. Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at *2-4 (S.D. Fla. Aug. 13, 2009); *Teirstein v. AGA Medical Corp.*, No. 6:08CV14, 2009 WL 704138, at *6 (E.D. Tex. Mar. 16, 2009); *Greenbeck Fan Corp. v. Loren Cook Co.*, No. 08-CV-335-JPS, 2008 WL 4443805, at *1-*2 (W.D. Wis. Sept. 25, 2008); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008); *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *2, (S.D. Fla. May 28, 2008); *United States v. Quadriani*, No. 2:07-CV-13227, 2007 WL 4303213, at *3-4 (E.D. Mich. Dec. 06, 2007). *But see*, e.g., *Ameristar Fence Prods., Inc. v. Phoenix Fence Co.*, No. CV-10-299-PHXDGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010) (expressly declining to apply *Twombly* standard to affirmative defenses); *McLemore v. Regions Bank*, Nos. 3:08-CV-0021, 3:08-CV-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (same); *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-CV-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010) (same); *Romantine v. CH2M Hill Eng'rs, Inc.*, No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) (same).

¹⁶ 263 F.R.D. at 650.

¹⁷ E.g., *Bradshaw*, 2010 WL 2948181, at *3 ("The application of the *Twombly* and *Iqbal* standard to defenses will also promote litigation efficiency and will discourage defendants from asserting boilerplate affirmative defenses that are based upon nothing more than some conjecture that [they] may somehow apply." (internal quotations omitted)); *HCRI TRS Qcquirer, LLC*, 2010 WL 1704236, at *3 ("Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints."); *Safeco Ins. Co. of Am.*, 2008 WL 2558015, at *1 ("Boilerplate defenses clutter the docket and, further, create unnecessary work. Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution.").

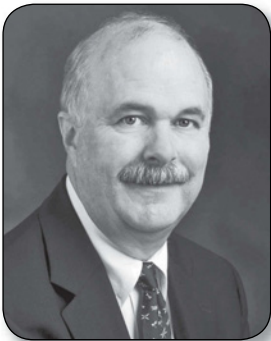
¹⁸ E.g., *Tracy*, 2009 WL 3153150, at *8; *Hayne*, 263 F.R.D. at 651-52; *Palmer*, 2010 WL 2605179, at *2-*6.

¹⁹ E.g., *Hayne*, 263 F.R.D. at 651-52; *Carretta*, 2010 WL 1139099, at *2.

²⁰ See, e.g., *Hayne*, 263 F.R.D. at 648-49; *Holtzman*, 2008 WL 2225668, at *1.

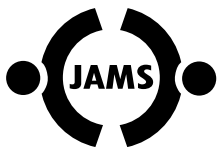
²¹ *Williams v. Jader Fule Co.*, 944 F.2d 1388, 1399 (7th Cir. 1991); *UMG Recordings, Inc. v. Lindor*, 531 F.Supp.2d 453, 458 (E.D.N.Y. 2007).

²² *Cowart v. City of Eau Claire*, 571 F. Supp. 2d 1005, 1008 (W.D. Wis. 2008).



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