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Beware of Affirmative Defenses: A Trap for the Unwary

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Most litigators, defense and plaintiffs' counsel alike, have become accustomed to the *Twombly* and *Iqbal* pleading requirements attendant to the allegations of a complaint. But many are not as familiar with whether the *Twombly* and *Iqbal* pleading requirements also apply to affirmative defenses raised in response to a complaint. And that necessarily begs the question: does the *Twombly*/*Iqbal* standard of pleading apply to defenses asserted in an Answer? As one federal magistrate judge explained, "neither the Fourth Circuit nor any other court of appeals has ruled on the question presented: whether *Twombly* and *Iqbal* extended the federal pleading requirements to a defendant's affirmative defenses." *Francisco v. Verizon South, Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *16 (E.D. Va. Jul. 29, 2010). In the absence of guidance from the U.S. Supreme Court or the circuit courts of appeal, the federal district courts have answered that question with varying results.

Twombly and *Iqbal* Pleading Requirements

In *Twombly,* the Supreme Court explained that to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Under this plausibility standard, a complaint need not contain "detailed factual allegations," but it must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id.* at 555.

In *Iqbal,* the Supreme Court further explained the process that a court must undertake in reviewing a Rule 12(b)(6) motion to dismiss. First, a court should "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009). Second, a court should "assume the[] veracity" of any well-pleaded factual allegations, and "then determine whether they plausibly give rise to an entitlement to relief." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully." *Id.* at 278 (quoting *Twombly,* 550 U.S. at 556.). The Court also stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

It is against this backdrop that we examine the pleading requirements of affirmative defenses.

The Districts Are Truly Divided

Among those federal district courts to have considered the issue of whether the *Twombly*/*Iqbal* pleading standard applies to defenses asserted in an Answer, a split of authority exists. On one hand, a number of federal district courts expressly have declined to extend the *Iqbal*/*Twombly* standard to affirmative defenses. In general, these courts have found that *Twombly* and *Iqbal* addressed only Rule 8(a), and no case has expressly extended those decisions to Rules 8(b) and 8(c). In *Hanzlik v. Birach*,

No. 1:09cv221, 2009 U.S. Dist. LEXIS 63091, at *12 (E.D. Va. July 14, 2009), for example, the court stated that "[f]orcing a defendant to cite each and every applicable statute and regulation that may support [a defense] at the answer stage would be contrary to the spirit of Rule 8. The matter can be fleshed out through discovery." The court explained that the basis for its reluctance to apply *Iqbal* and *Twombly* is grounded in the applicable rules of civil procedure. That is, Rule 8(a)(2), upon which the *Iqbal* and *Twombly* decisions relied, requires that "claims for relief," including complaints, contain a short and plain statement of the claim *showing that the pleader is entitled to relief*, whereas Rule 8(b)(1)(A), which governs affirmative defenses, merely requires a short and plain statement of the defense to each claim asserted. Thus, under Rule 8(b)(1)(A), "[a]n affirmative defense may be pleaded in general terms and will be held to be sufficient … as long as it gives plaintiff fair notice of the nature of the defense." *Id*. at *8 (citing *Clem v. Corbeau*, 98 F. App'x 197 (4th Cir. 2004)). Numerous federal district courts have concurred with the reasoning and decision of the court in *Hanzlik. See Wells Fargo & Co. v. United State*s, 750 F. Supp. 2d 1049 (D. Minn. 2010) (holding that *Twombly* and *Iqbal* do not apply to the pleading of defenses under Fed. R. Civ. P. 8(b) and (c)); *Bank of Beaver City v. Southwest Feeders, L.L.C.*, No. 4:10CV3209, 2011 U.S. Dist. LEXIS 114724 (D. Neb. Oct. 4, 2011) (determining, in light of Fed. R. Civ. P. 8 and 12(f), as well as Eighth Circuit's opinions on such rules, that heightened pleading standard does not apply to affirmative defenses); *Ash Grove Cement Co. v. MMR Constructors, Inc.*, No. 4:10-CV-04069, 2011 U.S. Dist. LEXIS 96585, 2011 WL 3811445 (W.D. Ark. Aug. 29, 2011) (holding *Twombly/Iqbal* analysis is inapplicable to affirmative defenses raised under Fed. R. Civ. P. 8(c) and would be unreasonable in practice).

On the other hand, a number of federal district courts have extended the *Twombly/Iqbal* standard to a defendant's pleading of affirmative defenses. These courts have found that the "same logic holds true for pleading affirmative defenses [as for pleading a complaint]—without alleging facts as part of the affirmative defenses, [a] [p]laintiff cannot prepare adequately to respond to those defenses." *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 U.S. Dist. LEXIS 42630, at *2 (S.D. Fla. May 28, 2008). Many district courts have found that "[i]t makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses." *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 64**7**–50 (D. Kan. 2009). In *Racick v. Dominion Law Assocs*., 270 F.R.D. 228 (E.D.N.C. 2010), the court summed up the reasoning courts give for applying the heightened pleading standard to affirmative defenses as two-fold:

> First, the courts recognize that what is good for the goose is good for the gander, and reason that it makes neither sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may possibly apply in the case. Second, the courts note that boilerplate defenses clutter the docket and create unnecessary work and extended discovery.

Id. at 233. (citations and quotation marks omitted).

In *Palmer v. Oakland Farms, Inc*., No. 5:10cv00029, 2010 U.S. Dist. LEXIS 63265 (W.D. Va. June 24, 2010), the court found that "*Twombly* and *Iqbal* strongly suggest that the same heightened pleading standard should also apply to affirmative defenses ... [because] [t]o require less of a defendant sets the pleading bar far too low." *Id.* at *5. The court noted that "[a] requirement that an affirmative defense be pleaded in accordance with the *Twombly-Iqbal* standard simply means ... that it be pleaded in a way that is intelligible, gives fair notice, and is plausibly suggested by the facts." *Id*. at *15. This pleading standard does not "necessarily require the assertion of underlying evidentiary facts.... At a minimum, however, some statement of the ultimate facts underlying the defense must be set forth, and both its

non-conclusory factual content and the reasonable inferences from that content, must plausibly suggest a cognizable defense available to the defendant." *Id.* at *17.

Now, as if the divide among different federal district courts was not enough, contradictory opinions appear to have been rendered by courts sitting within the same district. For instance, the Eastern District of Missouri, the Eastern District of Virginia, and the Western District of Virginia are all divided within their districts on this issue. *Compare Amerisure Ins. Co*., No. 4:11CV642 JCH, 2011 U.S. Dist. LEXIS 79530, at *5–6 (E.D. Mo. July 21, 2011) (noting split but siding with majority view that *Twombly/Iqbal* standards apply to affirmative defenses), *with Speraneo v. Zeus Tech. Inc.*, No. 4:12-CV-578-JAR, 2012 U.S. Dist. LEXIS 80263, at *3 (E.D. Mo. June 11, 2012) (citing approvingly *Bank of Beaver City*, 2011 U.S. Dist. LEXIS 114724, *supra*); *compare Francisco v. Verizon South, Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *24–26 (E.D. Va. July 29, 2010) (siding with the majority view and applying heightened pleading standard), *with Lopez v. Asmar's Mediterranean Food, Inc.*, No. 1:10cv1218, 2011 U.S. Dist. LEXIS 2265, at *3–7 (E.D. Va. Jan. 10, 2011) (quoting *Clem v. Corbeau*, 98 F. App'x 197 (4th Cir. 2004)) (refusing to apply heightened standard based on differing language in Rules 8(a)(2) and 8(b)(1)(A)); *compare Palmer v. Oakland Farms, Inc.*, No. 5:10cv29, 2010 U.S. Dist. LEXIS 63265, at *11–17 (W.D. Va. June 24, 2010) (applying heightened pleading standard to affirmative defenses based on "considerations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal*"), *with Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 726–27 (W.D. Va. 2010) (declining to subject defenses to "the same stringent plausibility standards that *Iqbal* and *Twombly* demand of claims for relief under Rule 8(a)").

And, to complicate the issue further, at least one federal district court has noted that "[t]he factual allegations contained in the complaint and answer are necessarily incorporated into a defendant's recitation of affirmative defenses," rendering "[i]t... absurd to require a defendant to re-plead every fact relevant to an affirmative defense." *Baum v. Faith Techs., Inc*., No. 10cv144, 2010 U.S. Dist. LEXIS 56704, at *7–8 (N.D. Okla. June 9, 2010).

So, Where Does That Leave Us?

Before a plaintiff files and serves a complaint, that plaintiff's timeline of investigation is conceivably only limited by the applicable statute of limitations. So, instead of the finite time period afforded defendants to plead in response to a complaint, Plaintiffs by comparison have an infinite period of time to investigate, formulate, and recite the factual allegations underlying their claims for relief. The filing of a complaint, and the factual and legal allegations attendant thereto, begin the adversarial process and put into motion the time and expense of defending against such allegations. It seems fundamentally unfair to impose upon defendants the same "burden" of pleadings, when plaintiffs largely control the mechanism of initiating a civil proceeding, and the benefit of the time constraints embodied in defense response time periods of the federal rules of civil procedure.

Courts have noted that applying the same pleading requirements to defendants should not stymie the presentation of a vigorous defense, because under Rule 15(a) of the Federal Rules of Civil Procedure, a defendant may seek leave to amend its answers to assert defenses based on facts that become known during discovery. But, defense counsel must balance this consideration with the fact that many affirmative defenses not raised in the answer may be deemed waived.

Those courts applying the *Twombly*/*Iqbal* standard to affirmative defenses place defense counsel in the untenable position of either (1) forgoing an affirmative defense that may be meritorious, but for which factual support is not yet fully developed at the responsive pleading stage, and hoping the court will allow amendment under Rule 15 if necessary, or (2) filing the affirmative defense to avoid issues of waiver, but potentially having to defend against a Rule 12(f) motion to strike the defense for failure to adequately plead with sufficient specificity.

Leaving the theoretical issues aside, many litigators face the very real and practical question of whether they should apply the *Twombly*/*Iqbal* pleadings to their affirmative defenses. While resort to case law within your practicing district should give some comfort and resolve, that same comfort and resolve cannot be had by litigators who practice within one of the multiple districts where different courts within the district have reached opposite conclusions on the issue. The safe bet may be to plead, and then plead some more. Or, make sure you know on which side of the dividing line the judge assigned to your case sits. As my law school professor once said, you may not know the answer, but at least you know the issue and the questions to ask to avoid that trap for the unwary.

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