The practice is familiar to any person required to draft an answer in federal court. Grab the Federal Rules of Civil Procedure, turn to Rule 8, and start listing, often in serial fashion, those affirmative defenses that could be applicable:

- The claims are barred by the doctrines of estoppel and waiver.
- The agreement is unenforceable due to fraud, duress or a lack of consideration.
- The claims are barred by the applicable statute of limitations and/or statute of frauds.

And so on.

This common practice has been called into serious question in many courts, however, following two Supreme Court decisions which dealt with the pleading requirements for complaints, but are now sometimes being applied to affirmative defenses.

### BACKGROUND

In a 2007 case, *Bell Atlantic Corp. v. Twombly*, the Court held that, to survive a motion to dismiss, a complaint must contain facts sufficient to state a claim to relief that is plausible on its face. That is, while plaintiffs are not required to include “detailed factual allegations” in their filing, more than bald accusations or mere speculation is needed to survive a motion to dismiss. In the words of the Court, providing nothing more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” is not enough.

Two years later, the Court reiterated in *Ashcroft v. Iqbal* that “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to plead a claim. Instead, the Court held that the complaint must “plausibly give rise to an entitlement to relief,” and that doing so requires “more than the mere possibility of misconduct.”

In the wake of *Twombly* and *Iqbal*, courts have been grappling with the corresponding issue not addressed in those decisions: if complaints need more factual detail, what about affirmative defenses? Without guidance from the Supreme Court or any federal appellate courts, district courts are reaching different conclusions – often in the same circuit and sometimes in the same district!

### DECISIONS FROM THE DISTRICT COURTS

Decisions from the district courts in the United States Court of Appeals for the Fourth Circuit (which covers Maryland, North Carolina, South Carolina, Virginia and West Virginia), serve as a perfect example. Prior to *Twombly* and *Iqbal*, the Fourth Circuit held that general statements of affirmative defenses were sufficient, as long as they gave plaintiffs fair notice of the defense.

### THE MAJORITY VIEW

Since then, however, the majority of the district courts in the Fourth Circuit (including judges in the District of Maryland, the Eastern District of North Carolina, the Eastern District of Virginia, the Western District of Virginia and the District of South Carolina) have held that the pleading requirements of *Twombly* and *Iqbal* do, indeed, apply to affirmative defenses. In reaching that conclusion, these courts have generally relied on the considerations of fairness, common sense and litigation efficiency underlying the Supreme Court decisions.

Explaining that “what is good for the goose is good for the gander,” they have reasoned that “it neither makes sense nor is it fair to require a plaintiff to provide the de-
fendant 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 apply in the case.”

According to these courts, the pleading requirements spelled out in Twombly and Iqbal are intended to ensure that an opposing party receives fair notice of the factual basis for an assertion, regardless of whether that assertion is contained in a claim or a defense. Applying this rule to affirmative defenses, the courts reason, further the interests of consistency and fairness by making sure plaintiffs receive proper notice of defenses in advance of the discovery process and trial—an advantage explicitly afforded to defendants as a result of the Twombly and Iqbal decisions.

In hewing to this line of reasoning, some courts have also cited the importance of litigation efficiency, noting that “boilerplate” defenses serve only to clutter the docket and create unnecessary work by requiring opposing counsel to conduct unnecessary discovery. And at least two courts have noted that a sample affirmative defense form that is appended to the Federal Rules of Civil Procedure includes factual detail in support of a statute of limitations defense.

The majority view was perhaps best summed up by a district court in Maryland in a 2011 decision. In Barry v. EMC Mortgage, the court stated that Twombly and Iqbal “recognize the fairness and efficiency concerns highlighted by district courts that have subsequently applied those standards to affirmative defenses.” The court also noted that, “[a]ll pleading requirements exist to ensure that the opposing party receives fair notice of the nature of a claim or defense.”

THE MINORITY VIEW

Of course, where there is a majority view, there is also a minority view, and that is the case here, as well. A minority of district courts in the Fourth Circuit (including judges in the Eastern District of Virginia and the Western District of Virginia) considering the same issue have held that the pleading requirements of Twombly and Iqbal do not apply to affirmative defenses. These courts have primarily grounded their decisions in the different language used to address complaints and affirmative defenses in the Federal Rules of Civil Procedure (Rules 8(a)(2) and 8(b)(1)(A)).

These courts have noted that Rule 8(a)(2), applicable to complaints, requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” while Rule 8(b)(1)(A), which governs affirmative defenses, merely requires that a responding party “state in short and plain terms its defenses to each claim asserted against it.”

Minority-view courts have held the absence of the wording included in Rule 8(a)(2) (“showing that the pleader is entitled to relief”) to be a notable one. As one such court explained, “[b]ecause Rules 8(b) and 8(c) do not require a party to ‘show’ that it is entitled to a defense, the court declines to hold affirmative defenses to the same pleading standards required by Rule 8(a).”

The minority-view courts respond to the “fairness” argument by noting that there are countervailing considerations of whether it is fair to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who generally have only 21 days to respond to a complaint, did not initiate the lawsuit and risk waiving any defenses not raised.

RECOMMENDATIONS

Until this issue is resolved by an appellate court, parties interposing affirmative defenses should make every effort to meet the Twombly and Iqbal pleading requirements. Although this may be a change for some, one court has noted that Twombly and Iqbal require only minimal facts establishing plausibility, a standard that most litigants presumably would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event.

Several courts have spelled out factors they consider necessary for an affirmative defense to rise to the level of plausibility required by Twombly and Iqbal, such as the inclusion of a brief narrative stating facts sufficient to give the plaintiff fair notice of what the defense is and the grounds upon which it rests, and a statement of facts that plausibly suggests cognizable defenses under applicable law.

One court held that affirmative defenses are insufficient under the Twombly and Iqbal standard if they are stated “in a conclusory manner and fail to provide fair notice to the plaintiff of the factual grounds upon which they rest.”

While this will require more effort than simply listing affirmative defenses seriatim, the Twombly/Iqbal pleading standard does not require the assertion of all supporting evidentiary facts. Nevertheless, some statement of the ultimate facts underlying the defense must be set forth, and the factual content and reasonable inferences from that content must plausibly suggest a cognizable defense available to the defendant.

Many courts applying Twombly and Iqbal to affirmative defenses have also noted that a party can move to amend its pleading under Rule 15 if it discovers additional facts, and that this remedy protects parties who learn of information supporting an affirmative defense later in the case. Attorneys should be aware of—and utilize—this rule.

Finally, even if the practitioner is before a judge who declines to apply the Twombly and Iqbal pleading standard to affirmative defenses, he or she should take little solace in that fact since affirmative defenses may nevertheless be subjected to extra scrutiny. Indeed, one district court judge did just that, holding that Twombly/Iqbal did not apply to affirmative defenses, but then striking 17 out of 19 defenses because it held there were no facts alleged in support that would make them “contextually comprehensible.”

For this reason, it is best to assume that the Twombly and Iqbal standard will be applied and proceed accordingly.

6 Odyssey, 752 F. Supp. 2d at 727.