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I. Introduction

The phrase, "what's sauce for the goose is sauce for the gander," is familiar not just to Parisian-trained restaurant chefs. Along with its American cousin,[1] the phrase has long found a settled home in the English lexicon as a shorthand way of imparting a principle of general equality—it is, to the idiom scholar and daily conversationalist alike, "something that you say to suggest that if a particular type of behaviour is acceptable for one person, it should also be acceptable for another person."[2] It seems that the phrase's culinary heritage comes from the supposedly evident notion that the sauce one would serve with a dish of cooked female goose is no different than the one expected to be served with a dish of cooked male goose.[3] Given this fowl ancestry, the phrase, unsurprisingly, was once understood as connoting equality just between sexes.[4] It has long since acquired

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1. "What's good for the goose is good for the gander." *See* CAMBRIDGE IDIOMS DICTIONARY 167 (2d ed. 2006) (identifying "good for" substitution (replacing "sauce for") as an "American & Australian old-fashioned" recasting of the earlier British saying).

2. *See id.* (offering the illustrative usage example: "If your husband can go out with his friends, then surely you can go out with yours. What's sauce for the goose is sauce for the gander.").

3. *See Answer to What Does the Saying 'What Is Sauce for the Goose Is Sauce for the Gander' Mean?*, ANSWERS BLOG, http://wiki.answers.com/Q/What_does_the_saying_'What_is_sauce_for_the_goose_is_sauce_for_the_gander'_mean?feedback=1 (last visited Oct. 1, 2013) ("This saying comes from cooking - you don't make sauce for the male goose and sauce for the female - you make one sauce.") (on file with the Washington and Lee Law Review). If this discussion has whetted your appetite for goose, the Thomas Jefferson Foundation offers you a recipe for a colonial sauce. Leni the Cook, *Jefferson-Era Recipe: Sauce for a Goose*, MONTICELLO (Nov. 4, 2011), http://www.monticello.org/site/blog-and-community/posts/jefferson-era-recipe-sauce-goose (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review).

4. A "goose" is "any of various long-necked, web-footed, wild or domestic waterfowl that are like ducks but larger, especially, a female . . . [as] distinguished from a gander." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 787 (2d ed. 1983). A "gander," conversely, is "a male goose." *Id.* at 752. Evidently, the British iteration of the saying finds its origins in John Ray's 1670 publication *Catalogue of Proverbs*, where he, parenthetically, characterized it as "a woman's proverb." *See* STUART FLEXNER & DORIS FLEXNER, WISE WORDS AND WIVES' TALES: THE ORIGINS, MEANINGS AND TIME-HONORED WISDOM OF PROVERBS AND FOLK SAYINGS OLDE AND NEW 159 (1993) ("That that's good sawce

its contemporary, far broader application—anything that's fair for you, ought to be fair for me.[5]

Though old fashioned, the phrase has made something of a modern revival of late in the fascinatingly tumultuous world of post-"*Twiqbal*"[6] federal pleading practice. The U.S. Supreme Court in *Twiqbal* announced that federal claimants may not plead in a cursory, conclusory fashion, but must instead supply enough facts in their pleadings to "'nudge[] [their] claims' . . . 'across the line from conceivable to plausible.'"[7] This whole business of "plausibility" has left courts and scholars in quite a state of anxiety.[8] And it has created a fair measure of uncertainty

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for the goose, is good for a gander." (quoting JOHN RAY, CATALOGUE OF PROVERBS 98 (1670)); *see also* E.D. HIRSCH, JR., JOSEPH F. KETT & JAMES TREFIL, NEW DICTIONARY OF CULTURAL LITERACY 57 (3d ed. 2002) (defining the saying as follows: "What is good for a man is equally good for a woman; or what a man can have or do, so can a woman have or do"). Some contend the saying actually may have even earlier roots, traced back to John Heywood's *A Dialogue Conteinyng the Nomber in Effect of All the Prouerbes in the Englishe Tongue* ("As well for the coowe as for the bull"), though it was given wide circulation in Roger L'Estrange's 1692 translation of *Fables of Aesop* ("Sauce for a Goose is Sauce for a Gander"). *See* FLEXNER & FLEXNER, *supra* at 159 (discussing the origins of the phrase).

5. *See* MCGRAW-HILL DICTIONARY OF AMERICAN IDIOMS AND PHRASAL VERBS 750 (Richard A. Spears ed. 2005) (explaining the saying to mean: "What is good for one person is good for another"). Elsewhere, the phrase's definition has been explained by illustration. For an example of such an illustration, see Ken Greenwald, *What's Sauce for the Goose*, WORDWIZARD (Dec. 13, 2004, 8:25 AM), http://www.wordwizard.com/phpbb3/viewtopic.php?f=7&t=23699 (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review). Greenwald defines the phrase to mean the following:

> What is appropriate for one person is equally appropriate for another person in a similar situation; sometimes used in the context of sexual equality: *If smoking is banned on the factory floor then it should also be banned in the boardroom—what's sauce for the goose is sauce for the gander*.

6. "*Twiqbal*" has become the clever, handy abbreviation to refer collectively to the U.S. Supreme Court's two recent federal pleading decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (identifying "*Twiqbal*" as how the Supreme Court's *Iqbal* and *Twombly* decisions are now "commonly known").

7. *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570).

8. *See, e.g.*, McCauley v. City of Chicago, 671 F.3d 611, 624 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("*Iqbal*'s reliance on the fact/conclusion dichotomy is highly subjective, and returns courts to the long disapproved

for plaintiffs struggling to decode the right way to plead "plausibly."[9]

But the pleading stage does not end with the claim. The Federal Rules of Civil Procedure prescribe that defending parties must counterplead, with their answer, to the claim's accusations.[10] In doing so, must a defending party's answer confront this brave new world of "plausibility" pleading? Should defending parties have to "nudge" their defenses across the line into "plausibility" in the same way that claimants must nudge their complaints? Isn't that the fair and just thing to require? After all, in the words of several of the federal district judges who have weighed in on this issue already, isn't "what is sauce for the goose sauce for the gander"?[11]

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methods of analysis under the regime of code pleading."); Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 630 (6th Cir. 2009) ("Exactly how implausible is 'implausible' remains to be seen."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 23–26 (2010) (decrying the "plausible" standard's instruction that courts rely on "judicial experience and common sense" as "highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning").

9. *See, e.g.*, PAUL BATISTA, CIVIL RICO PRACTICE MANUAL § 2.06 (2013) (discussing the Court's "important, but unclear," *Twombly* opinion, and surmising how a civil RICO complaint might survive the "plausibility" inquiry); MICHAEL DORE, LAW OF TOXIC TORTS § 10:1 (2012) ("While courts will undoubtedly reach a variety of conclusions with respect to whether toxic tort complaints meet the *Iqbal* plausibility standard, it is clear that the basis for resolving this question will be very different than it has been in the past."); DANA SHILLING, LAWYER'S DESK BOOK § 18.01 (2012) ("The plaintiff's bar says that *Iqbal* demands specificity that is often impossible until after discovery."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) (suggesting the Supreme Court "has seemingly turned its back on the liberal ethos of the rules and moved towards a more restrictive ethos," which is thought unfortunate because "the application of plausibility pleading is likely to stymie many valid claims in addition to the groundless claims that will not survive"). *But cf.* DAVID F. HERR, ROGER S. HAYDOCK, & JEFFREY W. STEMPEL, FUNDAMENTALS OF LITIGATION PRACTICE § 8.2 (2012) (noting that because "astute practitioners" have for years pleaded complaints with more than just their bare bones, "for most claims *Twombly/Iqbal* does not effect a serious or substantial change in pleading practice").

10. *See* FED. R. CIV. P. 8(b)–(c) (outlining the requirements for admissions, denials, and affirmative defenses).

11. *See, e.g.*, Godson v. Eltman, Eltman & Cooper, P.C., 285 F.R.D. 255, 258 (W.D.N.Y. 2012) (using the phrase "what's good for the goose is good for the gander"); Bank of Beaver City v. Southwest Feeders LLC, No. 4:10CV3209, 2011 WL 4632887, at *7 (D. Neb. Oct. 4, 2011) (same); Lopez v. Asmar's

This question has not been squarely addressed by the U.S. Supreme Court in *Twombly*,[12] *Iqbal*,[13] or any subsequent Court opinion. Nor has it yet been directly confronted by any U.S. court of appeals. Rather, this interpretative job has remained, to date, only the labor of the federal district courts, and they have written on the question aplenty. Their work is an intriguing story, complete with a curious minority-to-majority trending-line twist at the end. But their work is also a tale of disuniformity. And in that lack of uniformity, much mischief lurks.

Part II of this Article illustrates the incoherence of the national courts on the issue of *Twiqbal*'s applicability to the pleading of affirmative defenses, and explains why this incoherence poses worrisome risks in federal civil litigation.[14] Part III selects an exemplar case decision as a vehicle for examining this issue. That case, *Weddle v. Bayer AG Corp.*,[15]

Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573, at *1 (E.D. Va. Jan. 10, 2011) (same); Racick v. Dominion, 270 F.R.D. 228, 233 (E.D.N.C. 2010); Kaufmann v. Prudential Ins. Co., Civ. No. 09–10239–RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) (same).

12. 550 U.S. 544 (2007).

13. 556 U.S. 662 (2009).

14. Although the Federal Rules of Civil Procedure require the pleading of both general and affirmative defenses, this Article explores the *Twiqbal* pleading question only as it respects the latter. General defense pleading is addressed by Federal Rule of Civil Procedure 8(b)(1)(A), which provides that responding parties must "state in short and plain terms its defenses to each claim asserted against it." FED. R. CIV. P. 8(b)(1)(A). General defenses, however, are not especially prone to a *Twiqbal* pleading controversy for several reasons. First, general defenses confine the pleader to just three expressions—admitting the allegation, denying it, or announcing a lack of knowledge or information to either admit or deny. *See* FED. R. CIV. P. 8(b)(1)(B), 8(b)(5) (setting forth general pleading requirements). That protocol does not lend itself to much of a factual pleading debate. Second, by explicit leave of the Rules, denials may be made generally (and, thus, conclusorily). *See* FED. R. CIV. P. 8(b)(3) (allowing general denials). Third, post-*Twombly* authority confirms that such denials require no special pleader magic. *See In re* Sterten, 546 F.3d 278, 283 (3d Cir. 2008) ("No prescribed set of words need be employed in framing the general denial; any statement making it clear that the defendant intends to put in issue all of the averments in the opposing party's pleading is sufficient." (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1265, 546–47 (3d ed. 2004)). In light of this explicit tolerance for conclusory, nonfactual defensive pleading, the inapplicability of *Twiqbal* to general defenses seems incontestable.

15. No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012).

tackled the question in the context of a misappropriated likeness controversy filed by a professional football player against the maker of Alka-Seltzer. The opinion's result and reasoning aligns with the growing majority of courts that have considered the issue, and offers a worthy guide for considering the issue in an actual litigation context. Part IV surveys the various opinions of the federal judiciary on the question, describing their respective approaches and the principal analyses that lead them to their conclusions. Part V examines the three litigation options available to those who must plead affirmative defenses, and concludes that none is safe, reliable, or certain.

II. The Challenge of the National Incoherence on Twiqbal*'s Applicability to Affirmative Defenses*

Few examples crystallize the incoherence of the nation's treatment of *Twiqbal* and affirmative defenses quite as well as the remarkable tale of J & J Sports Productions, Inc. (J & J). This company hails from Campbell, California (about an hour south of San Francisco) and is in the business of sublicensing closed-circuit television exhibitions of boxing telecasts.[16] Apparently, J & J acquires exclusive nationwide commercial distribution rights for certain boxing matches and then sublicenses with various commercial establishments (including restaurants and bars) for the public exhibition of the match telecasts.[17] Over the course of one seventeen-month period (July 2008–December 2009), J & J controlled the distribution rights for four such closed-circuit telecasted matches: "'*The Battle': Miguel Cotto v. Antonio*

16. *See About Us*, J & J SPORTS PRODS., INC., http://www.boxingseries.com/about_us.php#1 (last visited Oct. 1, 2013) (noting that the company has acquired rights to boxing broadcasts) (on file with the Washington and Lee Law Review).

17. *See* J & J Sports Prods., Inc. v. Vargas, No. CV 11–2229–PHX–JAT, 2012 WL 2919681, at *1 (D. Ariz. July 17, 2012) (noting these rights); J & J Sports Prods., Inc. v. Munoz, No. 1:10–cv–1563–WTL–TAB, 2011 WL 2881285, at *1 (S.D. Ind. July 15, 2011) (same); J & J Sports Prods., Inc. v. Franco, No. CV F 10–1704 LJO DLB, 2011 WL 794826, at *1 (E.D. Cal. Mar. 1, 2011) (same).

Margarito" (July 26, 2008);[18] "'*The Dream Match': Oscar De La Hoya v. Manny Pacquiao*" (December 8, 2008);[19] "'*Number One': The Floyd Mayweather, Jr. v. Juan Manuel Marquez Championship Fight Program*" (September 19, 2009);[20] and "'*Firepower': Manny Pacquiao v. Miguel Cotto*" (November 14, 2009).[21]

Soon after these telecasts, J & J filed ten federal lawsuits in, respectively, the District of Arizona, the Eastern, Northern, and Southern Districts of California, and the Southern District of Indiana.[22] The accusations in all ten lawsuits were essentially the same—J & J accused various restaurants, bars, and other business establishments with unlawfully intercepting the four boxing telecasts.[23] Federal law proscribes such interceptions, and provides those injured with a right to recover compensatory and enhanced damages, court costs, and attorney's fees.[24] The

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18. "*The Battle*" Litigation: J & J Sports Prods., Inc. v. Khachatrian, No. CV–10–1567–GMS–PHX, 2011 WL 720049 (D. Ariz. Feb. 23, 2011).

19. "*The Dream Match*" Litigations: J & J Sports Prods., Inc. v. Luhn, No. 2:10–CV–03229 JAM–CKD, 2011 WL 5040709 (E.D. Cal. Oct. 24, 2011); *Munoz*, 2011 WL 2881285; J & J Sports Prods., Inc. v. Scace, No. 10cv2496–WQH–CAB, 2011 WL 2132723 (S.D. Cal. May 27, 2011).

20. "*Number One*" Litigations: J & J Sports Prods., Inc. v. Gidha, No. CIV S–10–2509 KJM–KJN,
2012 WL 537494 (E.D. Cal. Feb. 17, 2012); *Franco*, 2011 WL 794826; J & J Sports Prods., Inc. v. Coyne, No. C 10–04206 CRB, 2011 WL 227670 (N.D. Cal. Jan. 24, 2011); J & J Sports Prods., Inc. v. Montanez, No. 1:10–cv–01693–AWI–SKO, 2010 WL 5279907 (E.D. Cal. Dec. 13, 2010).

21. "*Firepower*" Litigations: *Vargas*, 2012 WL 2919681; J & J Sports Prods., Inc. v. Mendoza-Govan, No. C 10–05123 WHA, 2011 WL 1544886 (N.D. Cal. Apr. 25, 2011).

22. *See supra* notes 17–21 (outlining the J & J lawsuits).

23. *Supra* notes 17–21. In one of J & J's other federal suits, the trial judge catalogued the various ways in which such unlawful interceptions might take place: (1) use of a device that "descrambles the reception of a pay-per-view broadcast when installed on a cable TV line;" (2) use of a card that "descrambles the reception of a pay-per-view broadcast when installed on a DSS satellite;" (3) use of a misrepresented purchase by which a commercial establishment underpays for the programming by declaring itself to qualify for a residential rate; (4) use of a cable splice or cable drop; and (5) acquiring "other illegal unencryption devices" or "illegal satellite authorization codes." J & J Sports Prods., Inc. v. Patton, Civ. No. 10–40241–FDS, 2011 WL 5075828, at *4 n.3 (D. Mass. Oct. 25, 2011).

24. *See* 47 U.S.C. § 553 (2012) (describing the penalties for "[u]nauthorized

defendants in each case filed answers to the complaints, including affirmative defenses.[25] In response, J & J filed motions under Federal Rule of Civil Procedure 12(f) to strike each affirmative defense as insufficient, contending (among other things) that the pleaded defenses failed to meet the "plausibility" standard established by *Twiqbal*.[26]

In the two Arizona opinions, two different district judges refused J & J's request to apply *Twiqbal*, reasoning that, absent instructions otherwise from the Supreme Court or the U.S. Court of Appeals for the Ninth Circuit, the *Twiqbal* standard does not apply to affirmative defenses—the Spartan nature of defendants' pleading notwithstanding.[27] All the defenses survived.

In two of the California cases, a district judge from the Northern District and a district judge from the Eastern District granted J & J's request to apply *Twiqbal*, reasoning that affirmative defenses are indeed governed by the "plausibility" pleading standard.[28] Both courts struck all of the respective defendants' affirmative defenses (twenty-one defenses stricken in the Northern District case, twenty-nine defenses stricken in the Eastern District case), ruling that, as pleaded, the affirmative

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reception of cable service").

25. J & J Sports Prods., Inc. v. Vargas, No. CV 11–2229–PHX–JAT, 2012 WL 2919681, at *1 (D. Ariz. July 17, 2012)"); J & J Sports Prods., Inc. v. Munoz, No. 1:10–cv–1563–WTL–TAB, 2011 WL 2881285, at *1 (S.D. Ind. July 15, 2011); J & J Sports Prods., Inc. v. Franco, No. CV F 10–1704 LJO DLB, 2011 WL 794826, at *1 (E.D. Cal. Mar. 1, 2011); J & J Sports Prods., Inc. v. Khachatrian, No. CV–10–1567–GMS–PHX, 2011 WL 720049 (D. Ariz. Feb. 23, 2011).

26. *Vargas*, 2012 WL 2919681, at *2 n.1"); *Munoz*, 2011 WL 2881285, at *1; *Franco*, 2011 WL 794826, at *2; *Khachatrian*, 2011 WL 720049, at *1 n.1. *See also* FED. R. CIV. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . .").

27. *See Vargas*, 2012 WL 2919681, at *2 n.1 (Teiborg, J.) ("[T]he Court is hesitant to apply the Twombly standard to test the sufficiency of Defendant's pleading of his affirmative defenses."); *Khachatrian*, 2011 WL 720049, at *1 n.1 (Snow, J.) ("Plaintiff's argument that the Court should apply the Twombly standard to Defendants' affirmative defense is misplaced.").

28. *See* J & J Sports Prods., Inc. v. Mendoza-Govan, No. C 10–05123 WHA, 2011 WL 1544886 at *1 (N.D. Cal. Apr. 25, 2011) (Alsup, J.) ("Twombly's heightened pleading standard applies to affirmative defenses . . . ."); *Franco*, 2011 WL 794826, at *2 (O'Neill, J.) (applying the plausibility standard to affirmative defenses).

defenses were "boilerplate" that lacked "supporting facts."[29] As one of the judges admonished, such a pleading approach fell well short of the standard *Twiqbal* imposed: "To state an affirmative defense sufficiently, a defendant must plead 'enough facts to state a claim to relief that is plausible on its face.'"[30] Consequently, the affirmative defenses, as austerely pleaded, "amount to 'blanket assertions' of legal theories" that "fail to provide [J & J] with fair notice as to the facts upon which the defenses are asserted."[31]

In the Indiana opinion, the district judge rejected J & J's request to apply *Twiqbal*, but held that affirmative defenses may be stricken nonetheless if they are "insufficient on the face of the pleadings."[32] The court then explained that some of the sparsely pleaded affirmative defenses were sufficient and some were not, and entered a ruling granting in part and denying in part the motion to strike.[33]

In the five remaining cases, all from California districts, five different district judges ruled that they did not have to decide whether *Twiqbal* applied to affirmative defenses or not. Instead, by applying an arguably more forgiving "fair notice" standard, two of the judges (one from the Eastern District and one from the Southern District) found that cursory allegations imparted proper notice to the plaintiff,[34] although three other, different judges (two from the Eastern District and one from the Northern District) found that cursory allegations did not give proper notice to the plaintiff.[35]

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29. *See Mendoza-Govan*, 2011 WL 1544886, at *1–8 ("[D]efendant does not supply any supporting facts . . . ."); *Franco*, 2011 WL 794826, at *2–4 ("[A] boilerplate defense . . . [not] supported by facts.").

30. *Franco*, 2011 WL 794826, at *2 (quoting *Twombly*, 550 U.S. at 554).

31. *Id.*

32. J & J Sports Prods., Inc. v. Munoz, No. 1:10–cv–1563–WTL–TAB, 2011 WL 2881285, at *1–2 (S.D. Ind. July 15, 2011) (Lawrence, J.).

33. *See id.* (allowing some affirmative defenses but striking others).

34. *See* J & J Sports Prods., Inc. v. Luhn, No. 2:10–CV–03229 JAM–CKD, 2011 WL 5040709, at *1–2 (E.D. Cal. Oct. 24, 2011) (Hayes, J.) (finding that plaintiff had sufficient notice of defendant's defenses); J & J Sports Prods., Inc. v. Scace, No. 10cv2496–WQH–CAB, 2011 WL 2132723, at *2–4 (S.D. Cal. May 27, 2011) (Mendez, J.) (same).

35. *See* J & J Sports Prods., Inc. v. Gidha, No. CIV S–10–2509 KJM–KJN, 2012 WL 537494, at *2–5 (E.D. Cal. Feb. 17, 2012) (Mueller, J.) ("This court also

One litigant. Ten written opinions, by ten different federal judges sitting in three different states. The same essential motion filed ten times under the identical Federal Rule. Five different outcomes, supported by five differing views of *Twiqbal*'s applicability to affirmative defenses. If you were J & J Sports Productions, Inc., or its counsel, it'd probably be tough to know whether you were telecasting boxing matches, or enduring one.

The danger with this national incoherence is made clear by simply considering the nature of affirmative defenses.

Not all defenses are affirmative ones, but the list of affirmative defenses testifies to their potentially case-dispositive importance. They include: assumption of risk, contributory negligence, estoppel, fraud, laches, release, res judicata, statute of frauds, statute of limitations, and waiver.[36] These are not inconsequential legal arguments; if any of these defenses exist, they could terminate portions (or the entirety) of a claimant's lawsuit.[37] They may well prove to be, therefore, critical legal positions in a litigation.

Yet, affirmative defenses are vulnerable to loss at the pleading stage. Indeed, even delaying the assertion of an affirmative defense carries formidable risks. The Federal Rules obligate defending parties to "affirmatively" assert such defenses in their responsive pleadings.[38] Unasserted affirmative defenses

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declines to reach the issue of whether the heightened pleading standard applies to defendants' answer because, as set forth below, the challenged affirmative defenses do not meet the lower pleading standard . . . ."); J & J Sports Prods., Inc. v. Coyne, No. C 10–04206 CRB, 2011 WL 227670, at *2 n.2 (N.D. Cal. Jan. 24, 2011) (Breyer, J.) (same); J & J Sports Prods., Inc. v. Montanez, No. 1:10–cv–01693–AWI–SKO, 2010 WL 5279907, at *2–5 (E.D. Cal. Dec. 13, 2010) (Oberto, Mag.) (same).

36. *See* FED. R. CIV. P. 8(c)(1) (listing potential affirmative defenses). And this list is unquestionably non-exhaustive. *See id.* ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, *including* [listing of defenses].") (emphasis added). *See also* Jones v. Bock, 549 U.S. 199, 212 (2007) (confirming that "Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response").

37. *See, e.g.*, Oden v. Oktibbeha Cnty., 246 F.3d 458, 467 (5th Cir. 2001) (noting that affirmative defenses "will defeat an otherwise legitimate claim for relief" (citations omitted)).

38. FED. R. CIV. P. 8(c)(1). *See* Taylor v. Sturgell, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove . . . [an affirmative] defense."); John R. Sand & Gravel Co. v. United States, 552 U.S.

may be deemed waived and, therefore, lost to the defending litigant forever.[39] Consequently, given their potentially pivotal significance in litigation, as well as the risk posed by omitting them, it has long been among the "best practices" of prudent defending parties to include any affirmative defense that might possibly prove to be germane (regardless of whether the known facts can snugly support such assertions).[40] Whatever *Twiqbal* may be understood to mean, it probably does not tolerate that longstanding approach to affirmative defense pleading.

An attack on a pleaded affirmative defense is resolved under Rule 12(f)—precisely where this *Twiqbal* uncertainty now lies. Although settled legal principles guide the resolution of Rule 12(f) motions,[41] the decision to grant or deny such attacks is considered to be committed to the trial judge's sound discretion.[42] That discretion, furthermore, is considered "liberal" in the context of Rule 12(f).[43] Consequently, the authority this standard invests in the trial judge is vast, bounded only by abject arbitrariness or legal error. As one court explained the abuse of discretion

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130, 133 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.").

39. *See* Day v. McDonough, 547 U.S. 198, 202 (2006) (citing Rule 8(c) for the proposition that "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto"); Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 58 (1st Cir. 2012) ("The law is clear that if an affirmative defense is not pleaded pursuant to FED. R. CIV. P. 8(c)'s requirements, it is waived.").

40. *See* Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573, at *2 n.5 (E.D. Va. Jan. 10, 2011) ("While counsel often plead vast numbers of affirmative defenses without being sure whether the facts will ultimately support the defenses, such pleading is done precisely so that the defenses will be preserved should discovery or further proceedings reveal factual support." (quoting Wanamaker v. Albrecht, No. 95-8061, 1996 WL 582738, at *5 (10th Cir. Oct. 11,1996))).

41. *See infra* notes 80–81 and accompanying text (discussing the rationales underpinning Rule 12(f) decisions).

42. *See, e.g.,* United States v. Coney, 689 F.3d 365, 379–80 (5th Cir. 2012) (applying abuse of discretion standard in reviewing a motion to strike); Siskiyou Reg'l Educ. Project v. U.S. Forest Serv., 565 F.3d 545, 559 (9th Cir. 2009) (same); Delta Consulting Grp., Inc. v. R. Randle Const., Inc., 554 F.3d 1133, 1141–42 (7th Cir. 2009) (same).

43. *See* BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007) ("Judges enjoy liberal discretion to strike pleadings under Rule 12(f).").

standard, it is "abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."[44]

Moreover, once exercised, this immense discretionary authority is further insulated from searching appellate review by two other principles. First, the harmless error rule establishes that even acknowledged judicial mistakes under Rule 12(f) will usually be immune from reversal absent proof of prejudice to the appealing party.[45] Second, that opportunity for appellate review (modest as it may be) will almost certainly have to await the entry of a case-concluding final order; interlocutory appeals from a Rule 12(f) strike are extraordinarily unlikely.[46] This alone may end the chance for review. Given that so tiny a portion of federal civil litigation is actually resolved by trial and the involuntary entry of an appealable final order,[47] the prospects for even the *opportunity* for a meaningful appellate review will likely be quite dim for all but a small portion of challenged Rule 12(f) rulings.

At bottom, then, the specter now confronting federal civil defendants is this: there is national confusion about how to

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44. Delno v. Mkt. St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942); *see also* Bethel v. Baldwin Cnty. Bd. of Educ., 371 Fed. Appx. 57, 61 (11th Cir. 2010) ("Under this standard, we do not disturb the district court's decision as long as it is within a range of reasonable choices and is not influenced by any mistake of law."); Seay v. TVA, 339 F.3d 454, 480 (6th Cir. 2003) ("We review the decision to grant or deny a motion to strike for an abuse of discretion, and decisions that are reasonable, that is, not arbitrary, will not be overturned." (citation omitted)).

45. *See* FED. R. CIV. P. 61 (installing harmless error standard); Toth v. Corning Glass Works, 411 F.2d 912, 914 (6th Cir. 1969) (applying harmless error principles to alleged error in failing to strike a claim).

46. *See, e.g.*, Houston Cnty. Hosp. v. Blue Cross & Blue Shield of Texas, Inc., 481 F.3d 265, 268 (5th Cir. 2007) (describing the collateral order rule as a "narrow doctrine" permitting review of a "small category of decisions" that are "conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action"); Camacho v. Puerto Rico Ports Auth., 369 F.3d 570, 573 (1st Cir. 2004) (commenting that immediate appeals from interlocutory orders under 28 U.S.C. § 1292(b) are "hen's-teeth rare").

47. *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIGATION, Winter 2004, at 3, 4, http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf (discussing data finding that only 1.8% of civil cases were disposed of by trial).

properly plead affirmative defenses, notwithstanding that those defenses may well prove to be case-dispositive in nature, notwithstanding that they can be deemed waived by being belatedly (or improperly) asserted, and notwithstanding that the prospects are indescribably remote for an effective post-trial appellate review from an adverse Rule 12(f) ruling that is provably not harmless and so far outside the enormously sweeping discretionary authority imparted to the district court as to be reversible. The specter only darkens when one considers the risk (small though it may be) that a motion to strike will be granted by the trial judge with prejudice and therefore without hope of any rescue through repleading.[48]

That federal civil litigation now finds itself in so untenable a position is, perhaps, not surprising as the courts continue to work through the meaning and implications of *Twiqbal*. However, the fact that a single litigant—J & J Sports Productions, Inc.—could encounter the full range of the disparate impact of this national uncertainty ought to be a clarion call for resolution.

III. A Litigation Exemplar: Weddle v. Bayer AG Corp.

Oftentimes, assessments of the proper functioning of federal civil practice are gauged on the theoretical plane, where competing policy and practical concerns are examined in their predictive states, largely divorced from "boots-on-the-ground" applied realities. The proper role for *Twiqbal* in testing the adequacy of federal defenses (and, particularly, affirmative defenses) calls for a more applied approach. For that exercise, this article turns to *Weddle v. Bayer AG Corporation.*

The *Weddle* decision offers a helpful platform to guide this exploration for several reasons. First, the result it reaches and the reasoning it applies aligns with the emerging national majority on this *Twiqbal* question.[49] Second, the case comes from

48. *See, e.g.*, Herrera v. Utilimap Corp., Civ. No. H–11–3851, 2012 WL 3527065, at *4 (S.D. Tex. Aug. 14, 2012) (denying defendant's request to replead affirmative defenses that the court just struck, ruling that the record did not reveal the good cause necessary to permit such an amendment).

49. *See infra* Part IV (surveying judicial opinions on the issue).

a federal judicial region (the U.S. Ninth Judicial Circuit) that has been especially active (and internally divided) in considering this question, allowing for a localized assessment of the issue in both a predecision and postdecision setting. Third, the opinion is one of a small handful of cases decided in the context of a single industry (namely, pharmaceutical and medical device litigation) and offers the opportunity to view this issue within a topical litigation environment. Fourth, the case facts make for a fascinating read.

Although this exemplar case examines this *Twiqbal* issue in the context of a defendant's affirmative defenses, this is not, in truth, a "defendant" problem. It is, rather, a "defending party" problem and will confront plaintiffs facing counterclaims and third parties facing impleader complaints just as certainly as it confronts original defendants.[50] In *Weddle*, the problem confronted two defendants sued by a star athlete.

A. Mr. Weddle's Case and Its Pleadings

Plaintiff Eric S. Weddle plays professional football at the position of free safety for the National Football League's San Diego Chargers.[51] He has enjoyed an impressive football career. He was drafted by the Chargers in 2007 out of the University of Utah, where his collegiate exploits hearken back to a bygone era in big-time college football where players routinely pounded out their team's defense and, on change of possession, stayed on the field to run the offense.[52] In one particular game during Weddle's senior year at Utah (a 17–14 victory in November 2006 over Air Force), he was in the game for a numbing 90 plays: he made 8 solo tackles as a defensive back, scored twice as a running back, returned a punt, and held the ball for the team's placekicker for

50. *See* FED. R. CIV. P. 7(a) (confirming that answers are expected not just to complaints but to counterclaims, crossclaims, and third-party complaints).

51. *Player Bio—Eric Weddle*, CHARGERS.COM, http://www.chargers.com/team/roster/eric-weddle/f387ca47-e2bc-4716-9701-45026c431914/ (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review).

52. *See id.* (noting Weddle's college awards, which include both offensive and defensive recognitions).

the winning field goal in overtime.[53] (In other college games, he'd shown still more versatility by being a passer, throwing at least once for a touchdown.)[54] "The only people who spend more time on the field than Weddle each Saturday," gushed one sports columnist, "are referees."[55]

It was hardly surprising that, once in the NFL, Weddle's success continued. His rookie year, he helped ensure a Chargers' playoff victory over the Indianapolis Colts by intercepting Peyton Manning on the goal line.[56] He has since been voted to the Pro Bowl once, named a three-time All-Pro, voted the team's defensive player-of-the-year in 2011, and voted the team's most-valuable-player in 2012.[57] Off the field, Weddle's public recognition has led him to become a spokesperson for the Church of Jesus Christ of Latter-day Saints.[58]

It was Weddle's prominence as a football player and public figure that triggered the lawsuit that became *Weddle v. Bayer AG Corp*. In August 2009, an odd advertising campaign was launched to jointly promote a new sports book and antacid tablets.[59] For

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53. Doug Robinson, *Why Not Give Heisman to Utah's Eric Weddle?*, DESERET NEWS (Nov. 27, 2006), http://www.deseretnews.com/article/650210369/Why-not-give-Heisman-to-Utahs-Eric-Weddle.html; *Utah 17, Air Force 14*, SR/COLLEGE FOOTBALL (Nov. 18, 2006), http://www.sports-reference.com/cfb/boxscores/2006-11-18-air-force.html (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review); *Player Bio—Eric Weddle*, *supra* note 51.

54. Robinson, *supra* note 53.

55. *Id.*

56. *Player Bio—Eric Weddle*, *supra* note 51.

57. *Weddle Voted Chargers Most Valuable Player*, CHARGERS.COM (Dec. 28, 2012), http://www.chargers.com/news/press-releases/2-1/Weddle-Voted-Chargers-Most-Valuable-Player/b29a4203-3409-4352-bb91-ff223d682774 (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review).

58. Trent Toone, *Chargers' Eric Weddle Finds His Joy in the LDS Church*, DESERET NEWS (Mar. 24, 2010), http://www.deseretnews.com/article/705377418/Chargers-Eric-Weddle-finds-his-joy-in-the-LDS-Church.html?pg=all.

59. Neither the pleadings in the *Weddle* case nor the court's *Twiqbal* opinion offer any further insights into this curious co-promotion. Perhaps antacid tablets were considered a natural product-partner for football handbook users because not all members of the sport's fandom limit their enjoyment to "entertainment-only." Such a surmise would likely have only added to Weddle's feelings of affront, as a member of his Church. *See Gospel Topics: Gambling*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://www.lds.org/ldsorg/v/index.jsp?locale=0&sourceId=c9bb2f2324d98010VgnVCM100000

the co-promotion, national sports publisher Athlon Sports collaborated with Bayer USA, a subsidiary of Bayer AG Corporation, to jointly promote the *2009 Football Handbook* (published by Athlon) and Alka-Seltzer antacid tablets (manufactured by Bayer).[60] In conjunction with this joint promotion, national advertising was launched, including a special promotional packaging for Alka-Seltzer tablets to be sold in Wal-Mart, Walgreens, CVS, and other pharmacies throughout the country.[61] A featured image for both the advertising campaign and the Alka-Seltzer packaging was a photograph of a running football player carrying a ball. Evidently, the photo the campaign chose was an often-used one of Weddle, taken during his 2006 college football season at Utah.[62] Neither Weddle's name nor the Utah school or team names appear on the athlete's jersey or elsewhere in the photo. But it seems that these omissions were manufactured artificially by "photoshopping" the existing image to obscure team logos and to darken the running player's helmeted face.[63] Nonetheless, Weddle contended that, even "photoshopped," the image was still "clearly" one of him because the base photo was unquestionably one that had been taken of his play (and a widely seen one at that), and because the jersey's number (#32) was the number Weddle wore in college (and, also, later as a pro).[64]

4d82620a____&vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD (last visited Oct. 1, 2013) ("The Church of Jesus Christ of Latter-day Saints is opposed to gambling, including lotteries sponsored by governments. Church leaders have encouraged Church members to join with others in opposing the legalization and government sponsorship of any form of gambling.") (on file with the Washington and Lee Law Review).

60. Complaint ¶ 20, Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012).

61. *Id.* ¶ 24.

62. *See id.* ¶ 22 ("[Defendants] selected a photo from an online photo database of Weddle . . . .").

63. *Chargers' Weddle Accuses Bayer, Athlon of Unauthorized Use of His Image*, STREET & SMITH'S SPORTSBUSINESS DAILY (Apr. 22, 2011), http://www.sportsbusinessdaily.com/Daily/Issues/2011/04/22/Marketing-and-Sponsorship/Weddle.aspx (last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review).

64. Complaint ¶¶ 14 & 22.

Weddle considered this promotional use of his (albeit "photoshopped") photograph to be a misappropriation of his image and likeness, as well as a deception suggesting—inaccurately—that he was associated with or had otherwise endorsed the co-promoted products.[65] Weddle's attorney wrote to Athlon Sports insisting they cease-and-desist from further use of the photograph and, when they seemingly failed to do so (or to do so promptly or sufficiently), Weddle filed his lawsuit in the U.S. District Court for the Southern District of California (San Diego).[66] The lawsuit contained eight claims, alleging violations of the federal and California statutory image misappropriation laws, the Lanham Act, the California False or Misleading Advertising Act, the California Preservation and Regulation of Competition Act, as well as common law misappropriation, conspiracy to misappropriate, and unauthorized commercial use of likeness.[67] Weddle sought actual damages in the amount of a reasonable royalty fee, punitive damages, and attorney's fees.[68]

In their original answer, Athlon Sports and Bayer USA replied with specific paragraphed denials to Weddle's allegations, and then asserted fifteen affirmative defenses.[69] Weddle responded by moving to strike all of the affirmative defenses. He argued that the defenses "had not complied with Federal Rule of Civil Procedure 8(a), which requires a short and plain statement of the defense asserted" and were instead "merely . . . bare bone conclusory allegations" that "fail to put Plaintiff on fair notice of the nature of the defense."[70] Weddle's motion was soon mooted,

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65. *Id.* ¶¶ 12–13, 62, & 70.

66. *Id.* ¶¶ 23 (and Exhibit "C") & 42.

67. *Id.* ¶¶ 25–84.

68. *Id.* ¶ 15.

69. These originally pleaded affirmative defenses were (1) failure to state a claim; (2) lack of standing; (3) innocent infringer/lack of willfulness; (4) no jury for equitable issues; (5) failure to mitigate; (6) statute of limitations; (7) laches; (8) First Amendment; (9) newsworthiness; (10) request to strike punitive damages; (11) NCAA standing; (12) plaintiff not identifiable; (13) waiver; (14) estoppel; and (15) consent. Answer to Complaint ¶¶ 7–10, Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012).

70. Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *3 n.1 (S.D. Cal. Mar. 26, 2012) (quoting Plaintiff's Motion to Strike, Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, (S.D. Cal. Mar.

however, when he filed an amended complaint.[71] This, in turn, prompted the two defendants to file a new answer, which again included specific paragraphed denials, but this time asserted only five affirmative defenses: (1) lack of standing; (2) innocent infringer/lack of willfulness; (3) First Amendment; (4) newsworthiness; and (5) request to strike punitive damages.[72] The last three of these defenses were pleaded exactly as they had been in the original answer. The first two defenses, however, were factually enhanced. As originally pleaded, the lack of standing defense had read simply:

> Plaintiff lacks standing to assert some or all of his claims for relief.[73]

As reconfigured for the new answer, the defendants elaborated:

> Plaintiff lacks standing to assert some or all of his claims for relief because, among other things, on information and belief and subject to further discovery, Defendants contend that Plaintiff assigned to the University of Utah and/or the National Collegiate Athletic Association ("NCAA") any and all rights to exploit his name, image, likeness and other indicia of his identity as he appeared as a player for the University of Utah.[74]

Similarly, the innocent infringer defense to the original complaint had read:

> To the extent that Defendants infringed Plaintiff's trademark rights, which Defendants deny, such infringement was innocent and not willful.[75]

In the new answer to the amended complaint, defendants expanded:

26, 2012)).

71. The revised pleading was filed pursuant to an unusual "joint motion" for leave to file an amended complaint. *Weddle*, 2012 WL 1019824, at *1. Consequently, the court had no cause to rule upon the first motion to strike.

72. Answer to Amended Complaint ¶¶ 7–9, Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012).

73. Answer to Complaint at 7, Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012).

74. Answer to Amended Complaint, *supra* note 72, at 7.

75. Answer to Complaint, *supra* note 73, at 7.

> To the extent that Defendants infringed Plaintiff's trademark or other rights, which Defendants specifically deny, Defendants did not know or believe at the time the materials at issue in the First Amended Complaint were created and distributed that such materials contained or used or could be recognized as using an image and/or trademark of Plaintiff and therefore any alleged infringement of Plaintiff's trademark or other rights was innocent and not willful.[76]

Weddle then moved the district judge to strike the defendants' five affirmative defenses or, in the alternative, to compel the defendants to submit a more definite statement.[77]

B. The Weddle *Court's Ruling*

As he framed it, Weddle's challenge to the five affirmative defenses Athlon Sports and Bayer USA had pleaded in their new answer obligated the trial court to make three rulings. First, as a threshold matter, the court had to determine the federal pleading standard by which the defendants' affirmative defenses would be measured. Second, the court had to apply those standards to resolve Weddle's motion to strike the defenses. Third, if the defenses were not stricken, the court had to determine whether to order defendants to supply a more specific statement of their defenses. The judge who was called upon to make these determinations was the Honorable Janis Lynn Sammartino of the San Diego federal bench.[78]

The first two rulings would hinge on Weddle's request for relief under Federal Rule of Civil Procedure 12(f), motions to

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76. Answer to Amended Complaint, *supra* note 72, at 7.

77. Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *1 (S.D. Cal. Mar. 26, 2012).

78. Judge Sammartino was nominated to the bench by President George W. Bush and received her commission in 2007. She was born in Philadelphia, Pennsylvania, received her A.B. from Occidental College and her J.D. from Notre Dame. She served as a San Diego deputy city attorney for eighteen years, followed by terms on the San Diego municipal and superior courts. *See Biographical Directory of Federal Judges: Sammartino, Janis Lynn*, FED. JUDICIAL CTR., http://www.fjc.gov/public/home.nsf/hisj (follow "s" hyperlink; then click "Sammartino") (last visited Oct. 1, 2013) (providing biography) (on file with the Washington and Lee Law Review).

strike. The third would turn on Federal Rule of Civil Procedure 12(e), motions for more specific statements. Neither Rule is especially hospitable for litigants. Extensive case precedent confirms that both motions are viewed by courts with "disfavor" and are to be only sparingly granted.[79] Judge Sammartino began her opinion by noting just that. "[M]otions to strike," she wrote, "are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic."[80] Consequently, unless the matter sought to be stricken could, without "any doubt," have "no possible bearing on the subject of the litigation," motions to strike should be refused.[81] Likewise, she wrote, motions for more definite statements should only be entertained when the pleading under attack is "so indefinite" that a responding party would not "ascertain the nature of the claims being asserted and literally cannot frame a responsive pleading."[82] With those introductory principles behind her, Judge Sammartino turned to Weddle's motions.

First, the threshold issue of pleading standard had to be resolved. This compelled the court to tackle the critical *Twiqbal* question.

As all federal litigators can probably recite now from memory, the U.S. Supreme Court in its 2007 *Twombly* decision formally "retired" the oft-quoted mantra from *Conley v. Gibson*[83]

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79. *See, e.g.*, 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, at 394 (2004) (collecting cases and noting: "[b]oth because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic, numerous judicial decisions make clear that motions under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted" (footnotes omitted)); *id.* § 1377, at 338–39 (collecting cases and noting "as a result of the generally disfavored status of these motions [for a more definite statement], the proportion of Rule 12(e) requests granted by the district courts appears to have remained quite low" (citations omitted)).

80. *Weddle*, 2012 WL 1019824, at *1 (quoting Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003)).

81. *Id.* (quoting Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)).

82. *Id.* (quoting Hubbs v. Cnty. of San Bernardino, 538 F. Supp. 2d 1254, 1262 (C.D. Cal. 2008)).

83. 355 U.S. 41 (1957).

that federal complaints should not be dismissed "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."[84] The Court forced *Conley* to pasture, it explained, because such a construction of the federal pleading rules could, if "read in isolation," mean that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[85] This, the Court concluded, was an incorrect reading of Federal Rule of Civil Procedure 8(a)(2) and its admonition that pleading a federal claim requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[86] Although that austere standard would not necessitate "detailed factual allegations," more was expected than mere "labels and conclusions" and "formulaic recitation[s] of the elements of a cause of action."[87] Instead, as Rule 8(a)(2) commanded, to "show" the "grounds" for an "entitle[ment] to relief," federal pleaders were obligated to supply "enough" factual allegations "to raise a right to relief above the speculative level,"[88]

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84. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007) ("[*Conley*'s] 'no set of facts' language has been questioned, criticized, and explained away long enough . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement." (quoting *Conley*, 355 U.S. at 45–46)). *See generally* STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN, JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK 333–36, 452–55 (2013) (discussing background and principles of *Twombly* and *Iqbal*).

85. *Twombly*, 550 U.S. at 561.

86. *Id.* at 555 (quoting FED. R. CIV. P. 8(a)(2)).

87. *Id.*

88. *Id.* The requirements of a "showing" and an "entitle[ment] to relief" are both found in the text of Rule 8(a)(2) itself. *See* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim *showing* that the pleader is *entitled* to relief . . . ." (emphasis added)). The majority found the requirement of a "showing" corroborative of its conclusion that an adequate factual presentation from claimants is essential. *See Twombly*, 550 U.S. at 555 n.3

> Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also "grounds" on which the claim rests.

The requirement of stating the "grounds" for a claim comes a bit more indirectly. The Rule drafters had expressly required a statement of "grounds" for invoking the court's jurisdiction. *See* FED. R. CIV. P. 8(a)(1) ("[A] short and plain

or, as the Court later casted it, the pleading must "possess enough heft"[89] to "nudge[] . . . claims across the line from conceivable to plausible."[90] This "plausibility" inquiry, explained the Court, "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" to prove the allegations.[91] "[S]omething beyond . . . mere possibility" is necessary "lest a plaintiff with 'a largely groundless claim' 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.'"[92]

Two years later, in *Ashcroft v. Iqbal*, the Court reaffirmed the "plausibility" test for federal claims, verifying that the *Twombly* ruling "expounded the pleading standard for 'all civil actions,'" and rejecting—as "not supported by *Twombly* and . . . incompatible with the Federal Rules of Civil Procedure"—the intimation that the ruling ought not apply to all federal complaints.[93] The Court in *Iqbal* further explained how the appropriate "plausibility" inquiry progresses linearly through two steps: first, the court must set aside allegations that are "nothing more than conclusions," because, as to those, the court will not defer to their truth; second, the court must focus on the "well-pleaded" factual allegations, and, as to those, assume their truth and, then, assess whether they (and only they) plausibly give rise to an entitlement to relief.[94] This "plausibility" inquiry, the Court concluded, is to be "a context-specific task that requires the

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statement of the grounds for the court's jurisdiction . . . ."). But, as the quotation above confirms, that term is absent from the later obligation of pleading an entitlement to relief. Nevertheless, the obligation was pronounced summarily by the Court in *Conley v. Gibson*. *See Conley*, 355 U.S. at 47 ("[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is *and the grounds upon which it rests*." (emphasis added)). The *Conley* Court's source for this "grounds" obligation is not expressly identified in that opinion.

89. *Twombly*, 550 U.S. at 557.

90. *Id.* at 570.

91. *Id.* at 556.

92. *Id.* at 557–58 (quoting Dura Pharmas., Inc. v. Broudo, 544 U.S. 336, 347 (2005)) (citations omitted).

93. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

94. *Id.* at 679.

reviewing court to draw on its judicial experience and common sense."[95]

What neither *Twombly* nor *Iqbal* addressed, however, was whether this "plausibility" standard, formulated for claims (that, under Rule 8(a)(2), must be "show[n]" to have an "entitlement to relief"[96]) also applies to general and affirmative defenses. Of course, that comes as no particular surprise. The Court in both *Twombly* and *Iqbal* was testing the allegations of complaints against motions to dismiss; there was no occasion to consider, or cause to rule upon, the pleading standard governing answers.

Had the Court so ventured, however, it likely would have begun with the text of the implicated Rules.[97] The Rules governing general and affirmative defenses are expressed differently than the standard for claims. Rule 8(b)(1)(A) requires of responding parties that they must "state in short and plain terms [their] defenses to each claim asserted against [them]."[98] Rule 8(c)(1) requires further that responding parties "must affirmatively state any avoidance or affirmative defense."[99] Notably, neither provision contains any explicit analogue to Rule 8(a)(2)'s command for a "showing" of an "entitlement to relief,"[100] nor the *Conley* Court's command for an exposition of "grounds."[101]

In her research, Judge Sammartino in *Weddle* found no U.S. court of appeals decision ruling squarely on this question of whether *Twiqbal* applied to defenses.[102] She also determined that

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95. *Id.*

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

97. *See* Pavelic & LeFlore v. Marvel Ent. Grp., 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete.'" (citations omitted)).

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

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

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

101. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (requiring a statement of the grounds of plaintiff's claim).

102. *See* Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *2 (S.D. Cal. Mar. 26, 2012) (noting a lack of appellate rulings on the issue). That remains true as this Article goes to press. None of the U.S. courts of appeals has expressly ruled whether *Twiqbal* should, or should not, apply to the pleading of affirmative defenses. *See, e.g.*, Herrera v. Churchill McGee, LLC, 680 F.3d 539, 547 n.6 (6th Cir. 2012) ("We . . . have no occasion to

the district courts within the Ninth Circuit "have gone both ways."[103] (Interestingly, in the string-citation she offered to illustrate this division, Judge Sammartino tended towards modeling the national trend on the issue—of the five cases she cited, four rejected *Twiqbal*'s application to defenses and the one case that embraced the notion was also the earliest one in time, decided in 2007, on the heels of the *Twombly* opinion.)[104] After surveying this split and considering the competing arguments, she ruled that "*Twombly*'s heightened pleading standard does not apply to Defendants' defenses."[105] Instead, citing what she found to be controlling local circuit precedent on the issue, Judge Sammartino held that "[t]he key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."[106]

Second, having settled on the governing legal standard for Weddle's motion to strike, the court then proceeded to test the five challenged affirmative defenses. She ruled that none of the Athlon Sports/Bayer USA affirmative defenses ought to be stricken:

> First Affirmative Defense—Lack of Standing: Weddle had attacked this first defense as "bare bone conclusory allegations" that "fail[] to [give] Plaintiff fair notice of the nature of the defense."[107] Judge Sammartino, however, corrected the plaintiff: unlike the original answer (which had been pleaded in "bare bones" fashion), the answer to the amended complaint added enhancement details and was sufficient to impart fair notice of the defendants' factual

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address, and express no view regarding, the impact of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), on affirmative defenses.").

103. *Id.*

104. *See id.* at *2 (citing cases). In fact, this one outlier "*Twiqbal*-applies" case among Judge Sammartino's five citations was decided on August 13, 2007—less than 90 days after *Twombly* was released and in the veritable maelstrom that marked the early reaction to the new "plausibility" principle. *See id.* (noting Anticancer, Inc. v. Xenogen Corp., 248 F.R.D. 278, 282 (S.D. Cal. 2007) as the one outlier case).

105. *Id.* at *3.

106. *Id.* (quoting Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) (citing Conley v. Gibson, 355 U.S. 41, 47–48 (1957))).

107. *Id.* at *3 n.1.

argument, namely "that Plaintiff lacks standing because he has assigned his rights to the NCAA or the University of Utah."[108]

Second Affirmative Defense—Innocent Infringer: Weddle had attacked this second defense as legally insufficient because ignorance of the law is ordinarily no excuse for misconduct.[109] Again, the court corrected the plaintiff: defendants were not claiming ignorance of the law but rather seeking to negate an element of plaintiff's case (namely, knowledge).[110] The court agreed with Weddle that the averment was not a true "affirmative defense" because all it proposed to do was "negate[] an element of the plaintiff's prima facie case."[111] Even so, however, strikes are disfavored, and because Weddle could show no prejudice from allowing the allegation to remain, the motion to strike was denied.[112]

Third and Fourth Affirmative Defenses—First Amendment & Newsworthiness: Weddle challenged these defenses as failing to supply him or the court with "notice of the specific legal basis and/or facts for avoiding liability for the claims alleged in the Complaint based upon the constitutional grounds asserted in such defense."[113] Although acknowledging the averments to be "somewhat sparse as to how the referenced constitutional provisions serve to protect Defendants from liability or how the newsworthiness of the publication bears on Defendants' liability," the court found that Weddle had received "notice of the defense asserted," and that sufficed.[114]

Fifth Affirmative Defense—Punitive Damages: Lastly, Weddle challenged the adequacy of defendants' contentions that punitive damages could not be awarded because no facts supported such relief and because both the vagueness doctrine and the Constitution would forbid it.[115] The court rejected this challenge as well, ruling that the averment was either a

108. *Id.* at *3.
109. *Id.*
110. *Id.*
111. *Id.* at *4 (citation omitted).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at *5.

> nonprejudicially mislabeled general defense or adequate "fair notice of the defense asserted."[116]

Third and finally, Judge Sammartino turned to Weddle's alternative request that defendants be ordered to file a more definite statement. Here, too, Weddle met no success. The court noted that Federal Rule of Civil Procedure 12(e) permits such more definite statement requests only "of a pleading to which a responsive pleading is allowed."[117] Because plaintiffs are not generally "allowed" to file a responsive pleading to a defendant's answer, and because Judge Sammartino had not granted Weddle special leave to so respond, the predicate for Rule 12(e) relief was absent.[118] Weddle's motion thus denied in its entirety, the case proceeded on.

C. The Weddle *Court's Rationale*

As Judge Sammartino weighed her decision on whether to apply *Twiqbal* "plausibility" to affirmative defenses, she enjoyed the benefit of consulting a fruitful body of precedent within her judicial region, the Ninth Circuit. As of the date she ruled, at least fifteen of her trial-level circuit colleagues had written post-*Iqbal* opinions on the issue and, though divided, a majority view was emerging. At least nine of those courts ruled that *Twiqbal* should not apply to affirmative defenses,[119] at least five held that

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116. *Id.*

117. *Id.* (quoting FED. R. CIV. P. 12(e)).

118. *Id.* at *5.

119. *Twiqbal* Not Applied: Ferring B.V. v. Watson Labs., Inc., Nos. 3:11–cv–00481–RCJ–VPC, 3:11–cv–00485–RCJ–VPC, 3:11–cv–00853–RCJ–VPC, 3:11–cv–00854–RCJ–VPC, 2012 WL 607539 (D. Nev. Feb. 24, 2012); Kohler v. Islands Rests., LP, 280 F.R.D. 560 (S.D. Cal. Feb. 16, 2012); Meas v. CVS Pharmacy, Inc., No. 11cv0823 JM(JMA), 2011 WL 2837432 (S.D. Cal. July 14, 2011); J & J Sports Prods., Inc. v. Scace, No. 10cv2496–WQH–CAB, 2011 WL 2132723 (S.D. Cal. May 27, 2011); *In re* Washington Mut., Inc., Secs., Derivative & ERISA Litig., No. 08–md–1919 MJP, 2011 WL 1158387 (W.D. Wash. Mar. 25, 2011); J & J Sports Prods., Inc. v. Khachatrian, No. CV–10–1567–GMS–PHX, 2011 WL 720049 (D. Ariz. Feb. 23, 2011); Trustmark Ins. Co. v. C&K Mkt., Inc., No. CV 10–465–MO, 2011 WL 587574 (D. Or. Feb. 10, 2011); Garber v. Mohammadi, No. CV 10–7144–DDP (RNB), 2011 WL 2076341 (C.D. Cal. Jan. 19, 2011);

it should,[120] and one touched on the issue without making a definitive ruling.[121] This bounty of case law, along with the briefing of the litigants Weddle, Athlon Sports, and Bayer AG, ensured her ability to assess the issue comprehensively.

In the end, the emerging Ninth Circuit (and national) majority view on the question persuaded her. In ruling that *Twiqbal* "plausibility" ought not to apply to affirmative defenses, the court relied on two core arguments, one textual and one functional.

Textually, Judge Sammartino zeroed in on the syntax differences between Rule 8(a)(2), which addresses claims, and Rule 8(c)(1), which addresses affirmative defenses. As noted earlier, the former obligates claimants to plead a "short and plain statement of the claim showing that the pleader is entitled to relief."[122] Conversely, Rule 8(c)(1) requires only that "a party must affirmatively state any avoidance or affirmative defense."[123] To Judge Sammartino, this was a distinction with a difference. The Supreme Court's linkage of the "plausibility" test to this Rule 8(a)(2) "showing"/"grounds"/"entitlement-to-relief" triumvirate not only explained the origination of the test itself,[124] but also served to distinguish it from other pleading rules (like Rule 8(c)(1)) that contain none of those three terms. These

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Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907 (D. Ariz. July 15, 2010).

120. *Twiqbal* Applied: Dion v. Fulton Friedman & Gullace, LLP, No. 11-2727SC, 2012 WL 160221 (N.D. Cal. Jan. 17, 2012); Yates v. Perko's Café, Nos. C 11–00873 SI, C 11–1571, 2011 WL 2580640 (N.D. Cal. June 29, 2011); J & J Sports Prods., Inc. v. Franco, No. CV F 10–1704 LJO DLB, 2011 WL 794826 (E.D. Cal. Mar. 1, 2011); Barnes v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167 (N.D. Cal. 2010); CTF Dev't, Inc. v. Penta Hospitality, LLC, No. C 09–02429 WHA, 2009 WL 3517617 (N.D. Cal. Oct. 26, 2009).

121. *Twiqbal* Unresolved: Joe Hand Promotions, Inc. v. Alvarado, No. 1:10–cv–00907 LJO JLT, 2010 WL 4746165 (E.D. Cal. Nov. 16, 2010).

122. Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *2 (S.D. Cal. Mar. 26, 2012) (quoting FED. R. CIV. P. 8(a)(2)).

123. *Id.* at *2 (quoting FED. R. CIV. P. 8(c)(1)).

124. *See supra* notes 83–95 and accompanying text (discussing *Twombly* and *Iqbal*); *see also Weddle*, 2012 WL 1019824, at *2 (highlighting language differences between Rules 8(a)(2) and 8(c)(1)).

"differences in the plain language of Rule 8(a)(2) and Rule 8(c)," concluded Judge Sammartino, "suggest that less is required for pleading affirmative defenses."[125]

Functionally, Judge Sammartino reasoned that concerns of practicality and judicial economy verified her decision not to apply *Twiqbal*. "Some of these considerations include the limited time a defendant has to prepare an answer to the complaint, avoidance of the need to repeatedly amend an answer to assert later-discovered defenses, and discouragement of motions to strike brought for dilatory or harassment purposes."[126] These responding-party considerations were not mirrored in claiming-party pleadings, and provided the court with a measure of corroborating justification for the *Weddle* opinion result.

Together, these textual and functional concerns convinced Judge Sammartino to reject *Twiqbal*'s "plausibility" approach for testing the Athlon Sports/Bayer AG affirmative defenses: "Thus, the Court concludes that *Twombly*'s heightened pleading standard does not apply to defendants' affirmative defenses."[127] Without the *Twiqbal* modification, the incumbent Ninth Circuit standard, set by its Court of Appeals in 1979, would govern: "[t]he key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."[128]

In the time that has passed since Judge Sammartino rendered her decision in *Weddle v. Bayer AG Corp.*, at least fifty-five more district judges within the Ninth Circuit have issued *Twiqbal* decisions of their own on affirmative defenses.

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125. *Weddle*, 2012 WL 1019824, at *2.

126. *Id.* at *3.

127. *Id.* Judge Sammartino's reference to *Twiqbal* as a "heightened" pleading requirement may reflect her own impressions of the "plausibility" standard in operation, or her view of the standard's contrast to the "no-set-of-facts" formulation Justice Hugo Black coined in *Conley v. Gibson*. In either event, the reference would probably not be one the Supreme Court would embrace. *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007) ("[W]e do not apply any 'heightened' pleading standard . . . .").

128. Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *3 (S.D. Cal. Mar. 26, 2012) (quoting Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979)).

But, unlike the modestly divided precedent Judge Sammartino confronted, the newer precedent points in a far more hopelessly divided direction. Twenty-three of those opinions joined her in rejecting *Twiqbal*'s application to affirmative defenses,[129] twenty applied *Twiqbal* to affirmative defenses,[130] and twelve

129. *Twiqbal* Not Applied: Garity v. Donahoe, No. 2:11-CV-01805-MMD, 2013 WL 4774761 (D. Nev. Sept. 4, 2013); Burton v. Nationstar Mortg., LLC, No. CV-F-13-0307-LJO-GSA, 2013 WL 4736838 (E.D. Cal. Sept. 3, 2013); Pickern v. Chico Steakhouse, LP, No. 12-cv-02586-TLN-CMK, 2013 WL 4051640 (E.D. Cal. Aug. 8, 2013); DC Labs, Inc. v. Celebrity Signatures Int'l, Inc., No. 12-CV-01454 BEN (DHB), 2013 WL 4026366 (S.D. Cal. Aug. 6, 2013); Pacific Dental Servs., LLC v. Homeland Ins. Co. of N.Y., No. SACV 13-749-JST (JPRx), 2013 WL 3776337 (C.D. Cal. July 17, 2013); Polk v. Legal Recovery Law Offices, No. 12-CV-0641-W-MDD, 2013 WL 3147728 (S.D. Cal. June 19, 2013); Devermont v. City of San Diego, No. 12-CV-01823 BEN (KSC), 2013 WL 2898342 (S.D. Cal. June 14, 2013); Vogel v. AutoZone Parts, Inc., No. CV-13-0300-CAS (AJWx), 2013 WL 2395905 (C.D. Cal. May 31, 2013); Diaz v. Alternative Recovery Mgmt., No. 12-CV-1742-MMA (BGS), 2013 WL 1942198 (S.D. Cal. May 8, 2013); Vogel v. Linden Optometry APC, No. CV 13-0295 GAF (SHx), 2013 WL 1813686 (C.D. Cal. Apr. 30, 2013); Roe v. City of San Diego, No. 12-CV-0243-W-(WVG), 289 F.R.D. 604 (S.D. Cal. Mar. 5, 2013); Kohler v. Staples the Office Superstore, LLC, No. 11-CV-2025-W-BLM, 2013 WL 544058 (S.D. Cal. Feb. 12, 2013); Ferring B.V. v. Watson Labs., Inc., Nos. 3:11-CV-00481-RCJ-VPC, 3:11-CV-00485-RCJ-VPC, 3:11-CV-00853-RCJ-VPC, 3:11-CV-00854-RCJ-VPC, 2013 WL 499158 (D. Nev. Feb. 6, 2013); Palmason v. Weyerhaeuser Co., No. C11-695RSL, 2013 WL 392705 (W.D. Wash. Jan. 31, 2013); Rapp v. Lawrence Welk Resort, No. 12-CV-01247 BEN (WMc), 2013 WL 358268 (S.D. Cal. Jan. 28, 2013); Fed. Trade Comm'n v. North Am. Mktg. & Assocs., LLC, No. CV–12–0914–PHX–DGC, 2012 WL 5034967 (D. Ariz. Oct. 18, 2012); Walker-Cook v. Integrated Health Res., LLC, Civ. No. 12–00146 ACK–RLP, 2012 WL 4461159 (D. Haw. Aug. 10, 2012); Cape Flattery Ltd. v. Titan Maritime LLC, Civ. No. 08–00482 JMS/KSC, 2012 WL 3113168 (D. Haw. July 31, 2012); G&G Closed Circuit Events, LLC v. Mitropoulos, No. CV12–0163–PHX DGC, 2012 WL 3028368 (D. Ariz. July 24, 2012); J & J Sports Prods., Inc. v. Vargas, No. CV 11–2229–PHX–JAT, 2012 WL 2919681 (D. Ariz. July 17, 2012); Figueroa v. Baja Fresh Westlake Vill., Inc., No. CV 12–769–GHK (SPx), 2012 WL 2373254 (C.D. Cal. May 24, 2012); Kohler v. Big 5 Corp., No. 2:12–cv–00500–JHN–SPx, 2012 WL 1511748 (C.D. Cal. Apr. 30, 2012); Figueroa v. Marshalls of Cal., LLC, No. CV11–06813–RGK (SPx), 2012 WL 1424400 (C.D. Cal. Apr. 23, 2012).

130. *Twiqbal* Applied: Figueroa v. Stater Bros. Mkts., Inc., No. CV-13-3364 FMO (JEMx), 2013 WL 4758231 (C.D. Cal. Sept. 3, 2013); ADP: Commercial Leasing, Inc. v. M.G. Santos, Inc., No. CV-F-13-0587-LJO-SKO, 2013 WL 3863897 (E.D. Cal. July 24, 2013); Nextdoor.Com, Inc. v. Abhyanker, No. C-12-5667-EMC, 2013 WL 3802526 (N.D. Cal. July 19, 2013); Vogel v. Huntington Oaks Del. Partners, LLC, No 2:13-cv-842-ODW(MANx), 2013 WL 3337803 (C.D. Cal. July 2, 2013); Gandeza v. Brachfeld Law Group, No. C 13-0810 SC, 2013

were inconclusive.[131]

IV. A Survey of the Case Law Ruling on Twiqbal*'s Applicability to Affirmative Defenses*

As this Article goes to press, more than 230 federal decisions have addressed the question of *Twiqbal*'s applicability to affirmative defenses in the period since the Supreme Court

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WL 3286187 (N.D. Cal. June 27, 2013); Miller v. Ghirardelli Chocolate Co., No. C 12-04936 LB, 2013 WL 31553388 (N.D. Cal. June 19, 2013); Cabrera v. Alvarez, No. C 12-04890 SI, 2013 WL 3146788 (N.D. Cal. June 18, 2013); Dodson v. Munirs Co., No. CIV. S-13-0399 LKK/DAD, 2013WL 3146818 (E.D. Cal. June 18, 2013); Dodson v. Strategic Rests. Acquisition Co., No. CIV. S-13-0402 LKK/EFN, 289 F.R.D. 595 (E.D. Cal. June 18, 2013); J & J Sports Prods., Inc. v. Barwick, No. 5:12-CV-05284-LHK, 2013 WL 2083123 (N.D. Cal. May 14, 2013); Catch A Wave, Inc. v. Sirius XM Radio, Inc., No. C-12-05791-WHA, 2013 WL 1996134 (N.D. Cal. May 13, 2013); Innovation Ventures, LLC v. Pittsburg Wholesale Grocers, Inc., No. C-12-05523-WHA , 2013 WL 2009681 (N.D. Cal. May 13, 2013); Righetti v. Cal. Dep't of Corrections & Rehab., No. C-11-2717-EMC, 2013 WL 1891374 (N.D. Cal. May 6, 2013); Polo v. Shwiff, No. C 12-04461 JSW, 2013 WL 1797671 (N.D. Cal Apr. 29, 2013); Ramirez v. Ghilotti Bros., No. C-12-04590, 2013 WL 1786636 (N.D. Cal. Apr. 25, 2013); Spears v. First American Eappraiseit, No. 5-08-CV-00868-RMW, 2013 WL 1748284 (N.D. Cal. Apr. 23, 2013); Ross v. Morgan Stanley Smith Barney, LLC, No. 2:12-cv-009687-ODW(JCx), 2013 WL 1344831 (C.D. Cal. Apr. 2, 2013); Ansari v. Electronic Document Processing, Inc., No. 5:12-CV-01245-LHK, 2013 WL 664676 (N.D. Cal. Feb. 22, 2013); O'Sullivan v. AMN Servs., Inc., No. C–12–02125 JCS, 2012 WL 2912061 (N.D. Cal. July 16, 2012); Powertech Tech., Inc. v. Tessera, Inc., No. C 10–945 CW, 2012 WL 1746848 (N.D. Cal. May 16, 2012).

131. *Twiqbal* Unresolved: Hernandez v. Creative Concepts, Inc., No. 2:10-CV-02132-PMP-VCF, 2013 WL 4399235 (D. Nev. Aug. 16, 2013); Dodson v. CSK Auto, Inc., No. 2:13-cv-00346-GEB-AC, 2013 WL 3942002 (E.D. Cal. July 30, 2013); Intermountain Fair Housing Council, Inc. v. Michael's Manor, LLC,, No. 4:12-cv-00645-BLW, 2013 WL 3944259 (D. Idaho July 29, 2013); Charter Oak Fire Ins. Co. v. Interstate Mech., Inc., No. 3:10-CV-01505-PK, 2013 WL 3809466 (D. Or. July 23, 2013); Joe Hand Promotions, Inc., v. Dorsett, No. 12-CV-1715-JAM-EFB, 2013 WL 1339231 (E.D. Cal. Apr. 3, 2013); Fleming v. Escort, Inc., No. 1:12–CV–066–BLW, 2013 WL 870632 (D. Idaho Mar. 6, 2013); J & J Sports Prods., Inc. v. Bear, No. 1:12–cv–01509–AWI–SKO, 2013 WL 708490 (E.D. Cal. Feb. 26, 2013); Alcantar v. Hobart Serv., No. ED CV 11–1600 PSG (SPx), 2013 WL 228501 (C.D. Cal. Jan. 22, 2013); J & J Sports Prods., Inc. v. Catano, No. 1:12–cv–00739–LJO–JLT, 2012 WL 5424677 (E.D. Cal. Nov. 6, 2012); J & J Sports Prods., Inc. v. Sanchez, 2012 U.S. Dist. LEXIS 74070 (E.D. Cal. May 29, 2012); J & J Sports Prods., Inc. v. Romero, No. 1:11–cv–1880–AWI–BAM, 2012 WL 1435004 (E.D. Cal. Apr. 25, 2012); Botell v. United States, No. 2:11–cv–01545–GEB–GGH, 2012 WL 1027270 (E.D. Cal. Mar. 26, 2012).

decided the *Iqbal* case in May 2009.[132] Plotting that case law is an instructive exercise, both because of what it informs and because practicing attorneys need ready access to this now highly localized federal practice standard. That survey reveals what certainly seems to be an emerging consensus, and that consensus favors the same outcome the court in *Weddle v. Bayer AG Corp.* embraced. This, perhaps, is one of the more truly fascinating aspects of *Weddle*—more than six years after *Twombly* was decided, the question *Weddle* tackled of proper affirmative defense pleading remains inconclusively resolved and still subject to not only circuit-by-circuit uncertainty but district-by-district (and, indeed, chambers-by-chambers) uncertainty.[133] This frequently litigated *Twiqbal* spin-off issue has emerged as a paradigmatic trap for the unwary.

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132. In the post-*Twombly* and pre-*Iqbal* period, it remained uncertain whether the Supreme Court intended its "plausibility" test to be given a constrained reach—for example, to govern pleadings only in antitrust cases, or inference-heavy cases, or complex and sprawling discovery cases. That uncertainty was resolved by the Court in its May 18, 2009 opinion in *Iqbal*, where it made clear that "plausibility" is to be used to govern the adequacy of complaints in all federal civil litigation. *See supra* notes 83–95 and accompanying text (elaborating on the progression from *Twombly* to *Iqbal*). Because the federal judiciary remained unclear on the reach of "plausibility" until *Iqbal* was decided, it seems prudent to begin the assessment of the courts' treatment of "plausibility" in the affirmative defenses context from that date. To accommodate publication deadlines, the inclusion of new cases ended as of September 15, 2013.

133. *See, e.g.*, CitiMortgage, Inc. v. Draper & Kramer Mortg. Corp., No. 4:10CV1784 FRB, 2012 WL 3984497, at *3 (E.D. Mo. Sept. 11, 2012) ("[D]iffering opinions appear to have been rendered by courts sitting within this district alone."); Kohler v. Islands Rests., LP, 280 F.R.D. 560, 565 (S.D. Cal. 2012) ("Although the Ninth Circuit has not yet adopted the *Twombly/Iqbal* pleading standard for affirmative defenses [plaintiff] cites to several district courts that have . . . [defendant] directs the Court to at least one opinion from within this district that has declined to [do so]." (citations and footnotes omitted)); U.S. Bank Nat'l Ass'n v. Educ. Loans Inc., Civ. No. 11–1445 (RHK/JJG), 2011 WL 5520437, at *5 (D. Minn. Nov. 14, 2011) ("[C]ourts within this district have reached inconsistent conclusions.").

A. The Majority Trend Rejects Twiqbal *for Defenses, but the Minority View Remains Substantial*

In writing one of these *Twiqbal*-to-affirmative-defenses opinions, it had become, over time, *de rigueur* for the deciding judge to start each decision by announcing that the "majority" or "most" of the nation's courts hold the view that "plausibility" applies.[134] Such incantations have diminished a bit of late, as newer court opinions seem to have noticed a change in that national trend,[135] but those pronouncements of a pro-*Twiqbal*

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134. *See, e.g.*, Herrera v. Utilimap Corp., Civil Action No. H–11–3851, 2012 WL 3527065, at *2 (S.D. Tex. Aug. 14, 2012) ("A majority of District Courts have applied the heightened *Twombly* and *Iqbal* standard to affirmative defenses."); EEOC v. LHC Grp., Inc., No. 1:11CV355–LG–JMR, 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012) ("A majority of courts have concluded that the plausibility standard articulated in *Twombly* and *Iqbal* applies to the sufficiency of affirmative defenses."); Weed v. Ally Fin. Inc., Civ. No. 11–2808, 2012 WL 2469544, at *3 (E.D. Pa. June 28, 2012) ("[T]he majority of district courts that have opined on the matter have concluded that the *Twombly/Iqbal* standard applies to affirmative defenses."); Powertech Tech., Inc. v. Tessera, Inc., No. C 10–945 CW, 2012 WL 1746848, at *4 (N.D. Cal. May 16, 2012) ("[M]ost have found that the heightened pleading standard does apply to affirmative defenses."); Aguilar v. City Lights of China Rest., Inc., Civ. No. DKC 11-2416, 2011 WL 5118325, at *2 (D. Md. Oct. 24, 2011) ("The majority of district courts . . . have concluded that the *Twombly-Iqbal* approach does apply to affirmative defenses."); EEOC v. Kelly Drye & Warren, LLP, No. 10 Civ. 655(LTS)(MHD), 2011 WL 3163443, at *2 (S.D.N.Y. July 25, 2011) ("[M]ost lower courts that have considered the question of the standard applicable to pleading of defenses have held that the Rule 12(b)(6) standard, as elucidated in *Twombly* and *Iqbal*, governs the sufficiency of the pleading of affirmative defenses."); Shaw v. Prudential Ins. Co., No. 10–03355–CV–W–DGK, 2011 WL 1050004, at *2 (W.D. Mo. Mar. 21, 2011) ("[T]he majority of district courts that have considered this question have determined that it makes sense to apply the *Iqbal* standards to affirmative defenses."); Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573, at *1 (E.D. Va. Jan. 10, 2011) ("Most . . . have found that *Twombly/Iqbal* should apply to affirmative defenses . . . .").

135. *See, e.g.,* EEOC v. Joe Ryan Enters., 281 F.R.D. 660, 662 (M.D. Ala. July 9, 2012) ("[T]he growing minority of district courts . . . have held that the *Twombly/Iqbal* plausibility pleading standard does not apply to affirmative defenses."); Figueroa v. Baja Fresh Westlake Vill., Inc., No. CV 12–769–GHK (SPx), 2012 WL 2373254, at *2 (C.D. Cal. May 24, 2012) ("[N]umerous courts . . . have declined to extend the *Twombly/Iqbal* standard to affirmative defenses."); Tiscareno v. Frasier, No. 2:07–CV–336, 2012 WL 1377886, at *14 n.4 (D. Utah Apr. 19, 2012) ("[A] growing number of district courts are declining to extend the

"majority" view continue to persist.[136] The irony of these incantations lies with the national data itself. The incantations are wrong.

In the months immediately after the Supreme Court's May 2009 decision in *Iqbal*, only a modest majority of opinions favored the application of *Twiqbal* to affirmative defenses, and by 2011, the decided majority had shifted in the other direction.[137] Recently, a growing number of courts have sidestepped the controversy entirely, ruling that application of any standard would produce the same result (though those courts differ markedly on what that outcome would be).[138] A charting of those decisions, by date and court, is appended to the end of this Article, followed by a reordering of that same data by district and deciding judge. In sum, that charting of the post-*Iqbal* case law on affirmative defenses looks like this:

Twombly/Iqbal pleading standard to affirmative defenses, and it is unclear whether that approach is still a majority position."); Paducah River Painting, Inc. v. McNational, Inc., No. 5:11–CV–00135–R, 2011 WL 5525938, at *2 (W.D. Ky. Nov. 14, 2011) ("[T]he district courts that have commented on it appear evenly divided."); Willis v. Quad Lakes Enters., L.L.C., No. 4:11–CV–00096–SWH, 2011 WL 3957339, at *1 (W.D. Mo. Sept. 7, 2011) ("A number of recent decisions have determined that the heightened pleading requirements in *Twombly* do not apply to affirmative defenses.").

136. *See, e.g.*, J & J Sports Prods., Inc. v. Barwick, No. 5:12-CV-05284-LHK, 2013 WL 2083123, at *2 (N.D. Cal. May 14, 2013) ("The vast majority of district courts have held that the standard set forth in *Twombly* and *Iqbal* apply to affirmative defenses as well."); Staton v. North State Acceptance, LLC, No. 1:13-CV-277, 2013 WL 3910153, at *2 (M.D.N.C. July 29, 2013) ("[T]he majority of district courts have concluded that the particularity and plausibility standard from *Iqbal/Twombly* does apply to the pleading of affirmative defenses."); Herrera v. Utilimap Corp., Civ. No. H–11–3851, 2012 WL 3527065, at *2 (S.D. Tex. Aug. 14, 2012) ("A majority of District Courts have applied the heightened *Twombly* and *Iqbal* standard to affirmative defenses."); Gonzalez v. Heritage Pac. Fin., LLC, No. 2:12–cv–01816–ODW (JCGx), 2012 WL 3263749, at *1 (C.D. Cal. Aug. 8, 2012) ("The majority of district courts have held that the *Twombly/Iqbal* pleading standard applies equally to the pleading of affirmative defenses as it does to the pleading of claims for relief in a complaint."); Weed v. Ally Fin. Inc., Civ. No. 11–2808, 2012 WL 2469544, at *3 (E.D. Pa. June 28, 2012) ("[T]he majority of district courts that have opined on the matter have concluded that the *Twombly/Iqbal* standard applies to affirmative defenses.").

137. *See infra* Appendix of Cases (collecting cases treating the issue).

138. *See id.* (delineating cases where *Twiqbal* was and was not applied).

Year	Cases Applying *Twiqbal*	Cases Not Applying *Twiqbal*	Inconclusive Cases
2009*	3 (50%)	3 (50%)	0 (0%)
2010	10 (50%)	8 (40%)	2 (10%)
2011	13 (21.3%)	42 (68.9%)	6 (9.8%)
2012	10 (17.6%)	28 (54.9%)	14 (27.5%)
2013#	30 (32.3%)	44 (47.3%)	19 (20.4%)
Totals	66 (28.4%)	125 (53.9%)	41 (17.7%)

* Since May 2009 (Date of *Iqbal*)
# Through September 15, 2013

	Applying *Twiqbal*	Not Applying *Twiqbal*
Total Judges	49 (32.9%)	100 (67.1%)
Total Opinions	66 (34.6%)	125 (65.4%)

Thus, there is indeed today a national majority on the issue of *Twiqbal*'s applicability to affirmative defenses, but it is decidedly in the direction of refusing to apply "plausibility" to such pleadings. If those opinions that sidestepped the issue are removed from the study, the resulting margin is more striking still—judges are rejecting *Twiqbal* for testing affirmative defenses by very nearly a two-to-one margin.

The *Weddle* opinion was decided in the context of pharmaceutical and medical device litigation (albeit an atypical

variant on the normal drug and device type of dispute). That litigation section is a vibrant one,[139] and examining one litigation section is also instructive. Here, in the pharmaceutical and medical device cohort of *Twiqbal*-to-affirmative-defenses cases, the issue has been explored only infrequently. Nonetheless, and though small, this industry-litigation cohort, too, and by a strong margin, favors the resolution Judge Sammartino chose.[140]

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139. *See generally* William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541 (2011) (discussing *Twiqbal* generally in this section's litigation experience).

140. Eleven other district judges have joined Judge Sammartino in rejecting *Twiqbal*'s application to affirmative defenses in drug and device litigations. *See* DC Labs, Inc. v. Celebrity Signatures Int'l, Inc., No. 12-CV-01454 BEN (DHB), 2013 WL 4026366, at *5 (S.D. Cal. Aug. 6, 2013) (ruling that Court "will apply the more lenient 'fair notice' standard"); Pacific Dental Servs., LLC v. Homeland Ins. Co. of N.Y., No. SACV 13-749-JST (JPRx), 2013 WL 3776337, at *2 (C.D. Cal. July 17, 2013) ("[T]here is good reason to conclude that *Twombly/Iqbal* do not apply to affirmative defenses . . . ."); United States ex rel Health Dimensions Rehab., Inc. v. Rehabcare Group, Inc., No. 4:12-CV-00848 AGF, 2013 WL 2182343, at *1 (E.D. Mo. May 20, 2013) (view "more persuasive and consistent with the intent of all aspects of Rule 8"); Warren v. Tri Tech Labs., Inc., No. 6:12-cv-00046, 2013 WL 2111669, at *7 n.7 (W.D. Va. May 15, 2013) (following fellow District judges in rejecting *Twiqbal*'s applicability); Vogel v. Linden Optometry APC, No. CV 13-0295 GAF (SHx), 2013 WL 1813686, at *2-*3 (C.D. Cal. Apr. 30, 2013) (applying incumbent Ninth Circuit "fair notice" standard, rather than *Twiqbal*); Senju Pharma. Co. v. Apotex, Inc., 921 F. Supp. 2d 297, 303 (D. Del. Feb. 6, 2013) ("Due to the 'differences between Rules 8(a) and 8(c) in text and purpose, [ ] *Twombly* and *Iqbal* do not apply to affirmative defenses,' which 'need not be plausible to survive.'"); Cadence Pharm., Inc. v. Paddock Labs., Inc., C.A. No. 11–733–LPS, 2012 WL 4565013, at *1 (D. Del. Oct. 1, 2012) (rejecting the application of *Twiqbal* to affirmative defenses); Walker-Cook v. Integrated Health Res., LLC, Civ. No. 12–00146 ACK–RLP, 2012 WL 4461159, at *3 (D. Haw. Aug. 10, 2012) ("[C]ourts in this district have declined to extend the pleading standards in *Twombly* and *Iqbal* to affirmative defenses."); Ferring B.V. v. Watson Labs., Inc., Nos. 3:11–cv–00481–RCJ–VPC, 3:11–cv–00485–RCJ–VPC, 3:11–cv–00853–RCJ–VPC, 3:11–cv–00854–RCJ–VPC, 2012 WL 607539, at *2 (D. Nev. Feb. 24, 2012) (declining to apply *Twiqbal* to affirmative defense); Bayer CropScience AG v. Dow AgroSciences LLC, Civ. No. 10–1045 RMB/JS, 2011 WL 6934557, at *1 (D. Del. Dec. 30, 2011) ("[T]his Court agrees with those courts that have found Twombly/Iqbal inapplicable to affirmative defenses."); Meas v. CVS Pharmacy, Inc., No. 11cv0823 JM(JMA), 2011 WL 2837432, at *3 (S.D. Cal. July 14, 2011) ("Although a close issue, the court concludes that affirmative defenses are not subject to a heightened pleading standard."). In addition, the U.S. Court of Appeals for the Sixth Circuit has likewise not applied *Twiqbal* to affirmative defenses, though its opinion on the issue never squarely confronts *Twombly* or *Iqbal*, and there is no certain indication that the precise question of *Twiqbal*'s possible application was ever

In surveying the full post-*Iqbal* national case law on the applicability of *Twiqbal* to affirmative defenses (and, more precisely, those cases that squarely ruled on the issue), one might catalogue the various approaches used by the district judges into three groups:

1) "Plausibility" Governs: The *Twiqbal* "plausibility" approach applies, and is used by the court to test the pleading adequacy of affirmative defenses, in much the same manner as it would test a complaint;

2) "Factual Notice" Governs: "Plausibility" does not apply, but affirmative defenses are nevertheless required to have a measure of factual detail in order to survive challenge;

3) "Issue Notice" Governs: "Plausibility" does not apply, and a pleader is held solely to impart simple notice that the issue raised by the affirmative defense exists, without any further obligation to show how that issue is implicated under the case's facts.[141]

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asserted by the parties. *See* Montgomery v. Wyeth, 580 F.3d 455, 467–68 (6th Cir. 2009) (refusing to find waiver in a conclusorily pleaded statute of repose defense because "[t]he Federal Rules of Civil Procedure do not require a heightened pleading standard for a statute of repose defense").

Two judges have reached the opposite view, and held that *Twiqbal* does apply to the pleading of affirmative defenses. *See* Nixson v. Health Alliance, No. 1:10–CV–00338, 2010 WL 5230867, at *2 (S.D. Ohio, Dec. 16, 2010) (applying *Twiqbal* to affirmative defenses); Castillo v. Roche Labs. Inc., No. 10–20876–CIV, 2010 WL 3027726, at *1 (S.D. Fla. Aug. 2, 2010) (same).

Another judge rejected the "plausibility" test, but seemed to apply *Twiqbal*'s "no-conclusions" instruction. *See* Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721, 725 (W.D. Va. 2010) (requiring sufficient facts be alleged for the court to conclude the pleader is entitled to relief).

And three judges sidestepped the issue. *See* GN Hearing Care Corp. v. Advanced Hearing Ctrs., Inc., No. CV-WDQ-12-3181, 2013 WL 4401230, at *1 (D. Md. Aug. 14, 2013) ("[E]ven assuming that the *Twombly/Iqbal* standard governs defenses, GN Hearing can acquire—and likely has acquired—the necessary facts through discovery . . . ."); United States ex rel. Spay v. CVS Caremark Corp., No. CIV-09-4672, 2013 WL 1755214, at *5 n.7 (E.D. Pa. Apr. 24, 2013) (choosing not to "conclusively resolv[e] the debate"); Purdue Pharma L.P. v. Ranbaxy Inc., No. 10 Civ. 3734(SHS), 2012 WL 3854640 at *3 (S.D.N.Y. Sept. 5, 2012) ("The Court need not enter this debate because Actavis's defense satisfies the higher standard of Twombly.").

141. *See* Vurimindi v. Fuqua Sch. of Bus., Civ. No. 10–234, 2011 WL 3803668, at *2 (E.D. Pa. Aug. 29, 2011) (describing varying approaches); Tyco

The first of these views is readily described. It is *Twiqbal* unvarnished—the two-step path that disregards legal conclusions, and then assesses the remaining factual averments for "plausibility"—applied to test affirmative defenses.[142] "Bare bones" or conclusory allegations will not survive such an inquiry.[143] As one district court explained: when affirmative defenses set "forth conclusory legal statements wholly devoid of any supporting factual content," they likewise fail to set forth "the nature of the asserted defense," "violate Rule 8's general pleading requirements," and must be stricken.[144]

The second view expresses a middle ground position. It does not require a "plausibility" assessment, but nor will it always tolerate a conclusory affirmative defense lacking any expression of factual relevance to the plaintiff's claims. This view may also coincide with a particular circuit's longstanding precedent that predates *Twiqbal*.[145] Although courts vary in the nomenclature they use to describe this middle ground view,[146] one court's exposition is illustrative of the approach. That court tested an

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Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 899–901 (E.D. Pa. 2011) (same).

142. *See supra* notes 84–95 and accompanying text (discussing the Supreme Court's rationale in *Twombly* and *Iqbal*).

143. *See* Herrera v. Utilimap Corp., Civ. No. H–11–3851, 2012 WL 3527065, at *4 (S.D. Tex. Aug. 14, 2012) (noting that affirmative defense that "merely recites the common law requirements, without facts in support," is insufficient: "Without facts in support, a bare recitation of the elements does not reach the standard set in *Twombly* and must be struck").

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

145. *See* EEOC v. Kelly Drye & Warren, LLP, No. 10 Civ. 655(LTS)(MHD), 2011 WL 3163443, at *2 (S.D.N.Y. July 25, 2011) (noting that in the Second Circuit, "[i]t has long been held that affirmative defenses that contain only 'bald assertions' without supporting facts should be stricken" (citing pre-*Twiqbal* authority)).

146. Indeed, some courts simply attribute this fact-pleading obligation to the "fair notice" requirement, without affixing a special title. *See* Dann v. Lincoln Nat'l Corp., 274 F.R.D. 139, 146 (E.D. Pa. 2011) ("[Defendant] has failed to provide [plaintiff] with fair notice of the nature of some of its defenses; [some] represent bare bones allegations that not only include no facts, but also fail to allege legal elements."); United States v. Brink, Civ. No. C–10–243, 2011 WL 835828, at *2–3 (S.D. Tex. Mar. 4, 2011) (asserting that circuit law mandates application of *Twombly* to affirmative defenses).

affirmative defense averring that recovery "is barred by the doctrine of estoppel by [plaintiff's] own words and actions and upon which [defendant] relied and acted."[147] The court refused plaintiff's invitation to examine this allegation's "plausibility," but then cautioned that this was "not a license for a responsive pleader to either plead a form-book list of affirmative defenses or plead those defenses so cryptically that their possible application will remain a mystery until unearthed in discovery."[148] Instead, the court explained, the responding pleading must include sufficient facts to be "contextually comprehensible":

> Just as Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions," the court should not construe and administer the Rules in a manner that forces the plaintiff to incur undue expense to discover the secrets of a contextually incomprehensible affirmative defense.[149]

Though different from *Twiqbal*, the court noted that its "contextual comprehensibility" standard "will often produce the same result" as *Twiqbal*.[150]

Notably, however, while the courts that embrace this second standard find that application of the "factual notice" test produces definitive results, they disagree on what level of notice the test commands. For example, one court, after announcing its intention to apply the standard, found that "boilerplate defenses that lack factual support" fail to meet the standard.[151] Another court (from the same state, though a different district) found quite differently that austerely pleaded affirmative defenses "provide fair notice of the defense to Plaintiff."[152]

The third of these views asks merely if the plaintiffs are placed on notice of the legal type of affirmative defense they will

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147. Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721, 727 (W.D. Va. 2010) (citations omitted).

148. *Id.* at 726.

149. *Id.*

150. *Id.* at 727 n.5.

151. J & J Sports Prods., Inc. v. Catano, No. 1:12–cv–00739–LJO–JLT, 2012 WL 5424677, at *9 (E.D. Cal. Nov. 6, 2012).

152. J & J Sports Prods., Inc. v. Scace, No. 10cv2496–WQH–CAB, 2011 WL 2132723, at *2 (S.D. Cal. May 27, 2011).

be confronting. That an averment is "bare bones" or baldly conclusory is, to this group of courts, of no consequence because that is all the work that a responding pleader's affirmative defenses are required to do. One such court's treatment is illustrative of this approach. In denying a motion to strike several cursorily pleaded affirmative defenses, the court explained:

> [E]ach of Defendant's affirmative defenses, though void of factual details, provide Plaintiffs with fair notice because Plaintiffs are now aware that the issue exists. Under the notice pleading standard, Defendant was obligated only to provide "knowledge that the issue exists, and not precisely how the issue is implicated under the facts of a given case."[153]

In other words, if the defending parties advise that they may be defending on the basis of time-bar, waiver, and release, the plaintiff has been told enough to meet the federal pleading standard.

Which of these variations is the correct view, the one most faithful to the federal pleading regime set out by the Federal Rules of Civil Procedure? To answer that question is to explore the competing considerations that drove the district courts to their various conclusions, and then to assess the merits of those analyses. To do so, the bifurcation Judge Sammartino adopted in *Weddle*—textual considerations and functional considerations—is a useful path.

B. The Textual Argument Debate

In her decision in *Weddle*, Judge Sammartino began her analysis with the text of the implicated Rules themselves. Of course, this is as it must be. The Rules must be given "their plain meaning" and, just like in statutory construction, when the Rules are found to be "unambiguous, judicial inquiry is complete."[154]

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153. Weed v. Ally Fin. Inc., Civ. No. 11–2808, 2012 WL 2469544, at *4 (E.D. Pa. June 28, 2012) (citation omitted); *see also* Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) ("[T]he requisite notice is provided where the affirmative defense in question alerts the adversary to the existence of the issue for trial.").

154. Pavelic & LeFlore v. Marvel Ent. Grp., 493 U.S. 120, 123 (1989)

The text of the Rule governing the pleading of a claim (Rule 8(a)(2)) unquestionably differs from the text of the Rule governing the pleading of an affirmative defense (Rule 8(c)(1)).[155] As Judge Sammartino correctly noted, the "showing"/"entitlement-to-relief" requirements for claim-pleading do not appear in the far more austere "affirmatively state" standard for defense-pleading.[156] Alone, this nonsymmetrical choice of language by the drafters of the two Rules would seem to counsel caution before giving a symmetrical interpretation to the two Rules' application.[157] That interpretative inclination has a venerable lineage in the analogous context of statutory construction.[158] It would seem to apply with far stronger force here, where the Supreme Court, in its *Twombly* opinion, appears to explain (and justify) its "plausibility" test as expressing the correct interpretation of the "showing"/"entitlement-to-relief" mandate set out by the language of Rule 8(a)(2)'s claim-pleading requirement.[159] It would stand to reason that because the affirmative defense requirements of Rule 8(c)(1) omits this "showing"/"entitlement-to-relief" requirement, the *Twiqbal* "plausibility" test which emanates from precisely

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(quotations and citations omitted).

155. *Supra* notes 97–101 and accompanying text.

156. *See supra* notes 122–25 and accompanying text (discussing Judge Sammartino's textual analysis of the Rules).

157. The District Court in Alabama made the point crisply in *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 663 (M.D. Ala. 2012)

> If the drafters of Rule 8 intended for defendants to plead affirmative defenses with the factual specificity required of complaints, they would have included the same language requiring a "showing" of "entitle[ment] to relief" in the subsections governing answers and affirmative defenses. That Rules 8(b) and 8(c) contain no such language should end a court's inquiry.

158. *See* Lane v. Page, 272 F.R.D. 581, 594 (D.N.M. 2011) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Boumediene v. Bush, 553 U.S. 723, 778 (2008) (citation omitted))); *id.* ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

159. *Supra* notes 83–95 and accompanying text.

those requirements of a different Rule is likewise out of place. As one court resolved the point:

> *Twombly* and *Iqbal* did not *introduce* the requirement of showing entitlement to relief under Rule 8(a)(2), they *interpreted* it. . . . And they did this by interpreting language that is not present in Rule 8(b)(1)(A) [the general defenses rule]. This Court will not import that language, nor *Twombly* and *Iqbal*'s interpretation of it, to a different rule that lacks that language.[160]

Not all courts have drawn the same meaning from this textual difference, however. Others, though conceding the textual differences, emphasize the ways in which the Rules are alike. Pointing to the requirement that all defenses be stated "in short and plain terms,"[161] some courts have determined that this "short-and-plain" link to Rule 8(a)(2) is alone sufficient to trigger the "plausibility" requirement that *Twombly* announced.[162] The applicability of *Twiqbal* to affirmative defenses, wrote one court, is the "the more reasoned view" and the one supported by "the text of the Federal Rules" because "[w]hile the language of Rules 8(a) and 8(b) is certainly not identical, those sections contain important textual overlap with both subsections requiring a 'short and plain' statement of the claim or defense."[163] Presumably, for these courts, the obligation to plead a "short and plain" defense carries with it the same obligation required to plead a "short and plain" claim—namely, *Twiqbal* "plausibility."[164] In other words, the "plausibility" obligation

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160. Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573, at *2 (E.D. Va. Jan. 10, 2011).

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

162. *See infra* notes 163–64 and accompanying text.

163. Aguilar v. City Lights of China Rest., Inc., Civ. Action No. DKC 11-2416, 2011 WL 5118325, at *3 (D. Md. Oct. 24, 2011).

164. *See* Bank of Beaver City v. Sw. Feeders, LLC, No. 4:10CV3209, 2011 WL 4632887, at *6–8 (D. Neb. Oct. 4, 2011) (explaining, but ultimately rejecting, the "short-and-plain" language similarity argument). *See generally* Dann v. Lincoln Nat'l Corp., 274 F.R.D. 139, 146 (E.D. Pa. 2011) (finding no need to conclusively resolve the *Twiqbal* debate, but noting that "when an affirmative defense omits a short and plain statement of facts entirely and fails totally to allege the necessary elements of the claim, it has not satisfied the pleading requirements of the Federal Rules").

ought to be fixed as emanating from the common "short and plain" requirement (which is found in both Rules 8(a)(2) and 8(b)), and not from the distinctive "showing"/"entitlement to relief" requirement (which is found in Rule 8(a)(2) only).[165] Although this contention is certainly not bereft of logic (i.e., what does it mean to allege "plainly"?), it is difficult to square with the Supreme Court's apparent and repeated reliance in *Twombly* on the "showing"/"entitlement to relief" language in Rule 8(a)(2).[166]

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

166. This is not to say, however, that none have tried to square that view with *Twombly*. Professor Joseph A. Seiner has recently offered a thoughtful defense of this view. Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987 (2012). For him, and even granting that "the Court certainly discussed the terminology of Rule 8(a)," *Twombly* and its reasoning hinged less on the syntax of Rule 8(a)(2) and more on practical considerations of discovery costs and the fairness of notice to adversaries. *Id.* at 1004. Professor Seiner correctly notes that the nation's courts have long and often applied Rule 12(b)(6) standards in testing Rule 12(f) motions to strike. *See id.* at 1004–05 ("[M]any courts have treated a Rule 12(f) motion to strike an affirmative defense under a standard similar to that of a motion to dismiss a complaint."). Mindful of that body of case law, and the *Twombly* Court's emphatic rejection that it was installing a "heightened fact pleading" regime, Professor Seiner favors a unitary view of *Twiqbal*'s application: "To abruptly change course in light of *Twombly*—and suddenly rely on the subtle distinctions in the language between the two rules, as many courts have done—seems inconsistent with prior precedent and the Supreme Court decisions." *Id.* at 1006 (footnotes omitted). Professor Seiner may well be right: refusing to embrace a unitary application of federal pleading standards may seem precedentially inconsistent. It is hard, however, to read the *Twombly* Court's repeated emphasis on Rule 8(a)(2)'s syntax otherwise. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the '*grounds*' of his '*entitle[ment] to relief*' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (emphasis added)); *id.* ("Factual allegations must be enough to raise a *right to relief* above the speculative level" (emphasis added)); *id.* at 555 n.3 ("While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a *claimant* 'set out *in detail* the facts upon which he *bases his claim*,' Rule 8(a)(2) still requires a '*showing*,' rather than a blanket assertion, of *entitlement to relief*." (emphasis added in part) (citation omitted)); *id.* ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also '*grounds*' on which *the claim rests*." (emphasis added)); *id.* at 557 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [an antitrust] agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough helft to 'sho[w] that the pleader *is entitled to relief*.'" (emphasis added)); *id.* ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint; it gets the complaint close to stating a claim, but without some further factual

More interestingly still, both sides in this debate claim that the Official Forms support their construction. Because the Rules were first introduced into federal practice in 1938, the Official Forms have played a prominent illustrative role.[167] Rule 84 verifies that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[168]

Official Form 30 depicts an "Answer Presenting Defenses Under Rule 12(b)."[169] Courts holding that *Twiqbal* is not applicable to affirmative defenses often cite Paragraphs 4 and 6 of this form, which conclusorily and in "bare bones" fashion announce: "4. The complaint fails to state a claim upon which relief can be granted," and "6. The plaintiff's claim is barred by the statute of limitations because it arose more than ___ years before this action was commenced."[170] That is the official illustration of the "simplicity and brevity" Rule 8(c) requires.[171] From this unadorned austerity, those *Twiqbal*-rejecting courts draw confirmation of their view: "the undetailed recitations of affirmative defenses illustrated in Form 30 show . . . [that the Rule 8(c)(1) requirement] is not an exacting standard even

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enhancement it stops short of the line between possibility and plausibility of '*entitle[ment] to relief*.'" (emphasis added)); *id.* at 569 n.14 ("Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized];' rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' *entitlement to relief* plausible." (emphasis added in part) (citation omitted)); *id.* at 558 ("So, when the allegations in a complaint, however true, could not raise a *claim of entitlement to relief*, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" (emphasis added) (citation omitted)); *id.* at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state *a claim for relief* that is plausible on its face." (emphasis added)).

167. *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958)

> We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms. These are important because when you can't define you can at least draw pictures to show your meaning.

168. Form 30, FED. R. CIV. P. Appendix of Forms.

169. Form 30 ¶¶ 4, 6, FED. R. CIV. P. Appendix of Forms.

170. *Id.*

171. FED. R. CIV. P. 8(c).

remotely approaching the type of notice required of a claim under *Twombly* and *Iqbal*."[172] If factual detail and specification were required, Official Form 30 would be violating the Rules—something Rule 84 confirms is not the case.

Yet, courts abiding by the view that *Twiqbal* applies to the pleading of affirmative defenses draw precisely the opposite message from Official Form 30. They rely not on sample Paragraph 4 (failure to state a claim) but on sample Paragraph 6 (statute of limitations), and emphasize how that sample supplies additional language that seems to enhance the otherwise bald time-bar allegation:

> Form 30 . . . strongly suggests that bare-bones assertions of at least some affirmative defenses will not suffice, as the Form's illustration of a statute of limitations' defense sets forth not only the name of the affirmative defense, but also facts in support of it [namely, that "it arose more than __ years before this action was commenced"]. Given Rule 84's focus on illustrating "the simplicity and brevity that these rules contemplate," the additional factual detail contained in Form 30 is hardly superfluous.[173]

Not so, reason the *Twiqbal*-rejecting courts. They find such an interpretation of Official Form 30 belied by the distinction between facts and legal conclusions:

> The reference to a number of years has been interpreted by some courts as an elaboration of "facts" in support of the

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172. Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011). *Accord* Tiscareno v. Frasier, No. 2:07–CV–336, 2012 WL 1377886, at *15 (D. Utah Apr. 19, 2012) ("The fact that a simple statement that a complaint 'fails to state a claim' is sufficient to plead an affirmative defense under the federal rules, even in the absence of additional factual allegations, suggests that the heightened *Twombly/Iqbal* standard was not intended to be extended to affirmative defenses."); Falley v. Friends Univ., 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011) (quoting the same "fails to state a claim" allegation in the Official Form, and concluding "the brief and simple nature of this language indicates that no more detail is required of a defendant in an answer"); Lane v. Page, 272 F.R.D. 581, 594 (D.N.M. 2011) (noting that "[t]he forms appended to the rules bolster the Court's analysis that rule 8(b) does not require defendants to provide factual allegations supporting defendants" because "Form 30 provides no factual allegations in support of the defense, and form 30 is sufficient under the rules").

173. Aguilar v. City Lights of China Rest., Inc., Civ. No. DKC 11-2416, 2011 WL 5118325, at *3 (D. Md. Oct. 24, 2011).

> defense. This is patently not the case. The language of the Form suggests stating that the action "arose *more than* __ years" before the case was commenced. The use of "more than" does not call for the pleader to state when the action factually arose; it only calls for the pleader to state the relevant limitations period governing the plaintiff's claim. This is a legal conclusion, which is, again, insufficient under *Twombly/Iqbal* . . . . That both defenses listed in Form 30 would be laughed out of court under *Twombly/Iqbal* impresses strongly against extracting the principles from those cases and applying them in the different context of affirmative defenses.[174]

So, is there a "plain meaning" of Rule 8 and its subparts that answers the question of *Twiqbal*'s applicability to affirmative defenses? Both sides in the debate, fascinatingly, say yes. But that "yes" means a polar opposite conclusion for each.

C. The Policy Argument Debate

In her *Weddle* ruling, Judge Sammartino next considered the various functional considerations of applying, or refusing to apply, *Twiqbal* to affirmative defenses. Of course, as noted above, the analysis never reaches this level of inquiry (for anything other than mere collateral corroboration) if a court determines that the "plain language" of the Federal Rules is clear on the point.[175] In either event, whether as core support for an "un-

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174. EEOC v. Joe Ryan Enters., 281 F.R.D. 660, 664 (M.D. Ala. July 9, 2012) (emphasis added) (citations omitted).

175. *See supra* notes 123–26 and accompanying text (discussing plain meaning construction of Federal Rules of Civil Procedure); *see also Joe Ryan Enters.*, 281 F.R.D. at 663 ("[S]uch policy considerations are foreclosed when the language of the Rule is clear. The judiciary is commissioned to interpret the Rules as they are written, not to re-draft them when it may be convenient." (citation omitted)); Kohler v. Islands Rests., LP, 280 F.R.D. 560, 566 (S.D. Cal. 2012) ("Applying the same standard of pleading to claims and affirmative defenses, despite this clear distinction in the rules' language, would run counter to the Supreme Court's warning in *Twombly* that legislative action, not 'judicial interpretation,' is necessary to 'broaden the scope' of specific federal pleading standards."); Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573, at *2 (E.D. Va. Jan. 10, 2011) ("[P]olicy considerations may be compelling, but whether this Court agrees with them or not, it is first bound to apply the relevant rules of civil procedure as written.").

plain" Rule text or as passing corroboration for a dictated conclusion, Judge Sammartino identified three such policy considerations in refusing *Twiqbal*'s applicability to the *Weddle* defenses: "the limited time a defendant has to prepare an answer to the complaint, avoidance of the need to repeatedly amend an answer to assert later-discovered defenses, and discouragement of motions to strike brought for dilatory or harassment purposes."[176]

Those considerations are often cited by other courts in their own opinions rejecting *Twiqbal* for affirmative defenses, but the list of relevant functional concerns does not end with these three. Over time, many other considerations have been offered as counseling against the application of *Twiqbal* to affirmative defenses:

1) *Defendant's Time to Plead:* While plaintiffs may possess a lengthy prepleading period for fact-gathering and legal research (bounded by the applicable statute of limitations), defendants ordinarily receive just twenty-one days to prepare and file their answer and affirmative defenses;

2) *Defendant's Lack of Knowledge:* Given this brief time frame, and the fact that the defendant may be seeing and reacting to the allegations of the plaintiff's pleading for the first time, it is unrealistic to expect a defendant to learn the facts necessary to confirm "plausibility" in those twenty-one days;

3) *Waiver Risk:* This diminished preparation time is exacerbated by the command that potentially case-critical affirmative defenses be expressly (and appropriately) pleaded, or be deemed waived forever;

4) *No Counterpleading Obligation:* In part, the "plausibility" detail required from plaintiffs is intended to facilitate the requirement imposed on defendants to counterplead, paragraph by paragraph, to the complaint's allegations; in contrast, plaintiffs ordinarily need not (and, most often, may not) counterplead to the answer;

176. Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824, at *3 (S.D. Cal. Mar. 26, 2012).

5) *Ease of Fleshing Out Missing Details:* Because affirmative defenses are necessarily directed against the plaintiffs' claim, much of the factual support for those defenses will already be known to the plaintiffs, and what information they lack can readily be obtained through simple contention interrogatories;

6) *Judicial Intervention is Unnecessary:* In typical cases, nonviable affirmative defenses do not require court culling; instead, their nonviability becomes quickly apparent and they are, thereafter, simply ignored by both litigants—thus, ratcheting up the defense-culling standard will add nothing but cost and delay to federal litigation;

7) *Goal of Ending Litigation Not Present:* Holding complaints to the *Twiqbal* standard can permit the termination of federal litigation; conversely, striking an affirmative defense will rarely have that effect as the plaintiff's claim will still continue on;

8) *Goal of Expediting Litigation Not Present:* Were an affirmative defense stricken, it often will be without prejudice, to be replaced by a substituted averment in an revised answer; in such instances, the litigation is thereby retarded, not expedited;

9) *Goal of Avoiding Discovery Not Present:* The plaintiff will have already opened the doors to federal civil discovery by filing the complaint, so the *Twiqbal* objective of endeavoring to avoid the opening of discovery will not be implicated;

10) *Goal of Disincentivising Extortionate Settlements Not Present:* Baseless, implausible claims inject the risk of extorting settlements from nonculpable defendants who are forced into settling simply by the desire of avoiding prolonged, expensive, and disruptive discovery; a pending (though baseless and implausible) affirmative defense is unlikely to exert similar extortionate pressure;

11) *More Motions to Strike are Disfavored:* Applying *Twiqbal* to affirmative defenses would invite the filing of more Rule 12(f) motions to strike, a result that competes with the long-held conventional view that motions to strike are disfavored time-wasters, to be granted only with great reserve; and

12) *Plaintiff Protections Remain:* Plaintiffs are not unprotected against frivolous affirmative defenses, since defendants have initial disclosure obligations for their defenses, and Rule 11's mandate of veracity in pleading constrains wholly unfounded averments.[177]

The court in *Weddle* mentioned functional considerations like these to validate the holding that *Twiqbal* does not apply to affirmative defenses. Courts that have ruled differently—finding that affirmative defenses must satisfy the *Twiqbal* "plausibility" test—have likewise supported their conclusions with functional considerations, including:

1) *Nonsensical Disparate Standards:* Either as judicial policy or as an implement in the administration of justice, it makes no good sense to erect a national federal standard that sets one pleading norm for claimants and a different norm for defendants;

2) *Pleader Equality:* Requiring *Twiqbal* "plausibility" makes success in pleading a degree more difficult, and if such an enhanced pleading obligation is to be foisted upon claimants, defendants, too, should have to labor under the same weight (after all, "what's sauce for the goose . . . ");

3) *As a Broad Pleading Principle, Pleaders Should Make Only "Plausible" Averments, Not Possible Ones:* Mindful of *Twiqbal*, the goal of all federal pleading ought to be to impart enough notice to an opponent and the court of some "plausible," factual foundation

177. *See, e.g.,* EEOC v. LHC Grp., Inc., No. 1:11CV355–LG–JMR , 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012) (discussing functional considerations militating against applying *Twiqbal* to affirmative defenses); Floridia v. DLT 3 Girls, Inc., Civ. No. 4:11–cv–3624 ,2012 WL 1565533, at *2 (S.D. Tex. May 2, 2012) (same); Cottle v. Falcon Holdings Mgmt., LLC, No. 2:11–CV–95–PRC, 2012 WL 266968, at *2–3 (N.D. Ind. Jan. 30, 2012) (same); Bayer CropScience AG v. Dow AgroSciences LLC, Civ. No. 10–1045 RMB/JS, 2011 WL 6934557, at *1–*2 (D. Del. Dec. 30, 2011) (same); Bennett v. Sprint Nextl Corp., No. 09–2122–EFM, 2011 WL 4553055, at *1–2 (D. Kan. Sept. 29, 2011) (same); Vurimindi v. Fuqua Sch. of Bus., Civ. No. 10–234, 2011 WL 3803668, at *2 (E.D. Pa. Aug. 29, 2011) (same); Falley v. Friends Univ., 787 F. Supp. 2d 1255, 1257 (D. Kan. 2011) (same); Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 899–902 (E.D. Pa. 2011) (same); Lane v. Page, 272 F.R.D. 581, 595–97 (D.N.M. 2011) (same); Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721, 725–26 (W.D. Va. 2010) (same).

for every pleaded assertion, and not merely a suggestion of an issue that may possibly apply in the litigation;

4) *"Plausible" Pleading Is Not That Hard:* Importing *Twiqbal* should not radically alter how responding parties plead affirmative defenses; as with complaints, detailed, evidentiary pleading of facts will not be required, but instead only "enough" to "raise a reasonable expectation that discovery will reveal evidence"[178] to prove the allegations;

5) *"Plausibility" Cost Savings:* One of the objects of "plausibility" in pleading is to cull from the dockets (and from the workload of all parties and the judicial system) the task of litigating issues for which no threshold factual foundation exists; by holding affirmative defenses to the same "plausibility" standard, both the court and the parties are saved the costs and labor of discovering and sorting through affirmative defenses that lack factual foundation;

6) *Same "Plausibility" Discovery Trigger on Defense Issues:* Another object of "plausibility" pleading is to avoid embarking on unnecessary discovery; that goal is similarly achieved in the affirmative defense context, by shutting the door to potentially expensive discovery on affirmative defense issues until the "plausibility" line is first nudged passed; and

7) *Waiver Risk Can Be Minimized:* If the defendant is unable to plead a not-yet-"plausible" affirmative defense, the defendant can seek (and should liberally receive) leave to amend to add the defense following the uncovering of its factual foundation in discovery.[179]

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178. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

179. *See, e.g.*, Ferring B.V. v. Watson Labs., Inc., Nos. 3:11–cv–00481–RCJ–VPC, 3:11–cv–00485–RCJ–VPC, 3:11–cv–00853–RCJ–VPC, 3:11–cv–00854–RCJ–VPC, 2012 WL 607539, at *3 (D. Nev. Feb. 24, 2012) (discussing functional considerations militating in favor of applying *Twiqbal* to affirmative defenses); Paducah River Painting, Inc. v. McNational, Inc., No. 5:11–CV–00135–R, 2011 WL 5525938, at *2 (W.D. Ky. Nov. 14, 2011) (same); Aguilar v. City Lights of China Rest., Inc., Civ. No. DKC 11-2416, 2011 WL 5118325, at *2–3 (D. Md. Oct. 24, 2011) (same); Lucas v. Jerusalem Café, LLC, No. 4:10–cv–00582–DGK, 2011 WL 1364075, at *1–2 (W.D. Mo. Apr. 11, 2011) (same); Dann v. Lincoln Nat'l Corp., 274 F.R.D. 139, 145 n.6 (E.D. Pa. Feb. 10, 2011) (same); Nixson v. Health Alliance, No. 1:10–CV–00338, 2010 WL 5230867, at *2 (S.D. Ohio. Dec. 16,

Scholars, likewise, have taken opposite positions in this debate, some disfavoring the view that *Twiqbal* ought to apply to affirmative defenses, and some embracing that construction.[180]

V. National Incoherence and the Practitioner's Dilemma

In drafting the Federal Rules of Civil Procedure, one of the treasured aspirations of Charles E. Clark, Edson Sunderland, and their 1938 drafting compatriots was to establish of a uniform set of federal procedural standards that would become the settled practice rubric governing litigation in every federal court, be it Dallas, Detroit, Danbury, or Del Rey.[181] While Clark and Sunderland tilt to no one in the magnificence of their achievement, the Federal Rules have never quite achieved that vision of true uniformity. The nationally divided precedent addressing *Twiqbal*'s application to affirmative defenses is just another chapter in that tale.

2010) (same); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649–52 (D. Kan. Dec 22, 2009) (same). The court in *Oleksy v. General Electric Co.*, No. 06-C-01245, 2013 WL 3233259 (N.D. Ill. June 26, 2013), made its point with great emphasis in a recent patent dispute, noting how the defendant had raised "prior use" as both an affirmative defense and as a declaratory judgment counterclaim. The court reasoned, that it were to adopt the view that *Twiqbal* does not apply to affirmative defenses, "it would then be required to review the same factual allegations under two different standards and could potentially reach a result where it found the affirmative defenses were sufficiently pled but the counterclaim was not despite the fact they relied on the exact same factual allegations." *Id.* at *17.

180. *Compare, e.g.,* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1360 (2010) ("[O]n both the doctrinal and the purposive level, Twombly-Iqbal applies only to claimants. The backup test of notice pleading instead applies to defendant's pleadings, as it does everywhere else." (citations omitted)), *with* Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 1003–04 (2012) ("In the end, however, this [*Twiqbal*-inapplicable] reading should fail in favor of a much broader interpretation of these decisions and the Federal Rules. This broader reading would apply the plausibility standard set forth in *Twombly* and *Iqbal* to all pleadings, including the affirmative defense.").

181. *See* Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 451 (1958) (expressing hope in "the real ideal of a uniform and natural procedure for courts").

There is, today, a majority approach followed by more than sixty-seven percent of the federal judges who have ruled squarely on the issue (*Twiqbal* does not apply to affirmative defenses), but that somehow feels like cold comfort.[182] The "majority approach" of a few years ago (at least as many district courts understood that "majority approach") favored just the opposite view, the now minority view still retains a strong foothold, and the non-*Twiqbal* "factual notice" variant has done little to add stability and predictability into the affirmative defense pleading question.[183] It is also weak solace for litigators and their clients when the interpretation of Rule 8(c)—and its very serious ramifications in actual litigation contexts—continues to vary not from circuit to circuit but from courtroom to courtroom. Although the lower federal judiciary is understandably awash in the uncertainty following the Supreme Court's unveiling of "plausibility" pleading in *Twombly* and *Iqbal*, the fact that the courts are construing the very same textual language and still reaching entirely different interpretations of the same Rule offers little reassurance to those who must toil in the federal halls of justice. The result, for the bench, the bar, and scholars alike, inspires a shake of the head, not the awe of admiration.

Much suffers under the current state of things. Certainly, clients (for example, J & J Sports Productions, Inc.) are numbed into derision by the comical inconsistency among what advertises itself to be a unified court system. Practitioners are resigned to the conclusion that while many aspects of federal practice are normalized, a great many others are not, and that Dean Clark's hopeful vision of the genuine transportability of federal expertise from one district to another is often illusory. Jurists are condemned to an existence of unguided, island-like independence in which they are free not only to depart from the logic and reasoning of a distant colleague, but also from that of their lunch partner a chambers away down the hall. This may be judicial "percolation," but it has little else to commend it.

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182. *See infra* Appendix of Cases (discussing relevant case law).

183. *See supra* Part IV (recounting evolution in judicial views); *see also infra* Appendix of Cases (discussing relevant case law).

What Are Litigants To Do?

Until this national incoherence is finally and conclusively resolved by an authoritatively precedential ruling or Rule amendment, there seem to be three obvious options: plead affirmative defenses in the traditional manner, attempt to plead "plausible" affirmative defenses, or postpone pleading all affirmative defenses and seek leave to amend later. None offers a very satisfying choice.

Option 1: Plead Traditionally

The first option is for the litigants to plead affirmative defenses as they always had. Preliminarily, it is noteworthy that this option still would not fully resolve the national incoherence on the proper pleading of affirmative defenses. Even historically, in the pre-*Twiqbal* environment, national uniformity was absent on the issue, but the disparity that existed (wide as it sometimes was) seemed limited largely to circuit-to-circuit differences.[184]

This option likely supposes that the litigants (in courtrooms of first impression) propose to stand their ground and advocate against the importing of *Twiqbal* to affirmative defenses. The growing majority trend disfavoring *Twiqbal*'s importation certainly helps that cause, as does the strength of many of the *Twiqbal*-rejecting arguments. There is an indisputable textual difference between the pleading Rule for claims (Rule 8(a)(2)) and the pleading Rule for defenses and affirmative defenses (Rules 8(b) and 8(c)).[185] It seems plain that the Supreme Court relied heavily, at least in part, on the syntax of the claims-pleading

184. *Compare* Shechter v. Comptroller of New York, 79 F.3d 265, 270 (2d Cir. 1996) (finding that bald assertions of affirmative defenses are improper), *with* Lawrence v. Chabot, 182 Fed. Appx. 442, 456 (6th Cir. 2006) (approving the pleading of affirmative defenses in "general terms" as long as they afford "fair notice of the nature of the defense"), *and* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (acknowledging that, "in some cases, merely pleading the name of the affirmative defense . . . may be sufficient," but "baldly 'naming' the broad affirmative defenses of 'accord and satisfaction' and 'waiver and/or release' falls well short of the minimum particulars needed to identify the affirmative defense in question").

185. *See supra* notes 98–99 and accompanying text (noting the differences between Rule 8(b) and Rule 8(c)).

Rule in setting out the "plausibility" standard in *Twombly*.[186] The interpretative jousting over the implications of Official Form 30 inclines toward the *Twiqbal*-rejecting view.[187] In weighing the functional considerations, the *Twiqbal*-rejecting view has formidable strength: claimants frequently enjoy a prepleading investigation period measured in years, whereas defending parties are limited typically to just twenty-one days;[188] thus time constrained, defending parties must nonetheless timely and properly raise the defense or risk losing it;[189] defending parties have a Rule 8 need for factual clarity to counterplead to a complaint, whereas claiming parties are usually barred from ever counterpleading to an answer;[190] dismissing an unmeritorious claim ordinarily terminates the litigation, whereas striking a defense will rarely (if ever) have that effect, or even the advantage of materially shortening the case;[191] the presence of an

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186. *See supra* notes 85–91, 166 and accompanying text (discussing *Twombly*).

187. *See supra* notes 167–74 and accompanying text (discussing the impact of the official forms on the debate).

188. *See* FED. R. CIV. P. 12(a)(1)(A) (stating that answers must be filed within 21 days after service, but will be extended to 60 days if formal service is properly waived or to 90 days if sent outside the United States). *See generally* Lane v. Page, 272 F.R.D. 581, 596 (D.N.M. 2011)

> Plaintiffs can prepare their complaints over years, limited only by the statute of limitations, whereas defendants have only twenty-one days to file their answers. . . . Because a plaintiff can do a lot of pre-filing work, and a defendant generally cannot, there is a sound rationale for requiring more of plaintiffs than of defendants at the pleading stage.

189. *See* EEOC v. LHC Grp. Inc., No. 1:11CV355–LG–JMR, 2012 WL 3242168, at *3 (S.D. Miss. Aug. 7, 2012) ("[T]he federal rules require defendants to assert any affirmative defense that may be applicable. Accordingly, defendants must assert defenses out of an abundance of caution to avoid the argument that meritorious defenses should later be considered waived." (citation omitted)).

190. *See Lane*, 272 F.R.D. at 596 ("Whereas a defendant is deemed to admit the allegations in a complaint if he or she does not respond, a plaintiff may largely ignore an answer without formal legal consequence."); Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) ("[W]hile there is a need for a more factual understanding of a claim as to permit the formulation of a response, a party served with an affirmative defense is generally not required or permitted to file any responsive pleading at all.").

191. *See* Floridia v. DLT 3 Girls, Inc., Civ. No. 4:11–cv–3624, 2012 WL 1565533, at *2 (S.D. Tex. May 2, 2012) ("[W]hile a motion to dismiss can resolve

unmeritorious claim may induce an unwarranted settlement, whereas the presence of an unmeritorious affirmative defense is unlikely to have that effect;[192] and the discovery floodgates are probably already opening by the time the answer is filed.[193]

However one handicaps the strength of these textual and functional arguments, a litigant still confronts the severe consequences of misjudgment. The litigant may guess wrong, may misread the trial judge's inclinations, or may fail to persuade the trial judge of the soundness of the *Twiqbal*-rejecting approach (who would then join the nearly thirty-three percent of the ruling judges who now insist upon only "plausible" affirmative defenses in their courtrooms). In such a case, the litigant may be left with an inadequately pleaded affirmative defense, soon to be stricken,

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a case, thereby avoiding discovery entirely, motions to strike only prolong prediscovery motion practice; as such, raising the standard for pleading affirmative defenses would only encourage more motions to strike."(citation omitted)); Bennett v. Sprint Nextl Corp., No. 09–2122–EFM, 2011 WL 4553055, at *2 (D. Kan. Sept. 29, 2011) ("[B]ecause the remedy for striking defenses at this stage of the litigation is often to allow amendment, applying the plausibility standard here would likely have little to no positive impact on the progression of the litigation.").

192. *See Bennett*, 2011 WL 4553055, at *2 ("[I]t is unlikely that the prospect of having to engage in discovery related to a defense that the plaintiff believes to be baseless will motivate the plaintiff to settle their claim instead of fighting the defense they think is without merit.").

193. *See* Tiscareno v. Frasier, No. 2:07–CV–336, 2012 WL 1377886, at *15 (D. Utah Apr. 19, 2012)

> [I]t is plaintiffs' submission of their initial complaint that invokes the jurisdiction of the federal courts in the first instance. The primary function of imposing a pleading standard on a plaintiff in the first instance is to ensure that 'largely groundless claims' are not made to 'take up the time of a number of other people. Affirmative defenses, on the other hand,,]do not invoke the jurisdiction of the court and screening them for efficiency purposes is not vital.

(citations omitted); Vurimindi v. Fuqua Sch. of Bus., Civ. No. 10–234, 2011 WL 3803668, at *3 (E.D. Pa. Aug. 29, 2011)

> [W]hile an insufficiently plead complaint may unfairly subject a defendant to expensive and time-consuming discovery, the converse is not true with regard to affirmative defenses, in that a plaintiff may easily explore a defendant's affirmative defenses through contention interrogatories and other discovery. And, of course, a plaintiff who initiates litigation is less likely to be heard to lament the initiation of discovery in any event.

(citation omitted).

thereby confronting the very defense waiver the litigant must avoid. This first option, then, carries grave risks.

Option 2: Plead "Plausibly"

The second option is to assume that the *Twiqbal* "plausibility" standard will govern the pleading of affirmative defenses, and then endeavor to meet that standard. Indeed, that is what the defendants in the *Weddle* case appeared to be attempting with their enhanced pleading of the first and second affirmative defenses.[194] Originally, they had alleged both their standing and innocent infringer defenses in bare bones, conclusory fashion, but then seemed readily able to revise those averments by supplying clarifying factual details.[195] It is difficult to deny that the revised affirmative defenses impart better notice to Mr. Weddle than the original versions.[196] To some commentators, this is among the most salutary disciplining functions that the very threat of *Twiqbal* serves.[197] It prompts pleaders to add clarity. And sometimes, as the defendants in *Weddle* demonstrated, that factually enhanced pleading option is easily discharged. But only sometimes.

In the other instances, where the defending litigants are, on the heels of the complaint's arrival, just learning about the dispute for the first time, and then must meet a blisteringly quick turnaround obligation, the "plausibility" command is an

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194. *See supra* notes 71–72 and accompanying text (discussing the amended answer).

195. *See supra* notes 73–76 and accompanying text (comparing the original and the amended answer).

196. *See supra* notes 72–76 and accompanying text (comparing the original and amended answers).

197. *See* James M. Beck, *More Twiqbal Scholarship*, DRUG AND DEVICE LAW BLOG (May 10, 2011, 12:26 PM), http://druganddevicelaw.blogspot.com/2011/05/more-twiqbal-scholarship.html

> [W]e think there's more to *TwIqbal* than meets the eye—because we think that plaintiffs have themselves responded to *TwIqbal* by pleading more thoroughly than they used to. . . . In most cases plaintiffs can plead better . . . . That's one thing that *TwIqbal* is changing, whether or not a successful motion to dismiss results.

(last visited Oct. 1, 2013) (on file with the Washington and Lee Law Review).

"untenable" one.[198] For many litigants, this quick turnaround obligation may prove to be far less than twenty-one days; unless the served parties have counsel on-site or just around the block, and move swiftly to (a) appreciate the nature of the document served upon them, (b) forward the papers instantly to their counsel, and (c) rapidly assemble the personnel necessary to make factual sense of the allegations, it may be days or weeks before the litigants' attorneys even can begin to strategize through the available affirmative defense permutations. That the litigants in this posture simultaneously confront the risk of waiver only makes the "untenable" situation worse. As one court concluded: "[A]pplying the concept of notice to require more than awareness of the issue's existence imposes an unreasonable burden on defendants who risk the prospect of waiving a defense at trial by failing to plead it, and have a short amount of time to develop the facts necessary to do so."[199] This second option, then, may sometimes be a manageable one, but other times will prove catastrophic.

Option 3: Plead Later

The third option would reconfigure the pleading norms for affirmative defenses entirely. Fearing waiver by pleading un-"plausibly," but lacking both the time and the information to formulate "plausible" affirmative defenses, the defending litigants could decide to plead no affirmative defenses at all. Instead, they could pursue post-answer informal investigation and formal discovery, and upon marshaling all their affirmative defenses—now replete with "plausible" detail—they could seek at that later time leave (from their opponents or the court) to amend their answer to insert the new allegations.

198. *See* Michaud v. Greenberg & Sada, P.C., Civ. No. 11–cv–01015–RPM–MEH, 2011 WL 2885952, at *4 (D. Colo. July 18, 2011) ("[I]t is untenable to require a defendant to plead an affirmative defense with the same level of thoroughness required to state a claim for relief, considering the limited time frame to produce an answer.").

199. Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) (citations omitted).

The Rules certainly allow for post-answer amendments, and the standard for granting them professes liberality.[200] Commentators note that the prospect for such amendments could potentially cure the challenges that may arise from imposing the "plausibility" standard on affirmative defenses.[201] Alas, uncertainties abound.

Such amendments are permitted only through the beneficence of one's opponent or the tolerance of the presiding judge. Prudent counsel would probably not rely on either, at least not as a prospective matter. Help from an adversary may be offered graciously, but contentious litigation settings create unpredictable behavioral dynamics such that opponent generosity would seem a dangerous thing to count on. Help from the court should come "liberally," but here, too, circumstances intervene. Courts set schedules, press deadlines, and move dockets. Late amendments threaten all of these. Were a defending party to opt for this third option as a way to meet a "plausible" pleading standard for affirmative defenses, the presiding court would have to countenance routine post-answer amendments and their potential (likely?) incumbent risk of dooming the established case time-schedule. Even the commentators who see post-answer amendments as the antidote to "plausibility" complications impliedly acknowledge the uncertainty that delay injects.[202]

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200. Rule 15 provides that, following a very brief, early period of amendment as of right, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2).

201. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1274, at 314 (Supp. 2012) ("Given that the defendant may amend the answer to assert an omitted affirmative defense on the written consent of the adverse party or by leave of the district court, imposition of the plausibility standard is not overly burdensome. The defendant may state a plausible defense after facts become available." (footnotes omitted)).

202. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271, at 607 (2004)

> [T]he liberal amendment of pleadings philosophy expressed in Rule 15 can be used by the parties and the district court to correct a failure to plead affirmatively when the omission is brought to light. *A degree of diligence on the part of counsel is desirable in this regard so as to minimize any possibility of prejudice to the opposing party.*

(emphasis added) (footnote omitted).

Moreover, it is not altogether clear that the federal discovery procedures would even tolerate this maneuver as a canon of normal practice. The available scope of discovery under those procedures is, in most instances, defined by relevancy "to any party's claim or defense."[203] In the case of suspected—*but unpleaded*—affirmative defenses, one could readily understand the fear that meaningful discovery into those potential defenses would meet with scope objections and be successfully resisted. This third option, then, is as treacherous as the first two.

Which Option? The Diabolical Choice

Among the defending litigants' three options for asserting their affirmative defenses, none is safe and all are uncertain. The first risks waiver from the inadequacy of the pleaded affirmative defense. The second risks waiver from lacking the factual predicates to plead the affirmative defense adequately, and then having the resulting effort stricken as insufficient. The third risks waiver from postponing the pleading of affirmative defenses, and being later denied the chance for pre-pleading discovery or post-discovery amendment. Thus exists the unresolved question of *Twiqbal* applicability to affirmative defenses—the world in which J & J Sports Productions, Inc. found itself navigating for seventeen months in three jurisdictions.[204]

What is the "right" answer to this nagging uncertainty, which bedevils the current practice of defensive pleading in the federal courts? From a cloistered perch in legal academia, all manner of opinions on that question can be volunteered—and each of them is likely to be grounded in some reason and logic. To my mind, Judge Sammartino and her colleagues in the emerging majority have the better of the argument. As she noted in her *Weddle* opinion, the language difference between Rule 8(a)(2) and Rule 8(c) is neither incidental or inconsequential.[205] It is difficult to read *Twombly* as grounding the "plausibility" requirement in something other than the "show"/"entitlement to relief" language

203. FED. R. CIV. P. 26(b)(1).

204. *See supra* Part II (outlining the J & J litigation).

205. *Supra* Part III.

embodied in Rule 8(a)(2).[206] Because that very language is missing from Rule 8(c), a fair interpretation of the "plausibility" requirement (at least as it has emanated from *Twombly*) would seem to foreclose its applicability to affirmative defenses. This would not seem to lie within the fair ambit of broad judicial discretion; rather, it seems to be the only sound interpretation of *Twombly*'s analysis and associated logic. Under the "plain reading" standard for Rule construction (engrafted from longstanding statutory construction principles), that likely ends the analysis.[207]

Judge Sammartino continued, however, to examine the underlying functional policies to (seemingly) validate her conclusion. Although that excursion is perhaps unnecessary, it is difficult to quarrel with her inclinations and those of her like-minded colleagues among the federal district courts. Plaintiffs often do enjoy a longer pre-pleading investigation period (perhaps nearly as long as the full duration of the applicable limitations period), whereas defending parties are limited to only twenty-one days in most cases for their counterpleading.[208] Holding claiming parties to a higher standard of pleading specificity than defending parties aligns with the obligation of defending parties to counterplead in response (something very infrequently expected—or even tolerated—of claiming parties).[209] Plaintiffs are likely to have a greater command of the factual predicates to understand most defenses, whereas defending parties may be learning, for the first time, of the incident giving rise to the lawsuit with the service of the complaint, with very little time to accomplish a great deal of pre-pleading investigation.[210] The specter of claim-based extortionate settlements would seem meaningfully less pronounced with affirmative defenses: it seems unlikely that any plaintiff is going to be frightened into an

206. *Supra* notes 166 and accompanying text.

207. *Supra* notes 97, 122–25 and accompanying text.

208. *Supra* notes 188, 200 and accompanying text.

209. *Supra* note 191 and accompanying text.

210. *See supra* note 177 and accompanying text (noting that the plaintiff often has far more time to investigate prior to filing a complaint than the defendant will have in the days between receiving the complaint and filing a response).

unmerited settlement by the presence of a conclusorily pleaded affirmative defense.[211] And defending parties face the numbing risk of waiver from unpleaded affirmative defenses.[212] It would be desirable (and helpful) if defending parties could, and indeed did, plead with more factual precision in their affirmative defenses. But that is not what the terms of Rule 8(c) require, nor what the practical realities of defensive pleading often allow.

Perhaps, though, the "right" answer to resolving this *Twiqbal* interpretative uncertainty needs to be appreciated at a much more practical level. At some point, it might not matter what the "right" interpretation of Rule 8(c) is quite as much as it matters what the "wrong" interpretation is. The transcending problem today is that there is no uniform national answer (and, indeed, not even a reliable regional answer, circuit answer, or district answer) to this question. For a unified federal judiciary, that is a serious defect and, given the enormous ramifications of inadequate affirmative defense pleading, a potentially calamitous one. So, perhaps it is most precise to say simply that the "right" interpretation of Rule 8(c) is the one that everyone is obliged to follow as a uniform national approach, with accompanying procedural safeguards installed to ensure that justice is done.[213]

Of course, this national debate on the proper interpretation of Rule 8(c) could be readily abated by amending the federal rules, but here, too, many of these same concerns would confound that process. Perhaps the drafters could revise Rule 15 to make explicit that defending parties are entitled to proceed through discovery (or at least a fair measure of it) with unpleaded affirmative defenses, and then have a clear Rule-based assurance of their right to add factually "plausible" affirmative defenses

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211. *See supra* note 14 and accompanying text (discussing the differing risks attached to different types of conclusory pleadings).

212. *Supra* notes 189, 199 and accompanying text.

213. *See* FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice."); *see also* FED. R. CIV. P. 1 ("These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Thus, for example, there might be an express national rejection of "plausibility" for pleading affirmative defenses, either by the Supreme Court or through rulemaking, or alternatively, the unfortunate but necessary acceptance of a broad period for permissive amendments to Rule 8(c) answers to accommodate post-discovery affirmative defense additions.

later by amendment. This seems an unlikely solution. It would require a meaningful broadening of the scope of authorized federal discovery,[214] and it could send the process of trial scheduling spiraling into the realm of constant uncertainty as claiming parties, who now confront entirely new, belatedly added affirmative defenses, insist on equal time to explore those additions and to endeavor to marshal the evidence necessary to meet those new defenses at trial. No Rules revision fix is likely to be entirely satisfying.

In the meanwhile, what is the cautious practitioner to do? There is, of course, the rare possibility that the particular judge before whom the litigant will be appearing has already taken sides in this debate. Readers are reminded how this Article's national survey verified that views on this issue differ at the highly-local, chambers-by-chambers level. Nevertheless, a perfect match is certainly not out of the question. To aid in that search, the Appendix of Cases that now concludes this Article endeavors to provide a comprehensive cataloguing of the Nation's district court decisions on the *Twiqbal*-to-affirmative-defenses issue since the *Iqbal* decision was released in May 2009 through September 15, 2013. In the end, that is the only nearly[215] reliable option available to defending parties as they labor over how to plead. Unsatisfying to be sure, but it is the odd state of *Twiqbal* "plausibility" in pleading affirmative defenses.

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214. Federal civil litigants are now permitted, as a usual matter, to discover "any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). Because a contemplated but as yet unpleaded affirmative defense would not qualify as "any party's claim or defense," discovery pursuing it would likely be objectionable unless Rule 26(b)(1) were revised to expressly tolerate discovery on such possible but un-alleged defenses.

215. A district judge is likely always free, upon considerations of new briefing or more recent developments and trends in the law, to depart from an earlier position on how Rule 8(c) affirmative defenses ought to be pleaded. *See, e.g.*, Polo v. Shwiff, No. C-12-04461-JSW, 2013 WL 1797671, at *4–*5 (N.D. Cal. Apr. 29, 2013) (noting the Court's own original rejection of *Twiqbal* for affirmative defenses, but now, "[a]fter careful consideration, the Court has been persuaded by the reasoning of those courts that apply *Twombly* and *Iqbal* to affirmative defenses, and it shall evaluate the sufficiency of Defendants' affirmative defenses under that standard.").

VI. Conclusion

The majority view held by the Nation's district courts that have considered the question join *Weddle v. Bayer AG Corp.* in concluding that *Twiqbal* "plausibility" does not apply to the pleading of affirmative defenses. Some among that majority, however, impose a fact-sensitive interpretation of notice pleading that seems nonetheless to require a measure of enhanced detail. The persistent minority view (formerly the majority approach, just a few years back) holds that *Twiqbal* applies.

Where does this leave the practitioner? Perhaps Alice B. Toklas, life-mate to Gertrude Stein and author of two cookbooks, got it right when she observed, "What's sauce for the goose may be sauce for the gander. But it's not necessarily sauce for the chicken, the duck, the turkey or the guinea hen."[216] Or perhaps that's not exactly quite right. Maybe, as here, whether goose sauce ought to be seasoned differently than gander sauce depends on where the kitchen is and on who's doing the cooking.

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216. Obituary, *Alice Toklas, 89, Is Dead In Paris*, N.Y. TIMES, Mar. 8, 1967, *available at* http://www.nytimes.com/books/98/05/03/specials/stein-toklasobit.html (on file with the Washington and Lee Law Review).

VII. Appendix of Cases to The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses

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SURVEY OF TWIQBAL AFFIRMATIVE DEFENSES CASES LAW (MAY 2009)

2009 [Post-*Iqbal* (After May 19, 2009)]			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
AUG.		**Sixth Circuit:** Montgomery v. Wyeth, 580 F.3d 455 (6th Cir. Aug. 28, 2009) (Suhrheinrich, J.)	
SEPT.	**New York:** Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150 (W.D.N.Y. Sept. 30, 2009) (Payson, Mag.)		
OCT.		**Pennsylvania:** Romantine v. CH2M Hill Eng'rs, Inc., Civ. No. 09–973, 2009 WL 3417469 (W.D. Pa. Oct. 23, 2009) (Lenihan, Mag.)	
	California: CTF Dev't., Inc. v. Penta Hospitality, LLC, No. C 09–02429 WHA, 2009 WL 3517617 (N.D. Cal. Oct. 26, 2009) (Alsup, J.)		

2009 [Post-*Iqbal* (After May 19, 2009)]			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
DEC.		**Virgin Islands:** Charleswell v. Chase Manhattan Bank, N.A., Civ. No. 01-119, 2009 WL 4981730 (D.V.I. Dec. 8, 2009) (DuBois, J.)	
	Kansas: Hayne v. Green Ford Motor Sales, Inc., 263 F.R.D. 647 (D. Kan. Dec. 22, 2009) (Rushfelt, Mag.)		
2009 TOTAL	**3**	**3**	**0**

2010			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
FEB.	**Vermont:** In re Montagne, 425 B.R. 111 (D. Vt. Feb. 4, 2010) (Brown, J.)		
MAR.		**Colorado:** Holdbrook v. SAIA Motor Freight Line, Civ. No. 09–cv–02870–LTB–BNB, 2010 WL 865380 (D. Colo. Mar. 8, 2010) (Babcock, J.) **Tennessee:** McLemore v. Regions Bank, Nos. 3:08–cv–0021, 3:08–cv–1003, 2010 WL 1010092 (M.D. Tenn. Mar. 18, 2010) (Trauger, J.)	
APR.	**Ohio:** HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d. 687 (N.D. Ohio Apr. 28, 2010) (Zouhary, J.)		
JUNE	**California:** Barnes v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167 (N.D. Cal. June 22, 2010) (Patel, J.) **Virginia:** Palmer v. Oakland Farms, Inc., Civ. No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010) (Welsh, Mag.)		

2010			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JULY		**Arizona:** Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907 (D. Ariz. July 15, 2010) (Campbell, J.)	
	Maryland: Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532 (D. Md. July 27. 2010) (Bennett, J.)		
	Virginia: Francisco v. Verizon South, Inc., Civil Action No. 3:09cv737, 2010 WL 2990159 (E.D. Va. July 29, 2010) (Lauck, Mag.)		
OCT.	**North Carolina:** Racick v. Dominion Law Assocs., 270 F.R.D. 228 (E.D.N.C. Oct. 6, 2010) (Fox, J.)		
		Minnesota: Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049 (D. Minn. Oct. 27, 2010) (Schiltz, J.)	
		Tennessee: Damron v. ATM Cent. LLC, No. 1:10–cv–01210–JDB–egb, 2010 WL 6512345 (W.D. Tenn. Oct 29, 2010) (Bryant, Mag.)	

2010			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
NOV.	**Michigan:** Hahn v. Best Recovery Servs. LLC, No. 10–12370, 2010 WL 4483375 (E.D. Mich. Nov. 1, 2010) (Duggan, J.)	**Alabama:** Jackson v. City of Centreville, 269 F.R.D. 661 (N.D. Ala. Nov. 3, 2010) (Coogler, J.)	**New York:** Coach, Inc. v. Kmart Corp., 756 F. Supp. 2d 421 (S.D.N.Y. Nov. 16, 2010) (McKenna, J.)
	Maryland: Piontek v. Serv. Ctrs. Corp., Civ. No. PJM 10–1202, 2010 WL 4449419 (D. Md. Nov. 5, 2010) (Messitte, J.)		
	South Carolina: Monster Daddy LLC v. Monster Cable Prods., Inc., Civ. No. 6:10–1170–HMH, 2010 WL 4853661 (D.S.C. Nov. 23, 2010) (Herlong, J.)	**Virginia:** Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721 (W.D. Va. Nov. 24, 2010) (Wilson, J.)	

2010			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
DEC.		**California:** J & J Sports Prods., Inc. v. Montanez, No. 1:10–cv–01693–AWI–SKO, 2010 WL 5279907 (E.D. Cal. Dec. 13, 2010) (Oberto, Mag.) **Ohio:** Nixson v. Health Alliance, No. 1:10–CV–00338, 2010 WL 5230867 (S.D. Ohio, Dec. 16, 2010) (Spiegel, J.)	
TOTAL 2010	**10**	**8**	**2**
RUNNING TOTAL	**13**	**11**	**2**

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JAN.		**Tennessee:** Sewell v. Allied Interstate, Inc., No. 3:10–CV–113, 2011 WL 32209 (E.D. Tenn. Jan. 5, 2011) (Phillips, J.)	
		Virginia: Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 WL 98573 (E.D. Va. Jan. 10, 2011) (Cacheris, J.)	
		California: Garber v. Mohammadi, No. CV 10–7144–DDP (RNB), 2011 WL 2076341 (C.D. Cal. Jan. 19, 2011) (Block, Mag.)	
			Texas: EEOC v. Courtesy Bldg. Servs., Civ. No. 3:10–CV–1911–D, 2011 WL 208408 (N.D. Tex. Jan. 21, 2011) (Fitzwater, C.J.)
			California: J & J Sports Prods., Inc. v. Coyne, No. C 10–04206 CRB, 2011 WL 227670 (N.D. Cal. Jan. 24, 2011) (Breyer, J.)
FEB.		**Pennsylvania:** Dann v. Lincoln Nat'l Corp., 274 F.R.D. 139 (E.D. Pa. Feb. 10, 2011) (Brody, J.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Oregon: Trustmark Ins. Co. v. C&K Mkt., Inc., No. CV 10–465–MO, 2011 WL 587574 (D. Or. Feb. 10, 2011) (Mosman, J.)	
		Maryland: Ulyssix Techs., Inc. v. Orbital Network Eng'g, Inc., Civ. No. ELH–10–02091, 2011 WL 631145 (D. Md. Feb. 11, 2011) (Hollander, J.)	
		Arizona: J & J Sports Prods., Inc. v. Khachatrian, No. CV–10–1567–GMS–PHX, 2011 WL 720049 (D. Ariz. Feb. 23, 2011) (Snow, J.)	
	Florida: Mid-Continent Cas. Co., v. Active Drywall South, Inc., 765 F. Supp. 2d 1360 (S.D. Fla. Feb. 25, 2011) (Seitz, J.)		
MAR.	**California:** J & J Sports Prods., Inc. v. Franco, No. CV F 10–1704 LJO DLB, 2011 WL 794826 (E.D. Cal. Mar. 1, 2011) (O'Neill, J.)		
	Texas: United States v. Brink, Civ. No. C–10–243, 2011 WL 835828 (N.D. Tex. Mar. 04, 2011) (Jack, J.)		

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		New Jersey: Fed. Trade Comm'n v. Hope Now Modifications, LLC, Civ. No. 09–1204 (JBS/JS), 2011 WL 883202 (D.N.J. Mar. 10, 2011) (Simandle, J.)	
		Michigan: Jeeper's of Auburn, Inc. v. KWJB Enter., L.L.C., No. 10–13682, 2011 WL 1899195 (E.D. Mich. Mar. 16, 2011) (Hluchaniuk, Mag.)	
	Missouri: Shaw v. Prudential Ins. Co. of Am., No. 10–03355–CV–W–DGK, 2011 WL 1050004 (W.D. Mo. Mar. 21, 2011) (Kays, J.)		
		Washington: In re Washington Mut., Inc., Secs., Derivative & ERISA Litig., No. 08–md–1919 MJP, 2011 WL 1158387 (W.D. Wash. Mar. 25, 2011) (Pechman, J.)	
	Maryland: Haley Paint Co. v. E.I. Dupont De Nemours & Co., Civ. No.: RDB–10–0318, 2011 WL 1298257 (D. Md. Mar. 31, 2011) (Bennett, J.)		

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
APRIL	**Missouri:** Sch. of the Ozarks, Inc. v. Greatest Generations Found., Inc., No. 10–3499–CV–S–ODS, 2011 WL 1337406 (W.D. Mo. Apr. 7, 2011) (Smith, J.) **Missouri:** Lucas v. Jerusalem Café, LLC, 2011 WL 1364075 (W.D. Mo. Apr. 11, 2011) (Kays, J.)	**Pennsylvania:** Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893 (E.D. Pa. Apr. 12, 2011) (Robreno, J.) **Kansas:** Falley v. Friends Univ., 787 F. Supp. 2d 1255 (D. Kan. Apr. 14, 2011) (Murguia, J.) **Minnesota:** Schlief v. Nu-Source, Inc., Civ. No. 10–4477 (DWF/SER), 2011 WL 1560672 (D. Minn. Apr. 25, 2011) (Frank, J.)	**California:** J & J Sports Prods., Inc. v. Mendoza-Govan, No. C 10–05123 WHA, 2011 WL 1544886 (N.D. Cal. Apr. 25, 2011) (Alsup, J.)
MAY			**Illinois:** Riemer v. Chase Bank USA, 274 F.R.D. 637 (N.D. Ill. May 25, 2011) (Cole, J.)

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JUNE	**Illinois:** Groupon Inc. v. MobGob LLC, No. 10 C 7456, 2011 WL 2111986 (N.D. Ill. May 25, 2011) (Hibbler, J.)	**California:** J & J Sports Prods., Inc. v. Scace, No. 10cv2496–WQH–CAB, 2011 WL 2132723 (S.D. Cal. May 27, 2011) (Hayes, J.)	
	Missouri: Openmethods, LLC v. Mediu, LLC, No. 10–761–CV–W–FJG, 2011 WL 2292149 (W.D. Mo. June 8, 2011) (Gaitan, C.J.)	**Kansas:** Bowers v. Mortg. Elec. Registration Sys., Civ. No. 10–4141–JTM–DJW, 2011 WL 2149423 (D. Kan. June 1, 2011) (Waxse, Mag.)	
	Georgia: Floyd v. SunTrust Banks, Inc., Civ. No. 1:10–CV–2620–RWS, 2011 WL 2441744 (N.D. Ga. June 13, 2011) (Story, J.)	**New Mexico:** Lane v. Page, 272 F.R.D. 581, 588 (D.N.M. June 14, 2011) (Browning, J.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Kansas: United States *ex rel* Minge v. TECT Aerospace, Inc., Civ. No. 07–1212–MLB, 2011 WL 2473076 (D. Kan. June 21, 2011) (Belot, J.)	
		Kansas: DZ Bank AG Deutsche Zentral Genossenschaftsbank v. All Gen. Lines Ins., LLC, No. 10–2126–CM/JPO, 2011 WL 2579824 (D. Kan. June 28. 2011) (Murguia, J.)	
JULY		**Pennsylvania:** Dilmore v. Alion Sci. & Tech. Corp., Civ. No. 11–72, 2011 WL 2690367 (W.D. Pa. July 11, 2011) (Fischer, J.)	
		California: Meas v. CVS Pharmacy, Inc., No. 11cv0823 JM(JMA), 2011 WL 2837432 (S.D. Cal. July 14, 2011) (Miller, J.)	
		Indiana: J & J Sports Prods., Inc. v. Munoz, No. 1:10–cv–1563–WTL–TAB, 2011 WL 2881285 (S.D. Ind. July 15, 2011) (Lawrence, J.)	
		Colorado: Michaud v. Greenberg & Sada, P.C., Civ. No. 11–cv–01015–RPM–MEH, 2011 WL 2885952 (D. Colo. July 18, 2011) (Hegarty, Mag.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Missouri: Amerisure Ins. Co. v. Thomas, NO. 4:11CV642JCH, 2011 WL 3021205 (E.D. Mo. July 21, 2011) (Hamilton, J.)	
		Florida: Adams v. JP Morgan Chase Bank, No. 3:11–cv–337–J–37MCR, 2011 WL 2938467 (M.D. Fla. July 21, 2011) (Richardson, Mag.)	
		Florida: Jirau v. Camden Dev., Inc., No. 8:11–cv–73–T–33MAP, 2011 WL 2981818 (M.D. Fla. July 22, 2011) (Covington, J.)	
	New York: EEOC v. Kelley, Drye, & Warren, LLP, 2011 WL 3163443 (S.D.N.Y. July 25, 2011) (Swain, J.)		
		Kentucky: Holley Performance Prods., Inc. v. Quick Fuel Tech., Inc., Civ. No. 1:07–CV–00185–JHM, 2011 WL 3159177 (W.D. Ky. July 26, 2011) (McKinley, J.)	
AUG.		**Georgia:** Sec. Life Denver Ins. Co. v. Shah, No. CV411–008, 2011 WL 3300320 (S.D. Ga. Aug. 1, 2011) (Smith, Mag.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		New Hampshire: InvestmentSignals, LLC v. Irrisoft, Inv., No. 10–cv–600–SM, 2011 WL 3320525 (D.N.H. Aug. 1, 2011) (McAuliffe, C.J.)	
		Arkansas: Ash Grove Cement Co. v. MMR Constructors, Inc., No. 4:10-CV-04069, 2011 WL 3811445 (W.D. Ark. Aug. 29, 2011) (Holmes, J.)	
		Pennsylvania: Vurimindi v. Fuqua Sch. of Bus., Civ. No. 10–234, 2011 WL 3803668 (E.D. Pa. Aug. 29, 2011) (Pratter, J.)	
SEPT.		**Missouri:** Willis v. Quad Lakes Enters., L.L.C., No. 4:11–CV–00096–SWH, 2011 WL 3957339 (W.D. Mo. Sept. 7, 2011) (Hays, Mag.)	
		Kansas: Unicredit Bank AG v. Buchell, No. 10–2436–JWL, 2011 WL 4036466 (D. Kan. Sept. 12, 2011) (Lungstrum, J.)	
	Maryland: Barry v. EMC Mortg., Civ. No. DKC 10–3120, 2011 WL 4352104 (D. Md. Sept. 15, 2011) (Chasanow, J.)		
		Virginia: Pennell v. Vacation Reservation Ctr., No. 4:11cv53, 2011 WL 6960814 (E.D. Va. Sept. 20. 2011) (Stillman, Mag.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Ohio: Chiancone v. City of Akron, No. 5:11CV337, 2011 WL 4436587 (N.D. Ohio Sept. 23, 2011) (Lioi, J.)	
		Kansas: Bennett v. Sprint Nextel Corp., No. 09–2122–EFM, 2011 WL 4553055 (D. Kan. Sept. 29, 2011) (Melgren, J.)	
OCT.		**Nebraska:** Bank of Beaver City v. Sw. Feeders, L.L.C., No. 4:10CV3209, 2011 WL 4632887 (D. Neb. Oct. 4, 2011) (Urbom, J.)	**California:** J & J Sports Prods., Inc. v. Luhn, No. 2:10–CV–03229 JAM–CKD, 2011 WL 5040709 (E.D. Cal. Oct. 24, 2011) (Mendez, J.)
	Maryland: Aguilar v. City Lights of China Rest., Inc., Civ. No. DKC 11-2416, 2011 WL 5118325 (D. Md. Oct. 24, 2011) (Chasanow, J.)		
		Connecticut: Aros v. United Rentals, Inc., Civ. No. 3:10–CV–73 (JCH), 2011 WL 5238829 (D. Conn. Oct. 31, 2011) (Hall, J.)	
NOV.		**Minnesota:** Brossart v. DIRECTTV, Civ. No. 11–786 (DWF/JJK), 2011 WL 5374446 (D. Minn. Nov. 4 2011) (Frank, J.)	

2011			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Minnesota: U.S. Bank Nat. Ass'n v. Educ. Loans Inc., Civ. No. 11–1445 (RHK/JJG), 2011 WL 5520437 (D. Minn. Nov. 14, 2011) (Kyle, J.) **Kentucky:** Paducah River Painting, Inc. v. McNational Inc., No. 5:11–CV–00135–R, 2011 WL 5525938 (W.D. Ky. Nov. 14, 2011) (Russell, C.J.) **Connecticut:** Whitserve LLC v. GoDaddy.com, Inc., Civ. No. 3:11–CV–948 (JCH), 2011 WL 5825712 (D. Conn. Nov. 17, 2011) (Hall, J.) **Illinois:** Leon v. Jackson Transp. Co., No. 10 C 4939, 2010 WL 4810600 (N.D. Ill. Nov. 19, 2010) (Marovich, J.)	
DEC.		**Delaware:** Bayer CropScience AG v. Dow AgroSciences LLC, Civ. No. 10–1045 RMB/JS, 2011 WL 69334557 (D. Del. Dec. 30, 2011) (Bumb, J.)	
2011 TOTAL	**13**	**42**	**6**
RUNNING TOTAL	**26**	**53**	**8**

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JAN.	**California:** Dion v. Fulton Friedman & Gullace, LLP, No. 11-2727SC, 2012 WL 160221 (N.D. Cal. Jan. 17, 2012) (Conti, J.)	**Indiana:** Cottle v. Falcon Holdings Mgmt., LLC, No. 2:11–CV–95–PRC, 2012 WL 266968 (N.D. Ind. Jan. 30, 2012) (Cherry, Mag.)	
FEB.		**California:** Kohler v. Islands Rests., LP, 280 F.R.D. 560 (S.D. Cal. Feb. 16, 2012) (Whelan, J.)	**California:** J & J Sports Prods., Inc. v. Gidha, No. CIV S–10–2509 KJM–KJN, 2012 WL 537494 (E.D. Cal. Feb. 17, 2012) (Mueller, J.) **Kansas:** Salek v. Reload, Inc., No. 11–2585–SAC, 2012 WL 589277 (D. Kan. Feb. 22, 2012) (Crow, J.)
		Nevada: Ferring B.V. v. Watson Labs., Inc., Nos. 3:11–cv–00481–RCJ–VPC, 3:11–cv–00485–RCJ–VPC, 3:11–cv–00853–RCJ–VPC, 3:11–cv–00854–RCJ–VPC, 2012 WL 607539 (D. Nev. Feb. 24, 2012) (Jones, J.)	

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Kansas: Gemcor II, LLC v. ElectroImpact, Inc., No. 11–CV–2520–CM, 2012 WL 628199 (D. Kan. Feb. 27, 2012) (Murguia, J.)	
MAR.	**Texas:** Vargas v. HWC General Maint., LLC, Civ. No. H–11–875, 2012 WL 948892 (S.D. Tex. Mar. 20, 2012) (Harmon, J.)		
		California: Weddle v. Bayer AG Corp., No. 11CV817 JLS (NLS), 2012 WL 1019824 (S.D. Cal. Mar. 26, 2012) (Sammartino, J.)	**California:** Botell v. United States, No. 2:11–cv–01545–GEB–GGH, 2012 WL 1027270 (E.D. Cal. Mar. 26, 2012) (Burrell, J.)
APRIL		**Utah:** Tiscareno v. Frasier, No. 2:07–CV–336, 2012 WL 1377886 (D. Utah. Apr. 19, 2012) (Waddoups, J.)	
		California: Figueroa v. Marshalls of Cal., LLC, No. CV11–06813–RGK (SPx) 2012 WL 1424400 (C.D. Cal. Apr. 23, 2012) (Kalusner, J.)	
			California: J & J Sports Prods., Inc. v. Romero, No. 1:11–cv–1880–AWI–BAM, 2012 WL 1435004 (E.D. Cal. Apr. 25, 2012) (McAuliff, Mag.)

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
MAY	**Michigan:** Int'l Outdoor, Inc. v. City of Southgate, No. 2:11–CV–14719, 2012 WL 2367160 (E.D. Mich. Apr. 26, 2012) (Komives, Mag.)	**California:** Kohler v. Big 5 Corp., No. 2:12–cv–00500–JHN–SPx, 2012 WL 1511748 (C.D. Cal. Apr. 30, 2012) (Nguyen, J.)	
		Texas: Floridia v. DLT 3 Girls, Inc., Civ. No. 4:11–cv–3624, 2012 WL 1565533 (S.D. Tex. May 2, 2012) (Ellison, J.)	
		Florida: Great Am. Assur. Co. v. Sanchuk, LLC, No. 8:10–cv–2568–T–33AEP, 2012 WL 1656751 (M.D. Fla. May 10, 2012) (Covington, J.)	
	Puerto Rico: Ingeniador, LLC v. Interwoven, Civ. No. 11–1840(GAG), 2012 WL 1712492 (D.P.R. May 15, 2012) (Gelpi, J.)		
	California: Powertech Tech., Inc. v. Tessera, Inc., No. C 10–945 CW, 2012 WL 1746848 (N.D. Cal. May 16, 2012) (Wilken, J.)		

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
			Texas: Edison Global Circuits, LLC v. Ingenium Techs. Corp., Civ. No. H–11–1207, 2012 WL 1884083 (S.D. Tex. May 22, 2012) (Rosenthal, J.)
		California: Figueroa v. Baja Fresh Westlake Village, Inc., No. CV 12–769–GHK (SPx), 2012 WL 2373254 (C.D. Cal. May 24, 2012) (King, J.)	
			California: J & J Sports Prods., Inc. v. Sanchez, No. CV–08–2187–PHX–DGC, 2012 U.S. Dist. LEXIS 74070 (E.D. Cal. May 29, 2012) (Burrell, J.)
JUNE		**Alabama:** Loucks v. Shorest, LLC, Civ. No. 2:12cv304–WHA, 2012 WL 2126956 (M.D. Ala. June 13, 2012) (Albritton, J.)	
		Delaware: XpertUniverse, Inc. v. Cisco Sys., Inc., Civ. No. 09–157–RGA, 2012 WL 2335938 (D. Del. June 19, 2012) (Andrews, J.)	
		Kansas: Drury v. Wendy's Old Fashioned Hamburgers of New York, Inc., Civ. No. 12–2012–JTM–DJW, 2012 WL 2339747 (D. Kan. June 19, 2012) (Waxse, J.)	

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JULY		**Pennsylvania:** Weed v. Ally Fin. Inv., Civ. No. 11–2808, 2012 WL 2469544 (E.D. Pa. June 28, 2012) (Tucker, J.)	
		Alabama: Weeks-Walker v. Macon Cnty. Greyhound Park, Inc., 877 F. Supp. 2d 1192 (M.D. Ala. July 6, 2012) (Fuller, J.)	
		Alabama: EEOC v. Joe Ryan Enters., Inc., 281 F.R.D. 660 (M.D. Ala. July 9, 2012) (Fuller, J.)	
	California: O'Sullivan v. AMN Servs., Inc., No. C–12–02125 JCS, 2012 WL 2912061 (N.D. Cal. July 16, 2012) (Spero, Mag.)		**Minnesota:** EEOC v. Prod. Fabricators, Inc., Civ. No. 11–2071 (MJD/LIB), 2012 WL 2775009 (D. Minn. July 10, 2012) (Davis, C.J.)
		Arizona: J & J Sports Prods., Inc. v. Vargas, No. CV 11–2229–PHX–JAT, 2012 WL 2919681 (D. Ariz. July 17, 2012) (Teilborg, J.)	
		Arizona: G&G Closed Circuit Events, LLC v. Mitropoulos, No. CV12–0163–PHX DGC, 2012 WL 3028368 (D. Ariz. July 24, 2012) (Campbell, J.)	

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		New York: Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2012 WL 3538749 (S.D.N.Y. July 31, 2012) (Kaplan, J.)	
		Hawai'i: Cape Flattery Ltd. v. Titan Mar. LLC, Civ. No. 08–00482 JMS/KSC, 2012 WL 3113168 (D. Haw. July 31, 2012) (Seabright, J.)	
		Mississippi: EEOC v. LHC Grp. Inc., No. 1:11CV355–LG–JMR, 2012 WL 3242168 (S.D. Miss. Aug. 7, 2012) (Guirola, C.J.)	
AUG.	**Maryland:** Coach, Inc. v. Farmers Mkt. & Auction, Civ. No. AW–11–01239, 2012 WL 3195132 (D. Md. Aug. 7, 2012) (Williams, J.)		
		Hawai'i: Walker-Cook v. Integrated Health Res., LLC, Civ. No. 12–00146 ACK–RLP, 2012 WL 4461159 (D. Haw. Aug. 10, 2012) (Puglisi, Mag.)	
	Texas: Herrera v. Utilimap Corp., Civ. No. H–11–3851,2012 WL 3527065 (S.D. Tex. Aug. 14, 2012) (Johnson, Mag.)		

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
SEPT.	**New York:** Trilegiant Corp. v. Sitel Corp., No. 09 Civ. 6492(BSJ)(JCF), 2012 WL 3826841 (S.D.N.Y. Aug. 27, 2012) (Francis, Mag.)		**Texas:** CIMC Vehicles Grp. Co., Ltd. v. Direct Trailer, LP, Civ. No. H–10–709, 2012 WL 4017985 (S.D. Tex. Aug. 24, 2012) (Johnson, Mag.)
		Arkansas: Ash Grove Cement Co. v. MMR Constructors, Inc., No. 4:10-CV-04069, 2011 WL 3811445 (W.D. Ark. Aug. 29, 2011) (Holmes, J.)	
	California: PageMelding, Inc. v. ESPN, Inc., No. C-11-06263, 2012 WL 3877686 (N.D. Cal. Sept. 6, 2012) (Alsup, J.)		
		Missouri: Citimortgage, Inc. v. Draper & Kramer Mortg. Corp., No. 4:10CV1784 FRB, 2012 WL 3984497 (E.D. Mo. Sept. 11, 2012) (Buckles, Mag.)	
			New York: Purdue Pharma L.P. v. Ranbaxy Inc., No. 10 Civ. 3734(SHS), 2012 WL 3854640 (S.D.N.Y. Sept. 5, 2012) (Stein, J.)

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
			Louisiana: Schlosser v. Metro. Prop. & Cas. Ins. Co., Civ. No. 12–1301, 2012 WL 3879529 (E.D. La. Sept. 6, 2012) (Vance, J.) **New York:** Godson v. Eltman, Eltman & Cooper, P.C., 285 F.R.D. 255, 258 (W.D.N.Y. 2012) (Skretny, C.J.) **New York:** Trs. of Local 813 Ins. Trust Fund v. Wilner's Livery Serv., Inc., No. 11–CV–3180 (DLI)(CLP), 2012 WL 4327070 (E.D.N.Y. Sept. 19, 2012) (Irizarry, J.)
OCT.		**Delaware:** Cadence Pharm., Inc. v. Paddock Labs., Inc., Civ. No. 11–733–LPS, 2012 WL 4565013 (D. Del. Oct. 1, 2012) (Stark, J.) **Arizona:** Fed. Trade Comm'n v. North Am. Mktg. & Assocs., LLC, No. CV–12–0914–PHX–DGC, 2012 WL 5034967 (D. Ariz. Oct. 18, 2012) (Campbell, J.) **New York:** Petroci, v. Transworld Sys., Inc., No. 12–CV–00729 (A)(M), 2012 WL 5464597 (W.D.N.Y. Oct. 19, 2012) (McCarthy, Mag.)	

2012			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
NOV.		**California:** J & J Sports Prods., Inc. v. Catano, No. 1:12–cv–00739–LJO–JLT, 2012 WL 5424677 (E.D. Cal. Nov. 6, 2012) (Thurston, Mag.) **New York:** Scott v. WorldStarHipHop, Inc., No. 10 Civ. 9538(PKC)(RLE), 2012 WL 5835232 (S.D.N.Y. Nov. 14, 2012) (Castel, J.)	
2012 TOTAL	**10**	**28**	**14**
RUNNING TOTAL	**36**	**81**	**22**

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JAN.	**Illinois:** Senne v. Village of Palatine, No. 10-C-5434, 2013 WL 68703 (N.D. Ill. Jan. 4, 2013) (Kennelly, J.) **Maryland:** Hammer v. Peninsula Poultry Equip., Inc., No. RDB-12-1139, 2013 WL 97398 (D. Md. Jan. 8, 2013) (Bennett, J.) **Florida:** Lynch v. Continental Group, Inc., No. 12-21648-CIV, 2013 WL 166226 (S.D. Fla. Jan. 15, 2013) (Seitz, J.)	**North Carolina:** Guessford v. Pa. Nat'l Mut. Cas. Ins. Co., 918 F. Supp. 453 (M.D.N.C. Jan. 16, 2013) (Beaty, J.) **Illinois:** LaPorte v. Bureau Veritas N.A., Inc., No. 12 C 9543, 2013 WL 250657 (N.D. Ill. Jan. 18, 2013) (Marovich, J.)	**California:** Alcantar v. Hobart Serv., No. ED CV 11–1600 PSG (SPx), 2013 WL 228501 (C.D. Cal. Jan. 22, 2013) (Gutierrez, J.)

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	Illinois: FDIC v. Vann, No. 11-C-3491, 2013 WL 704478 (N.D. Ill. Jan. 23, 2013) (Lefkow, J.)		
		Pennsylvania: U.S. Bank Nat'l Ass'n v. Rosenberg, No. CV-12-723, 2013 WL 272061 (E.D. Pa. Jan. 24, 2013) (Rufe, J.)	
		California: Rapp v. Lawrence Welk Resort, No. 12-CV-01247 BEN (WMc), 2013 WL 358268 (S.D. Cal. Jan. 28, 2013) (Benitez, J.)	
	Florida: Royal Caribbean Cruises, Ltd. v. Jackson, 921 F. Supp. 2d 1366 (S.D. Fla. Jan. 29, 2013) (Seitz, J.)	**Missouri:** Southard v. City of Oronogo, No. 12-05027-CV-SW-SWH, 2013 WL 352943 (W.D. Mo. Jan. 29, 2013) (Hays, Mag.)	
		Washington: Palmason v. Weyerhaeuser Co., No. C11-695RSL, 2013 WL 392705 (W.D. Wash. Jan. 31, 2013) (Lasnik, J.)	
FEB.		**Delaware:** Senju Pharma. Co. v. Apotex, Inc., 921 F. Supp. 2d 297 (D. Del. Feb. 6, 2013) (Robinson, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Nevada: Ferring B.V. v. Watson Labs., Inc., Nos. 3:11-CV-00481-RCJ-VPC, 3:11-CV-00485-RCJ-VPC, 3:11-CV-00853-RCJ-VPC, 3:11-CV-00854-RCJ-VPC, 2013 WL 499158 (D. Nev. Feb. 6, 2013) (Jones, J.)	
		California: Kohler v. Staples the Office Superstore, LLC, No. 11-CV-2025-W-BLM, 2013 WL 544058 (S.D. Cal. Feb. 12, 2013) (Whelan, J.)	**Indiana:** Fifth Third Bank v. Double Tree Lake Estates, LLC, No. 2:11-CV-233-PPS-PRC, 2013 WL 587889 (N.D. Ind. Feb. 12, 2013) (Cherry, Mag.)
		Kansas: Fulghum v. Embarq Corp., No. 07-2602-EFM, 2013 WL 589611 (D. Kan. Feb. 14, 2013) (Melgren, J.)	
		Michigan: Strayhorn v. Caruso, No. 11-15216, 2013 WL 1189842 (E.D. Mich. Feb. 15, 2013) (Whalen, J.)	
	California: Ansari v. Electronic Document Processing, Inc., No. 5:12-CV-01245-LHK, 2013 WL 664676 (N.D. Cal. Feb. 22, 2013) (Koh, J.)		

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
MAR.			**California:** J&J Sports Prods., Inc. v. Bear, No. 1:12–CV–01509–AWI–SKO, 2013 WL 708490 (E.D. Cal. Feb. 26, 2013) (Oberto, Mag.)
		Georgia: Adair v. Boat Dock Innovations, LLC, No. 1:12-CV-1930-SCJ, 2013 WL 1859200 (N.D. Ga. Feb. 27, 2013) (Jones, J.)	
		California: Roe v. City of San Diego, No. 12-CV-0243-W-(WVG), 289 F.R.D. 604 (S.D. Cal. Mar. 5, 2013) (Whelan, J.)	
		Pennsylvania: Malibu Media, LLC v. Does, No. CV-12-2078, 2013 WL 1702549 (E.D. Pa. Mar. 6, 2013) (Baylson, J.)	**Idaho:** Fleming v. Escort, Inc., No.1:12–CV–066–BLW, 2013 WL 870632 (D. Idaho Mar. 6, 2013) (Winmill, C.J.)
	Florida: SEC v. BIH Corp. No. 2:10-CV-577-FtM-29DNF, 2013 WL 1212769 (M.D. Fla. Mar. 25, 2013) (Steele, J.)		
		New York: Serby v. First Alert, Inc., No. 09-cv-4229 (WFK), 2013 WL 1281561 (E.D.N.Y. Mar. 27, 2013) (Kuntz, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	Texas: *In re* Wheeler Hospitality, Inc., Bky Nos. 10-20166-rlj-11, 10-20167-rlj-11, 10-20168-rlj-11, 10-20169-rlj-11, 10-20170-rlj-11, 10-20171-rlj-11, 2013 WL 1335642 (Bankr. N.D. Tex. Mar. 29, 2013) (Jones, J.)		
APR.	**California:** Ross v. Morgan Stanley Smith Barney, LLC, No. 2:12-cv-009687-ODW(JCx), 2013 WL 1344831 (C.D. Cal. Apr. 2, 2013) (Wright, J.)		**California:** Joe Hand Promotions, Inc., v. Dorsett, No. 12-CV-1715-JAM-EFB, 2013 WL 1339231 (E.D. Cal. Apr. 3, 2013) (Mendez, J.)
		Colorado: Malibu Media, LLC v. Batz, No. 12-CV-01953-WYD-MEH, 2013 WL 2120412 (D. Colo. Apr. 5, 2013) (Hegarty, Mag.)	
	California: Spears v. First American Eappraiseit No. 5-08-CV-00868-RMW, 2013 WL 1748284 (N.D. Cal. Apr. 23, 2013) (Whyte, J.)	**Nebraska:** Strauss v. Centennial Precious Metals, Inc., No. 4:12-CV-3213, 2013 WL 1737012 (D. Neb. Apr. 23, 2013) (Kopf, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
			Pennsylvania: United States ex rel. Spay v. CVS Caremark Corp., No. CIV-09-4672, 2013 WL 1755214 (E.D. Pa. Apr. 24, 2013) (Buckwalter, J.)
	California: Ramirez v. Ghilotti Bros., No. C-12-04590, 2013 WL 1786636 (N.D. Cal. Apr. 25, 2013) (Breyer, J.)		
		Florida: Ramnarine v. CP RE Holdco 2009-1, LLC, No. 12-61716-CIV, 2013 WL 1788503 (S.D. Fla. Apr. 26, 2013) (Rosenbaum, Mag.)	
	California Polo v. Shwiff, No. C 12-04461 JSW, 2013 WL 1797671 (N.D. Cal Apr. 29, 2013) (White, J.)		
		California: Vogel v. Linden Optometry APC, No. CV 13-0295 GAF (SHx), 2013 WL 1813686 (C.D. Cal. Apr. 30, 2013) (Fess, J.)	
MAY		**Ohio:** GE Lighting Solutions, LLC v. Lights of Am., Inc., No. 1:12-CV-3131, 2013 WL 1874855 (N.D. Ohio May 3, 2013) (Polster, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	California: Righetti v. Cal. Dep't of Corrections & Rehab., No. C-11-2717-EMC, 2013 WL 1891374 (N.D. Cal. May 6, 2013) (Chen, J.)	**California:** Diaz v. Alternative Recovery Mgmt., No. 12-CV-1742-MMA (BGS), 2013 WL 1942198 (S.D. Cal. May 8, 2013) (Anello, J.)	
	California: Innovation Ventures, LLC v. Pittsburg Wholesale Grocers, Inc., No. C-12-05523-WHA, 2013 WL 2009681 (N.D. Cal. May 13, 2013) (Alsup, J.)		
	California: Catch A Wave, Inc. v. Sirius XM Radio, Inc., No. C-12-05791-WHA, 2013 WL 1996134 (N.D. Cal. May 13, 2013) (Alsup, J.)		
	California: J & J Sports Prods., Inc. v. Barwick, No. 5:12-CV-05284-LHK, 2013 WL 2083123 (N.D. Cal. May 14, 2013) (Koh, J.)		

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		Virginia: Warren v. Tri Tech Labs., Inc., No. 6:12-cv-00046, 2013 WL 2111669 (W.D. Va. May 15, 2013) (Moon, J.)	**Florida:** Katz v. Chevaldina, No. 12-22211-CIV, 2013 WL 2147156 (S.D. Fla. May 15, 2013 (King, J.)
		Missouri: United States *ex rel* Health Dimensions Rehab., Inc. v. Rehabcare Group, Inc., No. 4:12-CV-00848 AGF, 2013 WL 2182343 (E.D. Mo. May 20, 2013) (Fleissig, J.)	**Louisiana:** David v. Signal Int'l, LLC, No. CV 08-1220, 2013 WL 2181293 (E.D. La. May 20, 2013) (Morgan, J.)
			New Jersey: Malibu Media, LLC v. Lee, No. CIV-12-03900, 2013 WL 2252650 (D.N.J. May 22, 2013) (Thompson, J.)
		New York: Hon Hai Precision Indus. Co. v. Wi-Lan, Inc., No. 12 Civ 7900(SAS), 2013 WL 2322675 (S.D.N.Y. May 28, 2013) (Scheindlin, J.)	
		California: Vogel v. AutoZone Parts, Inc., No. CV-13-0300-CAS (AJWx), 2013 WL 2395905 (C.D. Cal. May 31, 2013) (Snyder, J.)	
JUNE		**California:** Devermont v. City of San Diego, No. 12-CV-01823 BEN (KSC), 2013 WL 2898342 (S.D. Cal. June 14, 2013) (Benitez, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	California: Dodson v. Strategic Rests. Acquisition Co., No. CIV. S-13-0402 LKK/EFN, 289 F.R.D. 595 (E.D. Cal. June 18, 2013) (Karlton, J.)		
	California: Dodson v. Munirs Co., No. CIV. S-13-0399 LKK/DAD, 2013WL 3146818 (E.D. Cal. June 18, 2013) (Karlton, J.)		
	California: Cabrera v. Alvarez, No. C 12-04890 SI, 2013 WL 3146788 (N.D. Cal. June 18, 2013) (Illston, J.)		
	Indiana: Cincinnati Ins. Co. v. Kreager Bros. Excavating, Inc., No. 2:12-CV-470-JD-APR, 2013 WL 3147371 (N.D. Ind. June 18, 2013) (Rodovich, Mag.)		
	California: Miller v. Ghirardelli Chocolate Co., No. C 12-04936 LB, 2013 WL 31553388 (N.D. Cal. June 19, 2013) (Beeler, Mag.)	**California:** Polk v. Legal Recovery Law Offices, No. 12-CV-0641-W-MDD, 2013 WL 3147728 (S.D. Cal. June 19, 2013) (Whelan, J.)	
		Texas: Deniece Design, LLC v.Braun, No. CIV-H-12-2814, 2013 WL 3166343 (S.D. Tex. June 19, 2013) (Harmon, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
JULY	**Illinois:** Oleksy v. Gen. Elec. Co., No. 06-C-01245, 2013 WL 3233259 (N.D. Ill. June 26, 2013) (Kendall, J.)		
	California: Gandeza v. Brachfeld Law Grp., No. C 13-0810 SC, 2013 WL 3286187 (N.D. Cal. June 27, 2013) (Conti, J.)	**New Jersey:** Signature Bank v. Check-X-Change, LLC, No. 12-2802 (ES), 2013 WL 3286154 (D.N.J. June 27, 2013) (Salas, J.)	
			Louisiana: Jolie Design & Décor, Inc. v. CECE, Caldwell's Paints, LLC, No. 2:12-CV-2387, 2013 WL 3293691 (E.D. La. June 28, 2013) (Berrigan, J.)
	California: Vogel v. Huntington Oaks Del. Partners, LLC, No 2:13-cv-842-ODW(MANx), 2013 WL 3337803 (C.D. Cal. July 2, 2013) (Wright, J.)		
		Illinois: Ford v. Psychopathic Records, Inc., No. 12-cv-0603-MJR-DGW, 2013 WL 3353923 (S.D. Ill. July 3, 2013) (Reagan, J.)	
	North Carolina: Johnson v. Clark, No. 5:12-CV-743-F, 2013 WL 3455737 (E.D.N.C. July 9, 2013) (Fox, J.)		**Maryland:** Utility Line Servs., Inc., v. Washington Gas Light Co., No. PWG-12-3438, 2013 WL 3465211 (D. Md. July 9, 2013) (Grimm, J.)

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	California: Nextdoor.Com, Inc. v. Abhyanker, No. C-12-5667-EMC, 2013 WL 3802526 (N.D. Cal. July 19, 2013) (Chen, J.)	**California:** Pac. Dental Servs., LLC v. Homeland Ins. Co. of N.Y., No. SACV 13-749-JST (JPRx), 2013 WL 3776337 (C.D. Cal. July 17, 2013) (Tucker, J.)	**Maryland:** Sprint Nextel Corp. v. Simple Cell, Inc., No. CIV-CCB-13-617, 2013 WL 3776933 (D. Md. July 17, 2013) (Blake, J.)
	California: ADP Commercial Leasing, Inc. v. M.G. Santos, Inc., No. CV-F-13-0587-LJO-SKO, 2013 WL 3863897 (E.D. Cal. July 24, 2013) (O'Neill, J.)	**New Jersey:** Coles v. Carlini, No. CIV-10-6132 (JBS/AMD), 2013 WL 3811642 (D.N.J. July 22, 2013) (Simandle, C.J.)	**Oregon:** Charter Oak Fire Ins. Co. v. Interstate Mech., Inc., No. 3:10-CV-01505-PK, 2013 WL 3809466 (D. Or. July 23, 2013) (Mosman, J.)
		Ohio: Joe Hand Promotions, Inc. v. Havens, No. 2:13-cv-0093, 2013 WL 3876176 (S.D. Ohio July 26, 2013) (King, Mag.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
			Idaho: Intermountain Fair Housing Council, Inc. v. Michael's Manor, LLC, No. 4:12-cv-00645-BLW, 2013 WL 3944259 (D. Idaho July 29, 2013) (Winmill, J.)
			North Carolina: Staton v. N. State Acceptance, LLC, No. 1:13-CV-277, 2013 WL 3910153 (M.D.N.C. July 29, 2013) (Eagles, J.)
			California: Dodson v. CSK Auto, Inc., No. 2:13-cv-00346-GEB-AC, 2013 WL 3942002 (E.D. Cal. July 30, 2013) (Burrell, J.)
AUG.	**Kansas:** Constr. Indus. Laborers Pension Fund v. Explosive Contractors, Inc., No. 12-2624-EFM, 2013 WL 3984371 (D. Kan. Aug. 1, 2013) (Melgren, J.)	**Tennessee:** Bolton v. United States, No. 2:12-CV-3031-JPM-dkv, 2013 WL 3965427 (W.D. Tenn. Aug. 1, 2013) (McCalla, C.J.)	
		Kansas: Res-Mo Springfield, LLC v. Tuscany Props., LLC, No. 13-2169-EFM-DJW, 2013 WL 3991794 (D. Kan. Aug. 5, 2013) (Waxse, Mag.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
		California: DC Labs, Inc. v. Celebrity Signatures Int'l, Inc., No. 12-CV-01454 BEN (DHB), 2013 WL 4026366 (S.D. Cal. Aug. 6, 2013) (Benitez, J.)	
		California: Pickern v. Chico Steakhouse, LP, No. 12-cv-02586-TLN-CMK, 2013 WL 4051640 (E.D. Cal. Aug. 8, 2013) (Nunley, J.)	
		South Dakota: Plan Pros, Inc. v. Joshua, Inc., No. CIV-13-4016, 2013 WL 4402357 (D.S.D. Aug. 14, 2013) (Piersol, J.)	**Maryland:** GN Hearing Care Corp. v. Advanced Hearing Ctrs., Inc., No. CV-WDQ-12-3181, 2013 WL 4401230 (D. Md. Aug. 14, 2013) (Quarles, J.)
			Nevada: Hernandez v. Creative Concepts, Inc., No. 2:10-CV-02132-PMP-VCF, 2013 WL 4399235 (D. Nev. Aug. 16, 2013) (Pro, J.)
		Texas: Federal Trade Comm'n v. Verma Holdings, LLC, No. 4:13-cv-00594, 2013 WL 4506033 (S.D. Tex. Aug. 22, 2013) (Atlas, J.)	
		Florida: Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc., No. 12-61670-CIV, 2013 WL 4496510 (S.D. Fla. Aug. 22, 2013) (Rosenbaum, J.)	

2013			
MONTH	**CASES APPLYING *TWIQBAL***	**CASES NOT APPLYING *TWIQBAL***	**INCONCLUSIVE CASES**
	Illinois: Intercon Solutions, Inc. v. Basel Action Network, No. 12-C-6814, 2013 WL 4552782 (N.D. Ill. Aug. 28, 2013) (Kendall, J.)		**Texas:** Array Holdings, Inc. v. Safoco, Inc., No. CIV-H-12-366, 2013 WL 4588506 (S.D. Tex. Aug. 28, 2013) (Werlein, J.)
SEPT.	**California:** Figueroa v. Stater Bros. Mkts., Inc., No. CV-13-3364 FMO (JEMx), 2013 WL 4758231 (C.D. Cal. Sept. 3, 2013) (Olguin, J.)	**California:** Burton v. Nationstar Mortg., LLC, No. CV-F-13-0307-LJO-GSA, 2013 WL 4736838 (E.D. Cal. Sept. 3, 2013) (O'Neill, J.)	
		Colorado: Malibu Media, LLC v. Ryder, No. 13-CV-00319-WYD-MEH, 2013 WL 4757266 (D. Colo. Sept. 4, 2013) (Daniel, J.)	
		Nevada: Garity v. Donahoe, No. 2:11-CV-01805-MMD, 2013 WL 4774761 (D. Nev. Sept. 4, 2013) (Hoffman, Mag.)	
		Texas: Thompson v. Law Office of Joseph Onwuteaka, PC, No. CIV.A. H-13-0441, 2013 WL 4787777 (S.D. Tex. Sept. 9, 2013) (Atlas, J.)	
2013 TOTAL	**30**	**44**	**19**
TOTAL OF ALL	**66 (28.4%)**	**125 (53.9%)**	**41 (17.7%)**

Data By Districts

[Legend: Data is displayed below by Districts within each State or Territory. District abbreviation is followed by total number of different judges ruling, total number of opinions they wrote, and their last names. Names that repeat denote judges who wrote multiple opinions on the issue.]

	JUDGES APPLYING *TWIQBAL*	JUDGES NOT APPLYING *TWIQBAL*	INCONCLUSIVE APPLICATIONS
ALA (3j,4o)		**ND (1j,1o):** *Coogler* **MD (2j, 3o):** *Albritton, Fuller, Fuller*	
ALSK (-)			
ARIZ (3j,5o)		**D (3j, 5o):** *Campbell, Campbell, Campbell, Snow, Teilborg*	
ARK (1j,2o)		**WD (1j, 2o):** *Holmes, Holmes*	
CAL (37j,58o)	**ND (12j, 18o):** *Alsup, Alsup, Alsup, Alsup, Breyer, Beeler, Chen, Chen, Conti, Conti, Illston, Koh, Koh, Patel, Spero, White, Whyte, Wilken* **CD (2j, 3o):** *Olguin, Wright, Wright* **ED (2j, 4o):** *Karlton, Karlton, O'Neill, O'Neill*	**CD (7j, 7o):** *Block, Feess, Kalusner, King, Nguyen, Snyder, Tucker* **ED (2j, 2o):** *Nunley, O'Neill* **SD (6j, 11o):** *Anello, Benitez, Benitez, Benitez, Hayes, Miller, Sammartino, Whelan, Whelan, Whelan, Whelan*	**ND (2j, 2o):** *Breyer, Alsup* **CD (1j, 1o):** *Gutierrez* **ED (6j, 10o):** *Burrell, Burrell, Burrell, Mendez, Mendez, Mueller, McAuliffe, Oberto, Oberto, Thurston*
COLO (3j,4o)		**D (3j, 4o):** *Babcock, Daniel, Hegarty, Hegarty*	
CONN (1j,2o)		**D (1j, 2o):** *Hall, Hall*	

DEL (4j,4o)		**D (4j, 4o):** *Andrews, Bumb, Robinson, Stark*		
DC (-)				
FLA (6j,10o)	**MD (1j, 1o):** *Steele* **SD (1j, 3o):** *Seitz, Seitz, Seitz*	**MD (2j, 3o):** *Covington, Covington, Richardson* **SD (1j, 2o):** *Rosenbaum, Rosenbaum*		**SD (1j, 1o):** *King*
GA (3j,3o)	**ND (1j, 1o):** *Story*	**ND (1j, 1o):** *Jones* **SD (1j, 1o):** *Smith*		
GUAM (-)				
HAW (2j,2o)		**D (2j, 2o):** *Seabright, Puglisi*		
IDA (1j,2o)			**D (1j, 2o):** Winmill, Winmill	
ILL (7j,9o)	**ND (4j, 5o):** *Hibbler, Kendall, Kendall, Kennelly, Lefkow*	**ND (1j, 2o):** *Marovich, Marovich* **SD (1j, 1o):** *Reagan*	**ND (1j, 1o):** *Cole*	
IND (3j,4o)	**ND (1j, 1o):** *Rodovich*	**ND (1j, 1o):** *Cherry* **SD (1j, 1o):** *Lawrence*	**ND (1j, 1o):** *Cherry*	
IOWA (--)				
KAN (7j,13o)	**D (2j, 2o):** *Melgren, Rushfelt*	**D (4j, 9o):** *Lungstrom, Melgren, Melgren, Murguia, Murguia, Murguia, Waxse, Waxse, Waxse*	**D (2j, 2o):** *Belot, Crow*	
KY (2j,2o)		**WD (2j, 2o):** *McKinley, Russell*		
LA (3j,3o)			**ED (3j, 3o):** *Berrigan, Morgan, Vance*	
ME (-)				

MD (8j,11o)	**D (4j, 7o):** *Bennett, Bennett, Bennett, Chasanow, Chasanow, Messitte, Williams*	**D (1j, 1o):** *Hollander*	**D (3j, 3o):** *Blake, Grimm, Quarles*
MASS (-)			
MICH (4j,4o)	**ED (2j, 2o):** *Duggan, Komives*	**ED (2j, 2o):** *Hluchaniuk, Whalen*	
MINN (4j,5o)		**D (3j, 4o):** *Frank, Frank, Kyle, Schiltz*	**D (1j, 1o):** *Davis*
MISS (1j,1o)		**SD (1j, 1o):** *Guirola*	
MO (7j,9o)	**WD (3j, 4o):** *Kays, Kays, Smith, Gaitan*	**WD (1j, 2o):** *Hays, Hays* **ED (3j, 3o):** *Buckles, Fleissig, Hamilton*	
MONT (-)			
NEB (2j,2o)		**D (2j, 2o):** *Kopf, Urbom*	
NEV (3j,4o)		**D (2j, 3o):** *Hoffman, Jones, Jones*	**D (1j, 1o):** *Pro*
NH (1j,1o)		**D (1j, 1o):** *McAuliffe*	
NJ (3j,4o)		**D (2j, 3o):** *Salas, Simandle, Simandle*	**D (1j, 1o):** *Thompson*
NM (1j,1o)		**D (1j, 1o):** *Browning*	

NY (12j,12o)	**WD (1j, 1o):** *Payson* **SD (2j, 2o):** *Francis, Swain*	**WD (1j, 1o):** *McCarthy* **ED (1j, 1o):** *Kuntz* **SD (2j, 2o):** *Castel, Scheindlin*	**WD (1j, 1o):** *Skretny* **ED (1j, 1o):** *Irizarry* **SD (3j, 3o):** *Kaplan, McKenna, Stein*
NC (3j,4o)	**ED (1j, 2o):** *Fox, Fox*	**MD (1j, 1o):** *Beaty*	**MD (1j, 1o):** *Eagles*
ND (--)			
NMI (--)			
OHIO (5j,5o)	**ND (1j, 1o):** *Zouhary*	**ND (2j, 2o):** *Lioi, Polster* **SD (2j, 2o):** *King, Spiegel*	
OKLA (--)			
OR (1j,2o)		**D (1j, 1o):** *Mosman*	**D (1j, 1o):** *Mosman*
PA (9j,9o)		**ED (6j, 6o):** *Baylson, Brody, Pratter, Robreno, Rufe, Tucker* **WD (2j, 2o):** *Fischer, Lenihan*	**ED (1j, 1o):** *Buckwalter*
PR (1j,1o)	**D (1j, 1o):** *Gelpi*		
RI (--)			
SC (1j,1o)	**D (1j, 1o):** *Herlong*		
SD (1j,1o)		**D (1j, 1o):** *Piersol*	

TENN (4j,4o)		**WD (2j, 2o):** *Bryant, McCalla* **MD (1j, 1o):** *Trauger* **ED (1j, 1o):** *Phillips*	
TEX (9j,12o)	**ND (2j, 2o):** *Jack, Jones* **SD (2j, 2o):** *Harmon, Johnson*	**SD (3j, 4o):** *Atlas, Atlas, Ellison, Harmon*	**ND (1j, 1o):** *Fitzwater* **SD (3j, 3o):** *Johnson, Rosenthal, Werlein*
UTAH (1j,1o)		**D (1j, 1o):** *Waddoups*	
VT (1j,1o)	**D (1j, 1o):** *Brown*		
VA (6j,6o)	**WD (1j, 1o):** *Welsh* **ED (1j, 1o):** *Lauck*	**WD (2j, 2o):** *Moon, Wilson* **ED (2j, 2o):** *Cacheris, Stillman*	
VI (1j,1o)		**D (1j, 1o):** *DuBois*	
WASH (2j,2o)		**WD (2j, 2o):** *Lasnik, Pechman*	
WVA (-)			
WIS (-)			
WYO (-)			
TOTALS	**49 judges; 66 opinions**	**100 judges; 124 opinions**	**36 judges; 41 opinions**