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## An Implausible Standard for Affirmative Defenses

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## NOTE

### AN IMPLAUSIBLE STANDARD FOR AFFIRMATIVE DEFENSES

Stephen Mayer\*

*In the wake of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, the federal district courts split over whether to apply Twombly's plausibility standard to the pleading of affirmative defenses. Initially, a majority of district courts extended Twombly to defense pleadings, but recently the courts that have declined to extend the plausibility standard have gained majority status. This Note provides a comprehensive analysis of each side of the plausibility split, identifying several hidden assumptions motivating the district courts' decisions. Drawing from its analysis of the two opposing positions, this Note responds to the courts that have applied plausibility pleading to affirmative defenses by identifying several fundamental flaws in their appeals to tradition, policy, and the text of Rule 8. Due to misguided reliance on historical pleading practices, an imprecise reading of Twombly, and an overestimation of the availability of discovery for unpled or stricken affirmative defenses, these courts fail to recognize that extending plausibility pleading beyond the complaint imposes an asymmetrical and unfairly onerous burden on defendants. This Note concludes that the courts that extend Twombly to affirmative defenses do so in violation of both the canons of statutory construction and the principles of the Rules Enabling Act.*

#### TABLE OF CONTENTS

INTRODUCTION .....	276
I. ANALYZING ARGUMENTS ON EITHER SIDE OF THE PLAUSIBILITY SPLIT .....	278
A. <i>Arguments for Extending Plausibility Pleading</i> .....	279
1. Basic Fairness and Historical Precedent Necessitate the Application of Symmetrical Pleading Standards ...	279
2. The <i>Twombly</i> Interpretation of Fair Notice Applies to Rule 8 Generally .....	282
3. Extending Plausibility Pleading to Affirmative Defenses Furthers the Policy Goals That Motivated <i>Twombly</i> and <i>Iqbal</i> .....	284
B. <i>Arguments Against Extending Plausibility Pleading</i> .....	285

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\* J.D. Candidate, May 2014, University of Michigan Law School. I would like to specially thank Professor Edward H. Cooper, both for inspiring my interest in civil procedure and for guiding me throughout this undertaking. I would also like to thank the *Michigan Law Review* Notes Office for its invaluable assistance. This Note is dedicated to my parents, Sandy and Libby Mayer, my grandparents, Frank and Betty Moses, and to Michael Kelly, Jacob Perkowski, and Philip Mayer.

1.	A Textual Analysis of Rule 8 and <i>Twombly</i> Does Not Support Application of Plausibility Pleading to Affirmative Defenses .....	285
2.	Time Constraints Unfairly Burden Defendants' Pleading Plausibly .....	286
II.	A RESPONSE TO THE PLAUSIBILITY COURTS .....	287
A.	<i>The Historical Precedent Fallacy</i> .....	288
B.	<i>The Fiction of a General "Fair Notice" Pleading Standard</i> .....	290
C.	<i>The Basic Fairness Argument Reimagined in a Discovery Context</i> .....	293
III.	FREQUENTLY OVERLOOKED ARGUMENTS REINFORCING THE DECLINING COURTS' POSITION .....	296
A.	<i>The Canons of Statutory Construction Indicate That Plausibility Pleading Does Not Apply to Affirmative Defenses</i> .....	297
B.	<i>Extending Twombly Beyond the Complaint Violates the Principles of the Rules Enabling Act</i> .....	298
	CONCLUSION .....	300

#### INTRODUCTION

More than one hundred federal cases have contemplated whether the plausibility standard outlined in *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*<sup>2</sup> applies to affirmative defenses,<sup>3</sup> yet the districts remain divided, and no court of appeals has yet addressed the issue.<sup>4</sup> This division stems from the fact that the Supreme Court's three most important interpretations of Rule 8 of the Federal Rules of Civil Procedure<sup>5</sup> have focused exclusively on Rule 8(a)(2), providing relative clarity in the pleading of complaints but no explicit guidance with regard to affirmative defenses.

For the fifty years leading up to *Twombly*, the federal courts relied on the liberal notice pleading standards outlined in *Conley v. Gibson*,<sup>6</sup> which held with reference to Rule 8(a)(2) that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what

1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009).

3. *Riemer v. Chase Bank USA*, 274 F.R.D. 637, 640 n.3 (N.D. Ill. 2011) (noting that over one hundred federal cases have examined the post-*Twombly* affirmative defense pleading standard).

4. *Godson v. Eltman, Eltman & Cooper, P.C.*, 285 F.R.D. 255, 257 (W.D.N.Y. 2012) ("[T]he applicability of *Twombly* and *Iqbal* to affirmative defenses [is] a dispute that has been brewing in the district courts since those cases were decided. No clear answer has yet been distilled. Indeed, as the parties acknowledge, not one court of appeals has considered this issue.").

5. FED. R. CIV. P. 8.

6. 355 U.S. 41, 45–46 (1957), *abrogated in part on other grounds by Twombly*, 550 U.S. 544.

the plaintiff's claim is and the grounds upon which it rests."<sup>7</sup> *Conley* directed "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>8</sup> When the Court reinterpreted *Conley*'s "notice pleading" standard half a century later in *Twombly*, it once again focused exclusively on Rule 8(a)(2),<sup>9</sup> explaining that to "sho[w] the pleader is entitled to relief,"<sup>10</sup> the plaintiff must plead sufficient factual matter to show a claim is "plausible on its face."<sup>11</sup> Two years later, when *Iqbal* made it clear that *Twombly*'s plausibility standard extends "to all civil complaints,"<sup>12</sup> the Court similarly restricted its holding to an interpretation of Rule 8(a)(2).<sup>13</sup>

While *Twombly* and *Iqbal* have given rise to a "deluge"<sup>14</sup> of academic commentary addressing the merits of plausibility pleading and the history of Rule 8 in general,<sup>15</sup> this Note addresses these cases solely as they relate to the pleading standard applicable to affirmative defenses. *Conley*, *Twombly*, and *Iqbal* do not mention Rule 8(c), which governs affirmative defenses.<sup>16</sup> All three decisions focus on the sufficiency of a complaint, as opposed to an answer or a defense, and the Court has never explicitly applied *Twombly*'s plausibility standard to pleadings beyond the complaint in any other case.<sup>17</sup>

Despite the lack of direct guidance from the Court on whether to extend plausibility pleading beyond Rule 8(a)(2), many of the initial district court

7. *Conley*, 355 U.S. at 47 (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)). This particular section of *Conley* was adopted in *Twombly*, see *infra* notes 96–101 and accompanying text.

8. *Conley*, 355 U.S. at 45–46. The Court explicitly "retire[d]" this "no set of facts" language as an "incomplete, negative gloss on an accepted pleading standard," *Twombly*, 550 U.S. at 562–63, while highlighting other portions of *Conley* as a proper guide to interpreting Rule 8(a)(2), see *supra* note 7 and accompanying text.

9. *Twombly*, 550 U.S. at 545 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'").

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

11. *Twombly*, 550 U.S. at 570.

12. *Atiyeh v. Nat'l Fire Ins. Co. of Hartford*, 742 F. Supp. 2d 591, 599 (E.D. Pa. 2010).

13. *Ashcroft v. Iqbal*, 556 U.S. 662, 667–68 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." (quoting FED. R. CIV. P. 8(a)(2))).

14. Edward H. Cooper, *King Arthur Confronts Twlqy Pleading*, 90 OR. L. REV. 955, 956 (2012); see also Kevin M. Clermont, *Three Myths About Twombly–Iqbal*, 45 WAKE FOREST L. REV. 1337, 1337 (2010) ("[J]udges and lawyers really are speaking of little besides *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* . . .").

15. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

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

17. *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at \*8 (N.D. Cal. Mar. 26, 2012) ("[N]either the Supreme Court nor any of the circuit courts has yet to address this question . . .").

decisions on this issue “found that the heightened pleading standard announced in *Twombly* and *Iqbal* does apply to affirmative defenses.”<sup>18</sup> The rationales outlined by both courts and scholars to justify such an extension have been exceptionally uniform.<sup>19</sup> This Note expands that discussion by exposing several flawed assumptions underlying courts’ decisions to apply *Twombly* to affirmative defenses and by introducing several frequently overlooked arguments supporting the courts that have confined *Twombly* to the pleading of complaints.

Specifically, this Note argues that the *Twombly* and *Iqbal* decisions did not contemplate applying the plausibility standard to affirmative defenses, and absent additional developments in federal civil procedure, such an extension imposes an asymmetrical and unfairly onerous burden on defendants. Part I provides a comprehensive analysis of each side of the plausibility split, identifying several hidden assumptions motivating the district courts’ decisions. Part II responds to the courts that have applied plausibility pleading to affirmative defenses by identifying several fundamental flaws in their appeals to tradition, policy, and the text of Rule 8. Part III presents two frequently overlooked affirmative arguments in support of the rapidly growing number of courts that have declined to extend plausibility pleading beyond the complaint.

#### I. ANALYZING ARGUMENTS ON EITHER SIDE OF THE PLAUSIBILITY SPLIT

The numerous district court opinions that have addressed whether plausibility pleading should be extended to affirmative defenses generally discuss four main issues: (1) whether fairness and historical precedent dictate that courts hold plaintiffs and defendants to the same pleading standard, (2) whether *Twombly* applies to Rule 8 as a whole or Rule 8(a) specifically, (3) whether the policy rationale motivating the *Twombly* and

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18. *Ansari v. Elec. Document Processing, Inc.*, No. 5:12-CV-01245-LHK, 2012 WL 3945482, at \*2 (N.D. Cal. Sept. 10, 2012).

19. Four articles have been written to date advocating for the application of heightened pleading standards to affirmative defenses. See Melanie A. Goff & Richard A. Bales, A “Plausible” Defense: Applying *Twombly* and *Iqbal* to Affirmative Defenses, 34 AM. J. TRIAL ADVOC. 603 (2011); Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987 (2012); James V. Bilek, Comment, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 CHAP. L. REV. 377 (2011); Nathan A. Leber, Note, *Solving a Pleading Plague: Why Federal Courts Should Strike Insufficient Affirmative Defenses Under the Twombly–Iqbal Plausibility Standard*, 61 CLEV. ST. L. REV. 231 (2013). Three other articles find convincing the arguments that the courts declining to apply heightened pleading to affirmative defenses advance. See Peter M. Durney & Jonathan P. Michaud, *Fending off the Use of a Rule 12(f) Motion to Strike Affirmative Defenses*, 79 DEF. COUNS. J. 438 (2012); Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173 (2011); Nathan Pysno, Note, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633 (2011). And one initial article introduces the district court split over the issue. See Manuel John Dominguez et al., *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. B.J. 77 (2010).

*Iqbal* decisions necessitates extending plausibility pleading to affirmative defenses, and (4) whether Rule 12(a)'s<sup>20</sup> twenty-one-day time limit for filing an answer unfairly prejudices defendants held to a plausibility standard.<sup>21</sup> This Note critiques several assumptions underlying these arguments in an attempt to reframe the debate over plausibility pleading's application to affirmative defenses. Consequently, an examination of the arguments themselves is necessary to provide context for Parts II and III. Section I.A addresses the arguments advanced by those in favor of extending plausibility pleading to affirmative defenses (the "plausibility courts"), while Section I.B addresses the arguments advanced by those opposed to such an extension (the "declining courts").

#### A. Arguments for Extending Plausibility Pleading

In the years immediately following *Twombly* and *Iqbal*, most of the district courts that considered affirmative defense pleading standards extended plausibility pleading from complaints to defenses, although that position has recently lost its majority status.<sup>22</sup> The district courts that extend plausibility pleading to affirmative defenses have nearly all advanced three principal arguments in support of their positions: (1) fairness indicates that *Twombly*'s plausibility standard, like *Conley*'s notice standard before it, should apply symmetrically to complaints and defenses; (2) *Twombly* reinterpreted notice pleading generally, equally affecting complaints under Rule 8(a), answers under Rule 8(b), and affirmative defenses under Rule 8(c); and (3) the policy concerns underlying the *Twombly* decision justify applying plausibility pleading to affirmative defenses.<sup>23</sup> This Section analyzes each of these arguments and identifies several key assumptions on which they rest.

##### 1. Basic Fairness and Historical Precedent Necessitate the Application of Symmetrical Pleading Standards

Of all the arguments raised to justify extending plausibility pleading to affirmative defenses, the assertion that basic fairness requires courts to apply the same pleading standard to both plaintiffs and defendants is probably the most deeply entrenched in district court jurisprudence. Early cases considering affirmative defense pleading standards post-*Twombly*<sup>24</sup> cited this historically motivated argument, and the first major scholarly article on the subject noted its ubiquity.<sup>25</sup> The primary thrust of the argument is simple: since

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20. FED. R. CIV. P. 12(a)(1)(A)(i).

21. See generally Goff & Bales, *supra* note 19, at 635–36, 638–39, 642 (introducing the principal district court arguments).

22. See *infra* Section I.B (summarizing the position of the "declining courts").

23. Pysno, *supra* note 19, at 1648.

24. See, e.g., *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*3 (E.D. Mich. Apr. 21, 2009) (discussing considerations of "fair play" and quoting Wright & Miller's assertion that pleading standards have historically been symmetrical).

25. Dominguez et al., *supra* note 19, at 78.

Rule 8's goal is to ensure fair notice to all litigating parties, it would make no sense to apply one pleading standard to plaintiffs and another to defendants—"what's good for the goose is good for the gander."<sup>26</sup> Courts support this simple proposition in two ways: they argue that (1) plaintiffs and defendants have historically shouldered the same burden under Rule 8's pleading standards and that (2) because *Twombly's* plausibility standard superseded the previous *Conley* standard, if plausibility pleading is not extended to affirmative defenses, courts will be unable to evaluate the sufficiency of such pleadings in the face of a Rule 12(f)<sup>27</sup> motion to strike.

The plausibility courts<sup>28</sup> that advance a basic fairness argument typically cite precedent from the *Conley* era, during which time circuit courts agreed that "[a]n affirmative defense is subject to the same pleading requirements as is the complaint,"<sup>29</sup> or they quote Charles Wright and Arthur Miller's similar pre-*Twombly* acknowledgment that complaints and affirmative defenses were held to an identical notice pleading standard.<sup>30</sup> Since circuit courts applied the *Conley* standard uniformly to both complaints and affirmative defenses, the plausibility courts reason, the new *Twombly* plausibility standard must similarly create symmetrical pleading standards for plaintiffs and defendants.

The Northern District of California decisions on affirmative defense pleading standards—which have thus far unanimously adopted symmetrical plausibility pleading<sup>31</sup>—follow this line of historical reasoning.<sup>32</sup> While these decisions augment their appeal to past practice with additional textual and policy arguments, as discussed below,<sup>33</sup> they demonstrate how heavily plausibility courts rely on pleading practices under *Conley* to justify extending *Twombly's* standard for complaints to affirmative defenses.

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26. *Godson v. Eltman, Eltman & Cooper, P.C.*, 285 F.R.D. 255, 258 (W.D.N.Y. 2012) (internal quotation marks omitted) (citing *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010)).

27. FED. R. CIV. P. 12(f).

28. See, e.g., *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) ("[T]he pleading requirements for affirmative defenses are the same as for claims of relief.")

29. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

30. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1274 (3d ed. 2004) ("The general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c).")

31. See *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 10-945 CW, 2012 WL 1746848, at \*4 (N.D. Cal. May 16, 2012) ("Within the Northern District of California, it appears that the judges who have decided the issue thus far have uniformly found that the *Twombly* and *Iqbal* standard does apply to affirmative defenses.")

32. The *Powertech* court reasoned that since "the Ninth Circuit [had] applied the *Conley* pleading standard for complaints to the pleading of affirmative defenses," and *Twombly* simply "changed the legal foundation" provided by *Conley* for determining when a pleading provides fair notice, *Twombly's* new standard should apply to both complaints and affirmative defenses, just as *Conley's* standard did before it. *Id.* (quoting *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at \*6 (N.D. Cal. Mar. 26, 2012)).

33. See *infra* Sections I.A.2–3.

The plausibility courts' reliance on historically symmetrical pleading standards gives rise to a second, related argument. They assert that unless *Twombly's* plausibility standard is extended to affirmative defense pleading, courts will not be able to "make a . . . determination on whether an affirmative defense is adequately pleaded" when challenged by a Rule 12(f) motion to strike.<sup>34</sup> This argument can be traced back to *United States v. Quadrini*,<sup>35</sup> one of the first cases to consider affirmative defense pleading standards in the months following *Twombly*, and it rests on two key assumptions arising from pleading practices under *Conley*.

First, the *Quadrini* decision and courts that follow it assume, based on pre-*Twombly* precedent, that affirmative defenses challenged under Rule 12(f) are "tested under a standard identical to Rule 12(b)(6)."<sup>36</sup> This assumption stems from the fact that the circuit courts applied *Conley's* permissive pleading standard to both complaints and affirmative defenses.<sup>37</sup> These courts accordingly saw a challenge to a complaint under Rule 12(b)(6) as the "mirror image" of a challenge to an affirmative defense under Rule 12(f).<sup>38</sup> Based on this *Conley*-era understanding that Rules 12(f) and 12(b)(6) are inextricably linked to a single, symmetrical pleading standard, the *Quadrini* court reasoned that *Twombly's* plausibility standard for plaintiffs' complaints "must also apply to defendants in pleading affirmative defenses," or motions to strike would cease to function.<sup>39</sup>

Second, at least one commentator has suggested that *Quadrini* stands for the proposition that since "*Twombly* rejects . . . *Conley* and requires" that pleaders show a "'plausible' claim of relief,"<sup>40</sup> courts can "no longer employ *Conley* on a Rule 12(f) motion to strike affirmative defenses, but must instead apply *Twombly*."<sup>41</sup> Plausibility courts that follow *Quadrini's* reasoning argue that even if extant Rule 12 precedent allowed courts to apply different pleading standards to complaints and affirmative defenses, courts would

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34. *United States v. Quadrini*, 69 Fed. R. Serv. 3d 953, 958 (E.D. Mich. 2007).

35. *See id.* at 958 ("This clarification by the Supreme Court that a plaintiff must plead sufficient facts to demonstrate a plausible claim . . . cannot be a pleading standard that applies only to plaintiffs. It must also apply to defendants in pleading affirmative defenses, otherwise a court could not make a Rule 12(f) determination on whether an affirmative defense is adequately pleaded . . ."); *see also* *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (following *Quadrini's* reasoning).

36. *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 737 (N.D. Ill. 1982); *accord* *Renalds v. S.R.G. Rest. Grp.*, 119 F. Supp. 2d 800, 802 (N.D. Ill. 2000) ("[A]ffirmative defenses must meet the standards of Federal Rule of Civil Procedure 12(b)(6) . . .").

37. *See supra* notes 28–32 and accompanying text.

38. *Solvent Chem. Co. v. E.I. DuPont De Nemours & Co.*, 242 F. Supp. 2d 196, 212 (W.D.N.Y. 2002) ("The standard for striking an affirmative defense is the mirror image of the standard for considering whether to dismiss for failure to state a claim.").

39. *Quadrini*, 69 Fed. R. Serv. 3d at 958.

40. *Id.*

41. *Dominguez et al.*, *supra* note 19, at 78.

nevertheless be foreclosed from applying *Conley*'s original permissive pleading standard since it was abrogated by *Twombly*.<sup>42</sup>

## 2. The *Twombly* Interpretation of Fair Notice Applies to Rule 8 Generally

Although appeals to fairness premised on pleading practices under *Conley* are the most common arguments that the plausibility courts marshal in support of extending *Twombly*'s pleading standard to affirmative defenses,<sup>43</sup> these courts also purport to anchor their decisions in the language of *Twombly* and the text of the Federal Rules. Despite the fact that *Twombly* and *Iqbal* focused specifically on Rule 8(a),<sup>44</sup> the plausibility courts argue that “[s]imilar language is used in Rule 8 to describe the requirements for pleading both claims in a complaint and defenses in an answer.”<sup>45</sup> Specifically, the plausibility courts point to Rule 8(a)'s language requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”<sup>46</sup> and Rule 8(b)'s language requiring a defendant to “state in short and plain terms its defenses to each claim asserted against it.”<sup>47</sup> These courts highlight the shared “short and plain statement” language of Rules 8(a) and 8(b) to make a larger point: regardless of the type of pleading in question, “the purpose of Rule 8 was to give the opposing party notice of the basis for the claim sought.”<sup>48</sup> They claim that *Twombly* redefined the meaning of the term “fair notice” as it applied to Rule 8 generally.<sup>49</sup> Since Rules 8(a) and 8(b) both require litigants to provide short and plain statements that give the opposing party “fair notice” of their assertions, if *Twombly* generally redefined “fair notice” to require plausibility pleading, then plausibility applies to complaints and defenses alike.<sup>50</sup>

42. *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at \*7 (W.D.N.Y. Sept. 30, 2009) (“Indeed, the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f).”), *report and recommendation adopted by* 667 F. Supp. 2d 244 (W.D.N.Y. 2009).

43. *See supra* notes 24–27 and accompanying text.

44. *See supra* notes 9–13 and accompanying text.

45. *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536–37 (D. Md. 2010).

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

47. FED. R. CIV. P. 8(b)(1)(a).

48. *O’Sullivan v. AMN Servs., Inc.*, No. C-12-02125 JCS, 2012 WL 2912061, at \*7 (N.D. Cal. July 16, 2012) (internal quotation marks omitted) (quoting *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010)).

49. *See, e.g., Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, \*7 (N.D. Cal. Mar. 26, 2012) (holding that *Twombly* reconceptualized the meaning of fair notice and that complaints and defenses alike must give the opposing party fair notice); *accord Miller*, *supra* note 15, at 101 n.391 (“Courts that read the decisions as a clarification of what information is necessary to provide fair notice to the other party extend the plausibility standard to the pleading of affirmative defenses.”).

50. *See Perez*, 2012 WL 1029425, at \*7 (“[I]n light of *Twombly* and *Iqbal*'s reconceptualization of fair notice pleading, the Court agrees that ‘[a]pplying the standard for heightened

Several plausibility courts<sup>51</sup> have bolstered their claim that *Twombly* reinterpreted Rule 8's overarching "fair notice" standard by referencing the forms appended to the Federal Rules under Rule 84.<sup>52</sup> They assert that Form 30 directs defendants to plead facts outlining the relevant statute of limitations barring the opposing party's action: "The plaintiff's claim is barred by the statute of limitations because it arose more than \_\_\_ years before this action was commenced."<sup>53</sup> Given that Rule 84 was meant to "illustrate the simplicity and brevity that these rules contemplate,"<sup>54</sup> these plausibility courts argue that Form 30's requirement that a plaintiff fill in the statute of limitations "strongly suggests that bare-bones assertions of at least some affirmative defenses will not suffice." They therefore hold that parties pleading affirmative defenses must now include "the additional factual detail" that *Twombly* requires in the pleading of complaints.<sup>55</sup>

Plausibility courts have also reinforced their position that *Twombly* generally redefined Rule 8's "fair notice" requirement by noting that Rule 8(c) allocates the burden of proof in affirmative defense pleading to the defendant.<sup>56</sup> These courts hold that *Twombly*'s pleading standard represented an admonition that "fair notice pleading under Rule 8 is not intended to give parties free license to engage in unfounded fishing expeditions on matters for which they bear the burden of proof at trial."<sup>57</sup> Therefore, such courts find that "in light of the fact that the defendant bears the burden of proof on an affirmative defense, as the plaintiff does on a claim for relief, '*Twombly*'s rationale of giving fair notice to the opposing party would seem to apply as

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pleading to affirmative defenses serves a valid purpose . . . ." (second alteration in original) (quoting *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009)).

51. See, e.g., *Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11-2416, 2011 WL 5118325, at \*3 (D. Md. Oct. 24, 2011); *Barry v. EMC Mortg.*, No. DKC 10-3120, 2011 WL 4352104, at \*3 (D. Md. Sept. 15, 2011); *Francisco v. Verizon S., Inc.*, No. 3:09CV-737, 2010 WL 2990159, at \*8 (E.D. Va. July 29, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 651 (D. Kan. 2009).

52. FED. R. CIV. P. 84.

53. FED. R. CIV. P. Form 30.

54. FED. R. CIV. P. 84.

55. *Barry*, 2011 WL 4352104, at \*3.

56. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) ("*[T]he moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense . . . .*" (internal quotation marks omitted) (quoting William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Issues of Material Fact*, 99 F.R.D. 465, 488 (1984))); accord *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492 n.4 (9th Cir. 1988) (holding that the defendant bears the burden of proof on an affirmative defense, just as the plaintiff bears the burden of proof on a claim for relief); *Ansari v. Elec. Document Processing, Inc.*, No. 5:12-CV-01245-LHK, 2012 WL 3945482, at \*5 (N.D. Cal. Sept. 10, 2012) ("The defendant bears the burden of proof on an affirmative defense.").

57. *Perez v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at \*8 (N.D. Cal. Mar. 26, 2012).

well to affirmative defenses.’<sup>58</sup> This line of reasoning, which has been employed since the first wave of district courts began to consider the appropriate pleading standard for affirmative defenses post-*Twombly*, advances the straightforward proposition that any party bearing the burden of proof on an issue must meet *Twombly*’s plausibility requirement to provide “fair notice” on that issue.<sup>59</sup>

### 3. Extending Plausibility Pleading to Affirmative Defenses Furthers the Policy Goals That Motivated *Twombly* and *Iqbal*

District courts that extend plausibility pleading to affirmative defenses routinely claim that such an extension furthers the policy goals that motivated *Twombly*.<sup>60</sup> These courts emphasize that *Twombly* implemented plausibility pleading in an effort to weed out frivolous claims “at the point of minimum expenditure of time and money by the parties and the court.”<sup>61</sup> Given this stated goal of quickly and inexpensively dismissing frivolous complaints that in turn lead to costly discovery, the plausibility courts assert that *Twombly* was motivated by a general policy of “encouraging efficiency and limiting costs” through a heightened pleading standard.<sup>62</sup>

After attributing this general policy goal of litigation efficiency to *Twombly*, the plausibility courts then assert that heightened pleading should not only be used to address the pleading of frivolous complaints but also to deal with the “boilerplate listing of affirmative defenses which is commonplace in most defendants’ pleadings where many of the defenses alleged are irrelevant to the claims asserted.”<sup>63</sup> The plausibility courts analogize the problem addressed by the Court in *Twombly*—frivolous complaints that unnecessarily unlock the doors to discovery and impose high costs on defendants—with a separate problem that these district courts have identified—

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58. *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 10-945 CW, 2012 WL 1746848, at \*4 (N.D. Cal. May 16, 2012) (quoting *Barnes & Noble, Inc. v. LSI Corp.*, No. C-11-2709 EMC, 2012 WL 359713, at \*2 (N.D. Cal. Feb. 2, 2012)); accord *Ansari*, 2012 WL 3945482, at \*3.

59. *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*4 (E.D. Mich. Apr. 21, 2009) (“I conclude that the Supreme Court has established a general standard of pleading matters upon which the pleader assumes the burden of proof.”).

60. *Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122–23 (D. Mass. 2012) (“Courts that have applied the heightened pleading standard to affirmative defenses have often done so on the basis that *Twombly* aimed to eliminate the high costs of discovery associated with boilerplate claims and that boilerplate affirmative defenses have the same detrimental effect on the cost of litigation.”).

61. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted) (quoting WRIGHT & MILLER, *supra* note 30, § 1216).

62. *Godson v. Eltman, Eltman & Cooper, P.C.*, 285 F.R.D. 255, 258 (W.D.N.Y. 2012) (internal quotation marks omitted) (quoting WRIGHT & MILLER, *supra* note 30, § 1274).

63. *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010); accord *Ear v. Empire Collection Auths., Inc.*, No. 12-1695-SC, 2012 WL 3249514, at \*1 (N.D. Cal. Aug. 7, 2012); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (“Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints.”).

namely, boilerplate defense pleading. These courts consequently extend the reach of *Twombly*'s comparatively rigorous interpretation of Rule 8(a)'s pleading standard to address affirmative defenses that they have determined "clutter" their dockets.<sup>64</sup>

### B. Arguments Against Extending Plausibility Pleading

A rapidly growing number of district courts, however, have ruled that *Twombly*'s plausibility standard for complaints under Rule 8(a) does not apply to affirmative defenses under Rule 8(c); although "a majority of early cases applied the heightened standard, this is now the minority approach."<sup>65</sup> These declining courts advance numerous reasons why the plausibility standard should be confined to the complaint,<sup>66</sup> but they most commonly cite two principal arguments: (1) a textual analysis of Rule 8 and *Twombly* itself cuts against the plausibility standard's application to affirmative defenses,<sup>67</sup> and (2) the time constraints that the Federal Rules place on defendants in pleading affirmative defenses necessitate that courts apply different pleading standards to plaintiffs and defendants.<sup>68</sup>

#### 1. A Textual Analysis of Rule 8 and *Twombly* Does Not Support Application of Plausibility Pleading to Affirmative Defenses

The declining courts typically base their decision not to extend *Twombly*'s plausibility standard to affirmative defense pleadings on the text of Rule 8 and the language of *Twombly* itself. First, they stress that in addition to the shared "short and plain statement" language found in Rules 8(a) and 8(b),<sup>69</sup> Rule 8(a) also requires that a complaint provide a "statement of the claim *showing* that the pleader is entitled to relief,"<sup>70</sup> whereas Rules 8(b)

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

65. *Hansen*, 287 F.R.D. at 122; *see also* *Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at \*17 n.4 (D. Utah Apr. 19, 2012) ("Plaintiffs argue, and several courts have suggested, that the majority approach has been to apply the *Twombly/Iqbal* pleading standard to affirmative defenses. . . . [I]t is unclear whether that approach is still a majority position.").

66. *See, e.g.*, *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at \*1-2 (D. Del. Dec. 30, 2011) (listing nine common reasons why the declining courts apply *Twombly* exclusively to Rule 8(a)).

67. *See, e.g.*, *Hansen*, 287 F.R.D. at 122 ("The most prevalent argument made by district courts against the heightened standard, however, relies on the text of Rule 8 . . .").

68. *See, e.g.*, *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 663 n.2 (M.D. Ala. 2012) ("[M]any of the district courts to have rejected *Twombly/Iqbal* in the affirmative defense setting . . . [note the] disparate amount of time a plaintiff has to research and draft a complaint compared to the amount of time for a defendant to research and draft an answer.").

69. *See supra* notes 45-50 and accompanying text.

70. FED. R. CIV. P. 8(a)(2) (emphasis added).

and 8(c) only require that a party “state”<sup>71</sup> its defenses, conspicuously omitting any “showing” language.<sup>72</sup> Second, these courts emphasize that both *Twombly* and *Iqbal* focused exclusively on Rule 8(a)(2), explicitly interpreting the Rule’s unique “showing” language.<sup>73</sup> At least one court has reinforced this textual interpretation of *Twombly* by noting that the *Twombly* majority responded in a footnote to the dissent’s protest that the Federal Rules had abolished fact pleading by specifically stating that “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of *entitlement to relief*.”<sup>74</sup>

The declining courts reason that since “Rule 8 is the bedrock of modern notice pleading, and one consistency to be found in the Supreme Court’s decisions—from *Conley v. Gibson* through *Ashcroft v. Iqbal*—is a steadfast fidelity to the text of Rule 8,” the fact that the Court focused on Rule 8(a)’s “showing” language is “significant.”<sup>75</sup> This reasoning leads to the simple conclusion that when the Court reinterpreted Rule 8(a)’s pleading standard, it meant *only* to reinterpret Rule 8(a)’s pleading standard—not Rule 8(c)’s.<sup>76</sup>

## 2. Time Constraints Unfairly Burden Defendants’ Pleading Plausibly

Although the wording of Rule 8 and the Court’s language in *Twombly* generally provides sufficient reason for declining courts to refrain from extending plausibility pleading to affirmative defenses, these courts usually buttress their textual rationale with a practical one as well.<sup>77</sup> Many declining courts cite Rule 12’s directive that “[a] defendant must answer . . . within 21 days after being served with the summons and complaint”<sup>78</sup> and subsequently hold that “it is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given [21] days to respond to a complaint and assert its affirmative defenses.”<sup>79</sup> The declining courts consider it unreasonable to expect a defendant to find a lawyer or mobilize in-

71. FED. R. CIV. P. 8(b)(1)(a), 8(c)(1).

72. See *Hansen*, 287 F.R.D. at 122 (“Subsections 8(b) and (c), on the other hand, require only that a defendant ‘state’ her defense.”); Miller, *supra* note 15, at 101 (“Neither Rule 8(b) nor Rule 8(c) contains the magic word ‘showing’ . . .”).

73. See *supra* notes 5–13 and accompanying text.

74. *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 662–63 (M.D. Ala. 2012) (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007)).

75. *Id.* at 662.

76. *Hansen*, 287 F.R.D. at 122 (“*Twombly* and *Iqbal* were decided under Rule 8(a)(2) and the Court is therefore hesitant to extend the holding of those cases to Rule 8(c) given that the drafters used different language in the sub-sections.”).

77. See *Joe Ryan Enters.*, 281 F.R.D. at 663 (“[P]olicy considerations are foreclosed when the language of the Rule is clear.”); *id.* at 663 n.2 (“With that said, many of the district courts to have rejected *Twombly/Iqbal* in the affirmative defense setting have found sound reasons to hold responding defendants to a lower pleading standard . . .”).

78. FED. R. CIV. P. 12(a)(1)(A)(i).

79. *Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 566 (S.D. Cal. 2012) (alteration in original) (internal quotation marks omitted) (quoting *Holdbrook v. SAIA Motor Freight Line*,

house counsel, conduct an investigation, and then plead all relevant affirmative defenses in plausible factual detail within a mere twenty-one days of service, after which time the defendant automatically waives all unpled defenses pursuant to Rule 12(h).<sup>80</sup> They find this consideration especially compelling given that a plaintiff may conduct its investigation into the facts relevant to litigation over the course of several years, subject only to the applicable statute of limitations.<sup>81</sup> Declining courts therefore hold that “[a]ny potential efficiency gained by applying *Twombly* does not outweigh the burden on defendants,” and they refuse to extend plausibility pleading beyond the complaint.<sup>82</sup>

An analysis of the declining courts’ unfair time constraint argument would be incomplete without mentioning the plausibility courts’ immediate counterargument; the latter courts consistently respond that any prejudice to defendants who are required to plausibly plead their defenses within twenty-one days is ameliorated by a court’s ability to liberally grant leave to amend under Rule 15.<sup>83</sup> The plausibility courts assert that “[u]nless it would prejudice the opposing party, courts freely grant leave to amend stricken pleadings.”<sup>84</sup> The negative implications for discovery of such defenses dismissed with leave to amend, however, are rarely explored.<sup>85</sup> This Note provides the most comprehensive analysis of the issue to date in Section II.C.

## II. A RESPONSE TO THE PLAUSIBILITY COURTS

This Part exposes several fundamental flaws in the reasoning of the courts that extend *Twombly*’s plausibility standard to the pleading of affirmative defenses. Section II.A examines the historically motivated non sequitur underlying the plausibility courts’ pervasive “basic fairness” argument. Section II.B deconstructs the plausibility courts’ general interpretation of “fair notice.” And Section II.C responds to the widespread assertion that Rule 15’s liberal amendment procedures ameliorate the harshness inherent in holding defendants to the plausibility standard, reimagining the basic fairness argument in the context of defendants’ access to discovery.

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LLC, No. 09-CV-02870-LTB-BNB, 2010 WL 865380, at \*2 (D. Colo. Mar. 8, 2010)); *accord* Florida v. DLT 3 Girls, Inc., No. 4:11-CV-3624, 2012 WL 1565533, at \*2 (S.D. Tex. May 2, 2012) (“[A] different standard for plaintiffs and defendants is sensible, given that defendants have only 21 days within which to serve an answer.”).

80. FED. R. CIV. P. 12(h)(1).

81. *See, e.g.*, Tiscareno v. Frasier, No. 2:07-CV-336, 2012 WL 1377886, at \*15 (D. Utah Apr. 19, 2012) (“If a defendant fails to include an affirmative defense in her answer, she risks waiving it. In contrast, plaintiffs may take years to gather facts and investigate legal claims to prepare a proper complaint.” (citation omitted)).

82. Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 119, 123 (D. Mass. 2012).

83. FED. R. CIV. P. 15(a)(2) (“[A] party may amend its pleading . . . [with] the court’s leave. The court should freely give leave when justice so requires.”).

84. *E.g.*, Kohler, 280 F.R.D. at 564.

85. *See infra* Section II.C.

A. *The Historical Precedent Fallacy*

The historically motivated basic fairness argument<sup>86</sup> most commonly cited by the plausibility courts in justifying their application of *Twombly* to affirmative defenses is premised on two fundamental errors. First, the appeal to pleading standards under *Conley* supporting this basic fairness argument<sup>87</sup> is a non sequitur. Second, the plausibility courts' related argument—pioneered by the *Quadrini* decision—that asymmetrical pleading standards will hopelessly confuse Rule 12(f) motions to strike<sup>88</sup> misreads *Twombly*.

The rationale for applying *Conley*'s relaxed notice pleading standard symmetrically to complaints and affirmative defenses does not automatically support a similarly uniform application of the heightened plausibility standard. The questions presented by the two pleading regimes are separate. The pre-*Twombly* Wright and Miller treatise that plausibility courts frequently cite<sup>89</sup> in support of symmetrical standards draws attention to this non sequitur in the sentence following its well-known pronouncement that “[t]he general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c).”<sup>90</sup> Writing in the context of *Conley*'s loose notice pleading standard, Wright and Miller then reason that “[a]s one district court has remarked: I have no doubt that the requirements for an affirmative defense are no more stringent than those for a complaint.”<sup>91</sup>

The plausibility courts uniformly ignore this sentence in their opinions; it significantly undermines their position. The fact that the requirements for pleading an affirmative defense are *no more stringent* than the requirements for pleading a complaint only means that the courts under *Conley* saw no reason to hold defendants to a higher standard than plaintiffs; it does not mean that heightening the pleading standard for plaintiffs, as the Court did in *Twombly*, necessarily heightens that standard for defendants.<sup>92</sup> Plausibility

86. See *supra* Section I.A.1.

87. See *supra* notes 28–32 and accompanying text.

88. See *supra* notes 34–39 and accompanying text.

89. See, e.g., HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010); *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*3 (E.D. Mich. Apr. 21, 2009).

90. WRIGHT & MILLER, *supra* note 30, § 1274; accord *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

91. WRIGHT & MILLER, *supra* note 30, § 1274 (quoting *Lehmann Trading Corp. v. J & H Stolow, Inc.*, 184 F. Supp. 21, 22 (S.D.N.Y. 1960)).

92. See *Jones v. JGC Dallas LLC*, No. 3:11-CV-2743-O, 2012 WL 4119570, at \*3–4 (N.D. Tex. Aug. 17, 2012) (“Although the Fifth Circuit has previously observed that affirmative defenses are subject to the same pleading requirements applicable to complaints, it has not clarified whether this observation still holds true under *Twombly* and *Iqbal*'s plausibility standard.”), report and recommendation adopted by No. 3:11-CV-2743-O, 2012 WL 4169685 (N.D. Tex. Sept. 19, 2012); *EEOC v. Courtesy Bldg. Servs., Inc.*, No. 3:10-CV-1911-D, 2011 WL 208408, at \*2 (N.D. Tex. Jan. 21, 2011) (“Although *Woodfield* noted at the time that ‘[a]n affirmative defense is subject to the same pleading requirements as is the complaint,’ it is unclear whether this observation still holds true under the plausibility standard of *Twombly* and *Iqbal*.” (quoting *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999))).

pleading by definition imposes a different set of burdens on litigants than did *Conley*'s notice pleading standard, and those burdens affect plaintiffs and defendants asymmetrically. It does not follow that because symmetrical standards worked under *Conley*, they must also necessarily work under *Twombly*.<sup>93</sup>

The plausibility courts' related holding based on pleading practices under *Conley*—that motions to strike under Rule 12(f) depend on the symmetrical application of pleading standards to complaints and defenses<sup>94</sup>—similarly fails for two reasons. First, the common understanding that the standard for dismissing a complaint under Rule 12(b)(6) and the standard for striking a defense under Rule 12(f) are “mirror images”<sup>95</sup> of each other arises from the faulty appeal to historical practice discussed above. Given that widespread acceptance of symmetrical notice pleading standards under *Conley* does not speak to whether plausibility pleading should similarly be symmetrical, nothing in current affirmative defense pleading jurisprudence bars courts from evaluating Rule 12(b)(6) and Rule 12(f) motions by separate standards.

Second, the plausibility courts' remaining contention—that even granting the acceptability of asymmetrical standards for motions to strike under Rule 12, *Twombly* rendered *Conley*'s older notice pleading standard a dead letter<sup>96</sup>—fails because it misreads *Twombly*. Rather than abrogating *Conley* as a whole, the Court carefully noted in *Twombly* that it was only retiring “*Conley*'s ‘no set of facts’ language.”<sup>97</sup> The Court confined its decision to redefining what “[Rule] 8(a)(2) requires” in order to “give the defendant fair notice”<sup>98</sup> of the claim asserted against it.<sup>99</sup> Nothing in the Court's decision indicates that “since *Twombly* abrogated the *Conley* pleading standard, courts can no longer employ *Conley* on a Rule 12(f) motion to strike affirmative defenses.”<sup>100</sup> *Quadrini*'s misreading of *Twombly* notwithstanding,

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93. See *Petroci v. Transworld Sys., Inc.*, No. 12-CV-00729 (A)(M), 2012 WL 5464597, at \*2 (W.D.N.Y. Oct. 19, 2012) (holding that symmetrical pleading standards no longer make sense given the asymmetrical burden plausibility pleading places on defendants), *report and recommendation adopted by* No. 12-CV-729A, 2012 WL 5464579 (W.D.N.Y. Nov. 8, 2012).

94. See *supra* Section I.A.2.

95. See *supra* notes 35–39 and accompanying text.

96. See *supra* notes 40–42 and accompanying text.

97. The Court saw this language as an “incomplete, negative gloss on an accepted pleading standard” meant to illustrate “the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007).

98. *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated in part on other grounds by Twombly*, 550 U.S. 544).

99. See *Gambol*, *supra* note 19, at 2207 (“*Twombly* itself did not fully overrule *Conley*, but rather only *Conley*'s ‘no set of facts’ language. The remainder of *Conley* remains good law.” (footnote omitted)).

100. *Dominguez et al.*, *supra* note 19, at 78 (interpreting *Quadrini* to hold that *Conley* is a dead letter).

courts are free to apply *Conley*'s comparatively loose notice pleading standard to affirmative defenses under Rule 8(c) while simultaneously adhering to *Twombly*'s requirements for the pleading of complaints under Rule 8(a)(2).<sup>101</sup>

B. *The Fiction of a General "Fair Notice" Pleading Standard*

The debate between the plausibility courts and the declining courts over whether *Twombly* interprets Rule 8 generally<sup>102</sup> or Rule 8(a) specifically<sup>103</sup> cannot be resolved without first identifying a fundamental difference in the approaches employed by the two sides. Unlike the courts that narrowly apply *Twombly* to the complaint, the plausibility courts hold that *Twombly* changed the "fair notice" requirement applicable to all pleadings. These plausibility courts fail to recognize the basic principle that a legal term can take on different meanings in different—although closely related—contexts.<sup>104</sup> The argument that *Twombly* generally redefined "fair notice" fails due to its reliance on the unfounded assumption that the Court applies a monolithic "fair notice" requirement to Rule 8 as a whole. The plausibility courts' attempts to derive support for this position from the model pleading forms provided through Rule 84 similarly fall short.

In asserting that *Twombly*'s pleading standard is "a clarification of what information is necessary to provide fair notice to the other party,"<sup>105</sup> the plausibility courts attempt to avoid the inconvenient fact that *Twombly* anchors its pleading standard in language specific to Rule 8(a).<sup>106</sup> They argue instead that "*Twombly*'s rationale of giving fair notice to the opposing party" applies equally to the pleading of affirmative defenses and complaints.<sup>107</sup> By claiming that the overarching goal of providing "fair notice" applies to all

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101. A growing number of district courts have adopted this approach, applying *Conley* to affirmative defenses and *Twombly* to complaints. See, e.g., *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 664 (M.D. Ala. 2012) (refusing to extend *Twombly* to affirmative defenses and instead evaluating affirmative defenses under *Conley*'s original fair notice standard); *Baroness Small Estates, Inc. v. BJ's Rests., Inc.*, No. SACV 11-00468-JST (Ex), 2011 WL 3438873, at \*6 (C.D. Cal. Aug. 5, 2011) (applying fair notice rather than plausibility pleading to affirmative defenses); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900–01 (E.D. Pa. 2011) (declining to apply *Twombly* to affirmative defenses and reverting to the original *Conley* standard).

102. See *supra* Section I.A.2.

103. See *supra* Section I.B.1.

104. Chief Justice Roberts reminded us forcefully of this principle in his opinion upholding the Patient Protection and Affordable Care Act ("PPACA"). See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584, 2594–96 (2012) (declining to define the PPACA as a tax for purposes of the Anti-Injunction Act while simultaneously identifying the PPACA as a tax in its Spending Clause analysis).

105. *Miller*, *supra* note 15, at 101 n.391.

106. See *Smith v. Wal-Mart Stores, Inc.*, No. 1:11-CV-226-MP-GRJ, 2012 WL 2377840, at \*2 (N.D. Fla. June 25, 2012) ("The Supreme Court in *Twombly* and *Iqbal* relied on the specific language of Rule 8(a)(2), which requires a 'showing' of entitlement to relief, when it established the plausibility requirement for complaints.").

107. *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012).

aspects of pleading,<sup>108</sup> the plausibility courts use this term as a vehicle for importing *Twombly*'s pleading standard into Rules 8(b) and 8(c), circumventing the lack of "showing" language in either of those subsections.

There are two problems with this approach. First, the term "fair notice" appears nowhere in the text of Rule 8—the Court introduced the term in *Conley* as a gloss on the goals underlying Rule 8(a)(2)<sup>109</sup> and never indicated in *Twombly* that it was expanding or reinterpreting those goals to apply to Rule 8 generally. Second, and even more importantly, the plausibility courts fail to consider that the Court can prescribe one set of "fair notice" requirements for pleadings under Rule 8(a) while prescribing a separate set of "fair notice" requirements for pleadings under Rule 8(c).<sup>110</sup> As the declining courts repeatedly emphasize,<sup>111</sup> the text of *Twombly*<sup>112</sup> indicates that the Court did just that—redefining what "fair notice" meant in the context of the complaint, while leaving the original meaning of "fair notice" undisturbed in the context of defenses.<sup>113</sup>

In order to reinforce their tenuous claim that *Twombly* heightened the "fair notice" requirement for *all* Rule 8 pleadings, the plausibility courts often assert that Form 30 directs litigants to provide plausible factual detail when stating affirmative defenses,<sup>114</sup> but the declining courts have overwhelmingly repudiated this argument for reasons apparent on the face of the Form.<sup>115</sup> The first and most obvious refutation of the plausibility courts'

108. See *Joe Hand Promotions, Inc. v. Davis*, No. C 11-6166 CW, 2012 WL 4803923, at \*2 (N.D. Cal. Oct. 9, 2012) (noting that *Twombly* "departed from *Conley* and redefined the pleading requirements under Rule 8").

109. *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("[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." (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2))), *abrogated in part by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

110. This is no different than defining the PPACA as a tax for purposes of the Spending Clause while declining to define it as a tax for purposes of the Anti-Injunction Act; the Court can and does define legal terms like "fair notice" and "tax" contextually. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584, 2594–96 (2012).

111. See *supra* note 106 and accompanying text.

112. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . .'" (quoting *Conley*, 355 U.S. at 47)).

113. See *supra* note 101 and accompanying text.

114. See *supra* notes 51–55 and accompanying text. Commentators have gone so far as to claim that "Form 30 provides the strongest argument in favor of applying plausibility standards to defendants." Goff & Bales, *supra* note 19, at 637.

115. E.g., *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 WL 6934557, at \*1–2 (D. Del. Dec. 30, 2011) (holding that "the lack of detail in Form 30, which demonstrates the appropriate pleading of an affirmative defense," provides evidence that *Twombly* does not apply to affirmative defenses); *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011) (finding support for its holding that *Twombly* does not apply to affirmative defenses in the "brief and simple nature" of the language in Form 30); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011) (describing Form 30 as containing "undetailed recitations of affirmative defenses").

reliance on Form 30 is the fact that the Form was composed prior to the *Twombly* decision, and while it became effective a few months after the opinion was handed down, it is highly unlikely that the Rules Committee drafters intended to illustrate a pleading standard not yet in existence.<sup>116</sup> This argument is confirmed by reference to Form 30's predecessor, the pre-Style Project Form 20, which illustrated *Conley's* relaxed pleading standard and included the same level of detail as the current Form 30.<sup>117</sup>

At least one plausibility court recognized this weakness yet still claimed that "the additional factual detail contained in Form 30 is hardly superfluous," suggesting that *Twombly* "merely made explicit principles long implicit in the general pleading requirements of the Federal Rules."<sup>118</sup> But the assertion that Form 30 requires "factual detail" is demonstrably false.<sup>119</sup> While several courts point to Form 30, which indicates that defendants should plead the number of years passed prior to the commencement of the action, as evidence that affirmative defenses must include plausible specifics,<sup>120</sup> such an assertion stems from a shallow and inaccurate reading of the Form.<sup>121</sup> Far from requiring specific factual detail, Form 30 "suggests stating that the action 'arose more than \_\_\_ years' before the case was commenced," and "[t]he 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."<sup>122</sup> This "more than" language,

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116. Form 30 was added on April 30, 2007, and became effective on December 1, 2007. FED. R. CIV. P. Form 30. *Twombly* was decided on May 21, 2007. *Twombly*, 550 U.S. 544.

117. See FED. R. CIV. P. Form 20 (2006) (superseded 2007) ("Fourth Defense[:] The right of action set forth in the complaint did not accrue within six years next before the commencement of this action."). Furthermore, the Style Project, which led to Form 30's inclusion in the Federal Rules, was stylistic only, so by definition Form 30 cannot illustrate a substantively new pleading standard. See, e.g., FED. R. CIV. P. 1 advisory committee's note, 2007 Amend. ("The language . . . has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.").

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

119. See *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 664 (M.D. Ala. 2012) ("Form 30's suggestion for . . . [an] affirmative defense could not be more bare-bones . . . [I]t would be difficult to imagine any affirmative defense that defies more strongly *Twombly's* instruction to plead 'more than labels and conclusions' than Form 30's example . . . ." (quoting *Twombly*, 550 U.S. at 555)).

120. See *supra* notes 51–55 and accompanying text.

121. See *Joe Ryan Enters.*, 281 F.R.D. at 664.

122. *Id.* (quoting FED. R. CIV. P. Form 30) ("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."); cf. *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.").

which only calls for a statement of the relevant limitations period by implication,<sup>123</sup> does not suggest the sort of details that would arguably be required to meet the plausibility standard. Read in conjunction with the fact that the Form's meaning has not changed since the *Conley* era,<sup>124</sup> the language of the Form itself demonstrates that the plausibility courts cannot reasonably rely on Form 30 to strengthen their claim that *Twombly* heightened the "fair notice" requirement for pleading affirmative defenses.

### C. *The Basic Fairness Argument Reimagined in a Discovery Context*

While the first wave of courts to consider the application of *Twombly* to affirmative defenses often cited "basic fairness" as a reason for applying plausibility pleading symmetrically to complaints and defenses,<sup>125</sup> such a position overlooked Rule 8's broader relationship to the other Federal Rules of Civil Procedure. This oversight ironically led the plausibility courts to impose an unfairly onerous burden on defendants and contradicted the same basic fairness principle these courts originally invoked.

The dispute between the plausibility courts and the declining courts over whether applying *Twombly* to affirmative defenses unfairly disadvantages one set of litigants over the other takes place at two different levels of complexity. The superficial formulation of the dispute involves the declining courts' contention that defendants are only allowed twenty-one days to file their answer, whereas plaintiffs are limited only by the relevant statute of limitations.<sup>126</sup> The plausibility courts reply that this perceived unfairness is obviated by the courts' routine practice of liberally granting leave to amend under Rule 15.<sup>127</sup>

The more complex formulation of this dispute, which has received far less attention from courts and scholars<sup>128</sup> and comes closer to actually resolving the two sides' basic fairness argument, questions whether litigants

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123. The Form simply leaves a blank space into which the defendant can insert a year. See FED. R. CIV. P. Form 30. It does not require—even by implication—that the defendant state why that particular year applies (e.g., because the claim arises out of tort or contract law), nor does it require factual details about when the plaintiff knew or should have known of the existence of the cause of action, which would arguably be required to meet the plausibility standard in pleading a statute of limitations defense to certain suits (e.g., medical malpractice suits). See, e.g., *Tanner v. Hartog*, 618 So. 2d 177, 179 (Fla. 1993) ("An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence.").

124. See *supra* notes 116–117 and accompanying text.

125. See *supra* Section I.A.1.

126. See *supra* Section I.B.2.

127. See, e.g., *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 234 (E.D.N.C. 2010) ("The court also notes that applying the same pleading requirements to defendants should not stymie the presentation of a vigorous defense, because under Rule 15(a) of the Federal Rules of Civil Procedure, a defendant may seek leave to amend its answers to assert defenses based on facts that become known during discovery.").

128. One short article mentions this second level of analysis but summarily dismisses the declining courts' fairness concerns in the course of its argument that *Twombly's* pleading

whose affirmative defenses are stricken or left unpled after twenty-one days can access the discovery required to take advantage of a Rule 15 motion to amend. This question, which no plausibility court has yet addressed, cannot be answered without a careful analysis of the interrelated provisions of Rules 12, 15, and 26.<sup>129</sup> Courts advocating the extension of *Twombly* to defense pleadings cannot evade the plainly inequitable time limit imposed on defendants held to the plausibility standard by appealing to Rule 15 if that same twenty-one-day time limit forecloses defendants from discovering the facts necessary to support a motion to amend.

The plausibility courts reason that if a defendant subject to Rule 12's twenty-one-day time limit for answers uncovers an affirmative defense after that time expires, that defendant may still amend its pleading as a "matter of course within . . . 21 days after serving."<sup>130</sup> But these courts ignore several key facts about motions to amend. First, since Rule 26(d) institutes a "discovery moratorium" prior to the parties' participation in a Rule 26(f) conference,<sup>131</sup> which itself must take place "at least 21 days before a [Rule 16(b)] scheduling conference,"<sup>132</sup> defendants will ordinarily be unable to access any discovery whatsoever within Rule 15(a)'s twenty-one-day time limit for amendment as a matter of course.<sup>133</sup> Defendants will therefore be unable to establish any affirmative defenses requiring discovery within the time period for amendment as a matter of course, and once that twenty-one-day window has passed, a court evaluates motions to amend according to a more stringent "good cause standard, not FRCP 15."<sup>134</sup> Plaintiffs can defeat "good cause" motions to amend by claiming prejudice from the delay caused by such motions.<sup>135</sup> These limitations weaken the plausibility courts' claim that

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standard should be applied to affirmative defenses. See Tom Tinkham & Eric Janus, *BNA Insights: Plausible Answers and Affirmative Defenses*, 79 U.S. L. WK. 2271 (2011).

129. See, e.g., FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.").

130. FED. R. CIV. P. 15(a)(1). It is debatable whether expanding the time limit imposed on a defendant from twenty-one days to forty-two days really levels the playing field between that defendant and a plaintiff who may have spent years investigating the facts relevant to litigation. See *supra* Section I.B.2.

131. FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . ."); see also *Fuss v. Blue Cross & Blue Shield of Mont., Inc.*, No. CV 12-83-M-DLC-JCL, 2012 WL 2370420, at \*1 (D. Mont. June 21, 2012) ("Rule 26(d) imposes a moratorium . . . on discovery before the Rule 26(f) conference.").

132. FED. R. CIV. P. 26(f)(1).

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

134. *Peterson v. Acumed, LLC*, No. CV-10-586-HU, 2010 WL 5158542, at \*2 (D. Or. Dec. 14, 2010); accord *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at \*4 (N.D. Okla. June 9, 2010) ("Should defendant seek to amend its amended answer, defendant must establish good cause to do so, and plaintiff will have an opportunity to object.").

135. *Herrera v. Utilimap Corp.*, No. H-11-3851, 2012 WL 3527065, at \*4 (S.D. Tex. Aug. 14, 2012) ("In deciding whether the amendment is proper, the court needs to consider:

since defendants held to a plausibility standard can freely amend their pleadings, they are not prejudiced by Rule 12's short answer deadline.

Second, and even more importantly, the plausibility courts fail to acknowledge that defendants will be unable to amend under either the "matter of course" or "good cause" standards if, after the Rule 26(d) discovery moratorium is lifted, Rule 26(b) then bars them from accessing the discovery necessary to establish the plausibility of their unpled or stricken affirmative defenses.<sup>136</sup> In the early stages of litigation, prior to discovery, a defendant often lacks the "factual information that would enable it to satisfy the pleading standards set forth in [*Twombly*]." <sup>137</sup> While Rule 26(b) allows a court to "order discovery of any matter relevant to the subject matter involved in the action,"<sup>138</sup> at least one district court has found that "an unpleaded affirmative defense is not 'involved in the action'—instead, it is 'exclu[ded] from the case.'" <sup>139</sup> Even proponents of extending plausibility pleading to affirmative defenses acknowledge that "[i]n a litigation environment hostile to broad discovery, facts related to an unpleaded affirmative defense" might not support discovery under Rule 26.<sup>140</sup> If discovery remains unavailable—even after the Rule 26(d) moratorium is lifted—to defendants who were unable to plead their affirmative defenses within the harsh Rule 12 time limit, Rule 15's generous leave-to-amend provision offers them no relief, defeating the plausibility courts' answer to the declining courts' basic fairness concern.<sup>141</sup>

Proponents of plausibility pleading might respond that defendants' lack of discovery "at worst . . . put the fact-deficient defendant in the same position as the fact-deficient plaintiff."<sup>142</sup> This response fundamentally

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'(1) the explanation for the failure to [timely move for leave to amend]; (2) the importance of the [amendment]; (3) the potential prejudice in allowing the [amendment]; and (4) the availability of a continuance to cure such prejudice.'" (alterations in original) (quoting *S&W Enters., L.L.C. v. SouthTrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003))).

136. FED. R. CIV. P. 26(b)(1); *see also* *Petroci v. Transworld Sys., Inc.*, No. 12-CV-00729 (A)(M), 2012 WL 5464597, at \*3 (W.D.N.Y. Oct. 19, 2012) ("[T]his reasoning begs the question of whether discovery would even be available concerning an unpleaded affirmative defense, since the '[f]ailure to plead an affirmative defense in the answer results in the waiver of that defense and its exclusion from the case.'" (second alteration in original) (quoting *United States v. Cont'l Ill. Nat'l Bank & Trust Co.*, 889 F.2d 1248, 1252 (2d Cir. 1989))), *report and recommendation adopted by* No. 12-CV-729A, 2012 WL 5464579 (W.D.N.Y. Nov. 8, 2012).

137. *Hahn v. Best Recovery Servs.*, No. 10-12370, 2010 WL 4483375, at \*2 (E.D. Mich. Nov. 1, 2010).

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

139. *Petroci*, 2012 WL 5464597, at \*3 n.4 (alteration in original) (quoting *Cont'l Ill. Nat'l Bank & Trust Co.*, 889 F.2d at 1253).

140. *Tinkham & Janus*, *supra* note 128, at 2274. It should be noted that while Rule 26(b)(1) can, and probably should, be read to allow discovery relating to unpled affirmative defenses as a "matter that is relevant to any party's claim or defense," that reading is far from assured. *See supra* note 139 and accompanying text.

141. *See supra* Section I.B.2.

142. *Tinkham & Janus*, *supra* note 128, at 2274.

misconceives both the respective roles of plaintiffs and defendants in litigation<sup>143</sup> and the disparate burden the plausibility standard imposes on defendants constrained by Rule 12's answer deadline.<sup>144</sup> A plaintiff may investigate its claim *before* determining whether the tremendous investment of time and money inherent in instigating litigation is worthwhile; a defendant, on the other hand, does not choose to come before the court. To task a defendant with pleading factually specific affirmative defenses within twenty-one days of service—before it can obtain discovery, no less—imposes an asymmetrical and unfairly onerous burden on that defendant. Such considerations have led courts to hold that the question of “whether there is a factual bases [sic] for affirmative defenses should be addressed during the discovery process and not through a motion to strike or a motion for judgment on the pleadings.”<sup>145</sup>

### III. FREQUENTLY OVERLOOKED ARGUMENTS REINFORCING THE DECLINING COURTS' POSITION

While most courts rely on two primary arguments—one textual<sup>146</sup> and one practical<sup>147</sup>—to support the increasingly widespread position that *Twombly* does not apply to affirmative defenses, those arguments are by no means the only reasons to read *Twombly* narrowly. This Part advances two additional arguments in support of the declining courts' position that have not been considered in the academic literature on this subject. Section III.A contends that the canons of statutory construction indicate that courts should confine *Twombly* to the complaint, and Section III.B argues that extending plausibility pleading beyond the complaint violates the principles outlined in the Rules Enabling Act.<sup>148</sup>

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143. The Court and Congress have both recognized that a defendant is “haled into court against his will,” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 366 (1978), and based on that fact have chosen to apply asymmetrical rules to plaintiffs and defendants in other areas of civil procedure. See, e.g., *id.*; 28 U.S.C. § 1367(b) (2006) (providing greater supplemental jurisdiction coverage to defendants than plaintiffs based on their differing roles in litigation). This fact casts doubt on scholars' assertions that since “the Federal Rules should not be understood to create systemically different treatment for plaintiffs and defendants,” plausibility pleading should be applied symmetrically to both parties. Tinkham & Janus, *supra* note 128, at 2272. The Court and Congress have no qualms applying asymmetrical standards in areas of civil procedure where the parties are differently situated, as plaintiffs and defendants are here.

144. See *supra* Section I.B.2.

145. Hahn v. Best Recovery Servs., No. 10-12370, 2010 WL 4483375, at \*2 (E.D. Mich. Nov. 1, 2010) (declining to extend plausibility pleading to affirmative defenses).

146. See *supra* Section I.B.1.

147. See *supra* Section I.B.2.

148. Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2006).

A. *The Canons of Statutory Construction Indicate That Plausibility Pleading Does Not Apply to Affirmative Defenses*

The Court often invokes the canons of statutory construction in interpreting the Federal Rules of Civil Procedure, and while lower courts have not yet broadly applied such analysis in determining the extent of *Twombly*'s reach, one canon in particular provides a clear answer to the question of whether plausibility pleading applies to affirmative defenses. In one of the heightened pleading cases leading up to *Twombly*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>149</sup> the Court explicitly invoked the *expressio unius est exclusio alterius* ("the mention of one thing implies the exclusion of the other")<sup>150</sup> canon in refusing to extend heightened pleading under Rule 9<sup>151</sup> to any action beyond fraud and mistake. Additionally, Justice Stevens explicitly mentioned this canon in a footnote to his dissenting opinion in *Twombly*.<sup>152</sup>

The Court gives "the Federal Rules of Civil Procedure their plain meaning . . . as with a statute,"<sup>153</sup> and since the Court relied on the *expressio unius est exclusio alterius* canon in interpreting Rule 9, it makes sense for district courts to similarly employ the canon in determining whether *Twombly* applies to affirmative defenses. At least one district court has noted that "[t]he rule of interpretation of *expressio unius est exclusio alterius* applies with force" to a determination of the proper affirmative defense pleading standard.<sup>154</sup> Thus, the drafters' inclusion of unique "showing" language<sup>155</sup> in Rule 8's section governing complaints should imply the exclusion of that language from the sections governing defenses. The plausibility courts, in "artificially supply[ing] Rules 8(b)(1) and 8(c)(1) with the unique language of Rule 8(a)(2)," disregard this well-accepted principle of construction.<sup>156</sup> The growing number of district courts declining to extend plausibility

149. 507 U.S. 163, 168 (1993) (reasoning that since Rule 9(b) only imposes heightened pleading in averments of fraud and mistake, the *expressio unius est exclusio alterius* canon indicates that such heightened pleading does not extend to any other pleadings).

150. *Hardy v. N.Y.C. Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (relying "on the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other").

151. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

152. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 576 n.3 (2007) (Stevens, J., dissenting) ("We have recognized that the canon of *expressio unius est exclusio alterius* applies to Rule 9(b).").

153. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989).

154. See *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." (alteration in original)).

155. Rule 8's "showing" language was the primary language the Court interpreted in *Twombly*. See *supra* Section I.B.1.

156. *Joe Ryan Enters.*, 281 F.R.D. at 663.

pleading to affirmative defenses should follow Justice Stevens's lead and anchor their interpretation of *Twombly* in the *expressio unius est exclusio alterius* principle.

B. *Extending Twombly Beyond the Complaint Violates the Principles of the Rules Enabling Act*

By importing *Twombly*'s plausibility standard into defense pleadings to remedy the problem of boilerplate affirmative defenses,<sup>157</sup> the plausibility courts essentially rewrite Rule 8(c) to address an issue entirely discrete from the problem of frivolous claims discussed in *Twombly*. In so doing, they violate the principles of the Rules Enabling Act, which delegates the power to prescribe general rules of procedure to the Supreme Court.<sup>158</sup> These courts attempt to justify their treatment of Rule 8(c) by claiming to further the policy goals underlying *Twombly*,<sup>159</sup> but few district courts have considered the extent to which this de facto revision of a Federal Rule disregards the rules' revision process established by Congress.

The cases<sup>160</sup> and prior scholarly articles<sup>161</sup> specifically addressing post-*Twombly* affirmative defense pleading have almost uniformly<sup>162</sup> entertained

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157. See *supra* notes 63–64 and accompanying text.

158. Rules Enabling Act, 28 U.S.C. § 2072(a) (2006) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”).

159. See *supra* Section I.A.3.

160. *Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11-2416, 2011 WL 5118325, at \*3 (D. Md. Oct. 24, 2011) (noting that in extending *Twombly*, plausibility courts “cite the importance of litigation efficiency, explaining that boilerplate defenses serve only to ‘clutter the docket and . . . create unnecessary work’” (alteration in original) (quoting *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010))); *accord Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122–23 (D. Mass. 2012) (“Courts that have applied the heightened pleading standard to affirmative defenses have often done so on the basis that *Twombly* aimed to eliminate the high costs of discovery associated with boilerplate claims and that boilerplate affirmative defenses have the same detrimental effect on the cost of litigation.”).

161. See, e.g., *Goff & Bales*, *supra* note 19, at 642 (“Applying plausibility standards to all pleadings will ensure efficiency . . . .”); *Bilek*, *supra* note 19, at 404 (“The *Twombly* Court was first to pronounce the Court’s concern over discovery costs when it explained that the purpose of adopting a heightened pleading requirement is to relieve the parties of the high costs of discovery wasted on claims or defenses which are not actually grounded in a factual basis.”); *Pysno*, *supra* note 19, at 1662 (“The *Twombly* court explicitly expressed concern about litigation costs. There is little doubt that reducing expense in discovery is a necessary and prudent goal of modern litigation practices and standards.”).

162. One article briefly introduced the idea that boilerplate affirmative defenses fail to implicate *Twombly*'s policy concerns. See *Durney & Michaud*, *supra* note 19, at 449. This article, like all the others previously written on this subject, immediately falls into the trap of responding to the plausibility courts' efficiency argument on its own terms, asserting that the application of plausibility pleading to defenses will not fulfill *Twombly*'s supposed goal of decreasing litigation costs. *Id.* (“Other courts have stated that applying the heightened pleading standard to affirmative defenses almost certainly guarantees the waste that *Twombly* and *Iqbal* sought to eradicate.”).

the premise that the Court heightened pleading standards to generally improve litigation efficiency,<sup>163</sup> and that therefore weeding out boilerplate affirmative defenses serves the Court's underlying goal. In actual fact, the Court "has never once lost sleep worrying about defendants filing nuisance affirmative defenses."<sup>164</sup> *Twombly* focused exclusively on protecting defendants—not on increasing general litigation efficiency—and explicitly voiced concerns about plaintiffs subjecting defendants to frivolous lawsuits, expensive discovery, and *in terrorem* settlements.<sup>165</sup> The problem of boilerplate affirmative defenses cluttering district court dockets therefore implicates a set of issues and policy concerns entirely discrete from the concerns underlying *Twombly*.<sup>166</sup>

Without the cover afforded by an expansive misinterpretation of the policy goals underlying *Twombly*, it becomes apparent that the plausibility courts have taken the Court's reinterpretation of Rule 8(a) as an invitation to reinterpret Rule 8(c) in a way that reduces strain on their dockets.<sup>167</sup> District courts should recognize this de facto rewriting of Rule 8(c) as a violation of the Rules Enabling Act, and they should bear in mind that "policy considerations," such as a desire to reduce the number of boilerplate affirmative defense pleadings, "are foreclosed when the language of the Rule is clear," since "[t]he judiciary is commissioned to interpret the Rules as they are written, not to re-draft them when it may be convenient."<sup>168</sup>

Given that *Twombly*'s reinterpretation of Rule 8(a) focused on "showing" language not found in Rule 8(c), the application of plausibility pleading to complaints and affirmative defenses alike, "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

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163. See *supra* Section I.A.3.

164. *Hansen*, 287 F.R.D. at 123 (internal quotation marks omitted) (quoting *Leon v. Jacobson Transp. Co.*, No. 10 C 4939, 2010 WL 4810600 (N.D. Ill. Nov. 19, 2010)).

165. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007).

166. In arguing that plausibility pleading will increase motion practice and fail to achieve the Court's goal of "litigation efficiency," opponents of extending the plausibility standard to affirmative defenses are missing the point. They should instead take advantage of the opportunity to directly attack the plausibility courts' misinterpretation of *Twombly* and refocus attention on its actual, defendant-focused goals. See *Hansen*, 287 F.R.D. at 123 ("However, the concerns voiced in *Iqbal* that high discovery costs will induce undeserved settlements do not apply in the context of affirmative defenses.").

167. Some jurists have argued that *Twombly* and *Iqbal* themselves conflict with the Rules Enabling Act, see, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 624 (7th Cir. 2011) (Hamilton, J., dissenting) (construed in *Cooper*, *supra* note 14, at 967 n.34), but their decisions at least drew support from Rule 8(a)'s "showing" language, which arguably lends itself to a heightened pleading standard. District courts expanding *Twombly*'s holding to Rule 8(c) cannot similarly draw support from the Rules' text. See *Lopez v. Asmar's Mediterranean Food, Inc.*, No. 1:10cv1218 (JCC), 2011 WL 98573, at \*2 (E.D. Va. Jan. 10, 2011) (stating that the court is "bound to apply the relevant rules of civil procedure as written" and finding that the lack of any "showing" language in Rules 8(b)(1)(A) or 8(c)(1) meant that *Twombly/Iqbal*'s plausibility pleading standard did not apply).

168. *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 663 (M.D. Ala. 2012).

'broaden the scope' of specific federal pleading standards."<sup>169</sup> District courts that decline to extend *Twombly* to affirmative defenses have the opportunity not only to refute the plausibility courts' faulty appeal to the policies underlying *Twombly*, but also to anchor their arguments in the rules' revision procedures prescribed by the Court and the Rules Enabling Act.

#### CONCLUSION

Due to misguided reliance on traditional pleading practices, an imprecise reading of *Twombly*, and an overestimation of the availability of discovery for unpled or stricken affirmative defenses, the courts that currently extend plausibility pleading to affirmative defenses fail to perceive that such an extension imposes an unfairly onerous burden on defendants. These courts essentially rewrite Rule 8(c) to ease strain on their dockets, and in so doing, they violate both the canons of statutory construction and the principles of the Rules Enabling Act.

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169. Kohler v. Islands Rests., LP, 280 F.R.D. 560, 566 (S.D. Cal. 2012) (quoting *Twombly*, 550 U.S. at 569 n.14).