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PLAUSIBILITY BEYOND THE COMPLAINT

JOSEPH A. SEINER*

ABSTRACT

In Bell Atlantic Corp. v. Twombly, and Ashcroft v. Iqbal, the Supreme Court announced a new plausibility standard for a plaintiff's allegations. The decisions may have even broader implications, however, as many federal district courts have already applied this pleading standard to a defendant's affirmative defenses. This Article makes sense of Twombly and Iqbal in the context of the affirmative defense.

This Article addresses the two possible readings of Twombly and Iqbal: first, that the decisions are limited to a plaintiff's civil complaint, and second, that a defendant must also comply with the Supreme Court's plausibility standard by pleading enough facts to sufficiently state an affirmative defense. This Article explains why a close textual review of the Federal Rules of Civil Procedure, combined with numerous policy and practical considerations, support the broader second reading of the Supreme Court's decisions.

What it actually means to plausibly plead an affirmative defense is a much more complicated question. This Article closely examines this issue through the lens of one of the most complex and important defenses in all civil case law—the affirmative defense to a claim of sexual harassment. By way of this example, this Article explains how the plausibility standard would apply more broadly to defendants in

* Associate Professor, University of South Carolina School of Law. I would like to thank the participants at the Southeastern Association of Law Schools' Annual Meeting for providing helpful comments and suggestions about this Article. I would also like to thank Charles Sullivan and Suja Thomas for their early and helpful comments on this Article, as well as Benjamin Gutman and Megan Seiner for their significant assistance with this Article. This Article is dedicated to Mary Elizabeth Seiner—always remember that there are no limits to what you can achieve, or boundaries to what you can accomplish. Any errors or misstatements are entirely my own.

all civil cases. The question whether the plausibility standard should apply to defendants—and if so, how it should apply—is likely to create significant controversy in the coming years. This Article establishes a foundation for that discussion.

TABLE OF CONTENTS

INTRODUCTION 990

I. *TWOMBLY, IQBAL* & THE FEDERAL RULES OF
CIVIL PROCEDURE 993

II. PLAUSIBILITY BEYOND THE COMPLAINT 998

 A. *The Complaint-Only Reading* 999

 B. *The All-Pleadings Approach* 1003

III. AN EXAMPLE OF THE ALL-PLEADINGS APPROACH:
THE EMPLOYER’S AFFIRMATIVE
DEFENSE TO SEXUAL HARASSMENT 1014

 A. *The Faragher-Ellerth Defense to
Sexual Harassment* 1016

 B. *The All-Pleadings Approach* 1018

 C. *Summary of the All-Pleadings Approach* 1024

 D. *The Complaint-Only Reading* 1027

IV. IMPLICATIONS OF THE ALL-PLEADINGS
APPROACH FOR ALL CIVIL CASES 1028

CONCLUSION 1037

“What’s good for the goose is good for the gander.”¹

INTRODUCTION

*Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*³ herald a new pleading standard not only for plaintiffs but perhaps for defendants as well. In these recent Supreme Court decisions, the Court announced a new standard for evaluating a plaintiff’s allegations—that is, a complaint now must set forth enough facts to give rise to a *plausible* claim to relief. The Court left unanswered, however, whether this plausibility standard should also apply to a defendant’s affirmative defenses. This Article makes sense of *Twombly* and *Iqbal* in the context of a defendant’s responsive pleadings.

Simply put, there are two possible readings of *Twombly* and *Iqbal* for the affirmative defense.⁴ The first reading concludes that these decisions apply only to a plaintiff’s complaint and should not be extended to a defendant’s pleadings.⁵ Supporters of this *complaint-only* approach point to the fact that the recent Supreme Court decisions make no reference to a defendant’s pleadings and are easily distinguishable on this basis.⁶ Additionally, whereas plaintiffs typically have many months or years to investigate and file their claims, defendants must respond to a federal complaint within twenty-one days.⁷ As a result, it is a fair reading of *Twombly* and *Iqbal*—as well as a sensible application of the Federal Rules of Civil Procedure—to conclude that the plausibility standard should not be extended beyond the complaint.

This Article explains why this reading should fail in favor of a second approach—applying the *Twombly* and *Iqbal* standard more broadly to all civil pleadings. This approach would require a defen-

1. ROBERT A. PALMATIER, A DICTIONARY OF ANIMAL METAPHORS 332 (1995).

2. 550 U.S. 544 (2007).

3. 129 S. Ct. 1937 (2009).

4. See *infra* Part II (analyzing the different approaches to *Twombly* and *Iqbal* for the affirmative defense).

5. See *infra* Part II.A (discussing the complaint-only approach to recent Supreme Court pleading decisions).

6. See, e.g., *McLemore v. Regions Bank*, No. 3:08-cv-0021, 2010 WL 1010092, at *12-13 (M.D. Tenn. Mar. 18, 2010).

7. See FED. R. CIV. P. 12(a) (setting forth the time limit to respond to a complaint).

dant to plead enough facts to give rise to a plausible affirmative defense.⁸ This *all-pleadings* interpretation of the Supreme Court's decisions is well supported by a close textual review of the Federal Rules of Civil Procedure.⁹ Beyond this textual reading, however, a number of policy considerations support the all-pleadings approach. Indeed, the basic reasoning that led the Court to develop the plausibility standard for allegations in a complaint applies equally to the affirmative defense.¹⁰ In particular, the *Twombly* and *Iqbal* decisions expressed significant concern over the costs of implausible litigation on defendants.¹¹ These costs run both ways, and a frivolous affirmative defense could prove quite expensive for plaintiffs to debunk, because they would be forced to test the merits of the defendant's implausible claim in discovery.¹²

In announcing the plausibility standard the Court also raised issues of basic fairness to defendants.¹³ According to the Court, it is unfair to provide a defendant with insufficient notice of a claim and to simply assert pure legal conclusions in the complaint.¹⁴ These fairness concerns apply equally to plaintiffs, who should similarly be entitled to notice of the basic facts related to any affirmative defense. Fairness in pleading should be symmetric, and both parties should be held to the same principles. Indeed, in the past, the courts have treated the motion to dismiss a complaint and the motion to strike an affirmative defense under an *identical* standard.¹⁵ We should therefore not create a new asymmetry in pleading standards following the recent Supreme Court decisions.

Practical considerations further support applying the plausibility standard to affirmative defenses. A plaintiff that is provided with basic factual information about a defense can more fully investigate and research the defendant's claim. This will result in more stream-

8. See *infra* Part II.B (discussing the all-pleadings approach to *Twombly* and *Iqbal* for affirmative defenses).

9. See *infra* notes 88-91 and accompanying text.

10. See *infra* notes 100-20 and accompanying text.

11. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

12. See *infra* text accompanying notes 100-11.

13. See *Iqbal*, 129 S. Ct. at 1949, 1953; *Twombly*, 550 U.S. at 555, 558-59.

14. *Iqbal*, 129 S. Ct. at 1949, 1953; *Twombly*, 550 U.S. at 555.

15. See, e.g., *Reis Robotics USA, Inc. v. Concept Indus.*, 462 F. Supp. 2d 897, 905 (N.D. Ill. 2006).

lined discovery, as the plaintiff will more narrowly tailor discovery requests to the specifics of the particular defense.¹⁶ The short time frame defendants have to respond to a complaint and assert their defenses should typically not be problematic, as defendants will often possess all of the information necessary to support their defenses.¹⁷ And when additional facts are uncovered during discovery, the courts should liberally allow defendants to amend their pleadings.¹⁸ Finally, as demonstrated in this Article, satisfying the plausibility standard will typically be an easy endeavor for defendants.¹⁹ A simple sentence or short paragraph will often suffice, though there may be some instances in which defendants have more difficulty proceeding under this standard.

Textual, policy, and practical considerations all support applying the plausibility standard to a defendant's responsive pleading. In practice, however, what plausibly pleading an affirmative defense actually means is a much more difficult question. This Article attempts to bring clarity to this issue by way of example and examines the contours of one specific affirmative defense—an employer's defense to a hostile work environment claim.²⁰ This Article examines this particular defense as employment discrimination cases—and civil rights claims more broadly—have been one of the areas most affected by the *Twombly* and *Iqbal* decisions.²¹ Given the difficulty plaintiffs have faced in the courts in satisfying the plausibility standard for workplace claims, it stands to reason that a defendant could confront similar problems when articulating an affirmative defense in this same context. This Article thus explores what the plausibility requirement for defendants would look like in one of the most critical and complex areas of employment discrimination law. By examining one important defense, this Article

16. See *infra* text accompanying note 104.

17. See *infra* notes 131-33 and accompanying text.

18. See FED. R. CIV. P. 15(a) (setting forth the rule on amending pleadings).

19. See *infra* Parts II.B, III (discussing the all-pleadings approach to affirmative defenses and providing an example in the sexual harassment context).

20. See *infra* Part III (applying the plausibility analysis of *Twombly* and *Iqbal* to an employer's affirmative defense in hostile work environment case).

21. See *infra* notes 145-49 and accompanying text (discussing the difficulty the employment discrimination and civil rights plaintiffs have faced in attempting to satisfy the plausibility standard).

explains how the plausibility standard would apply more broadly to affirmative defenses in *all* civil cases.

In Part I, this Article sets forth the relevant provisions of the Federal Rules of Civil Procedure and briefly summarizes the *Twombly* and *Iqbal* decisions, which established the plausibility standard. In Part II, this Article explores the two possible readings of these recent Supreme Court decisions for affirmative defenses—the complaint-only reading and the all-pleadings approach. This Part offers a textual analysis of the Federal Rules of Civil Procedure, and considers the policy and practical considerations of each of the possible readings. It concludes by explaining why the all-pleadings analysis is the better of the two approaches, particularly from the standpoint of equity and fairness to the parties.

In Part III, this Article examines what the all-pleadings approach to affirmative defenses would look like in the context of an employer's affirmative defense to a claim of sexual harassment. This Part explores the contours of plausibly pleading that defense and provides a concrete illustration of the facts a defendant must allege to satisfy the new standard articulated by the Court. Through this example, this Part explains what defendants in all civil cases must plead to comply with *Twombly* and *Iqbal*. In Part IV, this Article concludes by exploring some of the implications of adopting the plausibility standard for affirmative defenses and closely examines some of the benefits and drawbacks of this approach.

I. *TWOMBLY*, *IQBAL* & THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure clearly set forth what must be alleged in a plaintiff's complaint or in a defendant's answer. The *Twombly* and *Iqbal* decisions both interpret Rule 8(a), which requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief."²² As discussed in this Part, the recent Supreme Court pleading decisions have interpreted this language as requiring that a plaintiff sufficiently state a *plausible* claim to relief.²³ Similarly, Rule 8(b) provides the

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

23. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

requirements for the answer, making clear that the defendant must “state in short and plain terms its defenses to each claim asserted against it.”²⁴ Rule 8(c) addresses the requirements for any affirmative defenses, requiring that the defendant “affirmatively state any avoidance or affirmative defense” when “responding to a pleading.”²⁵

Rule 12(b)(6) allows a defendant to move for dismissal when a complaint is insufficient and fails “to state a claim upon which relief can be granted.”²⁶ Similarly, pursuant to Rule 12(f), “any redundant, immaterial, impertinent, or scandalous matter” can be stricken from a responsive pleading.²⁷ A court may act *sua sponte* in striking this material or upon the motion of one of the parties.²⁸ As explained in greater detail below, the lower courts frequently treated a motion to dismiss and a motion to strike under the same standards prior to *Twombly* and *Iqbal*.²⁹

Though the Federal Rules seem fairly clear on their face, in practice they have been difficult to apply. *Twombly* and *Iqbal* have only added to this confusion, undoing decades of federal pleading precedent and leaving countless unanswered questions for litigants attempting to navigate the Federal Rules. The facts of *Twombly* and *Iqbal* have been well visited—and revisited—by scholars and the judiciary. For purposes of providing context to the affirmative defense debate, however, this Article briefly summarizes these decisions here.

In *Conley v. Gibson*—a 1957 civil rights case—the Supreme Court concluded that it is an “accepted rule” that a plaintiff’s allegations should not be subject to dismissal under Rule 12(b)(6) “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.”³⁰ This “no set of facts” language governed federal pleading for the next fifty years, until *Twombly* and *Iqbal* revisited this standard. In *Bell Atlantic*

24. FED R. CIV. P. 8(b)(1).

25. FED R. CIV. P. 8(c). The time frame for responding to a complaint is relatively short, as the “defendant must serve an answer ... within 21 days after being served with the summons and complaint.” FED R. CIV. P. 12(a).

26. FED R. CIV. P. 12(b)(6).

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

28. *Id.*

29. See *infra* notes 93-96 and accompanying text (discussing lower court treatment of motions to strike and motions to dismiss).

30. 355 U.S. 41, 45-46 (1957).

Corp. v. Twombly, the Court again considered the proper pleading standard for federal claims, this time in the context of a complex antitrust case.³¹ In *Twombly*, the plaintiffs brought a class action lawsuit against several large telecommunications companies, alleging that these defendants had “engaged in certain parallel conduct unfavorable to competition” and had maintained agreements to “refrain from competing against one another” in violation of section 1 of the Sherman Act.³² In considering the sufficiency of the complaint in the case under Rule 8(a)(2), the Court “retire[d]” the “no set of facts” language from *Conley*, as this earlier standard had “been questioned, criticized, and explained away long enough.”³³

In place of the *Conley* “no set of facts” standard, the Court adopted a *plausibility* requirement.³⁴ Under this requirement, a complaint must allege “enough facts to state a claim to relief that is plausible on its face.”³⁵ A sufficient allegation must be more than “speculative,” and plaintiffs must plead enough facts to “nudge[] their claims across the line from conceivable to plausible.”³⁶ In articulating this plausibility standard, the Court expressed concern over the high cost of litigation and noted that these costs can persuade many “defendants to settle even anemic cases” prior to discovery.³⁷ Similarly, the Court expressed concern over basic fairness to defendants and noted that these litigants are entitled to “fair notice” of the allegations against them.³⁸ Such fair notice requires that a complaint include “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”³⁹ In applying the new plausibility standard to the facts of the case, the Court concluded that the plaintiffs’ complaint “fail[ed] to state a valid § 1 claim” and that “antitrust conspiracy was not

31. 550 U.S. 544 (2007).

32. *Id.* at 548-51.

33. *Id.* at 555, 562-63.

34. *Id.* at 556-57.

35. *Id.* at 570.

36. *Id.* at 555, 570.

37. *Id.* at 558-59.

38. *Id.* at 555.

39. *Id.*

suggested by the facts” set forth in the allegations.⁴⁰ The plaintiffs thus failed to *plausibly* state a claim to relief.⁴¹

The Court’s adoption of the plausibility requirement in *Twombly* made clear that federal pleading practice would be forever changed. However, one question still remained—whether plausibility pleading was limited strictly to antitrust claims or whether the standard would apply more broadly to all civil cases.⁴² In *Iqbal v. Ashcroft*, the Court resolved this question in the context of a civil rights case brought against former Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller.⁴³ The plaintiff, a Muslim and citizen of Pakistan, was arrested after the events of September 11, 2001.⁴⁴ He alleged that Ashcroft and Mueller “adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin.”⁴⁵ In analyzing the plaintiff’s claims, the Court determined that the *Twombly* pleading standard should apply to the case, as the plausibility standard is applicable to “all civil actions,” including “antitrust and discrimination suits.”⁴⁶ The Court thus made clear that its analysis in *Twombly* would not be limited to antitrust suits.⁴⁷

In *Iqbal* the Court expounded upon its decision in *Twombly* and discussed the two important principles to understand from that case.⁴⁸ First, the Court noted that legal conclusions are given little weight under the plausibility standard and “are not entitled to the assumption of truth.”⁴⁹ Thus, a plaintiff making only “conclusory statements” and “[t]hreadbare recitals of the elements of a cause of

40. *Id.* at 569.

41. *Id.* at 570. Interestingly, in articulating the new plausibility requirement, the Court noted that it was not adopting a “heightened” pleading standard.” *Id.* at 569 n.14.

42. See, e.g., Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1824 (2008) (“On one end, a number of writers have concluded that *Twombly* is best understood as a decision extending only to pleading in antitrust contexts. At the other end, writers believe that *Twombly* signals revolutionary overhaul of the entire concept of notice pleading.”).

43. 129 S. Ct. 1937 (2009).

44. *Id.* at 1942.

45. *Id.*

46. *Id.* at 1953.

47. *Id.*

48. *Id.* at 1949.

49. *Id.* at 1949-50.

action” will not survive a motion to dismiss.⁵⁰ Second, the Court emphasized that under *Twombly* a plaintiff’s allegations must rise to the level of plausibility.⁵¹ Evaluating a complaint under that standard is “a context-specific task” involving a court’s use of “judicial experience and common sense.”⁵² The Court noted that the plausibility requirement does not equate to a showing of “probability” but demands more than simply showing a “possibility” of success.⁵³ A complaint need not include “detailed factual allegations” but must consist of something beyond “an unadorned, the-defendant-unlawfully-harmed-me accusation.”⁵⁴ As with its earlier decision in *Twombly*, the *Iqbal* Court emphasized the issue of fairness in pleading, as well as the importance of avoiding unnecessary litigation costs.⁵⁵

In applying the plausibility standard to the facts of the case, the Court concluded that the plaintiff had failed to satisfy the *Twombly* test.⁵⁶ Thus, the plaintiff’s “complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination.”⁵⁷ Although its holding is significant, the real import of *Iqbal* is its application of the *Twombly* pleading standard beyond the confines of an antitrust case. And as discussed, *Iqbal* also provides noteworthy guidance on how the lower courts are to apply that pleading standard in *all* civil cases.⁵⁸ One critical issue not presented in either Supreme Court case, however, is the applicability of the plausibility standard beyond the complaint. Thus, whether the *Twombly* and *Iqbal* decisions apply to a defendant’s responsive pleadings remains an open question.

50. *Id.* at 1949.

51. *Id.* at 1950.

52. *Id.*

53. *Id.* at 1949.

54. *Id.*

55. *Id.* at 1949, 1953. Given the involvement of high-level government officials in the case, the Court was particularly concerned about the “heavy costs [of litigation] in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.” *Id.* at 1953.

56. *Id.* at 1954.

57. *Id.*

58. *See id.* at 1953 (“Our decision in *Twombly* expanded the pleading standard for ‘all civil actions,’ ... and it applies to antitrust and discrimination suits alike.”).

II. PLAUSIBILITY BEYOND THE COMPLAINT

Simply put, there are two possible interpretations of the plausibility standard for the affirmative defense. The first reading concludes that *Twombly* and *Iqbal* are applicable only to a plaintiff's complaint and that these decisions should not be extended to a defendant's affirmative defenses. This reading would thus conclude that the recent Supreme Court decisions are simply inapplicable to defendants. The second possible reading would require that defendants—like plaintiffs when drafting a complaint—state enough facts to give rise to a *plausible* defense. This Article examines both possible interpretations of Federal Rule of Civil Procedure 8(c) and ultimately concludes that basic principles of equity and fairness require that a defendant provide a plaintiff with a plausible basis for its affirmative defenses.⁵⁹

Before undertaking this analysis, it is worth briefly noting that what “plausible” exactly means under the current case law is unclear.⁶⁰ We have only the guidance provided by the Supreme Court in defining this term, as set forth above.⁶¹ From *Iqbal* and *Twombly*, we know that a sufficient allegation must be more than “speculative,” and a plaintiff must plead enough facts to “nudge[]

59. The question of the applicability of the plausibility standard to the affirmative defense has been raised by both the courts and commentators. See, e.g., Melanie A. Goff & Richard A. Bales, *A 'Plausible' Defense: Applying Twombly and Iqbal to Affirmative Defenses*, 34 AM. J. TRIALADVOC. 603 (2011) (discussing the affirmative defense question); Ryan Mize, Comments and Notes, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1260-61 (2010) (discussing different views of lower courts on the affirmative defense question). This Article attempts to enter this debate by providing an in-depth analysis of this issue and further explaining how the standard would work in practice.

60. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 859 (2010) (discussing the “instability” created by *Twombly* and *Iqbal*); Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 655-56 (2011) (“*Twombly* was immediately condemned, even by its supporters, as a ‘vague,’ ‘less than pellucid,’ ‘not entirely consistent,’ even ‘incoherent’ opinion that provided lower courts with virtually no guidance about the content of federal pleading standards.” (citations omitted)); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 228 (2010) (“*Twombly* and *Iqbal* have replaced a relaxed pleading standard with a more complex and undefined plausibility test.”).

61. See *supra* Part I (providing an overview of the *Twombly* and *Iqbal* Supreme Court decisions).

their claims across the line from conceivable to plausible.”⁶² A pleading must include “more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”⁶³ Moreover, legal conclusions are given little weight under the plausibility standard, and “[t]hreadbare recitals of a cause of action’s elements” will not survive a motion to dismiss.⁶⁴ Plausibility does not equate to a showing of “probability” but demands more than simply showing a “possibility” of success.⁶⁵

This guidance is helpful, but leaves the parameters of “plausibility” largely undefined. As we examine the two possible interpretations of Rule 8(c), then, we should keep in mind that the contours of the Court’s pleading standard are still being defined in the courts and academic literature.⁶⁶

A. *The Complaint-Only Reading*

Perhaps the narrowest reading of the applicability of the plausibility standard to the affirmative defense is to conclude that *Twombly* and *Iqbal* are case specific and apply only to a plaintiff’s complaint. Federal Rule of Civil Procedure 8(a)—upon which the Court’s decisions are premised—requires that a complaint include “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶⁷ Federal Rule of Civil Procedure 8(c), however, requires only that the defendant “affirmatively state any avoidance or affirmative defense” when “responding to a pleading.”⁶⁸ As the text of these two requirements differ in important respects, it would be fair to limit the *Twombly* and *Iqbal* holdings to Rule 8(a) and thus apply the plausibility standard only to a plaintiff’s complaint.

This complaint-only approach is bolstered by the differences between the provisions of the Federal Rules. Rule 8(a) requires not

62. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *see also Iqbal*, 129 S. Ct. at 1951.

63. *Twombly*, 550 U.S. at 555.

64. *Iqbal*, 129 S. Ct. at 1949-50.

65. *Id.* at 1949.

66. It is also worth noting that this Article focuses specifically on the applicability of *Twombly* and *Iqbal* to Federal Rule of Civil Procedure 8(c) and does not contemplate whether the plausibility standard applies to other provisions of the Rules.

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

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

only that the plaintiff state the claim, but further that the plaintiff *show*—through a “short and plain statement”—that it “is entitled to relief.”⁶⁹ Under Rule 8(c), however, a defendant need only *state* its affirmative defense, and it is *not* required to further *show* its entitlement to this defense.⁷⁰ One federal district court summarized these differences, as well as its view on the applicability of the plausibility standard to the affirmative defense:

Unlike [Rule 8] subsections (a) and (b), subsection (c) does not include any language requiring the party to state anything in “short and plain” terms.

....

On its face, *Twombly* applies only to complaints and to Rule 8(a)(2), because the Court was interpreting that subsection’s requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief.” ... The opinion does not mention affirmative defenses or any other subsection of Rule 8.⁷¹

Besides these textual differences in the Federal Rules, there are also practical reasons to read the Court’s plausibility standard narrowly. Most notably, plaintiffs typically have many months to investigate their claims and draft a detailed complaint setting forth a plausible basis for their entitlement to relief. The only time constraint on a civil plaintiff proceeding in federal court will be the applicable statute of limitations for the particular cause of action.⁷² There are obvious practical considerations that provide an incentive

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

70. FED. R. CIV. P. 8(c). It is worth noting that the language of Rule 8(c), which originally required that a defendant “set forth” its affirmative defense, was amended in 2007. The new version of the rule now requires that the defendant “state” the defense. *Compare* FED. R. CIV. P. 8(c) (2006), *with* FED. R. CIV. P. 8(c) (2010). Although arguments can certainly be made as to whether setting forth a defense is a greater or lesser burden than stating a defense, the explanation of the change in the rules suggests that it was simply a stylistic, nonsubstantive alteration. *See* COMM. ON THE RULES OF PRACTICE AND PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 47-48 (2006) (proposing style changes to Rule 8(c)).

71. *McLemore v. Regions Bank*, No. 3:08-cv-0021, 2010 WL 1010092, at *12-13 (M.D. Tenn. Mar. 18, 2010) (emphasis added) (citations omitted); *see also* *Westbrook v. Paragon Sys., Inc.*, No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007) (noting that unlike Rule 8(a), Rule 8(c) does not include “a requirement that the answer ‘show’ the defendant is entitled to prevail on its affirmative defense”).

72. *See, e.g., Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011).

to bring claims more quickly, such as preserving documents and testimony. Nonetheless, plaintiffs generally have a fair amount of time to craft their particular claims prior to filing suit. In responding to a complaint, however, defendants are much more time constrained. Indeed, under Rule 12(a), a party has only twenty-one days from the date of service to answer the complaint and set forth its affirmative defenses.⁷³ This significant time limitation on the defendant may serve as a substantial barrier to fully investigate the plaintiff's allegations and assert enough factual detail to state a plausible affirmative defense. Depending on the nature of the allegations, three weeks may simply not be enough time for the defendant to adequately develop its defenses.⁷⁴

It is also worth considering that defendants that fail to assert an affirmative defense in the responsive pleading *may* forever lose that defense.⁷⁵ This risk, combined with the short time frame for filing the response, strongly encourages a defendant to include all possible affirmative defenses in the answer, even when the defendant has only limited factual support for those defenses. It also serves as a sharp contrast to plaintiffs who usually have much more time to carefully consider which claims to include, or exclude, from the complaint.

Finally, the *Twombly* and *Iqbal* decisions arose specifically in the context of the sufficiency of a plaintiff's complaint, and the cases were considered under Rules 8(a) and 12(b)(6).⁷⁶ Thus, on its face, the plausibility standard articulated in these Supreme Court

73. See FED. R. CIV. P. 12(a) (setting forth the time limit to respond to a complaint); see also *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010) ("There may well be occasions when it would be reasonable to impose stricter pleading requirements on a plaintiff who has significant time to develop factual support for its claims, as opposed to a defendant who has only twenty-one days to respond to a complaint and assert any affirmative defenses.").

74. See, e.g., *Tyco Fire Prods. v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011).

75. See FED. R. CIV. P. 8(c); see also *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 WL 2990159, at *4 (E.D. Va. July 29, 2010); *Vermont Mut. Ins. Co. v. Everette*, 875 F. Supp. 1181, 1189 n.3 (E.D. Va. 1995) ("Generally, when a party fails to raise an affirmative defense in its answer, it waives the defense.... However, the majority of federal circuit courts have held that when a defendant raises an affirmative defense in a manner that does not result in unfair surprise to the other party, noncompliance with Rule 8(c) will not result in waiver of the affirmative defense.").

76. See *supra* Part I (discussing the Supreme Court's decisions in *Twombly* and *Iqbal*).

decisions applies only to an analysis of a plaintiff's complaint.⁷⁷ As discussed below, the reasoning of the Supreme Court can naturally be extended to Rule 8(c). Nonetheless, it is clear that the Supreme Court did not expressly apply the plausibility standard to affirmative defenses.⁷⁸ In fact, the Court did not mention the affirmative defense issue at all.⁷⁹ To apply the plausibility standard to a responsive pleading, then, would be to extend this standard beyond the confines of the Court's decisions.

The federal appellate courts have yet to address this issue.⁸⁰ However, numerous lower courts have examined the question of the applicability of the plausibility standard to the affirmative defense. Many of these courts have found the complaint-only approach persuasive, limiting the reasoning of *Twombly* and *Iqbal* to the plaintiff's complaint.⁸¹ Similar to the reasoning discussed above, these courts have concluded that "it is reasonable to impose stricter

77. See generally *McLemore*, 2010 WL 1010092, at *13 ("On its face, *Twombly* applies only to complaints and to Rule 8(a)(2).").

78. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

79. *Iqbal*, 129 S. Ct. 1937; *Twombly*, 550 U.S. 544; see also *McLemore*, 2010 WL 1010092, at *13 ("The [*Twombly*] opinion does not mention affirmative defenses or any other subsection of Rule 8. *Iqbal* also focused exclusively on the pleading burden that applies to plaintiffs' complaints.").

80. See generally *Schlief v. Nu-Source, Inc.*, No. 10-4477 (DWF/SER), 2011 WL 1560672, at *9 (D. Minn. Apr. 25, 2011) ("[The plaintiff] acknowledges that no circuit court has yet ruled that *Twombly* and *Iqbal* apply to affirmative defenses."); *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1256 (D. Kan. 2011) ("No appellate court has decided this issue, and district courts are split.").

81. See, e.g., *Bowers v. Mort. Elec. Registration Sys.*, No. 10-4141-JTM-DJW, 2011 WL 2149423, at *3-4 (D. Kan. June 1, 2011) (listing cases and adopting complaint-only approach); *Schlief*, 2011 WL 1560672, at *9 ("The Court concludes that the pleading standard set forth in *Twombly* and *Iqbal* does not apply to affirmative defenses."); *Falley*, 787 F. Supp. 2d at 1256-57, 1259 (listing cases and holding that "the pleading standards of *Twombly* and *Iqbal* should be limited to complaints—not extended to affirmative defenses"); *Tyco Fire Prods. v. Victaulic Co.*, 777 F. Supp. 2d 893, 899 (E.D. Pa. 2011) ("*Twombly* and *Iqbal* do not apply to affirmative defenses."); *FTC v. Hope Now Modifications, LLC*, No. 09-1204 (JBS/JJS), 2011 WL 883202, at *4 (D.N.J. Mar. 10, 2011) ("The Court therefore concludes that the pleading standards of *Twombly* and *Iqbal* do not apply to affirmative defenses under Rule 8(c)."); *Trustmark Ins. Co. v. C&K Mkt., Inc.*, No. CV 10-465-MO, 2011 WL 587574, at *1 (D. Or. Feb. 10, 2011) (declining "to extend the plausibility pleading requirements of *Twombly* to affirmative defenses"); *Lane v. Page*, 272 F.R.D. 581, 592-97 (D.N.M. 2011) (declining to extend plausibility standard to affirmative defenses). Numerous cases have addressed this issue, and the previous list provides a few illustrative examples of courts that have declined to apply the plausibility standard to affirmative defenses.

pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant.”⁸² These courts have also noted that Rule 8(c) “does not contain the [same] language from Rule 8(a)”⁸³ and have found that “*Twombly* applies only to complaints.”⁸⁴ Though the reasoning of these courts is persuasive, it is far from conclusive, and there is an emerging split of authority on the question of the applicability of the plausibility standard to the affirmative defense.⁸⁵

In sum, the complaint-only approach concludes that the *Twombly* and *Iqbal* decisions should not be applied beyond the context of a plaintiff’s complaint under Rule 8(a). This approach has serious limitations. As discussed below, a better reading of *Iqbal* and *Twombly* is that the decisions apply much more broadly and require that the defendant plausibly state its affirmative defenses.

B. The All-Pleadings Approach

As the previous section shows, limiting the plausibility standard to a plaintiff’s federal complaint is a fair interpretation of *Twombly* and *Iqbal*.⁸⁶ And some courts have already taken this approach.⁸⁷ In the end, however, this 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

82. *Holdsbrook v. Saia Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010).

83. *Ameristar Fence Prods. v. Phoenix Fence Co.*, No. CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010); *see also* *First Nat’l Ins. Co. of Am. v. Camps Servs.*, No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (“No such [‘short and plain statement’] language, however, appears within Rule 8(c), the applicable rule for affirmative defenses.”).

84. *McLemore*, 2010 WL 1010092, at *13; *see also* *Romantine v. CH2M Hill Eng’rs*, No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Jan. 5, 2009) (“This court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c), or general defenses under Rule 8(b), and declines to so extend the Supreme Court ruling as requested by Plaintiff.”).

85. *See infra* Part II.B (discussing the all-pleadings approach to Rule 8(c)). *See generally* Mize, *supra* note 59, at 1260-61 (discussing different views of lower courts on affirmative defense question).

86. *See supra* Part II.A.

87. *See* Mize, *supra* note 59, at 1260-61.

defense. Like the complaint-only reading, the all-pleadings approach can be derived from the plain terms of the Federal Rules.

As noted earlier, Rule 8(c) addresses affirmative defenses and requires that the defendant “affirmatively state any avoidance or affirmative defense” when “responding to a pleading.”⁸⁸ By requiring defendants to *affirmatively state* their defense, this language can be read as implicitly requiring that this stated defense also be plausible. Just as the plaintiff’s “short and plain statement of the claim showing that the [plaintiff] is entitled to relief” must be a *plausible statement* under *Twombly* and *Iqbal*, the defendant’s statement of its affirmative defenses could be subject to this plausibility requirement as well.⁸⁹ The Supreme Court’s recent pleading decisions do not turn on the language differential between Rule 8(a) and Rule 8(c)—in other words, the Court’s reasoning hinges on much more than the requirement that the complaint include a “short and plain statement” showing an entitlement to relief. Though the Court certainly discussed the terminology of Rule 8(a) in its decisions,⁹⁰ its analysis seems grounded much more on practical considerations—such as the high cost of discovery and providing fair notice to defendants—for its holding that the overall statement of the claim must be plausible.⁹¹ Thus, just as Rule 8(a) requires the plaintiff to plausibly state a claim to relief, similarly requiring the defendant to plausibly state its affirmative defense is a fair reading of Rule 8(c).

This interpretation of the language in the rules is consistent with the fact that many 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. Thus, in evaluating the motion to strike, one federal court stated that it will “evaluate the sufficiency of the defense pursuant to a standard *identical* to Federal Rule of Civil

88. FED. R. CIV. P. 8(c). The time frame for responding to a complaint is relatively short, and the “defendant must serve an answer ... within 21 days after being served with the summons and complaint.” FED. R. CIV. P. 12(a).

89. See Mize, *supra* note 59, at 1260-61.

90. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (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.” (citation omitted)). *But see* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (“Rule 8(a)(2) still requires a ‘showing’ rather than a blanket assertion, of entitlement to relief.”).

91. See generally *Iqbal*, 129 S. Ct. at 1937; *Twombly*, 550 U.S. at 544.

Procedure 12(b)(6).”⁹² Another court noted that the defense “must withstand a Rule 12(b)(6) challenge—that is, if the defendant could prove no set of facts in support of the affirmative defense that would defeat the complaint, the defense must be stricken as legally inadequate.”⁹³ And yet another federal court unequivocally concluded that “the standard by which 12(f) and 12(b)(6) motions are evaluated are *mirror images*.”⁹⁴ Thus, many courts have concluded that the difference between these two rules is “academic, as the standard is the same.”⁹⁵ As claims and defenses under Rule 8(a) and Rule 8(c) were frequently evaluated under the same standard before *Twombly* and *Iqbal*, there seems little reason to now treat the complaint and affirmative defense differently for purposes of a dismissal or a motion to strike. If the language of these two rules was considered “identical” before,⁹⁶ the rules should still be treated

92. *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 905 (N.D. Ill. 2006) (emphasis added); *see also* *Zytax, Inc. v. Green Plains Renewable Energy, Inc.*, No. H-09-2582, 2010 WL 2219179, at *5 (S.D. Tex. May 28, 2010); *LaSalle Bank N.A. v. Paramount Props.*, 588 F. Supp. 2d 840, 860 (N.D. Ill. 2008); *In re Katrina Canal*, No. 05-4182, 2007 WL 2480369, at *2 (E.D. La. Aug. 29, 2007); *Doe v. Roman Catholic Diocese of Galveston-Houston*, No. H-05-1047, 2006 WL 2413721, at *2 (S.D. Tex. Aug. 18, 2006) (“When a Rule 12(f) motion to strike challenges the sufficiency of an affirmative defense, the standards for a Rule 12(f) motion to strike and a Rule 12(b)(6) motion to dismiss are mirror images.” (citation omitted) (internal quotation marks omitted)).

93. *Surface Shields, Inc. v. Poly-Tak Prot. Sys., Inc.*, 213 F.R.D. 307, 308 (N.D. Ill. 2003). Though this “no set of facts” language obviously comes from a pre-*Twombly* decision, the case makes clear that many courts treat the 12(b)(6) and the 12(f) standards similarly.

94. *Credit Suisse First Bos., LLC v. Intershop Commc'ns*, 407 F. Supp. 2d 541, 546 (S.D.N.Y. 2006) (emphasis added) (internal quotation marks and bracket omitted); *see also* *United States v. Portions of Sale of Lakes Region Greyhound Park*, No. 06-CV-329-JD, 2008 WL 187598, at *1 n.2 (D.N.H. Jan. 17, 2008) (“The standard of review for a 12(f) motion is identical to that of a 12(b)(6) motion, and for this reason, whichever standard is used, the court will reach the same result.” (internal quotation marks omitted)); *Safe Bed Techs. Co. v. KCI USA, Inc.*, No. 02 C 0097, 2003 WL 21183948, at *2 (N.D. Ill. May 20, 2003) (“Motions to strike an affirmative defense are treated under the same legal standard as motions to dismiss under Rule 12(b)(6).”).

95. *United States v. Portrait of Wally*, No. 99 Civ. 9940(MBM), 2002 WL 553532, at *4 n.3 (S.D.N.Y. Apr. 12, 2002). *See generally* *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) (“An affirmative defense is subject to the same pleading requirements as is the complaint.”); *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (“Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure.... Thus, defenses must set forth a ‘short and plain statement,’ Fed. R. Civ. P. 8(a), of the defense.” (quoting *Bobbitt v. Victorial House*, 532 F. Supp. 734, 736-37 (N.D. Ill. 1987))).

96. *LaSalle Bank*, 588 F. Supp. 2d at 860.

as “mirror images” now.⁹⁷ 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 done⁹⁸—seems inconsistent with prior precedent and the Supreme Court decisions. This, of course, does not foreclose the possibility that *Twombly* and *Iqbal* somehow changed the pleading standards and that the Court would now require more from a plaintiff’s allegations than from a defendant’s affirmative defenses. Nonetheless, because *Twombly* itself relies on prior case law and suggests that it is not “requir[ing] heightened fact pleading of specifics,” there seems little reason to disturb the conclusions of earlier courts that interpreted Rule 8(a) and Rule 8(c) under a similar standard.⁹⁹

Though *Twombly* and *Iqbal* do not specifically speak to the issue of the affirmative defense, the reasoning of these decisions can properly be applied in that context. In particular, the Court seemed to develop the plausibility standard with a significant concern over the costs that implausible litigation would impose on defendants. In *Twombly*, the Court stated that discovery “can be expensive,” and noted that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”¹⁰⁰ The Court provided that “only by taking care to require allegations” reach a specified level “can [we] hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the discovery process will reveal relevant evidence.’”¹⁰¹ In *Iqbal*, the Court again expressed its concern over the potential costs of allowing certain cases to proceed to discovery, this time in the context of the lost time of governmental officials. The Court warned that litigation “exact[s] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”¹⁰²

97. *Credit Suisse First Bos., LLC*, 407 F. Supp. 2d at 546 (quoting *Cohen v. Elephant Wireless, Inc.*, No. 03 Civ. 4058(CBM), 2004 WL 1872421, at *2 (S.D.N.Y. Aug. 19, 2004)).

98. See *supra* notes 83-85 and accompanying text.

99. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

100. *Id.* at 558-59. The Court seemed particularly concerned about the potential discovery costs in the type of case before it—an antitrust claim. *Id.*

101. *Id.* at 559 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005)).

102. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). The *Iqbal* Court further noted that “[t]he costs of diversion are only magnified when Government officials are charged with

The Court's concern over the potential cost of litigation was thus clearly one of the primary rationales for the plausibility standard articulated in these decisions. It is a fair concern that complex antitrust litigation, or litigation against high-level governmental workers, will result in expensive, time-consuming discovery for defendants. The potential time and cost of litigation runs both ways, however, and frivolous or implausible affirmative defenses can also be quite expensive. Indeed, "[b]oilerplate defenses clutter docket[s]; they create unnecessary work, and in an abundance of caution require significant unnecessary discovery."¹⁰³ A plaintiff subjected to an implausible affirmative defense thus faces increased and unnecessary discovery costs when forced to pursue the merits of an implausible claim. In addition, a doubtful affirmative defense weighs down the docket, as the court must consider the validity of allowing the defense to proceed. Just as an implausible allegation unnecessarily burdens the defendant with increased litigation costs, an implausible affirmative defense results in time-consuming and expensive discovery for the plaintiff. By adopting the plausibility standard for affirmative defenses, "a plaintiff will not be left to the formal discovery process to find-out [sic] whether the defense exists and may, instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense."¹⁰⁴

The cost of frivolous affirmative defenses was a significant concern well before *Twombly*, and the lower courts are replete with decisions requiring far more than simply a plain statement of the defense.¹⁰⁵ When affirmative defenses "amount to nothing more than mere conclusions of law and are not warranted by any asserted facts," such defenses "have no efficacy."¹⁰⁶ This type of affirmative

responding to ... 'a national and international security emergency unprecedented in the history of the American Republic.'" *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007)).

103. *Palmer v. Oakland Farms*, No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010) (citation omitted) (internal quotation marks omitted).

104. *Id.* at *5.

105. *See, e.g., supra* notes 93-96 and accompanying text.

106. *Shechter v. Comptroller of N.Y.C.*, 79 F.3d 265, 270 (2d Cir. 1996) (quoting *Nat'l Acceptance Co. of Am. v. Regal Prods., Inc.*, 155 F.R.D. 631, 634 (E.D. Wisc. 1994)); *see also LaSalle Bank N.A. v. Paramount Props.*, 588 F. Supp. 2d 840, 860 (N.D. Ill. 2008) ("Even under the liberal notice pleading standard of the Federal Rules, an affirmative defense must include direct or inferential allegations as to all elements of the defense asserted.").

defense, which includes “bald assertions’ unaccompanied by supporting facts,” must “be stricken.”¹⁰⁷ In doing so, a court will “avoid the expenditure of time and money that must arise from litigating spurious issues.”¹⁰⁸ And in striking an improper affirmative defense, a court “will remove unnecessary clutter from the case,” thus “serv[ing] to expedite, not delay.”¹⁰⁹ This pre-*Twombly* concern over the time and cost associated with frivolous affirmative defenses likely led the courts to treat a motion to strike a defense under a standard similar to a motion to dismiss a complaint, as discussed above.¹¹⁰ In addition, these cost concerns—which are analogous to the cost concerns the Court raised in *Twombly* and *Iqbal*—strongly support extending the plausibility standard to the affirmative defense.

In addition to the unnecessary costs of implausible litigation, *Twombly* and *Iqbal* raised the issue of basic fairness to defendants. The Court believed that requiring a plaintiff to do more than simply parrot the language of a statute or assert pure legal conclusions was reasonable.¹¹¹ A plaintiff must instead state enough facts to give rise to a plausible claim.¹¹² The Court also required that the defendant receive “fair notice” of the allegations against it.¹¹³ The *Twombly* Court was clear that this notice “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹¹⁴ And *Iqbal* confirms that the plaintiff must

107. *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (quoting *Shechter*, 79 F.3d at 270); see also *Codest Eng'g v. Hyatt Int'l Corp.*, 954 F. Supp. 1224, 1228 (N.D. Ill. 1996) (“[A]ffirmative defenses must set forth a ‘short and plain statement’ of the defense. If an affirmative defense is insufficient on its face or comprises no more than ‘bare bones conclusory allegations,’ it must be stricken.” (quoting *Heller Fin. v. Midwhay Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989))).

108. *Smith v. Wal-Mart Stores*, No. C 06-2069 SBA, 2006 WL 2711468, at *2 (N.D. Cal. Sept. 20, 2006) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)); see also *Whittlestone v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (same).

109. *LaSalle Bank N.A.*, 588 F. Supp. 2d at 860 (quoting *Heller Fin.*, 883 F.2d at 1294) (internal quotation marks omitted); see also *FDIC v. Pelletreau & Pelletreau*, 965 F. Supp. 381, 389 (E.D.N.Y. 1997) (“Increased time and expense of trial may constitute sufficient prejudice to warrant granting a plaintiff’s motion to strike.”).

110. See *supra* text accompanying notes 93-96.

111. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

112. See generally *Iqbal*, 129 S. Ct. 1937; *Twombly*, 550 U.S. 544.

113. *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

114. *Id.*

provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”¹¹⁵ Thus, in fairness to the defendant, a plaintiff must set forth enough facts in the complaint to plausibly state a claim to relief and thereby provide the defendant with sufficient notice of the allegations.

Of course, fairness in litigation is a concern for plaintiffs as well, and plaintiffs are entitled to “fair notice of the nature of the defense” that is being asserted.¹¹⁶ A plaintiff that receives only a “formulaic recitation” of the affirmative defense,¹¹⁷ or an “unadorned,”¹¹⁸ the-plaintiff-is-not-entitled-to-relief defense, has not been given the basic notice required under the Federal Rules. A defendant providing only these types of “bald assertions’ unaccompanied by supporting facts” will not have given the plaintiff the fair notice that *Twombly* and *Iqbal* require.¹¹⁹ Fairness in pleading and under the Federal Rules should be *symmetric*, and a plaintiff should be entitled to the same level of notice of the affirmative defenses asserted in the case as the defendant receives of the allegations against it. The basic reasoning of *Twombly* and *Iqbal*—that fairness dictates that a defendant receive notice of enough facts to state a plausible claim—applies with equal force to the affirmative defense. Equity thus requires that the plausibility standard apply not only to a plaintiff’s allegations, but to a defendant’s affirmative defenses as well. As one federal court has already concluded, “‘the considerations of fairness, common sense and litigation efficiency dictate’ that litigants articulate complaints and affirmative defenses according to the same pleading standards.”¹²⁰

Moreover, the forms attached to the appendix of the Federal Rules of Civil Procedure likely provide some additional support for a plausibility analysis for affirmative defenses. These forms “suffice under the [Federal Rules of Civil Procedure] and illustrate the

115. *Iqbal*, 129 S. Ct. at 1949.

116. *Codest Eng’g v. Hyatt Int’l Corp.*, 954 F. Supp. 1224, 1228 (N.D. Ill. 1996).

117. *See Twombly*, 550 U.S. at 545.

118. *Iqbal*, 129 S. Ct. at 1949.

119. *See Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (quoting *Shechter v. Comptroller of N.Y.C.*, 79 F.3d 265, 270 (2d Cir. 1996)). *See generally Iqbal*, 129 S. Ct. 1937; *Twombly*, 550 U.S. 544.

120. *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010) (quoting *Palmer v. Oakland Farms*, No. 5:10cv00020, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010)).

simplicity that these rules contemplate.”¹²¹ More specifically, Form 30 sets forth an example of an acceptable statement of an affirmative defense, providing that “[t]he plaintiff’s claim is barred by the statute of limitations because it arose more than __ years before this action was commenced.”¹²² This example contains more than a simple statement of the defense as required by the complaint-only reading of the statute. Such a reading would only require a statement that the claim “is barred by the statute of limitations.”¹²³ Instead, the example provides *factual support* for the defense—stating that the claim arose before the time frame set forth in the relevant statute.¹²⁴ By suggesting that a proper affirmative defense include this type of factual information, this form seems to support the all-pleadings approach to Rule 8(c).¹²⁵ Nonetheless, given the lack of factual specificity required by the form, there is certainly room for debate as to the extent to which the form supports the all-pleadings approach.¹²⁶ And the limited factual requirements of this form should definitely be considered in an analysis of this issue.¹²⁷

121. FED. R. CIV. P. 84; *cf.* *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011) (discussing Form 30); *Tyco Fire Prod. v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011) (same).

122. FED. R. CIV. P. Form 30.

123. *Id.*

124. *Id.*

125. *See Francisco*, 2010 WL 2990159, at *8 (noting that Form 30 “underscores the notion that a defendant’s pleading of affirmative defenses should be subject to the same pleading standard as a plaintiff’s complaint because it includes factual assertions in the example it provides”).

126. *See* FED. R. CIV. P. Form 30. It is, of course, possible that Form 30 simply “overpleads” the affirmative defense by including factual support. In this regard, perhaps the form provides more than is actually required under the Rules.

127. Though the defendant’s pleading obligations do appear quite minimal in this sample form, the burden is in some ways comparable to the plaintiff’s requirements. In this regard, Form 11 in the appendix to the Federal Rules similarly provides that a plaintiff’s claim for negligence need only state that “[o]n Date, at Place, the defendant negligently drove a motor vehicle against the plaintiff.” FED. R. CIV. P. Form 11. For a plaintiff’s negligence claim to survive a motion to dismiss, then, the plaintiff must state only minimal facts supporting that claim—one short sentence. Indeed, the *Twombly* Court specifically approved of this form in its decision, indicating that it would satisfy the plausibility standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (discussing Form 11 in its previous Form 9 version, and stating that “[a] defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer”). Thus, just as Form 11, with its limited factual requirement for plaintiffs, has been read by the Supreme Court to satisfy the plausibility requirement, Form 30, with its limited factual requirement for defendants, could similarly be read as requiring the defendant to provide basic factual support for its affirmative defense.

Finally, practical considerations strongly favor the all-pleadings approach to Rule 8(c) over the complaint-only reading. As already noted, from the standpoint of equity, it is fair to hold the defendant's affirmative defense to the same standard as the plaintiff's complaint.¹²⁸ Providing the plaintiff with some basic facts about the defense supplies the fundamental notice required to investigate and research the defendant's claim. And the facts required as part of the defendant's statement will typically not be unduly burdensome to provide. As Form 30 demonstrates, a short, simple sentence asserting the affirmative defense and providing the facts necessary to support that defense will often suffice. In more complex cases, however, the pleading of additional facts may be necessary.

Moreover, in many instances, the defendant will have quick access to the information necessary to support the affirmative defense. This information should frequently be within the defendant's own possession. Thus, asserting common affirmative defenses—such as the statute of limitations defense discussed above—will often not even require the defendant to engage in an exhaustive investigation. By contrast, however, plaintiffs will typically have a much more difficult time satisfying the plausibility standard, as they may often not have such easy access to the required information. An excellent example of this distinction is the showing of discriminatory intent required by the *Iqbal* decision.¹²⁹ Establishing discriminatory intent can be quite difficult, particularly without access to discovery and the depositions of those allegedly involved in the unlawful acts.¹³⁰

Finally, it is a fair concern that defendants have significantly less time to develop their affirmative defenses than plaintiffs have in asserting their claims. As noted, under Rule 12(a), a party has only twenty-one days from the date of service to answer the complaint and set forth its affirmative defenses.¹³¹ However, given that most

See Seiner, *supra* note 60, at 182-83 (discussing Form 11); Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1050 (same).

128. See *supra* notes 117-21 and accompanying text.

129. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

130. See *infra* Part III.A (discussing the difficulty of establishing discriminatory intent).

131. See FED. R. CIV. P. 12(a) (setting forth the time limit to respond to a complaint); see also *Palmer v. Oakland Farms*, No. 5:10cv00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010).

of the information necessary to articulate the defense will typically be in the defendant's possession, this time frame should not be particularly problematic.¹³² And, when the defendant—after filing its answer—uncovers additional information necessary to support or assert a particular defense, the courts should liberally allow that defendant to amend pursuant to Rule 15 of the Federal Rules of Civil Procedure.¹³³ Indeed, through “flexibility of amendment” a court “softens any painful blow” of the pleading requirements.¹³⁴ Not surprisingly, then, the “majority of cases applying the *Twombly* pleading standard to affirmative defenses and striking those defenses have permitted the defendant leave to amend.”¹³⁵

This is not to say that there will not be some instances in which defendants experience difficulty uncovering information necessary to assert a particular defense. For example, a defendant may have to engage in some level of discovery to adequately establish an assumption of the risk or contributory negligence defense. In these types of cases, defendants may not always have easy access to the information required. Just like the difficulty some plaintiffs may face in plausibly establishing their claims without discovery, some defendants may encounter similar problems in pleading their defenses. In these instances, the courts should be more flexible in allowing limited discovery on these issues or in permitting the defendant to either amend its pleadings following discovery or further investigate the allegations. Thus, although the all-pleadings approach is not without its drawbacks, a symmetric approach to the Federal Rules—applying the plausibility standard to both plaintiffs and defendants—would provide the most equitable result. And if the courts continue their flexible approach to certain cases, it would

132. See *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) (recognizing short time period to assert affirmative defense but noting that “*Twombly* and *Iqbal* require only minimal facts establishing plausibility, a standard this Court presumes most litigants would apply when conducting the abbreviated factual investigation necessary before raising” the defense).

133. See FED. R. CIV. P. 15(a) (setting forth the rule on amending pleadings).

134. *Francisco*, 2010 WL 2990159, at *8; see also *Palmer*, 2010 WL 2605179, at *5 (encouraging liberal amendment and noting that “[b]y way of *caveat* it must be noted that litigants do not always know all the facts relevant to their claims or to their defenses until discovery has occurred”).

135. *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 652 (D. Kan. 2009).

assure that the pleadings standards are not unfairly prejudicing defendants.¹³⁶

As discussed earlier, the federal appellate courts have yet to consider this issue.¹³⁷ However, a number of lower courts have adopted this broader reading of the plausibility standard, applying the *Iqbal* and *Twombly* reasoning to a defendant's affirmative defenses.¹³⁸ These courts have concluded that "[a]n even-handed standard" for such defenses will require the defendant to "supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery."¹³⁹ In addition, the courts have noted that "[t]o require less of a defendant" than a plaintiff "sets the pleading bar far too low."¹⁴⁰ Thus, the "[p]laintiff should not be left to discover the bare minimum facts constituting a defense until discovery,"¹⁴¹ and "a wholly conclusory affirmative defense is not sufficient."¹⁴²

136. *See id.* at 651-52.

137. *See supra* note 80 and accompanying text.

138. *See, e.g.,* *Openmethods, LLC v. Mediu, LLC*, No. 10-761-CV-W-FJG, 2011 WL 2292149, at *2 (W.D. Mo. June 8, 2011) ("This Court finds this reasoning persuasive and agrees that the *Iqbal* and *Twombly* standards should apply to affirmative defenses."); *Palomares v. Second Fed. Sav. & Loan Ass'n of Chi.*, No. 10-cv-6124, 2011 WL 2111978, at *1 (N.D. Ill. May 25, 2011) ("Affirmative defenses must also contain sufficient factual matter, accepted as true, to state an affirmative defense to relief that is plausible on its face."); *J & J Sports Prods. v. Mendoza-Govan*, No. C 10-05123 WHA, 2011 WL 1544886, at *1 (N.D. Cal. Apr. 25, 2011) (holding that plausibility standard applies to affirmative defenses); *Lucas v. Jerusalem Café*, No. 4:10-cv-00582-DGK, 2011 WL 1364075, at *2 (W.D. Mo. Apr. 11, 2011) ("It makes little sense to hold defendants to a lower pleading standard than plaintiffs."); *United States v. Brink*, No. C-10-243, 2011 WL 835828, at *3 (S.D. Tex. Mar. 4, 2011) ("[T]his Court will also apply the plausibility standard articulated in *Twombly* and *Iqbal* in assessing the sufficiency of affirmative defenses."); *Ulyssix Tech., Inc., v. Orbital Network Eng'g, Inc.*, No. ELH-10-02091, 2011 WL 631145, at *15 (D. Md. Feb. 11, 2011) (holding that plausibility standard applies to affirmative defenses); *Nixon v. Health Alliance*, No. 1:10-CV-00338, 2010 WL 5230867, at *1-2 (S.D. Ohio Dec. 16, 2010) ("The Court agrees with the reasoning of the courts applying the *Iqbal/Twombly* pleading standard to defenses."). Numerous cases have addressed this issue, and the previous list provides a few illustrative examples of courts that have applied the plausibility standard to affirmative defenses.

139. *Francisco*, 2010 WL 2990159, at *7 (quoting *Burget v. Capital W. Sec., Inc.*, No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009)) (internal quotation marks omitted).

140. *Palmer v. Oakland Farms*, No. 5:1cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010).

141. *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *2 (S.D. Fla. May 29, 2008).

142. *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007).

The analysis of these courts is persuasive, and the reasoning of these cases emphasizes that the Federal Rules should be symmetric.¹⁴³ In the end, basic considerations of equity and fairness require that the same pleading standard be applied to both plaintiffs and defendants—strongly suggesting that the all-pleadings approach to Rule 8(c) is the correct analysis of this issue.

III. AN EXAMPLE OF THE ALL-PLEADINGS APPROACH: THE EMPLOYER'S AFFIRMATIVE DEFENSE TO SEXUAL HARASSMENT

The *Twombly* and *Iqbal* decisions have been enormously controversial, and the federal judiciary and legal academy continue to struggle with how to interpret and apply these decisions across the broad spectrum of civil law.¹⁴⁴ The plausibility standard announced in these cases has had a notable impact in the civil rights area.¹⁴⁵ More specifically, some plaintiffs have had difficulty satisfying this standard in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.¹⁴⁶ These types of cases are fact specific and often turn on

143. See also *Home Mgmt. Solutions, Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) ("Without some factual allegation in the affirmative defense, it is hard to see how a defendant could satisfy the requirement of providing not only fair notice of the nature of the defense, but also grounds on which the defense rests." (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal quotation marks omitted)). See generally *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620 (S.D.N.Y. 2008).

144. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 560 ("*Twombly's* most obvious and immediate consequence has been enormous confusion and transaction costs as a result of uncertainty about the requirements it imposes and its scope of application."); Clermont & Yeazell, *supra* note 60, at 859 ("*Twombly* and *Iqbal* have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process through which all litigation must pass."); Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) ("[I]t was irresponsible for the Court to invite the controversial 'plausibility' concept into pleading doctrine in a way that has led to such widespread confusion.").

145. See Hannon, *supra* note 42, at 1836-37.

146. See generally JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (providing a study of the impact of *Iqbal* on motions to dismiss in a wide range of cases, including employment discrimination and civil rights); Joseph Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010); Seiner, *supra* note 127, at 1027-31; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 32 (2010) ("Employment discrimination may be one of the areas most affected by the increased role of judges in deciding motions to dismiss.").

the question of discriminatory intent.¹⁴⁷ As the *Iqbal* decision plainly demonstrates, plausibly pleading discriminatory intent in a civil rights matter can be a difficult threshold to satisfy—and this is no less true for victims of employment discrimination.¹⁴⁸ Given the difficulty plaintiffs often face in articulating their workplace claims, it stands to reason that defendants may have similar trouble responding to employment discrimination suits and establishing their affirmative defenses in these matters.

How the all-pleadings approach discussed above should be applied to an affirmative defense is a fact-specific inquiry that will hinge on the particular claim alleged in the case. A serious question remains as to whether the plausibility standard is transsubstantive.¹⁴⁹ Nonetheless, the application of this standard will depend at least somewhat on the type of affirmative defense involved.¹⁵⁰ For example, the facts necessary to plausibly assert a statute of limitations defense will differ greatly from the facts necessary to show waiver. This Part explores the parameters of the plausibility standard through the lens of perhaps the most critical affirmative defense in employment discrimination law—an employer’s defense to sexual harassment. By examining the contours of an affirmative defense in the area of the law most affected by *Twombly* and *Iqbal*, this Part aims to bring to life the amorphous plausibility standard established by these decisions.¹⁵¹

As a preliminary matter, though this Part examines a critical defense under employment discrimination law, it does so only by way of example, and many defenses to other workplace allegations remain unexplored. Most notably, defendants often assert the di-

147. See Seiner, *supra* note 60; see also Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1640-43 (2011) (discussing impact of *Twombly* and *Iqbal* on employment discrimination cases).

148. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-52 (2009); Sullivan, *supra* note 147, at 1639-43.

149. See generally Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 69-70 n.98 (2010); Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 91 (2010) (“With *Twombly* and *Iqbal*, it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules.”).

150. As the *Iqbal* Court noted, “[d]etermining whether a complaint states a plausible claim for relief” is “a context-specific task.” *Iqbal*, 129 S. Ct. at 1950.

151. See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 160 (2008) (referencing the “amorphous concept of ‘plausibility’”).

rect-threat defense to claims under the Americans with Disabilities Act and the good-faith defense to punitive damages in response to employment discrimination litigation.¹⁵² By examining one important defense, however, this Article attempts to explain how the plausibility standard should be applied to other areas of employment law and, more importantly, how it should be applied more broadly in all civil cases.

A. *The Faragher-Ellerth Defense to Sexual Harassment*

Sexual harassment has a complex and controversial history under Title VII.¹⁵³ This type of discrimination is derived from the statute's language, which makes it unlawful for an employer to take an adverse action "or otherwise to discriminate against" a person "with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's ... sex."¹⁵⁴ The statute does not specifically mention sexual harassment, but this theory of discrimination has been read into Title VII by the Supreme Court, and it is also identified by the federal regulations.¹⁵⁵

As sexual harassment arose without a clear statutory underpinning, this theory of discrimination has been the source of significant litigation.¹⁵⁶ Over the years, however, case law has clarified what a

152. See 42 U.S.C. § 12113(b) (2006) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)) (internal quotation marks omitted)).

153. See, e.g., Kenneth Pollack, *Current Issues in Sexual Harassment Law*, 48 VAND. L. REV. 1009, 1010 (1995) ("[S]exual harassment has become an oft-discussed and increasingly litigated issue.").

154. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

155. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986) (referencing EEOC guidelines on sexual harassment and holding that this theory of discrimination is viable under Title VII); Pollack, *supra* note 153, at 1010 n.2 ("Although Title VII does not expressly prohibit sexual harassment, the United States Supreme Court has held that such conduct is discrimination on the basis of sex with respect to the terms, conditions, and privileges of an individual's employment and thus violates Title VII.").

156. See Theresa Beiner, *Let the Jury Decide: The Gap Between What Judges and*

plaintiff must show to prevail on a sexual harassment claim. Indeed, the Supreme Court has established a number of factors for the courts to consider when evaluating this type of discrimination. Specifically, to prevail in a sexual harassment suit in which no tangible employment action is involved,¹⁵⁷ a plaintiff will typically have to show that the conduct occurred because of sex, was unwelcome, and was severe or pervasive.¹⁵⁸ Additionally, the plaintiff must impute liability to the employer in one of two ways. First, the plaintiff can prove that the employer acted negligently by showing that the defendant knew or should have known of the conduct but failed to take appropriate remedial action—as is typically established in *coworker* harassment cases.¹⁵⁹ Alternatively, the plaintiff can impute liability by demonstrating that a *supervisor* was involved in the harassing conduct.¹⁶⁰

In its decisions in *Faragher v. City of Boca Raton*¹⁶¹ and *Burlington Industries, Inc. v. Ellerth*,¹⁶² the Supreme Court carved out an affirmative defense for employers when the plaintiff successfully establishes that a *supervisor* created a hostile working environment. To prevail on this affirmative defense, the employer must prove, by a preponderance of the evidence, the following two factors: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any

Reasonable People Believe Is Sexually Harassing, 75 S. CAL. L. REV. 791, 792 (2002) (“From its inception, sexual harassment law has been difficult to place among the other theories of employment discrimination already developed by the courts.”).

157. When the plaintiff can demonstrate that the employer took a tangible employment action, such as discharge or failing to promote, because of sex, vicarious liability is imputed to the employer. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (“No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”).

158. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-82 (1998) (discussing “because of” requirement for sexual harassment); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting that the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” (quoting *Vinson*, 477 U.S. at 67) (internal quotation marks omitted)); *Vinson*, 477 U.S. at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”).

159. See *Ellerth*, 524 U.S. at 759 (“An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”).

160. See *id.* at 764-65.

161. 524 U.S. 775 (1998).

162. 524 U.S. 742 (1998).

preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁶³

Faragher and *Ellerth* offer a complete defense to the employer. Thus, when the defendant is able to successfully carry its burden of establishing the two components of the affirmative defense, the employer may avoid all liability in the case.¹⁶⁴

B. The All-Pleadings Approach

Under the all-pleadings approach to Rule 8(c) affirmative defenses discussed above, a defendant must assert enough facts to plausibly state its defense.¹⁶⁵ As already discussed, this is a fairly low threshold, as a defendant must simply provide enough facts to give the plaintiff fair notice of the defense.¹⁶⁶ What it means to satisfy this plausibility standard for the sexual harassment affirmative defense turns on each of the two necessary components of this defense. It is useful to consider each element in turn. This Article considers each of these elements in the context of the most straightforward application of the affirmative defense—when the defendant has established a complaint procedure that the plaintiff has failed to utilize. Given the factual nature of the defense, however, there are almost limitless variations on how an employer might adequately establish these elements.

The first element of the *Faragher-Ellerth* defense requires the employer to show that it used reasonable care to avoid a hostile working environment.¹⁶⁷ To establish this element, employers typically must demonstrate that they have adopted an antiharassment policy and complaint procedure through which a victim of sexual harassment could complain.¹⁶⁸ Simply having a sexual harassment

163. *Id.* at 765; see also *Faragher*, 524 U.S. at 807.

164. See *Ellerth*, 524 U.S. at 765 (“When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages.”).

165. See *supra* Section II.B (discussing the all-pleadings approach to affirmative defenses).

166. See *supra* Section II.B (discussing the all-pleadings approach to affirmative defenses).

167. See *Ellerth*, 524 U.S. at 765. See generally Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 324 (2004) (“The affirmative defense essentially requires the employer to prove that it was not negligent in failing to prevent or correct the harassment and ... that the plaintiff was negligent in failing to mitigate her own harm.”).

168. See *Ellerth*, 524 U.S. at 765 (“While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a

policy in place is not enough, however, and employers must effectively implement and maintain that policy.¹⁶⁹ To be effective, a company policy must be communicated to the employees.¹⁷⁰ Beyond this, however, an employer can strengthen its affirmative defense by showing that it conducted antiharassment training and provided education to its workers on the policies in place.¹⁷¹ Employers should also consider incorporating several avenues in the policy whereby an employee can go to complain about harassment.¹⁷² Such avenues

matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”); see also John H. Marks, *Smoke, Mirrors, and the Disappearance of ‘Vicarious’ Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1419 (2002) (“Preventive measures typically consist of formalized anti-harassment policies and grievance procedures that include a harassment complaint mechanism.”).

169. See Paul Buchanan & Courtney Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 63 (1999) (“The existence of an effective and enforced anti-harassment policy will be the centerpiece of an employer’s defense.”).

170. See *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 21 (1st Cir. 2002) (“[T]he availability of the affirmative defense often will turn on whether the employer had established and disseminated an anti-discrimination policy, complete with a known complaint procedure.”); Buchanan & Wiswall, *supra* note 169, at 63 (“It is critical that the employer be able to establish that its policy was effectively communicated to all employees.”); Nancy R. Mansfield & Joan T.A. Gabel, *An Analysis of the Burlington and Faragher Affirmative Defense: When Are Employers Liable?*, 19 LAB. LAW. 107, 121 (2003) (noting that courts consider “whether ... the employer distributed the anti-harassment policy”); Heather Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 622 (2006) (“[T]he trier of fact should ascertain whether the employer maintained an antiharassment policy and, if so, whether the victim knew of the employer’s antiharassment policy.”).

171. See Buchanan & Wiswall, *supra* note 169, at 64 (“Employers should regularly conduct training to educate employees about harassment and company policies.”); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 697 (2000) (“Reasonable care to prevent harassment may also require employers to offer employees training sessions about the new policy and procedures or about sexual harassment in general.”); see also *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1062 (10th Cir. 2009) (“[T]he existence of a sexual harassment policy and training alone does not satisfy the employer’s burden under the first prong of the *Ellerth/Faragher* defense.”).

172. See Buchanan & Wiswall, *supra* note 169, at 63 (“The policy should provide multiple avenues for an employee to report inappropriate conduct and to seek help.”); David Sherwyn et al., *Don’t Train Your Employees and Cancel Your ‘1-800’ Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1290 (2001) (“[T]he overwhelming majority of cases holds that an employer exercises reasonable care when it has a policy that is disseminated to all employees, and it provides employees with an opportunity to report the harassment to someone other than a harassing supervisor.”).

can include just about any company official, a human resources worker, or even an anonymous messaging service.¹⁷³ The policy should be updated frequently, and those with authority to respond to complaints should understand their role in preventing workplace discrimination.¹⁷⁴ An effective policy should also make clear that retaliation against those who avail themselves of the complaint procedure will not be tolerated.¹⁷⁵

In all, to have a policy that satisfies the *Faragher-Ellerth* standard, an employer must reasonably tailor its procedures to the particular working environment and do its best to eradicate discrimination by encouraging victims of harassment to utilize an effective complaint process.¹⁷⁶ One survey of federal court decisions concluded that when an employer is able to show that it has implemented an antiharassment policy and complaint process, and when that employer has “evidence of reasonable efforts to investigate all sexual harassment grievances,” many courts have concluded that the first element of the defense is satisfied.¹⁷⁷

Thus, to plausibly state the first element of the *Faragher-Ellerth* affirmative defense, employers should allege, at a minimum, the following facts in their responsive pleading: (1) that the company has implemented and effectively maintained a policy prohibiting harassment and (2) that the policy includes a complaint process of which the plaintiff could have availed herself. Depending upon the nature of the case and the specifics of the allegations involved, the

173. See also *Weger v. City of Ladue*, 500 F.3d 710, 719-20 (8th Cir. 2007) (“[W]e have held that an employer exercised reasonable care to prevent harassment where it distributed its antiharassment policy to all of its employees, and the policy’s complaint procedure identified three company officials to whom harassment could be reported.” (quoting *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006)) (internal quotation marks and brackets omitted)).

174. See *Buchanan & Wiswall*, *supra* note 169, at 63-64.

175. See *id.* (“The policy should also contain a strong statement making clear that the employer will not in any way retaliate against any person reporting or confirming the existence of harassing acts in the workplace.” (citation omitted)).

176. See *Mansfield & Gabel*, *supra* note 170, at 122 (“[C]ourts have noted situations in which the employer did not reasonably tailor their policies to prevent or correct alleged harassment.”); see also *Minix v. Jeld-Wen, Inc.*, 237 F. App’x 578, 584 (11th Cir. 2007) (“[W]e have consistently held that where an employer promulgates a comprehensive anti-harassment policy—one that is effectively communicated to employees and that contains reasonable complaint procedures—the employer has satisfied its burden on the prevention prong of the first element.”).

177. See *Mansfield & Gabel*, *supra* note 170, at 121.

defendant should also strongly consider pleading any additional facts that would bolster its defense. Such additional facts could include whether the employer conducted sexual harassment training, the extent to which the policy was communicated to the plaintiff and the defendant's other workers, and the fact that multiple avenues of complaint were available to the plaintiff.

Of course, this list is not exhaustive, and the defendant should plead any specific facts about the policy that demonstrate that the company appropriately tailored the complaint procedure to its particular working environment. Moreover, in those instances in which the plaintiff did complain pursuant to the policy, the employer should indicate any relevant facts showing that the company response was reasonable in attempting to "correct" the situation.¹⁷⁸ By providing these facts in the responsive pleading, all of which should be well within the employer's knowledge at the time the answer is filed, the defendant will have clearly articulated to the plaintiff the nature of its defense and will have plausibly stated the first element of the *Faragher-Ellerth* affirmative defense.

The second element of the *Faragher-Ellerth* defense requires the employer to show that the plaintiff "unreasonably failed" to avail herself of "any preventive or corrective opportunities" offered by the defendant or that the plaintiff failed to "avoid harm otherwise."¹⁷⁹ To establish this element, an employer should show that despite being aware of the policy, the plaintiff nonetheless unreasonably failed to properly complain through the channels established by the employer.¹⁸⁰ What is "unreasonable" conduct on the part of the employee is obviously a highly fact-intensive inquiry. This element is often satisfied, however, by showing that the plaintiff simply failed to complain *at all* when a proper policy was in place.¹⁸¹ In this

178. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). As noted earlier, however, this Article primarily contemplates the most straightforward application of the *Faragher-Ellerth* defense in which the defendant has established a complaint procedure that the plaintiff has failed to use. See *supra* Part III.B.

179. *Ellerth*, 524 U.S. at 765.

180. *Id.* ("And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.")

181. See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 242 (2004) ("When the plaintiff does not report the harassment to her employer, the employer often prevails on its motion for summary

regard, *Faragher* makes clear that a plaintiff's unreasonable failure to use the company-established complaint process "will normally suffice to satisfy the employer's burden under the second element of the defense."¹⁸² Demonstrating that the plaintiff unreasonably failed to complain is thus the most straightforward way of establishing this prong of the affirmative defense.¹⁸³ It is worth noting that this element can be strengthened when the company has established multiple channels for the plaintiff to complain and when the plaintiff has failed to use any of these available avenues.¹⁸⁴ A defendant will also have a stronger defense when the alleged harasser is not one of those designated to receive complaints under the policy,¹⁸⁵ though this issue is certainly not dispositive when the employer has established alternative avenues for the worker to complain.¹⁸⁶

Beyond showing that the plaintiff unreasonably failed to complain, the alternative methods of establishing the second element of the defense are much less clear. Indeed, given the fact-specific nature of the working environment, the various types of policies an employer might implement, and the range of ways that an employee could respond to a hostile working atmosphere, there are numerous possible approaches to establishing this second element. As discussed earlier, this Article primarily contemplates those situations in which the plaintiff has failed to complain.¹⁸⁷ It should be noted,

judgment or judgment as a matter of law."); see also *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003) ("There is no bright-line rule as to when a failure to file a complaint becomes unreasonable, but *Faragher* and *Ellerth* do provide indirect guidance.... [M]ore than ordinary fear or embarrassment is needed.").

182. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (emphasis added); see also ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW* 517 (7th ed. 2004) (discussing affirmative defense).

183. See *Mansfield & Gabel*, *supra* note 170, at 124 ("District and circuit courts have generally found that the employer will prevail [on the second prong] if either (1) a reasonable person in the employee's position would have come forward earlier or to a designated manager in order to prevent the harassment from becoming more severe or (2) the employee fails entirely to report the harassment." (citations omitted)).

184. See *Buchanan & Wiswall*, *supra* note 169, at 63.

185. See, e.g., *Faragher*, 524 U.S. at 808 (discussing problems with employer's sexual harassment policy, including that it "did not include any assurance that the harassing supervisors could be bypassed in registering complaints").

186. See, e.g., *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1037 (7th Cir. 1998) ("[Plaintiff] provides no support for her argument that an employer's designation of one avenue for complaints in its sexual harassment policy forecloses the possibility of making complaints elsewhere.").

187. See *supra* Part III.B.

however, that even when the plaintiff filed an internal complaint, the defendant may still be able to avail itself of the affirmative defense.¹⁸⁸ In these scenarios, the employer should plead those facts supporting its argument that its response to the complaint was appropriate and reasonable.¹⁸⁹ Additional facts that could strengthen this argument include whether the plaintiff failed to report the harassment “in a timely manner” or whether the plaintiff reported the harassment through the proper channels.¹⁹⁰

The Court also created an alternative avenue to establish the second element of the defense—in which defendants can show that the plaintiff failed to “avoid harm otherwise.”¹⁹¹ In *Faragher* and *Ellerth*, the Court was not particularly clear as to what would satisfy this alternative to the second component of the affirmative defense.¹⁹² Not surprisingly, the case law and academic literature have provided little guidance on the parameters of this part of the defense.¹⁹³ Like the other considerations of the *Faragher-Ellerth* defense, this is likely a fact-intensive inquiry. Given the ambiguity surrounding this particular alternative component of the defense, it is unclear exactly what facts the defendant would need to allege to plausibly plead that the plaintiff failed to “avoid harm otherwise.”¹⁹⁴ Nonetheless, when the plaintiff’s conduct may suggest a

188. See Lawton, *supra* note 181, at 242-43 (“Even when a plaintiff does report harassment, however, many federal courts interpret prong two of the affirmative defense in ways that make it easier for an employer to prove that the plaintiff employee unreasonably failed to avail herself of her employer’s internal reporting mechanisms.”).

189. See *id.* (discussing various approaches of the courts in their treatment of the second prong of the affirmative defense when the plaintiff complains under an employer’s policy).

190. See Mansfield & Gabel, *supra* note 170, at 125-27.

191. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

192. See generally *Ellerth*, 524 U.S. 742; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

193. See Margaret E. Johnson, “Avoiding Harm Otherwise”: Reframing Women Employees’ Responses to the Harms of Sexual Harassment, 80 TEMP. L. REV. 743, 752 (2007) (“To date, most courts and scholars have not recognized the meaning and potential power of the ‘avoid harm otherwise’ component of the affirmative defense.”).

194. See also BELTON ET AL., *supra* note 182, at 518-19 (discussing the “avoid harm otherwise” language from the Supreme Court); *cf. id.* at 788-89 (“[M]any courts simply fail to consider whether the employee ‘avoided harm otherwise’ when analyzing the affirmative defense. This failure is a result of either conflating the two components of the employee-focused prong into one component or truncating the prong to exclude the ‘avoid harm otherwise’ component altogether.”).

failure to avoid harm, or a willingness to put one's self in harm's way, the defendant should plead these facts as part of its answer.

In sum, to plead the second element of the affirmative defense, an employer must allege sufficient facts to plausibly show that the plaintiff "unreasonably failed" to avail herself of "any preventive or corrective opportunities" offered by the defendant or that the plaintiff failed to "avoid harm otherwise."¹⁹⁵ This will usually be done by alleging facts that show that the plaintiff unreasonably failed to avail herself of an effective complaint process established by the employer.¹⁹⁶ However, there are numerous other ways that a defendant could sufficiently plead this second element of the defense.

C. Summary of the All-Pleadings Approach

As discussed above, to properly assert an affirmative defense to a hostile work environment claim, a defendant must establish the two elements of the *Faragher-Ellerth* test. At a minimum, defendant can plausibly plead the first element of this defense by alleging facts establishing that the company implemented and effectively maintained an antiharassment policy and complaint procedure. Pleading additional facts, such as including information as to any sexual harassment training conducted by the employer, the extent to which the employer communicated an antidiscrimination policy to employees, and whether the employer made multiple channels of complaint available to the plaintiff, could strengthen this defense.

A defendant can plausibly plead the second element of the *Faragher-Ellerth* defense by alleging facts that establish that the plaintiff unreasonably failed to complain pursuant to the employer's policy. Though this is the most straightforward articulation of the defense—as well as the formulation contemplated by this Article—additional facts must be alleged when the plaintiff has complained. Such facts would vary depending upon the nature of the case but

195. *Ellerth*, 524 U.S. at 765.

196. See Johnson, *supra* note 193, at 787 ("[I]n deciding liability for supervisor sexual harassment cases, the courts to date have focused primarily on the limited questions of whether the employer had a policy, and, if so, whether the plaintiff employee unreasonably failed to use the formal complaint mechanism pursuant to the policy.").

could include whether the plaintiff failed to timely report the harassment or failed to report it through the proper channels.¹⁹⁷

The following example will help illustrate the type of allegations a defendant could assert in a responsive pleading to satisfy the *Faragher-Ellerth* affirmative defense to a claim of sexual harassment. To plausibly plead this defense, an employer could allege that:

The defendant is entitled to an affirmative defense to any finding of sexual harassment. The defendant in this case established and disseminated a comprehensive anti-discrimination policy to all employees—including the plaintiff—which included a statement against harassment in the workplace. This policy specified several channels where the plaintiff could complain, none of which involved the alleged harasser in this case. Despite having acknowledged receipt of the policy and complaint procedure, the plaintiff unreasonably failed to complain to any manager of the company, or to any individual specified in the policy.

This clear-cut example demonstrates the type of simple, straightforward statement that would satisfy the plausibility standard for pleading the sexual harassment affirmative defense. The defendant's statement of the affirmative defense need not be long or involve extensive details. A short paragraph summarizing the basic elements of the defense—why the defendant acted reasonably and the plaintiff unreasonably—should suffice. Yet the statement succeeds in providing the necessary information about the defense to the plaintiff, who will now be able to tailor her discovery to the specific factors alleged by the defendant. Indeed, the above statement includes information relating to what defense is being asserted (“an affirmative defense to ... sexual harassment”), the basis for the defense (employer policy and failure to complain), and provides specifics about the policy itself (communicated to all employees, included multiple channels of complaint, harasser not

197. In addition, as discussed, a defendant can satisfy the second element of the defense by pleading facts that establish that the plaintiff failed to avoid the harm—though the case law is unclear as to the parameters of this component of the defense. See *Ellerth*, 524 U.S. at 765.

named in policy). In addition, a simple internal investigation by the employer would typically reveal all of the information alleged above.

It is worth emphasizing a key limitation of the above example. Most notably, this illustration provides just one way—though perhaps one of the most common ways—of asserting this defense. Thus, the example illustrates how a defendant would allege the defense in those scenarios in which an antiharassment policy exists and the plaintiff has failed to complain pursuant to that policy. As noted earlier, however, there are countless possible variations of this defense.¹⁹⁸ For example, when the plaintiff did in fact complain, a defendant should include additional facts to demonstrate that the company attempted to “correct” the situation.¹⁹⁹ This and other possible variations further demonstrate the fact-intensive nature of the plausibility standard announced by the Supreme Court, which appears somewhat malleable to the allegations of the particular case.²⁰⁰

It is also worth considering that individual courts may read *Iqbal* as requiring even more than what is set forth above.²⁰¹ Thus, although the above example attempts to illustrate what should be required of a defendant when pleading the affirmative defense to sexual harassment, some courts could require even greater detail.²⁰² For example, a court might find the statement that the “plaintiff unreasonably failed to complain” to be overly generalized and thus require specific facts from the defendant supporting this particular assertion. Suffice it to say that the law will be unsettled for a while following *Twombly* and *Iqbal*, and the courts are likely to take varying approaches as to what level of specificity is needed to satisfy the pleading standard.²⁰³ Nonetheless, the example above provides

198. See *supra* Part III.B.

199. *Ellerth*, 524 U.S. at 765.

200. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As noted earlier, however, a serious question remains as to whether the plausibility standard is transsubstantive. See *supra* note 149 and accompanying text.

201. Similarly, some courts might require less than what is set forth above, though these courts may be inclined to follow the complaint-only approach discussed below.

202. See generally *Sullivan*, *supra* note 147 (discussing impact of *Iqbal* and *Twombly* on employment discrimination cases).

203. See generally *Clermont & Yeazell*, *supra* note 60 (discussing the impact of the plausibility standard).

a straightforward and reasonable interpretation of what plausibility pleading should look like in the sexual harassment context.

In sum, this discussion makes clear that defendants should not have substantial difficulty plausibly pleading the affirmative defense to sexual harassment claims. Defending sexual harassment claims is one of the most complex and involved areas of employment discrimination law.²⁰⁴ Nonetheless, a short, simple paragraph outlining the defense, even in this intricate area of the law, should satisfy this standard and provide sufficient notice to the plaintiff of the defense being alleged. And most, if not all, of these facts would be within the defendant's knowledge at the time the answer is filed.

D. The Complaint-Only Reading

By way of contrast, the complaint-only approach would result in a significantly different result for sexual harassment defendants. As noted earlier, this approach takes a much narrower view of *Twombly* and *Iqbal* and would limit the plausibility standard to civil pleadings filed by plaintiffs.²⁰⁵ This approach takes Rule 8(c) completely at face value and would require no more than that an employer "affirmatively state any ... affirmative defense" in its answer.²⁰⁶

Under the complaint-only approach, then, an employer defending against a hostile work environment claim would only be required to provide a basic statement of its affirmative defense. The following sample pleading would comply with this approach:

The defendant is entitled to the *Faragher-Ellerth* affirmative defense for hostile work environment claims.

The stark contrast between the examples of a satisfactory pleading under the complaint-only reading and a satisfactory pleading pursuant to the all-pleadings approach underscores the importance of this issue. The all-pleadings approach clearly requires much more of an employer and would likely necessitate that the company conduct at least a minimal investigation into the nature of the purported discrimination. In addition, the all-pleadings

204. See *supra* Part III.A.

205. See *supra* Part II.A (discussing complaint-only reading of Supreme Court decisions).

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

approach provides the plaintiff with significantly more information about the defense being asserted.

There are certainly intermediary approaches that the courts could take on this issue. It would undoubtedly be reasonable for a court to require more than a statement of a legal conclusion as to any affirmative defense but less than what is required under the all-pleadings approach.²⁰⁷ Of course, adopting this type of gray area between a legal conclusion and a plausible statement could be particularly difficult to define. As the courts will likely grapple with the plausibility standard for years, adopting a hybrid approach could potentially result in even more litigation on this issue.²⁰⁸

IV. IMPLICATIONS OF THE ALL-PLEADINGS APPROACH FOR ALL CIVIL CASES

There are numerous implications of applying the plausibility standard to affirmative defenses in all civil cases.²⁰⁹ As explained in greater detail below, the example of the affirmative defense to hostile work environment claims helps provide context to many of these implications.

Perhaps the most significant benefit of the all-pleadings approach is the simplicity and symmetry that it provides. By imposing the same pleading standard on plaintiffs and defendants, the requirements of the parties would be symmetrical. Thus, as the case law continues to develop as to the meaning of *plausibility* under the Federal Rules, this meaning could be applied to both parties in most civil cases. In this way, the courts and litigants could look to the same body of case law when evaluating the sufficiency of a party's

207. *Dann v. Lincoln Nat'l Corp.*, 274 F.R.D. 139, 145 (E.D. Pa. 2011) (“[E]ven before *Twombly* and *Iqbal*, affirmative defenses had to provide the plaintiff with fair notice of the nature of the defense.... [I]t was also the case that bare bones conclusory allegations could be stricken.” (citations omitted)).

208. *See, e.g.*, Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 142 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“So, one thing is certain after *Bell Atlantic*: it will spawn years of increased litigation.”).

209. The qualified immunity defense is particularly cumbersome and the analysis of this specific defense is beyond the scope of this Article. *See, e.g.*, John M. Greabe, *Iqbal, Al-Kidd and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law*, 20 WM. & MARY BILL RTS. J. 1 (2011).

pleadings. This approach would simply restore the way many courts viewed the standards for dismissing a complaint or an affirmative defense before *Twombly* and *Iqbal*—as *identical*.²¹⁰ The alternative approach would require developing two separate tracks of analysis, one for plaintiffs and another for defendants, to determine whether a particular pleading satisfies the Federal Rules.²¹¹

Along these same lines, the all-pleadings approach promotes fairness and equity in court proceedings. In *Twombly* and *Iqbal*, the Court required the plaintiffs to set forth enough facts in the pleadings to plausibly state a claim to relief and thereby provide the defendant with “fair notice” of the allegations.²¹² Fairness also dictates that a plaintiff receive enough facts about a defendant’s affirmative defense to provide that plaintiff with a basic understanding of the contours of the defense.²¹³ By holding both parties accountable to the same pleading standard, neither party has an actual or perceived advantage at the earlier stages of the litigation. In addition, both parties will have been provided with fair notice of the nature of the allegations of the opposing side.

As demonstrated in the sexual harassment example discussed above, the all-pleadings approach also increases the flow of information in the case.²¹⁴ A defendant that must plausibly plead enough facts to state a defense has to provide the plaintiff with much more information than it would under the complaint-only approach.²¹⁵ This creates additional efficiencies in the litigation, as plaintiffs receiving more details about a defense will be able to tailor their

210. *See, e.g.,* *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 905 (N.D. Ill. 2006) (“[W]e evaluate the sufficiency of the [affirmative] defense pursuant to a standard identical to Federal Rule of Civil Procedure 12(b)(6).”); *see also supra* notes 93-96 and accompanying text (discussing approach of federal courts pre-*Twombly* and *Iqbal* when evaluating a complaint or an affirmative defense).

211. For an interesting look at the question whether plaintiffs must “establish the *inapplicability* of any affirmative defense” in their complaint, see Greabe, *supra* note 209, at 27 (emphasis added). For an additional view, see also David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 136-37 (2010).

212. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

213. *See supra* text accompanying notes 116-20.

214. *See supra* Part III.C (discussing how the plausibility standard would be applied to sexual harassment affirmative defense).

215. *See supra* Part III.D (contrasting between the complaint-only approach and the all-pleadings approach to affirmative defenses in the context of a sexual harassment claim).

discovery to the specific factors that the defendant alleged.²¹⁶ This information thus gives plaintiffs at least a starting point to begin exploring the parameters of the asserted defense. And, as already discussed, this information flows both ways, as plaintiffs and defendants will be required to provide at least the basic facts relating to their arguments for the case.²¹⁷

Moreover, allowing the courts to quickly identify any implausible defenses early in the case will lead to additional efficiencies. This will save the parties—and the courts—the time spent exploring these defenses in discovery and in the motions of the litigants. Rather than allowing baseless claims to proceed, the courts can reject these implausible defenses early in the case and focus on the more important aspects of the litigation. The potential time and cost of unnecessary discovery was one of the primary rationales for the plausibility standard articulated in *Twombly* and *Iqbal* for plaintiffs, and those concerns would apply equally in the context of a defendant's affirmative defense.²¹⁸ Just as the plausibility standard will help streamline a civil case and save defendants the time and cost of needless litigation, this standard will similarly help focus discovery on those defenses that have some likelihood of success.

As fairness, equity, and the free flow of information all support a plausibility analysis of affirmative defenses, many of the objections to this approach are likely to be more practical in nature. Thus, some might argue that the all-pleadings approach is unfair to defendants given the relatively short time period they have to respond to a complaint under the Federal Rules.²¹⁹ As discussed earlier, however, most of the information necessary to adequately allege the affirmative defense will often be in the defendant's own possession, thus requiring only a minimal investigation.²²⁰ And

216. See *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010).

217. See *supra* text accompanying notes 140-43.

218. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (discussing the “heavy costs [of litigation] in terms of efficiency and expenditure of valuable time and resources”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (discussing high cost of discovery).

219. See FED. R. CIV. P. 12(a) (setting forth the time limit to respond to a complaint).

220. See *supra* Part III. A defendant would often undertake a comprehensive investigation even in the absence of the plausibility standard. See *infra* notes 225-27, 245-46 and accompanying text. This would likely be true, for example, in the context of an internal sexual harassment complaint. See, e.g., U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL

given that the plausibility standard should require only limited factual pleading by the defendant, this short response time frame should not be particularly problematic.²²¹ Finally, as *Twombly* and *Iqbal* raise the pleading bar for defendants under the approach discussed in this Article, the courts should continue to liberally allow leave to amend the pleadings when the parties discover additional facts later in the case.²²²

An additional objection to the all-pleadings approach would likely be the added cost it creates for defendants. The requirement that a defendant plead sufficient facts to support its defense would often require at least an internal investigation into the allegations.²²³ This investigation would create an additional expense for the defendant. This potential cost is in many ways illusory, however. Depending on the nature of the allegations—and even in the absence of the plausibility standard—a defendant will typically conduct an investigation of the plaintiff’s accusations upon receipt of the complaint.²²⁴ This investigation could even be broader in scope than what is necessary to present an affirmative defense. Indeed, the defendant’s investigation would likely target the more comprehensive question of whether any wrongdoing occurred at all.²²⁵ Moreover, an

HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (addressing internal investigations); see also Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 57 (2003) (“In essence, the affirmative defense requires that sexual harassment disputes be investigated and resolved internally before proceeding to court.”); Amy Payne, Note, *Protecting the Accused in Sexual Harassment Investigations: Is the Fair Credit Reporting Act an Answer?*, 87 VA. L. REV. 381, 392-93 (2001) (discussing investigations of sexual harassment complaints). See generally Nancy L. Abell & Marcia Nelson Jackson, *Sexual Harassment Investigations—Cues, Clues and How-To’s*, 12 LAB. LAW. 17 (1996) (same).

221. See *Francisco*, 2010 WL 2990159, at *8 (recognizing the short time period to assert affirmative defense, but noting that “*Twombly* and *Iqbal* require only minimal facts establishing plausibility, a standard this Court presumes most litigants would apply when conducting the abbreviated factual investigation necessary before raising” the defense).

222. See FED. R. CIV. P. 15(a) (setting forth the rule on amending pleadings); *Francisco*, 2010 WL 2990159, at *8; *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 652 (D. Kan. 2009) (“The majority of cases applying the *Twombly* pleading standard to affirmative defenses and striking those defenses have permitted the defendant leave to amend.”).

223. See *supra* Part III.

224. This investigation may occur even earlier, when the defendant has been informed of potential wrongdoing prior to a federal complaint being filed. See *infra* note 246. See generally Grossman, *supra* note 220, at 57-64 (discussing internal investigations of sexual harassment).

225. By way of example, only a limited internal investigation would typically be required

investigation into the specific facts necessary to support an affirmative defense could be quite limited in nature. In many instances, the investigation need not extend beyond the information already within the defendant's own possession.²²⁶

This is not to say that instances will not arise in which the defendant must conduct a more expansive investigation into the facts of the case to support its affirmative defense. As noted earlier by way of example, a requirement that the defendant plausibly plead the affirmative defenses of contributory negligence or assumption of the risk might require defendants to engage in at least some discovery, and this will unquestionably create significant additional expense for the defendant.²²⁷ In these particular situations, however, plaintiffs are entitled to a clear picture of what the affirmative defense looks like, even if this requires the defendant to spend substantial time and resources investigating the matter. Imposing these additional costs on defendants in the context of the affirmative defense is in many ways no different than subjecting plaintiffs to the initial costs of uncovering enough facts to plausibly plead the complaint. Thus, although there may be some instances in which a defendant incurs substantial expense as a result of adopting the all-pleadings approach, these costs would be symmetric under the Federal Rules. And imposing these costs would serve the goal of providing both parties with additional information early in the case.

Similarly, there may be some concern that the all-pleadings approach would result in a significant increase in motions to strike, which could slow down court proceedings.²²⁸ Although this is certainly a reasonable concern, it does not detract from the fact that plaintiffs are entitled to be provided with a plausible basis for any

to uncover the facts necessary to adequately plead the affirmative defense to a claim of a hostile work environment. *See infra* text accompanying notes 245-46.

226. *See supra* Part III.

227. *See supra* Part II.B (discussing the all-pleadings approach to affirmative defenses).

228. *See Bowers v. Mort. Elec. Registration Sys.*, No. 10-4141-JTM-DJW, 2011 WL 2149423, at *4 (D. Kan. June 1, 2011) ("Granting these motions to strike may encourage parties to bog down litigation by filing and fighting motions to strike answers or defenses prematurely which cuts against the purpose of Rule 12(f): 'minimize delay, prejudice, and confusion.'" (citations omitted) (internal quotation marks omitted)); *Lane v. Page*, 272 F.R.D. 581, 596 (D.N.M. 2011) ("Applying [*Twombly* and *Iqbal*] to affirmative defenses would also invite many more motions to strike, which achieves little.").

affirmative defense asserted under a fair reading of the Federal Rules and the recent Supreme Court cases. And when the plaintiff is simply filing frivolous motions in the case, the court is free to sanction the party doing so to help limit this result.²²⁹ Moreover, without sufficient factual support, “[b]oilerplate defenses clutter the docket and, further, create unnecessary work.”²³⁰ And perhaps most importantly, the Supreme Court did not appear concerned that its decisions in *Twombly* and *Iqbal* would result in an increase in motions to dismiss plaintiffs’ complaints.²³¹ Taking an equitable approach to these decisions, then, there should similarly be little concern over the possible result that *Twombly* and *Iqbal* will lead to an increased filing of motions to strike a defendant’s affirmative defenses.

One final objection to the all-pleadings analysis may be that this approach could force defendants to settle otherwise unmeritorious claims. Some might argue that the additional time and expense a defendant must undertake to properly assert its defenses would simply encourage that defendant to settle the matter early on. The *Twombly* Court was particularly cognizant of this concern from the standpoint of frivolous litigation, noting that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases” early in the proceedings.²³² And it is certainly true that many defendants might settle a frivolous case to avoid the time and expense of discovery.²³³ In the context of the affirmative defense, however, the additional cost to the defendant of investigating the basic facts about its defense should be minimal.²³⁴ This is particularly true when compared to the enormous costs with which the Court was concerned—those expenses associated with discovery in a federal court proceeding.²³⁵ In many cases, then, there seems little

229. See FED. R. CIV. P. 11.

230. *Ulyssix Tech. v. Orbital Network Eng’g, Inc.*, No. ELH-10-02091, 2011 WL 631145, at *15 (D. Md. Feb. 11, 2011) (quoting *Safeco Ins. Co. of Am. v. O’Hara Corp.*, No. 08-CV-10545, 2008 U.S. Dist. LEXIS 48399, at *2 (E.D. Mich. June 25, 2008)).

231. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *CECIL ET AL.*, *supra* note 146 (discussing empirical analysis of motion to dismiss filings before and after *Iqbal*).

232. *Twombly*, 550 U.S. at 559.

233. See *id.* at 559-60.

234. See *supra* notes 224-27 and accompanying text; *infra* notes 245-46 and accompanying text.

235. *Twombly*, 550 U.S. at 558-59.

danger that the additional cost of plausibly pleading an affirmative defense will push a defendant into settlement.

Moreover, the corollary to the Supreme Court's concern about frivolous litigation forcing a defendant to settle a case should be considered. Just as the threat of discovery could push a defendant to settle an implausible claim, a baseless affirmative defense could similarly encourage a plaintiff with a strong case to unnecessarily settle early in the proceedings or to settle for less than the true value of the claim.²³⁶ Requiring a defendant to plead at least the basic facts relating to the defense would help guard against this unjust result, as it could help "avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence."²³⁷

A final implication of adopting the all-pleadings approach should be considered—the often negligible factual requirement that this standard imposes. In many ways, the plausibility standard requires that a defendant provide only the most basic facts related to the defense. As one federal court surmised when addressing the defendant's obligations under the affirmative defense, "*Twombly* and *Iqbal* require only minimal facts establishing plausibility."²³⁸ The ease with which defendants can often satisfy the standard is seen in the example provided for hostile work environment claims—a short paragraph setting forth the basic facts of the affirmative defense satisfies the plausibility standard in that context.²³⁹ And, as discussed earlier, the basic requirements of the statute of limitations example set forth in the Federal Rules also make clear just how minimal these pleading requirements should be for defendants.²⁴⁰ The simple paragraph required for the affirmative defense to sexual harassment, combined with the simple sentence required in the example provided by the Federal Rules, demonstrates just how undemanding the plausibility requirement will typically be for

236. See *supra* Part II.B (discussing the costs associated with implausible affirmative defenses).

237. *Twombly*, 550 U.S. at 559-60 (internal quotation marks and brackets omitted).

238. *Francisco v. Verizon S., Inc.*, No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010).

239. See *supra* Part III.C (discussing how the plausibility standard would be applied to sexual harassment affirmative defense).

240. FED. R. CIV. P. Form 30 ("The plaintiff's claim is barred by the statute of limitations because it arose more than __ years before this action was commenced.").

defendants. The standard is meant to promote fairness and equity in pleading and typically should not create burdensome obligations for defendants. This is not to say that some courts applying the plausibility standard would not require a higher level of pleading than what is suggested here.²⁴¹ Nonetheless, this Article outlines what should be an appropriate approach to plausibly pleading the affirmative defense—an approach that would typically not be burdensome for defendants.

The example of the hostile work environment affirmative defense discussed above provides a clear illustration of some of the implications of the all-pleadings approach discussed here.²⁴² Just as a plaintiff alleging a claim of sexual harassment against her employer would be required to plausibly plead enough facts to state a claim, an employer would similarly be required to provide the plaintiff with the fundamental facts related to the basic nature of its affirmative defense.²⁴³ All parties would thus receive critical background information about the claims and defenses in the case, which would allow these parties to much more narrowly tailor their discovery. In the sexual harassment context, then, this approach would clearly enhance the amount of information provided early in the case and provide symmetry to the pleading requirements of employers and employees.²⁴⁴

Despite being required to provide this additional information, however, employers should easily—and inexpensively—be able to comply with the all-pleadings approach in hostile work environment cases. It is true that this reading of the recent Supreme Court cases may result in *some* additional expense to employers. Requiring defendants to plausibly plead their affirmative defenses will likely require these defendants to conduct at least a minimal investigation

241. *See supra* notes 182-84 and accompanying text (discussing potential variations of court approaches to plausibly pleading an affirmative defense).

242. *See supra* Part III.C (discussing how the plausibility standard would be applied to sexual harassment affirmative defense).

243. Though the additional burden this approach puts on employers will often be minimal, the amount of additional information provided to the employee is significant. A plaintiff beginning discovery in this type of case will much more easily be able to target the employer's harassment policies and procedures, as well as those individuals with knowledge of how the complaint procedure was utilized in the particular case.

244. *See supra* Part III.D (discussing the contrast between the complaint-only approach and the all-pleadings approach to affirmative defenses in the context of a sexual harassment claim).

into the plaintiff's allegations.²⁴⁵ This investigation will reveal those background facts necessary to plausibly support the alleged affirmative defense. This approach may thus result in additional costs incurred by the employer to conduct that preliminary investigation—costs which would not necessarily have been present if the defendant were permitted to plead its affirmative defense in a conclusory manner.

Nonetheless, these costs should be minimal, as uncovering whether a company antiharassment policy exists and whether the plaintiff availed herself of that policy typically requires only a simple investigation. And in practice, the employer will likely conduct an even more sophisticated investigation to determine the merit of the plaintiff's harassment allegations in the case and whether a broader employment problem exists at the company.²⁴⁶ Moreover, if the case were to proceed to discovery, the costs to the defendant would likely be the same under either the complaint-only or the all-pleadings approach, as the defendant would certainly conduct an investigation into its possible defenses at this later stage of the litigation.

Thus, the most likely objections to the all-pleadings approach—additional time and expense for defendants—should not be of particular concern for employers in a hostile work environment case. A routine investigation—which would likely be conducted even in the absence of the plausibility standard—should quickly and easily provide those background facts necessary for an employer to sufficiently plead its affirmative defense. All of the required information should also be within the employer's own knowledge, and an *internal* investigation of the company's antiharassment policies and its response in the particular case should reveal all of the necessary facts to support the affirmative defense.

245. *See supra* Part III.D.

246. In reality, the defendant will often conduct an investigation before discovery has even begun in the case. Depending upon the nature of the allegations, many defendants would typically launch an investigation upon receiving notice of the alleged wrongdoing. *See generally* Grossman, *supra* note 220, at 57-64 (discussing internal investigations of sexual harassment). This is particularly true in the employment discrimination context, when an employer will likely have received a discrimination charge long before litigation is actually filed in the case. *See, e.g.,* Seiner, *supra* note 127, at 1049 n.253 ("Title VII claims are different from many other civil causes of action in that the defendant typically will have received notice of the relevant allegation of discrimination long before a federal complaint is ever filed.").

This is not to say that in other contexts the all-pleadings approach to affirmative defenses would not have the potential of creating significant additional time and expense for defendants. This example simply illustrates that in certain employment discrimination cases—an area of the law significantly affected by *Twombly* and *Iqbal*—a plausibility requirement for defendants may not be unduly burdensome. And, this is true in perhaps the most complex and important defense available to employers in these cases: the affirmative defense to hostile work environment claims.

Given that this plausibility standard can easily be applied to employers in these complex cases, it is fair to consider applying this plausibility analysis beyond this context to *all* civil cases. Such an approach is well supported by principles of equity, fairness, and efficiency—as well as a textual reading of the Federal Rules. Although the courts are currently in conflict over whether to apply the plausibility standard to a defendant’s affirmative defense,²⁴⁷ policy considerations seem to make clear that the standard should apply equally to all parties in the case.

CONCLUSION

An equitable approach to civil procedure would impose the *same* pleading standards on both plaintiffs and defendants, and this is exactly what many courts had done in the years leading up to *Twombly* and *Iqbal*. A close textual review of the Federal Rules supports this approach. Significant policy and practical considerations further suggest that a defendant must plausibly plead its affirmative defenses. Whether the plausibility standard should apply to a defendant’s responsive pleadings, and more problematically *how* that standard would apply, are certain to be sources of litigation and conflicting court decisions in the future. This Article provides a foundation for this discussion and offers one concrete example of how *Twombly* and *Iqbal* would apply to the affirmative defense. *Iqbal* signals that the plausibility standard is here to stay—the debate has now moved to how broadly that standard should apply.

247. See *supra* Part II.