



Affirmative Defenses: Beware of Conclusory Pleading

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The heightened pleading standard set forth by the Supreme Court in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* has become a familiar tool for defense counsel seeking to dismiss a complaint in federal court. But is what's good for the goose also good for the gander?

More and more, plaintiffs attorneys are moving away from merely playing defense and now use *Twombly* and *Iqbal* for their own offensive purposes: as the basis for a motion to strike affirmative defenses. A recent decision in the District of New Jersey highlights a growing split between trial courts around the country addressing this issue, and in particular between the U.S. Court of Appeals for the Third Circuit and other circuits. Several trial courts in the Third Circuit have read *Twombly* and *Iqbal* narrowly and refused to extend those holdings to affirmative defenses. Elsewhere, however, courts have granted motions to strike affirmative defenses for failing to plead sufficient facts.

In recent years, the Supreme Court has signaled its displeasure with the conclusory pleading of complaints. From a policy standpoint, the court is concerned that ill-founded actions get filed and generate great cost in time and money for innocent defendants. Such cases also strain limited judicial resources when they advance beyond the pleadings stage into the discovery and motions stages of litigation. Judges and litigants alike are taxed by those aspects of litigation.

Addressing those concerns, the Supreme Court, in *Twombly* and *Iqbal*, announced that a plaintiff must plead sufficient facts in his or her complaint to set forth a "plausible" claim and survive a motion to dismiss. Conclusory pleading is not enough to keep the case alive. Although *Twombly* was limited to an antitrust case alleging conspiracy, *Iqbal* went further. In *Iqbal*, the Supreme Court held that the *Twombly* "plausibility" standard is grounded in Federal Rule 8, which governs all pleadings in all civil actions.

The Supreme Court has not yet extended *Twombly/Iqbal* to pleadings beyond the complaint, such as an answer and affirmative defenses. There is, however, nothing expressly set forth in *Twombly/Iqbal* precluding their application of that standard to affirmative defenses. The Supreme Court could have expressly limited its reasoning to complaints, but it chose not to do so. True, much of the reasoning in *Twombly/Iqbal* reflects a "gatekeeper's" concern with strike suits and the costs they impose, particularly at the discovery stage of litigation. But equally important are requirements imposed by the Federal Rules, and sanctioned by the court, for parties to plead responsibly and to allege facts, not just conclusions. That policy concern affects all pleadings and is not logically limited to complaints. For just as a conclusory

complaint can lead to needless discovery and briefing, so can ill-founded and completely conclusory affirmative defenses.

A case decided last month by the federal trial court in the District of New Jersey dealt with that very question. In *Signature Bank v. Check-X-Change*, 2013 U.S. Dist. LEXIS 90880, the plaintiff bank filed a complaint seeking damages for money spent reimbursing one of its customers for fraudulent checks cashed by the defendant check-cashing service. Defendants filed a counterclaim and affirmative defenses. The plaintiff moved to dismiss the defendant's counterclaims and strike its affirmative defenses in their entirety on *Twombly* and *Iqbal* grounds.

The *Signature Bank* court denied the motion. It relied on three previous district court cases in the Third Circuit holding that the heightened pleading standards do not apply to affirmative defenses. In one of those cases, U.S. District Judge Jan E. DuBois, writing for the District Court of the Virgin Islands, recognized a split of authority amongst district courts hearing the issue, but ultimately concluded that *Twombly* and *Iqbal* do not apply to affirmative defenses because "there is no requirement under Rule 8(c) that a defendant 'show' any facts at all."

The court in *Signature Bank* embraced a restricted analysis of *Twombly/Iqbal* and refused to strike any conclusory affirmative defenses. In so doing, it followed an earlier New Jersey case, which found that the concerns of *Iqbal* — that threadbare complaints would create needless and expensive discovery — were inapplicable to affirmative defenses, which do not open the door to discovery in the way a complaint would. The court noted that other mechanisms, such as contention interrogatories, Rule 26 disclosures, and the Rule 11 certification of counsel, exist to require defendants to give fair and accurate notice of their defenses.

Although a number of Third Circuit trial decisions support *Signature Bank's* approach to affirmative defenses, even within the Third Circuit there is some dissent. U.S. District Judge Anita B. Brody issued an order in 2011 striking conclusory affirmative defenses for failure to plead with sufficient factual specificity. Specifically, Brody struck affirmative defenses that said nothing more than "plaintiffs' claims are barred by the statute of limitations and/or the doctrines of laches, waiver, and/or estoppel." Although she expressly declined to decide whether *Twombly* and *Iqbal* apply to affirmative defenses, she found that such conclusory affirmative defenses do not give "fair notice" of the defenses to the plaintiff.

Numerous district courts outside the Third Circuit have rejected a restrictive reading of *Twombly* and *Iqbal*, finding instead that *Twombly/Iqbal* applies to all pleadings, including affirmative defenses. These courts see no difference in the problems generated by a boilerplate complaint and a boilerplate set of affirmative defenses. Those courts stress the connection between discovery and affirmative defenses, as well as the ability of a defendant to add or amend its affirmative defenses (as a plaintiff may amend its complaint) should facts later come to light during discovery.

The Second Circuit in particular has several decisions at odds with *Signature Bank* and the Third Circuit decisions. In a magistrate's opinion, adopted in pertinent part by a Western District of New York Article III judge, the court explained that affirmative defenses must contain more than "bald assertions." Finding that *Iqbal* applied to affirmative defenses, as well as complaints, the court struck affirmative defenses that it found to be conclusory. Accordingly, it struck affirmative defenses stating nothing more than statute of limitations, estoppel, unclean hands, waiver, and acquiescence, but it granted leave to amend because the defendant claimed that it had a "factual basis for at least some of the affirmative defenses." In a case decided post-*Twombly* in the Southern District of New York, the court similarly granted a motion to strike defenses asserting collateral estoppel, res judicata, equitable estoppel, patent misuse, and unclean hands because the defendant "assert[ed] no facts, nor [did it] even refer to the elements of the various affirmative defenses." The court held that "conclusory assertions" of affirmative defenses do not satisfy the pleading requirements of Rule 8.

Courts from several other circuits view the issue similarly to the courts in the Second Circuit. Courts in Wisconsin, Ohio, Texas, Michigan, Florida and even Delaware have granted motions to strike affirmative

defenses for being too conclusory. To date, however, no circuit court has spoken on the issue, and trial courts remain free to decide whether to apply *Twombly/Iqbal* to affirmative defenses.

Given the split amongst courts around the country, and the Supreme Court's anchoring of *Twombly* and *Iqbal* in Rule 8, practitioners must be wary of pleading affirmative defenses in conclusory fashion. The careful practitioner will plead his affirmative defenses with greater factual specificity. Although several district courts in the Third Circuit still appear to accept the old-style, one-sentence, conclusory affirmative defense, the Third Circuit itself hasn't spoken. Moreover, courts outside the Third Circuit, and even some trial judges inside the Third Circuit, see it differently. Just as it's a new age for plaintiffs, who must plead enough facts sufficient to show a plausible claim, defendants may now be put to the same standard in their pleadings. After all, what's good for the goose is usually good for the gander. Accordingly, defense counsel should no longer assume that previously acceptable pleading of conclusory affirmative defenses will pass muster in a post-*Iqbal* litigation world.

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