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THE TWOMBLY/IQBAL PLAUSIBILITY PLEADING STANDARD AND AFFIRMATIVE DEFENSES: GOOSEES AND GANDERS TEN YEARS LATER

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THE TWOMBLY/IQBAL PLAUSIBILITY PLEADING STANDARD AND AFFIRMATIVE DEFENSES: GOOSES AND GANDERS TEN YEARS LATER

Anthony Gambol*

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I. INTRODUCTION

In April of 2011, the author published a piece entitled “*The Twombly Standard and Affirmative Defenses: What is Good for the Goose is Not Always Good for the Gander*”¹ in an attempt to assist courts grappling with the interpretation and application of the new and reasonably untested *Twombly* and *Iqbal* decisions. At the time, there were few cases that had broached the novel issue of whether the plausibility pleading standard for claims, which was articulated in *Twombly* and then clarified and extended in *Iqbal*, applied to a defendant’s pleading of affirmative defenses.

That was the first piece written on the subject at length.² It argued that both the text and the intention of the Federal Rules of Civil Procedure, the specific holdings and public policy considerations that the Supreme Court of the United States articulated in the *Twombly* and *Iqbal* decisions, and simple fairness all supported the notion that the plausibility pleading standard should not extend to affirmative defenses.

Now that approximately ten years have passed, it seems like an appropriate time to revisit these issues. Jurisprudence relating to the plausibility pleading standard is much better developed, and many more courts have now had the opportunity to consider whether that standard extends to affirmative defenses. However, despite this growing maturity in the law, no perfect consensus has yet emerged on this question.

The trend among the courts over the last decade has moved strongly away from extending the plausibility pleading standard to affirmative defenses. In 2019, however, the United States Court of Appeals for the Second Circuit decided *GEOMC Co. v. Calmare Therapeutics Inc.*,³ and became the first circuit court to consider the question directly. The Second Circuit ruled that the

1. Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173 (2011).

2. A piece published by The Florida Bar identified the issue in 2010 but did not offer much by way of analysis or direction. See Manuel John Dominguez et al., *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. B.J. 77 (2010). Others followed on both sides of the issue.

3. See *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019).

plausibility pleading standard shall apply to affirmative defenses, with some qualifications.

The purpose of this Article is to examine and synthesize the developments in this area of law over the last decade. After some brief background, it will review the arguments that have held sway in the courts both for and against extending the plausibility pleading standard to affirmative defenses. It will comment on the trend in the jurisprudence. It will then offer a thorough review and analysis of the Second Circuit's *GEOMC* decision, as well as offer decisions from other circuits that suggest their thinking. Based upon this review, this Article concludes that procedure, precedent, and policy still heavily support *not* extending the plausibility pleading standard to affirmative defenses.

II. BACKGROUND

This Section introduces the Federal Rules of Civil Procedure and their relevance to standards of pleading. It will describe the historical notice pleading standard for claims and how it changed into the modern plausibility pleading standard. Finally, it will describe the traditional manner of pleading affirmative defenses.

A. The Federal Rules and Notice Pleading

The Federal Rules of Civil Procedure govern procedure in all civil actions in the United States district courts.⁴ The Rules are promulgated by the Supreme Court under a grant of authorization from Congress.⁵ The Rules are specifically procedural in nature and may not “abridge, enlarge or modify any substantive right.”⁶ The analysis of the proper application and effect of the Rules has resulted in the countless gallons of spilled ink by courts, commentators, and litigants.

4. FED. R. CIV. P. 1.

5. Rules Enabling Act, 28 U.S.C. §§ 2072–2074. The Rules are periodically updated by the Supreme Court via an elaborate committee review procedure, pursuant to a statutory requirement that the Judicial Conference of the United States, the national policy-making body for the federal courts, must “carry on a continuous study of the operation and effect of the general rules of practice and procedure” 28 U.S.C. § 331.

6. 28 U.S.C. § 2072(b).

Rule 8 describes and defines the standards of pleading in the federal courts.⁷ Failure to satisfy Rule 8 makes a claim susceptible to dismissal.⁸ For claims for relief, Rule 8(a) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁹ For most of the Rules’ history, the interpretation of this brief but vital statement was governed primarily by the Supreme Court’s decision in *Conley v. Gibson*.¹⁰

In *Conley*, the Court solidified what had previously been a generalized rule: claims should be allowed to stand unless the plaintiff can proffer “no set of facts” under which the claim will succeed.¹¹ The Court based this conclusion on Rule 8, which does not require a plaintiff to articulate all of the facts upon which a claim is based.¹² Rather, the Court interpreted the “short and plain statement” language of Rule 8 to require a plaintiff to offer only such allegations as are sufficient to give a defendant “fair notice of . . . the plaintiff’s claim . . . and the grounds upon which it rests.”¹³ This “notice pleading” standard would go on to govern federal pleadings for fifty years.

B. The Plausibility Pleading Standard

In *Bell Atlantic Corp. v. Twombly*,¹⁴ the Supreme Court abrogated the precedent set by *Conley*.¹⁵ The Court instructed that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

7. FED. R. CIV. P. 8 (“Rule 8. General Rules of Pleading”).

8. FED. R. CIV. P. 12(b)(6); see *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007); see also *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (“The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint . . .”).

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

10. *Conley v. Gibson*, 355 U.S. 41 (1957). *Conley* was a class suit in which the plaintiffs were African American railway workers alleging discriminatory disparate treatment by their union. The union argued that the plaintiffs had not stated a claim for which relief could be granted and had failed to articulate specific facts in their complaint to support their claims.

11. *Id.* at 45–46.

12. *Id.* at 47.

13. *Id.*

14. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

15. *E.g.*, *E.R. v. Stitt*, No. CIV-18-1137-SLP, 2019 U.S. Dist. LEXIS 159393, at *6 n.5 (W.D. Okla. Sept. 19, 2019).

will not do.”¹⁶ Rather, Rule 8 requires a claim to have an affirmative “showing” sufficient to give fair notice of the “grounds on which the claim rests.”¹⁷ The Court articulated that failure to plead sufficient factual material to nudge a claim from the realm of mere possibility into “plausibility” should result in that claim being excised at the earliest stage for the sake of efficiency and economy.¹⁸ Notably, the Court explained that some part of its analysis was intended to avoid the burden on defendants of abusive discovery practices and nuisance settlements, which, in the antitrust arena like *Twombly*, could be monumental.¹⁹ Accordingly, the Court justified requiring something more than simple notice of what a claim entailed: a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”²⁰

Initially, the scale of the Supreme Court’s decision in *Twombly* was a bit circumscribed by its sounding in antitrust law.²¹ The dissent in *Twombly*, however, accurately presaged that “whether [the Court’s] test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”²²

Indeed, just two years later, the Supreme Court expressly held in *Ashcroft v. Iqbal*²³ that the Court in *Twombly* had expounded the pleading standard for “all civil actions.”²⁴ The

16. *Twombly*, 550 U.S. at 555. The *Twombly* matter comprised a putative class action with allegations of conspiracy in restraint of trade against telephone and internet service carriers under the Sherman Act. The Court found that even if the allegations in the complaint were consistent with conspiracy, “conscious parallelism” was equally likely and was not unlawful. Accordingly, the plaintiff had failed to make sufficient showing for the claim to survive; the allegations did not display that the unlawful interpretation of events was more “plausible” than an innocent, business-motivated one. The Court found that there was “an obvious alternative explanation” that plaintiffs failed to vitiate.

17. *Id.* at 555 n.3 (referencing both Rule 8 and *Conley*).

18. *Id.* at 558.

19. *See id.* at 559. The dissent also acknowledged this as a rationale of the decision. *Id.* at 573 (Stevens, J., dissenting).

20. *Id.* at 570, 569 n.14 (majority opinion).

21. *E.g.*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

22. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

23. *See Iqbal*, 556 U.S. at 662.

24. *Id.* at 684. *Iqbal* related to the claims of a Pakistani immigrant against Attorney General John Ashcroft, inter alia, after he was detained on

Iqbal Court first reiterated the *Twombly* decision, that the standard of plausibility was not a probability requirement, but rather a requirement for sufficient factual support to suggest “more than a sheer possibility that a defendant acted unlawfully.”²⁵ The Court offered relatively specific instructions for lower courts to consider the sufficiency of pled claims under its new standard: first, a court must accept as true all of the factual allegations of a complaint, but none of the legal conclusions.²⁶ Thereupon, only a claim that contains a plausible claim for relief can survive a motion to dismiss—a context-specific analysis guided by “experience and common sense.”²⁷

The *Iqbal* Court expressly disclaimed that the standard articulated in *Twombly* was limited to the antitrust context. Rather, it insisted that *Twombly* was decided based upon an analysis of the Federal Rules and, accordingly, that it applied in all contexts in which the Federal Rules apply.²⁸

C. Pleading Affirmative Defenses

Federal Rule of Civil Procedure 8(c) governs the pleading of affirmative defenses by defendants.²⁹ An affirmative defense is a statement in a responsive pleading that precludes liability even if all allegations made by the plaintiff are true.³⁰ Failure to plead an affirmative defense may result in its waiver.³¹

immigration charges following the 9/11 terrorist attacks. Plaintiff alleged that he was mistreated and that his constitutional rights had been violated based upon that treatment. Further, he claimed that Ashcroft (and FBI Director Robert Mueller) “knew of, condoned . . . and maliciously agreed to subject” plaintiff to harsh conditions solely on account of his inclusion in several protected classes. The Court originally applied the *Conley* “notice” standard, but *Twombly* was decided while the matter was on appeal. After the United States Court of Appeals for the Second Circuit applied a limited interpretation of *Twombly* and upheld the lower court’s ruling in favor of the plaintiff that the claims were sufficiently pled, the Supreme Court took up the matter.

25. *Id.* at 678.

26. *Id.* (“[M]ere conclusory statements, do not suffice.”).

27. *Id.* at 678–79.

28. *See id.* at 684.

29. FED. R. CIV. P. 8(c)(1) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: [list of affirmative defenses].”).

30. *See, e.g.,* El Corte Ingles, S.A. v. City Lights, LLC, No. 1:19-cv-00213-AWI-JLT, 2019 U.S. Dist. LEXIS 218435, at *26 (E.D. Cal. Dec. 19, 2019).

31. *See* Meyers v. Vill. of Oxford, No. 17-cv-10623, 2019 U.S. Dist. LEXIS 24637, at *9 (E.D. Mich. Feb. 15, 2019) (“Although there are some exceptions,

Traditionally, simple lists of affirmative defenses were usually sufficient so long as they provided fair notice of the defense.³² In this way, the standard for assessing the sufficiency of an affirmative defense was reminiscent of *Conley*'s notice standard for claims.³³ Even so, the courts acknowledged the independence of Rule 8(c).³⁴

Affirmative defenses may be challenged by motions to strike them from the pleadings under Rule 12(f).³⁵ Such motions will usually be denied unless the affirmative defense's insufficiency is obvious and its continued inclusion in the matter would prejudice the party moving to strike.³⁶ Motions to strike are strongly disfavored because they are a drastic remedy.³⁷ Most of

it is generally understood that the failure to allege an affirmative defense in the first responsive pleading may result in a waiver of the defense.”).

32. See, e.g., *Hawkins v. Kroger Co.*, No. 15cv2320 JM(BLM), 2019 U.S. Dist. LEXIS 205496, at *7–8 (S.D. Cal. Nov. 25, 2019) (citing *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979)); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 101 (2010) (“[D]efensive pleading[s] typically are alleged in a formulary, conclusory, and uninformative fashion along the style illustrated in Form 30 [of the Federal Rules].”).

33. See *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984) (“A motion to strike an affirmative defense . . . will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of facts which could be proved in support of the defense.”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1274 (3d ed. 2008).

34. See, e.g., *Pollock v. Marshall*, 845 F.2d 656, 657 n.1 (6th Cir. 1988); see also *FTC v. AMG Servs.*, No. 2:12-cv-536-GMN-VCF, 2014 U.S. Dist. LEXIS 152864, at *15 (D. Nev. Oct. 27, 2014) (“Therefore, when considering a 12(f) motion to strike an ‘insufficient defense,’ the court finds that *Twombly* and *Iqbal* govern Rule 8(b)(1)(A) defenses and *Conley* governs Rule 8(c) affirmative defenses. Rules 8(b)(1)(A) and 8(c) are not interchangeable.”).

35. FED. R. CIV. P. 12(f); see *Strobel v. Rusch*, 431 F. Supp. 3d 1315, 1325 (D.N.M. 2020) (“Rule 12(f) is intended to minimize delay, prejudice and confusion by narrowing the issues for discovery and trial.”).

36. See *Clark v. Milam*, 152 F.R.D. 66, 70 (S.D. W. Va. 1993); WRIGHT & MILLER, *supra* note 33, at § 1381.

37. See *Harrison Co. v. A-Z Wholesalers, Inc.*, No. 3:19-CV-1057-B, 2020 U.S. Dist. LEXIS 73191, at *2–3 (N.D. Tex. Apr. 27, 2020) (“Motions to strike a portion of a pleading are generally viewed with disfavor and are seldom granted, as such motions seek a ‘drastic remedy’ and are often sought by the movant simply as a dilatory tactic.”); see also *Ponder v. Prophete*, No. 16-2376-CM-GLR, 2016 U.S. Dist. LEXIS 152934, at *3 (D. Kan. Nov. 3, 2016) (“[T]he bar for succeeding on a motion to strike is high because courts consider striking an affirmative defense to be a drastic remedy. Indeed, the court should only utilize the legal tool where the challenged allegations cannot succeed under any circumstances. The Court cannot make such a judgment with only a short and plain statement of defenses in response to an equally, if not more so, short

the time, affirmative defenses that do not find support in the record simply fall by the wayside.³⁸

III. PLAUSIBILITY PLEADING OF AFFIRMATIVE DEFENSES IN THE DISTRICT COURTS

It was against the backdrop of the rules and practices described briefly above that the courts began to analyze the application and effect of the plausibility pleading standard for claims on affirmative defenses.³⁹ Courts found merits on both sides of the question. This Section will address the main arguments presented by both sides of the issue, as well as the trends and the majority position.

A. Arguments in Favor of Extension

The courts that select to extend the plausibility pleading standard to affirmative defenses offer a fairly uniform collection of reasoning to support their decisions. These analyses most frequently turn upon somewhat soft notions of expediency and fairness.

Perhaps the most commonly-stated justifications for extending the plausibility pleading standard to affirmative defenses relate to mitigation of discovery abuses and the streamlining of defensive pleadings.⁴⁰ By extending plausibility pleading, these courts and the litigants before them gain something in efficiency and judicial economy.⁴¹ These courts

and plain statement of the claim. This is especially true where discovery has not yet commenced.”); WRIGHT & MILLER, *supra* note 33, at § 1380.

38. See FED. R. CIV. P. 12(f); *Consumer Fin. Prot. Bureau v. Moseley*, No. 14-00789-CV-W-DW, 2015 U.S. Dist. LEXIS 185450, at *3 (W.D. Mo. May 26, 2015); *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1052 (D. Minn. 2010).

39. See Gambol, *supra* note 1, at 2195 (“After *Twombly*, the continued validity of the traditional manners of pleading affirmative defenses and determining their sufficiency [were] in doubt.”); see also *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1256 (D. Kan. 2011) (“The issue before the court is whether the pleading standards of *Twombly* and *Iqbal* apply to affirmative defenses, or only complaints.”).

40. See, e.g., *Taylor v. City of Saginaw*, No. 17-cv-11067, 2020 U.S. Dist. LEXIS 11114, at *6 (E.D. Mich. Jan. 23, 2020); *Racick v. Dominion L. Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010) (“[B]oilerplate defenses clutter the docket and . . . create unnecessary work and extend discovery.”).

41. See, e.g., *McGinity v. USAA Fed. Savs. Bank*, No. 5:19-cv-560-BO, slip

find further support in their analysis of the “underlying rationale” of *Twombly* and *Iqbal*: to eliminate fishing expeditions and reduce the cost associated with discovery.⁴² These courts equate the costs associated with meritless claims to those fostered by meritless affirmative defenses.⁴³

Some courts that choose to extend plausibility pleading to affirmative defenses seek to support that position by parsing the Federal Rules. Usually, this interpretation hinges upon similarities between language in Rule 8(a) and Rule 8(b), which governs the pleading of “Defenses; Admissions and Denials.”⁴⁴ These courts, perhaps anticipating a counterargument, frame Rule 8(c) as a subset of Rule 8(b), where Rule 8(c) exists to add additional requirements on the pleading of affirmative defenses and offers a list of examples, but is otherwise subsumed by Rule 8(b).⁴⁵

There is a notion among courts that choose to extend that the application of a different standard of support for a claim and a defense is definitionally unfair.⁴⁶ A more specific variant of this argument is that because both claims and affirmative defenses are pleadings; the standard for “pleadings” should be,

op. at 2 (E.D.N.C. Apr. 14, 2020); *FDIC v. Bristol Home Mortg. Lending, LLC*, No. 08-81536, 2009 U.S. Dist. LEXIS 74683, at *4 (S.D. Fla. Aug. 13, 2009).

42. See *Johnson v. City of Saginaw*, No. 17-cv-13174, 2018 WL 6168036, at *2 (E.D. Mich. Aug. 30, 2018); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010).

43. *PetroJebba, SA de C.V. v. Betron Enters.*, No. 19-11439, 2019 WL 6496565, at *8 (E.D. Mich. Dec. 3, 2019); *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008).

44. See FED. R. CIV. P. 8(b); see also *Espitia v. Mezzetti Fin. Servs., Inc.*, No. 18-cv-02480-VKD, 2019 WL 359422, at *3 (N.D. Cal. Jan. 29, 2019); *Hayden v. United States*, 147 F. Supp. 3d 1125, 1129 (D. Or. 2014) (“[A] party is held to the same ‘short and plain’ content requirement whether asserting a claim for relief or asserting a defense to a claim for relief. The drafters could have used different language or phrases to describe parties’ duties when asserting a claim for relief or a defense (or affirmative defense), but they did not.”); *Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438, 440–41 (C.D. Cal. 2013); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691–93 (N.D. Ohio 2010).

45. See *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1337 (S.D. Fla. 2019); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009).

46. *Andean Life, LLC v. Barry Callebaut U.S.A. LLC*, No. 20-20765-Civ-Williams/Torres, 2020 WL 1703552, at *4–5 (S.D. Fla. Apr. 8, 2020); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010).

and is, the same.⁴⁷

These courts acknowledge that there might be some prejudice to defendants by having their defenses struck for being insufficiently pled at an early stage of litigation or because defendants have a limited timeframe in which to respond.⁴⁸ But even so, they feel that a liberal construction of Rule 15 should ameliorate the problem by allowing defendants to amend their answer.⁴⁹

B. Arguments Against Extension

The courts that decline to extend the plausibility pleading standard to affirmative defenses usually turn at the first (and sometimes only) instance to *Twombly*, *Iqbal*, and the Rules themselves. *Twombly* and *Iqbal* specifically interpreted Rule 8(a) and do not even mention Rule 8(c).⁵⁰ As noted above, Rule 8(a) governs the pleading of claims, and Rule 8(c) governs

47. Taylor v. City of Saginaw, No. 17-cv-11067, 2020 U.S. Dist. LEXIS 11114, at *6 (E.D. Mich. Jan. 23, 2020); Racick v. Dominion L. Assocs., 270 F.R.D. 228, 233 (E.D.N.C. 2010) (“[W]hat is good for the goose is good for the gander.”); In re Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438, at *6 (Bankr. N.D. Ill. Sept. 9, 2009) (citations omitted) (“Affirmative defenses are pleadings and so are subject to all pleading requirements under the Federal Rules. . . . That means affirmative defenses must meet the notice-pleading standards of Rule 8(a).”); Pylant v. Cuba, No. 3:14-CV-0745-P, 2015 U.S. Dist. LEXIS 189656, at *12 (N.D. Tex. Mar. 6, 2015) (pointing out that this argument is overstated, where it stems from Rule 8(e)’s requirement that all pleadings must be “simple, concise, and direct”).

48. Vogel, 291 F.R.D. at 441; Francisco v. Verizon S., Inc., No. 3:09-cv-737, 2010 U.S. Dist. LEXIS 77083, at *15 (E.D. Va. July 29, 2010).

49. See McGinity v. USAA Fed. Savs. Bank, No. 5:19-cv-560-BO, slip op. at 3 (E.D.N.C. Apr. 14, 2020); Racick, 270 F.R.D. at 234; Palmer, 2010 WL 2605179, at *6 (“Rule 15 of the Federal Rules of Civil Procedure contemplates that motions to amend pleadings on that basis of relevant facts learned during discovery, and such motions should be liberally granted.”).

50. Daley v. Scott, No. 2:15-cv-269-FtM-29DNF, 2016 U.S. Dist. LEXIS 83735, at *5 (M.D. Fla. June 28, 2016) (“[N]either *Twombly* nor *Iqbal* addressed whether Rule 8(c) requires an affirmative defense, like a claim for relief, to be pled with ‘enough facts’ to show that [it] is plausible on its face.”); Sprint Sols., Inc. v. Shoukry, No. 2:14-cv-00127, 2014 U.S. Dist. LEXIS 152851, at *5 (S.D. Ohio Oct. 28, 2014) (“As numerous courts have observed, *Iqbal* and *Twombly* analyzed only complaints and Rule 8(a)(2).”; Paletaria La Michoacana v. Productos Lacteos, 905 F. Supp. 2d 189, 190 (D.D.C. 2012) (“*Iqbal* and *Twombly* interpreted Rule 8(a)(2), which sets forth the pleading requirements for a complaint. Affirmative defenses are governed by a different provision, Rule 8(c).”). See generally Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2011).

affirmative defenses.⁵¹ While Rule 8(a) requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” Rule 8(c) requires merely that “a party must affirmatively state any avoidance or affirmative defense.”⁵² The plausibility pleading standard hinges upon Rule 8(a)’s requirement of a “showing.”⁵³ However, Rule 8(c) does not require any “showing” by a defendant.⁵⁴ Accordingly, the text of the Rules shows that the plausibility pleading standard applies only to claims plead pursuant to Rule 8(a) and does not apply to affirmative defenses plead pursuant to Rule 8(c).⁵⁵

Many courts that decline to extend plausibility pleading point to the difference in time available to the parties to a lawsuit to formulate their pleadings. In this view, it is not fair to hold the parties to the same standard of factual support where

51. See, e.g., *Vazquez-Robles v. CommoLoCo, Inc.*, 186 F. Supp. 3d 138, 149 (D.P.R. 2016) (“[I]n *Twombly* and *Iqbal*, the Supreme Court interpreted Federal Rule of Civil Procedure 8(a)(2), which sets forth the pleading requirements for a complaint and employs different language, governs a different pleading, and affects a different stage of the litigation than Federal Rule of Civil Procedure 8(c), which governs affirmative defenses.”).

52. FED. R. CIV. P. 8(a), (c); see *United States v. All Assets Held at Bank Julius Baer & Co.*, 268 F. Supp. 3d 135, 144 (D.D.C. 2017).

53. E.g., *Vann v. Inst. of Nuclear Power Operations, Inc.*, No. 1:09-CV-1169-CC-LTW, 2011 U.S. Dist. LEXIS 165320 (N.D. Ga. Oct. 6, 2011); see *Twombly*, 550 U.S. at 555 n.3.

54. See FED. R. CIV. P. 8(c); see also *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 382 F. Supp. 3d 860, 866 (E.D. Wis. 2019); *Henry v. Ocwen Loan Servicing, LLC*, No. 17cv0688 JM(NLS), 2018 U.S. Dist. LEXIS 30779, at *6–7 (S.D. Cal. Feb. 26, 2018); *Lane v. Page*, 272 F.R.D. 581, 592 (D.N.M. 2011) (“The Court agrees with the latter cases that rule 8(c), which provides the requirements for pleading affirmative defenses, does not require factual support.”); *Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-119, 2009 U.S. Dist. LEXIS 116358, at *12–13 (D.V.I. Dec. 8, 2009); *Am. Res. Ins. Co. v. Evoleno Co.*, No. 07-0035-WS-M, 2007 U.S. Dist. LEXIS 55181, at *6 n.7 (S.D. Ala. July 30, 2007).

55. *Craten v. Foster Poultry Farms Inc.*, No. CV-15-02587-PHX-DLR, slip op. at 4 (D. Ariz. June 24, 2016); *Jam Tire, Inc. v. Harbin*, No. 3:14-cv-00489, 2014 U.S. Dist. LEXIS 124581, at *6–8 (N.D. Ohio Sept. 5, 2014) (“I am required to give the Federal Rules of Civil Procedure their plain meaning. . . . To apply a plausibility standard to affirmative defenses would place an unrealistic burden on defendants irreconcilable with the plain meaning of Rule 8(c) and the overriding consideration that pleadings ‘must be construed so as to do justice.’”); *Flame S.A. v. Indus. Carriers, Inc.*, No. 2:13-cv-658, 2014 U.S. Dist. LEXIS 86662, at *5 (E.D. Va. June 24, 2014); *EEOC v. Joe Ryan Enters.*, 281 F.R.D. 660, 662 (M.D. Ala. 2012); *Lopez v. Asmar’s Mediterranean Food, Inc.*, No. 1:10-cv-1218 (JCC), 2011 U.S. Dist. LEXIS 2265, at *5 (E.D. Va. Jan. 10, 2011) (“[The Court] is first bound to apply the relevant rules of civil procedure as written.”).

plaintiffs have years to develop their positions while defendants have to respond within, usually, twenty-one days.⁵⁶ Therefore, the equities support maintaining separate standards.⁵⁷

Courts that decline to extend plausibility pleading also regularly explain how the policy and practical concerns expressed in *Twombly* and *Iqbal*—relating to judicial efficiency and cost savings to parties—are advanced by declining to extend. First, extending plausibility pleading is likely to cause a great increase in the volume of motions to strike affirmative defenses.⁵⁸ But nearly all motions to strike affirmative defenses are without value.⁵⁹ And any inefficiencies caused by simply-

56. *Bigfoot on the Strip, LLC v. Winchester*, No. 18-3155-CV-S-BP, 2018 U.S. Dist. LEXIS 173447, at *4–5 (W.D. Mo. Oct. 9, 2018); *Henry*, 2018 U.S. Dist. LEXIS 30779, at *7–8 (“[A] plaintiff may investigate a potential claim for weeks, months, or even years before filing a complaint. To expect a defendant to retain counsel, investigate claims, adequately prepare an answer, and to plead affirmative defenses with particularity within 21 days of service of the complaint . . . would seem to be unrealistic in most cases[.]”); *Craten*, slip op. at 5; *Vann*, 2011 U.S. Dist. LEXIS 165320, at *13–14.

57. *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) (“Whatever one thinks of *Iqbal* and *Twombly*, the ‘plausibility’ requirement that they impose is more fairly imposed on plaintiffs who have years to investigate than on defendants who have 21 days.”).

58. See, e.g., *Ross v. Sharp One, Inc.*, No. 19-2293-KHV, 2019 U.S. Dist. LEXIS 179162, at *5 (D. Kan. Oct. 15, 2019) (“Applying *Twombly* and *Iqbal* to affirmative defenses would ‘invite many more motions to strike, which achieves little.’”); *Bayer CropScience A.G. v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 U.S. Dist. LEXIS 149636, at *4 (D. Del. Dec. 30, 2011) (declining to extend plausibility pleading to affirmative defenses based in part on “the fact that a heightened pleading requirement would produce more motions to strike, which are disfavored” and “the low likelihood that motions to strike affirmative defenses would expedite the litigation, given that leave to amend is routinely granted”); cf. *Francisco v. Verizon S., Inc.*, No. 3:09-cv-737, 2010 U.S. Dist. LEXIS 77083, at *10–11 (E.D. Va. July 29, 2010) (anticipating the onrush of mostly useless motion practice that its decision to extend plausibility pleading will cause and requesting plaintiffs not do that).

59. See *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV-MARRA/JOHNSON, 2008 U.S. Dist. LEXIS 42630, at *2–3 (S.D. Fla. May 28, 2008) (listing many cases that have described motions to strike as “time wasters”); see also *Green v. Obsu*, No. ELH-19-2068, 2020 U.S. Dist. LEXIS 26183, at *15 (D. Md. Feb. 13, 2020) (“Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.”); *Moore v. R. Craig Hemphill & Assocs.*, No. 3:13-cv-900-J-39-PDB, slip op. at 5 (M.D. Fla. May 6, 2014) (“Persuaded by the latter approach and its fidelity to both the rule that a court must give effect to a law that has plain and unambiguous meaning . . . and the longstanding adversity to striking an affirmative defense unless it does not have any possible connection to the controversy and might prejudice a party if it remains (an adversity left untouched by *Iqbal* and

pled affirmative defenses are, at most, slight.⁶⁰ Second, discovery is limited to the pleadings.⁶¹ Discovery will be more contentious as plaintiffs resist defendants' attempts to develop factual support for affirmative defenses that they were prevented from pleading.⁶² Third, defendants who wait to plead affirmative defenses, or who have had previously-pled affirmative defenses struck, will be forced later to move to amend their pleadings after some discovery has taken place.⁶³ And no matter how liberal the standards are in favor of amendment, plaintiffs will surely resist defendants' requests, adding yet another round of motion practice.⁶⁴ All told, extending plausibility pleading to affirmative defenses inexorably encourages a cavalcade of wasteful motion practice.⁶⁵

Twombly), the Court applies that approach here.”).

60. See *Traincroft, Inc. v. Ins. Co. of Pa.*, No. 14-10551-FDS, 2014 U.S. Dist. LEXIS 85170, at *10 (D. Mass. June 23, 2014) (“[A]ffirmative defenses generally add little marginal cost.”); *Baum v. Faith Techs., Inc.*, No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *4 n.9 (N.D. Okla. June 9, 2010) (noting the “utter lack of meaningful prejudice” presented by the continued existence of defendant’s affirmative defenses).

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

62. See *Laporte v. Bureau Veritas N. Am. Inc.*, No. 1:12-cv-09543, slip op. at 4 (N.D. Ill. Jan. 18, 2013) (“The Court would also like to avoid the discovery disputes that would inevitably develop as a defendant seeks discovery related to affirmative defenses it had not stated in its answer.”); *Leon v. Jacobson Transp. Co.*, No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010).

63. *Henry v. Ocwen Loan Servicing, LLC*, No. 17cv0688 JM(NLS), 2018 U.S. Dist. LEXIS 30779, at *7–8 (S.D. Cal. Feb. 26, 2018) (“[A] heightened pleading standard may require the court to address multiple motions to amend the answer as discovery reveals additional defenses.”); *Florilli Transp. v. W. Express, Inc.*, No. 14-CV-00988-DW, 2015 U.S. Dist. LEXIS 185459, at *4 (W.D. Mo. Feb. 20, 2015) (“[T]hen, after taking discovery, [defendants will need] to move the Court for permission to amend their answers to add affirmative defenses . . . Thus, another round of motion practice would be added to many cases, increasing the burdens on the federal courts, and adding expense and delay for the parties.”).

64. See *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 382 F. Supp. 3d 860, 867 (E.D. Wis. 2019); *Bigfoot on the Strip, LLC v. Winchester*, No. 18-3155-CV-S-BP, 2018 U.S. Dist. LEXIS 173447, at *5 (W.D. Mo. Oct. 9, 2018) (“Plaintiffs would often resist those motions on the grounds that the proposed affirmative defenses would be futile. Thus, another round of motion practice would be added to many cases, increasing the burdens on the federal courts, and adding expense and delay for the parties.”); *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1052 (D. Minn. 2010).

65. *Ross v. Sharp One, Inc.*, No. 19-2293-KHV, 2019 U.S. Dist. LEXIS 179162, at *5 (D. Kan. Oct. 15, 2019) (“Finally, the Court does not want to ‘encourage parties to bog down litigation by filing and fighting motions to strike answers or defenses prematurely.’ The goal of Rule 12(f) is to ‘minimize

C. The “Majority” Position That Isn’t

Around the time of the author’s previous work on this subject, a few dozen district courts had weighed in and most had ruled that plausibility pleading also applied to the pleading of affirmative defenses.⁶⁶ Today, however, thousands of cases have addressed the issue.⁶⁷ While many courts still select to extend the plausibility pleading standard to affirmative defenses, that is no longer the majority position.⁶⁸ Rather, the movement in the district courts over the last decade has been decidedly away from the extension of the plausibility pleading standard to affirmative defenses.⁶⁹ Courts selecting not to extend the plausibility pleading standard to affirmative defenses now comprise a sizable majority.⁷⁰

delay, prejudice, and confusion.”); *Sikorsky Aircraft Corp.*, 382 F. Supp. 3d at 867 (“What *would* clog the docket clutter [sic] is applying a rigorous pleading standard to affirmative defenses.”); *Ponder v. Prophete*, No. 16-2376-CM-GLR, 2016 U.S. Dist. LEXIS 152934, at *1–4 (D. Kan. Nov. 3, 2016); *cf.* *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1175–76 (N.D. Cal. 2010) (“It is the court’s opinion that while plaintiff partially succeeded on the merits of his motion, the issues raised would not have been difficult to address solely between the parties.”).

66. *Lane v. Page*, 272 F.R.D. 581, 589–90 nn.5–6 (D.N.M. 2011) (listing cases); *Barnes*, 718 F. Supp. 2d at 1171.

67. *See* Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875 (2019); Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 FED. CTS. L. REV. 79 (2016).

68. Soucek & Lamons, *supra* note 67; *Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122 (D. Mass. 2012) (noting that the weight of a majority had recently flipped).

69. Soucek & Lamons, *supra* note 67, at 891–95 (finding in a laborious study that the majority view among the district courts has been against extending the plausibility pleading standard since August of 2011 and that, as of the time of their writing, more than sixty-two percent of the decisions to squarely address the question, and seventy-one percent in the Second Circuit, selected not to extend); *see* *Goldsmith v. Lee Enters.*, No. 4:19CV1772 HEA, 2019 U.S. Dist. LEXIS 178132, at *10–11 (E.D. Mo. Oct. 15, 2019); *Benedict v. Hankook Tire Co.*, No. 3:17-cv-109, 2018 U.S. Dist. LEXIS 26129, at *6 (E.D. Va. Feb. 16, 2018); *Hand Held Prods., Inc. v. Code Corp.*, No. 17-167-RMG, 2017 U.S. Dist. LEXIS 89271, at *18 (D.S.C. June 9, 2017); *Advanced Pain Mgmt. Servs., LLC v. Wadhwa*, No. MJG-12-3579, 2014 U.S. Dist. LEXIS 7703, at *3 (D. Md. Jan. 22, 2014).

70. *Whetstone Indus., Inc. v. Yowie Grp., Ltd.*, No. 3:17-cv-1286-J-20PDB, 2019 U.S. Dist. LEXIS 177086, at *2 (M.D. Fla. Oct. 11, 2019) (noting a majority among courts selecting not to extend the plausibility pleading standard to affirmative defenses); *Leviton Mfg. Co. v. Pass & Seymour, Inc.*, 264 F. Supp. 3d 421, 427 (E.D.N.Y. 2017) (“The overwhelming majority view,

Despite this reality, there persists a continuing misapprehension that a majority of the district courts support the extension of the plausibility pleading standard to affirmative defenses. This error can be traced to some of the earliest decisions to consider the issue, when, indeed, it was not an error. The first reference to a nascent majority position on the issue appears to have been in *Hayne v. Green Ford Sales, Inc.*⁷¹ *Hayne* was decided a mere seven months after *Iqbal* and offered a count of nine-to-three in favor of extension.⁷² About five months later, the court in *Barnes v. AT&T Pension Benefit Plan*⁷³ cited to *Hayne* in support of its proposition that “the vast majority of courts presented with the issue have extended *Twombly*’s heightened pleading standard to affirmative defenses.”⁷⁴ This proposition was challenged at the time.⁷⁵ Even so, *Barnes* currently has over 300 citing decisions, and some courts persist in citing to *Barnes* for its “vast majority” language.⁷⁶ This practice is not supportable and should be ended.⁷⁷

to which I subscribe, is that the concept of plausibility has no application to affirmative defenses.”). See generally Soucek & Lamons, *supra* note 67, at 891.

71. *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649–50 (D. Kan. 2009).

72. *Id.* at 650 & n.15.

73. *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167 (N.D. Cal. 2010).

74. *Id.* at 1171 (“[T]he vast majority of courts presented with the issue have extended *Twombly*’s heightened pleading standard to affirmative defenses.”).

75. See, e.g., *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 640 n.3 (N.D. Ill. 2011) (“While it may be a stretch to say of the more than 100 cases that have considered the applicability of *Iqbal* and *Twombly* to affirmative defenses that the ‘vast majority of . . . districts’ are in favor of the application, it does appear that a majority are.”).

76. See, e.g., *OMS Collections, Ltd. v. Tien*, No. 19-23471-Civ-WILLIAMS/TORRES, 2020 U.S. Dist. LEXIS 14281, at *11–12 (S.D. Fla. Jan. 27, 2020); *Romero v. Makan*, No. 5:18-CV-353-ODW (SHKx), 2018 U.S. Dist. LEXIS 111334, at 3 & n.2 (C.D. Cal. July 3, 2018).

77. Continued relevance harkens to the worrisome possibility of selective counting among the district courts, which is worse yet when decisions are rendered based in some part on the weight of an erroneously believed majority position. See *Barnes*, 718 F. Supp. 2d 1167; Soucek & Lamons, *supra* note 67, at 902–11. By way of a simplified example, in the Northern District of Indiana (just to pick a jurisdiction), there are now more cases that have declined to extend the plausibility pleading standard to affirmative defenses than there were to support *Hayne*’s point that a majority existed favoring extension. See, e.g., *Keller v. Enhanced Recovery Co.*, No. 4:18-cv-15, 2018 U.S. Dist. LEXIS 186043 (N.D. Ind. Oct. 31, 2018); *Droz v. Droz*, No. 2:17-cv-00451-RL-JEM, 2018 U.S. Dist. LEXIS 111761 (N.D. Ind. July 5, 2018); *Reger v. Ariz. RV Ctrs.*,

Further, the majority declining to extend the plausibility pleading standard to affirmative defenses becomes even more commanding when one considers courts and not just decisions. There is a small yet active minority of courts in which a very large number of pro-extension cases are decided.⁷⁸ These courts appear to grant such motions readily, and, accordingly, plaintiffs appear to be bombarding these courts with motions to strike affirmative defenses that might not be granted in other jurisdictions.⁷⁹ Among other problems, these activities inflate

LLC, No. 3:16-CV-778-MGG, 2018 U.S. Dist. LEXIS 89773 (N.D. Ind. May 30, 2018); Briley v. Lawson, No. 3:17-CV-522-JD-MGG, 2018 U.S. Dist. LEXIS 80624 (N.D. Ind. May 14, 2018); Maloy v. Stucky, Lauer & Young, LLP, No. 1:17-CV-336-TLS, 2018 U.S. Dist. LEXIS 58084 (N.D. Ind. Apr. 5, 2018); Friend v. Taylor Law, PLLC, No. 4:17-CV-29-JVB-PRC, 2017 U.S. Dist. LEXIS 203695 (N.D. Ind. Dec. 11, 2017); Markel Ins. Co. v. United Emergency Med. Servs., LLC, No. 2:16-CV-220-JVB-PRC, 2017 U.S. Dist. LEXIS 34266 (N.D. Ind. Mar. 10, 2017); Design Basics, LLC v. Windsor Homes, Inc., No. 1:16-cv-00051-PPS-SLC, 2016 U.S. Dist. LEXIS 91910 (N.D. Ind. July 14, 2016); Husainy v. Allied Collection Serv., Inc., No. 4:15-CV-95-JVB-PRC, 2016 U.S. Dist. LEXIS 54003 (N.D. Ind. Apr. 22, 2016); Fletcher v. Hoepfner Wagner & Evans, LLP, No. 2:14-CV-231-RL-PRC, 2015 U.S. Dist. LEXIS 153057 (N.D. Ind. Nov. 12, 2015); Cottle v. Falcon Holdings Mgmt., LLC, No. 2:11-CV-95-PRC, 2012 U.S. Dist. LEXIS 10478 (N.D. Ind. Jan. 30, 2012). But in reality, this fact offers no insights into whether this district, the Seventh Circuit, or the nation on the whole tilts one way or the other. Indeed, the court in *Hayne* offered no suggestion that its count was exhaustive (and it was not), but that did not prevent it from spawning the “majority” myth. See *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608-CIV-LENARD/TORRES, 2007 U.S. Dist. LEXIS 61608, at *3 (S.D. Fla. Aug. 21, 2007). The author’s previous work on this topic warned against the risk of courts feeling pressured to comport with a “majority” position. Gambol, *supra* note 1, at 2207 (“The action within the district courts presents a very real danger of snowballing.”). It appears that this admonition proved prescient.

78. Soucek & Lamons, *supra* note 67, at 894.

79. See, e.g., *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1338 (S.D. Fla. 2019) (“When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8. See, e.g., *Barnes* . . . see also *Hayne*.”); *Pollo Campestre, S.A. DE C.V. v. Campero, Inc.*, No. 19-Civ-20001-SCOLA/TORRES, 2019 U.S. Dist. LEXIS 186749, at *10–11 (S.D. Fla. Oct. 29, 2019) (“When combining these considerations with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard under Rule 8 for a complaint and an affirmative defense. See, e.g., *Barnes* . . . see also *Hayne*.”); *Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, 333 F.R.D. 594, 599 (S.D. Fla. 2019) (“When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8. See, e.g., *Barnes* . . . see also *Hayne*.”); *Tokio Marine Specialty Ins.*

the number of decisions in favor of extension. In other words, absent a few outlier jurisdictions offering an outsized number of decisions on this subject, the majority of cases and courts in favor of not extending the plausibility pleading standard to affirmative defenses is overwhelming.

IV. ACTION AT THE CIRCUIT LEVEL

The Second Circuit recently became the first United States Court of Appeals to rule explicitly on whether to extend the plausibility pleading standard to affirmative defenses. In *GEOMC Co. v. Calmare Therapeutics Inc.*,⁸⁰ the Second Circuit answered that question in the affirmative. This Section will review the Second Circuit’s *GEOMC* decision and examine a number of questions and issues that the decision presents. It will also address briefly how other circuit courts have suggested that they might approach the issue.

A. The Second Circuit’s Decision in *GEOMC Co. v. Calmare Therapeutics Inc.*

At the trial level, the *GEOMC* matter sounded broadly in breach of contract, where the plaintiff alleged that the defendant had failed to pay for certain medical devices that the plaintiff had manufactured for the defendant, resulting in the plaintiff’s right to payment and fees.⁸¹ The trial court agreed and found for the plaintiff on a number of counts on summary judgment.⁸²

Co. v. Ramos, No. 19-22069-CIV-SCOLA/TORRES, 2019 U.S. Dist. LEXIS 160301, at *11 (S.D. Fla. Sept. 20, 2019) (“When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8. See, e.g., *Barnes* . . . see also *Hayne*.”); *Rubinstein v. Keshet Inter Vivos Tr.*, No. 17-61019-Civ-WILLIAMS/TORRES, 2019 U.S. Dist. LEXIS 99428, at *15–16 (S.D. Fla. June 13, 2019) (“When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8. See, e.g., *Barnes* . . . see also *Hayne*.”).

80. *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019).

81. *GEOMC Co. v. Calmare Therapeutics Inc.*, No. 3:14-cv-01222 (VAB), 2017 U.S. Dist. LEXIS 162353 (D. Conn. Sept. 29, 2017).

82. *GEOMC Co. v. Calmare Therapeutics Inc.*, No. 3:14-cv-01222 (VAB), 2017 U.S. Dist. LEXIS 131986 (D. Conn. Aug. 18, 2017).

A later trial established the quantum of damages.⁸³

In March of 2019, the Second Circuit issued a pair of opinions, the first of which vacated and remanded the matter for various reasons.⁸⁴ The Second Circuit rendered a separate opinion, affirming the lower court's previous ruling to strike two of the defendant's affirmative defenses and some counterclaims.⁸⁵ The affirmative defenses at issue were the defendant's claims that the plaintiff's damages were caused by its own negligence and that the plaintiff had failed to join a necessary party.⁸⁶

The Second Circuit offers this second opinion specifically to "clarify the standards for pleading affirmative defenses and granting a motion to strike them."⁸⁷ It begins by recounting the procedural posture of the "complicated" case below.⁸⁸ After the plaintiff filed an amended complaint, the defendant timely answered.⁸⁹ Nine months later, the defendant sought leave to amend its answer to add affirmative defenses and counterclaims.⁹⁰ This request was opposed while the plaintiff simultaneously sought leave to file a second amended complaint to add an additional claim.⁹¹ The Second Circuit states that the situation was "unusual," as was the lower court's solution: to deny the defendant leave to amend its answer to the amended complaint, to grant the concurrent motion for the plaintiff to amend its complaint again, and to permit the defendant to file an answer to the second amended complaint.⁹² At the same time, the lower court invited the plaintiff to move to strike should the defendant "exceed[] the scope of permissible amendment."⁹³ The plaintiff filed its second amended complaint,

83. *GEOMC*, 2017 U.S. Dist. LEXIS 162353.

84. *GEOMC Co. v. Calmare Therapeutics Inc.*, 768 F. App'x 1 (2d Cir. 2019).

85. *GEOMC*, 918 F.3d at 94–95 (citing *GEOMC Co. v. Calmare Therapeutics Inc.*, No. 3:14-CV-01222 (VAB), 2016 U.S. Dist. LEXIS 144735, at *5–6 (D. Conn. Oct. 19, 2016)).

86. *GEOMC*, 918 F.3d at 99.

87. *Id.* at 94. The Court also sought to clarify the standard for presenting and challenging new counterclaims, but that is beyond the scope of this article.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* ("In effect, [the lower court] authorized the Plaintiff to use a motion

the defendant filed its answer (with added affirmative defenses and counterclaims), the plaintiff moved to strike, and the lower court granted the motion in part.⁹⁴ The defendant appealed.⁹⁵

The Second Circuit prefaces its review with the observation that some lower courts have “not always distinguished between affirmative defenses in a timely filed answer and those later filed, either with or without court permission to amend an answer, especially those filed in late stages of litigation.”⁹⁶ It then delineates the Federal Rules that articulate the periods within which defendants may timely file affirmative defenses under different circumstances.⁹⁷

The Second Circuit’s “starting point” is Rule 12(f) regarding motions to strike.⁹⁸ It traces the history of the standard governing motions to strike affirmative defenses in its circuit from the adoption of the Federal Rules.⁹⁹ The Second Circuit notes that it did not address the pleading standard necessary for affirmative defenses to survive a motion to strike for many years.¹⁰⁰ When it did articulate a standard for adjudging the sufficiency of a pled affirmative defense, that standard broadly mirrored the *Conley* notice standard for pled claims.¹⁰¹ The Second Circuit notes that the *Conley* standard for claims was abrogated by *Twombly* and was replaced by a plausibility standard.¹⁰²

to strike under Rule 12(f) of the Federal Rules of Civil Procedure to raise whatever issues it would have raised in opposition to the Defendant’s motion to amend its answer under Rule 15(a)(2).”).

94. *Id.* at 94–95.

95. *Id.* at 95.

96. *Id.* (noting the “uncertainty” this practice has caused).

97. *Id.* (listing Rules 12(a)(1)(A)(i), 15(a)(1)(A), 15(a)(2), and 15(a)(3), each of which require or permit defendants to submit affirmative defenses at different times).

98. *Id.* (citing FED. R. CIV. P. 12(f)(1), (2)) (“Rule 12(f) . . . provides that a court may strike ‘from a pleading’ any ‘insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.’”).

99. *Id.* at 95–96.

100. *Id.* at 96.

101. *Id.* at 95–96 (“[A] motion to strike an affirmative defense, apparently timely filed, will not be granted unless ‘it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense.’” (quoting *William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015 (1986))).

102. *Id.* at 96.

The Second Circuit describes how a district court in *SEC v. McCaskey*¹⁰³ derived elements of review from the Second Circuit's previous guidance and articulated a test to review a motion to strike an affirmative defense; the test has been used and modified by other courts.¹⁰⁴ To prevail on a motion to strike an affirmative defense, the *McCaskey* test requires: "a plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by the inclusion of the defense."¹⁰⁵ The Second Circuit ultimately applies the *McCaskey* approach.¹⁰⁶ It admits, however, that the court below did not cite to or apply the *McCaskey* standard, but rather a standard properly applied to the pleading of claims.¹⁰⁷

Perhaps because of this confusion, the Second Circuit takes the opportunity "to clarify the factors relevant to striking an affirmative defense."¹⁰⁸ "To avoid having district courts continue to repeat the three-factor formulation as worded in *McCaskey*, we consider each of those factors in turn."¹⁰⁹

The Second Circuit first asks whether the first factor of the *McCaskey* test should be modified in the wake of *Twombly*.¹¹⁰ It notes that the issue "has divided the many district courts and commentators that have considered it."¹¹¹ The Second Circuit

103. *SEC v. McCaskey*, 56 F. Supp. 2d 323 (S.D.N.Y. 1999).

104. *GEOMC*, 918 F.3d at 96–97 & n.6 ("Fifteen years after *Salcer*, a District Court in this Circuit purported to extract from that opinion a three-part test . . . This formulation divided *Salcer*'s reference to facts into two factors, one concerned with facts, and the other concerned with law. The *McCaskey* formulation also added a third factor, prejudice to the plaintiff, a factor not mentioned in *Salcer*.").

105. *Id.* at 96 (quoting *McCaskey*, 56 F. Supp. 2d at 326).

106. *Id.* at 97–99 (applying *McCaskey*, with some criticisms).

107. *Id.* at 97 & n.7.

108. *Id.* at 97.

109. *Id.*

110. *Id.* ("[At issue is] [w]hether the first of the *McCaskey* factors should be reworded in light of *Twombly*, i.e., whether *Twombly* applies to the pleading of affirmative defenses.").

111. *Id.* at 97 & n.8 ("Three comprehensive articles take three different approaches. One article favors applying *Twombly* to affirmative defenses. One opposes applying *Twombly* to affirmative defenses. One proposes a 'middle-ground approach.'"). In a footnote, the Second Circuit compares three cases on the pro-extension side—*Perez v. Gordon & Wong L. Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425 (N.D. Cal. Mar. 26, 2012); *HCRI TRS Acquirer*,

immediately “conclude[s] that the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense, but with recognition that, as the Supreme Court explained in *Iqbal*, applying the plausibility standard to any pleading is a ‘context-specific’ task.”¹¹²

“The key aspect of the context relevant to the standard for pleading an affirmative defense is that an affirmative defense, rather than a complaint, is at issue. This is relevant to the degree of rigor appropriate for testing the pleading of an affirmative defense.”¹¹³ The Second Circuit notes that plaintiffs have years to develop factual plausibility for their claims, while defendants must respond within a few weeks.¹¹⁴ Further, it instructs that a court applying its standard must consider the nature of the specific affirmative defense pled, and that sometimes a “relaxed” standard should apply.¹¹⁵

The Second Circuit does not modify the second or third factors of the *McCasky* test.¹¹⁶ However, it does clarify that the third factor—prejudice—should infrequently be a basis for striking an otherwise valid affirmative defense because an effective defense should prejudice a plaintiff.¹¹⁷

Based upon these considerations, the Second Circuit reexamines the lower court’s decision to strike two of the

LLC v. Iwer, 708 F. Supp. 2d 687 (N.D. Ohio 2010); Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150 (W.D.N.Y. Sept. 30, 2009)—to three cases on the anti-extension side—Leviton Mfg. Co. v. Pass & Seymour, Inc., 264 F. Supp. 3d 421 (E.D.N.Y. 2017); Hon Hai Precision Indus. Co. v. Wi-LAN, Inc., No. 12 Civ.7900(SAS), 2013 WL 2322675 (S.D.N.Y. May 28, 2013); Lane v. Page, 272 F.R.D. 581 (D.N.M. 2011). *Id.* at n.8. The Second Circuit also notes that 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 12.37[4] (3d ed. 2018) states that the “better view” is that *Twombly* does not extend and cites to WRIGHT & MILLER, *supra* note 33, at § 1274 for the proposition that Wright & Miller do not offer an opinion on the matter. *GEOMC*, 918 F.3d at 97–98.

112. *GEOMC*, 918 F.3d at 98 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

113. *GEOMC*, 918 F.3d at 98.

114. *Id.* (“That aspect of the context matters.”).

115. *Id.* (“For example, the facts needed to plead a statute-of-limitations defense will usually be readily available; the facts needed to plead an ultra vires defense, for example, may not be readily known to the defendant, a circumstance warranting a relaxed application of the plausibility standard.”).

116. *Id.* at 98–99.

117. *Id.* (noting that the exception is if the defense is offered “beyond the normal times limits of the Rules”).

defendant's affirmative defenses. Although the district court had permitted the defendant to file an answer, the Second Circuit reminds us that the defendant had been warned against expanding the scope of the matter and agreed that these defenses "introduce[d] vague allegations regarding the actions of unnamed third parties, raising concerns of both legal sufficiency and prejudice to GEOMC."¹¹⁸ Further, the Second Circuit notes that the answer in which these affirmative defenses had been proffered did not indicate to what actions or parties the affirmative defenses at issue pertained.¹¹⁹ Accordingly, "[s]triking these two affirmative defenses was within the District Court's discretion."¹²⁰

[Defendants] needed to support these defenses with some factual allegations to make them plausible. Moreover, both affirmative defenses were presented at a late stage of the litigation. Although the defenses were presented soon after [the plaintiff] filed its second amended complaint, they were not aimed at the one new cause of action . . . Expanding the litigation at that stage would have been prejudicial to [the plaintiff].¹²¹

The Second Circuit then proceeds to consider questions related to the defendant's dismissed counterclaims.¹²²

B. Challenges Presented by the Second Circuit's Decision

The Second Circuit's stated intention in drafting the *GEOMC* decision was to "clarify" matters relating to the pleading of affirmative defenses and resolving motions to strike them. Unfortunately, it does not seem likely that the Second Circuit's decision will meaningfully affect that goal. While the lower courts in the Second Circuit must follow the *GEOMC*

118. *Id.* at 99 (quoting *GEOMC Co. v. Calmare Therapeutics Inc.*, No. 3:14-cv-01222(VAB), 2016 U.S. Dist. LEXIS 114735, at *14 (D. Conn. Oct. 19, 2016)).

119. *GEOMC*, 918 F.3d at 99.

120. *Id.*

121. *Id.*

122. *Id.* at 99–102.

precedent, rather than offer solutions, *GEOMC* instead raises a number of new questions and muddies a number of waters.

1. The Second Circuit Forgoes Support or Analysis

The primary difficulty of the *GEOMC* decision is that the Second Circuit offers literally no analysis or support for its ruling that the plausibility pleading standard applies to affirmative defenses.¹²³ Rather, the Second Circuit acknowledges that there is a difference of opinion among district courts and commentators, states flatly that the plausibility pleading standard now applies to affirmative defenses, and then moves directly into a discussion of the degree of rigor that should be applied to its newly-created standard.¹²⁴

The Second Circuit does not indulge a single reference to Rule 8(c), or indeed any part of Rule 8, the actual Rule at issue and upon which the instant decision imposes an interpretation.¹²⁵ This omission is particularly conspicuous because the Second Circuit quotes language from, and delves into the distinct requirements of, several other Federal Rules.¹²⁶ As noted, the difference in language between Rules 8(a) and 8(c), particularly in light of the fact that *Twombly* and *Iqbal* specifically and exclusively deal with Rule 8(a), is perhaps the foremost and most powerful argument that courts consider when selecting not to extend the plausibility pleading standard to affirmative defenses.¹²⁷ It is very problematic that the Second Circuit fails to address this point. Given the cases and commentaries that the Second Circuit references, it seems improbable that its silence is inadvertent.¹²⁸ We are left to speculate about what the Second Circuit intended to communicate by omitting this point that is directly relevant and, indeed, determinative to the issue at hand.

123. *See id.* at 98–99.

124. *See id.* at 99.

125. *See id. passim.*

126. *Id.* at 95.

127. *See supra* notes 50–55 and accompanying text.

128. *See GEOMC*, 918 F.3d at 97.

2. The Authority the Second Circuit Cites Does Not Support Its Conclusion

The Second Circuit's reasoning behind its decision that *Twombly* should apply to affirmative defenses is even more challenging to reconstruct based upon its citations. Indeed, the authority the Second Circuit selects to reference does not appear to support its conclusion.¹²⁹

First, in discussing the divergence of opinion, the Second Circuit appears to have crafted its account to be largely balanced between the opposing sides. It references three pro-extension cases and three anti-extension cases; it cites to three commentaries: one pro-extension, one anti-extension, and one that it describes as in the middle; and it cites to the leading procedural treatises, one anti-extension and one that it believes does not offer an opinion.¹³⁰ This balanced manner of the Second Circuit stymies one possible approach to understanding its reasoning. If it had cited only anti-extension articles, for instance, a reader could probably assume that it found those pieces persuasive. But because the Second Circuit leveled the field and does not offer further support or analysis as discussed above,¹³¹ a reader is challenged to infer what reasoning the Second Circuit may have found germane, or what references it may have found persuasive.¹³²

On a closer inspection of the cited authority, the Second Circuit predominantly uses references that oppose extending

129. Some trouble with *GEOMC*'s citations is foreshadowed by the Second Circuit's formulation of the question before it: "Whether the first of the *McCaskey* factors should be reworded in light of *Twombly* . . . is an issue that has divided the many district courts and commentators that have considered it." *Id.* But, strictly speaking, none of the cases, commentaries, or treatises referenced address *McCaskey* or its factors on this question. Rather than addressing an existing issue, *GEOMC* may have created one.

130. *GEOMC*, 918 F.3d at 97.

131. *See supra* notes 123–28 and accompanying text.

132. It is also worth noting that the Second Circuit's balance is artificial. As discussed previously, there is a robust majority of cases nationally that have declined to extend *Twombly* to affirmative defenses. *See supra* notes 67–69 and accompanying text. In the Second Circuit, there was an even more commanding majority opposed. *See id.* Further, the Second Circuit's presentation of three articles that address the issue omits reference to the dozens of other pieces of scholarship that have addressed the issue, a majority of which, much like the majority of courts, argue against extension. *E.g.*, Gambol, *supra* note 1.

Twombly to affirmative defenses. Among cases on the pro-extension side, the court cites two out-of-circuit cases and one in-circuit case decided four months after *Iqbal* in 2009.¹³³ Among cases on the anti-extension side, the court cites one out-of-circuit case and two in-circuit cases from 2017 and 2013.¹³⁴ While the Second Circuit is, of course, able to cite to whatever authority it pleases and is not bound by any lower court precedent in its district, it certainly feels odd that it has selected to reference a greater number of more recent case law from within its own circuit on the anti-extension side.

More emphatically, however, do the commentaries and treatises the Second Circuit cites reject extension. As noted, the court references three commentaries, where one favors the application of *Twombly* to affirmative defenses, one opposes such application, and one “proposes ‘a middle-ground approach.’”¹³⁵ But this is not a fair representation of the third article, which argues decisively against extension.¹³⁶ Indeed, the brief language that the court cites comes from a section entitled “V. Solution: Courts Should Not Hold Affirmative Defenses to the Plausibility Standard.”¹³⁷ Further, the court cites Moore’s *Federal Practice* and Wright & Miller’s *Federal Practice & Procedure*, the premier treatises on Federal Civil Procedure.¹³⁸ The Second Circuit acknowledges that Moore advises against applying a plausibility pleading standard to affirmative defenses.¹³⁹ It also states, however, that Wright & Miller take no position on the issue.¹⁴⁰ This is not correct. Rather, Wright & Miller, like Moore, clearly instruct that plausibility pleading should not apply to affirmative defenses.¹⁴¹

133. *GEOMC*, 918 F.3d at 97 n.8.

134. *Id.*

135. *Id.* at 97 (quoting Nathan Psyno, Note, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633, 1670 (2011)).

136. See generally Psyno, *supra* note 135.

137. *Id.* at 1669–71.

138. *GEOMC*, 918 F.3d at 97–98.

139. *Id.* at 98.

140. *Id.*

141. WRIGHT & MILLER, *supra* note 33, at § 1381 (“The better view is that the plausibility standard only applies to the pleading of affirmative claims for relief.”); 2 MOORE ET AL., *supra* note 111, at ¶ 8.08[1] (“[A]ffirmative defense pleading should not be subject to the same ‘plausibility’ standard applicable in pleading a claim for relief.”); see also *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 382 F. Supp. 3d 860, 864 n.1 (E.D. Wis. 2019) (“The two highly

In this additional way, the Second Circuit's conclusion to extend plausibility pleading to affirmative defenses is challenging to understand. Support among courts, commentators, and treatises is strongly against extension, including among the authority the court chooses to reference.

3. Litigation Stage Timeliness

The Second Circuit mentions several times that the notion of timeliness is relevant to its decision.¹⁴² And the court suggests throughout its opinion that there was something untimely about the defendant's response.¹⁴³ The affirmative defenses at issue in the instant matter, however, were offered by the defendant in a timely-filed answer.¹⁴⁴ Stated simply, timeliness was not an issue in the appeal.¹⁴⁵

Rather, the Second Circuit repeatedly indicates that special negative consideration should be accorded to affirmative defenses pled in "a late stage of litigation."¹⁴⁶ Reading the decision overall, it seems that this "litigation stage timeliness"—the raw timeframe in which various litigation activities occur—is of great concern. Indeed, the court several times elides the important distinction between timeliness under the Federal Rules and this litigation stage timeliness.¹⁴⁷ This confusion of the issues does not benefit the opinion's intelligibility.

Litigation stage timeliness is a somewhat surprising place

respected treatises on federal practice [Wright & Miller and Moore's] both recommend against applying the plausibility standard to affirmative defenses.").

142. *GEOMC*, 918 F.3d at 95, 96, 99.

143. *Id.*

144. *Id.* at 94–95.

145. It is appropriate to point out that there is no "timeliness" of any sort in Rule 8, and while there is an element of timeliness in Rule 12(f), it does not implicate the affirmative defenses struck in the instant matter. See FED. R. CIV. P. 8, 12(f).

146. *GEOMC*, 918 F.3d at 99.

147. *E.g., id.* at 95 ("Uncertainty has sometimes resulted from the fact that district courts . . . have not always distinguished between affirmative defenses in a timely filed answer and those later filed, either with or without court permission to amend an answer, especially those filed in late stages of litigation."); *Id.* at 99 ("[Defendant] needed to support these defenses with some factual allegations to make them plausible. Moreover, both affirmative defenses were presented at a late stage of the litigation. Although the defenses were presented soon after [plaintiff] filed its second amended complaint . . .").

for the Second Circuit to delve. First, and most obviously, because it does not address the issue that the court has set out to address.¹⁴⁸ Second, because the notion is quite vague.¹⁴⁹ Third, because litigation routinely take years without specific prejudices to any party. Fourth, because the lion's share of litigation stage timeliness is controlled not by the parties but instead by the court—its decisions, its local rules, and the realities of its docket and schedule. Fifth, because this focus incentivizes plaintiffs to engage in dilatory practices in order to deny defendants the ability to plead defenses. Sixth, because the Federal Rules offer many tools for courts to manage litigation stage timeliness and provide plainly when a party may offer affirmative defenses or amend pleadings.¹⁵⁰

Further, the Second Circuit elides that the affirmative defenses at issue were part of a request by the defendant to amend its answer before the second amended complaint was filed.¹⁵¹ Indeed, the relationship of these affirmative defenses to the second amended complaint was compelled by the trial court's "unusual" solution to the "complicated" procedural posture of the matter.¹⁵² The Second Circuit's ruling that the defendant's affirmative defenses were somehow untimely—and would prejudice the plaintiff—punishes the defendant for both adhering to the Federal Rules and following the trial court's instructions.¹⁵³

148. *See id.*

149. *See id.* at 94, 100. The Second Circuit has a problem with the defendant's motion to amend nine months after its original answer, but does not articulate just what stage to which the litigation had progressed that would be damaged by the inclusion of two additional affirmative defenses.

150. *E.g.*, FED. R. CIV. P. 15(b)(1).

151. *GEOMC*, 918 F.3d at 94.

152. *See id.*

153. It is somewhat beyond the purview of this Article, but *GEOMC* has also likely denied defendants the ability to respond freely to amended complaints, even with a court's permission. The permissible scope of a defendant's response under Rule 15(a) to an amended complaint is a subject more commonly addressed in the context of counterclaims. *See, e.g.*, *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02CV02253(AHN), 2005 U.S. Dist. LEXIS 4545, at *3–8 (D. Conn. Mar. 23, 2005) (noting that, while no court of appeals has addressed the issue, the lower courts tend to fall into three camps: (1) permissively allowing defendants to file answers regardless of scope, (2) narrowly limiting defendant's responses to amended complaints to the newly-amended material, and (3) a "moderate approach" where the scale of plaintiff's changes inform the scale permitted to defendants; and concluding

Moreover, the Second Circuit elects not to acknowledge that the plaintiff's new allegations in the second amended complaint arise at an identically "late stage[] of the litigation" as the defendants' affirmative defenses.¹⁵⁴ In all likelihood, the plaintiff's new allegations expand the scope of the litigation and are significantly more prejudicial than a few affirmative defenses.

Finally, the Second Circuit's consideration of litigation stage timeliness works to undermine a common justification for extending the plausibility pleading standard to affirmative defenses: that defendants would later be freely able to amend their pleadings to add affirmative defenses.¹⁵⁵ Instead, plaintiffs now have another argument to attempt to prevent just that.

4. Wherefore *McCaskey*

The Second Circuit's lengthy discussion of the *McCaskey* standard and its application also raises questions. To begin, the court does not seem to approve of *McCaskey*.¹⁵⁶ At a point, the court expressly repudiates the *McCaskey* standard as written.¹⁵⁷ Despite this, the court systematically applies *McCaskey* and, indeed, requires this approach to be used within the Second Circuit.¹⁵⁸

What might be even more confusing is that the Second Circuit engages in this exercise at all. The lower court did not cite to or rely on the *McCaskey* standard; the Second Circuit's examination of the *McCaskey* standard is sua sponte.¹⁵⁹ Indeed,

that "[s]imply put, principles of fairness compel the court to conclude that if a plaintiff is permitted to expand the scope of the case by amending her complaint to add new theories of recovery, a defendant should be permitted to do the same [thing]."). And, indeed, the issue is addressed more directly in the remainder of the *GEOMC* decision, which considers the defendant's attempt to amend to add counterclaims. *GEOMC*, 918 F.3d at 99. A defendant's affirmative defenses appear now to be circumscribed by the specific content of the amended complaint. *See id.*

154. *GEOMC*, 918 F.3d at 95, 99–101.

155. *See supra* notes 48–49 and accompanying text.

156. *See GEOMC*, 918 F.3d at 96–99 (citing *SEC v. McCaskey*, 56 F. Supp. 2d 323 (S.D.N.Y. 1999)).

157. *GEOMC*, 918 F.3d at 96–97.

158. *Id.* at 99–102.

159. *See id.* at 97–99. *McCaskey* appears once in the prior proceedings, in a reference to another case that cites *McCaskey*. *GEOMC Co. v. Calmare Therapeutics Inc.*, No. 3:14-cv-01222 (VAB), 2016 U.S. Dist. LEXIS 144735, at

the court acknowledges that the court below applied a standard derived via a different line of cases.¹⁶⁰ Moreover, in exploring *McCaskey*, the court delineates a line of cases beginning with *McCaskey* that has, over many years, altered and refined the *McCaskey* standard into its current form.¹⁶¹

This all raises two additional curiosities. First, given that *McCaskey* is not used in the case below, is not a universally applied standard in the Second Circuit, and is significantly different in its current form from when it was decided, it is unclear why the Second Circuit selects this opportunity to prevent “district courts continu[ing] to repeat the three-factor formulation as worded in *McCaskey*.”¹⁶² There does not appear to be much risk of that. Second, given the disfavor in which the Second Circuit appears to hold *McCaskey*’s formulation, the alternative case law in the Second Circuit, and the acknowledged distance between the modern formulation of the *McCaskey* standard and the one actually presented in *McCaskey*, it is unclear just why the court chooses to apply the *McCaskey* standard as it was originally written.¹⁶³

The Second Circuit makes no changes at all to the second or third original *McCaskey* factors.¹⁶⁴ In this way, the court abrogates any judicial refinements to those portions in intervening years.

However, the real action is in the Second Circuit’s treatment of the first original *McCaskey* factor. The court describes its inquiry as “[w]hether the first of the *McCaskey* factors should be

*9 (D. Conn. Oct. 19, 2016) (citing *Coach, Inc. v. Kmart Corps.*, 756 F. Supp. 2d 421, 426 (S.D.N.Y. 2010)). The Second Circuit says that the court below cited *Coach* (quoting *McCaskey*) for the proposition that “[i]f a court determines that a defense is legally insufficient, the court must next determine whether inclusion of the defense would prejudice the plaintiff.” *GEOMC*, 918 F.3d at 97. This is not correct. The court below cited *Coach* (and quoted *McCaskey*) for the proposition that “the Court should construe ‘the pleadings liberally to give the defendants a full opportunity to support its claims at trial, after full discovery has been made.’” *GEOMC*, 2016 U.S. Dist. LEXIS 144735, at *12–13. This is the only proposition for which *Coach* cites *McCaskey* and the only proposition for which *McCaskey* appears below.

160. *GEOMC*, 918 F.3d at 97–99.

161. *Id.*; see *SEC v. McCaskey*, 56 F. Supp. 2d 323 (S.D.N.Y. 1999).

162. *GEOMC*, 918 F.3d at 97.

163. See *id.* at 96–97.

164. *Id.* at 98.

reworded in light of *Twombly*.”¹⁶⁵ Yet this is a question to which it never returns. The court does not articulate a new formulation, nor does it reject the existing language.¹⁶⁶

So, the court somehow incorporates *Twombly* into the first factor of *McCaskey*’s existing three-part test.¹⁶⁷ However, it is not clear exactly how. There are many options. The first *McCaskey* factor could be replaced with some language of *Twombly*. Or perhaps the *McCaskey* formulation still exists and *Twombly* provides a standard to satisfy it.¹⁶⁸ Or perhaps the whole *McCaskey* standard has been functionally superseded. If *McCaskey* remains, what is the relationship between the factors now? Is one preeminent? Need all be satisfied? Are they disjunctive?

5. Below Plausibility; Above Fair Notice

The Second Circuit expressly embraces applying *Twombly* to affirmative defenses.¹⁶⁹ But the court strongly emphasizes the “context” provisions of *Iqbal*, which seem intended to temper a bright-line application of any rule.¹⁷⁰ It also states that the evaluation of affirmative defenses must be less rigorous than that of claims.¹⁷¹ The Second Circuit instructs that courts examining affirmative defenses should be guided in their inquiry by the brief timeframe accorded to defendants to gather facts and by the specific affirmative defenses pled, of which there are dozens of options.¹⁷² These imperatives will necessarily

165. *Id.* at 97.

166. *See supra* notes 103, 108 and accompanying text.

167. *See GEOMC*, 918 F.3d at 97 & n.8.

168. This approach would be akin to those courts that have suggested that *Twombly* merely describes the quantum of information necessary to provide fair use under pre-existing standards. *E.g.*, *Dodson v. Munirs Co.*, No. S-13-0399 LKK/DAD, 2013 U.S. Dist. LEXIS 85768, at *16–17 (E.D. Cal. June 18, 2013).

169. *GEOMC*, 918 F.3d at 97–98.

170. *Id.* at 98 n.9. This is a bit of a sleight of hand, where *Iqbal* extended a rule developed in the antitrust context to all civil actions and greatly expanded the scope of plausibility pleading. *See supra* notes 27–28 and accompanying text.

171. *GEOMC*, 918 F.3d at 98.

172. *See supra* notes 111–14 and accompanying text. The acknowledgement and concern for the unfairness visited upon defendants by the extension of plausibility pleading to affirmative defenses is a primary reason cited by courts choosing *not* to extend. *See supra* notes 56–57 and

require district courts, in every instance, to engage in a less rigorous inquiry than they perform for claims because, in every instance, defendants have far less time than plaintiffs to collect factual material for their pleading.¹⁷³ At the same time, every affirmative defense must undergo a unique inquiry because the factual support to prove each affirmative defense is different, and, therefore, a different showing is required to render each one “plausible,” given context.¹⁷⁴

All told, the Second Circuit has mandated that the district courts develop as many gradations of scrutiny as there are affirmative defenses. And on its instruction of a less rigorous inquiry, these dozens (hundreds?) of independent review standards must exist somewhere below plausibility yet above fair notice. This is before considering whether the same affirmative defense might be accorded a different review given litigation stage timeliness concerns.¹⁷⁵ It seems likely that the new standard will introduce significant uncertainty to pleadings.¹⁷⁶

The examples that the Second Circuit provides do not add significant clarity. The court offers a pair of affirmative defenses that possess, in its estimation, different expected availability of factual material (and, presumably, one should be struck and one should not).¹⁷⁷ Further, the court states simply that “the facts needed to plead a statute-of-limitations defense will usually be readily available.”¹⁷⁸ However, it is not entirely clear why the facts to support a statute of limitations affirmative defense will usually be readily available, and noting the word “usually,” the court offers no guidance as to how a court should determine whether the instance in front of it is, or is not, one where the

accompanying text. By attempting to accommodate this unfairness in its new rule, the Second Circuit tacitly acknowledges that it is a powerful argument *against* extension.

173. *See GEOMC*, 918 F.3d at 98.

174. *Id.*

175. *See supra* notes 141–54 and accompanying text.

176. It is beyond the scope of this Article, but a question also arises about the Second Circuit’s new standard and pled claims. The “context” requirement derived from *Iqbal* seems like it would apply to pled claims too, but the Supreme Court does not suggest in *Twombly* or *Iqbal* that different levels of scrutiny will apply at different times or to different claims; plausible is plausible.

177. *GEOMC*, 918 F.3d at 98.

178. *Id.*

facts relevant to the defense are readily available to the defendant. On the other hand, the court states that “the facts needed to plead an ultra vires defense . . . may not be readily available.”¹⁷⁹ Again, the circumstances in which the facts may or “may not be” readily available are not suggested by the Second Circuit.¹⁸⁰ This is a scenario that seems ripe for abuse by clever plaintiffs.¹⁸¹

Without more specific guidance, the Second Circuit’s examples suggest the unusual result that affirmative defenses with “readily apparent” facts should be struck for implausibility, while affirmative defenses more fairly characterized as fishing expeditions will be allowed to proceed. And requiring a defendant to plead facts that are “readily apparent” at the penalty of losing its, say, statute of limitations defense is reminiscent of the strict pleading standards that the Federal Rules were adopted specifically to abolish.¹⁸²

C. In Conclusion Regarding *GEOMC*

Given these many and sundry peculiarities of the *GEOMC* decision, it is not clear that the Second Circuit succeeded in its

179. *Id.*

180. This specific selection of ultra vires as an example of an affirmative defense where the factual complexity is such that it is inoculated against motions to strike is also a bit puzzling. In New York, at least, the “Defense of ultra vires” is a legislative provision codifying that there is no cause of action sounding in ultra vires, absent a few enumerated exceptions. N.Y. BUS. CORP. LAW § 203 (McKinney 2019). Either the plaintiff has offered a statutorily infirm claim, or it has not; this should be ascertainable from the content of the complaint.

181. See *Burget v. Capital W. Sec. Inc.*, No. CIV-09-1015-M, 2009 WL 4807619, at *3–4 (W.D. Okla. Dec. 8, 2009) (striking a statute of limitations affirmative defense with prejudice over defendant’s argument that plaintiff had not pled sufficient information to determine whether they were time-barred); cf. *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *2 n.3 (W.D. Tex. Sept. 22, 2008) (declining to strike an affirmative defense because plaintiffs had not alleged relevant facts).

182. See Charles E. Clark, *Simplified Pleading*, 2 F.R.D 456, 458 (1943) (“Strict pleading produces a reaction, because people will not tolerate the denial of justice for formalities only. That, as we should do well to recall, was the history of common-law pleading, as well as of some of the later misapplications of code pleading.”); see also LINDA J. SILBERMAN ET AL., *CIVIL PROCEDURE: THEORY AND PRACTICE* 540 (3d ed. 2009) (“The modern pleader is at much lesser risk of losing his rights through a technical pleading mistake.”); FED. R. CIV. P. 8(d)(1) (“No technical form is required.”).

goal to “clarify the standards for pleading affirmative defenses.”¹⁸³ The lower courts in the Second Circuit, however, are constrained to attempt to apply the new mechanism, regardless of the challenges presented by the ruling.

The district courts have exhibited difficulty interpreting the Second Circuit’s directives and applying them in a cohesive manner. Some have offered distinct and not necessarily compatible formulations of the new rule.¹⁸⁴ Others have taken

183. *GEOMC*, 918 F.3d at 94 (2d Cir. 2019) (“[T]o clarify the standards for pleading affirmative defenses and granting a motion to strike them.”).

184. *See, e.g.*, *Jablonski v. Special Couns., Inc.*, No. 1:16-cv-05243 (ALC), 2020 U.S. Dist. LEXIS 53531, at *6–7 (S.D.N.Y. Mar. 25, 2020) (“[I]n determining whether to apply plausibility standard or a relaxed version . . .”); *State St. Glob. Advisors Tr. Co. v. Visbal*, 431 F. Supp. 3d 322, 347 (S.D.N.Y. 2020) (“The Second Circuit has recently clarified that the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including ‘the pleading of an affirmative defense.’ Hence, a party asserting affirmative defenses must ‘support these defenses with some factual allegations to make them plausible.’”); *Haber v. Bankers Standard Ins. Co.*, No. 3:19-cv-276 (VLB), 2019 U.S. Dist. LEXIS 222847, at *2–3 (D. Conn. Dec. 31, 2019) (“An affirmative defense may be stricken if (a) it does not meet ‘the plausibility standard of *Twombly*’; (b) it is a legally insufficient basis for precluding a plaintiff from prevailing on its claims; or (c) it prejudices the defendant and it is presented beyond the normal time limits of the Rules. When considering a motion to strike affirmative defenses, the Court should construe the pleadings liberally to give the defendant a full opportunity to support its claims at trial, after full discovery has been made.”); *Car-Freshner Corp. v. Just Funky LLC*, No. 5:19-CV-0289 (GTS/ATB), 2019 U.S. Dist. LEXIS 203958, at *2–4 (N.D.N.Y. Nov. 25, 2019) (“In its clarification of the affirmative-defense standard, the Second Circuit has focused on the three-factor test used by the Southern District of New York to assess affirmative defenses in [*McCaskey*]. The *McCaskey* three-factor test requires a plaintiff to show as follows: ‘(1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense. . . . [T]he pleading party must produce allegations of fact that provide a sufficient basis for the court to draw a reasonable inference in favor of the party.’”); *New London Assocs., LLC, v. Kinetic Soc. LLC*, No. 18cv7963 (DLC), 2019 U.S. Dist. LEXIS 113021, at *3 (S.D.N.Y. July 8, 2019) (“[Plaintiff] cannot reasonably argue that it lacks a sufficient factual basis to understand the nature of [Defendant’s] proposed affirmative defenses.”). *Compare Car-Freshner Corp.*, 2019 U.S. Dist. LEXIS 203958, at *7 (while acknowledging a lesser burden on plaintiffs in this instance, rejecting affirmative defenses pled “Plaintiffs’ claims are barred by doctrine of equitable estoppel” and “Plaintiffs’ claims are barred by the doctrine of unclean hands generally”); *with Emerson Elec. Co. v. Holmes*, No. 16-cv-1390 (PKC)(SIL), 2019 U.S. Dist. LEXIS 100957, at *16 (E.D.N.Y. June 14, 2019) (sustaining defenses pled “The Complaint and its claims are barred by the doctrine[] of . . . estoppel” and “Plaintiff’s claims are barred by the doctrine of unclean hands”).

the Second Circuit's impalpable "context" to strange places.¹⁸⁵ Moreover, the judicial effort required to render these decisions appears to be substantial.¹⁸⁶

Despite all this, there is a significant weight of authority, both mandatory and persuasive, behind a circuit court decision. Courts in the minority that still favor extending plausibility pleading to affirmative defenses now have a large hook upon which to hang their hats.¹⁸⁷

D. How the Wind Blows in Other Circuits

A number of circuit courts have made post-*Twombly* rulings that suggest that they will not rule in favor of extension when they choose to address it directly. Either obliquely or directly, these courts have ruled that affirmative defenses are not subject to a heightened pleading standard.

For example, the Fifth Circuit continues to apply the fair notice standard.¹⁸⁸ Likewise, but more express, the Ninth Circuit has ruled that "the 'fair notice' required by the pleading standards only require[s] describing [the affirmative] defense in 'general terms.'"¹⁸⁹ At least one district court in the Ninth

185. See, e.g., *Signify N. Am. Corp. v. Reggiani Lighting USA, Inc.*, No. 18 Civ. 11098 (ER), 2020 U.S. Dist. LEXIS 49792, at *28–29 (S.D.N.Y. Mar. 23, 2020) (applying the plausibility pleading standard to affirmative defenses but declining to engage in the Second Circuit's less rigorous inquiry because defendant pled a counterclaim); *Emerson Elec. Co.*, 2019 U.S. Dist. LEXIS 100957, at *16 (allowing defenses to stand that it describes as "conclusory").

186. See, e.g., *Jablonski*, 2020 U.S. Dist. LEXIS 53531.

187. See, e.g., *Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 983 (N.D. Ill. 2019) ("The Second Circuit's approach is persuasive, and the Court follows its lead."). But see *Doe v. Bojangles' Rests., Inc.*, No. 4:19-CV-26-TAV-SKL, 2019 U.S. Dist. LEXIS 88348, at *8–9 (E.D. Tenn. May 9, 2019) ("[T]he recent out-of-circuit authority cited by Plaintiff, [*GEOMC*], although also well-reasoned, does not persuade me this Court would now apply the *Twombly*/*Ashcroft* plausibility standard to affirmative defenses.").

188. See, e.g., *LSREF2 Baron, L.L.C. v. Tauch*, 751 F.3d 394 (5th Cir. 2014); *Garrison Realty, L.P. v. Fouse Architecture & Interiors, P.C.*, 546 Fed. App'x 458 (5th Cir. 2013); *McNeely v. Trans Union LLC*, No. H-18-849, 2019 U.S. Dist. LEXIS 12950 (S.D. Tex. Jan. 28, 2019).

189. *Kohler v. Flava Enters.*, 779 F.3d 1016, 1019 (9th Cir. 2015) (quoting 5 *WRIGHT & MILLER*, *supra* note 33, at § 1274) ("As numerous federal courts have held, an affirmative defense may be pleaded in general terms and will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives the plaintiff fair notice of the nature of the defense."); *Sundby v. Marquee Funding Grp.*, No. 19-cv-0390-GPC-AHG, 2019 U.S. Dist. LEXIS 198927, at *3–4 (S.D. Cal. Nov. 13, 2019); see also *Simmons v. Navajo Cnty.*,

Circuit has opined that the Ninth Circuit had thus definitively resolved the question of the applicability of plausibility pleading to affirmative defenses within the Ninth Circuit, going so far as to abandon a previous pro-extension position.¹⁹⁰ And perhaps more express still, the Sixth Circuit ruled that “[t]he Federal Rules of Civil Procedure do not require a heightened pleading standard for [the affirmative] defense.”¹⁹¹ The Sixth Circuit expressly maintained *Conley*’s fair notice standard with direct reference to the language of Rule 8.¹⁹² Some district courts in the Sixth Circuit have felt obliged to adhere to the Sixth Circuit’s interpretation of the Federal Rules to rule that the plausibility pleading standard does not extend to affirmative defenses.¹⁹³

Holdings like these suggest that the Second Circuit’s position will become increasingly isolated as more circuit courts rule on the issue.¹⁹⁴ In this way, it is quite likely that declining

609 F.3d 1011, 1023 (9th Cir. 2010) (“The key to determining the sufficiency of pleading an affirmative defense is whether it gives [a] plaintiff fair notice of the defense.”); *Walker v. Charter Commc’ns Inc.*, No. 3:15-cv-00556-RCJ-VPC, 2016 U.S. Dist. LEXIS 84510, at *4–5 (D. Nev. June 29, 2016).

190. *Castellano v. Access Premier Realty7, Inc.*, No. 1:15-cv-00407-MCE-MJS, 2015 U.S. Dist. LEXIS 158078, at *3–4 (E.D. Cal. Nov. 20, 2015) (“District Courts in this circuit were previously split on whether the heightened pleading standard that the United States Supreme Court announced in *Twombly* and *Iqbal* applied to affirmative defenses. . . . The Ninth Circuit, however, has resolved the split in the district courts. . . . Accordingly, this Court now applies the ‘fair notice’ standard, and not the heightened pleading standard announced in *Twombly* and *Iqbal*, when evaluating motions to strike affirmative defenses.”).

191. *Montgomery v. Wyeth*, 580 F.3d 455, 468 (6th Cir. 2009).

192. *Id.*

193. *See, e.g., Meyers v. Vill. of Oxford*, No. 17-cv-10623, 2019 U.S. Dist. LEXIS 24637, at *8 (E.D. Mich. Feb. 15, 2019) (“In sum, controlling Sixth Circuit law and the language of the applicable rules weigh against application of *Twombly* and *Iqbal*’s heightened pleading standard to defendant’s affirmative defenses here.”); *Exclusively Cats Veterinary Hosp., P.C. v. Pharm. Credit Corp.*, No. 13-cv-14376, 2014 U.S. Dist. LEXIS 132440, at *2–3 (E.D. Mich. Sept. 22, 2014) (same); *Paducah River Painting, Inc. v. McNational Inc.*, No. 5:11-CV-00135-R, 2011 U.S. Dist. LEXIS 131291, at *8 (W.D. Ky. Nov. 14, 2011) (“[T]he Sixth Circuit rejected the higher pleading standard in favor of the fair notice standard.”).

194. *See United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 382 F. Supp. 3d 860, 864 (E.D. Wis. 2019) (quoting *In re Frescati Shipping Co.*, 886 F.3d 291, 313 (3d Cir. 2018)) (“In general, an affirmative defense need not be articulated with any rigorous degree of specificity, and is sufficiently raised for purposes of [Federal Rule of Civil Procedure 8] by its bare assertion.”); *Bigfoot on the Strip, LLC v. Winchester*, No. 18-3155-CV-S-BP, 2018 U.S. Dist. LEXIS 173447, at *3 (W.D. Mo. Oct. 9, 2018) (citing *Zotos v. Lindbergh Sch. Dist.*, 121

to extend the plausibility pleading standard to affirmative defenses will be the majority position among the circuit courts as it is among the district courts.

V. COURTS SHOULD CONTINUE TO DECLINE TO EXTEND PLAUSIBILITY PLEADING TO AFFIRMATIVE DEFENSES

This Section explains how declining to extend plausibility pleading to affirmative defenses remains the stronger position, despite *GEOMC*. Then, it will offer recommendations on how courts should respond to the issue when it might present itself to them.

A. Declining to Extend Plausibility Pleading Is Still the Superior Position

The language of the Federal Rules disallows the extension of the plausibility pleading standard to affirmative defenses.¹⁹⁵ The language and policy considerations of *Twombly* and *Iqbal* discourage it.¹⁹⁶ Unavoidable notions of simple fairness counsel against it.¹⁹⁷ Absent express binding contrary precedent, any court to address the issue should adhere to the majority position and decline to extend the plausibility pleading standard to affirmative defenses.¹⁹⁸

No court choosing to extend plausibility pleading to affirmative defenses has offered a compelling argument to rebuff the fact that their selected outcome is flatly contrary to the

F.3d 356, 361 (8th Cir. 1997)) (ruling that an affirmative defense need not be pled with any degree of particularity). “[T]he Eighth Circuit, if presented with the question, might well conclude that *Zotos* has been abrogated by *Iqbal* and *Twombly* . . . But *Zotos* is squarely on point, and *Iqbal* and *Twombly* are not, which means *Zotos* remains the law of this Circuit.” *Winchester*, 2018 U.S. Dist. LEXIS 173447, at *3.

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

196. See *supra* notes 50, 58–64 and accompanying text.

197. See *supra* notes 56–57 and accompanying text.

198. See *United States v. Kennebec Scrap Iron, Inc.*, No. 1:16-cv-191-GZS, 2016 U.S. Dist. LEXIS 156004, at *4 n.1 (D. Me. Nov. 10, 2016) (“However, the Court declines to extend the *Twombly/Iqbal* pleading standard to affirmative defenses given that the First Circuit has yet to address the question.”). But see *Espitia v. Mezzetti Fin. Servs., Inc.*, No. 18-cv-02480-VKD, 2019 U.S. Dist. LEXIS 14469, at *6 (N.D. Cal. Jan. 29, 2019) (“[A]bsent clear controlling authority, [this Court] joins the judges of this district that apply the *Twombly* and *Iqbal* pleading standard to affirmative defenses.”).

language of the Federal Rules. The law is clear and inescapable: Rule 8(c) requires only that a defendant “state” its affirmative defenses and does not require a defendant to make a “showing.”¹⁹⁹ Indeed, courts choosing to extend plausibility pleading to affirmative defenses frequently select not to mention Rule 8(c), even though it controls the question.²⁰⁰ These silences speak poorly of the decisions in which they occur; Rule 8(c) mandates a result other than the one these courts reach.

Neither *Twombly* nor *Iqbal* changes this reading. If anything, the specific and exclusive focus in those decisions on Rule 8(a) counsels against extension.²⁰¹ Further, only the Supreme Court is empowered to alter the pleading standard for affirmative defenses articulated in the Federal Rules, which it has not done.²⁰² It is outside the authority of any lower court to alter the scope or meaning of any Rule; there is a non-trivial argument that every court that selects to extend the plausibility pleading standard to affirmative defenses violates the Rules Enabling Act.²⁰³

As is widely referenced, defendants have a very limited window in which to retain counsel and offer a defense (typically twenty-one days).²⁰⁴ This is in contrast to the years that plaintiffs have to formulate their complaints. Holding these parties to an equal standard presents widely divergent burdens.²⁰⁵

199. See *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) (“An affirmative defense is not a claim for relief, and neither Rule 8(a)(2) nor any other rule requires a defendant to plead facts ‘showing’ that the plaintiff is *not* entitled to relief.”).

200. *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 99 (2d Cir. 2019).

201. See cases cited *supra* note 50 and accompanying text.

202. See sources cited *supra* note 5 and accompanying text; *cf.* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

203. See Jennifer M. Auger, *A ‘Plausible’ Outcome?: Twombly, Iqbal, and the Unforeseen Impact on Affirmative Defenses*, 75 MD. L. REV. 905, 932 (2016) (“The decision by district courts to extend the ‘heightened’ plausibility standard beyond the arena of complaints as established by the Supreme Court in [*Twombly*] and [*Iqbal*] violates the [Rules Enabling] Act.”); Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275, 298–300 (2013).

204. See cases cited *supra* note 56 and accompanying text.

205. See *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010).

Moreover, the Rules also require that a defendant plead any affirmative defense that it has at pain of waiving that affirmative defense.²⁰⁶ The courts that choose to extend the plausibility pleading standard to affirmative defenses force defendants to play a critical game of chicken in which they can only lose.²⁰⁷ These defendants must either select not to plead a defense or they must hope later to amend their response.²⁰⁸ Those seeking to amend a response will surely be resisted and, despite the purposefully lenient standard, will sometimes be rejected.²⁰⁹

Similarly, the burdens imposed upon the courts and adverse litigants by “unnecessary” pleadings from plaintiffs or defendants are not alike in scale or scope.²¹⁰ No real equivocation is possible. Plaintiffs fill dockets and seek access to discovery.²¹¹ This is plain from the fact that a successful motion to dismiss the complaint will preclude further discovery or litigation activities, while a successful motion to strike will

206. *Meyers v. Vill. of Oxford*, No. 17-cv-10623, 2019 U.S. Dist. LEXIS 24637, at *9 (E.D. Mich. Feb. 15, 2019) (“Although there are some exceptions, it is generally understood that the failure to allege an affirmative defense in the first responsive pleading may result in a waiver of the defense.”).

207. *See* *Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438, 441 (C.D. Cal. 2013); *Francisco v. Verizon S., Inc.*, No. 3:09-cv-737, 2010 U.S. Dist. LEXIS 77083, at *15 (E.D. Va. July 29, 2010).

208. *McGinity v. USAA Fed. Savs. Bank*, No. 5:19-cv-560-BO, slip op. at 3 (E.D.N.C. Apr. 14, 2020); *Racick v. Domonion L. Assocs.*, 270 F.R.D. 228, 234 (E.D.N.C. 2010); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *6 (W.D. Va. June 24, 2010) (“Rule 15 of the Federal Rules of Civil Procedure contemplates that motions to amend pleadings on that basis of relevant facts learned during discovery, and such motions should be liberally granted.”).

209. *See* *Henry v. Ocwen Loan Servicing, LLC*, No. 17cv0688 JM(NLS), 2018 U.S. Dist. LEXIS 30779, at *7–8 (S.D. Cal. Feb. 26, 2018) (“[A] heightened pleading standard may require the court to address multiple motions to amend the answer as discovery reveals additional defenses.”); *Florilli Transp. v. W. Express, Inc.*, No. 14-CV-00988-DW, 2015 U.S. Dist. LEXIS 185459, at *4 (W.D. Mo. Feb. 20, 2015) (“[T]hen, after taking discovery, [defendants will need] to move the Court for permission to amend their answers to add affirmative defenses . . . Thus, another round of motion practice would be added to many cases, increasing the burdens on the federal courts, and adding expense and delay for the parties.”).

210. *See supra* notes 40–43 and accompanying text.

211. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *see also* *Bayer CropScience A.G. v. Dow AgroSciences LLC*, No. 10-1045 RMB/JS, 2011 U.S. Dist. LEXIS 149636, at *3 (D. Del. Dec. 30, 2011) (noting “the absence of a concern that the defense is unlocking the doors of discovery”).

achieve neither.²¹² Moreover, defendants cannot force settlements based upon unsupported affirmative defenses.²¹³ Indeed, the desire to curb unwarranted but business-rational settlements was a prime motivation of the Supreme Court in *Twombly*.²¹⁴ Following the Supreme Court's reasoning would counsel for making the pleading standard for claims tougher, but not the pleading standard for affirmative defenses.

B. What Courts Should Do from Here

The arguments against extending plausibility pleading to affirmative defenses are overwhelming. Courts at all levels should continue to embrace and encourage this reality.

First, it seems unlikely that the Supreme Court would have an opportunity to rule on the sufficiency of the pleading of an affirmative defense. Even so, the Supreme Court does consider issues of federal procedure that exist among the lower courts.²¹⁵ It might offer language or explanation in its next rulemaking to clarify that the plausibility pleading standard applies only to claims.

Circuit courts in jurisdictions other than the Second Circuit should meet the question head-on and definitively reject the extension of the plausibility pleading standard to affirmative defenses.²¹⁶ District courts in circuits other than the Second

212. See *Florida v. DLT 3 Girls, Inc.*, No. 4:11-cv-3624, 2012 WL 1565533, at *2 (S.D. Tex. May 2, 2012).

213. See *Twombly*, 550 U.S. at 559; see also *In re Quaker Oats Labeling Litig.*, No. C 10-0502 RS, 2013 WL 12155299, at *1 (N.D. Cal. May 20, 2013) (“Permitting a plaintiff to proceed on a conclusory or factually deficient complaint potentially exposes the defendant to expensive and intrusive discovery, and to pressure to settle the matter for its ‘nuisance value.’ In most cases, even the most conclusory affirmative defenses do not impose similar burdens.”); *Leon v. Jacobson Transp. Co.*, No. 10 C 4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010) (“The point [of *Twombly* and *Iqbal*] was to reduce nuisance suits filed solely to obtain a nuisance settlement. The Court, though, has never once lost sleep worrying about defendants filing nuisance affirmative defenses.”).

214. *Twombly*, 550 U.S. at 558–59.

215. See Rules Enabling Act, 28 U.S.C. §§ 2072–2074. The Rules are periodically updated by the Supreme Court via an elaborate committee review procedure, pursuant to a statutory requirement that the Judicial Conference of the United States, the national policy-making body for the federal courts, must “carry on a continuous study of the operation and effect of the general rules of practice and procedure” 28 U.S.C. § 331.

216. See *supra* notes 188–94 and accompanying text.

Circuit should likewise decline to apply *Twombly* to affirmative defenses whenever the issue is offered to them. For the most part, this is what the district courts currently do, so no great upheaval is suggested.²¹⁷

As to the Second Circuit, it should revisit its *GEOMC* decision. As discussed above, the ruling is not supportable.²¹⁸ Short of revisiting *GEOMC*, the Second Circuit should articulate the reasoning by which it concluded that the plausibility pleading standard extends to affirmative defenses.²¹⁹ As it stands, the concerns the Second Circuit expressed with “context” already have a well-tailored solution: notice pleading.²²⁰ It accommodates defendants’ severe disadvantage in timeframe, and it allows all affirmative defenses to be considered similarly.²²¹ Perhaps most of all, it allows for district courts to manage reasonably the matters before them pursuant to the Federal Rules, while not inviting a glut of unnecessary motion practice.²²²

Lower courts in the Second Circuit should apply the nebulous “context” standard as broadly as possible.²²³ Perhaps as an unintended side-effect of the peculiarities of the *GEOMC* decision, a district court could quite rationally accept as adequately pled every affirmative defense offered within the twenty-one days normally accorded to defendants to respond to a complaint while still remaining fully compliant with the *GEOMC* ruling.²²⁴ Indeed, district courts in the Second Circuit should rule in every instance that the time frames are too brief, the prejudices to defendants too severe, and the relative burdens too lopsided to restrict defendants’ opportunity to offer a full and vigorous defense.

VI. CONCLUSION

Most courts to consider the issue have come to the correct

217. See sources cited *supra* note 69 and accompanying text.

218. See *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 95 (2d Cir. 2019).

219. See *supra* notes 122–27 and accompanying text.

220. See *supra* notes 112–14 and accompanying text.

221. See *supra* notes 113–14 and accompanying text.

222. See cases cited *supra* note 64 and accompanying text.

223. See *GEOMC*, 918 F.3d at 98.

224. *Id.*

conclusion: procedure, precedent, and policy all strongly disfavor extending the plausibility pleading standard articulated in *Twombly* and refined in *Iqbal* to affirmative defenses. Nothing in the last ten years, including the Second Circuit's *GEOMC* decision, has cast doubt on this basic analysis. Courts presented with the issue should continue to remember the requirement of Federal Rule 8(e)—that pleadings must be construed so as to do justice—and decline to extend the plausibility pleading standard to affirmative defenses.