Federal Bar Association
Orange County Chapter

FBA/OC

The Newsletter of the Federal Bar Association/Orange County Chapter

Spring/Summer 2019

Heightened Pleading Standards for Affirmative Defenses: What Standard Will You Be Required to Meet?

By Remington B. Lamons*

Bell Atlantic Corp. v. Twombly[1] and *Ashcroft v. Iqbal*[2] are two of the most cited Supreme Court cases of all time,[3] and with good reason: they raised the standard for surviving a motion to dismiss, which is the first major barrier to plaintiff recovery. Ten years after these landmark cases, "*Twiqbal's*" plausibility standard is entrenched within federal practice. But a closely related question remains uncertain: whether that same plausibility standard extends to affirmative defenses. It turns out that the standard applied to defendants depends on which judge is assigned to the case.

A review of the 1,100 federal cases that have discussed this question in the 10 years since *Twombly* reveals that district courts remain deeply divided, especially here in California.[4] File an answer in the Northern District and you will likely be held to *Twiqbal*'s heightened pleading standard. In the Central District, by contrast, the requirements are often more relaxed. Very recently, the only circuit court that has ruled directly on this issue, the Second Circuit, held that the heightened plausibility standard does apply to affirmative defenses.[5]

This article summarizes the plausibility standard, and the arguments for and against its application to affirmative defenses. It then analyzes the data, reviewing some of the statistics specifically within the Ninth Circuit and the Central District of California, to reveal what standard lawyers who practice here are most likely to face.

The Plausibility Standard

For 50 years, *Conley v. Gibson* instructed that a complaint should survive a

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UPCOMING EVENTS:

- **IP Program**
  September 10, 2019
- **Annual Judges' Night**
  October 17, 2019
- **Behind the Bench**
  November 2019
- **Criminal Practice Seminar**
  November 2019
- **Swearing In Event**
  December 2019
- **Ninth Circuit Update**
  Early 2020

For more details and to register for events visit www.fbaoc.com

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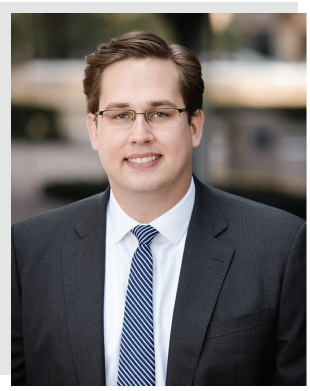
From the Editor



Welcome to the Spring/Summer 2019 issue of the Newsletter of the Federal Bar Association, Orange County Chapter.

In this issue, Remington B. Lamons from Latham & Watkins shares a fascinating survey examining which District Court judges in California apply the *Twombly/Iqbal* plausibility standard to the pleading of affirmative defenses. In addition to providing great practical utility to federal practitioners, the results of the survey reveal interesting geographical divides, particularly with the Northern District. Also in this issue, Diana Palacios of Davis Wright Tremaine LLP and Samrah Mahmoud of Troutman Sanders LLP highlight special and oft-overlooked requirements of the Central District Local Rules. We also have a brief recap of the FBA/OC Young Lawyers Division event, YLD Practice Panel: An In-House Perspective on Federal Practice. Finally, Newsletter Editor-in-Chief Emeritus Matt Wegner shares a judicial profile from his interview of our newest Magistrate Judge, the Honorable Autumn D. Spaeth.

As always, thank you to the authors for all their hard work and for sharing these excellent articles with our FBA/OC members.

Brent S. Colasurdo
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President's Message

Van Nguyen*

I am honored to serve as President of the FBA/OC chapter this year. We have had a busy year! We began the 2018-2019 term in October with our annual Judges' Night, which was nearly sold out with 300 attendees, including 27 judicial officers. At the event, the "State of the District" was presented by Chief Judge Virginia A. Phillips and the Chapter's prestigious Judge Alicemarie H. Stotler Award was presented to Kate Corrigan, a past president and current member of the Board of Directors of the FBA/OC. We followed that event with a program titled, "Behind the Scenes View of the Clerk's Office," which offered a behind-the-scenes presentation of the Clerk's Office. Then, in November, we hosted our annual Criminal Practice Seminar, which was co-hosted with the OCBA Criminal Division, OC Bar, and UCI's Center for Psychology and Law. The program was held at University of California, Irvine, Law School, and was titled, "Dark Web and Cryptocurrency." We ended 2018 with a champagne toast to the new members of the California Bar at our annual Swearing-In Ceremony, which was co-sponsored by the ABTL, and hosted by Judge James V. Selna and Judge Karen E. Scott.

"We have had a busy year!"

2019 started with a dynamic "duel" between two Supreme Court experts, Dean Erwin Chemerinsky, Dean of UC Berkeley School of Law, and Kannon Shanmugam, Chair of the Supreme Court and Appellate Practice Group at Paul, Weiss and Former Assistant to the Solicitor General. The "duel" was moderated by Judge Andrew J. Guilford. At the sold-out event, the speakers provided their insight on recent decisions by the Supreme Court and their predictions on upcoming issues for the Supreme Court. Then, in May, we hosted our annual Civil Practice Seminar, which featured Judge Josephine L. Staton and accomplished trial lawyers in a program titled, "Trials and Errors: Keys to Success and Avoiding Pitfalls at Trial." It was a full house with over 100 attendees.

In June, we kicked off our Bench and Bar series with Judge Autumn D. Spaeth who provided words of wisdom to an audience that included summer associates and law student externs. Judge Spaeth presented a program titled, "Standing on the Shoulders of Giants: Lessons from

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My Mentors." In July, Judge James V. Selna closed out our summer Bench and Bar series by presenting, "The Best of Times, the Worst of Times, Oral Argument on Monday Afternoons." Be on the lookout for future FBA/OC programs, including a new program featuring an update on the Ninth Circuit.

This year, FBA/OC has also continued to serve the public. Specifically, FBA/OC continues to support the Federal Pro Se Window at the courthouse, which provides free legal services to federal pro se litigants. We not only continue to provide volunteer attorneys to serve the clinic, but FBA/OC also increased its sponsorship level this year to the Public Law Center to financially support the Pro Se Window. We are committed to finding additional opportunities to support this much needed resource, and we encourage all of you to do the same. Also, in recognition of the Chapter's volunteer attorneys, in May, we hosted our annual Pro Bono luncheon, where we were honored by the special appearance of Judge Dolly M. Gee from Los Angeles. Judge Gee spoke about pro bono in the Central District and recognized our members for their commitment to pro bono, noting that the number of volunteer attorneys in pro bono matters in Orange County exceeded the number of volunteer attorneys in Los Angeles. Judge Scott C. Clarkson and local practitioners also presented the various pro bono opportunities available in the Central District to our members.

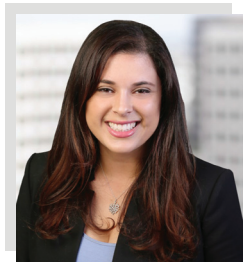
Our Young Lawyers Division (YLD) has also had a busy year. In addition to networking events and Brown Bag lunches, the YLD hosted its first substantive program, titled "YLD Practice Panel: An In-House Perspective on Federal Practice." The panel program included speakers from the legal departments of CAN Insurance, American Honda Motor Co., and Western Digital. The YLD is also active in serving our community. This year, the YLD partnered with the Constitutional Rights Foundation on "Constitution Day" to teach middle school students in local underserved communities on First Amendment freedom of speech protections in K-12 school. In October, the YLD also conducted a book drive to collect new and gently used books for donation to Think Together, which is a non-profit organization that provides programs and services to students, including distribution of books to children in Orange County. A special thank you to leaders of the YLD, including Derek Hahn, Samrah Mahmoud, Brent Colasurdo, Justin Gillett, and Ryan Fawaz.

We are fortunate to have an active and engaged membership, strong sponsorship by our law firm partners, and outstanding programs for our members. None of this would be possible without the leadership and dedication of our past presidents and our Board of Directors. Thank you for your support of FBA/OC and for the privilege of serving as your President.

**Van Nguyen is a Deputy Attorney General in the California Office of the Attorney General and is President of the Federal Bar Association, Orange County Chapter.*

Special Requirements of the Central District Local Rules

*By Diana Palacios and Samrah Mahmoud **



The Central District of California hosts one of the largest and most sophisticated caseloads of any U.S. District Court in the nation. It also has one of the most complex sets of civil local rules when compared to districts in other states and even in California. At 163 pages—135 page of rules plus an index and an appendix—the Central District's Civil Local Rules can be daunting for young and seasoned attorneys alike. Violating the local rules can expose you to a range of consequences including a notice of deficiency emailed to everyone who has appeared in the case, annoyed chambers staff, or your motion stricken or denied by the court. Here are ten requirements particular to the Central District Local Rules to keep in mind as you prepare your next non-discovery motion for filing.[1] Judges can change the local rules in their own standing and scheduling orders, however, so make sure to check your judge's particular orders and webpage before any filings.

1. Meeting and Conferring. Local Rule 7-3 requires parties to meet and confer at least 7 days prior to the filing of any motion to "discus thoroughly . . . the substance of the contemplated motion," preferably in-person. If the parties are unable to resolve the issues raised by the motion, the moving party must specifically state in the notice of motion the following: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)." This is a critical rule and many judges will deny or strike a motion that does not contain the required statement.

2. Obtaining a Hearing Date. Parties must file and serve a motion no later than 28 days before a hearing under Local Rule 6-1. Each judge has his or her own process for obtaining a hearing date. The process is usually stated on their individual webpage or in their standing orders, and it can range from calling the Courtroom Deputy Clerk to reserve a hearing date 24 hours before filing to simply checking the judge's online calendar to ensure that the desired hearing date is open. It is also often good practice to clear the date with opposing counsel as a courtesy before filing. Bottom line: determine the appropriate process ahead of time and make sure to factor that in to your filing plans.

3. Figuring out when oppositions and replies are due. Local Rules 7-9 and 7-10 provide that oppositions are due 21 days from the hearing date and replies are due 14 days from the hearing date, respectively. Once you have your hearing date, you can determine the opposition and reply deadlines from there. Keep in mind that if an opposition or reply is due on a court holiday, individual judges may advance opposition and reply deadlines to the last court day before the holiday.

4. **Brief length, font size, and spacing.** Local Rule 11-3.1.1 requires 14-point font for any proportionally spaced font like Times New Roman. Text must be double spaced except for footnotes, which can be single spaced. L.R. 11-3.6. Memoranda of points and authorities and trial briefs are limited to 25 pages. L.R. 11-6. Many judges, however, place a shorter page limit on reply briefs, so be sure to check your judge's orders. For instance, Judge Phillips limits reply briefs to 12 pages in her standing order.

5. Tables of Contents and Authorities. Local Rule 11-8 requires Tables of Contents and Tables of Authorities for any briefs over 10 pages. Running these tables can be tricky and is often fraught with technology problems, so it is advisable to start early in creating them.

6. Declarations and Exhibits. All exhibits are required to be attached "to the document to which it relates," which usually means a declaration. L.R. 11-5.2. The exhibits should be numbered consecutively to the main document either above or below the page number of each exhibit, and the exhibits should be tabbed in sequential order. L.R. 11-5.2, 11-5.3.

7. Proposed Orders: Proposed orders must be filed with any motion, stipulation, or application requesting relief from the court. The proposed order must be filed as a PDF attachment to the motion, stipulation, or application and it must also be emailed in a Microsoft Word format to the judge's chambers email address along with a PDF copy of the filed document. L.R. 5-4.4.1, L.R. 5-4.4.2. Rule 5-4.4.2 provides the format for the subject line of the email to chambers.

8. Courtesy Copies: Chambers copies are mandatory under the local rules; one copy of every document filed must be delivered chambers by 12:00 noon the day after the electronic filing. L.R. 5-4.5. Rule 5-4.5 provides specific requirements for the format of the chambers copy, including that the copy must be blue-backed and printed from CM/ECF with the CM/ECF generated header and the Notice of Electronic Filing ("NEF") attached as the last page.

9. E-signatures: E-signatures are permitted for electronically filed documents when there is only one signatory and the document is filed using the signatory's CM/ECF login. L.R. 5-4.3.4(a)(1). If the document requires more than one signatory, such as for a stipulation or a joint filing, e-signatures may be used so long as the document is filed using one of the signatories' CM/ECF logins **and** the signatory attests on the signature page that the other signatories listed agree with the filing submitted. L.R. 5-4.3.4(a)(2). If a document requires a signature of a person not registered as a CM/ECF filer, then the document must be hand signed. L.R. 5-4.3.4(a)(3).

10. Miscellaneous

A party may obtain an extension to respond to the initial complaint without court approval by filing a stipulation so long as the request is not more than 30 days; the stipulation does not need to be approved by the court. L.R. 8-3. See Local Rule 8-3 for specific requirements regarding the title and title page of such a stipulation. All other requests for an extension require court approval.

Documents electronically filed are electronically served unless the opposing party has not appeared or has not registered for CM/ECF (typically pro se litigants). L.R. 5-3.2.1.

Documents must be filed before midnight on the filing deadline to be considered timely filed. L.R. 5-4.6.1. However, some judges have shortened this cut-off so check your judge's standing orders and website.

**Diana Palacios is an associate at Davis Wright Tremaine LLP and a former federal clerk for U.S. District Court Judge John A. Mendez of the Eastern District of California. Samrah Mahmoud is a counsel at Troutman Sanders LLP and a former federal clerk for U.S. District Court Judge Josephine L. Staton of the Central District of California. Diana and Samrah recently taught a short-session class on California federal court filings at the University of California, Irvine School of Law this past January.*

[1] Discovery motions have their own unique procedures under the local rules. Parties must file a Joint Stipulation, which has its own format, timing, and meet and confer requirements. For more information see Local Rules 37-1 through 37-4.

Judicial Profile: Magistrate Judge Autumn D. Spaeth

*By Matthew K. Wegner**

United States Magistrate Judge Autumn D. Spaeth says she has not had a single boring day since June 15, 2018. Orange County's newest federal judge was sworn in that day, following a full career as a business litigator in private practice. Since then, she has enjoyed the intellectual rigor of life on the bench, grappling with issues as diverse as *habeas* petitions and electronic discovery in complex intellectual property cases.

Though she is familiar to most Orange County lawyers, and over the years became an obvious candidate for the Court, Judge Spaeth's path to the bench was not preordained. She was the first in her family to attend law school, enrolling at USC after earning her undergraduate degree at UCLA. After law school, she took a job as an associate in McDermott, Will & Emery's Irvine office — the beginning of a successful career as an Orange County business litigator. She spent a large portion of her career, and later became a partner, at Costa Mesa boutique Albert, Weiland & Golden, which changed its name to Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP when Theodore Albert joined the bench of the U.S. Bankruptcy Court. She ultimately became a founding partner of Smiley Wang-Ekvall, LLP, where her practice concentrated on insolvency and bankruptcy-related litigation matters.

"[Judge Spaeth] has not had a single boring day since June 15, 2018."

It was Judge Spaeth's service outside the law firm, however, that sparked her interest in becoming a judge. While in private practice, she became affiliated with the Ninth Circuit Judicial Conference, in which she held several positions. One of those positions turned out to be

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YLD Practice Panel: An In-House Perspective on Federal Practice

On April 25, 2019, the FBA/OC Young Lawyers Division hosted its first-ever YLD Practice Panel at Troutman Sanders LLP. The event, titled *An In-House Perspective on Federal Practice*, featured a panel of in-house counsel who discussed their background and answered questions regarding their practice, tips for younger attorneys looking to go in-house, and client development advice. The panelists were Dan Streeter, Director Strategic Claims, CNA Insurance; Kristin Gomez, Corporate Counsel, American Honda Motor Co.; and Lennis Collins, Associate General Counsel, Western Digital. Ryan Fawaz, Special Counsel at Katten Muchin Rosenman LLP and Samrah Mahmoud, Counsel at Troutman Sanders LLP, moderated the panel. The event was a great success and the FBA/OC YLD is looking forward to making this an annual event!

**Samrah Mahmoud, Counsel at Troutman Sanders LLP, Ryan Fawaz, Special Counsel at Katten Muchin Rosenman LLP, and Jordan Davisson Cook, associate at Latham & Watkins, LLP.*

Judge Autumn D. Spaeth

(Continued from page 7)

particularly formative: Judge Spaeth served as the co-chair of the Central District of California Lawyer Representatives to the Ninth Circuit Judicial Conference — an experience she says marked her first steps toward the bench. "Serving as a Lawyer Representative is an invaluable experience for any federal practitioner. It allows you to meet lawyers and judges from around the Ninth Circuit and gives you the opportunity to see beyond the bench, into the inner workings of the Court," she says. "The more I interacted with the judges in the quasi-social setting of the Conference, the more I realized I wanted to join them." When the Central District announced an opening for a new magistrate judge, she applied. The rest, as they say, is history.

Judge Spaeth has stayed involved in the Ninth Circuit Judicial Conference and is currently serving as the Chair of the 2019 Conference. She is the first magistrate judge to serve as Chair of the Conference in more than a decade. Most new magistrate judges experience a steep learning curve as they toggle between criminal and civil matters on their dockets. Arraignments and *habeas* petitions are usually not second nature for former civil litigators. But when asked to describe the challenges of her new role, Judge Spaeth also noted the high volume of *pro se* case filings. "These are litigants without lawyers trying to navigate the court system. From the perspective of a judge, I have a new appreciation for how much work goes into guiding them through the system — and how much is at stake," she says. The experience also underscores the important role lawyers play in the cases before the courts. "Case management is a challenge," she says, due to the Central District's high volume of cases. "Lawyers play an important role in the administration of justice," she says. Attorneys should consider whether the judiciary's limited resources are truly needed to resolve a dispute.

So, what advice does Judge Spaeth offer lawyers practicing in her courtroom?

"I ask that attorneys try to resolve as many issues as possible and bring to me the remaining issues that require judicial intervention. Counsel's ability to do this is the true mark of a professional, in my opinion." Civility among the lawyers is, of course, expected. "Judges read body language and facial expressions, and both affect our perception of your professionalism."

"Judges read body language and facial expressions, and both affect our perception of your professionalism."

When a courtroom battle cannot be avoided, she advises attorneys to focus their arguments not just on their clients' goals, but on the right result. The lawyer's role in the administration of justice is to help the Court reach the right result while advocating their client's position. An attorney seeking to improve the chances of success should brief all the law and information Judge Spaeth needs to reach the desired ruling and be sure to address the other side's cited legal authority. "Be sure you provide the burden of proof and standard of review that applies, for example. Tell me who wins in a 'tie,' and why."

Above all, Judge Spaeth says that she is honored that she was given the opportunity to join the federal bench and serve the people of the Central District of California, including the attorneys that practice here. She says, "it is a great thing when your day job is a community service." Federal practitioners, the Federal Bar Association, and the greater community are fortunate to have her service in the Central District.

* Matt Wegner practices intellectual property litigation with Brown Wegner LLP.

Pleading Affirmative Defenses

(Continued from page 1)

motion to dismiss unless "it appeared beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[6] This so-called "no set of facts" standard required only that the complaint give notice to the defendant of "what the plaintiff's claim is and the grounds upon which it rests."[7]

In 2007, the Supreme Court held in *Twombly* that a complaint needed to do more than just notify the defendant. Instead of notice, plaintiffs were held to a "plausibility" standard, which required that they establish enough facts in their complaint to "raise a right to relief above a speculative level."[8] The Court relied on the language of Federal Rule of Civil Procedure 8(a)(2), focusing on the requirement that plaintiff make a "showing" of entitlement to relief, "rather than a blanket assertion"[9] encompassing only a "formulaic recitation of the elements." The resulting standard requires an assertion that is more than conceivable, but less than probable.[10] In *Ashcroft v. Iqbal*, the Court confirmed that its ruling in *Twombly* was not limited to the facts of that case, but rather it applied to all civil complaints.[11]

"The answer has been called 'the forgotten pleading.'"

Affirmative defenses in civil answers assert that, even assuming the facts in the complaint are all true, the defendant should not be held liable based on some fact outside the complaint. A common example is the statute of limitations[12]: even if harm was done, the outside fact that the statute prevents plaintiffs from bringing stale claims renders the defendant not liable. The rules require defendants to "state in short and plain terms" their affirmative defenses.[13]

The answer has been called "the forgotten pleading"[14] in light of the relative lack of attention it receives. Affirmative defenses can affect both the cost and outcome of litigation. They can affect the scope of discovery, extend relevance for purposes of evidentiary law, and be a factor in whether or how a class gets certified.[15] Defendants can defeat a claim against them based on their affirmative defenses under Rule 12(c) or Rule 56.[16] Properly preserving affirmative defenses can be the difference between a large settlement and outright dismissal of the case.

Plaintiffs can attack affirmative defenses in a number of ways, but the most common is a motion to strike an insufficient defense under Rule 12(f). The number of 12(f) motions spiked in the wake of *Twombly* and *Iqbal*.[16] Plaintiffs claimed defenses were insufficient because they did not meet the plausibility standard. Defendants argued that the standard did not apply to their defenses. And the question remains to this day: does the Supreme Court's creation of the plausibility standard for a plaintiff's complaint apply to the defendant's answer as well? Neither *Twombly* nor *Iqbal* discussed affirmative defenses, and there are good arguments on both sides of the debate.

The Arguments For and Against Applying the Heightened Standard

Certain arguments were consistent in the 1,100-plus cases reviewed. Both plaintiffs and defendants appeal to the court's sense of equity. Plaintiffs argue that "what is good for the goose's complaint should be good for the gander's answer."[18] Why, they ask, should plaintiffs be held to a higher standard? Defendants counter, saying the uneven standards are necessary for equity. While plaintiffs have the whole statute of limitations to formulate their complaint, defendants have only 21 days. Plaintiffs counter that the 21-day period can be extended, and that leave to amend can be granted even after the filing of the answer.

The text of the Federal Rules is another basis

for both sides' claims.[19] Rule 8(a) requires that plaintiffs provide "a short and plain statement of the claim *showing* that the pleader is entitled to relief." Rules 8(b) and (c) instruct defendants to "state in short and plain terms its defenses," and "state any avoidance or affirmative defense." Defendants latch onto the difference, noting that plaintiffs are instructed to *show*, while defendants are not. The fact that the Supreme Court only focused on Rule 8(a) in *Twombly* and *Iqbal* bolsters this position. Plaintiffs, on the other hand, focus on the similarities: according to the rules, both sides' statements should be "short and plain." According to plaintiffs, the Court redefined "fair notice" as it applies generally to Rule 8.

Both sides also claim judicial efficiency[20] and discovery efficiency[21] as points for their side, arguing that their desired outcome would reduce burdens on the court. Plaintiffs argue that the heightened standard will declutter boilerplate defenses, preventing the need to litigate them. Defendants counter that the heightened standard will result in increased motions to strike (remember the spike in 12(f) motions after *Twombly*?). Because leave to amend is routinely granted, defendants argue, this will actually extend the litigation.

"[I]f you are asserting affirmative defenses, you want to look out the courtroom window and see cacti, not fog."

Another commonality from the case law review: plaintiffs and defendants alike stated that their desired standard was adopted by a majority of courts, either within the presiding district or circuit, or nationally. This "court-counting precedent," is not a real form of precedent at all. From a common sense perspective, this kind of argument may sound reasonable: if everyone else is doing it, it's more likely to be "right." But from a legal perspective, the district court is not beholden to the decisions of any other district court, even if every single district court across the country has decided the same. There is no binding precedent across district courts.[22] Courts' acceptance or rejection of this argument plays a particularly large role in the differences among district courts in the Ninth Circuit.

Trends in the Ninth Circuit

The data reveals that judges within the Ninth Circuit apply the plaintiff-friendly, heightened plausibility standard 43% of the time, a fairly evenly split.[24] On closer inspection, however, the data is skewed by an outlier. At 92%, the Northern District of California had the highest percentage of cases in the nation applying the plausibility standard to affirmative defenses. If you removed the 75 cases the district decided, the Ninth Circuit results would fall from 43% of cases applying the heightened plausibility standard to affirmative defenses to 23%. The District of Oregon was the second highest district in the Ninth Circuit, with 54% of cases applying the plausibility standard to affirmative defenses. In the Central District of California, only 32% of cases applied the pleading standards to affirmative defenses. The Eastern District matched the Central, while the Southern District applied the plausibility standard to affirmative defenses only 9% of the time. Nevada and Arizona applied the plausibility standard 8% and 0% of the time, respectively.

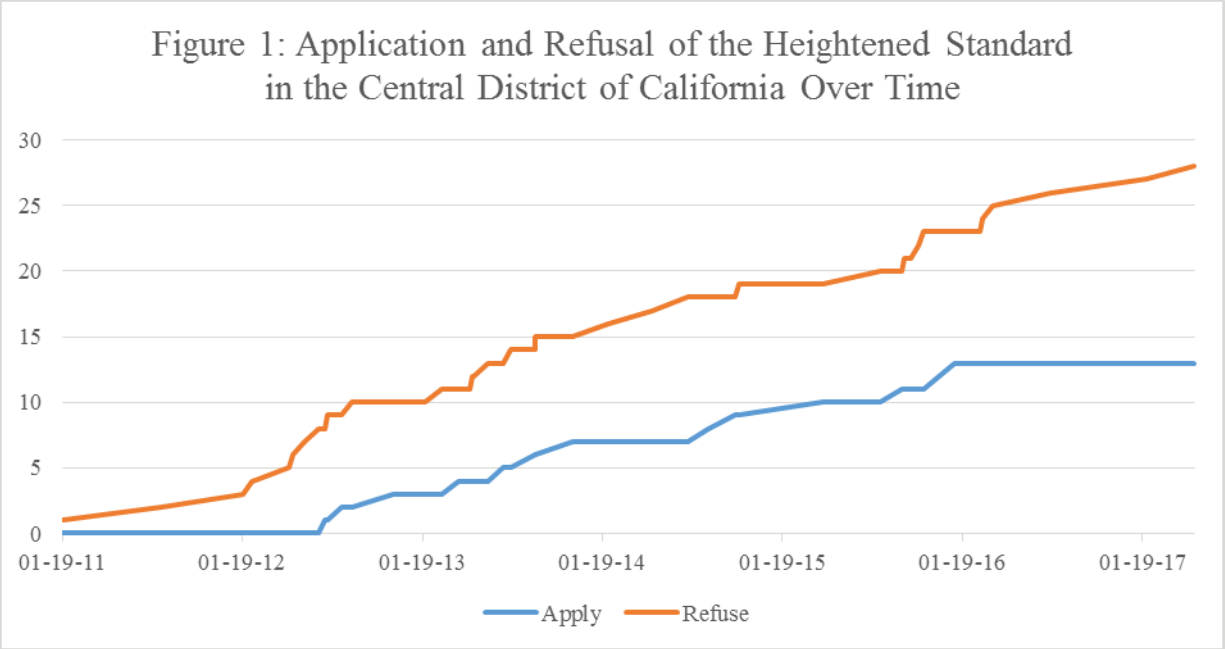
Apparently, the lesson here is that if you are asserting affirmative defenses, you want to look out the courtroom window and see cacti, not fog. A defendant in the Northern District can pretty safely expect to be held to the higher standard. But the data can be even more specific because judges are not bound by their district's majority, or even by their own prior decisions.[25]

Many of the judges in the Central District have been consistent in their rulings on this issue. Those that have always refused to extend the *Twiqbal* standard to defendants include Judges Klausner, Lew, and O'Connell. Other judges have consistently treated the goose like the gander. Judges Kronstadt, Mor-

row, Olguin, and Wright II have all required heightened pleading from defendants.

Most of the judges from the local federal courthouse in Orange County have held that *Twiqbal*'s plausibility standard does not apply to affirmative defenses. Judge Staton ruled in three instances that the heightened standard did not apply.[26] Judge Carter joined the Central District majority by holding the same.[27] Judge Selna also refused to apply the heightened standard to affirmative defenses after a thoughtful summary of the debate.[28] Most recently, Judge Guilford answered the question the same, holding that "[t]he text of Federal Rule of Civil Procedure 8, the principles underlying the Supreme Court's decisions in *Twiqbal*, and the practicalities of pretrial litigation all weigh against extending the plausibility requirement to affirmative defenses."[29] Judge Carney has indicated that the sufficiency of an affirmative defense is governed by a fair notice standard, though he has not directly analyzed whether the plausibility standard should apply.[30]

As Figure 1 indicates, the trend in the Central District over time has consistently been toward refusing to apply the heightened standard to affirmative defenses. More than twice the number of cases have refused to apply the heightened standard (28 to 13).



Kohler v. Flava Enterprises, Inc.

The Ninth Circuit view seems to have been influenced by the language and holding in *Kohler v. Flava Enterprises*,[31] though the influence of this case varies by district. If you ask in the Northern District of California, it seems the judges have agreed that no Ninth Circuit case has ruled on the issue. But that is a controversial position.

In 2015, the Ninth Circuit heard *Kohler v. Flava Enterprises, Inc.*, and stated that "the 'fair notice' required by the pleading standards only requires describing [an affirmative]

defense in 'general terms.'"[32] This sounds like a rejection of the heightened standard. But interestingly, the court did not even mention *Twombly* or *Iqbal*. Rather, it supported this claim by referencing the 1998 edition of Wright and Miller's *Federal Practice and Procedure*, written years before *Twiqbal* revolutionized pleading, at least on the plaintiff's side.

Before *Kohler*, the Ninth Circuit was split almost evenly: 78 cases applied the heightened standard, while 80 did not.[33] Since the *Kohler* decision, courts apply the heightened standard about half as often as they refuse to apply it (33 to 65). This shift appears to be due to the fact that many judges read *Kohler* as Ninth Circuit instruction to refuse to apply the heightened standard to affirmative defenses. The Northern District has stood its ground, arguing that *Kohler* did not rule on the issue — 18 of the 19 Northern District cases since *Kohler* have applied the heightened standard to affirmative defenses.[34] In the Central District of California, by contrast, only four cases (three judges) have applied the heightened standard since *Kohler*, while 11 have either refused or failed to reach the issue.[35]

Those litigants seeking to defend their affirmative defenses have a number of arguments available to convince a judge to refuse to apply the higher standard, including *Kohler* and the arguments that have been successful in prior cases. But the data shows that the issue is far from settled, leaving substantial uncertainty with respect to the proper standard with which to plead affirmative defenses in "the forgotten pleading."

* Remington Lamons is a litigation associate at Latham & Watkins' Orange County office, and a graduate of UC Davis School of Law. The author would like to thank Andrew Gray and Professor Brian Soucek for their helpful comments.

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

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

[3] Adam Steinman, *Ever Wonder Which SCOTUS Cases Have Been Cited the Most?*, CIVIL PROCEDURE AND FEDERAL COURTS BLOG (Sept. 21, 2016), http://lawprofessors.typepad.com/civpro/2016/09/ever-wonder-which-scotus-cases-have-been-cited-the-most.html (ranking *Twombly* third-most-cited with 127,521 federal court citing references, and Iqbal fourth-most-cited with 104,712 references).

[4] I conducted this review along with Professor Brian Soucek and the results were published in a recent law review article. *See* Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875 (2019).

[5] *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2nd Cir. 2019) ("We conclude 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."). Interestingly, by applying the heightened standard, this decision ruled the opposite of the majority of district courts.

[6] 355 U.S. 41 (1957).

[7] *Id.* at 47.

[8] 550 U.S. at 555. In assessing plausibility, courts are to assume all asserted facts as true and disregard any legal conclusions.

[9] *Id.* at 555 n. 3; *see* Fed. R. Civ. P. 8(a)(2).

[10] *Iqbal*, 556 U.S. at 678.

[11] *Id.* at 684.

[12] Fed. R. Civ. P. 8(c).

[13] Fed. R. Civ. P. 8(b)(1)(A).

[14] Hon. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152 (2013).

[15] Soucek & Lamons, *supra* note 4, at 884.

[16] *Id.*

[17] *Id.* (citing St. Eve & Zuckerman, *supra* note 14, at 171).

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

[19] *See Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 800 (C.D. Cal. 2016).

[20] *Id.* at 799-800.

[21] *Id.*

[22] *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 J. Moore et al., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)).

[23] In *Court-Counting Precedent*, we examine the implications in depth of district courts looking to other district courts for answers, and the need for uniformity, at least within each district. The focus here is narrowed to the California practitioner in an effort to provide practical information for litigation strategy.

[24] Soucek & Lamons, *supra* note 4, at 895. We only included districts with 10 or more cases on the subject in our charts.

[25] *See supra* note 22.

[26] *See Fed. Deposit Ins. Corp. v. Reis*, 12-cv-02212-JST, 2013 WL 12126777, at *2 (C.D. Cal. Sept. 5, 2013) ("The Ninth Circuit, however, has not required a heightened pleading standard for affirmative defenses . . . and the Court will not require one here."); *Pac. Dental Servs., LLC v. Homeland Ins. Co. of New York*, 13-cv-00749-JST, 2013 WL 3776337, at *2 (C.D. Cal. July 17, 2013) ("Accordingly, there is good reason to conclude that *Twombly*/*Iqbal* do not apply to affirmative defenses, and an affirmative defense is sufficiently pled if it gives plaintiff fair notice of the defense."); *Baroness Small Estates, Inc. v. BJ's Restaurants, Inc.*, 11-cv-00468-JST, 2011 WL 3438873, at *5 (C.D. Cal. Aug. 5, 2011) (same).

[27] *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, No. SA CV 11-1161 DOC, 2012 WL 177576 (C.D. Cal. Jan. 20, 2012).

[28] *In-N-Out Burgers v. Smashburger IP Holder LLC, et al.*, 8:17-cv-01474-JVS-DFM, Dkt. 142 at 4 -6 (C.D. Cal. Dec. 21, 2018) (Selna, J.) ("For these reasons and in the absence of further direction from the U.S. Supreme Court or the Ninth Circuit, this Court will not apply the *Twombly/Iqbal* plausibility standard to affirmative defenses."). This case fell outside of the temporal scope of our analysis in *Court-Counting Precedent*.

[29] *Loi Nguyen v. Durham Sch. Servs., L.P.*, 358 F. Supp. 3d 1056, 1057 (C.D. Cal. Feb. 20, 2019) ("Should the stricter plausibility requirement set forth in *Twiqbal* apply equally to pleading affirmative defenses in an answer? The short answer is plainly 'no.'"); *see also Elettronica GmbH v. Radio Frequency Simulation Sys., Inc.*, 2017 WL 6888823, at *1 (C.D. Cal. Aug. 24, 2017) (indicating inclination to apply the fair notice standard before denying the motion as moot).

[30] *Harbor Breeze Corp. v. Newport Landing Sportfishing, Inc.*, 2018 WL 4944224, at *1 (C.D. Cal. Mar. 9, 2018) (holding, without addressing the *Twiqbal* plausibility debate, that "the key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."); *Mega Brands Inc., et al. v. Amloid Corp.*, 8:13-cv-00108-CJC, Dkt. 18 at 2 (same).

[31] 779 F.3d 1016 (9th Cir. 2015).

[32] *Id.* at 1019.

[33] Soucek & Lamons, *supra* note 4, at 897.

[34] *Id.* at 897-98.

[35] *See, e.g.*, *Rosen v. Masterpiece Mktg. Grp.*, LLC, 222 F. Supp. 3d 793, 801-02 (C.D. Cal. 2016) (citing *Kohler* and conducting a lengthy discussion of both sides of the debate, settling on a refusal to apply heightened standards to defendants).

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