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Twombly-Iqbal and Affirmative Defenses in the Third Circuit

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There is a split of authority on whether the heightened pleading standards articulated in *Twombly* and *Iqbal* apply to affirmative defenses. In two recent decisions, district courts in New Jersey and Pennsylvania have declined to extend the reach of *Twombly* and *Iqbal* to affirmative defenses pled pursuant to Federal Rule of Civil Procedure 8(c).

In *Federal Trade Commission v. Hope Now Modifications, LLC, et al.*, Civ. No. 09-1204 (D.N.J. Mar. 10, 2011) the Federal Trade Commission (FTC) brought suit against various defendants who were affiliated with a mortgage-modification corporation. The FTC subsequently moved to strike various affirmative defenses that were pled by one group of defendants. The pleading at issue merely listed the affirmative defenses that were being asserted, without alleging any facts upon which the defenses were based. The FTC argued, among other things, that each of the listed affirmative defenses should be struck because the defenses did not meet the pleading requirements set forth in *Twombly* and *Iqbal*.

In denying the FTC's motion, Judge Jerome B. Simandle (D.N.J.) noted that the issue was one of first impression in the District of New Jersey and that no Federal Circuit Court had yet considered whether to extend the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses. However, two other district courts in the Third Circuit had previously addressed the issue and concluded that the pleading standards articulated in *Twombly* and *Iqbal* do not extend to affirmative defenses. *See, e.g., Charleswell v. Chase Manhattan Bank, N.A.,* Civ. No. 01-119(D.V.I. Dec. 8, 2009)and *Romantine v. CH2M Hill Engineers, Inc.,* Civ. No. 09-973 (W.D. Pa. Oct. 23, 2009).

Agreeing with both the *Charleswell* and *Romantine* courts, Judge Simandle found "persuasive the textual analysis demonstrating that the Federal Rules of Civil Procedure distinguish the level of pleading required between a plaintiff asserting a claim for relief under Rule 8(a) and a defendant asserting an affirmative defense under Rule 8(c)." *Twombly* and *Iqbal* concerned the pleading standard applicable to a party seeking relief under Rule 8(a). The court found this to be distinguishable from a defendant that merely states an affirmative defense under Rule 8(c). Thus, "by stating an affirmative defense under Rule 8(c), a defendant is not making a 'claim for relief' to which Rule 8(a) [or the heightened pleading standard articulated in *Twombly* and *Iqbal*] would apply."

Approximately four weeks later, Judge Eduardo C. Robreno (E.D. Pa.) reached a similar conclusion in *Tyco Fire Products LP v. Victaulic Co*.Civ. No. 10-4545 (E.D. Pa. Apr. 13, 2011).There, the plaintiff brought suit against the defendant, alleging infringement of two

patents. The defendant's answer pled affirmative defenses and a counterclaim that, among other things, contained averments that the patents are "invalid and/or unenforceable" without pleading any supporting facts, i.e., the defendant's second counterclaim "contains a mere legal conclusion, no supporting facts, and cites four broad provisions of Title 35 of the United States Code in support 'without limitation.'"

In addressing the plaintiff's motion to strike the affirmative defenses, Judge Robreno recognized that whether the *Twombly-Iqbal* pleading standard applied to affirmative defenses "is far from settled." However, Judge Robreno concluded that "[i]n light of the differences between Rules 8(a) and 8(c) in text and purpose, . . . *Twombly* and *Iqbal* do not apply to affirmative defenses." Rather, "[a]n affirmative defense need not be plausible to survive; it must merely provide fair notice of the issue involved." Because the affirmative defenses pled by the defendant in *Tyco Fire* provided fair notice of the issue—invalidity and/or unenforceability—they satisfied this standard.

The defendant's second counterclaim, however, failed to satisfy the *Twombly-Iqbal* "plausibility" standard. While "some courts have forgiven similarly sparse counterclaims based on the low bar to which the plaintiff's averments of patent infringement were subjected and their district's adoption of specialized local patent rules[,]" Judge Robreno declined to do so in *Tyco Fire* because (i) the Eastern District of Pennsylvania has not adopted local patent rules and, even if it had, local patent rules cannot "modify a defendant's pleading standard for counterclaims under the national rules[,]" and (ii) "[t]wo wrongs do not make a right"; i.e., the fact that plaintiff may not have pled a plausible claim for relief does not entitle a defendant to plead counterclaims in a correspondingly insufficient manner. As a result, the plaintiff's motion to dismiss the defendant's second counterclaim was granted.

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