Courts Split on Applying *Twombly* and *Iqbal* to Affirmative Defenses

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As previously discussed on this blog, the repercussions of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), continue. These cases established a “plausibility standard” for pleadings referred to as the *Iqbal-Twombly* standard. At first, this standard was limited to complaints, but more recently, courts have begun to apply the standard to affirmative defenses.

NKU law professor Richard A. Bales and 2011 Chase graduate, Melanie A. Goff, recently published an insightful analysis of how courts across the country are dealing with *Iqbal-Twombly* as the standard relates to affirmative defenses. The article Goff & Bales, *A “Plausible” Defense: Applying Twombly and Iqbal to Affirmative Defenses*, AM. J. TRIAL ADVOC., 34, No. 3 (2011) is available [here](#):

The authors provide a concise analysis of the history of notice pleading and the evolution of the *Iqbal-Twombly* standard. They then review key cases from various federal circuits that have either adopted or rejected the application of the *Iqbal-Twombly* standard to affirmative defenses.

Immediately relevant to Ohio and Kentucky practitioners is the authors’ analysis of *McLemore v. Regions Bank*, 2010 WL 1010092 (M.D. Tenn, March 18, 2010). *Id.* at *23. This district court case out of the Sixth Circuit found that the *Iqbal-Twombly* standard did not apply to affirmative defenses. The key holding of the *McLemore* court was that Rule 8(a)(2) related to complaints and not answers because the rule required only “a short and plain statement of the claim showing that the pleader is entitled to relief.” *McLemore*, 2010 WL 1010092 at *12 (citing *Twombly*, 550 U.S. at 555); Goff & Bales, *supra* at 25.

As outlined in the article, however, many courts have applied *Iqbal-Twombly* to pleading affirmative defenses. The authors conclude their analysis by suggesting that the federal courts should adopt the *Iqbal-Twombly* standard for all parties to the litigation. Goff & Bales, *supra* at 32. The authors contend that this will: (1) “ensure efficiency and fairness,” (2) avoid confusion by applying the same standard to all parties, and (3) help parties tailor discovery by including factual allegations as a part of the affirmative defense. *Id.*

Whatever side of the argument you take, this article provides a helpful foundation for any practitioner faced with this issue.