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Shadur's crusade against misdirected affirmative defenses still has merit

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Our previous Daily Law Bulletin article on March 21 explored the teachings by the late U.S. district judge Milton I. Shadur about answering a complaint, with reference to his appendix in *State Farm Mutual Automobile Insurance Co. v. Riley,* 199 F.R.D. 276 (N.D. Ill. 2001).

Because we only briefly touched on affirmative defenses, we explore that topic further here. In an opinion striking an affirmative defense in its entirety, Shadur observed:

"It has become increasingly apparent with the passage of time that this [c]ourt is the figurative legal equivalent of Mickey Mouse in Walt Disney's 1940 animated classic 'Fantasia' — engaged in a perhaps hopeless attempt to sweep back the relentless sea of improper pleadings with the equivalent of Mickey's broom: That is, by opinions such as this one. Nonetheless this [c]ourt cannot in good conscience give up the effort, but from here on out it plans to begin many, if not all, such opinions as it has begun this one. [Footnote omitted.] If any target of such an opinion finds that annoying, too bad — maybe placing a burr under the pleader's saddle in that fashion may induce thought on the pleader's part." *Sweis v. Travelers Casualty Insurance Co.*, No. 13 C 7175, Mem. Op. and Order at 1-2 (N.D. Ill., Jan. 14, 2014) (D.I. 30).

But why do litigants struggle with properly pleading affirmative defenses? And what causes the lack of thought described above by Shadur?

An affirmative defense is an admission of the facts alleged in the complaint coupled with an assertion of some other reason as to why defendant is not liable. *Bobbitt v. Victorian House Inc.*, 532 F.Supp. 734, 736 (N.D. Ill. 1982). Affirmative defenses arose from the common law "confession and avoidance" plea.

That plea meant that a defendant, who was willing to confess that plaintiff's complaint demonstrated a prima facie case, could then assert that there was

additional material that would defeat the plaintiff's otherwise valid cause of action. 5 Charles Alan Wright et al., Federal Practice & Procedure Civil, Section 1270 (3d ed.).

Here is an easy way to explain affirmative defenses to non-lawyers, using a contrived example: In some states adultery is grounds for divorce. Assume the offended spouse forgave the indiscretion, but later filed for divorce. Asserting the common law defense of condonation — in which the defendant-spouse admits to the adultery that is the basis for the divorce action, but asserts that the plaintiff-spouse forgave the indiscretion prior to bringing the action — is an example of confession and avoidance from which affirmative defenses arise.

Several of Shadur's cases have helpful teachings for how to properly plead affirmative defenses. *In Technology Licensing Corp. v. Pelco Inc.*, No. 1-11-cv-08544 (N.D. Ill., Dec. 1, 2011), a patent infringement case before Shadur, the defendant's answer asserted "non-infringement" of the patents as an affirmative defense to plaintiff's infringement allegations:

"[Defendant] does not make, use, sell, offer for sale or import into the United States and has not made, used, sold, offered for sale or imported into the United States any products or methods that infringe any valid claim of the ... patents, either willfully, directly, indirectly, contributorily, through the doctrine of equivalents or otherwise and has not induced others to infringe those patents."

Shadur struck the affirmative defense because it was directly at odds with the complaint asserting patent infringement, observing that an affirmative defense of non-infringement "violates the fundamental nature of an [affirmative defense] as accepting all of the allegations of a complaint but then going on to explain why defendant is nevertheless not liable." *Technology Licensing, Mem. Order* (March 5, 2012).

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Lest you think Shadur is alone in this approach, see *Drop Stop LLC v. Jian Qing Zhu,* No. 2:16-cv-07916-AG (SS), 2017 WL 3452990, at *4 (C.D. Cal. June 20, 2017) (J. Guilford) ("non-infringement isn't an affirmative defense").

In its answer, the defendant in *Technology Licensing* also pleaded the following affirmative defense:

"TLC's claims for relief are barred by the doctrines of laches, equitable estoppel, waiver, prosecution history estoppel, patent misuse, patent exhaustion or implied license, absolute and equitable intervening rights, recapture, notice, first sale and double recovery."

Shadur struck this affirmative defense as "an impermissible laundry list that gives no clue as to the grounds for any of the contentions set out there," that "[u]nder the federal system, notice pleading is incumbent on defendants as well as plaintiffs." *Technology Licensing*, Mem. Order (March 5, 2012).

Other courts have a similar view. *See Wyshak v. City National Bank*, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."); *Simmons v. Navajo County*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citing the Wyshak "fair notice" standard post-*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

In *Trading Technologies International Inc. v. CQG Inc.*, No. 1-10-cv-00718 (N.D. Ill., Feb. 3, 2010), the defendants asserted in their affirmative defenses that "Plaintiff's complaint fails to state a claim upon which relief can be granted."

Striking without leave to replead, Shadur characterized this affirmative defense as "dead wrong" because "when the complaint's allegations are taken as true (as must be done when it comes to [affirmative defenses]), [the affirmative defense] must be

rejected." *Trading Technologies*, Mem. Order (Aug. 12, 2010).

Shadur also noted that it was inappropriate to characterize what is really a Rule 12(b)(6) motion as an [affirmative defense]" citing his explanation of proper affirmative defense usage in his appendix to *State Farm*. Judges in other courts share this view. See, e.g., *Sanchez v. Roka Akor Chicago*, No. 14 C 4645, 2015 WL 122747, at *2 (N.D. Ill., Jan. 9, 2015) (J. Gottschall); *578539 BC Ltd. v. Kortz*, No. CV 14-0437 MMM (MANx), 2014 WL 12572679, at *8 (C.D. Cal. Oct. 16, 2014) (J. Morrow) (striking the affirmative defense of failure to state a claim because it "addresses the elements of plaintiff's claims and is properly raised through denial of plaintiff's allegations or an appropriate motion").

The defendants in *Trading Technologies* also asserted that the plaintiff's "claims are barred by the doctrines of estoppel, laches, acquiescence, implied license and/or unclean hands."

Shadur struck this affirmative defense because its "skeletal recitals of various legal doctrines are no more than boilerplate, giving no information to [plaintiff's] counsel or this [c]ourt as to just what is being asserted by [defendants]."

Shadur gave the defendants a chance to replead "one or more of the labels advanced there in conjunction with a fleshed-out set of informative allegations that satisfy notice pleading requirements."

And again, Shadur was not alone in his view of blunderbuss listings of affirmative defenses. See, e.g., *Jones v. UPR Products Inc.*, No. 14 C 1248, 2015 WL 3463367, at *2 (N.D. Ill., May 29, 2015) (J. Alonso); *Polara Engineering Inc. v. Campbell Co.,* No. 8-13-cv-00007, order at *3 (C.D. Cal. April 25, 2013) (J. Carney) ("In order to provide 'fair notice,' a defendant must provide more than 'simple identifications' of its defenses. ... Defendant has not provided the grounds on which each of its challenged defenses are based and each defense is essentially a restatement of a legal doctrine or principle. Plaintiff's ... affirmative defenses for laches, acquiescence/waiver and unclean hands simply refer to those principles and contain no explanation of why or how they apply in this case.").

We hope you have been struck by the above examples of affirmative defense cardinal pleading sins and that you will use these examples to carry on Shadur's efforts to "sweep back the relentless sea of improper pleadings." If not, your pleading may be recognized as a burr under your saddle.