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'The Forgotten Pleading' serves as guide to determining best defense

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We have previously explored the teachings by the late U.S. District judge Milton I. Shadur about answering a complaint and pleading affirmative defenses.

We now focus on negative and affirmative defenses as discussed in "The Forgotten Pleading" by 7th U.S. Circuit Court of Appeals Judge Amy J. St. Eve and Michael A. Zuckerman, a former St. Eve law clerk. 7 Fed. Cts. L. Rev. 152 (2013) (available at SSRN).

Like Shadur's teachings in his appendix in State Farm, St. Eve's "The Forgotten Pleading" provides important tips on properly pleading defenses and mastering the answer.

In "The Forgotten Pleading," St. Eve examines the affirmative and negative defenses that can be pleaded in the answer. Often a defendant will plead a grocery list of affirmative defenses, many of which are negative defenses cast as affirmative defenses.

What's the difference? A negative defense is an attack on a plaintiff's prima facie case, a defense that directly contradicts elements of the plaintiff's claim for relief. Fed. Rule of Civil Procedure 8(b); *Neylon v. County of Inyo*, No. 1:16-CV-0712 AWI JLT, 2017 WL 3670925, at *3 (E.D. Calif., Aug. 25, 2017) ("'negative' defenses, i.e., defenses that simply negate an element of the plaintiff's claim or defenses that state the plaintiff cannot meet her burden as to an element of proof, are not affirmative defenses").

"A negative defense arises out of the defendant's specific response in its answer to the allegations in the complaint," St. Eve writes. Negative defenses like "I did not do it" are included in the defendant's specific response to plaintiff's claim; negative defenses should not be separately pleaded or repeated as affirmative defenses, she says.

In contrast, an affirmative defense is an implicit admission of the factual allegations in the complaint, but avoids liability, in whole or in part, based on additional allegations of excuse, justification or other negating matters. Federal Rule of Civil Procedure 8(c); see *Sloan Valve Co. v. Zurn Industries Inc.*, 712 F. Supp. 2d 743, 749 (N.D. Ill. 2010) ("the basic concept of an affirmative defense is an admission of the facts alleged in the complaint, coupled with the assertion of some other reason defendant is not liable") (J. St. Eve); *Riemer v. Chase Bank USA N.A.*, 274 F.R.D. 637, 639 (N.D. Ill. 2011) (M.J. Cole); see also *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof [as to an element plaintiff is required to prove] is not an affirmative defense.").

For example, in *Escobedo v. Oswego Junction Enterprises*, No. 17-CV-0682, 2017 WL 3130643, at *4 (N.D. Ill., July 24, 2017) (M.J. Cox), a class-action case, the plaintiff sought to strike an affirmative defense alleging the putative class was overly broad and that both named plaintiffs were not qualified to act as class representatives because they were not similarly situated to other class members.

The court observed that challenges to the adequacy of class allegations are treated as negative defenses, not affirmative defenses. The asserted defense was a direct attack on the allegations made in the plaintiffs' complaint about the putative collective action.

The court struck this affirmative defense challenging the adequacy of the class because it was more accurately classified as a negative defense and was not appropriately pleaded as an affirmative defense.

For a second example, "failure to state a claim" is a negative defense that argues the plaintiff has not met its burden in establishing one or more elements of a claim. See *Unigestion Holding S.A. v. UPM Technology Inc.*, 305 F.Supp.3d 1134 (D. Or. 2018); see also *Hiramanek v. Clark*, No. 13-00228, 2015 WL 693222, at *2 (N.D. Calif., Feb. 18, 2015) ("Failure to state claim: [defendants] agree to remove this affirmative defense, which is an improper negative defense."). While commonly used, failure to state a claim is not an affirmative defense.

How does one determine whether a defense is negative or affirmative? Federal Rule of Civil Procedure 8(c) enumerates several affirmative defenses and the 7th Circuit has identified two approaches for determining whether a defense not specifically found in Rule 8(c) of the Federal Rules of Civil Procedure is an affirmative defense: (a) "if the defendant bears the burden of proof" under state law, or (b) "if it [does] not controvert the plaintiff's proof." *Winforge Inc. v. Coachmen Industries Inc.*, 691 F.3d 856, 872 (7th Cir. 2012); *Maurice Sporting Goods Inc. v. BB Holdings Inc.*, No. 15-CV-11652, 2016 WL 2733285, at *2 (N.D. Ill., May 11, 2016) (J. St. Eve); *Manley v. Boat/U.S. Inc.*, No. 13-CV-5551, 2016 WL 1213731, at *5 (N.D. Ill., March 29, 2016) (J. Dow); *Sarkis' Cafe Inc. v. Sarks in the Park LLC*, 55 F.Supp.3d 1034, 1040–41 (N.D. Ill. 2014) (J. Lee). If either is true, the defense is an affirmative defense.

The available procedure a party can use to defeat or pursue a defense depends on the type of defense — negative or affirmative.

For example, a defendant seeking early case termination on the basis of an affirmative defense should first answer the complaint, second, plead the affirmative defense in the answer and, third, move for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

Unlike negative defenses, affirmative defenses are external to the complaint — they do not invalidate the claim for relief pleaded in the complaint. So dispositive motions based on affirmative defenses should be raised after the pleadings are closed, under Rule 12(c) Motion for Judgment on the Pleadings, not under Rule 12(b)(6) which "tests whether the complaint states a claim for relief," according to "The Forgotten Pleading."

Problems created by poorly delineated defenses and cluttered pleadings manifest themselves during trial preparation, as St. Eve explained in "The Forgotten Pleading":

"Some may not even be cognizable under the applicable substantive law (for example, the 'operation of nature' or 'act of god defense'). Of the affirmative defenses that are properly pleaded as such, many will nonetheless lack sufficient evidentiary support, but if the plaintiff never moved for

summary judgment on that basis, the defenses will remain.

"Other remaining affirmative defenses will be boilerplate and perfunctory statements of law ('the claim is extinguished by accord and satisfaction'), but the plaintiff never moved to strike these defenses as insufficient under Rule 12(f). So they too will remain, although the nature and theory of the defense may be wholly unclear."

These problems continue when the parties file motions in limine and as the parties consider jury instructions:

"The parties now dispute whether the court should instruct the jury on each remaining affirmative defense pleaded in the answer. The defendant wants the instructions, but the plaintiff points out that the defendant pleaded the kitchen sink of purported affirmative defenses in its answer and many of them fail as a matter of law. No matter, the defendant retorts, because the plaintiff never filed an appropriate motion to strike the defenses," St. Eve writes.

Trial judges can, under Federal Rule of Civil Procedure 16, use the pretrial conference to remove clutter from pleadings and narrow issues for trial, but St. Eve notes this late stage remedy often results "in a tremendous waste of both judicial and private resources."

The answer and its defenses can present procedural traps for the unwary, hobbling a case for its duration.

Reviewing the helpful guidance contained in "The Forgotten Pleading" by St. Eve, et al., and the late judge Shadur's appendix in State Farm can reduce the risk of harm from these traps and give a party advantages during the lifecycle of a case.