Ferreting Out Affirmative Defenses

I have noticed that most, if not all, cases are much more difficult to get resolved today than they were years ago. Whether they are personal injury claims, employment discrimination cases or business breach of contract claims, attorneys and their clients are spending a lot more time, effort and money to get these claims resolved. I have also noticed far more creative pleadings on both sides of the bar as well. For example, many answers routinely assert every affirmative defense imaginable in the hope that one of them will succeed in having the plaintiff's case dismissed.

Fifteen? Sixteen? Seventeen affirmative defenses? How many affirmative defenses did opposing counsel raise in response to your last lawsuit? Which ones are valid, which ones are unreasonable, which ones do you need to take seriously? Sometimes it is difficult to determine at the beginning of a lawsuit which affirmative defenses carry more weight, but one thing is certain, all of them need to be addressed immediately.

I recall receiving an answer not too long ago where defense counsel raised the statute of limitations as a defense. The claim was filed well within the two-year statute of limitations, but nevertheless, it was one of several affirmative defenses raised in the answer and it caught my attention. I immediately submitted my discovery requests to opposing counsel and included Requests for Admissions specifically addressing many of the affirmative defenses, and specifically asking the defendant to admit, for example, that the collision occurred on XYZ date, that the lawsuit was filed within two years of that date, and that service of process was properly perfected as well. The defense admitted that service had been perfected but refused to admit that the lawsuit was filed within the two year statute of limitations. I then had to take additional time

to depose the defendant and then file a motion for summary judgment on the issue, which went unopposed and was ultimately granted by the court.

It seems to me that many attorneys have gotten into the habit of using standard forms for litigation, whether it is a form complaint, answer, discovery request or simply form objections. While such standard forms can appear to save an attorney hundreds of hours a year, they frequently do very little to help develop the case, they do little to help get the case resolved, and they frequently will end up costing each side much more time and money as they do not help narrow the issues of law or questions of fact.

While I have spent the majority of my time practicing law at the plaintiff's table, I have come to the defense of several clients as well. I am all too familiar with the understanding that an affirmative defense is waived if it is not raised, but does that mean that defense counsel should raise each and every affirmative defense that he/she can imagine? No.

The Ohio Supreme Court has held that the affirmative defenses listed in Civ.R. 8 must be presented before pleading pursuant to Civ.R. 12(B), must be affirmatively set forth in a responsive pleading pursuant to Civ.R. 8(C), or within an amended pleading pursuant to Civ.R. 15. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St. 2d, 55, 57, 320 N.E. 2d 668. In particular, the party shall set forth affirmatively the following defenses:

> Accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Civ.R. 8(C). While the initial reaction may be to cut and paste each of these affirmative defenses into your next answer, that would be improper without first determining that the defenses are applicable to your case.

The Ohio Rules of Civil Procedure require each attorney to certify that the attorney has read each pleading, motion or other document and verified that "to the best of the attorney's… knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Civ.R. 11. Any willful violation of the rule can result in an award to the opposing party of expenses and reasonable attorney fees. *Id*. The courts of Ohio have also held that each affirmative defense must be pled with specificity or else it will be waived. *Arthur Young & Co. v. Kelly* (1993), 88 Ohio App. 3d 343, 348, 623 N.E. 2d 1303. The use of a general denial to "each and every allegation of plaintiff's complaint," without more, was not specific denial and was, therefore, an admission. *Dryden v. Dryden* (1993), 86 Ohio App. 3d 707.

It is also well established that the following standard "Reservation of Rights" language is not the same as setting forth the affirmative defense:

> This Defendant reserves the right to amend this Answer to include affirmative defenses that may become apparent throughout the course of further investigation and/or discovery.

L.E. Sommer Kidron, Inc. v. Kohler (2007), 2007 Ohio 885; 2007 Ohio App. LEXIS 821 (9th App. Dist.); *Taylor v. Meridia Huron Hospital of Cleveland Clinic Health Sys.* (2000), 142 Ohio App. 3d 155, 157 *citing Lourdes College of Sylvania, Ohio v. Bishop* (1997), 94 Ohio Misc. 2d 51.

Now that we know that defense counsel has an affirmative duty to ensure that there is a good faith basis for each and every affirmative defense raised in the answer, what do we do when

we still receive sixteen affirmative defenses? The truth is, work. You need to discover the "good faith basis" for each defense and determine whether or not your case is in jeopardy.

The attorney in *Sawyer v. Devore* attempted to ferret out the basis for each affirmative defense by submitting general discovery requests asking for any facts upon which they premised their affirmative defenses. *Sawyer v. Devore* (1994), 1994 Ohio App. LEXIS 4954 (8th App. Dist). The trial court denied Sawyer's motion to compel which requested "the facts upon which [Devore and Wal-Mart] relied in support of [their] asserted affirmative defenses." *Id.* at 16. Sawyer appealed this and several other issues to the Eight District Court of Appeals. The Eight District Court of Appeals held that "Civ.R. 26 does not provide for the discovery of any facts upon which appellees premised their affirmative defenses," and then quoted the language of Civ.R. 26(A):

> **Policy; discovery methods.** It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

(Emphasis added.) While Ohio law prefers that the parties have ample opportunity to complete discovery, the trial court may, in its discretion and in accordance with Civ.R. 26(C), limit or forbid discovery to prevent "fishing expeditions" in which a party attempts arbitrarily to uncover incriminating evidence. *Bland v. Graves* (1993), 85 Ohio App. 3d 644, 659.

The Eight District Court of Appeals stated that Sawyer's general request for "any facts" upon which the defendants premised their affirmative defenses was nothing more than "an attempt to conduct a fishing expedition." *Sawyer, supra*, at 18. The court stated that the discovery request "essentially demanded that [defendants] examine their own body of evidence, determine the elements of that body of evidence relevant to [their] affirmative defenses and

compile the relevant evidence into a neat little package to be used against" them. *Id*., at 19. The Court held that the trial court would have permitted Sawyer to take undue advantage of the industry and efforts put forth by defendants' counsel if it had granted Sawyer's discovery request.

Why should you be concerned about the holding in *Sawyer*? The court's holding in *Sawyer* can be used against any discovery request where the request is not narrowly tailored to obtain specific information. Many attorneys do not take the time to draft discovery requests that are narrowly tailored to the particular information that they need to prove their side of the case. One such example that I have received numerous times is set forth below:

> If you ever suffered **any injuries** in **any accident** either prior to or subsequent to the accident referred to in the Complaint, state the date and place of such injury; a detailed description of all injuries you received; and the names and addresses of any hospitals, physicians or other medical practitioners rendering treatment.

My standard objection is as follows:

> **Object.** The plaintiff objects to the interrogatory on the grounds that it is unlimited in time and scope. The request is unduly burdensome as the plaintiff has sustained numerous injuries, cuts, bruises and abrasions throughout her life. The request asks the plaintiff to waive the physician-patient privilege for each and every injury, bump or bruise that she has had since birth to the present. Pursuant to Ohio Rev. Code §2317.02(B)(1)(c), filing this claim was only a waiver of any physician-patient privilege made to any physician **treating** her for her injuries in the collision, as well as, those communications that care **causally** or **historically** related to the injuries claimed.

Defense counsel's failure to try and narrow the request to those injuries at issue in the case and/or to limit the time frame of the request will result in no information being provided. A simple modification of the request to include the phrase "causally or historically related to the

injuries claimed in the complaint" along with a reasonable time frame would have received an answer which may have helped defense counsel's case instead of an objection.

The Ohio Rules of Civil Procedure provide attorneys with powerful tools to obtain discovery so long as those tools are used appropriately. A plaintiff's careful use of interrogatories, requests for production of documents, requests for admissions, depositions and subpoenas can significantly increase the value of the case as well as increase the likelihood of resolving the case prior to trial and prior to incurring substantial expert expenses. Similarly, a carefully tailored set of discovery requests submitted by defense counsel to the plaintiff can help to more quickly and economically reveal the true merit and value of the plaintiff's case. On the other hand, the use of pattern discovery requests that have not been tailored to your particular case will frequently do nothing to help prove the elements of your case, increase the value of the case, increase the likelihood of resolution or decrease expenses.

If opposing counsel raises sixteen affirmative defenses and you do not believe they are applicable to your case, ensure that each affirmative defense was pled with specificity. If they were not pled with specificity, you may move the court to strike the affirmative defenses pursuant to Ohio Civ.R. 12(F). Similarly, if you do not believe that the affirmative defense is applicable to your case, you can either move to strike the defense pursuant to Ohio Civ.R. 11 and/or Ohio Civ.R. 12(F) and/or submit requests for admissions relating to that particular defense.

I am an advocate of using requests for admissions to ferret out what are the true disputed issues of fact and/or law in the case. If the statute of limitations or service and/or process are raised as affirmative defenses, I will immediately submit requests for admissions concerning the date on which the incident occurred, the time the complaint was filed, the address of the

defendant, etc. These narrowly tailored questions are more likely to obtain a valid response as opposed to the "going fishing" method of submitting an interrogatory directing the defendant to "state the basis for each and every affirmative defense raised in your answer."

Pursuant to Civ.R. 36(A):

> A party may serve upon any other party a written request for the admission * * * of the truth of any matters within the scope of Rule 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact….

The use of requests for admissions will force the opposing party to admit that the complaint was filed within the applicable statute of limitations, deny it, or set forth in detail the reasons why they cannot truthfully admit or deny the matter. Failure to respond to the requests will result in the request being deemed admitted. *Id.*

The opposing party is likely to take more time to review the requests for admissions and to provide accurate responses as the rule specifically requires them to make a "reasonable inquiry" into the matter before stating that they do not have sufficient "information or knowledge" to admit or deny the request. *Id*. Further, the failure to comply with the rule can result in an award of reasonable expenses and attorney's fees. The proper use of requests for admissions and other forms of discovery should help you quickly determine which affirmative defenses are valid and which ones were simply used as "standard objections." The use of admissions will also help preserve the limited number of interrogatories for questions that cannot simply be admitted or denied.

The truth of the matter is that most cases in litigation have one or two truly disputed issues of fact and/or law, and that is why the case had to be filed in court. Unfortunately, our use of "standard" complaints, affirmative defenses and discovery requests cause us to lose focus on those issues and result in wasted time and money trying to ferret out the truly disputed issues.

The next time you receive a responsive pleading that includes “everything and the kitchen sink,” take the time to file a motion to strike and/or narrowly tailored requests for admissions. Don’t go fishing -- tailor the questions to the issue raised and ferret out the truth.