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E.D. WISCONSIN: BOILERPLATE DEFENSES INSUFFICIENT; CHALLENGES WASTEFUL

Litigators and litigants should always be wary of templates, unconsidered boilerplate pleadings—and unnecessary motion practice. Last week, a federal court in Wisconsin struck boilerplate affirmative defenses that lacked "short and plain statement of the facts and…the necessary elements of the defenses."[1] The ruling reinforced the Seventh Circuit's standards for affirmative defenses—even though the judge thoroughly reviewed why a lesser standard may be more practical.

THE DECISION

The Government alleged that Sikorsky Aircraft Corporation, and two of its subsidiaries, submitted inflated invoices for payment by the U.S. Navy thus violating the FCA. In their answers, the defendants asserted affirmative defenses. The Government moved to strike the affirmative defenses as both inadequately pleaded and substantively incorrect. The Court analyzed in detail Federal Rule of Civil Procedure 8(c)'s requirements for pleading affirmative defenses: "a party must affirmatively state any…affirmative defense."

The Court's analysis systematically rejected every justification for requiring more than a simple statement of the defense, including the plain language of Rule 8(c):

- The Rules and caselaw are largely silent on defining affirmative defenses;
- The Rules require only an affirmative statement of a defense—nothing more;
- Unlike pleadings, plaintiffs need not respond to affirmative defenses;
- Discovery allows plaintiffs adequate means to probe pleaded affirmative defenses;
- Unlike pleadings, the Rules do not permit plaintiffs a means for requesting more sufficient statements of affirmative defenses;
- Affirmative defenses are often legal conclusions—no need for plausibility analysis; and
- Rather than traditional lists of affirmative defenses that fall quietly to the wayside during discovery, motion practice on them clogs dockets.

Despite this analysis, the Court recognized that the Seventh Circuit's precedent requires more of defendants. Unlike other circuits, the Seventh Circuit requires affirmative defenses contain a "short and plain statement of the facts," and that defendants "allege the necessary elements" of their defenses.[2] Because the Defendants favored boilerplate affirmative defenses without that detail, the Court was bound by precedent to strike them, with leave to amend, and a cautionary note to the Government if it was considering another motion to strike: "I encourage the government to forego that step and instead file a motion for summary judgment after taking discovery on the defenses."

PRACTICAL TAKEAWAYS

Effective counsel must understand a jurisdiction's requirements even for the details and follow them closely—veering clear of the pitfalls of boilerplate pleadings. Adequately stating affirmative defenses saves everyone time and resources—including the court. Effective counsel must also know his or her audience. Federal judges staff complex and clogged dockets. Affirmative defenses are—in practice—often stated in an answer and never heard from again. Wrenching a busy judge from his or her docket for a procedural ruling with little effect on the litigation is both poor form—and often poor practice.

If you have any questions, please contact:

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[1] *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 382 F. Supp. 3d 860, 868 (E.D. Wis. 2019) (cleaned up).

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[2] *Id.*

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