

Precision in Pleading Affirmative Defenses: A Call to Action

BY MICHAEL T. GEBHART, ESQ.

A fair and efficient justice system demands precision in pleading. Yet, attorneys often overlook the importance of properly pleading affirmative defenses, leading to systemic issues that require attention and reform. These issues, such as delays, increased costs, and a skewed balance of power in the litigation process, are a call to action for all legal practitioners.

An affirmative defense goes beyond denying the plaintiff's claims; it acknowledges the validity of the plaintiff's allegations while asserting a distinct justification, excuse, or legal reason that reduces or negates liability. Defendants are burdened to prove facts substantiating these defenses, making them a pivotal component of the litigation process.

Importance of Rule 11: Affirmative Defense

Rule 11 of the Federal and Nevada Rules of Civil Procedure plays a crucial role in maintaining the integrity of the legal process. It obligates attorneys to plead affirmative defenses with the utmost care. Rule 11 states that when attorneys sign and file

responsive pleadings, they certify to the court that they have conducted an "inquiry reasonable under the circumstances" to ensure that every defense and legal contention is "warranted by existing law" and that "factual contentions have evidentiary support."¹ Despite this explicit requirement, attorneys often neglect this standard, with real-world consequences undermining the litigation process.

Harm Caused by Boilerplate Affirmative Defenses

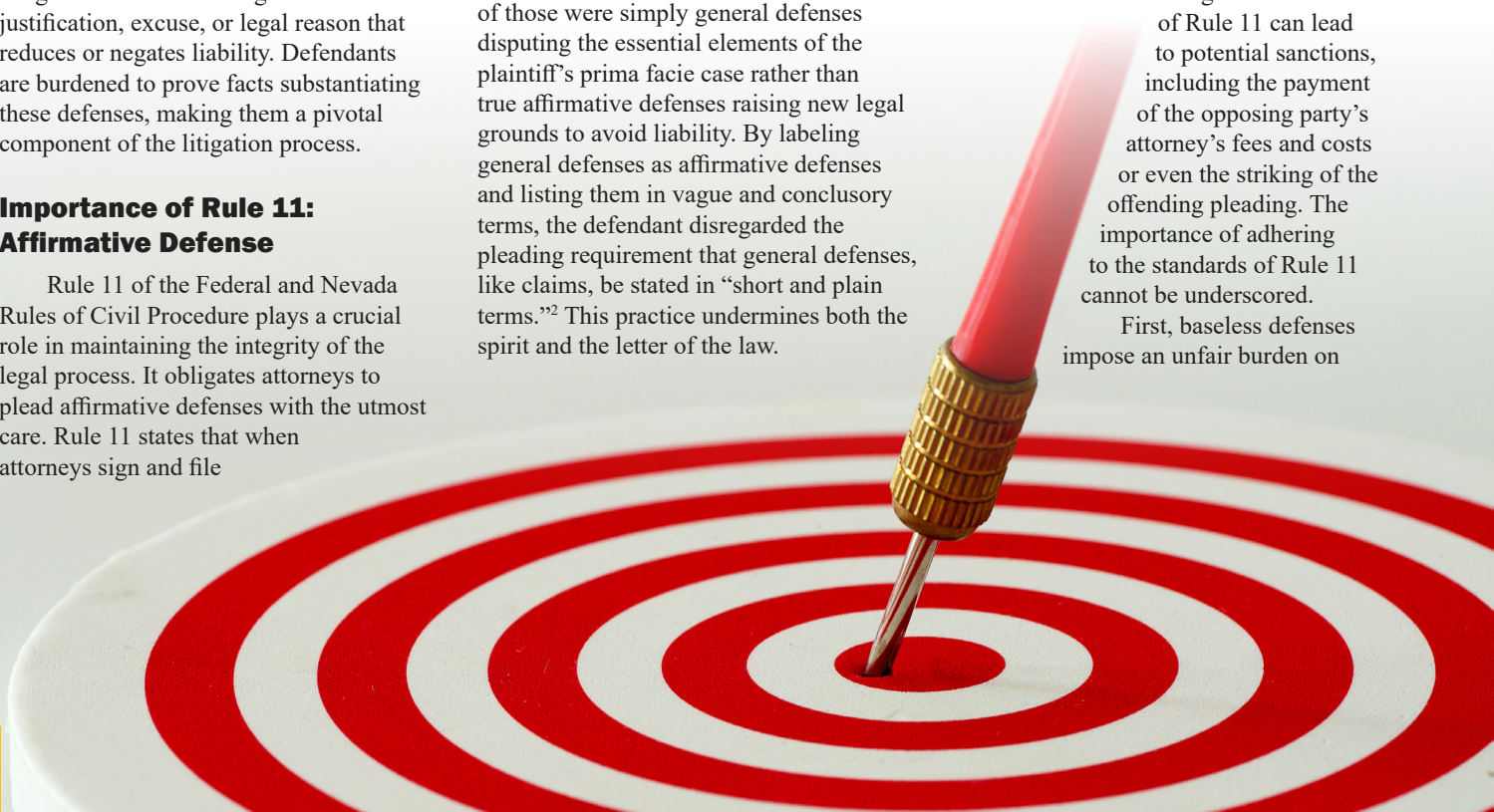
It is common to encounter responsive pleadings loaded with generic, "boilerplate" affirmative defenses. In one example, an answer filed in the Eighth Judicial District Court in response to a complaint alleging consumer fraud contained 27 affirmative defenses. Many of those were simply general defenses disputing the essential elements of the plaintiff's prima facie case rather than true affirmative defenses raising new legal grounds to avoid liability. By labeling general defenses as affirmative defenses and listing them in vague and conclusory terms, the defendant disregarded the pleading requirement that general defenses, like claims, be stated in "short and plain terms."² This practice undermines both the spirit and the letter of the law.

Reliance on boilerplate affirmative defenses may stem primarily from the language of civil procedure rules, which merely require litigants to "affirmatively state" any avoidance or affirmative defense coupled with the threat of waiver.³ With no explicit mandate for clarity or detail, many litigants exploit this rule by offering a laundry list of vague, barebones defenses.

While the fear of waiver is understandable, resorting to boilerplate defenses without any factual or legal foundation is not the answer. This tactic violates the standards of Rule 11 and creates problems for plaintiffs, hinders the courts, and undermines the efficiency of the legal system. Filing unsupported defenses is a shortcut that sacrifices the integrity of the process, leading to costly delays and unnecessary complications for all involved. Not meeting the standards

of Rule 11 can lead to potential sanctions, including the payment of the opposing party's attorney's fees and costs or even the striking of the offending pleading. The importance of adhering to the standards of Rule 11 cannot be underscored.

First, baseless defenses impose an unfair burden on



plaintiffs, forcing them into expensive and time-consuming discovery. Second, meritless defenses waste valuable judicial resources. When courts permit these defenses to proceed without proper scrutiny, they prolong litigation and erode the efficiency and fairness of the entire legal process.

Most critically, boilerplate defenses strike at the heart of the adversarial system. When defendants raise affirmative defenses with no genuine basis, they abandon legitimate legal arguments and instead create procedural obstacles that complicate, delay, and inflate the cost of litigation. This practice wastes time and resources and distorts the pursuit of justice, making the process more burdensome and unfair for all involved. It turns litigation into a game of obstruction rather than a genuine search for truth and erodes public trust in the legal system.

A Call to Practitioners: Precision is Both Ethical and Necessary

Defense attorneys must resist the urge to populate responsive pleadings with unwarranted affirmative defenses. While asserting every potential defense out of fear of waiver may be tempting, this approach is neither necessary nor ethical. Defense counsel should request an extension if more time is needed to investigate possible defenses. Most attorneys will grant additional time for a thorough investigation. If that fails, defense counsel can file an answer without asserting affirmative defenses and amend the pleading within 21 days after serving “as a matter of course.”⁴ Moreover, concerning amended pleadings, courts “should freely give leave when justice so requires,” eliminating the need for hastily pled defenses.⁵

When faced with a long list of boilerplate defenses, plaintiff attorneys should contact defense counsel to discuss the basis for each. Reminding opposing counsel of their Rule 11 obligations can encourage a more focused pleading approach. Moreover, practitioners should leverage rules concerning initial disclosures to demand that affirmative defenses be supported by identifying individuals with discoverable information or documentation.⁶ If necessary, plaintiffs’ counsel can serve interrogatories.

The following may be a helpful example:

“For affirmative defense No. ___, identify all facts known to you on the date you filed your responsive pleading that demonstrate that the affirmative defense is warranted by law.”

This approach ties directly to Rule 11 and discourages vague responses that may attempt to defer factual discovery to later stages.

A deposition may also help pin down any factual support for affirmative defenses. Locking in testimony will be helpful if a motion addressed to boilerplate defense becomes necessary. When less-formal efforts to clean up pleadings fail, a Rule 11 or Rule 56 motion may be appropriate to challenge unsupported defenses.

A Call to Courts: Ensure Fairness and Efficiency

Courts should, *sua sponte*, critically scrutinize boilerplate affirmative defenses early in the litigation process.⁷ Proactive judicial oversight ensures fairness and efficiency in the litigation process.

Pretrial conferences allow courts to take appropriate action on eliminating frivolous defenses and amending the pleadings.⁸ When courts actively review and put the offending party on notice of deficiencies in pleadings, they help eradicate procedural clutter and ensure that litigation focuses on genuine issues of merit. Such scrutiny promotes efficiency and prevents plaintiffs from being pressured into premature settlements due to baseless defenses.

Furthermore, judicial scrutiny of pleadings encourages a more disciplined practice among attorneys. When litigants know that courts will closely review the sufficiency of their affirmative defenses, they are more likely to ensure that their pleadings align with Rule 11 obligations. As a result, the standard of legal practice rises, leading to more efficient, fair, and cost-effective litigation for all parties.

Upholding the Standards of Pleading

“Pleadings are not an opportunity for lawyers to throw things against the wall and see what sticks. Rule 11 requires lawyers to give some thought to the assertions that they include in pleadings before they file them.”⁹ Precision in pleading is not merely a technical requirement but

a fundamental responsibility for legal practitioners, particularly those raising affirmative defenses. The overuse of boilerplate defenses without factual or legal support undermines the integrity of the judicial process.

Attorneys must embrace a more deliberate approach, ensuring that each affirmative defense is factually supported and legally warranted. Pleadings should reflect careful thought, not a scattershot strategy to exhaust the opposing party’s resources. Defense counsel should remember that the opportunity to amend pleadings provides ample time to investigate and assert valid defenses.

Courts also have a crucial role to play. By scrutinizing affirmative defenses early in the litigation process, they can promote judicial efficiency, encourage fair settlements, and ensure that only legitimate defenses proceed. Through collaboration, attorneys and courts can elevate pleading standards, fostering a legal system prioritizing substantive justice over procedural gamesmanship.

ENDNOTES:

1. FRCP / NRCP 11(b)
2. FRCP / NRCP 8(b)(1)(A). Some federal courts apply the “*Twiqbal*” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)] and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)] “plausible” pleading standards to affirmative defenses. The District of Nevada does not.
3. FRCP / NRCP 8(c)
4. FRCP / NRCP 15(a)(1)(A)
5. FRCP / NRCP 15(a)(2)
6. FRCP 26(a)(1)(A)(ii); NRCP 16.1(a)(1)(A)(ii)
7. See, e.g., *Greenspan v. Platinum Healthcare Grp., LLC*, 2021 WL 978899 (E.D. Pa. Mar. 16, 2021) (striking 25 affirmative defenses after issuing *sua sponte* show cause order under Rule 11).
8. FRCP / NRCP 16(c)(2)(A)(B)
9. *Greenspan* at 7.

MICHAEL T. GEBHART is a professor at the William F. Harrah College of Hospitality at UNLV. A proud graduate of the charter class at the William S. Boyd School of Law at UNLV, Gebhart has many years of experience working for international, regional, and local firms, focusing on labor and employment law.

