The Forgotten Reply to Defenses

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In Colorado, when a plaintiff files a complaint (or when a party files a counterclaim, cross-claim, or third-party complaint) the defendant may file an answer. The answer typically admits or denies the allegations, but may include affirmative defenses. When a party asserts an affirmative defense, C.R.C.P. 7 allows the plaintiff to reply to the defense, but litigators seldom do this. That may be a mistake if a claimed defense is not supported by any factual allegations or is not available. Filing a reply to a defense is an opportunity to frame the issues at any early stage, to add additional factual allegations relevant to the claimed defense, and to educate the court and opposing counsel. Moreover, there is the remote possibility that a court might rule (wrongly) that failing to reply to a defense waived what might have otherwise been a chance to strike that defense.

It's not necessary to reply to a defense merely to deny it. But many lawyers, particularly insurance defense counsel, include a boilerplate list of affirmative defenses in their answer, often without any supporting factual allegations. Listing defenses for which there is no factual support violates C.R.C.P. 11(a). See, the 2015 Comment to C.R.C.P. 12: "The practice of pleading every affirmative defense listed in Rule 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a)." (As a practical matter, seeking sanctions in that situation is seldom be worth the effort and may even irritate the judge because the practice of listing boilerplate defenses is so common). But if opposing counsel includes a boilerplate list of affirmative defenses, you can at least point it out and cite the comment to Rule 12 in a reply to defenses.

In some cases, a claimed defense is not available as a matter of law. One common example occurs when I file a breach of contract claim. Often, opposing counsel's answer lists contributory negligence as a defense. Contributory negligence is not a defense to a breach of contract claim. See, e.g., *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1337 (10th Cir.1984) (Contributory negligence has no place in contract and fraud actions); *Fresno Air Serv. v. Wood*, 232 Cal.App.2d 801, 43 Cal.Rptr. 276, 279 (1965) ("Assumption of risk and contributory negligence ... are not applicable as theories of law and defenses to actions ... for breach of contract."). In that situation, I like to file a reply to defenses pointing this out with citations to relevant case law.

When a lawyer asserts affirmative defenses, the lawyer seldom includes any factual allegations to support the defenses. Typically, the lawyer writes something like, "Plaintiff's claims are barred by laches, waiver, estoppel, and waiver." In this situation, when I file a reply to defenses, I assert that the defenses are not pled with sufficient specificity. There is a split of authority on whether the *Twombly/Iqbal* standard

also applies to affirmative defenses, but at least one federal appellate court has held that it does. *GEOMC Co., Ltd. v. Calmare Therapeutics Incorporated*, 918 F.3d 92 (2nd Cir. 2019). Even if the *Twombly/Iqbal* standard does not apply, an affirmative defense must be stated to give notice to a claimant, who can then use the discovery process to investigate more fully the factual basis supporting the defense. *United States Welding, Inc. v. Tecsys, Inc.*, No. 14-cv-00778-REB-MEH, 2015 WL 3542702, at *2 (D. Colo. June 4, 2015). A reply to defenses is your opportunity to make this argument even if you decide not move to strike the defense(s) in question.

Another scenario where you may want to file a reply to defenses is when the opposing party asserts that one of your client's claims is barred by the statute of frauds. In that situation, assuming a statute of frauds applies, there are exceptions to any statute of frauds based on full or partial performance, so a reply to defenses is an opportunity to frame those issues and to provide factual allegations in support of any claim of full or partial performance. Moreover, even a statute of frauds applies to a contract claim, it cannot apply to a promissory estoppel claim. *Chidester v. Eastern Gas and Fuel Associates,* 859 P.2d. 222 (Colo. App. 1992).

That leads to another common issue. Because so many answers contain boilerplate lists of affirmative defenses, it's often not clear whether the opposing party intends each defense to apply to each of your client's claims. Thus, a reply to defenses is an opportunity to assert for example, that while a statute of frauds defense may apply to a breach of contract claim, it can't apply to a promissory estoppel or unjust enrichment claim.

Still another situation where you may want to file a reply to defenses is where your client contends the opposing party's unclean hands prevent him/her/it from asserting equitable defenses. See, e.g., *Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F.Supp. 969 (S.D.N.Y. 1992)(Although the unclean hands doctrine is typically an affirmative defense asserted by a defendant, it may also be asserted by a plaintiff in opposition to an equitable defense such as estoppel). A reply to defenses is an opportunity to assert that the opposing party's own unclean hands preclude his/her/its assertion of any equitable defenses.

A common defense in many cases is the economic loss rule, a rule that seems to be an ongoing source of confusion in Colorado. But if a party asserts the economic loss rule as a defense, a reply to defenses is your first opportunity to explain why the economic loss rule does not apply (if it does not) and to provide any additional necessary factual allegations relevant to that issue.

Finally, a reply to defenses is a pleading under C.R.C.P. 7, and a lawyer's signature on such is a certification that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.