What is the Answer?- New Guidelines on How to Draft the Answer and Affirmative Defenses

By *Morley Witus*

Drafting an answer to a complaint has largely been a matter of style and taste, rather than legal rules. The court rules don't provide much guidance, and even that guidance is almost universally ignored. Nor are there many reported decisions clarifying what is required, because the sufficiency of the answer is not an issue often litigated on appeal. And it is certainly not a subject taught in law school; law school professors don't discuss anything so mundane as how to answer a complaint.

As a result, most of us compose an answer using local customs and prior pleadings as our models, putting familiar phrases here and there, inserting affirmative material or narrative where helpful, secure in the knowledge that rarely will the court ever be asked to judge our pleading. Our primary concern is not to admit anything, and to throw up every imaginable affirmative defense.

This is an area where the rules are at odds with the conventional way attorneys do things. The rules are so pervasively ignored by lawyers and judges that you may rationally decide that there is no reason to change. But you should at least know what the rules are.

Recently, the Michigan Court of Appeals rendered a decision that sheds new light on the proper way to answer a complaint, and gives occasion to make a few observations about this neglected topic.

THE *STANKE* DECISION

Stanke v *State Farm Mutual Auto Insurance* Co, 200 Mich App 307; 503 NW2d 758 (1993), involved a declaratory judgment action against an insurer to recover damages for an automobile accident. The complaint simply alleged that after the accident, plaintiff obtained a judgment against the driver, who was defendant's insured. The answer denied coverage under the policy, apparently without explaining the precise basis for the denial of coverage. Early

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in the case, defendant maintained that the driver was not an insured under the policy. Later, defendant filed a summary disposition motion with a new theory for denying coverage: The automobile was an owned vehicle not listed on the declarations page of the policy.

The trial court refused to entertain the summary disposition motion, ruling that defendant had waived this "owned vehicle exclusion" defense by failing to raise it in the answer or affirmative defenses. The trial court also refused to allow leave to amend the answer because of inexcusable delay in raising the defense.

The Court of Appeals reversed, holding that the "owned vehicle exclusion" defense was not waived.[1] The court appeared to reach this conclusion by two routes: 1) The answer sufficiently raised this defense, and 2) in any event, the defense was raised in a summary disposition motion, which is sufficient to avoid waiver.

Preserving the Defense in the Answer

The court began with the distinction between ordinary, negative defenses, which *deny* one or more elements of plaintiff's *prima facie* case, and affirmative defenses, which *avoid* plaintiff's *prima facie* case and assert that, even if the allegations are true, there is some other reason why plaintiff cannot recover. 200 Mich App at 312. This distinction makes a difference with regard to waiver, since an affirmative defense is only preserved if it is raised by the time of the responsive pleading. MCR 2.111(F)(3).

The *Stanke* Court noted that whether the vehicle was covered by the insurance policy was not an issue the defendant raised to avoid plaintiff's claim; rather, it directly controverted the claim.

> *Because defendant's position denies the existence of a prima facie claim, it is not an affirmative defense. Therefore, it is not subject to the rule that the failure to plead affirmative defenses in the first responsive pleading, or*

prior to the first responsive pleading by way of motion, constitutes a waiver of the affirmative defense. [200 Mich App at 315.]

The court then considered "to what degree and with what specificity an ordinary, or 'negative' defense must be pled." 200 Mich App at 316. The court first noted that MCR 2111(F)(2) requires all defenses to be pled and that MCR 2.111(D) requires all denials to state the "substance" of the matters on which the pleader will rely to support the denial. The court quoted commentary explaining that

> *general denials are inappropriate. A denial that merely states that the pleader "neither admits nor denies the allegations of paragraph, but leaves plaintiff to its proofs" is insufficient. An allegation merely "denied as untrue" frequently violates the rule's intent that a pleader state the reason and grounds for the denial. The intent of the rule is that the pleader state "why" the allegation is "untrue", for ex., the facts alleged are incorrect, the amount of the debt is incorrect, etc. [200 Mich App at 316 (quoting 1 Martin, Dean,& Webster,* Michigan Court Rules Practice *(1992 Supp),* p 43)]

Nonetheless, noting that "this requirement is honored more in the breach," the court declined to impose a strict pleading burden on defendants:

> *Certainly, the rule seems to envision a requirement that something beyond a "denied" be stated in an answer. Is it necessary, however, that a defendant plead every element of the plaintiff's claim that the defendant believes the plaintiff will be unable to substantiate, and the reasons for defendant's belief, in its first responsive pleading? That would certainly seem unreasonable because at the pleading stage there has been no discovery and, therefore, the defendant will not know what evidence the plaintiff will be able to present in support of the elements of his claim, nor will the defendant have necessarily discovered all the evidence it may be able to marshal to disprove one or more elements of the plaintiff's claim .... [200 Mich App at 316-317* (Emphasis added; footnote omitted).]

Because the purpose of the pleadings is simply to give notice of the general issues in dispute,

> *the appropriate interpretation of the court rule is that an answer must be sufficiently specific so that a plaintiff will be able to adequately prepare his case, just as the complaint must be sufficiently specific so that the defendant may adequately prepare his defense. Just as the plaintiff must plead something beyond a general "the defendant injured me," the defendant must plead something more specific than "I deny I'm liable". In the case at bar, defendant's answer, although not laying out in exacting detail every theory defendant could possibly allege regarding why there was no coverage, did plead something more specific than "we are not liable." [200 Mich App at 318.]*

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Thus, the court held that the defendant adequately preserved the defense that the automobile was not covered for failure to include it on the declarations page --- even though the answer merely denied coverage under the policy. However, at the same time, the court shied away from giving unequivocal approval to answers as cryptic and uninformative as the defendant's in *Stanke:*

> *In the case at bar, defendant's answer has satisfied its purpose: it notified plaintiff that defendant was disputing Roy Clothier's status as an insured and that the policy involved provided coverage for this accident. Certainly, defendant's answer was as specific as plaintiff's complaint. Plaintiff's complaint said little more than that Clothier was an insured and that the policy provided coverage. Defendant's answer denied those two facts. We think it unreasonable to expect that defendant's answer be more specific in alleging theories why plaintiff should not recover than what plaintiff's complaint was in alleging theories regarding why plaintiff should recover. [200 Mich App at 319* (Emphasis added; footnotes omitted).]

So the court basically approved a simple denial of the complaint's allegations, a denial that did not put plaintiff on notice as to defendant's theory or position as to why there was no coverage. Yet, the court said that such an answer was acceptable primarily because the complaint was equally uninformative; more explanatory detail may be required in an answer in other cases.

Preserving the Defense by a Motion for Summary Disposition

Even if the defendant did not adequately assert the defense in its answer, the *Stanke* Court alternatively suggested that the filing of the summary disposition motion preserved the defense and avoided waiver. 200 Mich App at 319. The court noted that negative defenses need not be pleaded in the answer or by motion before the first responsive pleading- they may be raised by motion for summary disposition at any time.

MCR 2.111(F)(2) says that defenses must be asserted in a responsive pleading and, "A defense not asserted in the responsive pleading or by motion as provided by these rules is waived." Thus, waiver may be avoided either by raising the defense in the responsive pleading or a proper motion. However, MCR 2.116 (D)(2) requires that motions for summary disposition based on most *affirmative* defenses must be filed not later than the first responsive pleading. In contrast, the court noted MCR 2.116(D)(3) allows a motion for summary disposition based on failure to state a claim or absence of a genuine issue of fact (i.e., motions based on *negative* defenses) to be filed *at any time.* "The issue defendant seeks to raise falls into the latter category and thus, could be raised at any time." 200 Mich App at 319.

In sum, the lesson of *Stanke* is that in describing why your client is not liable, your answer should at least be as specific as the complaint is. And, in any event, you can raise a negative defense later by filing a motion under MCR 2.116(D)(3).

HOW TO ANSWER

Leaving the *Stanke* decision, more generally, what does the law require when you are answering a complaint?

In responding to each allegation you really have only three choices: 1) "admitted," 2) "denied because," or 3) "defendants lack sufficient knowledge or information on which to form a belief as to the truth of the allegation" (which is regarded as an equivalent to a denial). MCR 2.111(C); FRCP 8(b).2

Remember, an allegation is *admitted* if you do not explicitly deny it or plead ignorance:

> *Allegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading.* [MCR 2.111*(E)*(1)See also, *FRCP B(d).]*

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Thus, if you simply say "defendant neither admits nor denies but leaves plaintiff to its proofs," this is deemed to be an admission! 5 Wright, Miller &: Cooper, *Federal Practice & Procedure,* § 1264 at 398. Other conventional formulas such as "the allegation does not require an answer" or "the document speaks for itself" or "neither admitted nor denied because it involves a legal conclusion" are technically also admissions. Be careful about using these customary responses. Any response other than a denial or a plea of ignorance is risky because it may be deemed an admission.

How much detail must you put in your answer? The Michigan Court Rules require a denial to include "the substance of the matters on which the pleader will rely to support the denial." MCR 2.111(D). "Denied as untrue" probably does not satisfy this requirement. Alterman, "Plain and Accurate Style In Lawsuit Papers," 2 *Cooley L Rev* 243, 281 (1984). If you deny an allegation, presumably you have to at least briefly identify the reasons why it is untrue. A leading commentary warns ""'that routine violation of the subrule, as has occurred in the past, is no longer wise." Martin, Dean, &: Webster, *Michigan Court Rules Practice Text, 1993* Pocket Part, p. 47. Although the *Stanke* case allowed a simple, noninformative denial where the allegations in the complaint were vague and noninformative, the court confirmed that ordinarily "the court rules envision more than a simple denial" 200 Mich App at 316.

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Affirmative defenses may require more detail than negative defenses. MCR 2.111 (F)(3) says that the defendant "must state the *facts"* constituting an affirmative defense *(emphasis added),* whereas according to MCR 2.111(D) ordinary negative defenses need only identify the "substance of the matters relied on" to support a denial. The difference is illustrated by contrasting *Stanke,* which allowed a negative defense to be vague, with a recent unpublished Court of Appeals decision, which required an affirmative defense to be detailed. In *Carlisle* v *New England Life Ins Co,* Nos. 141160, 142121 (December 29,1993), the trial judge prohibited an insurance company from arguing that the plaintiff failed to comply with the notice requirements of the policy. The Court of Appeals affirmed:

> *Procedurally an affirmative defense* is *not properly raised unless the facts constituting such defense are stated in a party's responsive pleading. Here, defendant's fifth affirmative defense that "Plaintiff's complaint* is *barred by her failure to satisfy the requirements of the policy under which she* is *claiming benefits* "is *only a general statement. The affirmative defense does not contain any facts that would constitute a contractual defense that plaintiff failed to fulfill certain specific requirements.* [Citations omitted.]

Frequently, in setting out affirmative defenses, defendants merely identify the general doctrines they are relying on-for example, "The claim is barred by estoppel." Under the Michigan rule, as demonstrated by *Carlisle,* it is not satisfactory to just say that you will rely on estoppel without mentioning some factual basis for this affirmative defense. As a practical matter, bare bones notice of the defense may be accepted in Michigan courts, although it is preferable for the answer and affirmative defenses to contain as much specificity as would a complaint. Alterman, *supra,* p. 283. Michigan courts strike complaints that contain mere conclusions. *Binder* v *Consumers Power, 77* Mich App 343; 258 NW2d 221 (1977). So the better practice would be to give the same specificity in drafting defenses that you give when drafting claims in a complaint.

Federal practice differs from Michigan practice in this regard. The federal rules do not expressly require any degree of detail for either denial or avoidance defenses; there is no federal provision comparable to MCR 2.111(D) or 2.111(F)(3). Alterman, *supra,* p. 281. This perhaps reflects federal "notice" pleading, whereas the Michigan rules are said to require "fact" pleading (although in practice, there is little difference between the two). 1 Martin, Dean, &: Webster, *Michigan Court Rules Practice Text,* pp. 184-185.

While occasionally courts disapprove of conclusory one-word defenses, the federal rules apparently allow terse, factually empty denials as long as the opposing party is put on notice about what issues are contested. 5 Wright, Miller, &: Kane, *Federal Practice &. Procedure,* §§ 1261, 1274. A bare bones affirmative defense such as "The claim is barred by estoppel" is thus authorized under the federal rules.

Even when in federal court, giving at least some detail or explanation when asserting affirmative defenses will force you to discard defenses that are baseless. Remember, the contents of a responsive pleading (no less than the complaint) must be reasonably well-founded in fact and law.3 Thus, in *Gargin* v *Morrell,* 133 FRD 504 (ED Mich 1991), Judge Newblatt *sua sponte* required defendant to show cause why he should not be sanctioned for asserting apparently inapplicable defenses; he then sanctioned defendant for asserting *pro forma* standard defenses without known basis in fact.

What do you do when the paragraph of the complaint is true in part, but also is untrue in part or you lack knowledge? At least in federal practice, you cannot simply give a blanket denial if part is true; you must in good faith specify the part that is true, and deny the remainder. "Denials

shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder." FRCP 8(b). (The Michigan rules have no comparable provision.) This means that a denial of knowledge cannot be capricious; it must be in good faith. A defendant cannot plead ignorance just because he lacks first hand knowledge; he may only plead ignorance if he lacks information on which to form a reasonable belief, and that this information is not easily accessible. 5 Wright, Miller, &: Kane, *supra*, § 1262.

Another possible difference between the Michigan and federal rules is that the federal courts may not impose strict waiver rules for failure to raise affirmative defenses in the responsive pleading. As noted above, judge Newblatt in the *Gargin* case held that sanctions should be imposed where defense counsel trot out standard boilerplate defenses whether or not they apply to the case at hand. Defendant argued that he was forced to raise all possible affirmative defenses "for fear that if they are not asserted in the first responsive pleadings, they would be waived," citing Michigan case law. *Id.* at 505. Judge Newblatt said that "[t]he Federal Rule governing this matter is Rule 12(h) and bears no resemblance to the Michigan Rule." The federal rule only says that a few specified defenses (lack of personal jurisdiction, improper venue, and insufficiency of process or service) are waived by failure to plead or move by the time of the first responsive pleading. Judge Newblatt concluded that no waiver of other affirmative defenses is applicable in federal court and assured defendants that amendment would be liberally allowed if discovery revealed facts to support such defenses. *Id.* at 506.[4] However, other federal courts apparently hold that affirmative defenses are waived if not pleaded (or if not made the subject of a prompt pretrial motion). 5 Wright, Miller, &: Kane, *supra,* § 1278.

Finally, note that the reservation of the right to raise additional defenses during discovery is meaningless. All affirmative defenses must be raised in the answer' or by pre-answer motion, but leave to amend is freely given. "Parties cannot unilaterally enlarge their position by a self-serving reservation of defenses." Alterman, *supra,* p. 284.

CONCLUSION

The courts rarely enforce the literal rules about answering a complaint. There are certain conventional ways of drafting answers that are part of legal lore and have no basis in the rules, statutes, or cases. They generally work. But there is a risk that a court may decide to apply the rules literally. If you choose to copy an old form or use a stock phrase in your answer, fine, as long as you realize what the rules require.

Sometimes lawyers like to give the defendant's entire story, while other times lawyers simply give blanket denials and plead ignorance of the facts. Whatever style you adopt, nonetheless you should at least be aware of the right way to draft a responsive pleading.

Footnotes

1. In addition, two judges held that even if there had been waiver, the trial court should have allowed leave to amend the answer to add the defense.
2. The Michigan rule also allows a plea of "no contest;' MCR 2.111(C)(2), which is an admission solely for the purpose of the pending suit.
3. The 1993 amendment of FRCP 11(b) waters down this requirement somewhat by in essence authorizing allegations based on information and belief.
4. While Judge Newblatt's opinion demonstrates the dilemma of defendants cautious not to waive defenses but unable to verify all their possible defenses within the relatively brief time for responding to the complaint, note that Judge Newblatt only assessed $25 for each of eight violations, for a total of $200 in sanctions.

APPENDIX: CHECKLIST OF AFFIRMATIVE DEFENSES

The court rules set forth a laundry list of affirmative defenses that are waived if not asserted. FRCP 8(c), 12(b); and MCR 2. 111(F) (2) and (3)(a). Always consult these lists when preparing an answer, but remember they are not exhaustive. Here is a handy checklist:

- abstention
- accord and satisfaction
- act of god
- another pending action
- arbitration agreement
- assignment of claim(s)
- assumption of risk
- *bona fide* purchaser
- collateral source payments
- consent
- contributory/comparative negligence
- duress
- election of remedies
- estoppel
- excuse/justification
- exemption from statute
- failure of condition precedent
- failure of consideration
- failure to exhaust remedies/ exclusive remedy
- failure to join a necessary or indispensable party
- failure to join claims arising out of the transaction or occurrence
- failure to mitigate damages
- failure to state a claim
- fraud
- illegality
- immunity
- impossibility-
- improper venue
- incapacity
- insufficiency of process or service
- laches
- lack of capacity to sue
- mistake
- mootness
- no personal jurisdiction
- no standing
- no subject matter jurisdiction
- parol evidence rule
- preemption
- premature/unripe
- privilege
- ratification
- real party in interest
- release
- repudiation of contract
- *res* judicata/collateral estoppel
- rescission
- statute of frauds
- statute of limitations
- unclean hands
- unconstitutionality
- undue influence
- waiver