Why Affirmative Defenses Matter

by Thomas M. Diachenko, Column Editor

What do you do with the defendant's answer when it comes into your office? Do you toss it into the out box with indifference? Or, do you spend some time to analyze it to see whether or not the defendant asserted certain affirmative defenses and fashion your discovery accordingly? Or, do you wait until pre-trial preparation to take a good look at the defenses? You are probably like me and have done all of the above. It has became apparent to me over the years that taking just a few minutes to analyze the answer can pay huge dividends. The focus of this article is on the defendants who fail to assert affirmative defenses in the answer who then try to assert them at the 11th hour just before trial.

If you consider how much attorney time is spent by the defense attacking the pleadings, it behooves us on the plaintiffs' side to at least spend a few minutes looking to see what the defendants have affirmatively pled. We all know the defendants are going to deny everything via a general denial as we typically do not file verified complaints for state court actions. I think most of us on the plaintiffs' side would all agree that most answers appear to be rather boilerplate in nature. Such a cookie-cutter pleading could end up costing the defendant dearly if we take a little time to see what they have and have not asserted in their client's defense when they put the case at issue.

California Code of Civil Procedure ("C.C.P.") §431.30 states that the answer to the complaint "shall contain...[a] statement of any new matter constituting a defense" and that "[a]ffirmative relief may not be claimed in the answer." The section also goes on to require that the "defenses shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished."

In other words, if the defendant wants to assert a "new matter", the defendant bears the burden of proof on that matter and s/he must affirmatively plead it or file a cross complaint. The defendants must also specify to which cause of action the affirmative defenses relate. Otherwise, there is a lack of notice to the plaintiff who, in reliance upon the same, should not be expected to meet a special defense giving rise to a different set of facts and requiring different proof. *Carranza v. Noroian* (1966) 240 Cal.App.2d 481,488.

Affirmative defenses of waiver and estoppel are waived by a defendant who fails to assert them as affirmative defenses. "A party who fails to plead affirmative defenses waives them." *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.

Plaintiffs should not be expected to engage in discovery for phantom affirmative defenses and relief. Once a plaintiff has completed discovery, the defendant shouldn't be allowed to amend his or her answer at trial after the plaintiff has relied to his/her detriment. Even if the court is willing to grant the relief, the additional costs should be borne by the defendant to limit the prejudice.

In *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, the court, after acknowledging the general rule of liberality in allowing a defendant to amend his/her answer asserting a *res judicata* defense, upheld the lower court's decision to deny the defendant's motion to amend the answer at the time of trial explaining as follows:

> ***...whether such an amendment shall be allowed rests in the sound discretion of the trial court...And courts are much more critical of pro-***

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> ***posed amendments to answers when offered after long unexplained delay or on the eve of trial…or where there is a lack of diligence, or there is prejudice to the other party… .***

Id at 1159.

However, certain defenses cannot be waived. For example, lack of subject matter jurisdiction cannot be waived if it is not pled. C.C.P. §430.80. Furthermore, a statutory immunity can be raised for the first time on appeal. See, *Hata v. Los Angeles County Harbor UCLA Medical Center* (1995) 31 Cal.App.4th 1791 [governmental tort immunity, Gov't. Code §854.8 is a jurisdictional issue that may be raised at any time, even for the first time on appeal].

No matter what your theory of liability or the area of civil litigation you practice in, there is bound to be an affirmative defense applicable to your complaint. The statute of limitations should be included in addition to a large number of other affirmative defenses at the disposable of the responding defendant.

Offsets to any money damage claim must be asserted in the answer and can be asserted even though the statute has run on the defendant's independent claim. C.C.P. §431.70. In a breach of contract claim, there are numerous affirmative defenses such a mistake, duress, undue influence, fraud, waiver, novation, etc.

In any negligence claim, a defendant cannot present a comparative negligence defense to a jury unless it is affirmatively pled and there is substantial evidence for it. *Drust v. Drust* (1980) 113 Cal.App.3d 1, 6. A superceding cause defense must be affirmatively pled because the defendant has the burden of proof. *Maudin v. Widling* (1987) 192 Cal.App.3d 568, 578. The emergency vehicle exemption under Vehicle Code §21055 is an affirmative defense that must be included in the answer. See, *Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242. For a premises liability cause of action, the recreational immunity is an affirmative defense. See, Civil Code §840.

Employment claims include a host of affirmative defenses: good cause is one for a wrongful termination claim, good faith/mistaken belief is a defense in a breach of the implied claim of good faith and fair dealing claim and business necessity defense can be asserted in a disparate impact FEHA claim. After-acquired evidence in a wrongful termination claim can serve as a complete or partial defense and must be pled in the answer. See, *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842. Failure to exhaust administrative remedies or obtain a right to sue letter for FEHA claims can be added to the list.

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The avoidable consequences defense in sexual harassment claims must also be affirmatively pled because the defendant bears the burden of proving this defense. *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043. Inability to perform the job, health/safety risks, and undue hardship are all affirmative defenses to a disability discrimination claim. See, Gov't. Code §12940(a)(1) and (m). Lack of certification, lack of fitness of duty statement, inevitable cessation of employment and key employee arguments in CFRA claims must also be affirmatively pled. See Gov't Code §12945.2 and California Code of Regulations, Title 2, §7297.2.

Wages claims also warrant an analysis of the answer to determine any claims of waiver or exemptions. The California Supreme Court has held that "the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, 794-795.

Workers compensation exclusivity doctrine defenses must be affirmatively pled. Labor Code §§3600 *et seq.*; *Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App. 4th 1, 12. In civil rights cases, affirmative defenses can include claims that the search was incident to a lawful arrest, consent and/or exigent circumstances.

There are a number of affirmative defenses which must be asserted in the answer in a products liability case such as exclusions of warranties, sophisticated user, product misuse or modification, etc. Self defense is an affirmative defense in a battery claim. *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386. If reliance on advice of counsel has been pled in a malicious prosecution case, then you are probably entitled to an otherwise privileged file. Truth in defamation claims and necessity in trespass claims should also be asserted if the defendant wants to assert them at trial.

The above listed affirmative defenses are not meant to be an exhaustive list. They do however, serve to illustrate that there are a myriad of defenses which we should look for in some of the more common civil lawsuits we handle. Generally, any "new matter" which would bar a claim in whole or in part must be asserted in the answer. See C.C.P. §431.30. If it's not, then you should consider your options and remedies. This should be distinguished from an assertion that something in the complaint is not true, which doesn't have to be pled as an affirmative defense. See, *State Farm Mutual Auto Insurance Company v. Superior Court* (1991) 228 Cal.App.3d 721, 725.

Before you frame the scope of your discovery, consider the parameters set forth in the defendant's answer. If he or she hasn't asserted a defense which should have been asserted, why waste time and costs on discovery targeting an affirmative defense that hasn't been pled? If the defendant tries to assert an affirmative defense in the later pre-trial stage for the very first time, they have not acted diligently and you have likely been prejudiced having not obtained discovery targeting that defense. In such a situation, you have a strong argument for excluding any evidence and jury instructions on that affirmative defense. Procedural defects in the answer can be your best friend in pre-trial motions. Don't overlook them. **TBN**