Late Filings of Affirmative Defenses: A Critical Analysis and Proposal for Change

by Jordan A. Butler & James D. Spiros

In recent years, our practice has observed a trend growing amongst defendants to file affirmative defenses long after it is procedurally proper to do so. Essentially, defense counsel waits until all of the party depositions are complete and then attempts to file affirmative defenses. The goal of this strategy, presumably, is to deny plaintiffs of their right to free, full and fair discovery of the allegations brought against them.

Unfortunately, despite clear gamesmanship, several courts, in our experience, allow affirmative defenses to be filed months or years into a case and often time after party depositions have been conducted. Making matters worse is that courts are openly granting leave to file additional affirmative defenses without requiring the defendant to show good cause for the delay.[1] The described conduct by defense counsel sometimes accompanied with a lack of enforcement by the judiciary render the language of the affirmative defense statute moot and create a multitude of problems for plaintiffs' attorneys. In response, legal institutions across Illinois, ranging from the courts, legislature and plaintiffs' bar, should take actions that deter tactical affirmative defense filings, including actually requiring a showing of good cause when affirmative defenses are filed after the initial pleadings stage.

735 ILCS 5/2-613(d)

As with any legal issue, the best place to begin is with the applicable statute. The statute governing the filing of affirmative defenses, 735 ILCS 5/2-613(d), is clear by its plain language that affirmative defenses must be set forth in the answer or reply to the complaint.

> "The facts constituting any affirmative defense…which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, **must be plainly set forth in the answer or reply.**"[2]

If the allegations are not set forth in the defendant's answer and could have reasonably been raised at that time, the defenses are waived.[3] The statute's requirement is commonly understood to prevent a plaintiff from being unfairly taken by surprise.[4] While unfair surprise takes many forms, it is has been particularly recognized by courts when two factors are present: (1) a defendant is allowed to file an affirmative defense long after he reasonably could have done so;[5] and (2) a party is not allowed to properly issue discovery surrounding the factual allegations brought against her.[6] When unfair surprise occurs, the law is clear that the defense is waived and is unavailable for trial regardless of the existence of evidence supporting the defense.[7]

Despite the clarity of the statute and accompanying caselaw, defendants continue to file affirmative defenses long after party depositions have been conducted. Such misconduct is further enabled by some courts allowing late filings of affirmative defenses without requiring the defendant to show a good reason why it took months or even years to file the defense.

For instance, in a recent case of ours the complaint was filed in April of 2017. The defendant filed his answer the following month. In January of 2018, the discovery depositions of both parties were conducted after extensive written discovery. *Fifteen months later*, in May of 2019, the defendant moved for leave to file numerous affirmative defenses alleging contributory negligence against our client. Despite the affirmative defenses being filed two years after defendant's answer and fifteen months after party depositions had been conducted, the court allowed the defendant to file his defenses without providing any type of explanation for the delay in filing. When situations like this occur, plaintiffs' lawyers are understandably left wondering: why have the statute in the first place if it is going to be applied in a meaningless fashion?

A Meaningless Statute

It is well known that the goal of statutory interpretation is "to ascertain and give effect to the intent of the legislature."[8] In doing so, courts are instructed to refer to cannons of statutory interpretation beginning with the "plain and ordinary meaning of the words of the statute."[9] Specifically, all portions of the statue should be read as a whole and applied practically and liberally in a way that is consistent with the intent of the legislature.[10] Once a court determines the plain meaning of the statute, it must give effect to the text as written.[11]

In instances such as the case described above, there is a blatant disagreement between the legislative intent behind 5/2-613(d) and the judicial interpretation of the law. It is very clear from the statute's plain language that affirmative defenses,

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WATERVILLE
ADVISORS

161 N. Clark Street
Suite 2925
Chicago, Illinois 60601

Office 312.781.9340
Fax 312.781.9345
waterville-adv.com

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which are reasonably known, are meant to be filed with initial pleadings.

- "The facts constituting any affirmative defense…"
- "if not expressly stated in the pleading…"
- "…must be plainly set forth in the answer or reply"

Affirmative defenses not filed with the initial pleadings may be filed at a later date *if* the facts alleged do not reasonably take the other party by surprise. When a court allows the late filing of an affirmative defense without requiring a showing of good cause, it wholly fails to give effect to the plain meaning of 735 ILCS 5/2-613 and renders the statute pointless.

Plaintiff's Right to Full Discovery

Plaintiff's right to full disclosure in civil discovery further suggests that affirmative defenses should not be filed late absent a showing of good cause. Illinois Supreme Court Rule 201 is clear that the purpose of discovery is to allow a party to obtain discovery by "full disclosure regarding any matter relevant to the subject matter involved in the pending action…"[12] When a defendant is allowed to file affirmative defenses after pleadings, written discovery and party depositions have occurred without providing a reasonable explanation for the delay, the plaintiff's right to fair and full discovery of the allegations brought against her is obstructed. In some instances, a plaintiff may not even be able to re-issue written discovery or obtain leave to redepose the defendant on the affirmative defenses. In these situations, plaintiff's discovery rights are infringed upon.

What Can the Judiciary Do?

A number of institutions, including the judiciary, are in a position to respond to the growing misuse of 5/2-613(d). Perhaps the most obvious suggestion is for courts to begin exercising their judicial discretion over pleadings and discovery more stringently when clear gamesmanship is occurring. That is to say that courts should patently deny late amendments to pleadings when the party can present *no* good cause for the delay.[13]

Unfortunately, plaintiffs are already often prevented from amending their complaint because they are unable to make a requisite showing of good cause. Should defendants not be restricted consistent with that scenario as well? Presumably, if there is a legitimate reason for *any* delay, then it can easily be explained from either a plaintiff or defendant's perspective. If the late filing is nefarious in nature and without *any* good cause, then it will be very difficult for counsel to present an objectively legitimate reason for the delay and such motions should be consistently denied whether they come from a plaintiff or defendant.

Apart from judicial discretion, courts can deter defense counsel's gamesmanship by imposing discovery sanctions under Illinois Supreme Court Rule 137.

Rule 137 provides in part that:

> "every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated…the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; 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."[14]

The tactical filing of affirmative defenses traditionally occurs after numerous pleadings and other papers have been signed by opposing counsel. If the party cannot reasonably show good cause for the delay, it is clear he is attempting to impose an affirmative defense for an improper advantage and sanctions should be implemented. Collectively, less exercise of discretion over the plain language of the statute and an increased imposition of Rule 137 would aid in combating misuse of affirmative defenses by defense counsel.

What Can Plaintiffs Do?

The judiciary does not stand alone in having the power to act against the misuse of affirmative defenses in pleadings. Plaintiffs in their own right can enact a number of counter measures that make it more difficult for a defendant to argue that a late affirmative defense is a fair filing. Most prominently, a plaintiff should lay a foundation in the record that makes it clear that the defendant's late filing is unfair surprise. This is primarily accomplished through the use of written discovery and depositions. At the outset of discovery, a plaintiff should issue a well-worded interrogatory to the defendant regarding any affirmative defenses he may assert. For instance:

> "Do you contend that the plaintiffs conduct contributed in any way to cause the occurrence? If so, please state:
>
> a. Exactly what you believe each plaintiff did or failed to do which you allege contributed to the occurrence; and
>
> b. The bases, if any, for your contention."

During initial discovery, plaintiffs are likely to receive a response akin to "Unknown at this time. Investigation continues…". However, plaintiffs should diligently follow up on the interrogatory as it can be powerfully used in depositions.

Once party depositions finally arrive, plaintiff should use the interrogatories regarding affirmative defenses as an exhibit during the

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deposition and show the defendant his sworn answer, then ask if he has learned any new information that would lead him to change his answer and assert an affirmative defense. Finely crafted interrogatories and deposition questioning, when used in tandem, can make it clear to the court that the defendant was given multiple opportunities to fairly disclose his affirmative defense yet deliberately failed to do so.

What Can the Legislature Do?

The legislature also has a role to play in fighting the misuse of affirmative defenses. Namely, reforms can be made to 735 ILCS 5/2-613 which *require* a litigant to show good cause when filing an affirmative defense after initial pleadings have been exchanged.

Another proposed legislative solution is a caveat to 5/2-613(d) that procedurally allows a plaintiff *as a matter of right* to redepose the defendant and issue new written discovery on the newly filed affirmative defenses *at the defendant's cost*. Of course, no legislative solution will produce meaningful change unless 183 judicial discretion is carefully exercised when overriding a statute's plain language. These proposed legislative solutions coupled with prudent use of Rule 183 discretion create simple yet powerful legislative shifts that would support plaintiffs' rights to fair discovery and reinforce existing protections against unfair surprise by litigants.[15]

A Practical Balance

With all of the aforementioned proposals, there must be a practical balance of well-plead affirmative defenses at the initial pleadings stage and flexibility to later add other affirmative defenses *if* good cause is shown. If more stringent restrictions are imposed on affirmative defenses, it is likely that the defendant will plead all of his affirmative defenses in the initial answer to preserve any claims that may later develop in discovery. The natural response to the proposed solutions is a sharp increase of affirmative defense filings at the outset of cases. It is well understood that pleadings should always be factually well-plead and made in good faith.[16] Thus, if the defense can be initially asserted in-fact, then it should be. Other defenses may be asserted later if good cause can be shown. This balance preserves defendants' rights to later plead, yet guards against unfair surprise and gamesmanship.

Conclusion

A distinctly recognized misuse of 735 ILCS 5/2-613 is occurring that calls for a response from various legal institutions. Namely, rules should be crafted and applied *requiring* defendants to show good cause when filing affirmative defenses after the initial pleadings stage. When all else fails, plaintiffs should use the tools outlined in this article to make the record clear that any late filings are tantamount to nothing more than gamesmanship and unfair surprise.

Endnotes

[1] Ill. S. Ct. R. 183; *Daleanes v. Bd. of Educ. of Benjamin Elementary Sch. Dist. 25, DuPage Cty.,* 120 Ill. App. 3d 505, 509 (2nd Dist. 1983)(enunciating the "for good cause shown" standard which considers the lack of prejudice to the nonmoving party as an element in determining whether to allow a late filing pursuant to Rule 183).

[2] See 735 ILCS 5/2-613(d).

[3] *Spagat v. Schak*, 130 Ill. App. 3d 130, 134 (2d Dist. 1985).

[4] *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 65, 70 (1st Dist. 2010).

[5] See *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 70 (1st Dist. 2010).

[6] *Chem. Bank v. Paul*, 244 Ill. App. 3d 722, 784 (1st Dist. 1993).

[7] *Edwards v. Lombardi*, 2013 IL App (3d) 120518 (holding that ordinarily,

if a party fails to plead an affirmative defense, the defense is waived and cannot be considered even if the evidence suggests the existence of the defense).

[8] *In re Estate of Dierkes*, 191 Ill. 2d 326, 331 (2000).

[9] *King v. Industrial Comm'n*, 189 Ill.2d 167, 171 (2000).

[10] *McNamee v. Federated Equipment & Supply Co.*, 181 Ill.2d 415, 423 (1998).

[11] *Paszkowski v. Metro. Water Reclamation Dist. of Greater Chicago,* 213 Ill. 2d 1, 7, 820 N.E.2d 401, 405 (2004).

[12] Ill. S. Ct. R. 201.

[13] Ill. S. Ct. R. 183.

[14] Ill. S. Ct. R. 137.

[15] *Ford v. Herman*, 316 Ill. App. 3d 726, 733, (5th Dist. 2000).

[16] *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20.

Jordan A. Butler *is an Associate Attorney with Spiros Law, P.C., where he practices in a broad range of litigation, with a focus in the area of serious personal injury cases, including nursing home abuse and neglect, medical negligence, defective drugs and devices, automobile accidents, trucking accidents, and workplace injuries. Jordan's legal skills and passion for justice have led to numerous successful jury verdicts for his clients.*

As the founding partner of Spiros Law, P.C., ***Jim Spiros*** *is a skilled litigator with extensive experience handling cases involving medical negligence, defective drugs and devices, workplace injuries, serious traffic and trucking accidents, nursing home neglect and abuse, and wrongful death. Jim's growing list of significant victories has earned Spiros Law, P.C. a reputation as the go-to firm for injury cases in downstate Illinois.*