

The Forgotten Pleading

Hon. Amy St. Eve<sup>1</sup> & Michael A. Zuckerman<sup>2</sup>

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The views set forth herein are the personal views of the authors and do not necessarily reflect those of the court or the law firm with which they are respectively associated.

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## INTRODUCTION

The Supreme Court’s decisions in *Twombly* and *Iqbal* have brought renewed attention to the civil complaint. It is well established that a “civil action is commenced by filing a complaint”<sup>3</sup> and, until recently, federal courts would routinely permit claims to proceed beyond the pleading stage “unless it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>4</sup> But in a pair of decisions—*Bell Atlantic Corp. v. Twombly*<sup>5</sup> (2007) and *Ashcroft v. Iqbal*<sup>6</sup> (2009)—the Supreme Court “retired . . . the no-set-of-facts test” and replaced it with the plausibility test.<sup>7</sup> Under this “retooled” test, as one court has called it,<sup>8</sup> “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”<sup>9</sup>

In the aftermath of *Twombly* and *Iqbal*, there has been a great deal of commentary, debate, and reflection about the plausibility standard and the civil complaint.<sup>10</sup> One study reports that as of June 30, 2009, federal courts have cited *Twombly* “nearly 24,000 times, making it the seventh most-cited case of all time.”<sup>11</sup> That number has surely increased dramatically, and by our count, may now have reached over 66,000.<sup>12</sup>

Often absent from the recent discussion—but lingering in the shadows—is the civil answer. The answer can bring with it significant procedural advantages but is too often overlooked. In this Article, we seek to bring the answer back into focus. Rather than offer an exhaustive discussion of the answer, we will focus on some of its important aspects to suggest that mastery of the answer is fundamental to achieving success (and

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3. FED. R. CIV. P. 3; *see also* *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980).

4. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also* *Mattice v. Mem’l Hosp. of S. Bend, Ind.*, 249 F.3d 682, 686 (7th Cir. 2001).

5. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

6. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

7. *Id.* at 670.

8. *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).

9. *Iqbal*, 556 U.S. at 678 (citations omitted).

10. *See, e.g.*, Mark Herrmann et al., *Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENNUMBRA 141 (2009). Congress even jumped into the fray. In 2009, then-Senator Arlen Specter proposed a law, the Notice Pleading Restoration Act, which sought to overturn *Twombly* and *Iqbal*. *See* *Hutchingson v. Metro. Gov’t of Nashville and Davidson Cnty.*, 685 F. Supp. 2d 747, 751–52 (M.D. Tenn. 2010); Jonah B. Belbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2284 n.54 (2012).

11. *See* *May We Plead the Court? Twombly, Iqbal, and the ‘New’ Practice of Pleading*, 38 HOFSTRA L. REV. 1191 (2010).

12. We calculate this number based on a search of citing references on Westlaw – September 5, 2012.

avoiding painful procedural traps) in federal court.

Part I reviews the basics of the answer as a pleading. Parts II and III focus respectively on two of the primary functions of the answer: to admit and deny allegations in the complaint, and to raise defenses. In Part II, we discuss how admissions and denials, though seemingly simple, are intricate and important. Part III then turns to the law of defenses, exploring the differences between Rule 12(b), negative, and affirmative defenses, and why those differences matter as both a legal and a practical matter. Part IV briefly discusses counterclaims.

## I. THE ANSWER GENERALLY

An answer is a type of pleading through which a party responds to claims, asserts, defenses, and makes any claims of its own.<sup>13</sup> It may “only be filed in response to” a complaint, counterclaim, cross-claim, or third-party complaint.<sup>14</sup> Rule 7(a) enumerates four types of answers, each based on the procedural posture of the claim to which it responds. For our purposes, we will refer to all of these types collectively as an “answer.”<sup>15</sup> To promote clarity, we will likewise refer to a complaint, third-party complaint, crossclaim, and counterclaim collectively as a “complaint.”

Because an answer is a “pleading” under the Federal Rules,<sup>16</sup> the generally applicable rules of pleading apply.<sup>17</sup> Like other pleadings, an

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13. See FED. R. CIV. P. 7(a); *Kontrick v. Ryan*, 540 U.S. 443, 458–59 (2004); *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 112 (2d Cir. 2012); *Whilttilker v. Deutsche Bank Nat’l Trust Co.*, 605 F. Supp. 2d 914, 936 (N.D. Ohio 2009) (“Rule 7(a) defines ‘pleadings’ to include both the complaint and the answer.”); *RBC Bank (USA) v. Holiday Isle, LLC*, No. 09-CV-0038, 2009 WL 3031217, at \*4 (S.D. Ala. Sept. 14, 2009); *McFadden v. Ballard, Spahr, Andrews & Indersoll, LLC*, No. 05-2401, 2008 WL 2569418, at \*1 (D.D.C. June 24, 2008); *Gupta v. Northrop Grumman Corp.*, 462 F. Supp. 2d 56, 61 n.3 (D.D.C. 2006); *Miller v. Batesville Casket Co.*, 219 F.R.D. 56, 58 (E.D.N.Y. 2003); *Dynasty Apparel Indus. Inc. v. Rentz*, 206 F.R.D. 603, 607 (S.D. Ohio. 2002). The Federal Rules distinguish between a “pleading” and a “motion.” Compare Rule 7(a) (pleadings) with Rule 7(b) (motions); see also *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 112 (2d Cir. 2012).

14. *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 112 (2d Cir. 2012); see also *Cudney v. Sears, Roebuck & Co.*, 84 F. Supp. 2d 856, 857 n.2 (E.D. Mich. 2000) (“An ‘answer’ is a defendant’s particularized responses to the allegations made by a plaintiff in his complaint.”); accord *United States v. Standard Sanitary Mfg. Co.*, 187 F. 229, 230 (D.C. Mich. 1911) (“Under the equity practice, an answer is a pleading as is a plea or demurrer. This is the primary, and in the typical case the only, function of the answer.”).

15. The four types of answers are: “an answer to a complaint;” “an answer to a counterclaim designated as a counterclaim;” “an answer to a crossclaim;” and “an answer to a third-party complaint.” FED. R. CIV. P. 7(a); see also *ISC Holding AG*, 688 F.3d at 112 (observing that the rule “enumerates the different ‘pleadings’ available in federal court”). Although the same general rules apply to each type of answer, accurately captioning the answer will assist the judge and opposing counsel in determining the nature of the answer, particularly in a complex case.

16. See *United States v. Jallali*, 478 F. App’x 578, 581 (11th Cir. 2012).

17. See *ISC Holding AG*, 688 F.3d at 112 (holding that pleading requirements did not apply to self-described “answer” because it was filed in response to a motion, not a pleading enumerated under Rule 7(a)).

answer must conform to a certain style<sup>18</sup> and include a Rule 11 certification of good faith.<sup>19</sup> The answer must also satisfy certain pleading requirements generally set forth in Rules 8 and 9.<sup>20</sup> An answer may be amended in accordance with Rule 15<sup>21</sup> and, like all pleadings, will be construed “so as to do justice.”<sup>22</sup>

Once a plaintiff asserts a claim for relief, the defendant must timely file an answer or otherwise plead in response.<sup>23</sup> This is so even after the defendant has answered, but the plaintiff later files an amended complaint under Rule 15.<sup>24</sup> Failure to answer a complaint—original or amended—will result in default.<sup>25</sup>

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18. Rule 10 governs the “form of pleadings.” FED. R. CIV. P. 10. The Rule seeks to provide a standardized and “easy mode” of pleadings, to facilitate notice to an opposing party, judicial review of the sufficiency of the pleadings, and efficient case management. *See, e.g.*, *Stanard v. Nygren*, 658 F.3d 792, 797 (7th Cir. 2011); *Dabney v. Sawyer*, No. 11-CV-273, 2012 WL 3241571, at \*1-2 (N.D.N.Y. July 16, 2012) (citing references omitted). Proceed with caution. *See Rogler v. U.S. Dep’t of Health & Human Servs.*, 620 F. Supp. 2d 123, 128 (D.D.C. 2009) (dismissing pleading where, “[i]nstead of being short and plain, the [pleading was] long and rambling”); *Gonzales v. Wing*, 167 F.R.D. 352, 355 (N.D.N.Y. 1996) (dismissing pleading in part because “plaintiffs have made no attempt to number their numberless paragraphs”) (citing FED. R. CIV. P. 10(b)).

19. *See* FED. R. CIV. P. 11(a) (“Every pleading . . . must be signed by at least one attorney of record.”); *Rush v. Unifund CCR Partners*, 604 F.3d 908, 911 (6th Cir. 2010) (“The requirement that parties have a good-faith basis for their pleadings applies to answers every bit as much as it does to counterclaims.”). Rule 11(b) states that the required signature is a certification that, among other things, “the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law” and “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.” FED. R. CIV. P. 11(b)(2), (4).

20. *See* *Haley Paint Co. v. E.I. Du Pont De Nemours and Co.*, 279 F.R.D. 331, 336 (D. Md. 2012) (“a defense may be exercised if it does not meet the pleading requirements of Rules 8 and 9”); *Barnes v. AT&T Pen. Benefit Plan*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (“Federal Rule of Civil Procedure 8 governs pleadings whether by complaint or answer.”).

21. FED. R. CIV. P. 15 (“Amended and Supplemental Pleadings”); *see also* *Kontrick v. Ryan*, 540 U.S. 443, 459–60 (2004) (“An answer may be amended to include an inadvertently omitted affirmative defense, and even after the time to amend ‘of course’ has passed, ‘leave [to amend] shall be freely given when justice so requires.’”) (quoting FED. R. CIV. P. 15(a)).

22. FED. R. CIV. P. 8(e); *accord* *Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938) (“Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants.”); *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (“One objective of Rule 8 is to decide cases fairly on their merits, not to debate finer points of pleading where opponents have fair notice of the claims of defenses.”) (citing FED. R. CIV. P. 8(e)).

23. *See* FED. R. CIV. P. 12(a)(1), (4).

24. FED. R. CIV. P. 15(a)(3).

25. *See* FED. R. CIV. P. 55(a) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit, the clerk must enter the party’s default.”); *Int’l Painters & Allied Trades Indus. Pen. Fund v. Lasalle Glass & Mirror Co.*, 267 F.R.D. 430 (D.D.C. 2010). The defendant should take particular care in answering an amended complaint where the defendant previously filed an answer that contained a counterclaim. *See* *Bremer Bank, N.A. v. John Hancock Life Ins. Co.*, No. 06-CV-1534, 2009 BL 51740, at \*14 (D. Minn. Mar. 13, 2009) (holding under the circumstances that the defendant abandoned counterclaim by failing to replead it in response to the amended complaint); *Johnson v.*

Rule 12(a)(4) extends the time to answer the original complaint when the defendant files a motion under Rule 12(b).<sup>26</sup> If the court denies the Rule 12(b) motion or “postpones its disposition until trial, the responsive pleadings must be served within fourteen days after the notice of the court’s action.”<sup>27</sup> Rule 12(a) does not, however, govern responses to amended pleadings; Rule 15(a)(3) does, and under that Rule, “any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within fourteen days after service of the amended pleading, whichever is later.”<sup>28</sup>

## II. ADMISSIONS AND DENIALS

Perhaps the most familiar aspect of the answer is just that, the specific answer it offers to each allegation in the complaint. This may come in the form of a denial or an admission.<sup>29</sup>

### A. *Denials*

Denials may be general or specific. Rule 8(b)(3) restricts the availability of general denials to instances in which the responding party “intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds.”<sup>30</sup> In most cases, the answering party “does not intend to deny all the allegations,” and so under the Rule that party “must either specifically deny designated allegations or generally deny all except those specifically admitted.”<sup>31</sup> Rule 8(b) also permits partial denials,<sup>32</sup> as well as constructive denials based on insufficient information.<sup>33</sup> Although Rule 8(b) is important, Rule 9 contains additional rules that govern specific situations. Rule 9(c), for example, provides that “when denying that a condition precedent has occurred or been performed, a party must do so

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Berry, 228 F. Supp. 2d 1071, 1079 (E.D. Mo. 2002) (“The last sentence of [Rule] 15(a) requires a party to plead in response to an amended pleading. No option is given merely to stand on preexisting pleadings made in response to an earlier complaint.”).

26. FED. R. CIV. P. 12(1)(4).

27. FED. R. CIV. P. 12(a)(4). A similar rule applies where the court grants a motion for a more definitive statement—the responsive pleading must be served within 14 days after the more definite statement is served.” *Id.*

28. FED. R. CIV. P. 15(a)(3); *see also* Berman v. Arlington Bank, No. 12-CV-2888, 2013 BL 47271, at \*6 (N.D. Ohio Feb. 22, 2013).

29. FED. R. CIV. P. 8(b)(1)(B).

30. FED. R. CIV. P. 8(b)(3); *see also* Randazza v. Cox, No. 12-CV-02040, 2013 BL 50804, at \*3 (D. Nev. Feb. 22, 2013).

31. FED. R. CIV. P. 8(b)(3).

32. FED. R. CIV. P. 8(b)(4) (“A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.”).

33. FED. R. CIV. P. 8(b)(5) (“A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”).

with particularity.”<sup>34</sup>

Whether governed by Rule 8, 9 or otherwise, every denial must “fairly respond to the substance of the allegation.”<sup>35</sup> Failure to do so may result in waiver.<sup>36</sup>

### B. Admissions

A party may also use the answer to admit allegations in the complaint.<sup>37</sup> And indeed, if denying the allegation would be in bad faith, the responding party may well have the duty to do so.<sup>38</sup> An admission in the answer—like a stipulation—“constitutes a binding judicial admission.”<sup>39</sup> This is significant, as the Seventh Circuit has explained:

Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are “not evidence at all but rather have the effect of withdrawing a fact from contention.” A *judicial admission* is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. When a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an *evidentiary admission*.<sup>40</sup>

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34. FED. R. CIV. P. 9(c).

35. FED. R. CIV. P. 8(b)(2). Cf. FED. R. CIV. P. 36(a)(4) (requests for admission; “[a] denial must fairly respond to the substance of the matter”).

36. See FED. R. CIV. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided . . . .”); *Stucchi USA, Inc. v. Hyquip, Inc.*, No. 09-CV-732, 2010 BL 173735, at \*5 & n.8 (E.D. Wis. July 28, 2010). There is also the risk of the answer being struck for non-compliance with the Rules. See, e.g., *Mission Honduras Int’l v. Apufram Int’l*, No. 10 C 1602, 2010 BL 83802 (N.D. Ill. Apr. 15, 2010) (striking answer that contained “pervasive” errors, with leave to refile).

37. FED. R. CIV. P. 8(b)(1)(B).

38. *Divane v. Krull Elec. Co.*, 200 F.3d 1020, 1029 (7th Cir. 1999) (affirming imposition of sanctions against the defendant where the district court found that the defendant’s failure “to make certain admissions was patently unreasonable.”).

39. *Crest Hill Land Dev., LLC v. City of Joliet*, 396 F.3d 801, 805 (7th Cir. 2005) (citing *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 2005)); *Cambridge Healthcare L.L.C. v. Infinity Home Health Servs.*, No. 10 C 7284, 2011 WL 2294196, at \*1 (N.D. Ill. June 9, 2011) (“Unless later withdrawn, an admission in an answer is conclusive.”); *In re Felski*, 277 B.R. 732, 738 (E.D. Mich. 2002) (“In addition, admissions in pleadings are generally binding on the parties to the action.”) (citing *Brown v. Tenn. Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980)). Cf. *Almand v. DeKal Cnty., Ga.*, 103 F.3d 1510, 1514 (10th Cir. 1997) (declining to construe an admission of factual allegations in the answer as a binding admission of the legal conclusion that the complaint draws).

40. *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 2005) (emphasis added); see also *Waver v. Conrail, Inc.*, No. 09-5592, 2010 WL 2773382, at \*8 (E.D. Pa. July 13, 2010) (“An admission is any deliberate, clear and unequivocal statement, either written or oral, made in the course of judicial proceedings, and may include a party’s statements in its pleadings or its legal briefs.”) (internal quotation marks omitted) (citing *Medcom Holding Co. v. Baxter Travenol Lab.*,

Given the potential significance of admissions in the answer, it is good practice to look back periodically at the answer during the course of the litigation, particularly in connection with motions for summary judgment. Admissions in the answer may be helpful in showing the presence or absence of genuine issues of material fact, preparing the case for trial, or simply defining the scope of discovery.<sup>41</sup> In one case, for example, a federal appellate court affirmed the district court's decision to grant summary judgment against the defendant in part based on the defendant's admission in the answer.<sup>42</sup>

### III. DEFENSES

Rule 12(b) requires, with limited exception, that “[e]very defense to a claim for relief in any pleading . . . be asserted in the responsive pleading if one is required.”<sup>43</sup> Rule 8(b)(1)(A) provides additional guidance: “In responding to a pleading, a party must state in short and plain terms its defenses to each claim asserted against it.”<sup>44</sup> Rule 8(c) adds that, “[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense[.]”<sup>45</sup> These rules may seem simple enough—if a responding party has a defense, she should plead it in her answer—but like many areas of the law, simplicity does not reign supreme here.

There are three primary types of defenses in federal civil proceedings: (1) Rule 12(b) defenses; (2) affirmative defenses; and (3) negative defenses.<sup>46</sup> As we will explain below, the type of the defense has practical

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106 F.3d 1388, 1404 (7th Cir. 1997) and *Purgess v. Sharrock*, 33 F.3d 134, 143–44 (2d Cir. 1994)).

41. See *Shaffer v. Am. Med. Ass’n*, 662 F.3d 439 (7th Cir. 2011) (rejecting argument in support of summary judgment that the plaintiff did not proffer evidence of a certain fact, where the fact was admitted in the answer but not in the parties’ Rule 56.1 statements); *Crest Hill*, 396 F.3d at 805 (“The City’s answer to paragraph 45 of the complaint, admitting that Division Street is a locally designated highway, constitutes a binding judicial admission. As such, it has the effect of withdrawing the question of whether Division Street is a locally designated highway from contention; for the purposes of summary judgment, it is.”); *Travelers Prop. Cas. Co. of Am. v. Las Vegas Twp. Constables Office*, No. 12-CV-01922, 2013 BL 106747, at \*1 (D. Nev. Apr. 19, 2013) (“Defendant Constable Bonaventura waived any objection to the disclosure of this document, as he admitted in his answer the allegations contained in the complaint that referenced the November 6 Letter . . .”).

42. *Crest Hill Land Dev., LLC*, 396 F.3d at 805 (affirming grant of summary judgment based in part on admissions in the answer). Cf. *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 67–68 (2d Cir. 1999) (reversing grant of summary judgment where allegations in the complaint — which were admitted — were insufficient to provide basis for summary judgment).

43. FED. R. CIV. P. 12(d).

44. FED. R. CIV. P. 8(b)(1)(A).

45. FED. R. CIV. P. 8(c).

46. These are general categories and some use others. See, e.g., David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 3 (2005) (special defenses). Although certain Rule 12(b) defenses may fall into the latter two types, the Federal Rules accord them special treatment and so we treat them as distinct. See *Ear v. Empire Coll. Auth.*, No. 12-

and legal significance.

*A. Rule 12(b) Defenses*

The easiest defenses to identify are the so-called Rule 12(b) defenses. There are seven, and Rule 12(b) specifically enumerates each one: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.<sup>47</sup> Unlike other types of defenses, a party may raise any of the Rule 12(b) defenses *either* by responsive pleading or by pre-answer motion.<sup>48</sup> Doing so by pre-answer motion tolls the time to answer until the court disposes of the motion,<sup>49</sup> though a pre-answer motion in response to an amended complaint may not.<sup>50</sup>

Rule 12(b) contains detailed procedural requirements for each of the defenses. The defense of lack of subject matter jurisdiction may be raised at any time.<sup>51</sup> The defenses of failure to state a claim, failure to join, and “failure to state a legal defense to a claim” may be raised in any pleading under Rule 7(a), by motion under Rule 12(c), or even at trial.<sup>52</sup> The remaining defenses, however—set forth in Rules 12(b)(2)-(5)—are subject to waiver.<sup>53</sup> Under Rule 12(h), a party waives these defenses by failing to assert them by motion or answer in a timely manner,<sup>54</sup> or by failing to raise them in a prior Rule 12(b) motion.<sup>55</sup>

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1695, 2012 WL 3249514, at \*2 (N.D. Cal. Aug. 7, 2012) (observing that failure to state a claim under Rule 12(b)(6) is the “paradigmatic example of a negative defense . . . [but] is more appropriately raised in motions to dismiss rather than” pleaded in the answer like an affirmative defense).

47. FED. R. CIV. P. 12(b)(1)–(7).

48. FED. R. CIV. P. 12(b).

49. FED. R. CIV. P. 12(a)(4).

50. FED. R. CIV. P. 15(a)(3) (“Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, which is later.”); *see also* Gen. Mills, Inc. v. Kraft Foods Global, Inc., 487 F.3d 1368, 1376 (Fed. Cir. 2007) (“The filing of a motion to dismiss does not extend the time for filing an answer to an amended complaint, at least in the circumstance here where the time for responding to the original complaint has already run.”), clarified on denial of rehearing, 495 F.3d 1378, 1380–81 (Fed. Cir. 2007).

51. FED. R. CIV. P. 12(g)(2), (h)(3).

52. FED. R. CIV. P. 12(h)(2).

53. *See, e.g.*, Swanson v. City of Hammond, Ind., 411 F. App’x 913, 915 (7th Cir. 2011) (“As long as defendants comply with the rules by raising their defenses in their first responsive pleading or consolidate their defenses in a pre-pleading motion under Rule 12(b), they do not waive their Rule 12(b) defenses.”).

54. FED. R. CIV. P. 12(b), (h)(2). “A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.” FED. R. CIV. P. 12(b).

55. FED. R. CIV. P. 12(g)(2), (h)(1).



## B. Negative & Affirmative Defenses

Most other defenses will constitute either affirmative or negative defenses. Federal law distinguishes between the two, and so too should the careful litigator.

### 1. The Legal Distinction

A negative defense is an “attack on the plaintiff’s prima facie case,”<sup>56</sup> for example, a defense of no causation to a negligence claim.<sup>57</sup> As one court put it, “a negative defense is the equivalent of a defendant saying, ‘I did not do it.’”<sup>58</sup> The defense asserts “defects in the plaintiff’s case” and the defendant has no burden to prove it.<sup>59</sup> The burden of proof remains on the plaintiff to establish the elements of her prima facie case.<sup>60</sup> A negative defense arises out of the defendant’s specific response in its answer to the allegations in the complaint.<sup>61</sup>

Unlike a negative defense, an “affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability, in whole or in part, by new allegations of excuse, justification, or other negating matter.”<sup>62</sup>

56. *Gen. Auto. Parts Co. v. Genuine Parts Co.*, No. 04-CV-379, 2007 WL 704121, at \*6 (D. Idaho Mar. 5, 2007); *see also* *United States v. Sterling Centrecorp, Inc.*, No. 08-CV-2556, 2011 WL 6749801, at \*9 n.5 (E.D. Cal. Dec. 22, 2011).

57. *Hubbell v. World Kitchen, LLC*, 688 F. Supp. 2d 401, 422–23 (W.D. Pa. 2010) (“a so-called ‘negative defense’ directly challenges the substance of the plaintiff’s allegations . . .”).

58. *F.T.C. v. Think All Pub., L.L.C.*, 564 F. Supp. 2d 663, 665–66 (E.D. Tex. 2008); *see also* *Gessele v. Jack in the Box, Inc.*, No. 10-CV-960, 2011 WL 3881039, at \*2 (D. Or. 2011); *Texidor v. E.B. AABY’S REDERI A/S*, 354 F. Supp. 306, 309 (D.P.R. 1972) (stating that a negative defense is “a denial of responsibility.”).

59. *Hackworth v. Torres*, No. 06-CV-00773, 2013 BL 193833, at \*3 (E.D. Cal. July 22, 2013); *Ear v. Empire Collection Auth.*, No. 12-1695, 2012 WL 3249514, at \*4 (N.D. Cal. Aug. 7, 2012); *Barnes v. AT&T Pen. Benefit Plan*, 718 F. Supp. 2d 1167, 1173–74 (N.D. Cal. June 22, 2010) (stating that a negative defense is “merely rebuttal against evidence presented by the plaintiff”).

60. *See Zivkovic*, 302 F.3d at 1088.

61. *See, e.g., In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) (“A defense which points out a defect in the plaintiff’s prima facie case is not an affirmative defense.”); *Think All Pub., LLC*, 564 F. Supp. 2d at 663 (striking negative defenses as redundant under Rule 12(f) because the defenses “simply repeat the Defendants’ denial of the allegations in the complaint) (citing *Emmons v. S. Pac. Trans. Co.*, 701 F.2d 1112, 1118 (5th Cir. 1983) (stating that a negative defense is “one which tends to disprove one or all of the elements of a complaint.”)).

62. *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637 (N.D. Ill. 2011); *see also* *Donohue v. Am. Isuzu Motors, Inc.*, 155 F.R.D. 515, 519 (M.D. Pa. 1994) (“An affirmative defense is a matter which serves to excuse a defendant’s conduct or otherwise avoids the plaintiff’s cause of action but which is proven by facts extrinsic to the plaintiff’s cause of action, in the sense that liability is avoided without negating an element of the plaintiff’s prima facie case.”). *Accord* *Evans v. Michigan*, 133 S. Ct. 1069, 1078 (2013) (“Lack of insanity was not an ‘element’ of Burks’ offense, bank robbery by use of a dangerous weapon. Rather, insanity was an affirmative defense to criminal liability. Our conclusion thus depended upon equating a judicial acquittal with an order finding insufficient evidence of culpability, not insufficient evidence of any particular element of the offense.”). *Cf. Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)

As one court explained, a “true affirmative defense raises matters outside the scope of plaintiff’s prima facie case and such matter is not raised by a negative defense.”<sup>63</sup> An affirmative defense operates much like a claim for relief in that “[t]he party asserting an affirmative defense usually has the burden of proving it.”<sup>64</sup>

The modern concept of the affirmative defense is “derived from the common law plea of ‘confession and avoidance.’”<sup>65</sup> This means that an “affirmative defense should accept, rather than contradict, well-pleaded allegations of the complaint”<sup>66</sup> (the “confession”) and then state why the pleader is nonetheless entitled to prevail (the “avoidance”). Rule 8(c) sets forth common affirmative defenses—such as assumption of the risk, statute of frauds, and waiver — but that list is neither controlling nor exhaustive. The availability of any given affirmative defense depends on the underlying substantive law.<sup>67</sup>

Identifying whether a defense is negative or affirmative is often easy. The defense of “no intent” in a civil battery action is clearly a negative defense; it seeks to negate an essential element of the plaintiff’s prima facie case.<sup>68</sup> It is not always that straightforward—consider for example the

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(“A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense.”).

63. *Instituto Nacional v. Cont. Ill. Nat’l Bank*, 576 F. Supp. 985, 991 (N.D. Ill. 1983).

64. *Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985); *see also* *Landolfi v. City of Melbourne*, No. 12-14295, 2013 BL 91315, at \*2 (11th Cir. Apr. 05, 2013) (“Once the plaintiff meets his prima facie burden, the employer may establish an affirmative defense by proving by a preponderance of the evidence that legitimate reasons, standing alone, would have induced it to take the same adverse action.”); *Columbia Pictures Indus., Inc. v. Fung*, No. 10-55946, 2013 BL 75615, at \*17 (9th Cir. Mar. 21, 2013) (“Because the DMCA safe harbors are affirmative defenses, Fung has the burden of establishing that he meets the statutory requirements.”); *Okla. Radio Assoc. v. F.D.I.C.*, 987 F.2d 685, 693 (10th Cir. 1993); *Greyhound Corp. v. Blakley*, 262 F.2d 401, 409 (10th Cir. 1958) (“Contributory negligence, being an affirmative defense on which the defendant has the burden of proof, the defendant must produce substantial evidence of the plaintiff’s own negligence before the trial court is required to instruct the jury on contributory negligence.”); *Ear v. Empire Collection Auth.*, No. 12-1695, 2012 WL 3249514, at \*2 (N.D. Cal. Aug. 7, 2012) (“affirmative defenses . . . require the defendant to meet a burden of proof”).

65. *Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986).

66. *Crow v. Wolpoff & Abramson*, No. 06-CV-3228, 2007 WL 1247393, at \*2 (D. Minn. Apr. 19, 2007) (citing *Gwin v. Curry*, 161 F.R.D. 70, 71 (N.D. Ill. 1995)).

67. *First Union Nat’l Bank v. Pictet Overseas Trust*, 477 F.3d 616, 621–22 (8th Cir. 2007); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 710 (2d Cir. 2004) (looking to New York law in a diversity action to determine the nature of an affirmative defense); *Troxler v. Owens-Ill., Inc.*, 717 F.2d 530, 532 (11th Cir. 1983) (“Determining whether a contention is an affirmative defense for rule 8(c) purposes is a matter of state law.”); *Alegre v. Marine Motor Sales Corp.*, 228 F.2d 713, 721 (5th Cir. 1956) (Jones, J., dissenting) (observing that under the applicable state law, the “right to interpose equitable defenses in common law actions is recognized, but such defenses are restricted to negative defenses and cannot be made the basis for affirmative relief”); *Haywood v. City of Chi.*, No. 01 C 3872, 2002 WL 31118325, at \*7 (N.D. Ill. Sept. 25, 2002).

68. *Accord* *Donohoe v. Am. Isuzu Motors, Inc.*, 155 F.R.D. 515, 518 (M.D. Pa. 1994) (discussing other examples of affirmative defenses, including the defense of failure to comply with federal housing law to an eviction claim; the defense of abandonment in an easement action).

“tolerances for accuracy defense”<sup>69</sup> and the “mend the hold doctrine.”<sup>70</sup> The federal courts have developed tests to classify defenses. In the Seventh Circuit, for example, a defense is affirmative if Rule 8(c) enumerates it, or “(a) ‘if the defendant bears the burden of proof’ under state law or (b) ‘if it [does] not controvert the plaintiff’s proof.’”<sup>71</sup> The Ninth Circuit has adopted a similar rule; a “defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense.”<sup>72</sup>

## 2. The Practical Differences

For a number of reasons it is important to distinguish between negative and affirmative defenses. We will discuss four of these reasons below.

### a. Requirement of Pleading

An affirmative defense must be affirmatively pleaded, but a negative defense need not be.<sup>73</sup> Rule 8(c) provides the basic rule for affirmative defenses: “In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense to the claims for relief in the complaint.”<sup>74</sup> A general denial is insufficient to preserve any specific affirmative defense.<sup>75</sup> The purpose of the requirement of pleading affirmative defenses

69. See *In re Sterten*, 546 F.3d 278, 285–86 (3d Cir. 2008).

70. See *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F. Supp. 2d 719, 738 (S.D. Ohio 2012). There are countless others that are not so obvious. See, e.g., *Lamonica v. Safe Hurricane Shutters, Inc.*, No. 11-15743, 2013 BL 59594, at \*16 (11th Cir. Mar. 06, 2013) (“the fluctuating workweek method is not an affirmative defense”).

71. *Winforge, Inc. v. Coachmen Indus., Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) (citation omitted); *accord In re Livent, Inc. Noteholders Sec. Litig.*, 355 F. Supp. 2d 722, 726 (S.D.N.Y. 2005); *Red Deer v. Cherokee Cnty.*, 183 F.R.D. 642, 650–56 (N.D. Iowa 1999).

72. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

73. *Winforge*, 691 F.3d at 872 (rejecting argument that defendant waived the defense of invalidity in a contract action because that was a negative defense under the applicable law in that the defense challenges the element of a valid and enforceable agreement); *Ridgeway Nat’l Bank v. N. Am. Van Lines, Inc.*, 326 F.2d 934, 936 n.4 (3d Cir. 1964) (stating that the defense of “unavoidable accident” . . . came into being through the negative defense of the defendant, that is, a denial of negligence.”); *Ferrone v. Onorato*, No. 05-CV-303, 2007 WL 1247093, at \*2 (W.D. Pa. Apr. 27, 2007) (explaining that certain requested discovery was relevant to a general defense that need not be pleaded to be at issue).

74. FED. R. CIV. P. 8(c). (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense[.]”). Some courts also speak about affirmative defenses under Rule 8(b)(1). See *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, No. 11-CV-1161, 2012 WL 177576, at \*3 (C.D. Cal. Jan. 20, 2012) (“Rule 8(b)(1)(A) contemplates pleading all defenses; no limitation as to affirmative or negative defenses is expressed in the text of the rule.”).

75. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (“general assertion that the plaintiff’s complaint fails to state a claim is insufficient to protect the plaintiff from being ambushed with an affirmative defense.”) (citing, among other cases, *Rademacher v. Colo. Ass’n of Soil Conservation Districts Med. Ben. Plan*, 11 F.3d 1567, 1571 (10th Cir. 1993)) (“A naked assertion that a plaintiff’s complaint fails to state a claim will not, by itself, excuse a defendant’s

is “to give the opposing party notice of [each] affirmative defense and a chance to rebut it.”<sup>76</sup> The general rule in federal court is that a party’s failure to plead specifically any given affirmative defense will result in waiver of that defense.<sup>77</sup> In one recent case, for example, a federal appellate court held that a defendant waived an affirmative defense by raising it for the first time in its motion for summary judgment.<sup>78</sup>

Waiver of affirmative defenses can be devastating, but there are two caveats. First, the rule does not apply to negative defenses. So, if a party mistakenly believes that its unpleaded negative defense is affirmative, the rule of waiver is no obstacle.<sup>79</sup> Second, the rule is discretionary.<sup>80</sup> This means that a court may allow a party to add an affirmative defense by amendment before, during, and even after trial.<sup>81</sup> In considering whether to

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failure to timely present and argue available defenses to the district court.”); *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984) (holding that a general denial of allegations is insufficient to plead an affirmative defense)).

76. *Zelenika v. Commonwealth Edison Co.*, No. 09 C 2946, 2012 WL 30005375, at \*11 (N.D. Ill. July 23, 2012) (quoting *Williams v. Lampe*, 399 F.3d 867, 871 (7th Cir. 2005)); *see also Saks*, 316 F.3d at 350 (“One of the core purposes of Rule 8(c) is to place the opposing parties on notice that a particular defense will be pursued so as to prevent surprise or unfair prejudice.”); *Robinson v. Johnson*, 313 F.3d 128, 134–35 (3d Cir. 2002) (“The purpose of requiring the defendant to plead available affirmative defenses in his answer is to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed.”).

77. *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012) (“Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant’s answer or in an amendment thereto.”) (internal citation and quotation marks omitted); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (observing that an affirmative defense is a defense that “the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver”) (citing FED. R. CIV. P. 8(c)(1), 12(b), 15(a)); *Arizona v. California*, 530 U.S. 392, 410 (2000) (observing that an “affirmative defense” is “ordinarily lost if not timely raised.”); *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 807 (8th Cir. 2013) (“We agree with the district court that Smithway waived the affirmative defense of failure to mitigate damages [by failing to plead it].”); *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 42 (2d Cir. 2009) (finding request for setoff to be “abandoned” where the defendant “never affirmatively pleaded any defense or counterdemand in their answer or other pleading on which a claim for setoff . . . could be based.”).

78. *Nguyen v. Biondo*, No. 12-13776, 2013 BL 37404, at \*4 (11th Cir. Feb. 13, 2013).

79. *LaFont v. Decker-Angel*, 182 F.3d 932 (10th Cir. 1999) (holding that the district court did not err in permitting the defendant to assert an unpleaded defenses at trial, reasoning that the defense was a negative defense, not an affirmative defense).

80. *United States v. Miss. Vocational Rehab. for the Blind*, 794 F. Supp. 1344, 1353 (S.D. Miss. 1992).

81. *See* FED. R. CIV. P. 15(a) (before trial), (b) (during and after trial). Rule 15(b)(2) permits implied amendment by consent of the parties in certain circumstances. *See* FED. R. CIV. P. 15(b)(2) (“When an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.”). Unpleaded affirmative defenses can also operate on appeal. *See Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 617 F.3d 114, 143 n.3 (2d Cir. 2010) (“appellate courts, using [Rule] 15(b) ‘by way of analogy,’ permit constructive amendment of pleadings ‘when the effect will be to acknowledge that certain issues upon which the lower court’s decision has been based or consistent with the trial court’s judgment have been litigated’”) (internal citations omitted). *Cf.*

do so, courts will consider, among other things, any “undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings.”<sup>82</sup> Some courts hold that “failure to plead an affirmative defense in the first response is ‘especially excusable’ where the law on the topic is not clearly settled.”<sup>83</sup>

In contrast to affirmative defenses, negative defenses need not be affirmatively pleaded in the answer.<sup>84</sup> Courts do not read the word “defenses” in Rule 8(b)(1) as extending to negative defenses.<sup>85</sup> Because a negative defense is an attack on the prima facie case—and not a separate defense to prove at trial—the plaintiff presumably already has sufficient notice of the basis for the negative defense, and the reasons underlying the requirement of pleading fall away.<sup>86</sup>

#### b. Pleading Standard

Because Rule 8(c) requires that affirmative defenses be pleaded, it follows that affirmative defenses—unlike negative defenses—are subject to the pleading requirements of the Rules 8(b)(1)(A) and 9.<sup>87</sup> Apart from the

*Wood*, 132 S. Ct. at 1834 (holding that in federal habeas proceedings, “courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative”).

82. *Saks*, 316 F.3d at 350; *see also* *Kariuki v. Tarango*, 709 F.3d 495, 507 (5th Cir. 2013) (“We have recognized a good faith exception to waiver where raising the affirmative defense after the pleadings does not cause undue prejudice.”); *Sky Harbor Air Serv., Inc. v. Reams*, 491 F. App’x 875, 896 (10th Cir. 2012) (finding no abuse of discretion in district court’s refusal to permit the defendant to assert a previously unpleaded affirmative defense); *Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626, 632 (7th Cir. 2010); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (“We do not take a formalistic approach to determine whether an affirmative defense was waived. Rather, we look at the overall context of the litigation and have found no waiver where no evidence of prejudice exists and sufficient time to respond to the defense remains before trial.”); *Chambers v. Johnson*, 197 F.3d 732, 735 (5th Cir. 1999).

83. *Pasco*, 566 F.3d at 576 (citing *Johnson v. Johnson*, 385 F.3d 503, 516 n. 7 (5th Cir. 2004)).

84. *See, e.g.*, *Am. Gooseneck, Inc. v. Watts Trucking Serv., Inc.*, 159 F.3d 1355 (5th Cir. 1998) (“A denial that an essential element of a claim exists is not the same as an affirmative defense to the claim and need not be included in the answer under rule 8(b).”); *see* *Porto v. Peden*, 233 F. Supp. 178, 181 (E.D. Pa. 1964). That said, in a recent decision, a federal district court in California denied a motion to strike a separately pleaded negative defense. *See Kohler v. Islands Rest., LP*, 280 F.R.D. 560, 567 (S.D. Cal. 2012) (declining to strike separately pleaded negative defense, reasoning that “[n]egative defenses may also be raised in [the] answer”).

85. *Zivkovic*, 302 F.3d at 1088 (holding that the defendant was not required to plead its negative defense in the answer).

86. *See, e.g.*, *Porto v. Peden*, 233 F. Supp. 178, 180 (W.D. Pa. 1964) (“The specific denial of agency warned plaintiff that he must prove agency as part of his prima facie case; such a denial is a negative defense, contradistinguished from an affirmative defense.”).

87. *Renalds v. SRG Rest. Grp.*, 119 F. Supp. 2d 800, 802 (N.D. Ill. 2000) (observing that affirmative defenses are subject to the pleading requirements of the Federal Rules). *See generally* *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) (“An affirmative defense is subject to the same pleading requirements as is the complaint.”); *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (“Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure.”)

rules governing denials, there is no pleading standard governing negative defenses. After all, a party need not affirmatively plead her negative defenses, which arise out of denials.

The general rule for pleading affirmative defenses is set forth in Rule 8(b)(1)(A): “In responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it.”<sup>88</sup> The meaning of this standard, however, is the subject of a debate simmering in the lower federal courts. “[E]ver since . . . *Twombly* and *Iqbal*, district courts . . . have split over whether the ‘plausibility’ standard [applicable to Rule 8(a) under those decisions] applies to all Rule 8 pleadings, and hence to affirmative defenses pled in answers.”<sup>89</sup> The emerging majority view appears to be that the *Twombly/Iqbal* standard does indeed apply to affirmative defenses.<sup>90</sup> Courts ascribing to this view have relied generally on “considerations of fairness, common sense, and litigation efficiency underlying *Twombly* and *Iqbal*.”<sup>91</sup> As one district court explained, “plaintiffs are entitled to receive proper notice of defenses in advance of the discovery process and trial.”<sup>92</sup>

Courts declining to extend the *Twombly/Iqbal* standard to affirmative defenses have generally relied on linguistic differences between Rule 8(a)(2) and Rule 8(b)(1)(A). As one noted, the plain language of Rule

88. FED. R. CIV. P. 8(d)(2).

89. *Ear v. Empire Collection Auth., Inc.*, No. 12-1695, 2012 WL 3249514, at \*1 (N.D. Cal. Aug. 7, 2012); *Reimer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 639–40 (N.D. Ill. 2011) (collecting cases); Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 987 (2012); Leslie Paul Machado et al., *Do Twombly and Iqbal Apply to Affirmative Defenses*, 59 FED. LAW. 56, 57 (2012) (“In the wake of the Supreme Court’s decisions in [*Twombly*] and [*Iqbal*], an interesting question has been perplexing judges in federal district courts around the country: Do the pleading requirements announced in those decisions apply to affirmative defenses?”).

90. *See Nextdoor.com, Inc. v. Abhyanker*, 12-CV-5667, 2013 BL 192271, at \*11 (N.D. Cal. July 19, 2013) (granting in part and denying in part motion to strike affirmative defenses under *Twombly* and *Iqbal*); *Ross v. Morgan Stanley Smith Barney LLC*, No. 12-CV-09687, 2013 BL 89815, at \*2 (C.D. Cal. Apr. 02, 2013); *Borger Props., Inc. v. Auer Corp.*, No. 10-02022., 2013 BL 86475, at \*18 (Bankr. N.D. Tex. Mar. 29, 2013) (“Most courts have held that the plausibility standard applies to affirmative defense pleading”) (citing cases); *Hammer v. Peninsula Poultry Equip. Co.*, No. 12-1139, 2013 BL 15974, at \*5 (D. Md. Jan. 08, 2013) (collecting cases); *Mittelstaedt v. Gamla-Cedron Orleans, LLC*, No. 12-C-5131, 2012 BL 324827, at \*2-3 (N.D. Ill. Dec. 12, 2012); *Barnes v. AT&T Pen. Benefit Plan*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. June 22, 2010) (“the vast majority of courts presented with the issue have extended *Twombly*’s heightened pleading standard to affirmative defenses”) (collecting cases); Machado, *supra* note 89, at 57 & n. 4 & 6 (collecting cases). Extension of the plausibility standard from claims for relief to affirmative defenses is reminiscent of the extension of the standard from antitrust cases to all civil cases. *See* Andrey Spektor & Michael A. Zuckerman, *Judicial Recusals and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977, 995 (2011) (discussing development of plausibility standard, from the limited holding of *Twombly* to the generally applicable holding of *Iqbal*).

91. Machado, *supra* note 89, at 57 (quoting *Racick v. Dominion Law Assoc.*, 270 F.R.D. 228, 234 (E.D.N.C. 2010)).

92. *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010).

8(a)(2) demands much more than its counterpart; whereas Rule 8(a)(2) requires a showing that “the pleader is entitled to relief,” Rule 8(b)(1)(A) simply requires the pleader to “state in short and plain terms its defenses.”<sup>93</sup> Some courts also have reasoned that requiring plausibility under Rule 8(b) would be unfair: “While the plaintiff often can conduct an investigation before filing the complaint to ensure its allegations are adequately supported, the defendant must respond quickly after being served.”<sup>94</sup>

In light of the uncertainty, “it is best to assume that the *Twombly* and *Iqbal* standard will be applied and proceed accordingly.”<sup>95</sup> Notably, “[u]nder any standard, the defendant “must give” the plaintiff “fair notice of which defense” the defendant asserts, “rather than leaving it to” the plaintiff and the court “to guess.”<sup>96</sup>

c. Method of Pre-Trial Attack

The nature of the defense (negative or affirmative) will inform the type of available procedure that a party can use either to attack or to pursue the defense in advance of trial. We discuss this topic in greater detail below, and simply flag the issue here.

d. Issue for the Jury

An affirmative defense will often go to the jury as such, but a negative defense will not. Where an affirmative defense raises issues of fact, and there is sufficient evidence to support the defense, the trial court will generally instruct the jury on the defense and submit the issue to the jury. A negative defense is just a denial of the plaintiff’s prima facie claim, so no separate jury instruction or verdict form is needed. The court’s burden of proof jury instruction is sufficient to put the negative defense in issue.<sup>97</sup>

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93. FED. R. CIV. P. 8(a)(2).

94. *Godson v. Eltman, Eltman & Cooper, P.C.*, 285 F.R.D. 255, 259 (W.D.N.Y. 2012) (quoting *Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 726 (W.D. Va. 2010)).

95. *Machado*, *supra* note 89, at 58.

96. *Dion v. Fulton Friedman & Gullace LLP*, No. 11-2727, 2012 WL 160221, at \*3 (N.D. Cal. Jan. 17, 2012). *Cf. Godson*, 285 F.R.D. at 259 (“Years before *Twombly* was decided, the Second Circuit held that “[a]ffirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy.”) (quoting *Shechter v. Comptroller of City of N.Y.*, 79 F.3d 265, 270 (2d Cir. 1996)). The *Godson* court further explained that the Second Circuit’s decision in *Shechter* “emphasize[s] the importance . . . of providing the plaintiff with fair notice, buttressed by sufficient facts, of the affirmative defendants that the defendant intends to assert; thus allowing the plaintiff an opportunity to knowledgably respond.” *Id.*

97. *See, e.g.*, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.27 (2009).

*C. Defenses & Motion Practice*

We now turn to the subject of motion practice on defenses, both negative and affirmative. This section will focus on four types of motions: motions to dismiss for failure to state a claim under Rule 12(b)(6), for judgment on the pleadings under Rule 12(c), to strike under Rule 12(f), and for summary judgment under Rule 56.

*1. Negative Defenses*

A negative defense will not support a motion for judgment on the pleadings under Rule 12(c), or for summary judgment under Rule 56.<sup>98</sup> This follows from the premise that negative defenses do not exist apart from the denial of the allegations in the complaint, and therefore there would be nothing to move upon. The claim is all that exists. So, when a defendant purports to move under Rule 12(c) or Rule 56 on the basis of a negative defense (*e.g.*, “the product did not cause the injury”), the defendant is actually just attacking the claim itself (*e.g.*, “the plaintiff cannot prove that the product caused the injury”).

Although a negative defense (denominated as such) cannot support a motion under Rules 12(c) and 56, it may support a motion to strike under Rule 12(f). Some courts will strike separately pleaded negative defenses on the basis that they are “redundant” to the general denial of the claim for relief,<sup>99</sup> but other courts have declined to do so.<sup>100</sup> In considering whether to file a Rule 12(f) motion to strike a negative defense, keep in mind that motions to strike are “disfavored” and are likely of little or no utility when used to strike negative defenses. In any event, the movant should first meet and confer in good faith with the other side, because the defendant may well agree to excise separately pleaded negative defenses from the answer rather than litigate the issue.<sup>101</sup>

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98. *Gilbert v. Eli Lilly Co.*, 56 F.R.D. 116, 125 (D.P.R. 1972) (“By making a general denial of any negligence on their part, the codefendants can present at trial any evidence to show that the claimed damage was not caused by their negligence. In the same way the plaintiff can plead negligence in general terms and prove any negligent act, so may a defendant deny negligence generally and prove that the claimed damage was not caused by him but by the conduct of a third person beyond his control.”).

99. *Barnes v. AT&T Pen. Benefit Plan*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010) (striking negative defense as redundant under Rule 12(f) because the affirmative statements of the negative defenses are merely “restatements of denials present in earlier parts of the complaint.”); *see also Insuremax Ins. Agencies, Inc. v. Shanze Enters., Inc.*, No. 13-CV-1231 (N.D. Tex. Aug. 07, 2013).

100. *See Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 567 (S.D. Cal. 2012) (declining to strike separately pleaded negative defense, reasoning that “[n]egative defenses may also be raised in [the] answer”).

101. *Barnes*, 718 F. Supp. 2d at 1171 (admonishing the parties that many of the issues raised in the motion to strike could have been resolved without judicial intervention).



## 2. Affirmative Defenses

### a. Summary Judgment

Any party may move for summary judgment on an affirmative defense under Rule 56.<sup>102</sup> This is an important point; even if the plaintiff does not have grounds for summary judgment on her claims, for example, the plaintiff should nonetheless consider whether grounds exist for summary judgment on the defendant's affirmative defenses. The inverse is true for defendants. Affirmative defenses are like claims, and considering them early may avoid headaches as the case moves to trial. Indeed, when a party has a meritorious argument, failure to seek summary judgment on affirmative defenses, often clutters the pleadings and obfuscates the real issues for trial. But, of course, a party should not seek summary judgment unless there are adequate legal grounds upon which to move.

With that background, we now turn to specific procedural devices—other than summary judgment—for attacking or pursuing an affirmative defense in advance of trial.

### b. For the Plaintiff

The plaintiff has two other primary procedural vehicles to attack affirmative defenses before trial: a motion to strike under Rule 12(f) and a motion for judgment on the pleadings under Rule 12(c). These motions, when used to attack affirmative defenses, are largely identical, with the primary difference being timing.<sup>103</sup> A motion to strike must be brought “within 21 days after being served” with the answer (or, if the court orders a reply to the answer, prior to serving the reply),<sup>104</sup> while a motion for judgment on the pleadings can be brought anytime “after the pleadings are closed[,] but early enough not to delay trial.”<sup>105</sup>

Rule 12(f)—rather than Rule 12(c)—appears to be the most common method of attacking an insufficient defense.<sup>106</sup> Courts and litigants have long “struggled with the proper method for raising the insufficiency of a defense,” but the 1948 amendments to the Federal Rules sought to “correct this problem” with Rule 12(f).<sup>107</sup> According to the Advisory Committee,

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102. See *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012).

103. See *Loucks v. Shorest, LLC*, 282 F.R.D. 637, 638 (M.D. Ala. 2012); *Safe Bed Techs. Co. v. KCI USA, Inc.*, No. 02 C 0097, 2003 WL 21183948, at \*2 (N.D. Ill. May 20, 2003).

104. FED. R. CIV. P. 12(f)(2); see also *Bicek v. C&S Wholesale Grocers, Inc.*, No. 13-CV-00411, 2013 BL 198094, at \*-2-3 (E.D. Cal. July 25, 2013) (denying motion to strike affirmative defense because the motion “was brought . . . fourteen days late”).

105. FED. R. CIV. P. 12(c).

106. *E.g.*, *Hammer v. Peninsula Poultry Equip. Co.*, No. 12-1139, 2013 BL 15974, at \*5 (D. Md. Jan. 08, 2013) (considering motion to strike affirmative defenses).

107. *Krauss v. Keibler-Thompson Corp.*, 72 F.R.D. 615, 616 & nn. 2–3 (D. Del. 1976).

Rule 12(f), as amended, “affords a specific method of raising the insufficiency of a defense.”<sup>108</sup>

Under Rule 12(f), “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”<sup>109</sup> Although courts frequently explain that motions to strike are “disfavored,”<sup>110</sup> this judicial disfavor may be directed at attempts to strike “redundant, immaterial, impertinent, [and] scandalous matter,” rather than insufficient defenses.<sup>111</sup> Indeed, courts routinely grant motions to strike insufficient defenses in the answer.<sup>112</sup>

Common defects that give rise to motions to strike affirmative defenses include (1) misdesignations (*e.g.*, pleading a negative defense as an affirmative defense);<sup>113</sup> (2) defective pleading (*e.g.*, failure to comply with Rules 8 and 9); and (3) legally insufficient pleading (*e.g.*, pleading an affirmative defense that is not cognizable under the governing law).<sup>114</sup> In the aftermath of *Twombly* and *Iqbal*, federal courts have seen a surge in

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108. FED. R. CIV. P. 12(f) – adv. comm. notes (1946); *see also* *Dragon v. I.C. Sys., Inc.*, 241 F.R.D. 424, 425 n.1 (D. Conn. 2007); *Sec. & Exch. Comm’n v. Thomas*, 116 F.R.D. 230, 232 (D. Utah 1987); *Fed. Dep. Ins. Corp. v. Nanula*, No. 87 C 4690, 1987 WL 20145, at \*1 (N.D. Ill. Nov. 16, 1987) (observing that “purpose” of the rule “is to provide a method for raising the insufficiency of a defense” and thus cannot be used to “strike” a complaint.). Although less than clear, a plaintiff may perhaps rely on Rule 12(c) to achieve partial judgment on the pleadings by attacking an affirmative defense. *Cf. Strigliabotti v. Frankling Res., Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005) (“While Rule 12(c) of the Federal Rules of Civil Procedure does not expressly provide for partial judgment on the pleadings, neither does it bar such a procedure; it is common to apply Rule 12(c) to individual causes of action.”).

109. FED. R. CIV. P. 12(f).

110. *Facility Wizard Software, Inc. v. Southeastern Tech. Servs., LLC*, 647 F. Supp. 2d 938, 942 (N.D. Ill. 2009) (“A motion to strike is generally disfavored.”) (citing *Heller Fin., Inc. v. Midwhay Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)).

111. *Barnes v. AT&T Pen. Benefit Plan*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. June 22, 2010) (suggesting that the standard under Rule 12(f) is lower when seeking to strike an insufficient defense rather than strike a matter that is “redundant, immaterial, impertinent, or scandalous.”) (quoting FED. R. CIV. P. 12(f)).

112. *Nat’l Trust Ins. Co. v. Graham Bros Const. Co., Inc.*, No. 11-CV-1437, 2012 WL 2945563, at \*2 (M.D. Fla. July 18, 2012) (granting motion to strike because “the [d]efenses at issue “are not true affirmative defenses. They do not admit the allegations of the Complaint but avoid liability based upon some negative factor.”).

113. *See, e.g., Dion v. Fulton Friedman & Gullace LLP*, No. 11-2727, 2012 BL 12785, at \*3 (N.D. Cal. Jan. 17, 2012) (“To the extent that Defendants have improperly labeled negative and other defenses as affirmative defenses, this provides another reason for the Court to strike those putative affirmative defenses.”); *Gilbert v. Eli Lilly Co., Inc.*, 56 F.R.D. 116, 125 (D.P.R. 1972) (striking an affirmative defense that alleges damages were “exaggerated and speculative” because this defense is a “negative defense, encompassed under the general denial” of allegations related to damages). With regard to misdesignations, Rule 8(c)(2) provides that: “If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.” FED. R. CIV. P. 8(c)(2).

114. As one court observed, striking an affirmative defense on essentially definitional grounds “does not necessarily eliminate its substantive argument from the case.” *Instituto Nacional de Comercializacion Agricola (Indeca) v. Cont. Ill. Nat’l Bank*, 576 F. Supp. 985, 988 (N.D. Ill. 1983).

litigation involving the second category—pleading defects—given the uncertainty about whether the plausibility test applies to affirmative defenses.<sup>115</sup>

The proliferation of litigation under Rule 12(f) underscores the importance of the procedural law of defenses. Properly designating a defense as either negative or affirmative can avoid an otherwise unnecessary and costly motion to strike.<sup>116</sup> So too will pleading any affirmative defense with plausibility, and ensuring that each affirmative defense—like each claim for relief—is cognizable under the substantive law. These measures will also expedite and streamline the litigation, giving greater certainty to the parties and allowing for more timely appellate review.

c. For the Defendant

In federal court, it is not uncommon for defendants to move to dismiss under Rule 12(b)(6) on the basis of an affirmative defense. If the defendant has a meritorious affirmative defense, the thinking goes, then the defendant should raise the defense before even answering the complaint. But moving to dismiss under Rule 12(b)(6) on the basis of an affirmative defense is generally improper.<sup>117</sup>

A motion to dismiss under Rule 12(b)(6) “tests whether the complaint states a claim for relief.”<sup>118</sup> “[A]n affirmative defense is external to the complaint” and the “mere presence of a potential affirmative defense does not render the claim for relief invalid.”<sup>119</sup> For these and other reasons, the Seventh Circuit recently reminded district courts that dispositive motions based on affirmative defenses are most appropriately adjudicated under Rule 12(c), not Rule 12(b)(6). The court explained:

A plaintiff whose allegations show that there is an airtight defense has pleaded himself out of court, and the judge may dismiss the suit on the

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115. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

116. *Cf. Advance Concrete Materials, LLC v. Con-Way Freight, Inc.*, No. 09-80460, 2009 WL 2973265, at \*3 (S.D. Fla. Sept. 11, 2009) (“[W]hen a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not [to] strike the claim, but rather to treat [it] as a specific denial.”); *Painters Joint Comm. v. J.L. Wallco, Inc.*, 2011 WL 2418615, at \*2 (D. Nev. June 14, 2011) (“The court agrees with defendants that these defenses should not be stricken. Again, the plaintiffs have identified no harm in allowing the defenses to remain in the answer until the parties have completed discovery, at which time the court will be better informed and able to determine which defenses are viable.”).

117. *Brownmark Films LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). We say “generally” because in rare cases some courts will consider an affirmative defense on a motion to dismiss where the “allegations in the complaint suffice to establish” the defense. *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

118. *Brownmark Films, LLC*, 682 F.3d at 690.

119. *Id.*; *see also* *Richards v. Mitcheff*, 696 F.3d 635, 637–38 (7th Cir. 2012) (noting the general rule that a plaintiff need not plead around affirmative defenses).

pleadings under Rule 12(c). This comes to the same thing as a dismissal under Rule 12(b)(6), and opinions . . . often use the two interchangeably. But in principle a complaint that alleges an impenetrable defense to what would otherwise be a good claim should be dismissed (on proper motion) under Rule 12(c), not Rule 12(b)(6). After all, the defendants may waive or forfeit their defense, and then the case should proceed.<sup>120</sup>

So instead of filing a pre-answer motion to dismiss, a defendant seeking early termination of the case on the basis of an affirmative defense should *first* answer the complaint if otherwise appropriate; *second*, plead the affirmative defense in the answer; and *third*, move for judgment on the pleadings under Rule 12(c).

Pursuing an affirmative defense in this manner has practical benefits to the defendant, perhaps the most significant of which is the potential cost-savings. A motion to dismiss based on an affirmative defense is apt to be stricken or denied without prejudice (or even with prejudice!),<sup>121</sup> often resulting in a wasted effort and later litigation on the same issue. Even if the court adjudicates the motion on the merits, the deviation from the rules may nonetheless send the litigation “into a procedural sidetrack” that may require appellate review to correct.<sup>122</sup>

Additionally, a Rule 12(c) motion may be more cost effective for a defendant than a Rule 12(b)(6) motion by virtue of the rules governing amendment under Rule 15. Under Rule 15(a), a party may amend its pleading once as a matter of course within “21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.”<sup>123</sup> This means—as is fairly common—a plaintiff may amend her complaint in response to a motion to dismiss under Rule 12(b)(6), thereby mooting the motion to

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120. *Id.*; see also *Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963, 975 (7th Cir. Feb. 28, 2013) (“Dismissing a case on the basis of an affirmative defense is properly done under Rule 12(c), not Rule 12(b).”); *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544 (7th Cir. 2012) (“Preemption is an affirmative defense, we note, and thus the more appropriate motion would have been one under Rule 12(c); plaintiffs have no duty to anticipate affirmative defenses . . .”).

121. *Fed. Deposit Ins. Corp. v. Saphir*, No. 10 C 7009, 2011 WL 3876918, at \*5 & n. 1 (N.D. Ill. Sept. 1, 2011) (denying Rule 12(b)(6) motion as premature, whether the defendants moved on the basis of an affirmative defense, and stating that the defendants “remain free to file an answer asserting these affirmative defenses and then filing a Rule 12(c) motion for judgment on the pleadings.”).

122. *Bausch v. Stryker Corp.*, 630 F.3d 546, 561–62 (7th Cir. 2010) (“The defendants led the district court into a procedural sidetrack that began with defendants’ decision to move for dismissal under Rule 12(b)(6) rather than filing an answer to plead preemption as an affirmative defense and moving for judgment on the pleadings under Rule 12(c). Preemption is an affirmative defense, and pleadings need not anticipate or attempt to circumvent affirmative defenses. If the defense had been properly presented under Rule 12(c), and if the district court had adhered to its erroneous view of preemption, then the proposed amended complaint would have seemed futile, but, having been presented with an affirmative defense, the plaintiff was entitled to try to cure the problem through an amended complaint.”) (internal citations omitted).

123. FED. R. CIV. P. 15(a)(1)(B).

dismiss. A plaintiff has no such right to amend as a matter of course in response to a Rule 12(c) motion, but may do so only upon consent or with leave of court.<sup>124</sup>

Beyond the potential for cost savings, waiting until the pleadings close to pursue an affirmative defense will allow defense counsel additional time to prepare the motion in full view of the pleadings. This means that instead of quickly filing a motion to dismiss based on the complaint, counsel can pause, file an answer that plausibly alleges any affirmative defenses, and thereafter file a more fully-developed motion under Rule 12(c). Taking this approach will enable counsel to more carefully consider more carefully her response to the allegations in the complaint (and take advantage of any admissions that may prove helpful), what affirmative defenses to plead, and ultimately, in full view of the litigation, how to craft the motion so as to maximize the potential for success.

#### D. *The Problem of Defenses*

Many cases proceed beyond the pleadings stage without a clear understanding of the actual affirmative defenses at issue. This creates practical problems. The nature of the affirmative defenses informs discovery. Rule 26(b) couches relevance of discovery materials in terms of the “claims or defenses,” and Rule 26(a) likewise provides for automatic disclosure based on claims or defenses.<sup>125</sup> Some courts have found that affirmative defenses may inform motions for class certification under Rule 23.<sup>126</sup> Additionally, at trial, the affirmative defenses, together with the claims for relief, will define the scope of relevance under Rule 401 of the Federal Rules of Evidence and may inform the balance under Rule 403 of the evidence rules.

The issues that we discuss in this Article will often arise during trial preparation. In a typical case, the defendant will plead a “grocery list” of purported affirmative defenses.<sup>127</sup> Many are actually negative defenses disguised as affirmative ones. Some may not even be cognizable under the applicable substantive law (for example, the “operation of nature” or “act of god defense”). Of the affirmative defenses that are properly pleaded as such, many will nonetheless lack sufficient evidentiary support, but if the plaintiff never moved for summary judgment on that basis, the defenses

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124. FED. R. CIV. P. 15(a)(2).

125. FED. R. CIV. P. 26(a), (b).

126. *See Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521, 537 (N.D. Ill. 2008) (“[T]he possibility of hundreds if not thousands of individual hearings related to ownership, distinctiveness and the applicability of *affirmative defenses*, including managing probable discovery to be conducted prior to those hearings, precludes a finding that a class action is a superior method of adjudicating the trademark-related claims . . . .”) (emphasis added).

127. *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*2 & n.1 (E.D. Mich. Apr. 21, 2009).

will remain. Other remaining affirmative defenses will be boiler-plate and perfunctory statements of law (“the claim is extinguished by accord and satisfaction”), but the plaintiff never moved to strike these defenses as insufficient under Rule 12(f). So they too will remain, although the nature and theory of the defense may be wholly unclear.<sup>128</sup>

As trial approaches, the parties will file motions *in limine*, many of which raise questions of relevance. Relevance, of course, depends on the underlying claims and affirmative defenses at issue. Problems arise when evidence is relevant to affirmative defenses that the defendant no longer pursues (or that the evidence as a whole does not support), but that remain in the case. At the same time, the parties will (or should) begin thinking about jury instructions. The parties now dispute whether the court should instruct the jury on each remaining affirmative defense pleaded in the answer. The defendant wants the instructions, but the plaintiff points out that the defendant pleaded the kitchen sink of purported affirmative defenses in its answer and many of them fail as a matter of law. No matter, the defendant retorts, because the plaintiff never filed an appropriate motion to strike the defenses. Making matters worse, the defendant may now request an instruction on an affirmative defense that it never, in the first place, pleaded in the answer. All of this, of course, assumes that the parties even focus on affirmative defenses in their trial preparation.

Trial judges, of course, should and do actively manage pretrial proceedings. Under Rule 16, trial judges may utilize the pretrial conference to “consider and take appropriate action on,” among other things, “formulating and simplifying the issues for trial, and eliminating frivolous claims and defenses”;<sup>129</sup> “amending the pleadings if necessary or desirable”;<sup>130</sup> and “obtaining admissions and stipulations about facts and documents.”<sup>131</sup> After the pretrial conference, Rule 16(d) requires the trial judge to issue a pretrial order “reciting the action taken.”<sup>132</sup>

Although capable, the pretrial conference and order are less-than-ideal devices to resolve the problems discussed above. As an initial matter, the pretrial procedures under Rule 16 are discretionary and permissive—the trial judge need not even hold a pretrial conference. Even assuming the trial judge holds a pretrial conference, the necessarily belated efforts to narrow the issues for trial often result in a tremendous waste of both judicial and private resources. The parties should have narrowed the issues for trial and

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128. Cf. *Renalds v. S.R.G. Rest. Grp.*, 119 F. Supp. 2d 800, 803 (N.D. Ill. 2000) (“The first and eleventh affirmative defenses are insufficient on their face because they are bare-bones conclusory allegations, simply naming legal theories without indicating how they are connected to the case at hand.”).

129. FED. R. CIV. P. 16(c)(A).

130. FED. R. CIV. P. 16(c)(2)(B).

131. FED. R. CIV. P. 16(c)(2)(C).

132. FED. R. CIV. P. 16(d).

de-cluttered the pleadings long before the case is ready for trial.

#### IV. COUNTERCLAIMS

Finally, we offer a brief word about counterclaims.<sup>133</sup> Rule 13 permits a defendant to plead any counterclaim in the answer.<sup>134</sup> Counterclaims come in two types: mandatory and permissive. Under Rule 13(a), which governs mandatory counterclaims, a party “must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and does not require adding another party over whom the court cannot acquire jurisdiction.”<sup>135</sup> Failure to assert a mandatory counterclaim will bar any subsequent attempt to do so.<sup>136</sup> Rule 13(b), on the other hand, governs permissive counterclaims. These are counterclaims that need not be pleaded. Rule 13(b) permits—but does not require—a party to plead any other counterclaim against an opposing party, even if wholly unrelated to the primary claims.

We leave the intricacies of Rule 13 to others, and simply highlight three important points. First, although pleaded in the answer, a counterclaim is a “claim for relief,” just like a claim in the complaint. This means that the counterclaim is subject to the pleading requirements of Rule 8(a)(1), as interpreted by *Twombly* and *Iqbal*, as well as Rule 9.<sup>137</sup> Second, the plaintiff (now, counter-defendant) must respond to the counterclaim, or face default. The response may be a motion under Rule 12(b), or a responsive pleading, subject to all of the rules described above. Finally, in approaching counterclaims, remember that “[c]ourts have typically declined to consider counterclaims for declaratory relief that are duplicative of affirmative defenses.”<sup>138</sup>

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133. See *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467 (1974) (discussing development of pleading counterclaims in federal court).

134. Cf. *Patton v. Marshall*, 173 F. 350, 354 (4th Cir. 1909) (“In equity pleading, the answer is a defense to complainant’s bill, and does not set up grounds for affirmative relief. Such relief is granted upon a cross-bill.”).

135. FED. R. CIV. P. 13(b).

136. See, e.g., *Angell v. U.S. Army Corps. of Eng’rs*, 149 F. App’x 34 (2d Cir. 2005) (“If a litigant fails to raise a compulsory counterclaim as defined by Rule 13(a), she is barred by the doctrine of res judicata from raising it in a subsequent suit.”).

137. E.g., *Tenn. Valley Auth. v. Long*, No. 12-CV-704, 2012 BL 169278, at \*3 (N.D. Ala. July 09, 2012) (“On the whole, the purported counterclaim fails to meet the federal pleading standards because it contains threadbare facts and is not sufficient to give rise to a plausible claim for relief.”) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

138. *Malibu Media, LLC v. Doe*, No. 12-1198, 2012 BL 337914, at \*3 (D. Md. Dec. 21, 2012) (citing *Penn Mutual Life Ins. Co. v. Berck*, No. 09-0578, 2010 WL 3294305, at \*3 (D. Md. Aug. 20, 2010)) (“This type of double pleading is not the purpose of a declaratory judgment.”); *Penn Mutual Life Ins. Co. v. Greatbanc Trust Co.*, No. 09 C 6129, 2010 WL 2928054, at \*5 (N.D. Ill. July 21, 2010) (“counterclaims that mimic affirmative defenses are no less duplicative [than] counterclaims that mirror the plaintiff’s request for declaratory relief.”); *Zytax, Inc. v. Green*

## CONCLUSION

An author recently made it clear: the “answer is an important pleading.”<sup>139</sup> As we have explained, an understanding of the answer is fundamental to success in federal court. Though some see the answer as the Cinderella of pleadings, the careful litigator should not be fooled by appearances. The answer can give a party significant procedural advantages at all stages of litigation, or it can harm a party’s case through waiver, abandonment, or otherwise, and increase the costs of litigation for everyone. But to reap the potential benefits of the answer, and to avoid its procedural traps, counsel must pay close attention to its intricacies and requirements. For the plaintiff, this begins by drafting a complaint with an eye towards the defendant’s likely response; and for the defendant, this begins by pausing before filing that reflexive motion to dismiss. Both parties should continue to look back at the pleadings during discovery, summary judgment practice, and during pretrial and trial proceedings (remembering not to forget the affirmative defenses).

In the end, familiarity with the answer may not only give a party procedural advantages and protection against procedural missteps, but it will complement existing procedures in the Federal Rules to streamline litigation and save both public and private resources.

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Plains Renewable Energy, Inc., No. 09-2582, 2010 WL 2219179, at \*8 (S.D. Tex. May 28, 2010) (dismissing declaratory counterclaim duplicative of affirmative defense); *United States v. Zanfei*, 353 F. Supp. 2d 962, 965 (N.D. Ill. 2005) (noting that it is “well settled” that courts may dismiss duplicative counterclaims); accord FED. R. CIV. P. 8(c) (“If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.”).

139. JEFFREY A. JENKINS, *THE AMERICAN COURTS: A PROCEDURAL APPROACH* 230 (2011).