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<https://www.law.com/thelegalintelligencer/2024/05/21/court-rejects-prophylactic-use-of-affirmative-defenses-sanctions-defendant/>**NOT FOR REPRINT**COMMENTARY

Court Rejects Prophylactic Use of Affirmative Defenses, Sanctions Defendant

The ruling serves as a reminder to legal practitioners that pleadings should not be used as a testing ground for defenses but rather as a platform assertions grounded in existing evidence and legal principles.

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Employment Law

By Jeffrey Campolongo | May 21, 2024 at 09:21 AM

“Lawyers—especially defense lawyers—are naturally risk averse. Were it otherwise, they would all have taken their considerable talents to riskier ventures in life.” Those are the opening words of a recent memorandum opinion issue by U.S. District Judge Joshua D. Wolson of the Eastern District of Pennsylvania. What follows over the next several pages of the opinion is a veritable smackdown of defense attorneys who over-plead affirmative defenses.

Wolson continued “Federal Rules Of Civil Procedure 11 requires lawyers to have a good faith basis to make an assertion in a pleading or other filing. A good faith basis requires more than just a worry that something might happen. It means that a lawyer has a reason to think that the claims in the case warrant the assertion.” See *DeSandies v. Encore Group (USA)*, Case No. 2:24-cv-01044-JDW (E.D. Pa. Apr. 19, 2024).

The crux of the case revolves around defendant Encore Group’s inclusion of affirmative defenses, particularly the statute of limitations defense, in its response to Demien DeSandies’

complaint alleging violations of the Americans with Disabilities Act (ADA). In his complaint, DeSandies stated that he intends to assert additional claims pursuant to the Pennsylvania Human Relations Act (PHRA) once they have been administratively exhausted. Encore Group, seemingly motivated by risk aversion, preemptively raised the statute of limitations defense without a substantial basis, prompting Wolson to intervene, sua sponte.

After the defendant's answer hit the docket, the court issued a show cause order directing Encore Group either to file an amended answer, asserting only those defenses for which it had a good faith basis, or file a memorandum explaining why the court should not strike its answer for violating Fed. R. Civ. P. 11(b). Encore Group chose the latter.

Encore Group attempted to justify its assertion of the statute of limitations defense by arguing that it "cannot know when DeSandies may file a PHRA claim or what it would allege," so it was "obligated to preserve a statute of limitations defense to any PHRA claims." The court was not convinced, citing that Rule 11 does not permit a defendant to assert an affirmative defense to an inchoate claim that a plaintiff might assert in the future. That, the court wrote, is "the definition of a prophylactic defense."

Encore Group also contended that the statute of limitations defense was appropriate "given the possibility that DeSandies offers testimony during discovery regarding any alleged ADA violation that is outside the applicable statute of limitations." The court's counter to that argument was to point out the obvious—DeSandies has not yet testified in the case. Just because he may testify and may change the scope of the claims in the case in discovery, those mere possibilities do not give the defendant a good faith basis to assert the affirmative defense now.

The court examined the specific allegations in DeSandies' complaint, namely that he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within the prescribed 300-day window and that he initiated the suit within 90 days of receipt of a right to sue letter. "From the facts alleged, there does not appear to be any good faith basis to believe that the claims DeSandies asserts could fail for timeliness," the court wrote.

As all employment lawyers know, Federal Rule of Civil Procedure 11 mandates attorneys to certify the factual and legal basis of their claims, requiring a good faith basis for assertions in pleadings or filings. However, Encore Group's assertion of the statute of limitations defense lacked such a basis, as it was founded on speculative future claims rather than existing evidence. Wolson's ruling underscores the importance of upholding legal standards and discouraging the practice of employing prophylactic affirmative defenses. Such defenses not only lack merit but also impede the efficient resolution of cases by unnecessarily expanding discovery processes and prolonging proceedings.

As explained by the court, the assertion of prophylactic affirmative defenses is not a victimless crime. "A plaintiff's lawyer faced with a multitude of prophylactic affirmative defenses must serve interrogatories to ferret out the factual basis for each defense. If there is not such a

basis, the plaintiff's counsel either has to file a motion or persuade defense counsel to withdraw that defense, all for a defense that should not have been in the case in the first place."

The court next fashioned a remedy that it thought would not only discipline Encore Group for its misuse of the affirmative defense, but one that would deter future practitioners who may be inclined to over plead. "To make sure that Encore Group and other litigants understand that violating Rule 11 has a real consequence, I will strike all of Encore Group's affirmative defenses." Striking only the offending affirmative defense would only incentive future defendants to employ a "no harm, no foul" approach. Thus, all affirmative defenses were booted without prejudice, with leave permitted to file an amended answer with 'real' defenses rooted in good faith.

The ruling serves as a reminder to legal practitioners that pleadings should not be used as a testing ground for defenses but rather as a platform for assertions grounded in existing evidence and legal principles. The decision also elucidates the appropriate application of sanctions under Rule 11, emphasizing their role in deterring similar conduct in future litigation. By striking all of Encore Group's affirmative defenses, including those other than the statute of limitations defense, the court sends a clear message that violations of Rule 11 will have tangible consequences.

Wolson's memorandum serves as a significant precedent in promoting legal accountability and integrity within the federal system. It reaffirms the principle that pleadings should be grounded in substantive legal reasoning and evidence, rather than speculative assumptions or preemptive measures. By holding attorneys accountable for the assertions they make in court filings, the decision upholds the integrity of the profession and ensures the fair and just resolution of disputes in accordance with established legal standards. The decision also serves as reminder that Rule 11 sanctions need not be raised by an opposing party. The court, as gatekeeper of justice, can, and indeed will, raise the issue when appropriate. Defense counsel, consider yourself warned.

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