Seventh Circuit Rejects Permissive Approach to Assertion of Affirmative Defenses or Counterclaims in Response to an Amended Complaint

The Federal Rules of Civil Procedure do not address whether a defendant may assert, as a matter of right, previously unpleaded affirmative defenses or counterclaims in response to an amended complaint. Courts evaluating the propriety of newly-pleaded affirmative defenses or counterclaims typically employ one of three approaches: the narrow, permissive, or moderate rule. In *Burton* v. *Ghosh*, --- F.3d ----, 2020 WL 3045954 (7th Cir. June 8, 2020), the Seventh Circuit rejected the permissive approach — which permits a defendant to assert any affirmative defense or counterclaim whenever an amended complaint is filed — because such an approach "would drastically undermine district judges' control over the pleading process under Rule 15 and would lose sight of Rule 1's instruction to construe the Rules to secure the just, speedy, and inexpensive resolution of civil actions." *Id.* at *5.

I. The Three Approaches

Before delving into the *Burton* decision, a short primer on the three approaches referenced above is appropriate. "Under the narrow approach, in order for a counterclaim or defense to be permitted as a matter of right, the amendment(s) in the answer must be related to the specific amendment(s) to the complaint." *Ramsay-Nobles* v. *Keyser*, 2018 WL 6985228, at *3 (S.D.N.Y. Dec. 18, 2018) (citation omitted). In other words, courts applying the narrow approach hold "that an amended answer must be confined specifically to the amendments" made by the plaintiff. *See Virginia Innovation Scis., Inc.* v. *Samsung Elecs. Co., Ltd.*, 11 F. Supp. 3d 622, 630 (E.D. Va. 2014). Historically, the narrow approach has been premised on Federal Rule 13(f), which was abrogated by the 2009 amendments to the Federal Rules of Civil Procedure. *See, e.g.*, *Ramsay-Nobles*, 2018 WL 6985228, at *3-*4. Most courts have construed the 2009 amendments as precluding application of the narrow approach. *Id.* at *4; *but see GEOMC Co., Ltd.* v. *Calmare Therapeutics Incorporated*, 918 F.3d 92, 99-100 (2d Cir. 2019) (adopting the permissive approach for early-in-the-litigation counterclaims and the narrow approach for later-in-the-litigation counterclaims because, "[a]s a general rule, the risk of substantial prejudice increases with the passage of time") (citations omitted).

At the opposite end of the spectrum is the permissive approach, which treats an amended complaint as wiping away the prior pleading and, thus, allowing a defendant to belatedly plead any defense or counterclaim in response to the amendment. "Under the permissive approach, any amendment is permitted as a matter of right, regardless of its relation to the amendment to the complaint." *Ramsay-Nobles*, 2018 WL 6985228, at *3 (citation omitted).

The moderate approach — which has been adopted by the majority of circuit and district courts[1] — bridges the gap between the other two approaches by focusing on the degree of changes to the amended complaint. "Under the moderate approach, 'the breadth of the changes allowed in an amended response [is limited] to the breadth of

[1] *See Coppola* v. *Smith*, 2015 WL 2127965, at *3 (E.D. Cal. May 6, 2015) (stating that the moderate approach is the majority position among the nation's federal courts and that the courts of the Ninth Circuit generally follow the moderate approach); *Virginia Innovation Scis., Inc.* v. *Samsung Elecs. Co.*, Ltd., 11 F. Supp. 3d 622, 630 (E.D. Va. 2014) (endorsing moderate approach); *Manasher* v. *NECC Telecom*, 310 F. App'x 804, 807 (6th Cir. 2009) (rejecting permissive approach); *Tralon Corp.* v. *Cedarapids, Inc.*, 966 F.Supp. 812, 832 (N.D. Iowa 1997), *aff'd*, 2000 WL 84400 (8th Cir. Jan. 21, 2000) (endorsing moderate approach); *Krinsk* v. *SunTrust Banks, Inc.*, 654 F.3d 1194, 1204 (11th Cir. 2011) (rejecting permissive approach); *Patel* v. *Pandya*, 2016 WL 3129615, at *2 (D.N.J. June 2, 2016) (endorsing moderate approach); *Ramsay-Nobles*, 2018 WL 6985228, at *4 (S.D.N.Y. Dec. 18, 2018) (observing that the courts of the Second Circuit generally follow the moderate approach).

the changes made in an amended complaint,' but the changes in the amended response do not need to be directly linked to the changes in the original complaint." *Id.* Applying the moderate approach, "when a plaintiff files an amended complaint which changes the theory or scope of the case, the defendant is allowed to plead anew as though it were the original complaint filed by the Plaintiff. . . . The obvious corollary is that if an amended complaint does not change the theory or scope of the case, a [defendant] must seek leave of court pursuant to Rule 15(a) before it can amend its answer to assert a counterclaim." *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 42 F. Supp. 3d 520, 524 (S.D.N.Y. 2014) (citations omitted).

II. Background to the *Burton* Decision

Alnoraindus Burton allegedly injured his knee while in custody at Pontiac Correctional Center. *See Burton* v. *Ghosh*, 2018 WL 3861560, at *1 (N.D. Ill. Aug. 14, 2018), *rev'd and remanded*, 2020 WL 3045954 (7th Cir. June 8, 2020). After being transferred to Stateville Correctional Center, Burton alleged that Dr. Partha Ghosh ("Dr. Ghosh") and Wexford Health Sources, Inc. failed to provide him with adequate medical treatment. *Id.*

In 2011, Burton brought a claim in the United States District Court for the Northern District of Illinois against Dr. Ghosh and certain other medical professionals. *Id.* at *2. Because the medical professionals were misjoined, Burton was directed to amend his complaint, which he did to name only Dr. Ghosh. Burton never served Dr. Ghosh with the amended complaint, and six months later he voluntarily dismissed the suit. The order dismissing the case stated that the dismissal would be with prejudice if the case was not reinstated by August 6, 2012. *Id.* Burton did not reinstate the claim, choosing instead to file another suit on October 19, 2012. *Id.*

In January 2018, after discovery was complete in the subsequently-filed suit, Burton filed an amended complaint that offered only minor clarifications regarding some of Burton's factual allegations. The defendants moved to dismiss based upon the affirmative defense of *res judicata*, arguing that the dismissal of Burton's first suit with prejudice six years earlier in 2012 precluded the second suit. Burton responded that the defense of *res judicata* had been waived because the defendants raised the defense for the first time five years after the suit was initiated (i.e., after all discovery had been completed and on the eve of summary judgment briefing). *Id.* at *3.

The district court disagreed and cited *Massey* v. *Helman*, 196 F.3d 727, 735 (7th Cir. 1999), for the proposition that when the plaintiff files an amended complaint, that complaint "supersedes all previous complaints [and] opens the door for defendants to raise new and previously unmentioned affirmative defenses." 2018 WL 3861560, at *3. The district court continued, "[i]n *Massey*, the Seventh Circuit reasoned that it would be unfair to allow a plaintiff to 'change [its] theory of the case while simultaneously locking defendants into their original pleading.'" *Id.* Accordingly, the district court allowed the defendants to assert their affirmative defense of *res judicata*, and then promptly dismissed Burton's claims with prejudice. *Id.*

III. The Seventh Circuit Clarifies *Massey* and Rejects the Permissive Approach

Rejecting the district court's understanding of *Massey*, the Seventh Circuit found that "*Massey* did not adopt or apply such a categorical rule and does not compel the revival of defendants' untimely defense." 2020 WL 3045954, at *5. The Court explained that *Massey* concerned a very different situation, in which the amended complaint changed the case substantially "by adding an additional plaintiff and new theory of recovery." *Id.* The Court continued, "*Massey* is best understood as an application of Rule 15(a)(2): when an amended complaint fundamentally changes the scope or theory of the case, the interests of justice will generally allow a new, relevant affirmative defense to be asserted." *Id.*

The approach adopted by the district court and championed by the defendants was contrary to *Massey* and was "an abuse of discretion even under the liberal standard of Rule 15(a)(2)." *Id.* at *7. The Court explained, "Defendants assert that any amendment, regardless of its scope, should open the door to any and all new defenses. A changed name, a substituted party, correcting a typographical error? According to defendants, even the slightest change is enough. Defendants' rule would drastically undermine district judges' control over the pleading process under Rule 15 and would lose sight of Rule 1's instruction to construe the Rules to secure the just, speedy, and inexpensive resolution of civil actions." *Id.* at *5.

Weighing the limited degree to which Burton amended his allegations, the Court reasoned that "Burton's amended complaint was irrelevant to defendants' late assertion of an affirmative defense. It did not wipe the slate clean and render irrelevant the previous failure to raise it." *Id.* at *7. The Court also focused on what it characterized as the prejudicial "procedural tactic" employed by Dr. Ghosh's counsel in raising the *res judicata* defense in a motion to dismiss, rather than via an amended answer. *See id.* at *9 ("This procedural tactic thus gave defendants the benefit of an amended pleading without having to address in their motion whether amendment was appropriate. Defendants said nothing in the motion about Rule 8(c), the timing of affirmative defenses, or the standard for amendment."). Accordingly, the Seventh Circuit reversed the district court because the affirmative defense was "untimely and forfeited" (*id.* at *7) and remanded for further proceedings.

IV. Implications

The *Burton* decision makes clear that courts within the Seventh Circuit must take a pragmatic and balanced approach to considering the propriety of belatedly pleaded affirmative defenses and counterclaims. Minor amendments by a plaintiff will not open the door for defendants to plead defenses and counterclaims anew. Rather, the ability of a defendant to belatedly plead affirmative defenses or counterclaims will depend upon whether the plaintiff's amended pleading "fundamentally changes [the] theory or scope of the case." It remains to be seen how district courts within the Seventh Circuit implement the rationale of *Burton*, but there exists ample guidance from other district courts that have applied the moderate approach discussed above.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Peter J. Linken at 212.701.3715 or plinken@cahill.com; or G. Kevin Judy II at 212.701.3499 or kjudy@cahill.com; or email publications@cahill.com.