

Policyholder Playbook Episode 4: Achieve an Early Win - Chip Away at the Insurer's Kitchen Sink of Affirmative Defenses

July 25, 2023 Greg Van Houten

PRACTICES Insurance Recovery, Litigation

Success in insurance litigation is often tied to momentum. Stacking early wins, in motions practice on the pleadings or discovery, for example, may open the door to an early victory at summary judgment or a favorable settlement. To the plaintiff-policyholder, one win that often hangs low in the tree regards the defendant-insurer's affirmative defenses, which are often pled with no basis in fact or law, and in buckshot fashion. They may be stricken accordingly.

In *Seneca Insurance Co. v. Celli Trucking Co.*, the counterclaim-plaintiff policyholder moved to strike the counterclaim-defendant insurer's 10 affirmative defenses on the basis that they were "inadequately pled" and, in some cases, were not even affirmative defenses. No. 19-cv-08241, 2020 WL 7241064, at *1 (N.D. Ill. Dec. 9, 2020). Here were five of insurer's 10 defenses, many of which are typically pled by insurers in coverage litigation:

1. "The Counterclaim fails to state a cause of action upon which relief can be granted."
2. "Defendants' claims are barred in whole or in part by the doctrine of estoppel."
3. "Defendants' claims are barred due to [Defendants'] breach of the Conditions contained in the Policy."
4. "Seneca's conduct at all times was reasonable and in good faith."
5. "The claims asserted in the Counterclaim are barred, in whole or in part, to the extent that the Policy's 'other insurance' provisions applies."

In assessing the motion to strikes, the court noted that while such motions are "disfavored generally," they "will be granted where they remove unnecessary clutter from the case or where the affirmative defense is insufficient on [its] face." *Celli Trucking*, 2020 WL 7241064, at *1. The court further noted that "affirmative defenses must contain sufficient factual allegations that state a defense that is plausible on its face under *Iqbal* and *Twombly*," and through that lens, "[t]he Court may strike affirmative defenses that are conclusory, vague, and unsupported." *Id.* Applying that test, the court struck all the insurers' defenses, albeit without prejudice to replead. *Id.* at *3.

The court reasoned that the first defense should be stricken because "it merely restates the standard for dismissal pursuant to Rule 12(b)(6) and fails to provide any factual basis." *Id.* at *2. The court struck the remainder of the defenses because they hinged on "bare bones assertions of these defenses without adequate factual enhancements." *Id.* Unsurprisingly, when the insurer repled, it included only eight defenses instead of 10, and it included detailed support for those defenses.

This sequence benefitted the policyholder in three ways: (1) it achieved an early win, (2) the insurer decreased its defenses from 10 to eight, and (3) because the insurer added detailed factual support for its defenses, the policyholder now had more insight into its insurer's defenses.

Quick Overview of the Play

Carefully review and analyze the insurer's affirmative defenses. If they are not true affirmative defenses, or if they are pled without sufficient factual support, consider an early motion to strike.

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