FILING WITH YOUR FINGERS CROSSED: SHOULD A PARTY BE SANCTIONED FOR FILING A CLAIM TO WHICH THERE IS A DISPOSITIVE, YET WAIVABLE, AFFIRMATIVE DEFENSE?

David H. Taylor†

CONTENTS

INTRODUCTION

A party contemplating filing an action is faced with a dilemma when there is an affirmative defense available to the party's opponent that would be dispositive of the action.[1] Because the potential defense

† Associate Professor, Northern Illinois University College of Law. This Article was written with the support of a summer grant provided by the College of Law. The author wishes to acknowledge the helpful assistance of Cavan Berry and Benjamin Swift.

1. For purposes of simplicity, this Article will use plaintiff and defendant to refer to the parties filing and defending a given claim, respectively, whether filed as an original

is waived if not raised,[2] it would seem that in an adversarial system the action could be filed with plaintiff's fingers crossed, hoping that the defendant would not raise the defense, either by choice or neglect.[3] Nevertheless, filing an action knowing that a dispositive defense lurks on the horizon could also be seen as pushing the adversarial nature of litigation to the extreme, wasting the resources of courts and litigants on claims that are hopeless but for a misstep by the opponent.[4] In a time of growing concern over abusive litigation tactics and increased interest in mechanisms to control such conduct, filing with one's fingers crossed could be viewed as sanctionable under Rule 11 for violating pre-filing inquiry requirements[5] or violating ethical obligations of candor to the tribunal.[6] This tension between the adversarial nature of litigation and attempts to control abusive or dishonest tactics leave the *fingers-crossed* plaintiff in a less than clear position. Courts that have considered the issue have made it no more clear. They have taken approaches that cover the full spectrum of possibilities, ranging from condemning such filing as a "cat and mouse game" subject to sanction under Rule 11[7] to condoning such filing in order to preserve established burdens of pleading and proof.[8]

---

claim by a plaintiff, as a counterclaim by a defendant/counter-plaintiff, or as a crossclaim, etc. Similarly, only the term claim will be used. These simple designations adequately suffice for the discussion herein.

2. *See infra* notes 14-23 and accompanying text (discussing affirmative defenses and the burden of defendant to raise the defense or have the court consider that defendant has waived the right to put on evidence in support of the defense).

3. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 3.1:204-2 at 558.3 (2d ed. Supp. 1996) (discussing the reasons why a defendant would not raise an available affirmative defense, ranging from incompetence, to public vindication, to a moral or social decision to forego the defense); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (discussing that a defendant may not assert an affirmative defense for reasons "ranging from incompetence to a considered decision").

4. *But see* HAZARD & HODES, *supra* note 3, at 558.4 (stating that "[t]he whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents").

5. *See infra* notes 35-47 and 61-72 and accompanying text (discussing cases in which plaintiffs have been subject to sanction pursuant to Rule 11 for filing an action in the face of an affirmative defense).

6. *But see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (concluding that it is not an ethical violation to file a time-barred lawsuit, nor is it an ethical violation to negotiate with an opponent about a claim that would be subject to a defense of expiration of the statute of limitations).

7. Brubaker v. City of Richmond, 943 F.2d 1363, 1384 (4th Cir. 1991). For a discussion of *Brubaker*, see *infra* notes 35-47 and accompanying text.

8. *See In re* Leeds Bldg. Prods., Inc., 181 B.R. 1006, 1010 (Bankr. N.D. Ga. 1995) (stating that there is no obligation of a party to inquire into defenses where the burden of

The dilemma for the plaintiff, or more precisely, the risk of sanctions under Rule 11, was somewhat diminished by the 1993 amendments to Rule 11 that established the "safe harbor" provision.[9] A plaintiff may escape defendant initiated sanctions by withdrawing the filed action within twenty-one days of defendant raising a dispositive affirmative defense and serving a proposed motion for sanctions upon the plaintiff.[10] In a sense, the "safe harbor" provision reflects approval for filing with fingers crossed by a plaintiff hoping that the defense will not be raised.[11] Nevertheless, a *fingers-crossed* plaintiff remains subject to sanctions imposed upon the initiative of the court under Rule 11[12] without the escape hatch of the "safe harbor" provision,[13] as well as pursuant to 28 U.S.C. § 1927[14] and the court's inherent powers.[15] Therefore, the underlying substantive question remains unanswered as to the propriety of filing an action to which there is a dispositive affirmative defense. This article will examine that question.

First, this Article will survey and critique the various approaches taken by courts in considering whether to sanction the *fingers-crossed*

---

proof is carried by the opponent).

9. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (stating that the amendments were, in part, "intended to provide a type of 'safe harbor' against motions under Rule 11").

10. *See* FED. R. CIV. P. 11 (c)(1)(A) (providing for a motion for sanctions by a party to be served 21 days before filing during which time the challenged document may be withdrawn to escape sanctions).

11. *See, e.g.*, Pierre v. Inroads, Inc., 858 F. Supp. 769, 774-75 n.9 (N.D. Ill. 1994) (discussing that the 1993 amendments to Rule 11 "tend to encourage such shabby conduct" in the filing of an action that is obviously barred by applicable statute of limitations in order to determine whether defendant will raise the defense and then withdrawing the claim when noticed of defendant's intention to pursue sanctions); HAZARD & HODES, *supra* note 3, § 3.1:204-2 to 3.1:205 (referring to the "safe harbor" provision as "official sanction for the 'cat and mouse game' criticized by the Fourth Circuit").

12. FED. R. CIV. P. 11 (c)(1)(B) (providing for court initiated sanctions commenced by a show cause order and not allowing for the "safe harbor" escape).

13. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining that the rule does not provide for a "safe harbor" in situations where the court initiates sanctions); *see also* Progress Fed. Sav. Bank v. Lenders Ass'n, Inc., No. CIV.A. 94-7425, 1996 WL 57942, at *4 (E.D. Pa. Feb. 12, 1996) (discussing that "[t]he 'safe harbor' provision of Rule 11 does not apply when the court rather than a party initiates the consideration of sanctions").

14. 28 U.S.C. § 1927 (1994) provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

15. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

plaintiff. It will conclude that none of the courts considering the issue have fully appreciated or considered the issues involved. Next, this Article will discuss how sanctioning the *fingers-crossed* plaintiff results in an adversarial imbalance. A plaintiff is forced to act in a non-adversarial fashion when deciding whether to file a lawsuit in that plaintiff must anticipate what defenses might be raised and refrain from filing if they appear dispositive, even though the available defenses would be waived if not raised. At the same time, a defendant may seek dismissal of a suit inadvertently filed in an untimely manner, thereby taking full advantage of the tactical rewards afforded by an adversarial system. This Article will then discuss the issue most overlooked by the courts, whether requiring a plaintiff to anticipate an affirmative defense in order to avoid Rule 11 sanctions reorders traditional burdens of pleading, thereby impermissibly altering substantive law. In conclusion, this Article will argue that the better approach is to not sanction plaintiff for filing the action as either unwarranted by existing law or not well-grounded in fact, but rather to consider whether the affirmative defense was *obvious* to plaintiff. That is, did plaintiff have full access to facts necessary to assess the merits of a defense, and did plaintiff know that defendant intended to assert it? In situations where both questions are answered in the affirmative, plaintiff should be subject to sanctions at the initiative of the court for filing an action for an improper purpose.[16] This approach preserves the present adversarial system while deterring hopeless, resource-wasting filings.

I. THE AFFIRMATIVE, YET WAIVABLE DEFENSE

The affirmative defense[17] has its origin in the common law plea of confession and avoidance.[18] At the risk of stating the obvious, it is a matter not within the elements of plaintiff's prima facie case that de-

16. *See* FED. R. CIV. P. 11(b)(1) (providing that by presenting a document to a court an attorney or unrepresented party certifies that "it is not being presented for any improper purpose").

17. *See* FED. R. CIV. P. 8(c) (providing that "[i]n a pleading to a preceding pleading, a party shall set forth affirmatively" nineteen listed defenses as well as "any other matter constituting an avoidance").

18. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (2d ed. 1990) (describing Rule 8(c) as a "lineal descendent of the common law plea in 'confession and avoidance,' which permitted a defendant who was willing to admit that plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat plaintiff's otherwise valid cause of action"); Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988) (referring to Rule 8(c) affirmative defenses as "derived from the common law plea of 'confession and avoidance'") (citing *In re* Rawson Food Serv., Inc., 846 F.2d 1343, 1349 (11th Cir. 1988)).

feats plaintiff's claim.[19] It differs from a defense in that it does not controvert plaintiff's prima facie case, rather it raises matters outside of plaintiff's claim that, if proven, defeat plaintiff's established prima facie case.[20] For purposes of this discussion, two aspects of the affirmative defense are critical.

First, whether a matter is an affirmative defense or part of plaintiff's prima facie case is a question of allocation of burdens of pleading or proof.[21] If the applicable substantive law allocates the burden of pleading and proving a matter to the plaintiff, that matter becomes a part of plaintiff's prima facie case which must be both pled and proven by plaintiff.[22] A matter that is an affirmative defense need not be pleaded in anticipation by plaintiff, but must instead be raised by defendant as an affirmative defense.[23] Conversely, a defendant need not affirmatively set forth in its responsive pleading, nor establish at trial, a matter of which the burden of proving and pleading has been allocated to plaintiff's prima facie case.[24] For example, if the affirmative defenses of expiration of the statute of limitations, prior release or res judicata would potentially bar recovery by plaintiff, it is unnecessary for the plaintiff to plead that the claim is not time-barred, has not been released or is not barred by principles of res judicata.[25] Plaintiff need

19. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 96 at 607 (2d ed. 1947).

20. *See* WRIGHT & MILLER, *supra* note 18, § 1270 (quoting Charles C. Clark, the reporter for the original Advisory Committee, "the answer must set forth, in addition to denials and as special defenses, any new matter constituting a defense").

21. *See* WRIGHT & MILLER, *supra* note 18, § 1271 (discussing "defenses not mentioned in Rule 8(c)" and how a matter would be determined to be allocated to either plaintiff or defendant); *see also* Edward J. Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity*, 12 STAN. L. REV. 5, 8-14 (1959) (discussing allocating the burdens of pleading the elements of claims and defenses).

22. *See* Robert A. Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1212-19 (1981) (discussing, in part, the substantive law's determination of the elements of plaintiff's prima face case and the allocation to defendant of the burden to plead and prove affirmative defenses).

23. *See* FED. R. CIV. P. 8(c) (providing that affirmative defenses "shall" be "set forth affirmatively" by defendant); *see also* Gomez v. Toledo, 446 U.S. 635 (1980) (holding in an action for violation of plaintiff's civil rights that defendant bears the burden of pleading qualified immunity for good faith acts by a public official rather than placing the burden on plaintiff to plead and to prove that the acts of defendant were not in good faith).

24. *See* Cleary, *supra* note 21, at 8-14 (discussing allocating the burdens of pleading the elements of claims and defenses).

25. *But see infra* notes 58 and 95 (discussing cases that indicate that as part of a plaintiff's claim, plaintiff should plead matters indicating an avoidance of an available affirmative defense).

only plead and prove the prima facie elements of her claim, while defendant must plead and prove the elements of any affirmative defense.[26]

Second, because the burden of pleading an affirmative defense rests with defendant, failure to do so may result in waiver of the ability to put on evidence in support of the defense.[27] Therefore, as above, though recovery by plaintiff may be subject to bar by available defenses, defendant must raise the defense or defenses in a responsive pleading or risk waiving the right to put on proof of the defense at trial.[28]

Otherwise stated, if the substantive law that is the basis of plaintiff's prima facie case requires plaintiff to establish elements A, B and C, and D is an affirmative defense, plaintiff bears the burden of pleading only A, B and C. Plaintiff need not anticipate D as a defense and plead that D is not capable of proof by defendant. If defendant wishes to raise D, defendant must do so as an affirmative defense. Generally speaking, defendant will have waived the ability to prove D at trial if defendant has not raised D in its pleadings.[29]

The above two points are critical for an understanding of the issue at hand—whether plaintiff should be sanctioned for filing a case when an affirmative defense exists even though plaintiff has no burden to plead it in anticipation nor prove it at trial, and the defense will be waived if not raised by defendant? If the answer is yes, it would seem that plaintiff is then in a position that an affirmative defense within the burden of defendant to plead, is essentially added as an element to plaintiff's prima facie case. Though not required by the underlying substantive law to be pleaded or proven by plaintiff,[30] if sanctions lie for filing in the face of an affirmative defense, Rule 11 dictates that its existence must then be considered and evaluated by plaintiff, essentially making the anticipated affirmative defense a part of plaintiff's prima facie case. The effect is considerable, for in order to avoid the risks of

---

26. *See* Belton, *supra* note 22, at 1213.

27. *See* WRIGHT & MILLER, *supra* note 18, § 1278 (stating that, "[g]enerally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case").

28. *See, e.g.*, Layman v. Southwestern Bell Co., 554 S.W.2d 477 (Mo. Ct. App. 1977) (holding in an action for trespass that defendant's failure to raise the affirmative defense of an easement prevented defendant from putting on proof of the easement at trial in order to prevent an unfair surprise to plaintiff).

29. *See* Belton, *supra* note 22, at 1213.

30. *See* WRIGHT & MILLER, *supra* note 18, § 1276 (discussing that it is "technically" improper for a plaintiff's complaint to contain allegations that seek to avoid or defeat a potential defense).

sanctions, plaintiff, though able to plead and prove the prima facie elements of a claim, must nevertheless forego filing its action. This is the case even though the failure of defendant, either by choice or inadvertence, to raise the defense would result in its waiver.[31]

II. THREE UNSATISFACTORY APPROACHES (YES, NO AND SOMETIMES)

Judicial consideration of whether a plaintiff who files an action in the face of an affirmative defense should be sanctioned has not distinguished itself. The decisions contain little reasoning or examination of precedent. Instead, they largely represent a hasty shot from the hip aimed at a practice that apparently has angered some trial judges. The decisions can be grouped into three basic categories: a per se rule for sanctions (the yes's),[32] a per se rule opposing sanctions (the no's),[33] and a search for some middle ground (the sometimes).[34] None reflects an approach that is sufficiently thoughtful to appreciate the issues involved and address them in a satisfactory fashion.

A. Yes to Sanctions—No to Cat and Mouse Games

Six Circuits have considered the question in the past decade. The most strict line has been drawn by the Fourth Circuit in *Brubaker v. City of Richmond*.[35] Plaintiffs were sanctioned, in part, for filing defamation claims after the point in time when the applicable limitation period had run.[36] The Fourth Circuit found such claims to be "groundless in law."[37] Though plaintiffs had apparently continued to prosecute the claims for a period of time after defendant had raised the limitations defense, the Fourth Circuit said that it would have imposed sanctions even

31. *See* Belton, *supra* note 22, at 1207 (referring to the concept of a burden of proof (encompassing the burdens of pleading, proof and persuasion) as "one of the most important procedural notions in our legal system") (citing Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Windship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

32. *See infra* notes 35-47 and accompanying text.

33 *See infra* notes 48-57 and accompanying text.

34. *See infra* notes 58-72 and accompanying text.

35. 943 F.2d 1363 (4th Cir. 1991).

36. *See id.* at 1385. Plaintiffs also were sanctioned for other counts deemed to be without legal merit. *See id.* From the outset of its opinion and throughout, the court expressed great dissatisfaction with plaintiffs' counsel and the complaint filed referring to counsel as having passed the state bar examination only a few years prior to the filing of the action and referring to the complaint as "sprawling," "incomprehensible" and "inordinately lengthy and confusing." *Id.* Perhaps the court was not in the best of moods to consider the issues involved necessary to render a fully reasoned decision.

37. *See id.*

if plaintiffs had "dropped the claim as soon as the limitations defense was raised."[38]

The *Brubaker* opinion is troublesome in two main respects. First, there is no authority cited for the hard-line approach taken. The amount of reasoning involved is only slightly greater. Though the court seems to acknowledge that it is requiring plaintiffs to anticipate a defense that is not part of their prima facie case, the Fourth Circuit brushes aside the issue, merely stating that "a pleading requirement . . . is irrelevant to whether a complaint is well-grounded in law."[39] The court does not seem to appreciate that it may be altering the substantive law by adding an element to plaintiffs' burden of pleading. What is overlooked is whether a "pleading requirement" is simply a non-substantive formality, or whether a pleading requirement reflects the underlying substantive law that, if altered, also alters substance as well as procedure.[40] The only discussion of the issue simply disparages the filing of an action in the face of a limitations period that has run as a "cat and mouse game"[41] in which plaintiffs are filing an action that is dependent for merit upon the "ignorance of one's adversary."[42] The question, however, is whether the relative burdens of pleading and proof, reflective of the objectives of the substantive law, are impermissibly reordered by a rule of procedure if one must anticipate the possible defenses of one's adversary and refrain from filing if potential defenses exist.

Second, the Fourth Circuit's sanctioning of plaintiffs for filing an action that is "groundless in law" overlooks the fact that plaintiffs' action was only defeated by a defense that plaintiffs were required neither to plead nor to prove. Whether a motion for sanctions against plaintiffs should be considered as a legal or factual inadequacy under Rule 11 is problematic.[43] It is difficult to see how a claim that meets all elements

---

38. *Brubaker*, 943 F.2d at 1384.

39. *Id.*

40. *See* Belton, *supra* note 22, at 1212-13. In the article, Belton explained:

> Substantive law thus can be viewed as rules of conditional imperatives that have a syllogistic form: If such and such, and unless so and so, then the defendant is liable . . . a rule of law that imposes upon the plaintiff the obligation to plead and prove all of the "ifs," "ands," and "unlesses" would make it particularly difficult—if not impossible—for him ever to prevail.

Id. (citing Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 7 (1959)).

41. *Brubaker*, 943 F.2d at 1384.

42. *Id.* at 1385.

43. At the time *Brubaker* was decided, Rule 11 required that an attorney, when signing a pleading, etc., was certifying:

> that to the best of his knowledge, information and belief formed after reasonable

of a prima facie case is "groundless in law." Nevertheless, it is equally difficult to see how a claim that has factual support for all prima facie elements would not be "well-grounded in fact." Unfortunately, the opinion offers no explanation as to why the court conceptualized the matter as one of legal inadequacy. Perhaps doing so led the court astray and dictated the hard-line approach the court adopted. Both the ethical duty and Rule 11 obligations to disclose adverse legal authority have customarily been considered to be a higher duty than that to disclose adverse facts.[44] But the court was indeed led astray by the specter of this higher duty.

The Fourth Circuit was concerned that if sanctions were not levied against plaintiffs' "cat and mouse game," arguments against sanctions could then be extended to any situation where adverse precedent existed that would defeat a claim.[45] The court reasoned that any plaintiff would be able to file a meritless action and escape sanctions claiming a right to rely upon defendant's failure to recognize and raise the precedent.[46] The court missed the point. In the affirmative defense situation, plaintiff's underlying claim does not necessarily lack merit. The existence of the affirmative defense does not destroy the merit of the underlying case. Rather, in spite of the underlying meritorious case, the affirmative defense negates liability.[47] What the court states it fears does not logically follow, for it is contemplating a situation where the underlying claim has no merit. That situation does warrant sanctions. The affirmative defense situation is very different. An affirmative defense, when raised, does not cause the underlying claim to be without merit.

> inquiry it is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

FED. R. CIV. P. 11 (prior to 1993 amendment).

44. For example, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1995) requires an attorney to disclose "legal authority . . . directly adverse to the position of the client and not disclosed by opposing counsel," while Rule 3.3(a)(2) limits the duty to disclose facts to situations necessary to avoid assisting a criminal or fraudulent act. In ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (discussing disclosure to opposing party and court that statute of limitations has run), the Committee found that a lawyer is not "constrained by the rules of ethics from filing suit to enforce a time-barred claim."

But see Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), *reh'g en banc denied,* 809 F.2d 584 (9th Cir 1987) (holding that a litigant is not required to disclose adverse authority and stating that Rule 11 is not intended to be used to enforce ethical obligations that may require disclosure).

45. *See Brubaker*, 943 F.2d at 1384.

46. *See id.* at 1384 n.32.

47. *See supra* notes 17-20 and accompanying text.

Instead, the defense causes an otherwise meritorious claim to be defeated, but defeated by the existence of a matter that is not part of plaintiff's prima facie case.

B. No to Sanctions—Yes to Cat and Mouse Games (kind of)

None of the circuits have held that there is a per se rule against sanctions, although a somewhat unclear opinion from the Eleventh Circuit seems to reject the Fourth Circuit's disparagement of "cat and mouse" lawyering and approaches that result. In *Souran v. Travelers Insurance Co.*, the court reversed the imposition of sanctions against a plaintiff who filed an action on an insurance policy in the face of a potential affirmative defense of fraudulent procurement.[48] In so doing, the court stated, "[a]n unasserted defense is no defense at all."[49] This would appear to be an approval of "cat and mouse" lawyering, embracing the notion that a party need not refrain from filing an action because of the existence of a possible defense. The court implicitly recognized that the allocation of pleading burdens is an important consideration in what is sanctionable, reasoning that a defense only becomes so when the party with the burden raises it.[50]

The court did directly state that a party should not be sanctioned for filing an action knowing that an affirmative defense exists.[51] Though the context of the discussion and other language perhaps equivocates from a per se rule against sanctions, the court distinguished *Brubaker* because the defense in *Souran* was not as certain to defeat plaintiff's claim as it was in *Brubaker*.[52] Nevertheless, the opinion reads as if the existence of an unequivocal affirmative defense would cause the filing of the action to warrant sanctions.[53] Such a reading, however, would negate the court's recognition of the importance of considering the allocation of pleading burdens in the determination of what is subject to sanction. How far the opinion intended to go towards a per se rule against sanctions is a puzzle, especially in light of a previ-

48. 982 F.2d 1497, 1510 (11th Cir. 1993).

49. *Id.*

50. *See id.*

51. *See id.* (stating that "plaintiffs need not refrain from filing suit . . . because they know that defendants will interpose an affirmative defense").

52. *Id.* (stating that although the Fourth and Tenth Circuits had imposed sanctions for the assertion of a claim knowing that it will be barred by an affirmative defense, the situation at bar was different because plaintiff did not know that the defense was certain to prevail).

53. *See Souran*, 982 F.2d at 1510 (stating that "in no way do the facts unequivocally establish that Travelers' affirmative defense of fraudulent procurement would succeed").

ous dissenting opinion written by its author, Judge Tjoflat.[54] In dicta, in a dissenting opinion six years prior to *Souran*, Judge Tjoflat appeared to reason in the same vein as *Brubaker*, rejecting the notion that an affirmative defense of release did not become so until such time as the defendant raised it.[55] Though, his dissent seems to back off a bit from the strict approach of *Brubaker* in that it is the failing to inform the court of the possible defense that is viewed as the offending conduct, not the filing of the action.[56]

In any event, the two opinions are difficult to reconcile, especially with regard to the issue of whether Rule 11 obligations trump traditional burdens of pleading. Together, they leave it unclear as to how far *Souran* should be read as establishing a per se rule against sanctions for filing an action knowing a possible affirmative defense lurks in the offing. It is only a handful of district court opinions that have adopted such approach.[57]

C. Sanctions Sometimes—The Great Middle Ground

In many ways, the varying approaches of *Brubaker* and *Souran*, as well as Judge Tjoflat's divergent views expressed in *Souran* and *Irvin*, may be nothing more than a recognition that all affirmative defenses are not created equal. A defense of limitations or release, as in *Brubaker*[58] and *Irvin*,[59] respectively, would be rather cut and dried with all relevant

---

54. *See* Irvin v. Griffin Corp., 808 F.2d 802, 807-13 (11th Cir. 1987) (Tjoflat, J., dissenting).

55. *See id.* at 811.

56. *See id.* at 811 n.5 (discussing "counsel ignor[ing] his ethical responsibilities" and the "spirit, if not the letter, of Rule 11" by not informing the district court that he would seek to avoid appellees' anticipated defense).

57. *See, e.g.*, Asbeka Indus. v. Travelers Indem. Co., 831 F. Supp 74, 90 (E.D.N.Y. 1993) (discussing in dicta that sanctions for filing time-barred claims would not be granted if sought because a defense must be raised by defendant to defeat a claim); *In re* Concorde Nopal Agency, 92 B.R. 956, 958 (Bankr. S.D. Fla. 1988) (holding that "[a] plaintiff is not required by Rule 11 to determine at his peril, before he files suit, that there is no affirmative defense available to the defendant"); Oliphant & Jarchow v. Cowhey, No. 88 C 5332, 1988 WL 139351, at *1 (N.D. Ill. Dec. 20, 1988) (questioning whether Rule 11 sanctions can be based on the failure of a complaint to anticipate an affirmative defense and stating that a "plaintiff can always hope that a defendant will choose not to raise it [the affirmative defense], however vain such a hope may be").

58. 943 F.2d at 1369 (discussing that plaintiff's claim for defamation was subject to a one year period of limitation but was filed more than a year and a half after the claim accrued without any reason for why the limitations period should be tolled or not applied).

59. 808 F.2d at 803-04 (discussing that plaintiff's claim for products liability stemming from an automobile accident was barred by a previously executed and unmistaken general release of liability).

facts known to the filing party unless some exception were available. A potential plaintiff could well anticipate when a contemplated action would be defeated if the rather straightforward defense were raised. A defense of fraudulent procurement, as in *Sourvan*, is very fact laden and may not be so clear cut.[60] Not only must the defendant meet the burden of raising it, the defendant must also meet the burden of proving it. Without all the facts readily at its disposal, a plaintiff may not be able to accurately predict whether the defense would defeat the action. Putting aside the intrusion upon burdens of pleading, a per se rule in favor of sanctions might make some sense in the context of a non-complex defense in the nature of limitations or release. In the context of more complex, fact-based defenses in the nature of fraudulent procurement, a rule against sanctions appears better reasoned. Perhaps in recognition of this tension, the majority of circuits that have considered the issue have sought to adopt a *middle-ground* that accommodates the varying natures of affirmative defenses.

The *middle-ground* approach traces its origin to the Tenth Circuit opinion in *White v. General Motors Corp.*, where sanctions were imposed, in part, for filing an action knowing that an affirmative defense of release of claims existed.[61] In apparent acknowledgment of the varying complexity of affirmative defenses, the Tenth Circuit held that the pre-filing obligations imposed by Rule 11 include determining whether any "obvious" affirmative defenses would bar the action, though every possible defense need not be sought out.[62] The Tenth Circuit's approach of sanctionable if *obvious* is the predominant view in the circuits, having been followed in the Fifth,[63] Sixth[64] and Seventh Circuits.[65] Nevertheless, two major problems persist with the sanction-

60. 982 F.2d at 1501 (discussing one of several affirmative defenses raised in defendant's answer as being that the insurance policy on which plaintiff based his claim was void because plaintiff had procured it with the fraudulent intention of having his wife murdered in order to recover the policy proceeds).

61. 908 F.2d 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); *see also In re* Leeds Bldg. Prods., 181 B.R. 1006, 1010 n.5 (Bankr. N.D. Ga. 1995) (referring to *White* as "the source of case authority suggesting that there is a duty on the plaintiff to investigate into possible obvious . . . defenses").

62. *See White*, 908 F.2d. at 682.

63. FDIC v. Calhoun, 34 F.2d 1291, 1299 (5th Cir. 1994) (citing *White* with approval, though not imposing sanctions upon a plaintiff for filing an action in the face of an affirmative defense of capacity to sue).

64. James v. Tura, Nos. 90-3419, 90-3445, 1991 WL 88346, at *1 (6th Cir. May 28, 1991) (citing *White* with approval and imposing sanctions for filing an action despite a previous release).

65. *See* Parrish v. Patel, 985 F.2d 563 (7th Cir. 1993) (though not citing *White*, hold-

able if *obvious* approach of the Tenth Circuit.

First, it is not clear what makes a defense *obvious* to a plaintiff so that an action could not be filed without running afoul of Rule 11. The few courts that have sought to discuss, in other than cursory terms, what constitutes being *obvious* have taken very different approaches. One approach has been to view being *obvious* as a matter of whether all necessary facts would have been available to the plaintiff to allow for a determination whether the available defense would prevail.[66] The difficulty with this approach (factually obvious) is that it continues to reorder the burden of pleading. It requires a plaintiff to investigate a defense that is within defendant's burden to plead and to prove. Plaintiff must determine whether a defense would be factually supported and then assume it will be asserted by defendant and asserted successfully. The other approach to when a defense is *obvious*, somewhat relieves plaintiff of having to make that assumption. Therefore, a determination of *obvious* constitutes whether all necessary facts are available to plaintiff, and plaintiff knows that the defense will be asserted and will prevail.[67] This approach (obviously raised) is by far the most stringent in terms of when sanctions should be imposed.[68]

Second, the cases contain a paucity of reasoning, discussion of the issues involved, or citation to authority. As its sole authority, *White* cited a commentary written by United States District Judge William W. Schwarzer.[69] As one district court has pointed out, there is nothing within the cited pages that directly supports the Tenth Circuit's holding

---

ing that "sanctions are appropriate where the validity of an affirmative defense was so apparent that a plaintiff could not have advanced his or her position in good faith").

66. *See In re* Excello Press, Inc., 967 F.2d 1109, 1113 (7th Cir. 1991).

67. *See* Western Die Casting Co. v. Athearn Chandler & Hoffman (*In re* Western Die Casting Co.), 106 B.R. 645, 649 n.3 (Bankr. N.D. Cal. 1989) (holding that Bankruptcy Rule 9011 [identical to Rule 11] does not require inquiry into potential defenses unless the defenses are indisputably valid and plaintiff has knowledge that defendant will raise the defense).

68. *See id.* at 649 n.3 (referring to the "unusual instance" when knowledge of a potential defense would warrant sanctions for a party filing an action).

69. *See* White v. General Motors Corp., 908 F.2d at 682 (citing William J. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1023-24 (1988)). At the time of writing the commentary, Judge Schwarzer was Director of the Federal Judicial Center. It is also interesting to note that Judge Schwarzer was the trial judge *in Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984); *rev'd* 801 F.2d 1531 (9th Cir. 1986); *reh'g en banc denied*, 809 F.2d 584 (9th Cir. 1987). He sanctioned a trial attorney for failing to disclose adverse authority in the jurisdiction, reasoning that the brief violated a duty of candor corollary to the requirement that the brief be warranted by existing law. *See id.* at 129. The Ninth Circuit reversed, finding no duty to "step first into the shoes of opposing counsel to find all potentially contrary authority." 801 F.2d at 1542.

in *White*.[70] The commentary is largely a general discussion of what a lawyer should do to conduct a pre-filing inquiry that is adequate within the meaning of Rule 11. Interestingly, at one point the commentary discusses an adequate inquiry in terms of the elements of one's "claims and defenses," limiting the inquiry to established burdens of pleading.[71] Yet, at another point in his commentary, Judge Schwarzer does state that, to be adequate, a pre-filing inquiry should disclose whether an action is time-barred, thereby extending the inquiry beyond the elements of the party's prima facie case.[72] Nevertheless, there is no authority cited for the statement, nor is there any consideration of whether that approach to Rule 11 would effectuate a reallocation of burdens of pleading. A reasoned consideration of the issue would seem to require such discussion.

III. TO BE OR NOT TO BE ADVERSARIAL, WHAT IS THE SYSTEM?

At the heart of the Fourth Circuit's strict approach in *Brubaker* is the notion that a party should not be allowed to rely upon the mistakes or omissions of her adversary.[73] Therefore, a plaintiff may not file an action without risk of sanctions in the face of a potential affirmative defense even though plaintiff may have no idea whether defendant intends to raise the defense. This application of Rule 11 seeks to remove the adversarial edge from determining whether to file an action. A potential plaintiff deciding whether to file an action is required to anticipate what her opponent will do and assume that it will be done competently and successfully. While this may reflect a less confrontational and more laudable approach to dispute resolution, it causes an imbalance in the present adversarial system. A plaintiff deciding whether to file an action to resolve a dispute must approach the decision outside of an adversarial context. Nevertheless, the action would be filed within an adversarial system. It is difficult to justify why this one aspect of litigation should be, or can be viewed in a non-adversarial fashion, while the rest of the action remains adversarial.

Brubaker arose in the context of a defense of expiration of the

---

70. *In re* Leeds Bldg. Prods., Inc. v. Moore-Handley, Inc., 181 B.R. 1006, 1010 n.5 (Bankr. N.D. Ga. 1995).

71. *See* Schwarzer, *supra* note 69, at 1023 (discussing that a reasonable pre-filing inquiry would, in part, determine whether there existed "available evidence to support the elements of one's claims or defenses").

72. *See id.* at 1020 (discussing that an adequate pre-filing inquiry "would disclose such crucial facts as whether an action is time-barred . . . .").

73. *See supra* notes 41-42 and accompanying text.

statute of limitations. According to the decision, an action can not be filed without risk of sanctions if the limitations period has run.[74] An adversarial imbalance occurs because the defendant is allowed to escape adjudication of liability due to the inadvertence of plaintiff in letting the limitations period expire. The defendant gains from an adversarial advantage while the plaintiff is sanctioned if seeking to take advantage of the exact same sort of adversarial "cat and mouse game." If the dispute were truly to be resolved without adversarial gamesmanship, underlying liability and the attendant equities would be the sole focus of the matter. Yet the system remains one of adversaries and removing that nature from one small aspect creates an imbalance.

In most aspects of litigation, opponents profit from an adversary's mistakes and oversights. Averments in pleadings not specifically denied are deemed admitted.[75] Requests to admit not denied within thirty days are deemed admitted.[76] Claims not filed within the applicable limitations period may be dismissed with prejudice.[77] None of these examples looks to the underlying merits to determine whether the result of the adversarial inadvertence is ultimately justified in a moral or social sense. Instead, a party profits at the adversary's expense. While this approach to dispute resolution may warrant an overhaul, overhauling one small corner and leaving the rest intact destroys whatever balance is sought to be maintained by having the system be adversarial.

Additionally of great interest, is the regard with which the defense of limitations is held. The courts that have addressed the sanctions question in the context of the statute of limitations have not questioned the propriety of a defendant escaping liability merely because of the passage of time. Most curiously, this has occurred in the context of looking for a kinder, gentler, less adversarial approach to filing actions. In terms of a lawyer's ethical obligations, it is not considered unethical to file an action knowing it is time-barred, nor does an attorney have an ethical duty to inform an opposing party during negotiations that the limitations period has run.[78] Most interestingly, raising the defense of

74. *See Brubaker*, 943 F.2d 1363 (4th Cir. 1991).

75. *See* FED. R. CIV. P. 8(d).

76. *See* FED. R. CIV. P. 36(a). Rule 36(a) also states that a limitation period can be shorter or longer than 30 days if the court allows or parties agree in writing.

77. *See infra* notes 139-44 and accompanying text (discussing the somewhat unaccommodating procedural mechanisms available to dismiss untimely claims).

78. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (finding no ethical obligation to disclose to opposing party in pre-filing negotiation that the applicable statute of limitations has run nor to file the action without disclosing such to court or opponent).

the statute of limitations in the face of a known obligation has been historically disfavored from David Hoffman[79] to the Model Rules of Professional Conduct.[80] Yet, the *Brubaker* approach elevates the statute of limitations defense to a near sacrosanct level, making it sanctionable to file an action when the opponent has the potential to raise this somewhat disfavored defense.[81] Additionally troublesome is that *Brubaker* fails to consider that a defendant may choose not to raise the available defense for reasons other than incompetence, ranging from a sense of moral or social responsibility to a desire for public vindication.[82] The threat of sanctions could prevent the action from being filed and deny defendant the opportunity to pursue these objectives.

IV. THE REWRITING OF SUBSTANTIVE LAW BY *BRUBAKER*, AS WELL AS THE "MIDDLE GROUND"

There is, of course, a fair amount of attractiveness to the notion from *Brubaker* that a plaintiff may not, without recourse, file an action whose only chance of success lies in hoping that defendant will err and fail to raise an available defense. Hazard and Hodes argue that if there is no limiting point to the previously stated objections to *Brubaker*, Rule 11 would become meaningless.[83] A plaintiff, they argue, could file any action, however meritless, in the hope that defendant would fail to raise the proper objections.[84] Therefore, though disagreeing with the

---

79. *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 754 (Joseph Neal ed., 2d ed. 1836) (stating, as part of Fifty Resolutions in Regard to Professional Decorum, "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defense than the *legal bar*, he shall never make me a partner in his knavery.").

80. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995) (encouraging a lawyer to render moral, as well as legal advice to a client in determining a course of action to be pursued); *see also,* Kenney Hegland, *Quibbles,* 67 TEX. L. REV. 1491 (1989) (suggesting that a lawyer's ethical obligation extends even farther than the Model Rules and that a lawyer should refuse to assert technical defenses such as the statute of limitations when there is underlying liability).

81. 943 F.2d 1363 (4th Cir. 1991).

82. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (discussing that a defendant may not assert an affirmative defense for reasons "ranging from incompetence to a considered decision"); HAZARD & HODES, *supra* note 3, § 3.1:204-2 (discussing reasons why a defendant might forego the filing of a statute of limitations defense).

83. *See* HAZARD & HODES, *supra* note 3, at 558.4 (discussing that if the holding of *Brubaker* were rejected without a limiting point, that such reasoning would "completely swallow Rule 11").

84. *See id.* (arguing that rejecting *Brubaker* for the sake of preserving the adversarial

Fourth Circuit's result in *Brubaker*, they do agree that a line must be drawn somewhere.[85] The *middle-ground* line of cases have tried to draw such a line by providing for sanctions when an available defense could be considered *obvious*.

The concern of Hazard and Hodes for the "swallow[ing]" of Rule 11 is overstated. A plaintiff could not, as they argue, file "the most bizarre court papers" hoping for the possibility that defendant would err.[86] Any claim filed must meet the standard of well-grounded in fact and warranted by existing law, as well as not having been filed for any improper purpose.[87] It is hard to imagine how "bizarre" claims could meet such requirements. A "bizarre" claim that is lacking in factual support, or lacks an essential element of a prima facie case for which plaintiff has the burden of pleading, would certainly not meet the requirement. A plaintiff could not rely on the argument that perhaps defendant would fail to try to properly dismiss the action to escape sanctions. It is the absence of factual or legal support for plaintiff's claim that exposes the plaintiff to sanctions under Rule 11.

The affirmative defense situation is unique and very different than the situation contemplated by Hazard and Hodes. Plaintiff's underlying claim can meet the requirements of well-grounded in fact and warranted by existing law. It is only the specter of the defense that, if raised by defendant, defeats the claim. There is no defect in the claim itself. What plaintiff hopes for when filing with its fingers crossed is that defendant will not raise a defense for which defendant bears the burden of pleading, not that defendant will fail to oppose a defect in plaintiff's underlying claim that causes it to fail to meet the burdens allocated to plaintiff. Hazard and Hodes fail to recognize that tying Rule 11 obligations to matters which a party has the burden to plead keeps Rule 11 from being rendered meaningless. The reasoning of the *middle-ground* line of cases is deficient for the same reason. But for a lone opinion from a bankruptcy court, the cases have not considered the relationship between burdens of pleading and Rule 11 obligations.[88]

---

system "could justify filing the most bizarre court papers, so long as it remained theoretically possible that the opposition would bungle or waive the objections").

85. *See id.* (disagreeing with the result in *Brubaker* but agreeing that "a line must be drawn" somewhere so that plaintiffs can not escape Rule 11 sanctions by relying on the argument that defendant might err). This argument is identical to that used by the Fourth Circuit to justify the result in *Brubaker*. *See supra* notes 45-46 and accompanying text (discussing the reasoning in *Brubaker*).

86. *See* HAZARD & HODES, *supra* note 3, at 558.4.

87. *See* FED. R. CIV. P. 11(b)(1)-(3).

88. *In re* Leeds Bldg. Prods., Inc., 181 B.R. 1006, 1010 (Bankr. N.D. Ga. 1995)

There is a certain facial appeal to the approach of the *middle-ground* line of cases that imposed sanctions where the defense was "obvious." It does seem to make sense that everyone's time and resources not be wasted by the filing of an action that has no chance of success due to a dispositive affirmative defense. Therefore, the approach of the *middle-ground* would seem to be an appropriate place to draw the line. A plaintiff need not search out every possible defense available to defendant or search out facts that would not be available. At the same time, a plaintiff may not ignore the obvious without repercussions. The difficulty, however, is that the defense that is obvious is not within plaintiff's burden to plead or prove. Sanctioning a plaintiff for filing in the face of even an obvious defense rewrites the substantive law underlying plaintiff's claim by adding elements for which plaintiff is without a burden either to plead or to prove.

This application of Rule 11 would seem to violate the prohibition of the Rules Enabling Act against modification of substantive rights by rules of procedure.[89] It does so by requiring a plaintiff who wishes to avoid sanctions to account for matters outside the substantive elements of plaintiff's prima facie case in pleading and filing the claim.[90] Though Rule 11 has been held to not violate the Rules Enabling Act when its purpose is to deter baseless filings[91] and the affect upon the substantive rights of the plaintiff is "incidental,"[92] in the affirmative defense situation, what occurs is more than merely deterring baseless filings. Instead, by requiring a plaintiff to anticipate defenses in determining whether a claim is well-grounded in fact and warranted by existing law, this application of Rule 11 redefines what is a baseless filing. A claim that would otherwise be both factually and legally sufficient may not be filed without a risk of sanctions if defenses that are outside the prima facie elements of the claim are not considered and accounted for. This is a redefinition of the substance of what constitutes a claim that is

---

(stating that there is no obligation of a party to inquire into defenses where the burden of proof is carried by the opponent).

89. *See* 28 U.S.C. § 2072(b) (1994) (providing that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

90. *See id.*

91. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (rejecting a Rules Enabling Act challenge to Rule 11 and stating "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts").

92. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) (holding that "[r]ules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules").

more than an incidental effect on substance.[93] Instead, it redefines the substance of what is a prima facie case.

Two additional problems remain with requiring a plaintiff to anticipate affirmative defenses to avoid sanctions. First, there is a conflict with the basic requirements of notice pleading of the Federal Rules. A pleading stating a claim need only contain "a short and plain statement of the claim."[94] A plaintiff who chooses to file in the face of a potential affirmative defense that the plaintiff believes does not defeat her claim appears to be required by those courts that have imposed sanctions to somehow account for why the defense is not dispositive of the action.[95] Thus, some form of pleading beyond a short and plain statement of the claim appears to be contemplated, but that is inconsistent with the notion of a claim under the Federal Rules.[96] If somehow not stated as part of the claim, this anticipation of a defense would be inconsistent with what pleadings are allowed. There is no such procedural creature as an anticipation to an affirmative defense.[97] The Federal Rules do not even contemplate a reply to an affirmative defense unless ordered by the court.[98] In situations where a plaintiff does try to plead in anticipation of an affirmative defense, such allegations are either treated as surplusage[99] or are considered as having raised the defense in the event that de-

---

93. *See* Business Guides Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 568 (1991) (Kennedy, J., dissenting) (stating that "[a] rule sanctioning misconduct during the litigation process will often satisfy the Rules Enabling Act because it 'affects only the process of enforcing litigants' rights and not the rights themselves'") (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987)).

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

95. *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 679 (7th Cir. 1990) (mentioning in discussion of imposition of sanctions for filing action in face of known affirmative defense of release of claim that "[t]he original complaint made no mention of signed releases"); *see also* Irvin v. Griffin Corp., 808 F.2d 802, 811 (11th Cir. 1987) (Tjoflat, J. dissenting) (suggesting that counsel "ignored" ethical responsibilities to the court and to adversary by failing to inform them that he intended to avoid anticipated defense of release of claim); Blackwell v. Department of Offender Rehab., 807 F.2d 914 (11th Cir. 1987) (holding that failing to mention the existence of a release that could bar a petition for attorney's fees is sanctionable under Rule 11).

96 *See* Leatherman v. Tarrant County, 507 U.S. 163, 167-68 (1993) (holding that a "heightened" standard for pleading in civil rights cases that requires something beyond a statement of the basic claim impermissibly conflicts with the requirements of notice pleading under the Federal Rules).

97. *See* FED. R. CIV. P. 7(a) (setting forth the pleadings that are allowed and not providing for any form of reply to an affirmative defense but providing that "the court may order a reply to an answer").

98 *See* FED. R. CIV. P. 8(d) (providing that "[a]verments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided").

99 *See, e.g.*, Alcoa S. S. Co. v. Ryan, 211 F.2d 576 (2d Cir. 1954) (refusing to rec-

fendant denies the allegations in a responsive pleading.[100]

Second, if required to disclose information adverse to the client in an anticipated affirmative defense, the lawyer could be considered to have violated obligations of confidentiality owed the client.[101] Because the facts stated in the anticipated defense are not required to be stated in order to set forth a prima facie claim,[102] there is nothing that requires their pleading other than the threat of Rule 11 sanctions.[103] The attorney then must choose between an ethical lapse and the threat of sanctions.

V. A SAFE, BUT UNSATISFACTORY, UNRESOLVED HARBOR

The troublesome issues surrounding sanctions for filing a claim in the face of an affirmative defense are not likely to soon find a resolution in the courts. The advent of the "safe harbor" provision of the 1993 amendments to Rule 11[104] would seem to embrace the "cat and mouse" game decried by *Brubaker*.[105] A defendant who raises an affirmative defense that is dispositive of a claim and who wishes to pursue sanctions must do so only by motion served upon the plaintiff twenty-one days prior to defendant filing the motion with the court.[106] During the twenty-one day period, the plaintiff may dismiss her claim and escape sanction.[107] Courts that have considered sanctions subsequent to the advent of the "safe harbor" provision have reluctantly

---

ognize allegations of an anticipated affirmative defense of release); Hoover v. Roberts, 153 F.2d 726 (8th Cir. 1946) (considering allegations of due care pleaded in anticipation of the affirmative defense of concurrent negligence).

100. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.21 at 293-95 (2d ed. 1993); *but see* CLARK, *supra* note 19, at 251-52 (suggesting that the goals of notice pleading would be better served if plaintiff stated allegations that responded to anticipated defenses in the complaint).

101. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995) (providing that a lawyer shall not reveal information relating to the client without client consent).

102. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) cmt. 5 (1995) (discussing that a lawyer is impliedly authorized to make certain disclosures and, specifically in litigation, to make disclosures admitting facts that cannot properly be disputed).

103. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (discussing that the failure to bring attention to the expiration of the applicable limitations period when filing an action does not violate obligations of candor owed the tribunal nor constitute filing a frivolous claim).

104. *See* FED. R. CIV. P. 11(c)(1)(A) advisory committee's note 1993 amendment (stating that the amendments were, in part, "intended to provide a type of 'safe harbor' against motions under Rule 11").

105. *See* HAZARD & HODES, *supra* note 3, § 3.1:205 (stating that the "safe harbor" provision might be said to provide "official sanction" for the "cat and mouse game").

106. *See* FED. R. CIV. P. 11(c)(1)(A).

107. *See id.*

found that the provision provides an escape hatch for such plaintiff.[108] Yet the safe harbor is merely just that, an escape hatch.[109] The underlying substantive issue is merely avoided and not resolved.

The specter of sanctions does remain for the *fingers-crossed* plaintiff who has sought refuge in the escape hatch of the "safe harbor." The 1993 amendments retained court initiated sanctions commenced sua sponte by a show cause order without the pre-condition of the safe harbor period.[110] A judge feeling that her time, as well as that of the opposing party, has been especially wasted by a claim disposed of by an obvious defense may resort to court initiated sanctions not available to the defendant.[111] Court initiated sanctions, however, are limited to a non-monetary nature or the payment of a penalty to the court and do not include the attorneys' fees or expenses of the opposing party.[112] Nevertheless, a court could additionally consider sanctioning plaintiff's attorney pursuant to 28 U.S.C. § 1927[113] or both plaintiff and/or her attorney pursuant to the courts inherent powers,[114] both of which could include monetary compensation for the aggrieved opponent.[115] Therefore, resolution of the issue remains warranted.

---

108. *See, e.g.*, Pierre v. Inroads, Inc., 858 F. Supp. 769, 775 n.9 (N.D. Ill. 1994) (referring to the "safe harbor" provision as encouraging the "shabby" practice of filing a claim after the expiration of the statute of limitations in hopes that defendant will not raise the defense).

109. Dissatisfaction with the "safe harbor" provision has led to efforts, so far unsuccessful, to eliminate it. *See, e.g.*, The Attorney Accountability Act of 1995, H.R. 988, sec. 4(a)(2)(A), 104th Cong. 1st sess. (1995) (passed by the House on March 7, 1995, and placed on the Senate calendar, March 15, 1995, but no further action was taken by the Senate).

110. FED. R. CIV. P. 11 advisory committee's note (explaining that "the rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative").

111. *See generally* Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 76-77 (1995) (discussing the power of a court to commence sanctions sua sponte without affording a litigant the benefit of the safe harbor provision); Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The Monetary Sanctions for the "Stop-and-Think-Again" Rule*, 1993 BYU L. REV. 879 (1993) (discussing, in part, a new emphasis under the 1993 amendments to Rule 11 for court initiated sanctions in the form of fines issued to further public interests).

112. *See* FED. R. CIV. P. 11(c)(2).

113. 28 U.S.C. § 1927 (1994). For text of statute, see *supra* note 14.

114. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991); *see also*, Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986).

115. *See, e.g.*, Einhorn Yaffee Prescott Architectural & Engineering P.C. v. Turpin, No. 94-CV-830, 1995 U.S. Dist. LEXIS 20546, at *1 (N.D.N.Y. May 12, 1995) (holding that the court did not have power to sanction plaintiff who had withdrawn its complaint during the "safe harbor" period, but imposing sanctions of $93,955.19 against plaintiff and its counsel in equal amounts pursuant to its inherent power and 28 U.S.C. § 1927 (1994)).

VI. BUILDING A BETTER *FINGERS—CROSSED* PLAINTIFF TRAP

Despite the problems of apparent reallocation of pleading burdens associated with requiring a plaintiff to anticipate and account for possible defenses, it remains desirable to find some mechanism to avoid wasting the time and resources of courts and parties. It certainly seems that plaintiffs should not be able to file obviously hopeless actions without any recourse for defendants or courts whose time and resources would have been wasted. Therefore, two concerns should be addressed. First, how to deter such conduct. Second, how to provide as painless an avenue as possible for a defendant to seek disposition of a claim doomed by an obvious defense.

A. A New Pigeon Hole—Drawing the Line Anew

With regard to the first concern, the actions of the *fingers-crossed* plaintiff should be scrutinized at two points in time: filing the action and proceeding with the action after the defense has been raised. As to the time of filing, the difficulty with *Brubaker* (yes to sanctions)[116] and *White* (sometimes sanctions)[117] lies in considering a claim deficient in fact or law when an affirmative defense is present. It is not intellectually sound to treat a claim as deficient when it pleads all elements of a prima facie claim as determined by substantive law and that meets all burdens of pleading allocated to the plaintiff. Therefore, the better approach would be to consider whether the filing is subject to sanctions as having been filed for an improper purpose, rather than as being unwarranted legally or unsupported factually.[118] This approach preserves traditional burdens of pleading, and at the same time provides a deterrence against hopeless filings.

Two conditions should be met before a claim is considered to have been filed for an improper purpose and, therefore, is subject to sanction. The filing of a claim in the face of a dispositive defense would be considered filed for an improper purpose when the two conditions are met. First, all facts necessary to evaluate the merits of the defense would need to be known to the plaintiff. As discussed, affirmative defenses vary greatly in terms of complexity, both factual and legal.[119] Sanctions are not appropriate when the potential defense is factually complex and not all necessary facts are available to plaintiff in order that

116. *See supra* notes 35-47 and accompanying text.
117. *See supra* notes 61-72 and accompanying text.
118. *See* FED. R. CIV. P. 11(b)(1)-(3).
119. *See supra* notes 59-60 and accompanying text.

the merits of the defense can be assessed. To assess sanctions otherwise would force a plaintiff to guess as to the facts and choose between possibly forgoing a viable claim or running the risk of sanction.

Second, plaintiff would have to know that defendant intended to raise the defense in the event the action was filed. The adversarial nature of litigation should not be reordered to the extent that plaintiff must anticipate what defenses are available and assume that the defendant will raise them. Nevertheless, if in pre-filing discussions, or otherwise, defendant has communicated to plaintiff that defendant intends to raise a defense that plaintiff knows to be dispositive, there would be no proper purpose for commencing a hopeless action, and sanctions should follow.[120]

Of course, one could argue that judicial and party resources are wasted by allowing plaintiff to file a claim in the face of dispositive affirmative defenses simply because defendant has not communicated its intention to raise the defense. As discussed, to do otherwise creates an adversarial imbalance.[121] Additionally, allowing plaintiff to file its action in order to see if defendant will choose to raise any available defenses is analogous to the 1993 amendment to Rule 11 allowing contentions to be filed that are lacking in evidentiary support but are "likely to have evidentiary support" after further investigation or discovery.[122] Both situations contemplate plaintiff filing an action that may lack merit dependent upon later information or occurrences. It is only the later obtained information, defendant's raising the defense in one situation, and plaintiff obtaining adverse factual information in the other that makes the claim no longer meritorious. But such later occurrences do not necessarily render the claim subject to sanctions.[123]

Therefore, if both conditions are present, there would be no reason for plaintiff to file a hopeless claim and sanctions would be appropriate

120. The communication need not be very formal. In fact, in an analogous situation the 1993 amendments to Rule 11 contemplate "informal notice . . . in person, or by telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion" at the advent of the "safe harbor" period. FED. R. CIV. P. 11 advisory committee's note 1993 amendment. Nevertheless, it would behoove defendant to make the communication in a form that was documented in the event that plaintiff filed the action after being informed that the defense would be raised and sanctions were later sought.

121. *See supra* notes 73-77 and accompanying text.

122. FED. R. CIV. P. 11(b)(3).

123. *See* FED. R. CIV. P. 11 advisory committee's note 1993 amendment (discussing that a party is under a duty not to persist with a contention if, after reasonable opportunity, the required evidentiary support is not obtained, but that the adverse disposition of a claim containing a specified contention does not necessarily mean that evidentiary support was so lacking as to warrant sanction).

for filing the action for an improper purpose. In the event that plaintiff withdraws its claim within the "safe harbor" when defendant raises the defense and serves a motion for sanctions, plaintiff should not escape sanction altogether. If the two conditions are met, the court should consider whether to raise the specter of sanctions sua sponte.[124] Court initiated sanctions are limited, however, to those of a nonmonetary nature or a penalty to the court.[125] This could leave the defendant without recourse having expended resources in raising a defense it had previously told plaintiff it would raise. This would especially be the case where defendant must respond to plaintiff's complaint within twenty days of service[126] but plaintiff has a safe harbor of twenty-one days within which it can withdraw its claim and escape party initiated sanction.[127] It is here that the court's initiation of sanctions should include sanctions against plaintiff's attorney pursuant to 28 U.S.C. §1927[128] as well as against both plaintiff and its attorney pursuant to the court's inherent powers.[129] So doing would provide defendant with compensation not available under Rule 11 for attorneys' fees and expenses needlessly expended.[130]

While a plaintiff who has filed a claim with fingers firmly crossed, waiting to see whether defendant will fail to raise an affirmative defense due to either choice or inadvertence, should dismiss the claim

---

124. *See, e.g.*, Brubaker v. City of Richmond, 943 F.2d 1363, 1385 (4th Cir. 1991) (stating that the court would have imposed sanctions even if plaintiff had "dropped the claim as soon as the limitations argument was raised"). Under the two-part test proposed herein, sanctions would not have been appropriate unless defendant had informed plaintiff of its intention to raise the defense in the event that an action were filed. That is not clear from the opinion. Nevertheless, plaintiffs apparently did continue to prosecute the action after the defense was raised. *See id.* Therefore, it would have been appropriate to sanction plaintiff for "later advocating" the claim after the defense was raised.

125. *See* FED. R. CIV. P. 11(c)(2).

126. *See* FED. R. CIV. P. 12(a)(1)(A), (B) (providing for an answer to be served within 20 days of service of the complaint unless service has been timely waived upon request pursuant to Rule 4(d)).

127. *See* FED. R. CIV. P. 11(c)(1)(A).

128. *See* Campana v. Muir, 786 F.2d 188 (3d Cir. 1986) (awarding attorneys' fees and costs to defendant in action filed with knowledge of unqualified immunity defense that defeated all claims).

129. *See* Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (citing Acevedo v. Immigration and Naturalization Serv., 538 F.2d 918, 920 (2d Cir. 1976) (stating, "[l]ike an award made pursuant to the court's inherent power, an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay").

130. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (discussing that imposition of sanctions pursuant to the court's inherent powers are appropriate where appropriate sanctions can not be imposed under other provisions, such as Rule 11).

once the affirmative defense has been raised,[131] all may not choose to do so. A plaintiff who persists in the face of an obvious defense should be subject sanctions for "later advocating" the pleading for an "improper purpose."[132] Treating the situation as either lacking in law or fact would suffer from the problem of shifting burdens of pleading as previously discussed, though plaintiff's response to the affirmative defense should be scrutinized to see if it is well-grounded in fact and warranted by law in its own right.[133] Of course, situations involving good faith argument as to the availability of the defense would not warrant sanctions for not dismissing, but persisting in the face of *obvious* defenses is conduct that should be strictly scrutinized under Rule 11. Therefore, the focus should be on what has the *fingers-crossed* plaintiff done once the defense was raised, not whether plaintiff should have anticipated the defense and refrained from filing without knowing whether defendant would raise the defense.[134] Nevertheless, when plaintiff knew that the defense would be raised, sanctions should follow for simply filing the action. With this two-pronged approach, the adversarial nature of litigation is preserved, while the concerns of deterrence and efficiency are served.

This approach would lead to the same result as that reached in those courts that have taken the *middle-ground* of awarding sanctions where the defense was *obvious* and have defined *obvious* to be both factual knowledge sufficient to assess the merits of the affirmative defense, as well as knowledge that defendant will raise the defense.[135] The adversarial nature of litigation would not be reordered in a one-

131. Adding to the burden upon the defendant is a lack of clarity as to how a dispositive affirmative defense may be raised procedurally. *See infra* notes 139-45 and accompanying text (discussing the division in authority as to whether affirmative defenses should be raised by motion to dismiss or summary judgment).

132. FED. R. CIV. P. 11(b), (b)(1).

133. *See supra* notes 83-93 and accompanying text.

134. Courts taking the *middle-ground* approach have failed to recognize this distinction. They have scrutinized plaintiff's response to an affirmative defense to see if it is meritorious, but they have done so to determine whether plaintiff should be sanctioned for filing the action rather than determining whether the response itself is well-grounded in law or fact. Examining whether plaintiff's is non-frivolous for the purpose of determining whether sanctions should lie for filing the action amounts to impermissible shifting of traditional burdens of pleading. *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 682 (7th Cir. 1990) (discussing that an attorney filing a time-barred claim runs the risk of sanctions if the attorney does not have a non-frivolous response to the asserted defense, rather than properly examining whether the response itself warrants sanctions).

135. *See supra* notes 61-68 and accompanying text.

sided fashion,[136] and Rule 11 would not be used to impermissibly alter substantive law by reordering burdens of pleading.[137] Yet the time of courts and defendants would not be wasted by hopeless filings. This represents a more intellectually sound approach. Additionally, this approach does not put plaintiff's lawyer in the ethical dilemma of having a Rule 11 obligation to disclose adverse facts relating to the affirmative defense that may involve a violation of the duty of candor.[138] Limiting sanctions to situations where defendant had informed plaintiff that the defense would be raised would necessarily mean that defendant was in possession of information necessary for the defense from a source independent of plaintiff's lawyer. Therefore, the specter of sanctions would not force plaintiff's lawyer to disclose information that should not be disclosed without permission of the client.

B. A Quick Fix for Defendants

Obviously, a defendant asserting an affirmative defense that will be dispositive of the action seeks dismissal of the action as quickly and efficiently as possible. Unfortunately, the Federal Rules are not entirely accommodating to this concern. An affirmative defense is to be raised in a defendant's responsive pleading leading to disposition by means of summary judgment or proof at trial.[139] Neither is a very efficient prospect, especially for a claim that would appear to be hopeless once the defense is properly asserted. Authority is divided as to whether an affirmative defense may be raised by motion to dismiss for failure to state a claim, a significantly more streamlined method,[140] though the trend appears to be to allow it.[141] The procedural difficulty with utilization of motions to dismiss is that if the facts necessary to establish the affirmative defense are not apparent on the face of plaintiff's claim and are otherwise presented to the court, Rule 12(b) necessitates treating the motion as one for summary judgment,[142] a mechanism that is much less

136. *See supra* notes 73-82 and accompanying text.

137. *See supra* notes 83-93 and accompanying text.

138. *See supra* notes 101-03 and accompanying text.

139. *See* FED. R. CIV. P. 8(c).

140. *See* Rhynette Hurd, *The Propriety of Permitting Affirmative Defenses to be Raised by Motions to Dismiss*, 20 MEM. ST. U. L. REV. 411, 433-47 (1990) (discussing the division in judicial experience with allowing affirmative defenses to be raised by motions to dismiss); *see also id.* at 448-49 (concluding that affirmative defenses should not be allowed to be raised by motions to dismiss due to an unfairness resulting to plaintiffs in not having the opportunity to fully respond).

141. *See* WRIGHT & MILLER, *supra* note 18, at 461-77.

142. *See* FED. R. CIV. P. 12(b) providing in part that:

efficient, especially when local rules add cumbersome requirements.[143] Additionally, summary judgment is only available when there is "no genuine issue of material fact" leaving any disputed affirmative defense for resolution at trial.[144]

For purposes of this discussion, the key is not what procedural mechanism defendant chooses to raise the defense. Rather, the focus is what plaintiff does once defendant raises the defense by whatever mechanism. As discussed, once the defense is raised, plaintiff must dismiss the action or risk sanction for later advocating the pleading for an improper purpose. It is only where the defense is not obviously dispositive of the action that the choice of procedural mechanism is significant. In such situation, however, sanctions would not be warranted for filing the action.

CONCLUSION

While laudable as an effort to deter hopeless filings and preserve court and party resources, treating a claim as legally or factually deficient and subject to Rule 11 sanctions because of an affirmative defense that a defendant may or may not assert constitutes a reordering of the burdens of pleading as defined by the underlying substantive law. The goal of deterrence can be better accomplished by judicially imposed sanctions, not for factual or legal deficiency, but rather as a pleading asserted for an improper purpose. When a defense is *obvious*, that is, when plaintiff has access to all information necessary to assess the merits of the defense that plaintiff knows defendant will assert, there can be no proper reason for filing a claim which has no chance of suc-

---

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

143. For example, in addition to the supporting materials referred to in FED. R. CIV. P. 56(e), a party seeking summary judgment in the Northern District of Illinois must also file a supporting memorandum of law, a statement of uncontested facts that entitle the moving party to a judgment as a matter of law, a description of the parties and a statement of facts that support jurisdiction and venue. *See* RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, LOCAL GENERAL RULE 12M . The party opposing the motion must file its own supporting materials referred to in FED. R. CIV. P. 56(e), a supporting memorandum of law, a response to the movant's statement of uncontested facts and the party's own statement of uncontested facts. *See* RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, LOCAL GENERAL RULE 12N. The ultimate decision would then await a reply brief from the moving party and the court's ruling.

144. FED. R. CIV. P. 56(c).

ceeding and court initiated Rule 11 sanctions should be imposed. Where plaintiff does not know whether the defense will be raised and files the action, sanctions should follow if the plaintiff refuses to immediately dismiss the action once a dispositive affirmative defense is asserted. With this approach, deterrence is accomplished and no one's time is wasted by a plaintiff who refuses to accept the obvious. Most importantly, a rule of procedure is not used to add to the elements of plaintiff's prima facie case, and traditional burdens of pleading are preserved.