

MEMORANDUM

TO: All Attorneys with Adversary Proceedings Assigned to my Docket

FROM: Pat E. Morgenstern-Clarren, United States Bankruptcy Judge,  
Northern District of Ohio

DATE: 30 November 2011

RE: Tips re Affirmative Defenses in Adversary Proceedings

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This is to follow up on a point raised at the recent Bench-Bar Retreat.

Long ago and far away, a defendant answering an adversary proceeding complaint in a bankruptcy case included this “Affirmative Defense”:

The defendant reserves the right to add defenses or to amend this answer if additional information becomes available during discovery.

My impression is that, from that day forward, the vast majority of answers have included the same or similar language. On occasion, I have asked counsel at pretrials where this came from or why they included it. The answer is always: “I don’t know. I just included it because everybody else does.” Although there is general agreement that this “Affirmative Defense” is not actually a defense and that it does not give the defendant any rights in and of itself, no one is willing to be the first to omit it, for fear that harm may follow.

In considering whether this is a valid defense, counsel may want to review:

- Federal Rule of Bankruptcy Procedure 7008(a), which incorporates Federal Rule of Civil Procedure 8(c) *Affirmative Defenses*;
- Federal Rule of Bankruptcy Procedure 7012 *Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings*; and
- Federal Rule of Bankruptcy Procedure 7015 *Amended and Supplemental Pleadings*.

As always, I appreciate your consideration of this issue.