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A NON-FRIVOLOUS CHALLENGE TO FRIVOLOUS DEFENSES

Jan 6, 2021 | Linda S. Mullenix | Add a Comment

Thomas D. Russell, *Frivolous Defenses* (Aug. 17, 2020), available at SSRN.

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From the mid-1980s through the turn of the twenty-first century, tort reform advocates, corporate entities, politicians, and lobbyists have raged about an alleged plague of frivolous lawsuits clogging state and federal dockets. In what perhaps might be characterized as revenge of the plaintiffs' bar, Thomas Russell has turned the table and written the first systematic study of frivolous defenses. This provocative article, which has raised the ire of insurance defense attorneys, is worth reading as a compelling counterpoint to the frivolous lawsuit narrative.

Russell is a torts professor and plaintiffs' attorney in Colorado. Based on his experience representing plaintiffs in auto accident litigation, Russell concluded that "Sometime after the first-year civil procedure course, insurance defense lawyers learn to ignore the rules of civil procedure when filing answers to lawsuits." In handling client cases, insurance defense attorneys repeatedly frustrated Russell with the paucity of their responses to the averments in his complaints. Trial judges frustrated Russell by denying his motions concerning the inadequacy of defense responses.

Russell anchors his discussion in Nora Freeman Engstrom's scholarship on "settlement mills." He notes that Engstrom's scholarship demonstrates how plaintiffs' lawyers participating in settlement mills engage in routinized practices, conduct little factual investigation, and take shortcuts to achieve the quick settlement of small cases. Russell's article crosses from the plaintiffs' side of the docket to examine the work of insurance defense lawyers in auto accident lawsuits who respond by filing boilerplate, largely non-responsive answers to plaintiffs' averments. As titillating as studies of plaintiffs' lawyers may be, additional study of the plaintiffs' side without a correlative look into defense work perpetuates a distorted view of tort litigation. His study of insurance defense practices is intended to provide this balance.

The heart of the paper is an in-depth empirical study of the Colorado state court docket in 2015, focusing on auto accidents occurring between 2012 and 2015. Approximately ¼ of Colorado car crashes result in personal-injury claims, comprising the highest proportion of personal-injury cases in the state. He examined answers in 355 cases, focusing on defense lawyers' responses to plaintiffs' averments in their complaints and cataloguing how defense attorneys' responses departed from the rules of procedure when answering.

The centerpiece of Russell's analysis is compliance—or non-compliance—with Colorado Rules of Civil Procedure 8(b) and (c). Colorado Rule 8(b) directs a defendant to state in short and plain terms their defense to each of the plaintiff's claims by admitting, denying, or indicating a lack of knowledge or information sufficient to form a belief as to the truth of an averment. Like its federal counterpart, Colorado Rule 8(c) permits defendants to assert affirmative defenses.

Russell argues that in replying, defense attorneys fail in their professional obligation to conduct the adequate investigation required by Rule 11 prior to responding, as well as frustrating plaintiffs' ability to obtain useful information to advance their litigation

First, defense lawyers routinely fail to respond to plaintiffs' averments by stating that an averment "calls for a legal conclusion," a response not recognized by, and thus contrary to, the rules. Second, defense attorneys fail to admit information concerning co-defendants, an evasion not authorized by any rule or privilege. Third, defense counsel routinely assert that a "document speaks for itself," a boilerplate response that evades Rule 8's clear path. Finally, Russell documents the boilerplate laundry list of affirmative defenses asserted by insurance company defendants, many of which are clearly unmeritorious or fantastical.

Russell's hero is the late federal Judge Milton Shadur of the Northern District of Illinois, one of few federal judges to balk at defense lawyers' boilerplate responses that evade Rule 8 and its goal of providing meaningful information to plaintiffs. Discussing Rule 8(b) of the Federal Rules of Civil Procedure, the counterpart to the Colorado rule, Judge Shadur insisted that too many lawyers "feel a totally unwarranted need to attempt to be creative by straying from that clear path." He complained of defense attorneys' "pervasive and impermissible flouting of the crystal-clear directive" of the rules for responsive pleadings.

Russell argues that his analysis parallels Engstrom's, insisting that insurance defense attorneys engage in similar mill-style practices. He makes a sweeping indictment: Defense lawyers engage in routinized practices; conduct little or no pre-answer factual investigation; ignore factual investigations that claim agents have conducted; ignore the rules of civil procedure; take purposive, obstructive actions that defeat the fact-finding goals of pleading; and likely delegate legal work to paralegals, thereby violating the Rules of Professional Conduct. In the final analysis, Russell's remix of Engstrom's scholarship is his recommendation to law professors "Don't Let Your Law Students Grow Up to be Insurance Defense Mill Lawyers."

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1. 'A Non-Frivolous Challenge to Frivolous Defenses' | Private Law Theory - Obligations, property, legal theory - […] Thomas D Russell, Frivolous Defenses (Aug 17, 2020), available at SSRN. From the mid-1980s through the turn of the…

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