Ohio Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses

J. Patrick Browne
Cleveland-Marshall College of Law

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OHIO RULE 8(C) AND RELATED RULES:
SOME NOTES ON THE PLEADING OF AFFIRMATIVE DEFENSES

J. PATRICK BROWNE

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*B.S., John Carroll Univ.; M.S.L.S., Case Western Reserve Univ.; J.D., Univ. of Detroit;
Member, Ohio and Michigan Bars; Professor of Law, Cleveland-Marshall College of Law,
Cleveland State University.
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1. INTRODUCTION

The adoption of the Ohio Rules of Civil Procedure on July 1, 1970, ushered in the age of “Pledger’s Lib” for the plaintiff’s attorney. In code days, a pleader had to allege facts which showed a cause of action. Under the rules, however, a statement of claim\(^1\) need only state the bare operative facts which show that the claimant\(^2\) has a claim for relief,\(^3\) and the complaint cannot be dismissed for failure to state such a claim unless it appears beyond doubt from the face of the pleading that the claimant can prove no set of facts entitling him or her to recovery.\(^4\) It will be a rare statement of claim that fails so liberal a test,\(^5\) especially when the court assists the claimant in formulating

\(^{1}\) Under the rules, a claim may be asserted in a complaint, a counterclaim, a cross-claim, or a third-party complaint. Ohio R. Civ. P. 7, 8, 13 and 14.

\(^{2}\) Since a claim may be asserted in a variety of pleadings, see note 1 supra, and since some of these pleadings may be filed by one who is a nominal defendant in the action, Ohio R. Civ. P. 13 and 14, “claimant” is a more accurate designation for the party asserting the claim than is the term “plaintiff.” Accordingly, in the following pages, the party asserting the claim will be designated the “claimant,” whether he or she be the nominal “plaintiff” or “defendant.” To the extent practicable, the pleading asserting the claim will be designated the “statement of claim,” whether that pleading be a complaint, a counterclaim, a cross-claim, or a third-party complaint. Likewise, the party defending against the claim will be designated the “defender,” whether he or she be the “plaintiff” or “defendant.” The pleading containing the defense will be designated the “responsive pleading” or the “statement of defense,” whether it be an answer to the complaint, a reply to the counterclaim, an answer to the cross-claim, or a third-party answer.

\(^{3}\) Ohio R. Civ. P. 8(A).

Under the civil rules, however, the complaint need not necessarily state facts constituting a cause of action. Under Rule 8(A), it shall contain “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.” Now, the statement of a claim showing entitlement to relief is far less than a statement of facts constituting a cause of action. Since such a complete set of facts need not be set forth, the omission of any portion of the facts constituting that cause of action does not render the complaint subject to dismissal as long as a claim is set forth for which relief may be granted. As pointed out in 8 West’s Ohio Practice 288, this statement of a claim cannot be too abbreviated. It must at least state the operative grounds which create a claim, but the relating of facts giving rise to the claim is not necessary. The grounds may be stated in relatively broad general terms and as long as they are sufficient to ultimately lead to the relief claimed, the requirements of the rule are met.

Steps v. Boothby, 40 Ohio App. 2d 197, 198-99, 318 N.E. 2d 535, 536 (3d Dist. 1974). The court stated somewhat less accurately in Slife v. Kundtz Properties, 40 Ohio App. 2d 179, 182, 318 N.E.2d 537, 560 (8th Dist. 1974): “All that the civil rules require is a short, plain statement of the claim that will give the defendant fair notice of the plaintiff’s claim and the grounds upon which it is based.”


\(^{5}\) In Laster v. Bowman, the court said: It is clear that under the liberal requirements of the civil rules few complaints are properly subject to dismissal for failure to state a claim. Where the complaint states any
the various scenarios which he or she might be able to prove from the allegations made.6

This essential change in the basic rules for pleading a statement of claim exemplifies the basic philosophy of the civil rules, a philosophy which transfers the burden of pleading from the claimant to the defender. In accordance with this philosophy, the general denial has been all but abolished,7 and each distinct averment in the statement of claim must now generally be met with a specific admission, a specific denial, or a specific denial for want of knowledge or information sufficient to form a belief as to the truth of the averment.8 In such manner is the obligation of specificity in pleading transferred from the claimant to the defender.

facts which if proven would entitle the pleader to relief as a matter of law the motion to dismiss should be denied. 52 Ohio App. 2d 379, 390, 370 N.E.2d 767, 774 (8th Dist. 1977). In Slife v. Kundtz Properties, 40 Ohio App. 2d 179, 182, 318 N.E.2d 557, 560 (8th Dist. 1974), the court said: "Actually few complaints fail to meet the liberal standards of Rule 8 and become subject to dismissal. . . . Moreover, the motion to dismiss is viewed with disfavor and should rarely be granted."

These decisions somewhat overstate the case. Generally, a pleading will fail to state a claim upon which relief can be granted for one or more of three distinct reasons: (1) it fails to allege sufficient operative facts, see, e.g., Berisford v. Sells, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975) (failure to allege proximate cause); (2) it alleges facts which establish a defense which bars recovery on the claim, see, e.g., Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974) (appearance of the bar of the statute of limitations from facts alleged in the complaint); or (3) it alleges a claim not cognizable under existing law, see, e.g., Shelton v. Industrial Comm'n, 51 Ohio App. 2d 125, 397 N.E.2d 51 (10th Dist. 1976) (failure to allege a duty to the plaintiff upon which a claim for negligence can be predicated). In the first instance, the rule is fully applicable, and it is error to dismiss the claim if the claimant seeks leave to amend, Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973), or amends as a matter of course when permitted to do so under the provisions of Rule 15(A). If the claimant does not choose to amend, the claim may be dismissed. Berisford v. Sells, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975). In the second instance, the claim must be dismissed unless the claimant can allege facts which defeat the apparent defense, and seeks leave to do so, Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973), or unless the defender fails to properly plead the defense. Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). In the third instance, the claim must be dismissed, Shelton v. Industrial Comm'n, 51 Ohio App. 2d 125, 397 N.E.2d 51 (10th Dist. 1976); El v. State, 48 Ohio App. 2d 290, 297 N.E.2d 690 (10th Dist. 1974); Espy v. Sears, Roebuck & Co., 2 Ohio Op. 3d 91 (10th Dist. Ct. App. 1976). Thus, the motion to dismiss is not quite as worthless as Laster and Slife would imply.

See, e.g., Espy v. Sears, Roebuck & Co., 2 Ohio Op. 3d 91 (10 Dist. Ct. App. 1976). Ironically, the plaintiff, despite the court's help, was unable to state a claim upon which relief could be granted: "regardless of what theory of law appellant pursues or what set of facts he might prove from the allegations of the complaint, on the face of the complaint there is an absolute defense to any possible recovery." Id. at 93.

In pertinent part, Ohio R. Civ. P. 8(B) provides that when "the pleader intends in good faith to controvert all the averments of the preceding pleading . . . including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11." This language is identical to that of Fed. R. Civ. P. 8(b), of which it has been stated:

It can not be said that Rule 8(b) forbids, in all circumstances, the employment of a general denial in the making of an answer. Quite the contrary, the rule expressly permits such a denial, but it also prescribes the sole condition under which it may be tendered.

That condition is present when, but only when, the pleader intends in good faith to controvert "all the averments of the preceding pleading." United States v. Long, 10 F.R.D. 443, 444-45 (D. Neb. 1950). Since statements of claim are seldom wholly false, it may be said as a practical matter that "[g]eneral denials or the equivalent are no longer permitted under the Federal Rules of Civil Procedure." Gulf Oil Corp. v. Bill's Farm Center, Inc., 52 F.R.D. 114, 118-19 (W.D. Mo. 1970).

Ohio R. Civ. P. 8(B). However, the same rule provides that if the bulk of the averments are
In like fashion, the rules have transferred the burden of pleading legal capacity and the performance of conditions precedent. In the days of the code, the claimant was required to allege facts which demonstrated that he or she had the legal capacity to sue and that the defender had the legal capacity to be sued. Under the rules, legal capacity is presumed; if capacity is to be put in issue, the defender must do so by a "specific negative averment" buttressed with "such supporting particulars as are peculiarly within the pleader's knowledge." Thus, the rules have converted an essential element of the statement of claim into an affirmative defense which must be raised by the defender.

As a general rule, it may be said that if an affirmative defense is not timely and properly pleaded, it is waived; if that waiver is not made with the informed consent of the client, it will expose the defending attorney to a charge of malpractice. Thus, the defending attorney must be able to recognize an affirmative defense, must know how to properly plead it, and must be aware of the various means of recovering from an unintended waiver of that defense. The following pages will present some introductory notes to each of these topics.

false, the defender "may generally deny all the averments except such designated averments or paragraphs as he expressly admits." Id. Thus, a qualified general denial with specifically noted exceptions may be employed in some instances.

*Ohio R. Civ. P. 9(A).*

*Id.*

*Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974).*

*Id.*

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7-7.

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

*Id.* at EC 7-8. These Ethical Considerations condition Disciplinary Rule DR 7-101 (B), which states: "In his representation of a client, a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." *Id.* at DR 7-101 (B).

*See R. Malley & V. Levit, Legal Malpractice § 333, at 414 (1977)*, which states that "[t]he most commonly asserted error [of the defense attorney] is the failure to plead a defense." *See also Ohio Rev. Code Ann. § 4705.06 (Page 1977)*, providing in pertinent part:

If a suit is dismissed for the nonattendance of an attorney at law practicing in any court of record, it shall be at his costs, if he has not a just and reasonable excuse. He shall be liable for all damages his client sustains by such dismissal, or any other neglect of his duty, to be recovered in any court of records (emphasis added).

*R. Malley & V. Levit, Legal Malpractice § 333, at 415 (1977)*, which states that "[t]he [defense] attorney may be negligent because he failed to recognize the defense."
II. RECOGNIZING THE AFFIRMATIVE DEFENSE

Recognition is simplified somewhat by Rule 8(C), which lists the more common affirmative defenses and which may be used as a checklist in the preparation of the defense. However, it is the first resort, not the last. As noted above, Rule 9 creates an affirmative defense — lack of legal capacity to sue or be sued — which is not included in Rule 8(C). Further, the list of affirmative defenses in Rule 8(C) closes with the phrase "and any other matter constituting an avoidance or affirmative defense," which clearly implies the existence of other affirmative defenses not included in the rule. Therefore, the defending attorney cannot rest with Rule 8(C), but must look elsewhere if all possibilities are to be exhausted.

One can begin by examining the case law. A search of the post-rule decisions of the Ohio courts reveals the following additional affirmative defenses: (1) charitable immunity from tort liability, (2) failure to exhaust administrative remedies, (3) immunity under the Workers' Compensation Act, (4) self-defense, and (5) sovereign immunity, or lack of statutory consent to be sued. Pre-rule cases will add to the list.

A search of the case law, however, is apt to be more exhausting than exhaustive, especially now that unreported appellate decisions are treated as binding precedent within the deciding court's appellate district. Large law

15 Ohio R. Civ. P. 8(C). In the order listed, the defenses are: (1) accord and satisfaction, (2) arbitration and award, (3) assumption of risk, (4) contributory negligence, (5) discharge in bankruptcy, (6) duress, (7) estoppel, (8) failure of consideration, (9) want of consideration for a negotiable instrument, (10) fraud, (11) illegality, (12) injury by fellow servant, (13) laches, (14) license, (15) payment, (16) release, (17) res judicata, (18) statute of frauds, (19) statute of limitations, and (20) waiver.

16 See text accompanying notes 9 and 10 supra.


22 See 43 OHIO JUN. 2d Pleading § 137 (1960); cf. 43 OHIO JUN. 2d Pleading § 167 (rev. 1973). Note, however, that the revised edition of the article on pleading is not entirely reliable. See, e.g., 43 OHIO JUN. 2d Pleading § 167, at 254 (rev. 1973), stating:

Therefore, the Civil Rules embrace in the requirement that affirmative defenses be pleaded all the defenses which had to be pleaded specially under prior law, and add to this category the defense of contributory negligence and assumption of risk. Thus, among the defenses which now must be, and previously had to be, pleaded affirmatively or specially, and which are waived if not so pleaded, are... misjoinder of parties...

Ohio R. Civ. P. 21 states: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." (Emphasis added.) Thus, misjoinder of parties is an objection rather than a defense; as such it cannot be included in the responsive pleading, but must be raised by motion. While it is true that this objection may be waived if not timely raised by motion, it is not correct to say that it is waived if not pleaded as an affirmative defense.

23 The second paragraph of the syllabus of State v. George, 50 Ohio App. 2d 297, 297, 362
firms have the personnel and resources to cope with developments such as
this, but the smaller firms and the sole practitioner are at a tremendous
disadvantage; unless such attorneys make regular trips to the courthouse for
a perusal of the appellate court’s files, they are not likely to discover such
opinions until it is too late.

What is needed, then, is a simple, certain test by which an affirmative
defense can be identified. Unfortunately, no such test exists. However, the
closing clause of Rule 8(C) — “and any other matter constituting an avoidance
or affirmative defense” — provides a two-pronged test that is reasonably
accurate.

A. The Plea in Bar

An affirmative defense under the civil rules is one which avoids the claim.

N.E.2d 1223, 1225 (10th Dist. 1975) (syllabus para. no. 2), states that “[t]he unreported opinions of a Court of Appeals may be cited by it as authority in support of its decision, and those within its authority are considered to be on notice of the legal determinations within such opinions.”

The same case suggests, however, that an unreported decision is like a good cheese — its precedential value ripens with age. An unreported decision less than seven days old is like a new Camembert; it’s not worth very much as binding precedent. Id. at 312, 362 N.E.2d 1233. What the George case does not tell us, though, is how long the decision must age before it savors of that fair notice so desired by that demanding gourmet, Due Process.


Of course, the court’s files are not the sole source of information. In State v. George, 50 Ohio App. 2d 297, 310, 362 N.E.2d 1223, 1231-32 (10th Dist. 1975), the court noted:

In this district [10th Appellate District, Franklin County], it had been the practice for a good many years to provide a copy of all decisions to the law library, as well as to counsel for the parties. Starting in 1967, the decisions were bound quarterly, and indexed by case style, with copies made available to the court. Beginning in 1969, copies of the decisions in all cases were distributed to counsel for the parties, and to the Supreme Court Reporter, Supreme Court law library, Municipal Court, Common Pleas Court, county law library, clerk of courts, defense lawyers’ association, trial lawyers’ association, county prosecutor, police department’s legal bureau, the news media, and the legal aid and defender society.

Further, since 1969, at the end of each quarter, all of the decisions of this court are bound and indexed by subject matter and by section of law or rule of practice involved. Copies of such volumes are available in the court, and copies are made available to any law office or practicing attorney who desires them for only the cost of their printing. Unfortunately, the “cost of their printing” may be more than the average practitioner can reasonably bear. Indeed, as long ago as 1935, it was noted that services such as these were beyond the financial means of most attorneys. See Note, The Unofficially Reported Case as Authority, 1 Ohio St. L. J. 135 (1935).

Some additional assistance in discovering these unreported opinions can be had from the new feature of the Ohio Bar entitled “Ohio Courts of Appeals Opinion Summaries,” which first appeared in 51 Ohio B. 817 (July 3, 1978). Valuable as they are, these summaries are not as detailed as one would wish, and some are simply enigmatic. Further, unless the issues of the Ohio Bar are preserved and indexed, this source of information will vanish when the separate issues are discarded upon the appearance of the bound volume containing the text of the officially reported decisions from the weekly magazines.

Occasional assistance may also be obtained from such features as Stanley B. Kent’s “Law Clerks Corner,” which appears regularly in the Cleveland Bar Journal, “Eighth Circuit Shorts,” which appears in the Cuyahoga County Bar Association’s Law & Fact; “Exegesis,” a case analysis prepared by the editorial board of the Cleveland State Law Review, a regular feature of Law & Fact, which occasionally treats unreported decisions.

In any event, these secondary sources cannot note all of the unreported decisions, and not all appellate courts go to the same pains as the Tenth District Court of Appeals in Franklin County. Thus, a trip to the courthouse is the only sure way of discovering the most recent authority.
Thus, the first hallmark of a true affirmative defense is its similarity to the common law plea in bar; that is, the defense is one which defeats the claim itself and will bar all recovery on that claim in the present action or in some future action. In the words of Professor Shipman, it is a defense "which shows some ground for barring or defeating the action on the merits."26

A denial of the material allegations of the statement of claim will accomplish the same result — a judgment for the defender on the merits. A denial, however, is not the affirmative defense contemplated by the civil rules. How, then, does this test help in identifying the affirmative defense?

Pleas in bar are of two types: (1) pleas which deny the material allegations of the statement of claim, and (2) pleas which admit the truth of those averments, but allege new facts which destroy their legal effect. Shipman states:

> It follows from the nature and object of the plea in bar that it must generally deny all or some essential part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse and pleas by way of confession and avoidance.27

In a note to that passage, he adds: "Pleas by way of confession and avoidance are divided into pleas by way of justification and excuse, and pleas by way of discharge. They are also referred to as affirmative defenses or defenses of new matter."28 Affirmative defenses, then, are of the second type of plea in bar; they are pleas by way of confession and avoidance.

Thus, there are three touchstones to this test for a true affirmative defense in the classical sense: the defense must (1) allege new matter, (2) which confesses the claim, and (3) avoids its legal effect.29

26 B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 11, at 30 (3d ed. 1923) [hereinafter SHIPMAN]. These statements, of course, assume that the statement of claim sets forth all of the relevant facts which the claimant can muster. In any given case, a claimant may be able to plead additional facts which overcome the defense. See, e.g., Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973). The original complaint was premised on the fraud of the defendant, but it was apparent from the face of that complaint that the action had not been brought within four years of the commission of the alleged fraud; thus, the defense of the statute of limitations appeared to lie. The plaintiff, however, tendered an amended complaint which alleged facts that indicated that the action was brought within four years of the discovery of the fraud. If true, the additional facts took the case out of the statute of limitations and overcame the defense. For test purposes, however, the quality of the defense is measured against the statement of claim to which it is directed; no account is taken of the speculative possibility that the claimant may be able to allege additional facts. Put another way, the defense is a plea in bar if a judgment for the defender on that defense would be res judicata of the claim as stated in the pleading to which the defense is directed.

27 SHIPMAN, supra note 26, § 11, at 30 (3d ed. 1923) (footnote omitted).

28 Id. at n.21.

29 4 ANDERSON'S OHIO CIVIL PRACTICE WITH FORMS § 153.08, at 412 (1975), stating: "Throughout the periods of common law pleading, code pleading, and rules pleading, the affirmative defense has performed the same basic functions; the affirmative defense 'confesses,' 'avoids' and raises 'new matter.'"
1. **New Matter...**

a. New Matter Defined

Both the confession and the avoidance are the logical consequence of the new matter, and the meaning of "new matter" thus becomes the key to the test. Judge Neff's opinion in *Corrigan v. Rockefeller* is the definitive Ohio analysis of the term, and much that is said in the following paragraphs is drawn from that opinion.

Judge Neff's analysis was premised on statutory language which prescribed the content of an answer. At the time of this opinion that language appeared as section 5070 of the Revised Statutes of 1880 and read as follows:

The answer shall contain —
1. A general or specific denial of each material allegation of the petition controverted by the defendant.
2. A statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary and concise language.

This provision, in substantially the same language, first appeared as section 92 of the Code of Civil Procedure (1853), and, with some minor cosmetic amendments, remained essentially the same until it was superseded by Rules 1978.

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30 Corrigan v. Rockefeller, 5 Ohio N.P. 338 (C.P. Cuyahoga County 1898).
31 Id.
32 51 LAWS OF OHIO 57, 72 (1853) and REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF CIVIL PROCEDURE 62 (1853), setting forth the provision as follows:
The answer shall contain —
1. A general or specific denial of each material allegation of the petition controverted by the defendant;
2. A statement of any new matter constituting a defense, counterclaim, or set-off, in ordinary and concise language and without repetition.

33 Section 5070 of the Revised Statutes of 1880 dropped the phrase "and without repetition" from subsection 2 of the original enactment. The Revised Statutes of 1880 were the product of the Commission to Consolidate the Statute Law of Ohio, which began its work pursuant to the Act of March 27, 1875, 72 LAWS OF OHIO 87 (1875). That portion of the Commission's work which contained Section 5070 was presented to the First Session of the 63d General Assembly, and adopted by it, in 1878. 75 LAWS OF OHIO 597, 620 (1878). With some minor exceptions, the balance of the work was adopted on June 20, 1879, with an effective date of January 1, 1880.

Section 5070 was renumbered 5066 in 1900, and a new subsection was added, which read: "3. When a defendant seeks affirmative relief therein, a demand for the relief to which he supposes himself entitled." 94 LAWS OF OHIO 268, 280 (1900).

With the adoption of the General Code of Ohio in 1910, this section became Section 11314, General Code, and subsections 2 and 3 were amended to read:
2. A statement in ordinary and concise language of new matter constituting a defense, counterclaim or setoff;
3. When a defendant seeks affirmative relief therein, a demand for such relief.

Like its predecessor of 1880, the General Code of 1910 was the product of a Commission to Revise and Consolidate the Statute Laws of Ohio. 98 LAWS OF OHIO 221 (1906). The Commission was appointed by the Governor on December 11, 1906, and reported its work to the 78th General Assembly on January 3, 1910. On February 14th of that year, the General Assembly enacted the revision as the General Code, and the Governor approved the legislation the following day. See 1 OHIO GEN. CODE ANN. vii-xiv (Page & Adams 1912). (Neither the Act adopting the Revised Statutes of 1880 nor the Act adopting the General Code of 1910 are found in the printed session laws of the 63d or 78th General Assemblies. See volumes 76 and 101, LAWS OF OHIO.)

In 1947, subsection 2 was again amended to substitute "or counterclaim" for the words "counterclaim or set-off," so that the subsection read: "2. A statement in ordinary and concise..."
7(A), 8(B), 8(C), and 13(A) through (F) on July 1, 1970. The traditional concept and meaning of "new matter," however, has been carried over into the civil rules, even though the statutory language embracing that phrase has been repealed.

After quoting section 5070 of the Revised Statutes of 1880, Judge Neff says of new matter:

"[The words 'new matter constituting a defense'] manifestly imply something not embraced under the first subdivision, relating to denials, general and specific.

Nothing can be new matter within the meaning of this section which amounts to a mere traverse of the averments of the plaintiff's petition. New matter must, by the most inexorable necessity of logic, be something additional to what would be the subject of a traverse.

What is this something additional to the subject of traverse or denial which is introduced in our code? It is simply confession and avoidance as understood at common law. It must be in the nature of confession, otherwise subdivision No. 2 would not and could not be differentiated from subdivision No. 1 relating to denials. By the same logical necessity, the term 'new matter' must include matter in avoidance, else confession without avoidance would constitute no defense, and would ex vi termini entitle plaintiff to judgment on the pleadings."

That is the general doctrine. It is apparent from the cases and the language of new matter constituting a defense or counterclaim." 122 LAWS OF OHIO 676 (1947).

It was in this form that the statute passed into the Ohio Revised Code in 1953, becoming Section 2309.13, and reading as follows:

The answer shall contain:

(A) A general or specific denial of each material allegation of the petition controverted by the defendant;

(B) A statement in ordinary and concise language of new matter constituting a defense or counterclaim;

(C) When a defendant seeks affirmative relief therein, a demand for such relief.


See note 32 supra for the text of the various amendments and the final form of the statute as Section 2309.13, Ohio Revised Code.

Although Section 2309.13 was probably repealed by implication on July 1, 1970, because of the provisions of the "conflicts clause" of OHIO CONST. art. 4, § 5(B), it was not formally repealed until July 1, 1971. Amended House Bill 1201, 133 LAWS OF OHIO 3017 (1970).

See OHIO JUR. 2D Pleading § 145 (rev. 1973), stating:

The term "new matter" has long been used to refer to the averments set out in affirmative defenses, and while the term does not appear in the Civil Rules, such rules do not affect the meaning of the term, or the type of averments in an answer to which it may properly be applied.

See also J. MCCORMAC, OHIO CIVIL RULES PRACTICE WITH FORMS § 7.35, at 166 (1970) [hereinafter MCCORMAC] stating: "The distinction is basically the same as was previously required under Ohio statute. The pleader must determine whether his defense is merely a denial of allegations in plaintiff's complaint or whether it constitutes new matter setting up a confession and avoidance defense." Finally, see 4 ANDERSON'S OHIO CIVIL PRACTICE WITH FORMS § 153.08 (1975), quoted at note 28 supra.

Note that Judge Neff's opinion was given orally from the bench and that he apparently substituted the word "precise" for the word "concise" in his reading of subsection 2 of the statute. Corrigan v. Rockefeller, 5 Ohio N.P. 338, 343 (C.P. Cuyahoga County 1898). This inadvertent substitution, however, does not affect the interpretation of the subsection.
texts selected from the various commentators on the code, that the term 'new matter' includes matter in confession and avoidance and involves matter extrinsic to the matter set up in plaintiff's petition. Confession and avoidance admits directly or impliedly the truth of the allegations constituting plaintiff's cause of action.\textsuperscript{38}

To begin with, then, “new matter” is an allegation of fact. The term “fact” must be understood in the rules sense of the word, not in the code sense. Under the codes, nice distinctions were drawn between evidentiary facts, ultimate facts, and conclusions of law; under the rules, however, a “fact” is a statement which informs one’s opponent of the operative grounds upon which one’s position is based and which formulates in a simple, concise, and direct manner the issue to be resolved by the trial court.\textsuperscript{39} Thus, under the codes, an allegation that the claimant was guilty of contributory negligence would be a conclusion of law;\textsuperscript{40} under the rules, it is an allegation of “operative fact.”\textsuperscript{41}

Second, the allegations of fact comprising the new matter must be allegations of fact extrinsic to the statement of claim; that is, the facts must be “new” in the sense that they are not already alleged in the statement of claim. If the facts upon which the defense is based are contained in the statement of claim, either as essential elements thereof or in anticipation of the defense being pleaded, an affirmative defense is not required; it is sufficient for the defendant simply to admit or deny those facts, as the manner of their pleading should require.\textsuperscript{42} Thus, if a claimant alleges that the defender was guilty of negligence and that he, the claimant, was free of contributory negligence, the defendant need not plead contributory negligence as an affirmative defense; that issue will be raised by the defender’s denial of the allegation that the claimant was free of contributory negligence.\textsuperscript{43}

\textsuperscript{38} Id. at 346. See also C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 94, at 598 (2d ed. 1947) [hereinafter CLARK] which states:

The code provision for the pleading of new matter obviously contemplates this as a different plea from the denials. Such new matter will consist of affirmative allegations relied on by the defendant to bar a recovery by the plaintiff. Hence it corresponds to the plea in confession and avoidance of the common law.


\textsuperscript{40} McDonald v. Haught, 10 Ohio St. 2d 43, 225 N.E.2d 235 (1967).

\textsuperscript{41} American Motors Ins. Co. v. Napoli, 166 F.2d 24 (5th Cir. 1948).

\textsuperscript{42} Corrigan v. Rockefeller, 5 Ohio N.P. 338, 346-49 (C.P. Cuyahoga County 1898).

\textsuperscript{43} CLARK, supra note 38, § 96, at 606 (2d ed. 1947), stating that “[t]he rule generally stated is that, where a denial of allegations of the complaint will raise the particular issue, new matter is not necessary; but, where the defense in question is consistent with such allegations, it must be affirmatively pleaded.” Judge Clark later notes that, “[i]f a particular issue may be raised by a denial, an affirmative defense is not necessary, and is usually viewed as objectionable. . . .” Id. at 607.

But see 4 ANDERSON'S OHIO CIVIL PRACTICE WITH FORMS § 153.08, at 417 (1975), where it is said:

“[i]f a plaintiff anticipates an affirmative defense, as where he unnecessarily pleads freedom from contributory negligence, the unnecessary allegation should be treated as mere surplusage and should be ignored.”

Ignoring the allegation, whether it be surplusage or not, is far too dangerous a course to take. Ohio R. Civ. P. 8(E)(1) provides: “Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.” Ohio R. Civ. P. 8(D) states in material part: “Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” By
The new matter must be “new” not only in the sense that the facts are not already alleged in the statement of claim, but also in the sense that they could not logically be inferred from a denial of some or all of the facts alleged in the statement of claim. In other words, the matter is not “new” if it is consistent with a denial of the allegations in the statement of claim and could be placed in evidence in support of that denial. Suppose, for example, that claimant Construing these two rules together, a trial court might deem the allegation to be other than surplusage and hold that the failure to deny it amounts to an admission that the claimant was free of contributory negligence.

Judge Clark suggests the better answer: “Where, however, the plaintiff has anticipated a defense by allegations in his complaint, a denial should, it seems, put such matter in issue.”

In Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974), the court states that the purpose of an affirmative defense is to inform one’s opponent of the operative grounds of the defense he or she is expected to meet, and to formulate in a simple, concise, and direct manner the issue to be resolved by the trial court. When the claimant anticipates the affirmative defense by allegations in the statement of claim, a simple denial of those allegations will accomplish this purpose as well as the reiteration of those allegations in the responsive pleading. Thus, when read in the light of Ohio R. Civ. P. 1(B) (providing that “[t]hese rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice”), Judge Clark’s code solution is also the better rules solution to the problem of the anticipated defense.

However, Ohio R. Civ. P. 8(C) commands: “In pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence.” If read in isolation, this would preclude a simple denial of the anticipated affirmative defense of contributory negligence or, at best, would require that that affirmative defense be coupled with a denial of those anticipatory allegations. But in the circumstances of our example, it would seem that Rule 1(B) countermands this command and permits the simple denial, as Judge Clark recommends. Given the unexplored state of the Ohio law on the subject, a defender might be somewhat reluctant to take this on faith or to put unwavering trust in Judge Clark’s text. Therefore, when faced with an anticipated affirmative defense, the defender may wish to test the propriety of the claimant’s allegations by moving to strike them from the pleadings under the provisions of Rule 12(F). If the court grants the motion to strike, the defender can interpose the affirmative defense of contributory negligence in his or her response to the amended statement of claim, but if the court overrules the motion to strike, the defender can simply deny the anticipatory allegations in his or her response to the original statement of claim.

In any event, the defender should not simply assume that the court will agree that the allegation is mere surplusage and that no response to it is required. The defender will ignore such an allegation at his or her peril.

See Clark, supra note 38, § 96, at 606, stating that “[t]he rule generally stated is that, where a denial of allegations of the complaint will raise the particular issue, new matter is not necessary; but, where the defense in question is consistent with such allegations, it must be affirmatively pleaded.” See also 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271, at 311-12 (1969) (hereinafter Wright & Miller):

But what criteria are available to guide a pleader when there does not appear to be any controlling precedent available? One standard that has been mentioned for deciding which defenses must be pleaded affirmatively is whether a particular issue arises by logical inference from the allegations of plaintiff’s claim. The theory of this approach is that a simple denial of the allegations in the complaint relating to a necessary or intrinsic element of plaintiff’s claim is sufficient to put those matters in issue and therefore pleading by way of affirmative defense is unnecessary.

G.S.T. v. Avon Lake, 48 Ohio St. 2d 83, 357 N.E.2d 38 (1976); Schreiber v. National Smelting Co., 157 Ohio St. 1, 104 N.E.2d 4 (1952); Taylor v. City of Cincinnati, 143 Ohio St. 428, 55 N.E.2d
alleges that her injuries were caused by the defender’s negligent operation of his automobile. The defender’s response denies that he was negligent and alleges either that the claimant’s own negligence was the sole cause of her injuries or that claimant’s injuries were solely caused by the negligence of some third person. Although the allegation of the claimant’s sole negligence, or the sole negligence of a third party, is “new” in the sense that neither is included in the statement of claim, it is not “new matter.” In both cases, the new allegations are consistent with the denial and either may be logically inferred from that denial or may be introduced in support of it. An actual denial is not required; the test is premised on the logical effect of the defender’s allegations. Thus, the same result would prevail if the defender had answered somewhat as follows: “For his answer to plaintiff’s complaint, defendant avers that plaintiff’s injuries were caused solely by her own negligence,” or “defendant avers that plaintiff’s injuries were caused solely by the negligence of [a third person].” In either case, the defender’s response has the effect of denying the claimant’s allegation that it was the defender’s negligence which was the sole cause of her injury.

724 (1944); Gottesman v. City of Cleveland, 142 Ohio St. 410, 52 N.E.2d 644 (1944); Hrybar v. Metropolitan Life Ins. Co., 140 Ohio St. 437, 45 N.E.2d 114 (1942); Hanna v. Stoll, 112 Ohio St. 344, 147 N.E. 339 (1925); Montanari v. Haworth, 108 Ohio St. 8, 140 N.E. 319 (1923); Glass v. William Heffron Co., 86 Ohio St. 70, 98 N.E. 923 (1912); List & Son Co. v. Chase, 80 Ohio St. 42, 88 N.E. 120 (1909); Barholv. Wright, 45 Ohio St. 177, 12 N.E. 185 (1887); Simmons v. Green, 35 Ohio St. 104 (1878); Ridenour v. Mayo, 29 Ohio St. 138 (1876).

See also CLARK, supra note 38, § 94, at 598 ("[M]atter provable under a denial could not be set up as a defense."); M. GREEN, BASIC CIVIL PROCEDURE 105 (1972) ("As a rule of thumb, any evidence which will not be admissible under a denial must be pleaded as an affirmative defense."); J. MCCORMAC, supra note 35, § 7.35, at 166 ("The pleader must determine whether his defense is merely a denial of allegations in plaintiff’s complaint or whether it constitutes new matter setting up a confession and avoidance defense."); 2A MOORE’S FEDERAL PRACTICE ¶ 8.27[3], at 1851 ("Any matter that does not tend to controvert the opposing party’s prima facie case as determined by applicable substantive law should be pleaded, and is not put in issue by a denial made pursuant to Rule 8(b).") and ¶ 8.27[4], at 1858 (2d ed. 1975) ("[A] true affirmative defense raises matter outside the scope of plaintiff’s prima facie case and such matter is not raised by a negative defense.").

As a general rule, under a denial, a defender may introduce any evidence tending to disprove anything which the claimant is bound in the first instance to prove in order to make out the truth of the matter alleged. The evidence which may be introduced in support of the denial includes affirmative matter which is directly contradictory to and inconsistent with the particular facts which the claimant must prove to make out a case. Ex parte Frank, 30 Ohio N.P. (n.s.) 30 (C.P. Hamilton County 1932). For specific applications of this rule, see the Ohio Supreme Court decisions cited above, the annotations to OHIO REVISED CODE § 2309.13 (Page 1954) (repealed 1971), and the materials collected at 43 OHIO JUR. 2D Pleading §§ 183-84 (rev. 1973).

46 See, e.g., Gottesman v. City of Cleveland, 142 Ohio St. 410, 52 N.E.2d 644 (1944); Hanna v. Stoll, 112 Ohio St. 344, 147 N.E. 339 (1925); Glass v. William Heffron Co., 86 Ohio St. 70, 98 N.E. 923 (1912). Note carefully the distinction between an averment which alleges that claimant’s injuries were due solely to her own negligence and one which alleges that claimant’s own negligence was a contributing cause of her injuries. The former is an argumentative denial; the latter is an affirmative defense of contributory negligence. See the example given in ABA-ALI COMM. ON CONTINUING PROFESSIONAL EDUCATION, CIVIL TRIAL MANUAL 125 (student ed. 1974); but see Glass v. William Heffron Co., 86 Ohio St. 70, 98 N.E. 923 (1912). Although such a defense does not raise the issue of contributory negligence in the pleadings, the evidence introduced by claimant and defender in the trial of the action may raise that issue and either justify or require an instruction on contributory negligence.


48 See cases cited at notes 46 and 47 supra.

49 Whether a “denial” in this form would be good under Rule 8(B) is another question. The
The distinction between new, affirmative matter in support of a denial and the "new matter" required of an affirmative defense, was summarized by the Ninth District Court of Appeals:

[A] defendant, under a denial, should be permitted to prove such facts as go directly to disprove the facts denied, which, although apparently new matter, instead of confessing and avoiding, tend to disprove the facts alleged in the petition. . . . In other words, any affirmative fact that is inconsistent with the facts alleged may be proved under a denial, because the proof of one is the disproof of the other.

On the other hand, evidence of facts which are not inconsistent with the facts alleged in the petition, and do not tend to defeat such facts, but which, when considered in connection with the facts alleged . . . show that the plaintiff has not the right that arises from the facts alleged . . . is incompetent under a denial; it being necessary, in order to make the evidence of such facts admissible, to specifically allege such facts in the answer. In other words, facts that are consistent with the facts alleged, but show nonliability notwithstanding the facts as alleged, constitute new matter; and such facts must be pleaded in order to make the proffered proof of them competent and admissible in evidence. 50

Thus, a defense is not made an affirmative defense merely because it may be proved by an affirmative allegation of "new" facts; the "new" facts must be tested against a hypothetical denial of the statement of claim. If they would be consistent with that denial, and either logically inferable from it or provable under it, they are not "new matter" and need not be alleged in the responsive pleading. 51

The tenor of that rule would seem to require a specific denial rather than an inferred denial. However, in construing the similar Federal Rule 8(b), Professor Moore notes: "Rule 8(b) does not prescribe any exclusive method of denial, such as specific denials of every allegation. The pleader is given freedom to present his denials in any form that is clear." 2A Moore's Federal Practice ¶ 8.21, at 1820 (2d ed. 1975). Professor Wright adds:

Rule 8(b) also must be read in conjunction with Rule 8(e), which makes it clear that in framing an answer a party need not adhere to any technical forms of pleading. As long as the answer gives reasonable notice of those allegations sought to be put in issue, the pleading will be effective as a denial.

5 Wright & Miller, supra note 44, § 1261, at 269. Finally, see Ohio R. Civ. P. 8(F), which provides: "All pleadings shall be so construed as to do substantial justice."

In light of Rules 1(B) and 8(F), inferred denials will be effective as denials if they are of sufficient clarity to give fair notice "of those allegations sought to be put in issue." However, Professor Wright also notes: "Defendant's answer should not contain verbose, argumentative, or redundant material or include evidentiary matters. A gross violation of this standard will result in an order to strike the pleading or part of it pursuant to Rule 12(f)." 5 Wright & Miller, supra note 44, § 1261, at 267-68. Accordingly, while inferred denials such as this may be effective as denials, they are not favored as a method of pleading and should be avoided.


51 Most of the commentators warn, however, that this test is not absolutely reliable because, for one reason or another, the courts have failed to apply it consistently. See Clark, supra note 38, §§ 96-97; M. Green, Basic Civil Procedure 105 (1972); F. James, Jr. & G. Hazard, Jr., Civil Procedure § 4.7 (2d ed. 1977); 5 Wright & Miller, supra note 44, § 1271, at 312-16. Ridenour v. Mayo, 29 Ohio St. 138 (1876), illustrates the judicial tendency to create ad hoc exceptions to the test set out in the text. In his petition, the plaintiff alleged that the defendants had
b. Argumentative Denials Distinguished

If allegations respecting the claimant's own negligence, or the negligence of a third party, being the sole cause of the claimant's injuries, are not "new matter," and therefore not affirmative defenses, what are they? The technical answer depends upon the form in which the defense is pleaded. If the defense is simply an affirmative statement of fact which is inconsistent with averments of the statement of claim, it is an "argumentative denial;" if the defense is an express denial followed by an affirmative statement of fact that is consistent with the denial but inconsistent with the averments in the statement of claim, it is an "explanatory denial." In Ohio practice, both forms of defense may be referred to as "argumentative denials." Thus, any defense which either expressly or impliedly denies the essential elements of the statement of claim, and then "argues" or "explains" the validity of that denial by an affirmative allegation of fact consistent with the denial but inconsistent with the statement of claim, is an argumentative denial.

associated themselves together as bankers under the name "Farmers' Savings Bank" and that, in such associated capacity, they had received the plaintiff's money on a certificate of deposit and had, by their agent, issued the certificate sued upon. The defendants' answer contained two defenses: the first was a general denial; the second admitted that they had associated themselves together as bankers under the name stated, averred that prior to the transaction in question the association was incorporated, that the corporation was doing business under the name of the Farmers' Savings Bank, and that the certificate of deposit sued upon was the corporate contract, agreement, and undertaking of the incorporated association. The question presented was whether the second defense was an improper argumentative denial or a proper affirmative defense of "new matter." The Ohio Supreme Court answered the question as follows:

We are inclined, however, to hold the answer to be sufficient as containing a statement of new matter constituting a defense. It is true, the facts thus pleaded might have been given in evidence under a denial of the facts stated in the petition, and, as a general rule, matters which may be given in evidence under the general issue should not be specially pleaded. To this rule, however, there are some exceptions.

By pleading the facts stated in this answer an issue was tendered, which is much narrower than the general issue or an issue made by a general denial; and the issue thus tendered, no doubt, involved all the facts which were in dispute between the parties. The prime object in pleading is to narrow the controversy between the parties by joining issue only upon such material facts as are really in dispute.

Id. at 145.

32 CLARK, supra note 38, § 92, at 591-92; 2A MOORE'S FEDERAL PRACTICE ¶8.25 (2d ed. 1975); SHIPMAN, supra note 26, § 235; 5 WRIGHT & MILLER, supra note 44, § 1268.

33 43 OHIO JUR. 2d Pleading § 180 (rev. 1973). At the common law, the addition of an express denial was deemed a cure for the "argumentativeness" of the inconsistent affirmative statement of fact. SHIPMAN, supra note 26, § 235, at 409.

34 C. & S. R. Co. v. Ward, 5 Ohio Dec. Reprint 391 (Cincinnati Super. Ct. 1876). In substance, the claimant alleged a breach of contract. The defender denied the breach of the contract pleaded and alleged facts which indicated that the parties had entered into a contract entirely different from the one set out in the statement of claim. With respect to these additional allegations, the Cincinnati Superior Court said:

As a matter of pleading, this averment was simply an argumentative denial. It was an affirmative allegation, stated as though it confessed and avoided the plaintiff's cause of action, and yet the fact averred was not new matter, it was simply a circumstance of evidence which could be offered in support of the denial. In order that evidence may be competent under a denial, it need not be in its own nature negative. Affirmative evidence may be used to contradict the allegations of the petition and may, therefore, be proved to maintain the negative issues raised by the defendant's denial. . . . It was competent, under the general denial, to introduce evidence affirmatively proving the making of a contract differing in its terms from that set forth in the petition, and then, by circumstances, to show that such contract was the only one which the parties had ever made.

Id. at 394-95.
At common law, argumentative denials were bad because the denial had to be inferred.\textsuperscript{55} Under the Ohio code of procedure, they were good as to substance but bad as to form because they contained irrelevant or redundant matter which was productive of confusion and uncertainty.\textsuperscript{56} Under the civil rules, they are likewise good as to substance but, because they may be productive of confusion, they are generally disapproved as to form.\textsuperscript{57} To this last general rule there is one, and in some instances two, clear-cut exceptions. If a claimant avers generally that all conditions precedent have been performed or have occurred, and the defender wishes to take issue with this averment, he or she must "specifically" deny the performance or occurrence of all conditions precedent and support that denial "with particularity;" that is, he or she must allege the facts which establish the nonperformance or non-occurrence of one or more of the conditions precedent.\textsuperscript{58} Likewise, if the

\textsuperscript{55} Shipman, \textit{supra} note 26, \S 235; 5 Wright \& Miller, \textit{supra} note 44, \S 1268.

\textsuperscript{56} See, e.g., C. \& S. R. Co. v. Ward, 5 Ohio Dec. Reprint 391, 395 (Cincinnati Super. Ct. 1876), stating:

The tendency of this mode of pleading could only have been to produce confusion and uncertainty. And it is in this view mainly that we have thought it useful to refer to the subject at such length. The fault is one of form merely. The objection is that the matter was redundant and irrelevant. It would have been stricken out on motion. . . .


In \textit{Ridenour}, the Ohio Supreme Court suggested that, were it not for the exception it there created, the defense would have been demurrable:

We have been in some doubt, whether the facts stated in the "second defense" should be regarded as new matter constituting a defense to the action, or as a statement of evidence whereby the allegations in the petition would be disproved. If the former, a good defense is stated. If the latter, the answer is bad on general demurrer, and the plaintiff should have had judgment on his petition as upon default. 29 Ohio St. at 145. As indicated in note 51 supra, the court decided to treat the matter as an affirmative defense rather than as an argumentative denial.

\textsuperscript{57} In addition to the authorities cited in note 49 supra, see 4 Anderson's \textit{Ohio Civil Practice with Forms} \S 153.04, at 406 (1975); 1 S. Jacoby, \textit{Ohio Civil Practice} 74 (1970); 1 W. Knepper, \textit{Ohio Civil Practice with Forms} \S 3.01(B)(1971); 2A Moore's \textit{Federal Practice} \S 8.25 (2d ed. 1975); 43 Ohio Jur. 2d Pleading \S 180 (rev. 1973); 11 West's \textit{Ohio Practice: Civil Procedure Forms} \S 9.21 comment, at 371 (1973); 5 Wright \& Miller, \textit{supra} note 44, \S 1268.

\textsuperscript{58} Ohio R. Civ. P. 9(C). The provisions of this rule are not entirely new to Ohio practice. Compare:

\textit{OHIO CIVIL RULE 9(C)}: In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

\textit{\S 121, CODE OF CIVIL PROCEDURE, 1853}: In pleading the performance of conditions precedent, it shall be sufficient to state, that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

The original provision, 51 \textit{Laws of Ohio} 76 (1852), was first codified as Section 121, Code of Civil Procedure, 1853; it remained unchanged until its repeal in 1971, passing through the following transitions: Section 5091, Revised Statutes of 1880; Section 11339, General Code of 1910; and Section 2309.37, Ohio Revised Code. Although none of the Code versions required the defender to make his or her denial "specifically and with particularity," the Ohio Supreme Court had from time to time read that requirement into the statute. See Ohio Farmers' \textit{Ins. Co. v. Titus}, 82 Ohio St. 161, 92 N.E. 82 (1910); \textit{see also} Evans v. Warwick, 20 Ohio Misc. 217, 252 N.E.2d 328 (Lima Mun. Ct. 1969).

Rule 9(C) lacks one virtue possessed by its Code predecessors — it does not clearly allocate the burden of proof when the performance or occurrence of a condition precedent is denied...
claimant has affirmatively alleged the legal existence of any party, the
capacity of a party to sue or be sued, or the authority of a party to sue or be
sued in a representative capacity, and the defender wishes to contest these
allegations, he or she must couple the "specific negative averment" with "such
supporting particulars as are peculiarly within the pleader's knowledge."\(^{59}\) In
these instances, at least, the rules not only approve of a defense in the form of
an argumentative denial but also demand it.\(^{60}\)

The principal difference between an argumentative denial and an
affirmative defense lies in the consistency of each with the facts alleged in the
statement of claim. If the affirmative allegations in the responsive pleading are
expressly or impliedly inconsistent with the ultimate facts in the statement of
claim, they constitute an argumentative denial; if those same affirmative
allegations are expressly or impliedly consistent with the ultimate facts in the
statement of claim, they constitute an affirmative defense. To illustrate, in the
second example above, the claimant expressly pleaded capacity to sue or be
sued and thus made it an element of the statement of claim. The equally
express denial of that capacity and the affirmative allegations accompanying
it were "argumentative" because they were inconsistent with that element of
the claim. Suppose, however, that the claimant had relied upon the
presumption in favor of capacity and had not expressly alleged capacity to
sue or be sued. To put capacity in issue, the defender affirmatively would have
had to allege lack of capacity and to support that allegation with "such . . . particulars as are peculiarly within the [defender's] knowledge."\(^{61}\) Allegations of this nature are neither inconsistent with the existence of
a claim nor inconsistent with any expressed elements of the statement of
claim; rather, they are consistent with the existence of the claim, but assert
grounds for defeating a recovery on that claim.\(^{62}\) Accordingly, in this

\(^{59}\) "specifically and with particularity." Under the Code, the burden clearly remained with the
claimant. The rule places the burden of pleading particulars on the defender so one might reasonably suppose the defender would have the burden of proof on the issue. The supposition would generally be true if this were an affirmative defense; but since it is an argumentative denial, the burden should remain with the claimant. Thus, Professor Moore tells us:

The instant rule is merely a codification of past federal practice under the
Conformity Act, in those states whose procedure was governed by the more convenient
code provisions [which permitted a general allegation of the performance of
conditions.] But it should be noted that the Rule is not intended to shift the burden of
proof . . .

\(^{60}\) Neither the Ohio nor Federal Rules Advisory Committee Notes explain the motivation
behind Rule 9(C), but one may speculate that it is the same motivation which spurred the Ohio
Supreme Court to carve out the Ridenour exception to the rules governing affirmative defenses —
the desirability of narrowing the issues for trial. See 2A MOORE'S FEDERAL PRACTICE \$9.04, at 1944
(2d ed. 1975). For the Ridenour exception, see Ridenour v. Mayo, 29 Ohio St. 138 (1876), quoted
in note 51 supra.

\(^{61}\) OHIO R. CIV. P. 9(A).

\(^{62}\) In the language of Berry v. Cleveland Trust Co., 53 Ohio App. 425, 432, 5 N.E. 2d 702, 706
(9th Dist. 1935), these are allegations of
facts which are not inconsistent with the facts alleged in the petition, and do not tend to
defeat such facts, but which, when considered in connection with the facts alleged in the
variation, the defense is an affirmative defense and not an argumentative denial.

2. *Which Confesses* . . .

Consistency with the allegations in the statement of claim is not only the mark of distinction between an argumentative denial and an affirmative defense; it is also the second of the three touchstones in the test for an affirmative defense. In the language of the common law, affirmative allegations in the responsive pleading are new matter amounting to an affirmative defense if they give "color" to, or "confess," the claim by being consistent with its existence; that is, the logical consequence of the consistent new matter is either an express or implied admission of the truth of the claimant's essential averments and a concession that, on the basis of those averments, the claimant has a right to recover.83

3. . . . *And Avoids*

To be a true affirmative defense, the new matter must go beyond simply confessing the existence of a claim; it must also avoid that confession. Judge Neff aptly states, "[b]y the same logical necessity, the term 'new matter' must include matter in avoidance, else confession without avoidance would constitute no defense, and would *ex vi termini* entitle plaintiff to judgment on the pleadings."84 Thus, the third and last touchstone of the test for an affirmative defense is the avoidance of the claim, an avoidance which is accomplished by the allegation of new matter which, if true, bars or defeats the claim on the merits.85

In summary, then, the classical affirmative defense is a plea in bar; that is, it is an affirmative allegation of operative facts which are consistent with the ultimate facts alleged in the statement of claim; which are neither included in the allegations of the statement of claim, logically inferable from a denial of

petition, show that the plaintiff has not the right that arises from the facts alleged in the petition . . . . In other words, [they are] facts that are consistent with the facts alleged, but show nonliability notwithstanding the facts as alleged . . . (emphasis added).

83 Shipman states: "A plea in confession and avoidance must give color; that is, admit the apparent truth of the plaintiff's allegations and give him credit for an apparent or prima facie right of action, which the new matter in the plea destroys. Color may be express or implied." *SHIPMAN, supra* note 26, § 200, at 350.

The second headnote to C. & S. R. Co. v. Ward, 5 Ohio Dec. Reprint 391 (Cincinnati Super. Ct. 1876), states:

New matter consists of facts which, if true, are in law, a defense to the action. This defense, impliedly, admits the truth of the facts stated in the petition, and that, upon these facts, the plaintiff is entitled to recover, and it avoids the effect of these admissions by other facts, or new matter, which goes to show that a right of action, once existing, has been lost or discharged, as by release, accord and satisfaction, payment, performance, the statute of limitations, etc.

The second headnote to Corrigan v. Rockefeller, 5 Ohio N.P. 338 (C.P. Cuyahoga County 1898), states: "Confession and avoidance admit directly or impliedly the truth of the allegations constituting plaintiff's cause of action, but aver other facts which would prevent plaintiff from recovering." Finally, in Leedle v. Christie, 24 Ohio Cir. Dec. 572, 575-76 (5th Cir. Ct. 1912), *aff'd mem.*, 88 Ohio St. 527, 106 N.E. 1065 (1913), the court notes: "This defense impliedly admits the truth of the facts stated in the petition, and that upon those facts the plaintiff is entitled to recover, and it avoids the effect of these statements by the answer or new matter stated therein."

84 *Corrigan v. Rockefeller*, 5 Ohio N.P. 338, 343 (C.P. Cuyahoga County 1898).

85 *SHIPMAN, supra* note 26, § 11; see also the authorities cited at note 63 *supra*.
that statement, nor admissible in evidence to support such a denial; and which, if true, amount to an absolute defense which bars or defeats the claim on the merits.

In theory, only defenses which meet all of these requirements are affirmative defenses. However, the defense of failure to exhaust administrative remedies does not defeat a claim on the merits; at best it defeats the action in which the claim is presented and simply postpones a consideration of the merits. Yet the Ohio Supreme Court has thrice held that such a defense is an affirmative defense and, to paraphrase both the First Vatican Council and Mr. Justice Jackson's famous aphorism, in matters of practice and procedure, the Ohio Supreme Court is infallible because it is supreme. Therefore, failure to exhaust administrative remedies must be an affirmative defense, even though it does not meet all the requirements of the classical test for an affirmative defense. If it is an affirmative defense, there must be a second class of affirmative defense which is not included in the traditional concept of the plea in bar which confesses and avoids.

B. The Plea in Abatement

This brings us to the second prong of the two-pronged test enunciated in the concluding clause of Rule 8(C) — "and any other matter constituting an avoidance or affirmative defense." The existence of the second class is indicated by the disjunctive phrase "or affirmative defense." As the disjunctive "or" implies, it is a class of affirmative defense which does not "avoid" the claim on the merits.

1. Characteristics of Pleas in Abatement

Except for its non-avoiding properties, the characteristics of the second class of affirmative defense are remarkably similar to those of the plea in bar which confesses and avoids. Using the concluding clause of Rule 8(C) as a guide, we may note those characteristics as follows: first, affirmative defenses in the second class are "other matter." They consist of allegations of new matter extrinsic to the allegations of the statement of claim, allegations of operative facts which are not included in the statement of claim. Second, because the matter must be "new," the content of these allegations must be neither logically inferable from a denial of the statement of claim nor

66 In Driscoll v. Austintown Assoc., 42 Ohio St. 2d 263, 276, 328 N.E. 2d 395, 404 (1975), the court stated: "Failure to exhaust administrative remedies is an affirmative defense which must be timely asserted in an action or it is waived. Civ. R. 8(C) and 12(H)." In Cannon v. Perk, 46 Ohio St. 2d 301, 309-10, 348 N.E.2d 342, 348 (1976), the court quoted the above passage from Driscoll, and said: "The record before this court does not disclose timely assertion by the appellants of the affirmative defense of failure to exhaust administrative remedies. Therefore, pursuant to Driscoll, that defense is no longer available to appellants." Finally, in G.S.T. v. Avon Lake, 48 Ohio St. 2d 63, 65, 357 N.E.2d 38, 40 (1976), the court noted:
The failure-to-exhaust-administrative-remedies doctrine is a court-made rule of judicial economy which can be asserted as an "affirmative defense" to an action by a landowner for declaratory relief. As an affirmative defense, it can be waived if it is not "timely asserted." Driscoll v. Austintown Associates, supra, at page 276.

67 It may also be considered infallible in matters of practice and procedure because of Ohio Const. art. 4, § 5(B), which stipulates that "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state." Although this provision is primarily concerned with procedural rules such as the civil and appellate rules, it must necessarily include supreme court decisions which define proper practice and procedure.

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admissible in evidence in support of such a denial. 68 68 See, e.g., G.S.T. v. Avon Lake, 48 Ohio St. 2d 63, 65, 357 N.E.2d 38, 40 (1976). In the circumstances of G.S.T., the proper administrative remedy available to the appellant would have been a request for a building permit or a variance from Avon Lake's zoning regulations. Appellant had not made such a request before filing suit for a declaratory judgment as to the constitutionality of those zoning regulations and, accordingly, did not plead the making of such a request. One of the questions presented to the supreme court was whether the appellant's suit for declaratory judgment was barred by the appellant's failure to exhaust this administrative remedy; the answer to this question, in turn, depended upon whether the appellee had properly pleaded the defense of failure to exhaust administrative remedies. Appellee conceded that it had not expressly pleaded such a defense, but claimed it had impliedly done so:

Appellee urges, however, that its "general denial" of appellant's allegations about attempting to obtain rezoning has preserved the affirmative defense of failure to exhaust administrative remedies. That argument is without merit because rezoning is a legislative remedy. Therefore, pursuant to [Driscoll v. Austintown Associates, 42 Ohio St. 2d 263, 328 N.E.2d 395 (1975)], the defense of failure to exhaust administrative remedies is not available to the appellee (emphasis added).

Thus, the defense of failure to exhaust administrative remedies could not logically be inferred from a denial of the allegations of appellant's complaint for a declaratory judgment: the defense of failure to exhaust administrative remedies was "new matter" which had to be affirmatively pleaded. Indeed, as we shall see below, the reason why defenses in this second class must be "affirmatively" pleaded is because their existence is not deducible from a denial of the allegations in the statement of claim; the operative facts comprising the defenses are not logically inferable from such a denial.

69 The defense of failure to state a claim upon which relief can be granted — a defense which generally falls within this class of affirmative defense — may be an exception to this rule in the right circumstances. Indeed, the defense of failure to state a claim upon which relief can be granted is an affirmative defense that may fall within either class, depending upon the ground on which it is premised.

69 See, e.g., G.S.T. v. Avon Lake, 48 Ohio St. 2d 63, 65, 357 N.E.2d 38, 40 (1976). In the circumstances of G.S.T., the proper administrative remedy available to the appellant would have been a request for a building permit or a variance from Avon Lake's zoning regulations. Appellant had not made such a request before filing suit for a declaratory judgment as to the constitutionality of those zoning regulations and, accordingly, did not plead the making of such a request. One of the questions presented to the supreme court was whether the appellant's suit for declaratory judgment was barred by the appellant's failure to exhaust this administrative remedy; the answer to this question, in turn, depended upon whether the appellee had properly pleaded the defense of failure to exhaust administrative remedies. Appellee conceded that it had not expressly pleaded such a defense, but claimed it had impliedly done so:

Appellee urges, however, that its "general denial" of appellant's allegations about attempting to obtain rezoning has preserved the affirmative defense of failure to exhaust administrative remedies. That argument is without merit because rezoning is a legislative remedy. Therefore, pursuant to [Driscoll v. Austintown Associates, 42 Ohio St. 2d 263, 328 N.E.2d 395 (1975)], the defense of failure to exhaust administrative remedies is not available to the appellee (emphasis added).

Thus, the defense of failure to exhaust administrative remedies could not logically be inferred from a denial of the allegations of appellant's complaint for a declaratory judgment: the defense of failure to exhaust administrative remedies was "new matter" which had to be affirmatively pleaded. Indeed, as we shall see below, the reason why defenses in this second class must be "affirmatively" pleaded is because their existence is not deducible from a denial of the allegations in the statement of claim; the operative facts comprising the defenses are not logically inferable from such a denial.

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entitled to have the statement of claim stricken from the files for failure of
commencement under the provisions of Rule 3(A). Thus, in the vast majority
of cases, this defense can be overcome by prompt corrective action; if that
corrective action is not taken, the defense will inevitably lead to a defeat of the
claim otherwise than on the merits.

Since the affirmative defenses in this class generally result in little more
than a delay in the presentation of the claim on the merits, they may be
roughly equated with the common law dilatory pleas\(^71\) and, more
particularly, the common law plea in abatement.\(^72\) To distinguish between the
two classes of affirmative defense, we may refer to the first class as affirmative
defenses in the nature of a plea in bar and to the second class as affirmative
defenses in the nature of a plea in abatement.\(^73\)

2. Objections Distinguished

It is necessary to distinguish between objections and affirmative defenses
in the nature of a plea in abatement since the two are quite similar in
appearance but must be asserted in distinctly different ways.

By and large, "objections" are a separate class of quasi-defenses which was
created by the Ohio Rules Advisory Committee for the purpose of regulating
the method of presenting challenges to pleadings, motions, and other papers.
In its Staff Note to Rule 12(B), the committee noted that "the framers of the
1853 code of civil procedure undoubtedly intended that all defenses (other
than those which could be asserted by demurrer) must be asserted in the
answer. However, the 1853 code did not explicitly say so." An informal

\(^{71}\) Shipman describes the common law dilatory pleas in the following terms:
Dilatory pleas are those which do not answer the general right of the plaintiff, either by
denial or in confession and avoidance, but assert matter tending to defeat the particular
action by resisting the plaintiff's present right of recovery. They may be divided into two
main classes: (1) pleas to the jurisdiction and venue; (2) pleas in abatement. A minor
class, sometimes recognized, is pleas in suspension of the action.

B. SHIPMAN, supra note 26, § 220, at 392.

\(^{72}\) At the common law, dilatory pleas were of three types: pleas to the jurisdiction of the court,
pleas in suspension of the action, and pleas in abatement of the action. See SHIPMAN, supra note 26,
§ 220, quoted at note 71 supra. A plea to the jurisdiction challenged the court's jurisdiction over the
subject matter of the action, the court's jurisdiction over the person of the defender, or, in some
cases, the venue of the action. Id. at § 223. A plea in suspension showed some ground for not
proceeding with the action and prayed that the action be stayed until that ground had been
removed; in general, these pleas raised some disability in the claimant which prevented him or
her from proceeding until the disability had been removed. Id. at §§ 10, 230.

A plea in abatement demonstrated some ground for abating or defeating the particular action
without destroying the right of action itself. Pleas in abatement included improper venue (when
not covered by a plea to the jurisdiction), lack of legal capacity to sue or be sued, actions brought
prematurely, a prior action pending for the same cause, misnomer, and the nonjoinder and
misjoinder of parties. Id. at § 225.

Affirmative defenses of the second class cover the gamut and fall within all three common law
categories. The bulk of them will correspond more to the plea in abatement than to the other
dilatory pleas. Further, as Shipman notes, dilatory pleas "may be divided into two main classes:
(1) pleas to the jurisdiction and venue; (2) pleas in abatement. The term 'plea in abatement' is
frequently applied, however, to cover both classes of dilatory pleas, and also so called pleas in
suspension." Id. at § 220. Therefore, it seems fair to equate all affirmative defenses in this class
with the common law plea in abatement.

\(^{73}\) The Ohio Rules Advisory Committee has recognized both classes of affirmative defense
under the same names. Thus, in its Staff Note to Rule 12(B), the committee states: "When a
defendant is permitted to assert an affirmative defense (in abatement or in bar) in a motion to
dismiss, no rules exist to guide the lawyers and the court."
practice grew up over the years, therefore, by which certain defenses were presented by motions filed prior to the filing of a demurrer or answer. In a large number of cases this informal practice "made it possible and sometimes necessary for a defendant to utilize at least four separate and successive steps to assert his defenses and objections: (1) motion to quash, (2) motions to the petition, such as to strike, make definite and certain, etc., (3) demurrer, and (4) answer." In the committee's opinion, this made "[t]he present Ohio law as to the method of asserting defenses and objections . . . uncertain and unsatisfactory" because

[w]hen a defendant is permitted to assert an affirmative defense (in abatement or in bar) in a motion to dismiss, no rules exist to guide the lawyers and the court. No procedure has been established for an attack on the form of the asserted defense no matter how deficient it may be; no procedure has been established to question the legal sufficiency of the asserted defense and no procedure has been established for a response to the asserted defense by way of denial or avoidance.

Accordingly, the committee divided all challenges into two broad classes: defenses and objections. With respect to defenses, it noted in its Staff Note to Rule 12(B):

Rule 12(B) lays down the clear, simple and comprehensive rule that every defense shall be asserted in the responsive pleading thereto if one is required, except that the seven enumerated defenses (and only those defenses) may at the option of the pleader be made by motion. Observance and enforcement of this rule should correct the loose and irregular practice in Ohio discussed above.\textsuperscript{74}

\textsuperscript{74} The Ohio Supreme Court, however, has not seen fit to follow the committee's plan. In Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974), the court specifically approved of the informal practices tolerated under the Code and authorized the use of a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted as the vehicle for raising the affirmative defense of the statute of limitations. It said:

Appellee is correct insofar as it maintains that a Civ. R. 12(B)(6) motion will lie to raise the bar of the statute of limitations when the complaint shows on its face the bar of the statute.

The purpose behind the allowance of a Civ. R. 12(B) motion to dismiss based upon the statute of limitations is to avoid the unnecessary delay involved in raising the bar of the statute in a responsive pleading when it is clear on the face of the complaint that the cause of action is barred. The allowance of a Civ. R. 12(B) motion serves merely as a method for expeditiously raising the statute of limitations defense.

This result is in accord with the pre-Civil rules procedure established by this court in [Aetna Cas. & Sur. Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N.E.2d 237 (1970)].

Id. at 58, 60, 320 N.E.2d at 671-72. Hensgen somewhat modified the supreme court's prior decision in Wentz v. Richardson, 165 Ohio St. 558, 138 N.E.2d 675 (1956), which authorizes the use of the then extra-legal motion to dismiss for this purpose.

This case exhibits all of the horrors and confusion of which the Ohio Rules Advisory Committee warned. Instead of using a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief could be granted to raise the statute of limitations defense, the defendant pleaded the defense of failure to state a claim upon which relief could be granted in its answer; it argued that this defense included the statute of limitations defense because the latter could have been raised by the motion to dismiss for failure to state a claim upon which relief could be granted. As noted above, the supreme court agreed that the statute of limitations defense could have been raised by the Rule 12(B)(6) motion, but held that when that defense was pleaded in the
Objections, on the other hand, are not deemed to be "defenses;" therefore they may be asserted only by motion, not by answer, [and] a defendant who wishes to assert an objection must necessarily employ [a] two-step defensive procedure, that is, he must serve a motion first [and then serve his answer after the motion has been disposed of by the court].

Answer, it had to be pleaded in its own terms and could not travel in the guise of a failure to state a claim upon which relief could be granted. As the court put it:

Appellee's first defense [in its answer], "the complaint fails to state a claim against the defendant, City of Hillsboro, upon which relief can be granted," clearly fails to allege affirmatively the bar of the statute of limitations to the present action nor does it formulate in a simple, concise, and direct manner the issue to be resolved by the trial court.

Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 58, 320 N.E. 2d 668, 670 (1974). While there is merit to the position that the Rule 12(B)(6) phraseology conceals the true nature of the affirmative defense asserted, the court fails to explain how the complaint in this case fails to state a claim upon which relief can be granted for motion purposes, but states a claim upon which relief can be granted for answer purposes. It is this failure to provide a rational explanation for the difference which emphasizes the merit of the Ohio Rules Advisory Committee's position.

It is also unfortunate that the supreme court did not see fit to mention two rules procedures which would not have done violence to the committee's scheme, yet would have disposed of the statute of limitations defense as expeditiously as would a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief could be granted. The first rules procedure would require an answer containing a defense in the following terms: "The complaint fails to state a claim against the defendant, City of Hillsboro, upon which relief can be granted because it appears from the face of the complaint that the right of action attempted to be set forth therein did not accrue within two years next before the commencement of this action." (If we assume that a complaint which is time-barred on its face fails to state a claim upon which relief can be granted, this language combines the defense of failure to state a claim with a properly pleaded statute of limitations defense. See the "FIRST DEFENSE" and "FOURTH DEFENSE" in OHIO R. Civ. P. App. of Forms, Form 15; see also Ohio R. Civ. P.84, which stipulates that the forms "are sufficient under these rules.") The defendant would then serve and file with the answer a Rule 12(D) motion for a preliminary hearing. Since the defense pleaded is, at least in part, a defense "specifically enumerated . . . in subdivision (B) of [Rule 12],'" the court would have to honor the motion and make an immediate ruling on the defense. (For the proposition that the trial court would have to act as expeditiously when presented with a Rule 12(D) motion for a preliminary hearing as it would if the defense had been raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, see State ex. rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974).) Alternatively, and more simply, the defendant could have answered: "The right of action set forth in the complaint did not accrue within two years next before the commencement of this action." An answer containing this defense would have been served and filed with a motion for summary judgment grounded upon the running of the statute of limitations. Since the statute of limitations defense appears from the face of the complaint, the motion for summary judgment would not have to be supported by documentary evidence in testimonial form. Tiefel v. Gilligan, 40 Ohio App. 2d 491, 321 N.E.2d 247 (10th Dist. 1974). Further, since there would be no genuine issue of material fact apparent from the record, and since the defendant would be entitled to judgment as a matter of law on the limitations defense, the motion for summary judgment would have to be granted "forthwith." Ohio R. Civ. P.56(C).

Thus, there were at least two ways in which the supreme court could have achieved the speed it desired without reviving the informal pre-rule practice. It did not choose to mention either of these ways; rather, it chose to repudiate the scheme proposed by the Ohio Rules Advisory Committee and, in the process, revivified the "loose and irregular practice" which the committee sought to end.

Ohio Rules Advisory Committee Staff Note to Rule 12(E).

Again, however, the courts have frustrated the committee's plan. In F.O.P. v. City of Dayton, 35 Ohio App. 2d 196, 199, 301 N.E.2d 269, 271 (2d Dist. 1973), the Second District Court of Appeals impliedly recognized the propriety of presenting an objection in the answer when it said: Plaintiffs say that defendants did not raise this question in the trial court. Defendants claim without a written motion they had no opportunity to do so. However, in their answer they did attack the supplemental complaint, but only on the basis that it was not signed as provided in Civil Rule 11. Dismissal is not mandatory under that rule for such a formal and technical reason.
While both affirmative defenses in the nature of a plea in abatement and objections have the potential for suspending or abating an action, the affirmative defense may be pleaded in the responsive pleading. The objection may not. The objection must be raised by a motion made prior to the service of a responsive pleading (when a responsive pleading is required), or it is waived. It is imperative, then, that the defender's counsel be able to distinguish between objections and affirmative defenses in the nature of a plea in abatement if he or she is to avoid the accidental waiver of the objection.

Unfortunately, the precise scope of the term “objection” is not entirely clear; several challenges are noted in the civil rules that could logically fall within either the “objection” classification or the “affirmative defense in the nature of a plea in abatement” classification. Until the courts have occasion to sort these out, one cannot be entirely sure where they ought to be placed. At the present time, however, the following categorization and listing of objections could be ventured.

a. Challenges to Irregularities of Form

The first category of objection consists of challenges to irregularities of form. It includes: (1) the objection that a document is not properly signed; the objection that a document is not properly served; and the objection that a document is not properly file stamped.

As a general rule, errors of form are deemed to be amendable irregularities. Roberts v. Sogg, 30 Ohio L. Abs. 523 (2d Dist. Ct. App. 1939). However, a deliberate failure to follow the prescribed form may be deemed misconduct which requires a more severe sanction than an amendment. Thus, a distinction must be drawn between an “irregularity” and “misconduct.”

By and large, an irregularity is an inadvertent and unintended failure to comply with the civil rules, the supplemental local rules of court, or a court order; it is generally the product of carelessness or excusable neglect. Misconduct, on the other hand, is the intentional, contumacious, or inexcusably negligent failure to comply with the civil rules, the local rules, or a court order. See the distinction made between the two terms in Ohio R. Civ. P. 59(A) (1) and (2), and see also such decisions as Butterfield v. Doe, No. 78 AP-73 (10th Dist. Ct. App., July 27, 1978) as abstracted in 51 Ohio B. 1207 (Sept. 25, 1978); Schreiner v. Karson, 52 Ohio App. 2d 219, 369 N.E.2d 800 (9th Dist. 1977); Point Rental Co. v. Posani, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (10th Dist. 1976); Repp v. Horton, 44 Ohio App. 2d 335, 335 N.E.2d 1267 (8th Dist. 1974); Brown v. Lamb, 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960); Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (C.P. Cuyahoga County 1977).


As a general rule, when neither tradition nor the civil rules provides a more specific motion, the vehicle for raising an objection to an irregularity of form is the motion to strike the offending document from the files. Finch v. Finch, 10 Ohio St. 501 (1860); Brown v. Lamb, 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960); Carpenter v. Traver, 22 Ohio App. 249, 153 N.E. 520 (6th Dist. 1926); Schottenfels v. Massman, 16 Ohio App. 78 (1st Dist. 1921); Rogers v. Metropolitan Life Ins. Co., 15 Ohio App. 333 (1st Dist. 1921); Black v. Goodman, 32 Ohio C.C. 369 (1st Cir. Ct. 1909); but see Malone v. Summer & Co., 17 Ohio App. 2d 58, 50, 244 N.E.2d 455, 487 (10th Dist. 1968), stating: “All too commonly a motion to strike pleadings is used with reckless abandon. The sole function of a motion to strike pleadings is to test the regularity of the filing.” (emphasis added).
captioned, as required by Rules 7(B)(3) and 10(A);\textsuperscript{78} (2) the objection that the contents of a document have not been divided into paragraphs, that the paragraphs have not been numbered, or that each claim founded upon a separate transaction or occurrence has not been stated in a separate count, all as required by Rule 10(B);\textsuperscript{79} (3) the objection that a claim is stated in so vague

\textsuperscript{78} Traditionally, the motion to strike from the files has been used as the vehicle for presenting objections to irregularities in the caption. Blackwell v. Montgomery & Bates, 12 Ohio Dec. Reprint 16 (Cincinnati Super. Ct. 1854); Rayburn v. Strouth, 86 Ohio L. Abs. 97, 170 N.E.2d 868 (C.P. Fayette County 1960).

\textsuperscript{79} The appropriate vehicle for raising an objection on any one of these three heads is the motion to separately state and number. As it is said in the Ohio Rules Advisory Committee Staff Note to Ohio Civil Rule 10(B):

- Under [pre-rule] Ohio practice the penalty for failing to separately state and number is a motion to separately state and number. Under the rule the same motion should be used (although such motion is not specifically provided for in Rule 12), but it should be granted as a practical matter . . . only when confusion is caused by failure to separately state and number such that the opposing party cannot properly answer.

The motion to separately state and number is a subspecies of the motion for a definite statement. City of Youngstown v. Moore, 30 Ohio St. 133 (1876). Therefore, Rule 12(E), read in conjunction with Rules 7(B)(3) and 10(B), will serve as a guide to the procedure which may be followed in making, and ruling upon, the motion to separately state and number. See Browne, \textit{Civil Rule 10(B) and the Three Basic Rules of Form Applicable to the Drafting of Documents Used in Civil Litigation}, 8 CAP. U. L. Rev. 199 (1978).

Misseparation — the converse of nonseparation — is equally objectionable. Thus, where a single claim is misseparated into two or more counts, the misseparation may be challenged by a Rule 12(F) motion to strike from the pleading. Fox v. Pennsylvania R.R. Co., 12 Ohio Dec. Reprint 386 (Cincinnati Super. Ct. 1856). However, there is more recent authority for the proposition that if one of the several counts, standing alone, would be substantively insufficient, it may be dismissed for failure to state a claim upon which relief can be granted. Accordingly, in Berisford v. Sells, 43 Ohio St. 2d 205, 207, 331 N.E.2d 408, 409 (1975), the court said:

- We find that the second claim is merely an abbreviated version of the first (with a failure to specify speeding as the negligent conduct and a failure to allege that passenger status was grounded in an agreement to pay for the ride), except that proximate cause is not alleged.

Upon that basis, the dismissal of the second claim is arguably justified (an absence of proximate cause amounts to failure to state a claim [Civ. R. 12(B)(6)] or the insubstantial differences between the claims warrants a dismissal of the second claim because it is redundant [Civ. R. 12(F)]), and appellant has not attempted to show how such action prejudiced her rights.

In Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 58, 351 N.E.2d 775, 777 (9th Dist. 1973), the court noted:

- That part of defendants' motion, relating to the complainants' failure to state a claim upon which relief can be granted, is partially tenable. The complaint, in each of its claims, adequately sets forth a cause of action, with the exception of claim number five [which] is simply a duplication of the content of the first four claims, and the allegation that the acts were intentional. All of this matter goes to the question of punitive damages, and it is not the subject of a separate cause of action.

Accordingly, the trial court's order, in dismissing claim number five of the complaint, will be sustained. . . .

Technically, neither decision is correct. If the matter is merely redundant, it should be ordered stricken from the complaint as redundant under the provisions of Rule 12(F); if it is legally insufficient, it should be ordered stricken from the complaint as an insufficient claim under the provisions of Rule 12(F). In neither case should it be dismissed under the provisions of Rule 12(B)(6).

Misseparation of a single claim into two or more counts must be distinguished from separately stated and numbered theories of recovery arising out of a single claim. Rule 10(B) does not expressly authorize the separate statement of various theories of recovery; however, there is authority for the proposition that when a right to relief arises out of a single claim, but that right to relief may be premised on different theories of recovery, each theory of recovery may be set forth in a separate paragraph or a separate count whenever either method would facilitate the clear presentation of the matters set forth. See Sherman v. Renth, 22 F.R.D. 59 (E.D. Ill. 1957); W.D.G., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397 (10th Dist Ct. App. 1976). In W.D.G., the Tenth District Court of Appeals recognized that the complaint stated a single claim for relief
or ambiguous a manner that a party cannot reasonably be required to frame a responsive pleading;\(^{\text{50}}\) (4) the objection that the statement of claim contains redundant, immaterial, impertinent, or scandalous matter\(^{\text{51}}\) or that it contains scandalous or indecent matter;\(^{\text{52}}\) (5) the objection that there has been a gross, divided into nine counts, each of which stated a separate theory of recovery. Nevertheless, it affirmed the trial court's dismissal of some of these counts. Its action was erroneous. To the extent that any count was insufficient, it should have been stricken from the complaint under the provisions of Rule 12(F), rather than dismissed under the provisions of Rule 12(B)(6).

\(^{\text{50}}\) See \textit{Ohio} R. Civ. P. 8(A) and 12(E). The appropriate motion for raising this objection is the Rule 12(E) motion for a definite statement. The motion must point out the defects complained of and the details desired. If the motion is granted, the action is suspended for fourteen days after the notice of the order granting the motion or for such other time as the court may fix; the claimant must serve an amended statement of claim correcting the deficiency by the end of the suspension period. \textit{Westmoreland v. Valley Homes Corp.}, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975); \textit{Point Rental Co. v. Posani}, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (10th Dist. 1976). Furthermore, "[i]n the event a party fails to obey the order of the court, the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to Civ. R. 41(B)(1)." \textit{Id.} at 186, 368 N.E.2d at 1269.

\(^{\text{51}}\) \textit{Ohio} R. Civ. P. 12(F). The appropriate motion for raising an objection on any one of these four heads is the Rule 12(F) motion to strike from the document. In \textit{Berisford v. Sells}, 43 Ohio St. 2d 305, 331 N.E.2d 408 (1975), the Ohio Supreme Court suggested that a claim might be dismissed for redundancy under the provisions of Rule 12(F). This would seem to be a slip of the pen; the rule does not authorize a dismissal, but merely the striking out of the redundant matter. Of course, if the court orders the redundant matter stricken, and the claimant fails to serve and file an amended statement of claim which does not include the redundant matter, the court might dismiss the action for failure to prosecute or failure to obey a court order, as provided in Rule 41(B)(1).

Rule 12(F) does not provide any procedure to be followed in the striking of redundant, immaterial, impertinent, or scandalous matter; but the procedure outlined in Rule 12(E) would seem to apply by analogy, and that procedure may be followed. Accordingly, if the motion to strike from the document is granted, the action is suspended for fourteen days after the notice of the order granting the motion, or for such other time as the court may fix; the claimant must serve an amended statement of claim correcting the error by the end of the suspension period. If the claimant does not, he or she is subject to the sanction provided in Rule 41(B)(1).

\(^{\text{52}}\) \textit{Ohio} R. Civ. P. 11. It is not entirely clear whether Rule 11's "scandalous or indecent matter" is the same as the "scandalous matter" of \textit{Ohio} R. Civ. P. 12(F). If it is the same, a Rule 12(F) motion to strike from the pleadings is the appropriate method of raising the objection; if it is different, a Rule 11 motion to strike the document from the files on the ground that it is presumed sham and false is the appropriate motion. The pertinent language of Rule 11, with identifying numbers added, is as follows:

\begin{enumerate}
\item If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.
\item For a willful violation of this rule an attorney may be subjected to appropriate action.
\item Similar action may be taken if scandalous or indecent matter is inserted.
\end{enumerate}

The answer seems to turn on the phrase "similar action" in sentence [3]. If that phrase refers to sentence [1], then the motion to strike from the files would be the appropriate motion. If, however, it refers to sentence [2], then Rule 11's "scandalous and indecent matter" is the same as Rule 12(F)'s "scandalous matter," and the appropriate motion is the Rule 12(F) motion to strike from the document. The only authority on point, \textit{Spencer v. Dixon}, 290 F. Supp. 531 (W.D. La. 1968), does not solve the riddle. In \textit{Spencer}, the defendant moved to strike an amended complaint from the files on the ground that it was "replete with scandalous matter in violation of Rule 11 and with redundant, immaterial, impertinent, and scandalous material in violation of Rule 12(f)." \textit{Id.} at 534. The court adeptly straddled the question; it struck the amended complaint from the files because it was "permeated with scandalous material reprobated by Rule 11 and with redundant, immaterial, impertinent matter forbidden to be contained in a pleading under Rule 12(f) of the Federal Rules of Civil Procedure." \textit{Id.} at 535. The court's order suggests, however, that "similar action" in sentence [3] of Rule 11 refers back to the striking provision of sentence [1], because an entire pleading cannot be stricken from the files under the authority of Rule 12(f), even if it is "replete with" and "permeated with" scandalous matter. See \textit{Brown v. Lamb}, 112 Ohio App. 116,
outrageous, or extreme failure to comply with the rules of form governing the content of a document, such as the failure to state with particularity the grounds upon which a written motion is premised, the failure to keep the statement of claim short, plain, simple, concise, and direct, as required by Rules 8(A) and (E)(1), the failure to include a demand for judgment as

122, 171 N.E.2d 191, 195 (6th Dist. 1960), stating:

[T]he remedy is by way of motion to strike from the pleading. Defendants' counsel contend that the petition is so replete with evidentiary, redundant and other improper allegations that a motion to strike would be as lengthy as the petition itself and, if granted, would so emasculate the petition as to leave nothing of substance remaining, and would impose undue hardship upon the court and counsel. . . . [W]e are of the opinion that the appropriate remedy is by way of motion to strike [from the pleading] or possibly by motion to make definite and certain (emphasis added).

Anyway, for what it's worth, Professor Wright suggests that the whole document may be stricken from the files under Rule 11 if it contains scandalous or indecent matter. Wacirr & Miller, supra note 44, § 1334, at 501 (1969).

The question of which rule applies is not as trivial as it may seem as first glance. If matter is ordered stricken under Rule 12(F), the claimant must be given an opportunity to correct his or her mistake by means of an amended statement of claim; if the document itself is stricken from the files under Rule 11, the claimant need not be given an opportunity to amend. Ohio R. Civ. P. 11 states that "the action may proceed as though the pleading had not been served." Thus, Rule 12(F) would merely suspend the action, but Rule 11 could terminate it.

See, e.g., Ohio R. Civ. P. 7(B)(1), 8(A)(1) & (2), 8(B), 8(E)(1), 33(D), 36(C), 56(E), and the like. Ohio R. Civ. P. 10(A), (B), (D), and 11 might have been included here, but they have been, or will be, treated elsewhere in this article.

Again, in the absence of a more specific motion, the motion to strike from the files is the motion of choice in raising an objection on this head. In Longstreth v. Charles Vangrov & Son, Inc., 27 Ohio Misc. 15, 16-17, 265 N.E.2d 843, 844 (Dayton Mun. Ct. 1970), the court stated:

Unlike the former Ohio Rules (R.C. 2309.70), there is no specific provision in the new rules for a motion to strike from the files. [In so saying, Judge Rice apparently overlooked Rules 11 and 12(E).] However, a court has an inherent right to strike pleadings from a file in certain instances. Courts often, under the old rules, would order the striking of an entire pleading when the rules of pleading are violated in a gross manner.

See, e.g., Ohio R. Civ. P. 7(B)(1); Rosenberg v. Gattarrello, 49 Ohio App. 2d 87, 359 N.E.2d 467 (8th Dist. 1976). A failure to state the grounds in support of the motion renders it both formally and substantively insufficient. However, since there is no other rules device for challenging the substantive insufficiency of a written motion, the motion to strike from the files does double duty; that is, it may be used to challenge both substance and form.

As Brown v. Lamb, 112 Ohio App. 116, 171 N.E.2d 191 (6th Dist. 1960), indicates, a statement of claim that is both verbose and replete with redundant, immaterial, and other improper allegations may be challenged by either a motion to strike from the pleading or a motion for a more definite statement, as the situation warrants; it may not be challenged by a motion to strike the document from the files. For a more complete discussion of this point, see note 82 supra; see also McMullen v. Bright, 27 Ohio Misc. 1, 272 N.E.2d 202 (C.P. Clinton County 1970).

In W.D.G., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397, 398 (10th Dist. Ct. App. 1976), the "[d]efendants filed a motion to dismiss the complaint, relying upon Civ. R. 8(A)(1), contending the complaint to be too long and complicated, and upon Civ. R. 12(B)(6), contending that the complaint fails to state a claim against defendants upon which relief could be granted." Unfortunately, the first point was swallowed up in the discussion of the second point, and nothing further was said about the violation of Rule 8(A)(1). This omission was proper; it is noted in Lucas v. Central Trust Co., 50 Ohio App. 2d 109, 361 N.E. 2d 1382 (1st Dist. 1976), that when a court grants a motion to dismiss for failure to state a claim upon which relief can be granted, it need not pass on other motions. A motion to dismiss, however, is not the proper vehicle for challenging a violation of Rule 8(A)(1); the proper motion is either a motion for a more definite statement or a motion to strike from the pleading, as the nature of the pleading warrants. Brown v. Lamb, 112 Ohio App. 116, 171 N.E. 2d 191 (6th Dist. 1960).
required by Rule 8(A)(2), the failure of an affidavit to satisfy the requirements of Rule 56(E), the failure of interrogatories or requests for admissions to meet the requirements of Rules 33(D) and 36(C), or the failure to complete and return a deposition as required by Rules 30 and 31; (6) the objection that the claimant has neither attached the account or other written instrument upon which the claim is founded to his or her statement of claim nor stated the reason for the omission in the statement of claim, as required by Rule 10(D); or (7) the objection that the document has not been signed as required by Rule 11.

A common law motion to strike from the files is an appropriate method of raising the objection. More v. Darrow, 1 Iddings Term Reports 169, 170 (C.P. Montgomery County 1899).

Although Rule 56(E) literally applies only to affidavits offered in support of, or in opposition to, motions for summary judgment, there is authority for the proposition that its provisions apply to all testimonial affidavits. See Adomeit v. Baltimore, 39 Ohio App. 2d 97, 104, 316 N.E.2d 469, 475 (8th Dist. 1974) stating:

The rigid procedural requirements of Civil Rule 56 regarding the documents and other material the parties should submit in support of and in opposition to a motion for summary judgment are excellent guides to a commendable procedure to be followed in seeking relief or in opposing relief under Civil Rule 60(B).

Although the court is speaking in the context of a Rule 60(B) motion for relief from judgment, it is clear that what it says applies to other motions as well.

In any event, the appropriate motion for challenging an inadequate affidavit is the motion to strike from the files. United States v. Dibble, 429 F.2d 598 (9th Cir. 1970); Noblett v. General Elec. Credit Corp., 400 F.2d 442 (10th Cir. 1968); United States ex rel. Austin v. Western Elec. Co., 337 F.2d 569 (9th Cir. 1964); Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426 (S.D. Ohio 1950). However, if only portions of the affidavit are objectionable, the motion to strike from the files must specify the parts to be stricken and why they should be stricken. Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969); Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426 (S.D. Ohio 1950); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa. 1945).

A failure to set out interrogatories or requests for admissions in proper form presents an interesting problem. In theory, discovery by either method remains an extra-judicial process until a response is served, or until the time for responding has expired, and the discoveror moves for an order compelling discovery. Even though the defective copy of the interrogatories or request for admissions is on file with the court within three days after its service on the discoveree, see Omo R. Civ. P. 5(D), the court is not officially involved in the discovery process at the time when the objection must be made, i.e., within the time for serving the response. Accordingly, a motion to strike the offending documents from the files would not seem to be an appropriate method of raising the objection, since it is the service on the discoveree, and not the filing with the court, that is the key act in making discovery under Rules 33 and 36. The more appropriate method of objecting to violations of Rules 33(D) and 36(C) is the Rule 26(C) motion for a protective order. This latter motion is specifically designed to quicken the court's "jurisdiction" over the discovery process before that "jurisdiction" would normally come alive.

In Rule 32(D)(4) it is noted that the appropriate motion for raising this objection is the motion to suppress the deposition. See Turoff v. May Co., 7 Ohio Op. 3d 314, 314 (N.D. Ohio 1974): A motion has been filed by plaintiffs under Rule 12(f), Federal Rules of Civil Procedure, to strike their deposition from the files [sic] of this action. The basis of the motion is that "the depositions were never submitted to the witnesses as required by Federal Rules of Civil Procedure, Rule 30(e)."

There is at the outset, a procedural flaw in plaintiff's motion. Rule 12(f), under which the motion is brought, applies to pleadings, not depositions. Rule 30(e) has a specific provision applicable to depositions filed without signature [which require the use of a motion to suppress under Rule 32(d)(4)].

Under the code, the appropriate motion for raising this objection was the motion to strike from the files or the motion to strike from the pleading, as the circumstances of the case might require. Huff v. Spruance, 52 Ohio Op. 97, 116 N.E.2d 470 (C.P. Fayette County 1953). Under the rules, the motion of choice is the Rule 12(E) motion for a definite statement: [the proper procedure in attacking the failure of a plaintiff to attach a copy of a written...]

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A motion has been filed by plaintiffs under Rule 12(f), Federal Rules of Civil Procedure, to strike their deposition from the files [sic] of this action. The basis of the motion is that "the depositions were never submitted to the witnesses as required by Federal Rules of Civil Procedure, Rule 30(e)."

There is at the outset, a procedural flaw in plaintiff's motion. Rule 12(f), under which the motion is brought, applies to pleadings, not depositions. Rule 30(e) has a specific provision applicable to depositions filed without signature [which require the use of a motion to suppress under Rule 32(d)(4)].

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b. Challenges to Irregularities of Service or Filing

The second category of objection consists of challenges to irregularities in the service or filing of a document. It includes: (1) the objection that a

instrument or to state a valid reason for his failure to attach same is to serve a motion for a
definite statement, pursuant to Civ. R. 12(E). Had the motion been granted, as would have been proper in this case, plaintiff could properly have been required to amend his
complaint within 14 days after notice of the order sustaining the motion for a definite
statement, and ordered to attach a copy of the written instrument or state a valid reason
for the failure to attach same. In the event a party fails to obey the order of the court, the
court may strike the pleading to which the motion was directed, or make any other or-
ders as it deems just, which would include involuntary dismissal with prejudice pursuant
to Civ. R. 41(B)(1).


If, however, the absence of the account or other written instrument renders the statement of
claim substantively insufficient, the case is taken out of the realm of an objection and put in the
realm of a defense; in such case, the omission may be challenged by a Rule 12(F) motion to strike an insufficient claim from the pleading or a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, as the statement of claim warrants. Point Rental Co. v. Posani, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (10th Dist. 1976); Longstreth v. Charles Vangrov &

Presumably, the motion for a definite statement could also be used to challenge a claimant's
failure to comply with Rules 19(C) and 19.1(C). In substance, both rules stipulate that a pleading
asserting a claim for relief shall state the names, if known to the pleader, of any necessary parties
who are not joined as required by Rules 19(A) and 19.1(A), or any indispensable parties not joined
as required by Rules 19(A) and (B), and the reasons why they are not joined. If the absent parties
are necessary parties under the terms of Rule 19(A) or Rule 19.1(A), the Rule 12(E) motion for a
definite statement must be coupled with a Rule 12(B)(7) motion to compel joinder, or the defense
of nonjoinder may be waived. See OHIO R. CIV. P. 12(G), 12(H), 19(A), and 19.1(A); Layne v.
Huffman, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975). On the other hand, if the absent party is an
indispensable party under the terms of Rule 19(A) and (B), the Rule 12(B)(7) motion to compel joinder may be coupled with the Rule 12(E) motion for a definite statement, or the defense
of failure to join an indispensable party may be asserted in the responsive pleading, by motion for
judgment on the pleadings, or by a motion made at the trial on the merits. OHIO R. CIV. P.
12(H)(1).

One may also presume that the motion for a definite statement will lie when one suspects that
the opposing party is a minor or incompetent and the opposing party's documents do not set forth
the fact of minority or incompetency when such revelation is required by the terms of Rule 8(H).

In substance, the pleading requirements of Rule 8(H), 10(D), 19(C) and 19.1(C) are explicit
manifestations of the "honesty in pleading" requirement of Rule 11, which is made applicable to
"motions and other papers" through the operation of Rule 7(B)(3). With respect to the matters
covered, these rules remove the burden of discovery from the adverse party and place a burden
of revelation on the party who possesses the necessary knowledge or information. This burden of
revelation is designed to prevent the informed pleader's taking unconscionable advantage of his
or her adversary's lack of information, a lack of information which might lead to an insufficient
service of process or the waiver of an available defense. Thus, when the adversary suspects a
noncompliance with any one of these rules and moves for a definite statement, his or her motion is
more than a mere objection; it has in it something of the essence of a Rule 37(A) motion to compel
discovery, and it ought to be treated as such.

Professor Risinger's seminal study of Rule 11 identifies six general ways in which the rule
may be violated: (1) the signature may be omitted; (2) the signature may fail to be in an individual
name; (3) an address may be omitted; (4) a party may sign pro se when in fact represented by
counsel within the meaning of the rule; (5) an attorney may sign a document without having read
it; and (6) an attorney may sign a document without having "good ground" to support it. Risinger,
Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil
Procedure 11, 61 MINN. L. REV. 1, 14 (1976). Points (2) through (5) are generally the result of
inadvertence, while points (1) and (6) may be the result of either inadvertence or misconduct.
Further, points (1) and (3) may be the fault of the party alone, as when that party is appearing pro
document has been served or filed "out of rule," that is, it has not been served or filed within the various times limited by the civil rules,\textsuperscript{92} supplementary local rules of court,\textsuperscript{93} or court orders;\textsuperscript{94} (2) the objection that a document has

\textit{se}, or they may be the fault of the party's attorney, when the party is represented by an attorney of record. The balance of the points are solely attributable to the fault of a party's attorney, but this makes little difference, since the sins of the attorney are visited on the client. GTE Automatic Elec. Inc. v. ARC Indus., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Colley v. Colley, No. 37429 (8th Dist. Ct. App., July 13, 1978), \textit{as abstracted in} 51 Ohio B. 1170 (Sept. 18, 1978). This is true even though the attorney may be subject of special punishment — "For a willful violation of this rule an attorney may be subjected to appropriate action." Ohio R. Civ. P. 11. See also W.D.C., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397, 400 (Ct. App. 10th Dist. 1976), stating:

An attorney does have an obligation to the public and to his profession to act honestly, competently, in good faith, and without malice in all of the activities he undertakes. This duty has been set forth in the Code of Professional Responsibility adopted by the Supreme Court of Ohio and is enforceable by disciplinary proceedings against the attorney, including suspension from the practice of law or permanent disbarment.

When the violation of the rule is due to misconduct, the appropriate sanction would appear to be either a dismissal under Rule 41(B)(1) for failure to comply with the civil rules, the local rules of court, or a court order, or a default judgment, if the offender happens to be a defender; the appropriate vehicle for raising the challenge would appear to be a motion to dismiss or a motion for a default judgment. See note 77 supra. However, whether the violation is characterized as an irregularity or misconduct, Rule 11 provides its own vehicle for raising the challenge — the motion to strike the document from the files as sham and false. Where the court is satisfied that the violation is a mere irregularity, it will generally grant leave to correct the violation by amendment, or it may simply "treat the [document] as properly amended." Burak v. Pennsylvania, 339 F. Supp. 534, 535 n.2 (E.D. Pa. 1972) and, by inference, F.O.P. v. City of Dayton, 35 Ohio App. 2d 196, 301 N.E.2d 269 (2d Dist. 1973). Where the court is faced with evidence of misconduct, however, it should impose the full penalty provided by Rule 11 — the document "may be stricken as sham and false and the action may proceed as though the [document] had not been served." While this sanction may indirectly lead to a dismissal or default judgment, there is no rules authority for the direct imposition of either. Accordingly, since the action cannot be directly defeated by a violation of Rule 11, the challenge to such a violation is properly deemed an objection rather than a defense. It follows, therefore, that if the motion to strike from the files is not timely made, the violation of Rule 11 is waived. Burak v. Pennsylvania, 339 F. Supp. 534, 535 n.2 (E.D. Pa. 1972).

\textsuperscript{92} See, e.g., Ohio R. Civ. P. 3(A), 3(D), 5(D), 6(B), 6(D), 6(E), 12(A) through (C), 12(E), 14, 15(A), 15(C), 19(A), 19.1(A), 25(A)(1), 25(E), 30(A), 31(A), 32(A), 33(A), 34(B), 36(A), 36(B), 41(A)(1)(a), 41(B)(2), 49(B), 50(A)(1), 50(B)(C)(2), 51(A), 52, 53(E)(2), 54(C), 55(A), 56(A), 56(B), 59(B) and (D), and 60(B) for some of the more important time limitations. With respect to Rule 6(B), however, compare \textit{W.D.G.}, Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397 (Ct. App. 10th Dist. 1978) \textit{with} Browne, \textit{Motion Practice: Some General Rules for Determining the Date for Service and Filing Documentary Opposition to Written Motions}, 51 Ohio B. 1493 (1978); \textit{see also} Ohio R. Ct. R. 1978, Time Table for Lawyers Under Ohio Civil Rules, vii-xviii (West 1978).

\textsuperscript{93} Local rules of court contain time limitations too numerous to mention here. Typically, they include time for serving and filing briefs or memoranda in opposition to motions. \textit{See}, e.g., R. Ct. C.P. \textit{Cuyahoga County 11(C); R. Ct. C.P. Franklin County 25.01; R. Ct. C.P. Hamilton County 14(B).}

If the local rules of court containing these various time limitations are consistent with the civil rules and are on file with the Ohio Supreme Court, Ohio R. Civ. P. 83, they are as binding on the court and the parties as are the Civil Rules themselves. Shore v. Chester, 40 Ohio App. 2d 412, 321 N.E.2d 614 (10th Dist. 1974). Accordingly, a court abuses its discretion when it rules on a motion before the expiration of the time limited in its local rule for the service and filing of a brief in opposition to that motion. Blankschaen v. Blankschaen, No. 38040 (8th Dist. Ct. App. July 13, 1978), \textit{as abstracted in} 51 Ohio B. 1170-71 (Sept. 18, 1978).

\textsuperscript{94} \textit{See}, e.g., Ohio R. Civ. P. 6(B) and 12(E).

The proper method of raising an objection on any one of these heads is the motion to strike from the files. \textit{See} authorities cited in note 77 supra, as well as those cited in 43 Ohio Jur. 2d \textit{Pleading} §§ 299-300 (rev. 1973).

As the pre-rule decisions put it, the function of a motion to strike from the files is to test the regularity of \textit{filing}. Since the advent of the rules, however, \textit{service} has generally replaced \textit{filing} as the key jural act. As Judge Corrigan stated:

While Rule 4(B) provides that a copy of the complaint and summons shall be served on

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not been served or filed with leave of court, when leave of court is required; or (3) the objection that the document has not been served in the proper manner, has not been served on the proper person, or has not been served at all.

But this question of service raises a rather interesting problem. Ohio Civil

...
Rule 5(D) provides: "Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed." The phrase "shall not be considered" suggests a lack of subject matter jurisdiction over the paper. Lack of subject matter jurisdiction is an affirmative defense in the nature of a plea in abatement which, if valid, requires the dismissal of the action. But the dismissal of the action because of a lack of subject matter jurisdiction over a single document filed in the case would be wholly inconsistent with the principles set forth in Ohio Civil Rule 1(B). Further, the defense of lack of subject matter jurisdiction cannot be waived, yet, in Miller v. Thordyke, it was held that the absence of a proof of service was waived by the party's participation in a hearing on the document without objection. From this it might be concluded that the failure to file a proof of service is not jurisdictional. That conclusion, however, is not entirely sound. As noted in Garverick v. Hoffman, the term "jurisdiction" has different meanings depending upon the connection in which it is found and the subject matter to which it is directed. Accordingly, the Ohio courts have frequently drawn a distinction between subject matter jurisdiction over a particular class of such party appears and participates in the hearing on the pleading, he may not later interpose his lack of notification." Id. at 71, 283 N.E.2d at 184 (syllabus para. no. 1).

Since the objection was not raised by motion in either of these cases, they are not very helpful in determining the appropriate motion to use in these circumstances.

The complete failure of service has likewise come before the courts on two separate occasions. See Westmoreland v. Valley Homes Corp., 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975); Hershey v. Happy Days Boating Co., 52 Ohio App. 2d 95, 368 N.E.2d 318 (6th Dist. 1976). In Westmoreland, plaintiff failed to file an amended or supplemental complaint as required by court order made pursuant to Rule 12(E), but did file a copy of the written contract on which his claim was founded. No copy of the contract was served on the attorney for defendant, and defendant took no further action in the case. In time, a default judgment was entered against defendant, and defendant moved to vacate it. The trial court overruled the motion, the court of appeals affirmed, and the case went to the supreme court on appeal. In substance, the supreme court held that since no amended or supplemental complaint had been served and filed and since a copy of the contract had not been served on defendant's attorney, there was nothing before the court to which defendant had to respond, and it was error to enter the default judgment. In Hershey, plaintiff filed an amended complaint pursuant to leave of court, but failed to serve a copy on the attorneys for the other parties. Defendant moved to dismiss the action on the ground that plaintiff had failed to comply with the service requirements of Rule 5. Thereafter, plaintiff served a copy of the amended complaint on the defendant's attorney. The trial court then overruled the motion to dismiss, and, on the same day, defendant served and filed its answer to the amended complaint. Defendant subsequently appealed on the ground that the trial court had erred in overruling the motion to dismiss, a motion apparently made under the provisions of Rule 41(B)(1). The Sixth District Court of Appeals held that since defendant neither asked for a continuance nor indicated that it was taken by surprise, the trial court's ruling was in accord with substantial justice and did not prejudice defendant.

Since there was no indication of misconduct in Hershey, the Rule 41(B)(1) motion to dismiss for failure to comply with Rule 5 was inappropriate. However, the case does indicate that the complete failure of service may be challenged by motion. Further, from Westmoreland, we may conclude that an unserved document is a nullity. Cf. Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954), by analogy, we may conclude that in the absence of some indication of misconduct, the appropriate motion for asserting the objection to lack of service is the motion to strike from the files. (In Kossuth, the action had not been commenced because service had not been obtained on the defendant in the time allowed by the then applicable statute. In substance, the court held that since no action even came into existence, there was no action to dismiss, and the proper method for disposing of the case was a motion to strike the petition from the files.)


23 Ohio St. 2d 74, 262 N.E.2d 695 (1970).
action and subject matter jurisdiction over a particular action within that class. This latter type of subject matter jurisdiction generally depends upon the timely performance of some act by one of the parties, and it has long been held that if the nonperformance of that act is not challenged — at least prior to the entry of final judgment in the action — the court's lack of subject matter jurisdiction over the particular case is waived. Therefore, the failure to file a proof of service may be jurisdictional in this second, more restricted sense of the term. Put another way, the filing of a proof of service is a prerequisite to the court's taking subject matter jurisdiction over the matters raised in the document to which the proof of service relates. If that is the case, the challenge to the absence of the proof of service is an affirmative defense in the nature of a plea in abatement.

On the other hand, the Ohio Rules Advisory Committee Staff Note to Rule 5(D) states: "In the event, however, that proof of service is absent from the paper filed, the court will not consider the paper filed." In other words, the document is in the court's file, but not on file with the court; it is not before the court at all. Accordingly, under this view, the absence of the proof of service can be construed as a mere irregularity in the filing of the document somewhat similar to a filing out of rule or a filing without leave of court. In that case, the challenge to the absence of the proof of service is in the nature of an objection to the regularity of filing.

Until the courts say otherwise, it may be best to treat the document to which the non-existent proof of service would pertain as being objectionable because it is not properly before the court. Accordingly, the proper method of asserting the objection would be a motion to strike the document from the files. And if this view is correct, it must necessarily follow that the challenge cannot be included in the responsive pleading as a defense.

A similar problem arises out of Rule 3(A), which provides that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." Absent the entry of an appearance by the defender or the waiver of service of process, a complete failure to obtain service within the year, or the failure to obtain legally sufficient

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101 See, by analogy, the authorities cited in notes 77, 94, and 95 supra. Even if the absence of the proof of service has jurisdictional overtones, the motion to strike from the files may be used to assert the challenge. See Toledo v. Custer, 24 Ohio St. 2d 152, 265 N.E.2d 284 (1970).

Since the document is not before the court one might, in theory, simply ignore it. But Westmoreland v. Valley Homes Corp., 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975), illustrates the danger of such a course of action — if the court is not made aware of the absence of the proof of service, it may not notice the defect and may proceed with the action. See note 96 supra. Thus, one must either make one's objection to the proof of service, or ignore the omission and proceed with the action. This latter course results in a waiver of the objection, as illustrated by Miller v. Thorndyke, 30 Ohio App. 2d 71, 283 N.E.2d 184 (1st Dist. 1971). See note 96 supra.

102 Ohio R. Civ. P. 4(D).

103 Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954). If the defender is dead at the time the complaint is filed, or dies before being served, the result is the same as if there had been a complete failure of service. Barnhart v. Schultz, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978); Samstag v. McDonough, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975).
service on the defender within that time,\textsuperscript{104} will result in a failure of commencement. Thus, it is not clear whether failure of commencement is a defense or an objection.\textsuperscript{105} \textit{Kossuth v. Bear}, \textsuperscript{106} demonstrates three points: (1) when there is a failure of commencement no action ever comes into existence\textsuperscript{107} and there is, therefore, no action before the court which can be dismissed; (2) the proper method of disposing of the complaint resting in the court’s files is a motion to strike it from the files; and (3) when the complaint is stricken from the files, the action neither fails “on the merits” nor “otherwise than on the merits;” the merits are simply not before the court.\textsuperscript{108} Accordingly, one might be tempted to argue that failure of commencement is an objection on two grounds: (1) the challenge must be made by a motion to strike from the

\textsuperscript{104} Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977); Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

\textsuperscript{105} We are not speaking here of a failure to commence an action within the statute of limitations, although that may be an added factor. If it is, the problem is simply solved by the timely and proper assertion of the statute of limitations defense. Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977).

\textsuperscript{106} Likewise, we are not concerned with an action involving multiple defenders. If there are multiple defenders and some, but less than all, are served within the year, the action is properly commenced as to those served; those who are not served have available the defense of lack of jurisdiction over their persons. The timely and proper assertion of this defense must culminate in a finding that the action has not been commenced against those defenders not served within the year. Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977).

\textsuperscript{107} An interesting problem arises when one of two defenders has not been served within the year, but is validly served after the year has expired. The defense of lack of jurisdiction over the person would appear to lie at the expiration of the year in which service is to be made. Yancey v. Pyles, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975); Hayden v. Ours, 44 Ohio Misc. 62, 337 N.E.2d 183 (C.P. Paulding County 1975). If the defender waits until after he or she has been served, however, the situation becomes more complex. The motion to strike the complaint from the files will not lie, since the action has been properly commenced as to the other defender; the defense of lack of jurisdiction over the person will not lie, since there has been valid service, albeit late. Under these circumstances, the only available challenge, absent a statute of limitations question, would appear to be the challenge of failure of commencement as to the defender untimely served. This challenge cannot be an affirmative defense in the nature of a plea in bar, since it does not dispose of the action on the merits. See note 108 infra. It cannot be an objection, since it does not merely suspend the action until the defect is cured; the defect is incurable. Therefore, it must be an affirmative defense in the nature of a plea in abatement, since it abates the action as to the challenger but does not prevent the bringing of a new action against him or her if the statute of limitations has not run. Accordingly, as a defense, it may be asserted in the responsive pleading. See Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977). (Unfortunately, \textit{Lash} does not give a clear solution to the problem because the question there was tainted by the running of the statute of limitations.)

\textsuperscript{108} 161 Ohio St. 378, 119 N.E.2d 285 (1954).

\textsuperscript{109} In both Southgate Shopping Center Corp. v. Jones, 49 Ohio App. 2d 358, 361 N.E.2d 460 (5th Dist. 1975) and Hayden v. Ours, 44 Ohio Misc. 62, 337 N.E.2d 183 (C.P. Paulding County 1975), the courts appear to have overlooked this vital point. In Southgate, the Fifth District Court of Appeals erroneously suggested that an alias summons could be issued and served after the action had failed of commencement because legally sufficient service had not been obtained within the year; in Hayden, the Common Pleas Court of Paulding County erroneously permitted an amendment substituting the personal representative of the deceased as defendant after it became clear that no action could ever come into existence because the named defendant had died prior to being served with process. As to this latter point, see Barnhart v. Schultz, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978); Samstag v. McDonough, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975).

\textsuperscript{109} This third point is affirmed in Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966), and Hoehn v. Empire Steel Co., 172 Ohio St. 285, 175 N.E.2d 172 (1961), \textit{modified on other grounds by} Wasyk v. Trent, 174 Ohio St. 525, 191 N.E.2d 58 (1963).
files, and (2) since no action exists, there is nothing to support a defense.\textsuperscript{109} But the answer is not that simple. The prime characteristic of an objection is that it suspends the action until the defect can be cured. In the case of failure of commencement, however, the defect is incurable. Therefore, failure of commencement must be something more than an objection. Second, the motion to strike the complaint from the files is not available to the defender until the year for obtaining service has expired.\textsuperscript{110} Consequently, during that year, the action has a quasi-existence as an action "attempted to be commenced," as that term is presently used in Section 2305.19, Ohio Revised Code, and as it was defined in former Section 2305.17, Ohio Revised Code.\textsuperscript{111} As an action "attempted to be commenced," the action is fully capable of receiving defenses. Indeed, where there has been an insufficient service of process, the defender may have to assert defenses to the sufficiency of the service if he or she is to avoid waiving those defenses, and may have to serve a

\textsuperscript{109} Similarly, there is nothing which can support an amendment of the complaint substituting a personal representative for the named defendant who is dead. Barnhart v. Schultz, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978); Samstag v. McDonough, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975).


\textsuperscript{111} In pertinent part, former Section 2305.17 read: "an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days." Ohio Rev. Code Ann. § 2305.17 (Page 1954) (repealed 1965). Of course, to the extent that this definition survives, the one-year provision of Rule 3(A) must be substituted for the 60-day provision of the former statute. As to its survival, Howard v. Allen, 28 Ohio App. 2d 275, 277-78, 277 N.E.2d 239, 241 (10th Dist. 1971), states:

R.C. 2305.19 applies also if the original action was "attempted to be commenced." This poses a more vexing problem. In Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966) the Supreme Court applied a statutory definition of what constituted an attempt to commence an action. That statute, R.C. 2305.17, was amended in 1965 to delete the definition of "attempted commencement," and modified the definition of "commencement" to essentially the same definition as contained in Civil Rule 3(A). There is now no definition of what constitutes an action attempted to be commenced within the meaning of R.C. 2305.19 set forth either by statute or civil rule. Unless it can be held that the definition, of an attempt to commence an action, of former R.C. 2305.17 continues to define the terms as used in R.C. 2305.19, it would appear that the good faith filing of a complaint followed by service within one year from such filing . . . would constitute an attempt to commence the action . . .

The Howard court's suggestion that Section 2305.19 applies when there has been ineffective service resulting in a failure of commencement is unsound. While the failure of commencement leads to the failure of an action "attempted to be commenced," it is not a failure "otherwise than on the merits." See note 108 supra. Therefore, failure of commencement does not fall within the ambit of Section 2305.19. However, Howard might be correct if the defender does not raise failure of commencement and is content, as in Howard, to have the action dismissed for lack of jurisdiction over his or her person. In such case, failure of commencement is waived, and the dismissal for lack of jurisdiction is a "failure otherwise than on the merits" for the purposes of Section 2305.19 See Ohio R. Civ. P. 41(B) (4). (Howard's conclusion — that a "dismissal" for insufficiency of process or insufficiency of service of process is not a "dismissal" otherwise than on the merits because neither of those two defenses is included in Rule 41(B)(4) — is equally unsound. An action cannot be dismissed for either of those two reasons; the action can only be dismissed for lack of jurisdiction over the person, if that defense is timely and properly asserted and the insufficiency is not correct.)
responsive pleading to avoid a default judgment. Thus, the fact that the action may ultimately "self-destruct" for failure of commencement does not mean that it does not have a quasi-existence during the year following the filing of the complaint. If it does "self-destruct" for failure of commencement, all that has happened in the action during that year is a nullity, a mere potency that never ripened into an act.

In any event, failure of commencement is not an objection since it does more than merely suspend the action while a defect is corrected. Therefore, it

112 One who does so will probably sacrifice any chance of making use of failure of commencement. Suppose that during the year following the filing of the complaint there is an attempt at service, but the resulting service is legally insufficient. The defender is fully conscious of the insufficiency and "stands pat," hoping to run out the year; the claimant, who is unaware of the insufficiency, moves for a default judgment. The defender must choose one of two options. First, he or she can suffer the default judgment to be taken with the hope of having it vacated when the year expires. (Since the default judgment would be void for want of jurisdiction over the person of the defendant, Rule 60(B) would not be applicable, and the defender need not be concerned with the "reasonable time" limitations in that rule. "Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation." Ohio Rules Advisory Committee Staff Note to Civil Rule 60(B).) Second, the claimant can challenge the insufficiency. Suppose the defender challenges by moving to dismiss for lack of jurisdiction over the person. If that motion is granted, the dismissal will be otherwise than on the merits under Rule 41(B)(4), and the claimant will be able to bring a new action even if the statute of limitations has expired before the date of dismissal. See Ohio Rev. Code Ann. § 2305.19 (Page 1954) and the discussion of Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971), in note 111 supra. Thus, the defender will forfeit the benefit of failure of commencement by asserting the defense of lack of jurisdiction over the person. However, if the defender couples failure of commencement with the defense of lack of jurisdiction, he or she preserves a challenge on that basis. What is the court to do with the challenge? It cannot sustain it until the year has run, see note 110 supra, and, under the rule of State ex rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974), it cannot withhold a ruling on the lack of jurisdiction defense.

Alternatively, the defender might have coupled a motion to strike the complaint from the files for failure of commencement with a motion to quash for insufficiency of process or insufficiency of service of process. The result would be the same. Although the court could not dismiss the action for insufficiency of process or insufficiency of service of process, neither could it grant the motion to strike until the year has run; during the balance of the year, the claimant can perfect service by means of an alias summons, Ohio R. Civ. P. 4(A), or by means of an amendment to the original summons, Ohio R. Civ. P. 4.6(B). (Since this alternative approach is the more time-consuming of the two, it is also the better of the two from the defender's point of view. See Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966), for an illustration of how these defenses may work to the defender's advantage.)

Thus, we have a paradox arising out of the language of Rule 3(A) — the earlier and the oftener the claimant blunders in commencing the action, the less likely is it that the defender will be able to take advantage of those blunders.

Here's another paradox. Assume the same set of facts as above, except that the year has run without good service. If the defender moves to dismiss for lack of jurisdiction over his or her person, the action will be dismissed otherwise than on the merits. But if the defender moves to strike the complaint from the files, the disposition of the action will be neither "on the merits" nor "otherwise than on the merits." In the first instance, if the statute of limitations has run at the time of the dismissal, the claimant would have another year in which to bring the action under the Savings Statute, Ohio Rev. Code Ann. § 2305.19 (Page 1954); in the second instance, the running of the statute of limitations would bar the institution of a new action.

In any event, if the defender has a legitimate doubt as to the court's jurisdiction over his or her person and does not wish to gamble on vacating a default judgment, he or she should — for what it's worth — couple a motion to strike the complaint from the files for failure of commencement with any other defense he or she asserts by motion, or should include failure of commencement in the responsive pleading if no defense is asserted by motion prior to the service of the responsive pleading. In this way, failure of commencement is preserved as a challenge; if the court does not dispose of the case otherwise than on the merits before the year expires, and if the claimant does not perfect service before that time, the defender will be able to take full advantage of failure of commencement.

113 See note 115 infra.
must be a defense. But it cannot be an affirmative defense in the nature of a plea in bar because, absent a concurring statute of limitations defense, it does not dispose of the action on the merits. Accordingly, it must be an affirmative defense in the nature of a plea in abatement. But it may be argued that it cannot be a plea in abatement because no action ever came into existence and there is no action to abate. While that may be so, an action “attempted to be commenced” did come into at least a spectral existence, and it is that action which is abated by failure of commencement.

See note 108 supra.

Since no action ever existed, it follows that no action failed either “on the merits” or “otherwise than on the merits.” Accordingly, if the statute of limitations has not run at the time the complaint is stricken from the files, the claimant may attempt to commence a new action on the same claim.

The concurrent existence of the statute of limitations defense simply adds a complicating factor. As noted, the disposition of the action for failure of commencement does not affect the merits of the claim. Since the statute of limitations defense is an affirmative defense in the nature of a plea in bar, the disposition of the action for failure of commencement within the statutory period of limitations is a failure of the action on the merits. LaBarbera v. Batsch, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967). Accordingly, when the statute of limitations has run at the time the defendant asserts his or her defenses, the better part of valor would suggest coupling the defense of failure to commence an action within the statutory period of limitations with the defense of failure of commencement. See, e.g., Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977); Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966). It is not essential that the defender do so; the defense of failure of commencement, standing alone, will accomplish the same practical result even though it may not accomplish the same theoretical result. If, after the statute of limitations has run, the complaint is stricken because the action has failed of commencement, that is an automatic finding that no action was commenced within the statutory period of limitations.

Perhaps it would be more accurate (but less credible to the legal mind, not much given to the contemplation of metaphysics or mysticism) to say that the quasi-action “attempted to be commenced” simply vanishes, and with it vanishes all that was previously done in the case. However, since the law does not know a plea in disappearance, and since the plea in abatement is, in these circumstances, the closest thing to a plea in disappearance, this defense may as well be called an affirmative defense in the nature of a plea in abatement.

Try it this way: With the filing of the complaint, an “action attempted to be commenced” comes into existence. It is not yet an “action”; it is a potential action which has the promise of becoming an action in fact. However, as an action in potency, it has all the attributes of an action in fact until it either becomes an action in fact or it disappears. Its status as an “action attempted to be commenced” continues until one of three things happens: (1) the court acquires valid jurisdiction over the person of the defendant within the year following the filing of the complaint; (2) the court disposes of the case either “on the merits” or “otherwise than on the merits” within the year following the filing of the complaint; or (3) the year expires without the court having either acquired jurisdiction over the person of the defender or disposed of the case.

If the first event occurs, the effect of its occurrence relates back to the date the complaint was filed, and the “action attempted to be commenced” becomes an “action” as of the date the complaint was filed. To put it in the language of former Section 2305.17 (amended 1965), as modified by Rule 3(A): “An attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within [one year].” The same is true if the second event occurs, unless the defender has asserted a challenge to the jurisdiction and a challenge to the commencement of the action. If the challenges are preserved, and upheld on appeal, the result will probably be the same as if the third event occurred. See, e.g., Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

If the third event occurs, the “action attempted to be commenced” disappears; with it disappears all that was done in the case. This disappearance likewise relates back to the date the complaint was filed, and its effect is that neither an “action attempted to be commenced” nor an “action” ever came into existence. “Since there was no effective service prior to that date, no action was commenced, nor was there an attempt to commence an action equivalent to its commencement. . . . This action was not commenced or attempted to be commenced. . . .” ld. at 215-16, 217 N.E.2d at 216. All that is left is the complaint resting in the court’s files, and this is subject to a motion to strike it from those files. Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954).
As an affirmative defense in the nature of a plea in abatement, "failure of commencement" may be asserted in the responsive pleading when one is required or permitted by the civil rules. But as we have seen, it may also be asserted by a pre-answer motion to strike the complaint from the files. Thus, it becomes an irregular defense; "irregular" in the sense that it is an exception to the general scheme of the civil rules which permits only those defenses listed in Rules 12(B)(1) through (7) to be asserted by motion prior to service of the responsive pleading.\footnote{116}

This hairsplitting is required by the present language of Ohio Civil Rule 3(A),\footnote{117} but could be avoided if that rule were rewritten somewhat as follows:

A civil action is commenced by filing a complaint with the court. If the court does not acquire jurisdiction over the person of the defendant within one year from such filing, the action shall be dismissed for failure to prosecute. A dismissal for failure to prosecute under this subdivision operates as an adjudication upon the merits if, at the date of dismissal, the time limited for the commencement of such action has expired; otherwise, a dismissal for failure to prosecute under this subdivision shall operate as a failure otherwise than on the merits.

This language accomplishes the same result as the present Rule 3(A), but eliminates the metaphysical mystification inherent in the existing wording of that Rule.\footnote{118}

c. Challenges to Substance Rather Than Form

The third category of objection is also "irregular," but not quite in the same way as the defense of failure of commencement. Heretofore, the objections we have examined have been objections to defects of form rather than substance. The objections in this third category are objections to substance rather than form: (1) the objection to an insufficient defense and (2) the objection to an insufficient claim. As Rule 12(F) puts it, "the court may order..."
stricken from any pleading any insufficient claim or defense.” As that rule also
provides, the appropriate method for asserting either of these objections is the
motion to strike from the pleading.

Although there does not appear to be any reported post-rule Ohio decision
discussing the use of the motion to strike an insufficient defense from a
pleading, the Ohio Rules Advisory Committee Staff Note to Rule 12(F) states
that this objection is intended to be the rules equivalent of the former code
demurrer to the answer or reply.119 As such, it is a motion to strike an
affirmative defense from the responsive pleading or a court ordered reply on
the ground that, on its face, the affirmative defense does not state a defense
upon which relief can be avoided or an action abated.120 In general, it may be

119 In pertinent part, the Staff Note provides: “Rule 12(F) authorizes the court to strike from
any pleading any insufficient . . . defense.” . . . This provision explicitly permits an attack on
one . . . defense in a pleading containing more than one . . . defense paralleling the Ohio
statutes which permit a demurrer of one of several . . . defenses. See, §§ 2309.12, 2309.21,
2309.23 and 2309.25, R.C.”

Of the four former Code provisions cited, the second, third and fourth are the pertinent ones.
The second provides: “The plaintiff may demur to a counterclaim or defense consisting of new
matter on the ground that on its face it is insufficient in law.” The third states: “The plaintiff may
demur to one or more of several counterclaims or defenses consisting of new matter, and reply as
to the residue.” And the fourth stipulates: “The defendant may demur to the reply, or to a separate
denial or avoidance therein of a defense or counterclaim, on the ground that on its face it is
insufficient in law.”

As far as the counterclaim is concerned, the Rule 12(B)(6) motion to dismiss for failure to state
a claim upon which relief can be granted, or the Rule 12(F) motion to strike an insufficient claim
from a pleading, has replaced the demurrer mentioned in these code sections; therefore, we are
here concerned only with the rules equivalent of the demurrer to a “defense consisting of new
matter” in the responsive pleading, or to the “avoidance therein of a defense” in a reply, when a
reply is ordered by the court under the provisions of Rule 7(A). In short, we are concerned here
with an objection to an affirmative defense to a statement of claim or, in the case of a reply
ordered by the court, an objection to an affirmative defense to an affirmative defense to a
statement of claim. For authority that there can be an affirmative defense to an affirmative
defense, see the classic case of Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (9th Dist.
1927), in which the reply asserted the affirmative defense of estoppel to the answer’s affirmative
defense of fraud.

For a more extensive discussion of this whole matter, see Browne, The Finality of an Order
Granting a Rule 60(B) Motion for Relief from Judgment: Some Footnotes to GTE Automatic
Electric, Inc. v. ARC Industries, Inc., 26 CLEV. ST. L. REV. 13, 124-32 (1977) [hereinafter Browne,
Finality].

120 See note 119 supra. If former Sections 2309.21, 2309.23, and 2309.25 of the Ohio Revised
Code are still controlling with respect to the proper interpretation of this aspect of Rule 12(F) —
and there is no reason to believe they are not — the motion to strike an insufficient defense from a
pleading may only be directed to a defense consisting of “new matter” in the responsive pleading
or to a defense stated in a court-ordered reply which attempts to “avoid” a defense stated in the
responsive pleading. As we have seen above, “new matter” and “avoidance” are the hallmarks of
an affirmative defense. Thus, the motion to strike an insufficient defense may only be directed to
affirmative defenses asserted in the responsive pleading or a court-ordered reply, and not to
defenses consisting only of admissions and denials. If a responsive pleading or a reply contains
only admissions or denials, and the admissions admit all of the material facts alleged in the
statement of claim or in the statement of the affirmative defense (in the case of a reply to a
responsive pleading), or the denials fail to deny all of the material facts alleged, the responsive
pleading or the reply fails to state a legal defense. In such case, neither is subject to a Rule 12(F)
motion to strike an insufficient defense from the pleading. Rather, in either of these situations, the
claimant or defender may obtain judgment in his or her favor by means of a Rule 12(C) motion
for judgment on the pleadings.

As the former Code sections also emphasize, the motion to strike an insufficient defense from a
pleading may only be premised “on the ground that on its face [the affirmative defense] is
insufficient in law.” Accordingly, the motion to strike may not be supported by documentary
evidence in testimonial form; it is limited to the matter contained in the four corners of the
sustained if the "affirmative defense" to which it is directed (1) fails to allege sufficient operative facts, or (2) it alleges operative facts which do not amount to a legally cognizable defense.

It is therefore clear that the challenge to an insufficient defense is substantive in nature, and because it is, it would not be considered an "objection" at all, were it not for the fact that Rule 12(H) specifically refers to it as an objection, and contrasts it with defenses. As the rule puts it:

A party waives all defenses and objections which he does not present either by motion or by responsive pleading except (1) the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of jurisdiction of the subject matter, and the objection of failure to state a legal defense to a claim. Thus, the "objection of failure to state a legal defense to a claim" is irregular in its nature.

As an objection it is irregular in other ways as well. As a general rule, objections may only be presented by motion, and if that motion is not timely and properly made, the objections are waived. This objection is only partly subject to that general rule. As Rule 12(F) states: "[I]f no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him the court may order..."

pleading to which it is directed. Everett v. Waymire, 30 Ohio St. 308 (1876). There is, however, federal authority that if a motion to strike is supported by documentary evidence admissible under the provisions of Federal Rule 56, the motion to strike may be treated as a motion for partial summary judgment. Kramer v. Living Aluminum, Inc., 38 F.R.D. 347 (S.D.N.Y. 1965). Whether the Ohio courts will adopt this view remains to be seen.

In any event, when testing the legal sufficiency of an affirmative defense challenged by a motion to strike it from the pleadings, admissions and denials incorporated into that defense by reference are to be ignored as mere surplusage:

The defendant, in its First Defense, which contains a general denial, denies the allegations material to the plaintiff's right to recover. In view of this fact, the repetition of such denial by reference, in said Third Defense, seems superfluous and cannot, in our opinion, have the effect of protecting said Third Defense from its vulnerability to a demurrer, if such defense is otherwise vulnerable thereto.


123 Emphasis added. See note 124 infra.

124 See the previous analysis of the Ohio Rules Advisory Committee Staff Note to Ohio Civil Rules 12(B), 12(E) and 12(F). See also the Ohio Rules Advisory Committee Staff Note to Ohio Civil Rules 12(E) and 12(F), which expressly states:

Rule 12(E) and Rule 12(F) provide, respectively, for a motion for more definite statement and a motion to strike. The matters raised by these motions are classified as "objections" rather than as "defenses." Since they may be asserted only by motion, not by answer, a defendant who wishes to assert an objection must necessarily employ the two-step defensive procedure, that is, he must serve a motion first.

As to the question of waiver, see Washington Poultry, Inc. v. Dill, 28 Ohio App. 2d 242, 243, 276 N.E.2d 668, 669 (10th Dist. 1971), stating:

The proper manner of attack upon the pleading was by motion. This was not done. The rule is clear: "All defects of a pleading not affecting its validity as such and not going to the jurisdiction of the court are waived unless proper objection is made at the proper time." 43 Ohio Jurisprudence 2d 389, Pleadings, section 384.
stricken from any pleading any insufficient . . . defense.” But Rule 12(H)(1) adds:

[T]he objection of failure to state a legal defense to a claim may be made by a later pleading, if one is permitted [i.e., a reply to a responsive pleading ordered under the provisions of Ohio Civil Rule 7(A)], by motion for judgment on the pleadings or at the trial on the merits.

Thus, this objection is unique in at least two ways: (1) it may be asserted in a pleading, and (2) it is not waived if it is not made by motion at the challenger’s earliest opportunity (i.e., by a motion to strike from the pleadings made within 28 days after the service of the pleading to which it is directed). Despite all that, it remains an objection rather than a defense.

The second objection in this category — the objection to an insufficient claim — is even more anomalous. Again, the Ohio Rules Advisory Committee Staff Note to Rule 12(F) explains that it is the rules equivalent to the partial demurrer provided for in former Section 2309.12, Ohio Revised Code. In substance, then, the motion to strike an insufficient claim is identical to the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Accordingly, it admits, for the purpose of the motion, the truth of all of the facts well-pleaded in the claim which it attacks, it cannot be aided by evidence extrinsic to that claim and it can be granted only if it appears beyond doubt from the face of the claim attacked that the claimant

125 In pertinent part, that Staff Note states:
Rule 12(F) authorizes the court to strike from any pleading “any insufficient claim or defense.” The words “claim or” were added to the Ohio rule. This provision explicitly permits an attack on one claim . . . in a pleading containing more than one claim . . . paralleling the Ohio statutes which permit a demurrer to one of several causes of action . . . See, §§ 2309.12 . . . .

Former Section 2309.12, Ohio Rev. Code Ann. (Page 1954) (repealed 1971) provides: “The defendant may demur to one or more of several causes of action stated in a petition, and answer to the residue.”

These remarks demonstrate that the Dayton Municipal Court is clearly wrong in stating:
Although an insufficient claim may be the subject of a motion to strike, the provision should not be interpreted as being a substitute for a motion to dismiss for failure to state a claim under which relief can be granted. The motion to strike should be restricted only to a claim which is completely redundant, immaterial, impertinent or scandalous.

Longstreth Co. v. Charles Vangrov & Son, Inc., 27 Ohio Misc. 15, 17, 265 N.E.2d 843, 845 (Dayton Mun. Ct. 1970). Redundancy, immateriality, impertinence, or scandal were not grounds for demurrer under the code; they were matters to be raised by motion. For this point an explanation of the Dayton Municipal Court’s error is given in note 131 infra.

126 Both Rule 12(B)(6) and Rule 12(F) are the rules equivalent of the code demurrer. As to Rule 12(B)(6) being so, see Schulman v. City of Cleveland, 30 Ohio St. 2d 196, 283 N.E.2d 175 (1972); State ex rel. Brown v. BASF Wyandotte Corp., 67 Ohio Op 2d 239 (C.P. Cuyahoga County 1974); as well as the Ohio Rules Advisory Committee Staff Note to Rule 7(C), which states: “Rule 7(C) abolishes the demurrer, but the demurrer is substituted for by the motion to dismiss discussed under Rule 12.” As to Rule 12(F) being so, see note 125 supra. Thus, to the extent that both are substitutes for the demurrer, they must share common characteristics.


128 But see the contrary inference in Miles v. N. J. Motors, 32 Ohio App. 2d 350, 353, 291 N.E.2d 758, 762 (6th Dist. 1972):
The defendants stipulated in their brief and in oral argument before this court that the constitutional “allegations include assertions of fact which require an evidentiary hearing before (such claims) can be intelligently discussed and decided.” We hold, without reaching the merits, that the trial court erred in granting the defendant’s motion
can prove no set of facts entitling him or her to recovery on that claim. That is to say, it can be granted only if the claim attacked (1) alleges operative facts which, on their face, establish a defense which bars recovery on the claim, (2) alleges a claim not cognizable under existing law, or (3) fails to allege sufficient operative facts to show the existence of a claim for relief. 129

It is in its employment that the motion to strike an insufficient claim from a pleading differs from a motion to dismiss for failure to state a claim upon which relief can be granted. If a pleading contains a single statement of claim and that statement is legally insufficient, or if a pleading contains a number of statements of claim and all such statements are legally insufficient, the proper motion to be used in challenging the sufficiency of the pleading is the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. However, if a pleading contains more than one statement of claim and one or more, but less than all, of such statements are legally insufficient, the proper motion to be used in challenging the insufficient claims is the Rule 12(F) motion to strike from the pleading. 130 Thus, this motion to strike is a motion to strike a particular claim or claims from a multi-claim pleading on the ground that the challenged claim does not state a claim upon which relief can be granted. 131

It would thus appear that this particular challenge was a defense rather than an objection were we not expressly told otherwise by the Ohio Rules Advisory Committee. 132 But the conclusion that this is an objection rather than a defense is not wholly dependent upon the committee’s dictat.

As a general rule, a valid defense leads directly to a dismissal of an action, and a valid objection leads directly to a suspension of the action. But Ohio Civil Rule 8(E)(2) states: “When two or more statements [of claim] are made to strike the constitutional claims without first conducting an evidentiary hearing.

Obviously, an “evidentiary hearing” implies the taking of evidence, and the taking of evidence implies the consideration of matters dehors the statement of the claim itself. An “evidentiary hearing” is wholly inconsistent with the letter and spirit of the civil rules. Even if it were to be conceded that a motion to strike an insufficient claim from a pleading could be considered a motion for summary judgment (and there is nothing in the Civil Rules which would support such a construction), an evidentiary hearing would still be improper, since Rule 56(C) permits only documentary evidence in such a proceeding, and that documentary evidence must be on file with the court not later than the day prior to the oral hearing on the motion. See, e.g., Gates Mills Inv. Co. v. Village of Pepper Pike, No. 37009 (8th Dist. Ct. App. Aug. 10, 1978), as abstracted in 51 Ohio B. 1297-99 (Oct. 9, 1978); Hickman v. Ford Motor Co., 52 Ohio App. 2d 327, 370 N.E.2d 494 (8th Dist. 1977).

129 See notes 4 and 5 supra.

130 See Browne, Finality, supra note 119, at 121-24.

131 It is on this point that the Dayton Municipal Court fell into heresy. In pertinent part, Ohio R. Civ. P. 12(F) states that “the court may order stricken from any pleading any redundant, inmaterial, impertinent, or scandalous matter.” In Longstreth Co. v. Charles Vangrov & Son, Inc., 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970), the court assumed that the word “insufficient” referred to the phrase “redundant, inmaterial, impertinent, or scandalous matter,” and thus concluded that:

Although an insufficient claim may be the subject of a motion to strike, the provision should not be interpreted as being a substitute for a motion to dismiss for failure to state a claim under which relief can be granted. The motion to strike should be restricted only to a claim which is completely redundant, inmaterial, impertinent or scandalous. Id. at 17, 265 N.E.2d at 845. But the Ohio Rules Advisory Committee Staff Note’s equation of the motion to strike an insufficient claim with the demurrer provided for in former Section 2309.12, Ohio REV. CODE ANN. (Page 1954) (repealed 1971), makes it clear that “insufficient” refers to substantive insufficiency and not formal insufficiency. See note 125 supra.

132 See note 124 supra.

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in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.” This is equally true of two or more independent claims joined under the provisions of Ohio Civil Rule 18(A). Therefore, a valid motion to strike an insufficient claim from a pleading will not render the whole pleading insufficient. But if the whole pleading is not insufficient, the action may not be dismissed; at best, the action is suspended until the claim is made sufficient, or until it is dropped from the pleading. Thus, since a valid motion to strike an insufficient claim cannot lead directly to a dismissal of the action, but does lead directly to a suspension of the action, it must be an objection rather than a defense.

Nevertheless, because this objection deals with the substantive insufficiency of a claim, it is irregular in its nature. But in all other respects, it is a regular objection; that is, the motion by which it is asserted must be made “before responding to a pleading,” and if it is not so made, it is waived.

In theory, then, if a party fails to move to strike an insufficient claim from a multi-claim pleading before responding to the pleading, he or she waives the substantive insufficiency of that claim. But practice has not followed theory. The reported decisions have either confused the motion to strike an insufficient claim from a pleading with the motion to strike a pleading from the files for formal irregularity, or they have permitted the defense of failure to state a claim upon which relief can be granted to stand duty for the motion to strike an insufficient claim from the pleading. If the view taken in these latter decisions prevails, the objection of insufficient claim will lose its reason for being, and might just as well be withdrawn from the civil rules. In any event, to the extent that the defense of failure to state a claim upon which relief can be granted may be used in lieu of a timely motion to strike an insufficient claim from the pleading, the challenge to the substantive insufficiency of one or more claims in a multi-claim pleading is not waived if not raised by the Rule 12(F) motion to strike made before responding to the pleading.

d. Challenges to Irregularity of Joinder

The fourth category of objection consists of challenges to irregularities in the joinder of parties. By and large, it includes only one objection — that parties have been misjoined.

133 Ohio R. Civ. P. 12(F).

134 Ohio R. Civ. P. 12(H), providing that “[a] party waives all . . . objections which he does not present . . . by motion as hereinbefore provided.” Subsections (1) and (2) of Rule 12(H) contain exceptions to this rule of waiver; unlike the objection of failure to state a legal defense to a claim, the objection of failure to state a legally sufficient claim is not among them.

135 This is clearly the case in Longstreth Co. v. Charles Vangrov & Son, Inc., 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970), and appears to be the case in Washington Poultry, Inc. v. Dill, 28 Ohio App. 2d 242, 276 N.E.2d 668 (10th Dist. 1971).

136 See Berisford v. Sells, 43 Ohio St. 2d 205, 331 N.E.2d 408 (1975); Hamilton v. East Ohio Gas, 47 Ohio App. 2d 55, 351 N.E.2d 775 (9th Dist. 1973); W.D.C., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397 (Ct. App. 10th Dist. 1976), quoted and criticized at note 79 supra. Only one reported decision seems to have recognized the true functions of the motion to strike an insufficient claim from a pleading, and even that decision was not wholly correct. See Miles v. N. J. Motors, 32 Ohio App. 2d 350, 291 N.E.2d 758 (6th Dist. 1972), quoted and criticized at note 128 supra.
Under the code, misjoinder of parties was a ground for demurrer, or, if the misjoinder did not appear from the face of the statement of claim, a matter in abatement which had to be specially pleaded in the responsive pleading. Thus, in pre-rule days, misjoinder of parties was an affirmative defense in the nature of a plea in abatement.

Ohio Civil Rule 21, however, stipulates that "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped ... by order of the court on motion of any party ... at any stage of the action and on such terms as are just." Accordingly, since the challenge to misjoinder must be made by motion, and since a successful challenge cannot lead directly to a dismissal of the action, it may be concluded that under the rules misjoinder is an objection rather than a defense. It is, however, irregular in at least one sense. Unlike most objections, which have to be asserted at the challenger's earliest opportunity, and generally within rather strict time limits, the objection of misjoinder may be made "at any stage of the action." Thus, it would appear that this objection cannot be waived prior to the entry of a final judgment.

In passing, it may be noted that the proper method of asserting the objection is a motion to drop the misjoined party. If the motion is granted, the "dropping" of the misjoined party is effectuated by an order requiring the claimant to serve and file an amended statement of claim which omits both the name of the misjoined party and the claim by or against that party.

e. Problems with an Unknown Defendant

The problem presented by Rules 15(D) and 17(A) remains. Rule 15(D) provides:

When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover...
the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

The following potential problems are inherent in any use of this rule: (1) the pleading does not contain a description of the party sued; (2) the pleading is not amended to reflect the correct name after that name is discovered; (3) the pleading does not aver that the claimant could not discover the correct name of the defender; (4) the summons does not contain the words "name unknown," and (5) the summons was not served personally on the defender. And our question is this: are challenges to any one of these potential defects objections or defenses?\textsuperscript{1}\textsuperscript{142}

The problems presented by points (4) and (5) are easily solved. If the summons does not contain the words, "name unknown," it is insufficient, and may be challenged by the defense of insufficiency of process.\textsuperscript{1}\textsuperscript{143} Likewise, if the summons was not personally served on the defender, the service may be challenged by the defense of insufficiency of service of process.\textsuperscript{1}\textsuperscript{144}

Point (1) is more difficult. The description of the defender required by the

\textsuperscript{142} The Ohio Rules Advisory Committee Staff Note states that Rule 15(D) is based on former Section 2309.62 of the Ohio Revised Code. \textit{Ohio Rev. Code Ann.} § 2309.62 (Page 1954) (repealed 1971) read as follows:

When a plaintiff is ignorant of the name of a defendant, he may be designated in a pleading or proceeding by any name and description. When the true name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must state in the verification of his petition, that he could not discover the true name. The summons must contain the words "real name unknown," and a copy thereof must be served personally upon the defendant.

The only essential difference between the rule and the former statute is that the averment that the claimant could not discover the name of the defender is removed from the verification (which, all practical purposes, has been abolished by \textit{Ohio R. Civ. P. 11}) to the body of the pleading.

Unfortunately, few of any reported cases interpret the statute that might be used as a guide to the interpretation of Rule 15(D).


\textsuperscript{144} \textit{Ohio R. Civ. P. 12(B)(5). Personal service is mandatory; no other method of service will confer jurisdiction over the person of the defender, even if the defender actually receives notice of the lawsuit. Uihlein v. Gladieux, 74 Ohio St. 232, 78 N.E. 363 (1906); Vocke v. Dayton, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973), appeal dismissed, 37 Ohio App. 2d xiv (1974). Both of these cases involved residence service on a defender; in both, such service was held insufficient. In Vocke, the court stated:}

We were constrained to decide as we did largely from our interpretation of Civil Rule 15(D). The last sentence of the paragraph reads:

"The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

This signifies to us that the action must be brought against some person identified otherwise than by name, who can and must be personally served, despite the fact that his name is presently unknown.

36 Ohio App. 2d at 143-44, 303 N.E.2d at 896. In \textit{Uihlein}, the court stated:

The constable's return shows service of the summons by leaving copy "at the defendants' usual place of residence, they being absent." There was, therefore, as it seems to us, no service such as is required by statute upon the defendant against whom judgment was rendered and unless this defect was cured it is fatal to the validity of the judgment.

74 Ohio St. at 249, 78 N.E. at 365. However, the supreme court also observed that the voluntary entry of a general appearance in the action will cure a defect in service.

Of course, if the defender is not served at all, he or she has available the defense of lack of jurisdiction over the person, or failure of commencement, whichever is the more appropriate in the circumstances. Bar Ass'n v. Gold Shield, 52 Ohio Misc. 105, 309 N.E.2d 1232 (C.P. Cuyahoga County 1975).
rule serves two purposes: it assists the process server in making personal service on the correct defender, and it assists the defender in identifying himself or herself as the party whom the claimant intends to sue. We are concerned here with the second purpose. If the pleading does not contain a description of the defender, it might be considered so vague and ambiguous that the party served cannot reasonably be required to serve a responsive pleading. Under this view, the pleading is irregular in form, and subject to an objection — the motion for a definite statement. This conclusion is arguably sound when the pleading contains an inadequate description of the defender, but what of the case where it contains no description at all? Vocke v. Dayton appears to be the only reported decision directly on point. In paragraph 2 of the syllabus, the court states: "An action is not begun within the provisions of statutes of limitation against a defendant whose name is unknown, unless his identity is set forth in the complaint. If the defendant is not identified, the action is not begun against anyone." From this language

145 So much may be inferred from Uihlein v. Gladieux, 74 Ohio St. 232, 248, 78 N.E. 363, 365 (1906), in which the court notes: "The summons does not appear in the record, but it could not have contained the name of the defendant, Lucy Rogers, for that was not known, and the attempted description (Mrs. Wm. Rogers), is at most exceedingly meagre. But passing that, what sort of service was necessary?"


147 Id. at 139, 303 N.E.2d at 893. In this case, plaintiff brought an action against the City of Dayton and three "John Does," none of whom was described in the complaint. The action was for personal injuries suffered on April 25, 1969, and the complaint was filed on March 6, 1971. The City of Dayton was dismissed on June 7, 1971. Two of the three John Does were personally served on January 27, 1972 (within the year following the filing of the complaint), and the third was served by residence service the following day. As we have seen above, residence service is not valid so the court never acquired jurisdiction over the person of the third John Doe. This left the question of the validity of the action against the two John Does who had been properly served within the year following the filing of the complaint. On this point, the Second District Court of Appeals made the following remarks:

The fatal weakness of plaintiff's position is that she lacked not only the names, but also any really specific clue to the identity of those sought to be sued. After the city was dismissed, there was no longer any defendant in the case upon whom a summons could be served, and the case was for all practical purposes at an end for the lack of a defendant.

Civil Rule 3(A) contemplates, as did R.C. 2305.17, that when an action is commenced it should be commenced against someone. When the city was dismissed, this action had been commenced against no one. (Emphasis in the original).

36 Ohio App. 2d at 141, 303 N.E.2d at 895.

If the present plaintiff were to prevail in her contention, any claimant could, within the period of limitation, file a petition [sic] without designation or description of any defendant, and without service upon anyone, in the mere hope that within a year thereafter he might discover a missing party to designate. Obviously, in the meantime, the action would not be begun against anyone. Whether or not a plaintiff who is unfortunate enough not to find the proper defendant should be permitted successfully to follow such a course, is a question to be answered elsewhere. The law and rules do not now permit him to do so. The action was properly dismissed [sic] and the judgment will be affirmed.

Id. at 143, 303 N.E.2d at 895-96. If, as the court implies, no action was ever commenced against the undescribed John Does, there was no action to dismiss; the complaint should have been stricken from the files. Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

[The language of Rule 15(D)] signifies to us that the action must be brought against some person identified otherwise than by name, who can and must be personally served, despite the fact that his name is presently unknown. Unless the action is against some such person, it has not been brought against anyone, and is therefore not actually begun at all.

36 Ohio App. 2d at 144, 303 N.E.2d at 896.
it is obvious that a failure to include a description of the defender amounts to more than a failure to state a claim upon which relief can be granted, for if it were merely a failure to state a claim, an amendment supplying the description would relate back to the date of the original pleading. Rather, when the Vocke syllabus is read in conjunction with the language of the opinion, it is clear that the court is equating the undescribed defender with a nonexistent defender and holding that the action fails for want of commencement since no defender exists who can be served with process. If this view were correct, the proper challenge to an absence of a description would be the defense of failure of commencement.

Point (3) — that the pleading does not aver that the claimant could not discover the correct name of the defender — has received somewhat similar treatment. One might have assumed that the absence of such an averment would be no more than a formal irregularity, or at worst, it would amount to no more than an amendable failure to state a claim upon which relief can be granted. But the only authority on point — two unreported cases abstracted in the Ohio Bar — appears to treat it more seriously.

Rebrock v. Weller Township is chronologically the first and, as abstracted, reads:

The reviewing court stated: ‘The issue before this court is whether a complaint, filed within the statute of limitation as to a defendant not named may be amended to insert the name of a previously unnamed defendant after the statute of limitation has run, where the original complaint fails to allege, as required by O.C.R. 15(D), that plaintiff could not discover the name.’ ‘We hold it cannot and affirm the trial court.’

The cryptic comment is something of a slender reed, but what the court appears to be saying is that in the absence of an averment that the claimant cannot discover the correct name of the defender, it will be assumed that the name given in the complaint is the name of the defender whom the claimant intends to sue. Therefore, if service is not obtained on a defender by that name within a year following the filing of the complaint, no action is commenced against anyone. And if no action is commenced under the provisions of Rule 3(A), no action comes into existence. But if no action exists, there is nothing to amend. Therefore, an amendment substituting the name of the real defender will not lie. Further, if the statute of limitations has run between the filing of the complaint and the expiration of the year in which service may be had, a new action against the intended defender is barred by the running of the statute of limitations.

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149 See the extracts from the opinion set out in note 147 supra.
151 Id.
152 This situation is somewhat akin to that of Barnhart v. Schultz, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978). In Barnhart, the action was filed against a defender who was dead at the time of filing. After the statute of limitations had run, the claimant attempted to substitute the personal representative of the deceased defender by means of an amended complaint. The Ohio Supreme Court held that the amendment would not lie because an action had not been commenced against...
Sidenstricker v. Weir\textsuperscript{153} is the second case. As abstracted, it reads:

Action filed as a result of automobile accident. Trial court dismissed action as to several Defendants because of Plaintiff's failure to comply with Civ. R. 15. Held: judgment affirmed. Plaintiff did not aver in the complaint that he could not discover the name, nor did the summons contain the words 'name unknown' as required by Civ. R. 15(D).\textsuperscript{154}

While this equally cryptic comment might be read as a dismissal under Rule 41(B)(1) for failure to comply with the civil rules, the reference to the insufficient summons makes it more likely that there was a failure of commencement because the "named" defender was never served, and the intended defender was served with an ineffective summons.

Thus, the proper challenge is the defense of failure of commencement. But again, this defense will be viable only if the year in which to obtain service has run.\textsuperscript{155} If the claimant moves for default judgment or otherwise pushes the action before that year expires, the party served, though not the named defender, will have to respond, or that party will be bound by the default

the named defender and could not be, because the named defender was dead. The court stated:

It is accepted law that an action may only be brought against a party who actually or legally exists and has the capacity to be sued. . . . Since the only complaint filed by plaintiffs within two years after the accident designated as a sole defendant one who was dead when the complaint was filed, plaintiffs did not commence their action within the period provided for in the statute of limitations.

Although Civ. R. 15(C) provides for the relation back of amendments to an original complaint, the rule cannot be applied in the instant cause because there was no complaint against an existing party for the amended complaint to relate back to. . . . The reason for such a rule is self-evident. There can be no amendment "when there is nothing to amend."

Appellee contends further that, since plaintiffs served a living defendant within one year of the time that they timely filed against a deceased one, plaintiffs commenced an action within the terms of Civ. R. 3(A), and, therefore, their cause of action was saved. We disagree with this argument as well.

Civ. R. 3(A) imposes two requirements. The first is that the action be brought by filing a complaint within the applicable statute of limitations. The second is that service be obtained within one year after the complaint has been filed. The fact that Civ. R. 3(A) does not grant an option to commence an action either by filing within the statute of limitations or by filing and serving within the post-filing service period is clear from the language of the rule, which provides for commencement of an action "by filing . . . if service is obtained." (Emphasis added). See, also, staff note to Civ. R. 3(A). [The clear implication from this passage is that service must be had on the named defender.]

We hold, therefore, that a complaint in negligence which designates as a sole defendant one who died after the cause of action accrued but before the complaint was filed has neither met the requirements of the applicable statute of limitations, nor commenced an action pursuant to Civ. R. 3(A) and such complaint may not be amended to substitute an administrator of the deceased defendant's estate for the original defendant after the limitations period has expired, even though service on the administrator is obtained within the one-year, post-filing period provided for in Civ. R. 3(A).


\textsuperscript{154} Id.

\textsuperscript{155} See discussion at notes 102-118 supra.
judgment. Under these circumstances, the proper challenge will be the defense of misnomer, coupled with the defense of failure of commencement. In any event, whatever challenge is chosen in a point (3) situation, it is more properly deemed a defense than an objection.

There does not appear to be any reported authority on point (2) — a failure to amend after the correct name of the defender is discovered — but this seems to be in the nature of a formal irregularity, and the corresponding challenge would then be in the nature of an objection. Most likely, the proper method of asserting the challenge would be a motion for a definite statement.

f. Problems with Real Party in Interest

Rule 17(A) presents somewhat different problems. In pertinent part the rule provides:

Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

A party who is not a real party in interest lacks standing to sue, and a challenge to a violation of Rule 17(A) may properly be denominated a motion to dismiss for lack of standing. But is such a challenge a defense or an

156 Maloney v. Callahan, 127 Ohio St. 387, 188 N.E. 656 (1933).
157 Id.

The distinction between a John Doe situation such as that described in the text and a misnomer situation is paper-thin. In a John Doe situation, the claimant knows that he does not know the real name of the defender and deliberately sues the defender by an incorrect name. Such suit is valid if the claimant religiously observes the requirements of Rule 15(D). In a misnomer situation, the claimant thinks he knows the real name of the defender, but does not, and unintentionally sues the defender by an incorrect name. If the intended defender has been validly served within the year, the courts generally permit the claimant to correct his pleadings by way of amendment. Grooms v. Greyhound Corp., 287 F.2d 95 (6th Cir. 1961); Maloney v. Callahan, 127 Ohio St. 387, 188 N.E. 656 (1933); Burton v. Buckeye Ins. Co., 26 Ohio St. 467 (1875); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (6th Dist. 1974); Farm Bureau Mut. Auto. Ins. Co. v. Gioia Macaroni Co., Inc., 88 Ohio L. Abs. 215, 182 N.E.2d 25 (7th Dist. Ct. App. 1971); Spence v. Commercial Motor Freight Inc., 99 Ohio App. 143, 127 N.E.2d 427 (2d Dist. 1954); Morgan v. Bayview Hospital, 82 Ohio L. Abs. 499, 166 N.E.2d 430 (C.P. Cuyahoga County 1959).

When, as in the Sidenstricker case cited in the text, the claimant fails to aver that the correct name of the defender could not be discovered, it is difficult to tell whether the claimant is attempting a John Doe suit or is guilty of misnomer. The correct answer depends upon the claimant’s knowledge at the time suit is filed, but that must generally be determined by objective circumstances surrounding the filing of the complaint. When the name chosen by the claimant bears a close resemblance to the defender’s correct name, or where the name chosen by the claimant is one which he or she might logically assume to be the defender’s correct name, the courts generally assume a misnomer situation and permit correction by amendment when the intended defender has been validly served. But when there is a radical difference between the name used and the defender’s correct name, or when the claimant employs the traditional John or Jane Doe as the name of the defender, the courts may reasonably conclude that the claimant is attempting a John Doe suit. In this latter event, the rules stated in the text apply.

158 See Point Rental Co. v. Posani, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (10th Dist. 1976), by way of a somewhat stretched analogy.
159 (Emphasis added).
objection? Because the rule itself refers to the challenge as an “objection,” one might conclude that the challenge is in the nature of an objection. But the question is not that easily answered; it is not at all clear whether the word “objection” as it appears in the rule is used in the technical sense of objection, as opposed to defense, or whether it is used in the generic sense of a protest to a violation of the rule.

The essential difficulty with the rule is that it has a foot in both camps. Not only is the challenge referred to as an objection, but the rule provides for a suspension of the action for a reasonable time pending cure by ratification, joinder or substitution, and suspension pending cure is a typical characteristic of an objection. On the other hand, if no cure is forthcoming within a reasonable time the rule provides for a dismissal of the action. Thus, a direct dismissal is possible under the rule, and direct dismissal of the action is a characteristic of a defense.

It may be said, however, that the dismissal aspect of the rule outweighs its suspension-pending-cure aspect, and the better answer will view the challenge as a defense. This conclusion is reinforced by State ex rel. Dallman v. Court of Common Pleas in which the Ohio Supreme Court equated lack of standing with lack of subject matter jurisdiction.

While this equation may assist in solving the problem of objection v. defense — lack of subject matter jurisdiction is clearly a defense — it presents new problems in the areas of pleading and waiver. First, the problem of pleading. If the defense of lack of standing is presented by motion prior to the service of the responsive pleading, it would appear that under the rule of Mills v. Whitehouse Trucking Co. it could be asserted either by a motion to dismiss for lack of subject matter jurisdiction under the provisions of Rule 12(B)(1), or by a motion to dismiss for lack of standing under the provisions of Rule 17(A). On the other hand, if the defense is asserted in the responsive pleading, it must be averred in such a way that it formulates “in a simple, concise, and direct manner the issue to be resolved by the trial court.” A defense formulated in terms of lack of subject matter jurisdiction, though technically accurate, would probably not meet the Mills standard since it would not expose the true issue to be resolved by the court. Thus, it would

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161 See, e.g., Browne, Finality, supra note 119, at 72-79, in which the objection to lack of standing is discussed. There, the term “objection” was used in its generic sense of protest or challenge.


163 35 Ohio St. 2d 176, 298 N.E.2d 515 (1973).

164 The wisdom of this jurisdictional requirement, that a party must have standing to raise an issue, is well illustrated by the instant case. Few cases present a better example of an instance in which the nature of the parties is such as to not assure adjudication in accordance with the historical connotations of the adversary process.

It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action. We conclude, therefore, that neither this court nor the Court of Appeals has jurisdiction to determine this cause on its merits. Id. at 179, 298 N.E.2d at 517.

The subject matter jurisdiction to which the court refers is in the more limited sense of subject matter jurisdiction over a particular case. See note 100 supra and accompanying text.

165 40 Ohio St. 55, 320 N.E.2d 668 (1974). For a discussion of the “rule” of Mills, see note 74 supra.
have to be formulated somewhat as follows: "For her first defense, defendant says that plaintiff is not the real party in interest herein and lacks standing to invoke the jurisdiction of this court, and that as a consequence thereof, this action is not prosecuted in the name of the real party in interest and the court lacks jurisdiction over the subject matter thereof."

As to waiver, the general rule is that an affirmative defense is waived if not asserted by motion made prior to the responsive pleading, by a defense in a responsive pleading, or by a defense in a responsive pleading amended as a matter of course. But lack of subject matter jurisdiction is an exception to this general rule; the defense of lack of subject matter jurisdiction is timely raised "whenever it appears by suggestion of the parties or otherwise" that the court does not have jurisdiction, and it may be raised for the first time on appeal to the supreme court. But the lack of subject matter jurisdiction which results from a lack of standing is an exception to this exception; it is a lack of subject matter jurisdiction in the limited sense of jurisdiction over a particular action and as such it is generally waived if the defense is not raised prior to the entry of final judgment in the action.

The preceding pages have covered the various categories of objections at some length in order to better exhibit the essential characteristics of an objection. As a general rule, objections are challenges to curable irregularities appearing in pleadings, motions and other papers. They must be asserted by motion, and the motion must generally be made within twenty-eight days after the service of the document to which the challenge is directed. If a responsive pleading is required by the rules, the motion asserting the objection must generally be made prior to the service of the responsive pleading. Where a more specific motion is not prescribed by tradition or the civil rules, the motion to be used in asserting the objection is the motion to strike the challenged document from the files. If the motion asserting the objection is not timely and properly made, the objection is waived. A valid objection requires the suspension of the action until the irregularity is cured. Thus the objection cannot lead directly to a dismissal of the action but it can do so indirectly; if the irregularity is not promptly cured by the offending party, the court may dismiss the action as a sanction. Depending upon the

167 Ohio R. Civ. P. 12(H).
170 See note 164 supra.
171 See the cases cited in note 100 supra.
172 Objections must be distinguished from sanctions. A sanction is a challenge to the misconduct of another party to the action. It is a challenge to that other party's willful and deliberate failure to comply with the civil rules or a court order. When the misconduct appears from the face of a pleading, motion or other paper, the request for a sanction may be made by a motion to dismiss the action for failure to prosecute or for failure to comply with the civil rules or a court order. In this context, a "court order" may include local rules of court which are deemed standing orders of the court. Although a curable defect almost always underlies misconduct of this type, the request for sanctions leads directly to a dismissal of the action, and not merely to its suspension pending cure of the defect. Whether the dismissal will be "on the merits" or "otherwise than on the merits" is within the sound discretion of the court, and the exercise of that discretion is generally governed by the amount of contumaciousness exhibited by the offending party.
nature of the document in which the irregularity appears, an objection may be asserted either by the claimant or the defender.

In contrast, an affirmative defense in the nature of a plea in abatement may only be asserted by a defender. As a general rule, affirmative defenses of this type are challenges to some substantive or jurisdictional defect which prevents the claimant from proceeding further with the action, but which does not necessarily bar the ultimate recovery on the claim. These defenses may be asserted by motion, or they may be included as defenses in the responsive pleading when a responsive pleading is required. When asserted by motion, the motion must generally be made within twenty-eight days after the defect appears in the record, and if a responsive pleading is required, the motion must generally be made prior to the service of the responsive pleading. Where a more specific motion is not prescribed by tradition or the civil rules, the motion to be used in asserting the defense is the motion to dismiss the action. If the defense is not asserted by a timely and proper motion, or included as a properly pleaded defense in the responsive pleading, it is waived. A valid defense of this nature requires the dismissal of the action but it does not lead directly to a disposition of the claim on the merits.

So much for abstract theory. In practice, the above description of affirmative defenses in the nature of a plea in abatement is so riddled with exceptions that it is practically worthless. For example, Rule 12(B) contains a group of defenses which so closely match the description of an objection that they would be believed to be such were it not for the fact that the rule insists that they are defenses.173

3. Rule 12 Defenses and their Quirks

A contrast between Rules 12(B) and 41(B)(4) provides the necessary introduction to our analysis:

Ohio Civil Rule 12(B) Defenses:
1. Lack of jurisdiction over the subject matter.
2. Lack of jurisdiction over the person.
3. Improper venue.
4. Insufficiency of process.
5. Insufficiency of service of process.
6. Failure to state a claim upon which relief can be granted.
7. Failure to join a necessary party under Rule 19 or Rule 19.1.174
8. Failure to join an indispensable party under Rule 19.175

Ohio Civil Rule 41(B)(4) Dismissals:
1. Lack of jurisdiction over the subject matter.
2. Lack of jurisdiction over the person.
3. Failure to join an indispensable party under Rule 19.176

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173 Thus, Rule 12(B) states:
Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, . . . (7) failure to join a necessary party under Rule 19 or Rule 19.1. (emphasis added)

Ohio R. Civ. P. 12(D) speaks of "[t]he defenses specifically enumerated (1) to (7) in subdivision (b) of this rule." (emphasis added)
Without question, these two rules were designed to parallel each other. Rule 12(B) delineates the defense, and Rule 41(B)(4) specifies the consequence which follows a successful assertion of that defense.

174 See note 175 infra.

175 OHIO R. Civ. P. 12(B)(7) actually reads: “failure to join a party under Rule 19 or Rule 19.1.” But OHIO R. Civ. P. 12(H) draws a distinction between necessary parties and indispensable parties:

A party waives all defenses . . . which he does not present either by motion as hereinafter provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A), except (1) . . . the defense of failure to join an indispensable party . . . .

The Ohio Supreme Court held in Layne v. Huffman, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1965), that the parties required to be joined by Ohio Civil Rule 19.1 are necessary parties rather than indispensable parties:

Appellant argues that since appellee [Mrs. Layne] failed to join in her husband's suit pursuant to Civ. R. 19.1(A), she is now barred from filing her separate action against him.

[The supreme court then quoted that portion of Civil Rule 12(H) given above.]

It is clear that no motion, pleading or amendment was made by Mr. Huffman raising his Civ. R. 19.1(A) defense of failure to join in the original suit brought by Mr. Layne. Unless Mr. Layne is now determined to be an indispensable party, that defense has been waived.

Civ. R. 19.1 was developed as a logical extension of the procedure provided in Civ. R 19 (joint party of persons needed for a just adjudication). The rationales for each are alike. Here, the same facts govern the claims of the parties who are required to be joined. Without joinder there is the possibility of inconsistent results, and defendant may be required to defend multiple suits based on the same question of liability . . . .

However, although related in the manner outlined above, these claims remain separate. Kraut v. Cleveland Ry. Co. (1936), 132 Ohio St. 125. This determination leads the court to the conclusion that Mrs. Layne was not an indispensable party. While the term “indispensable party” is not used in Civ. R. 19.1 (which is another indication that the party required to be joined here is not indispensable), that term is used in Civ. R. 19 [(B): “. . . the absent person being thus regarded as indispensable.”], and criteria are provided in Civ. R. 19(B) to determine whether a party is indispensable: [here, the court quotes the four tests for indispensability set forth in Ohio Civil Rule 19(B)].

Id. at 288, 289-90, 327 N.E.2d at 769-70.

Accordingly, a distinction must be drawn between necessary parties and indispensable parties; a distinction must likewise be drawn between the defense of failure to join a necessary party and the defense of failure to join an indispensable party. As a rule of thumb, necessary parties are parties who are required to be joined under the provisions of Rules 19(A) and 19.1(A). (As to Rule 19(A), see State ex rel. Dayton v. Kerns, 49 Ohio St. 2d 295, 361 N.E.2d 247 (1977); Lumbermens Mut. Cas. Co. v. Ohio Dept of Transp., 2 Ohio Op. 3d27 (10th Dist. Ct. App. 1976); John P. Novatny Elec. Co. v. State, 46 Ohio App. 2d 255, 349 N.E.2d 328 (10th Dist. 1975); Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (C.P. Cuyahoga County 1977); Foremost Ins. Co. v. Walters, 45 Ohio Misc. 51, 345 N.E.2d 93 (Franklin County Mun. Ct. 1975). As to Rule 19.1(A), see Layne v. Huffman, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1965); see also Layne v. Huffman, 43 Ohio App. 2d 53, 333 N.E.2d 147 (10th Dist. 1974), aff’d, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975). Hence, the defense of “failure to join a necessary party under Rule 19 or Rule 19.1.” On the other hand, indispensable parties are necessary parties under Rule 19(A), who are also made indispensable by the application of the four criteria mentioned in Rule 19(B). (See OHIO R. Civ. P. 19(B), quoted at note 176 infra, and Layne v. Huffman, 42 Ohio St. 2d 287, 327 N.3d 767 (1975).) Therefore, the defense of “failure to join an indispensable party under Rule 19.”

A second class of indispensable party consists of persons whose joinder is required by statute (but who would not fall within the parameters of Rules 19 or 19.1), and upon whose joinder the subject matter jurisdiction of the court depends. See, e.g., Cannon v. Perk, 46 Ohio St. 2d 301, 348 N.3d 342 (1976); Macy v. Herbert, 28 Ohio St. 2d 124, 276 N.3d 845 (1971); Aucker v. Adams & Ford, 23 Ohio St. 543 (1973); Hagler v. Burger, No. 78-CA-4 (2nd Dist. Ct. App. July 28, 1978), as abstracted in 51 Ohio B. 1107 (Sept. 11, 1978); Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.3d 362 (8th Dist. 1974). Interestingly enough, the Ohio civil rules make no express provision for challenging the nonjoinder of these indispensable parties. However, since their joinder is generally deemed a jurisdictional requisite, one may presume that the proper defense is lack of jurisdiction over the subject matter of the action rather than the nonjoinder of an indispensable party.

OHIO R. Civ. P. 41(B)(4) actually reads: “A dismissal . . . (b) for failure to join a party
Putting aside the Rule 12(B)(6) defense (because of its exceptional nature, it requires special treatment), it is striking that defenses number 3, 4, 5, and 7 have no corresponding dismissals under the provisions of Rule 41(B)(4). It is obvious that none of these defenses goes to the merits of the claimant's claim. If an action were to be dismissed on any one of these four grounds, the dismissal would have to be "without prejudice," or "otherwise than on the merits." But Rule 41(B)(4) specifies those Rule 12(B) defenses which result in a dismissal otherwise than on the merits. Therefore, since Rule 41(B)(4) does not provide for a dismissal otherwise than on the merits for any of these defenses under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits.

Either this rule is ineptly drawn, or the courts' interpretation of Rules 19 and 19.1 is wholly incorrect. To begin with, it has been held that an action cannot be dismissed for failure to join a necessary party. If the absent party is subject to service of process, the court will order his or her joinder under the provisions of Rule 19(A); if the absent party is not subject to service of process, the action will proceed in his or her absence. See John P. Novatny Elec. Co. v. State, 46 Ohio App. 2d 255, 349 N.E.2d 328, 329 (10th Dist. 1975), the syllabus of which states that "[t]he nonjoinder of a person in whose absence complete relief cannot be accorded among those already parties is not a ground for dismissal, but such a situation calls for the application of Civ. R. 19(A)." See also Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (C.P. Cuyahoga County 1977). Second, as pointed out in note 175 supra, Rule 19.1(A) has reference only to necessary parties. See Layne v. Huffman, 43 Ohio App. 2d 53, 333 N.E.2d 147 (10th Dist. 1974), aff'd, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975). Finally, an action may be dismissed for failure to join an indispensable party. See Ohio R. Civ. P. 19(B), which states that, "[i]f a person as described in [Rule 19(A)] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Therefore, since there can be no dismissal for the nonjoinder of a necessary party, and since Rule 19.1 is concerned only with necessary parties, Rule 41(B)(4)(b) makes no sense unless the reference to Rule 19.1 is ignored and the balance is read as if it referred to the dismissal of indispensable parties only. In other words, if the judicial interpretations are correct, the rule should read: "A dismissal . . . (b) for failure to join an indispensable party under Rule 19 shall operate as a failure otherwise than on the merits."

This conclusion is reinforced by Ohio R. Civ. P. 3(D), which provides for a rare dismissal in the case of improper venue; as that rule expressly states, "the court shall dismiss the action without prejudice." This statement would be absolutely true if the rule remained as originally enacted. Compare:

**ORIGINAL RULE 41(B) (4):**
- A dismissal
  - (a) for improper venue,
  - (b) for lack of jurisdiction over the person or the subject matter, or
  - (c) for failure to join a party under Rule 19 or Rule 19.1

**PRESENT RULE 41 (B) (4):**
- A dismissal
  - (a) for lack of jurisdiction over the person or the subject matter, or
  - (b) for failure to join a party under Rule 19 or Rule 19.1

The 1971 Rules Advisory Committee Staff Note explains:

Rule 41(B)(4) has been amended by deleting the provision for a dismissal of the action on the grounds of "improper venue." The language providing for a dismissal for "improper venue" is unnecessary and perhaps misleading. A party may object to "improper venue." See Rule 12(B). Or a party may waive the question of "improper venue." See Rule 12(H). But the remedy for the objection to "improper venue" is transfer of the action to a proper venue and not dismissal of the action. See particularly Rule 3(C).

But as indicated in note 179 infra, Ohio R. Civ. P. 3(D) does provide for the dismissal of an action "without prejudice" in certain circumstances when there is no proper forum in Ohio, but there is a proper forum in another jurisdiction outside of Ohio. Thus, the statement in the text is no longer absolutely true, but the exception noted here reinforces rather than contradicts the conclusion that is based on that statement.
four grounds, it may be concluded that an action may not be dismissed for improper venue, insufficiency of process, insufficiency of service of process, or the failure to join a necessary party under Rule 19 or Rule 19.1.179 A closer examination of each of these defenses will better illustrate the proposition.

a. Improper Venue

Suppose that the defender moves to "dismiss" for improper venue.180 If the defense is well-taken, the court may not dismiss the action; rather, it must transfer it to a proper venue.181 If the claimant does not go forward with the action in the forum to which it has been transferred, the action may be dismissed for failure to prosecute under the provisions of Rule 41(B)(1), but in no event will the action be directly dismissed because it was improperly venued.182 Thus, in most cases, the defense of improper venue will

179 In Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971), appeal dismissed, 409 U.S. 908 (1972), the Tenth District Court of Appeals made the same comparison between the two rules, but reached a different result. It concluded that because Rule 41(B)(4) did not include dismissals for insufficiency of process or insufficiency of service of process, a dismissal on either of these two grounds must be a dismissal on the merits. Perhaps the court was beguiled by the almost universal tendency to refer to all Rule 12(B) motions as motions to dismiss. In any event, the court began its analysis with the assumption that a dismissal could be granted for insufficiency of process or insufficiency of service of process. The awkwardness of the result—a dismissal on either ground is a dismissal on the merits, but a dismissal for lack of jurisdiction over the person, which is the logical consequence of insufficiency of process or insufficiency of service of process, is a dismissal otherwise than on the merits—testifies to the unsoundness of that assumption.

180 As indicated in note 177 supra, all Rule 12(B) motions are commonly designated motions to dismiss. However, because a dismissal for improper venue is a rare occurrence, this particular motion is more appropriately designated a motion to transfer or a motion for change of venue. See State v. Licsak, 41 Ohio App. 2d 165, 324 N.E.2d 589 (10th Dist. 1974) (motion to transfer); State ex rel. Morgan v. Daugherty, No. 1246 (2d Dist. Ct. App. 1978), as abstracted in 51 Ohio B. 981 (Aug. 7, 1978) (motion for change of venue).


182 The 1971 Ohio Rules Advisory Committee Staff Note to Rule 3(D) lists an exception to this rule:

Rule 3(D) governs that unusual situation in which defendant objects to venue on the ground of improper venue and the court finds that there is not an appropriate venue within the state to which to transfer the action. In this situation Rule 3(D) states that the court shall direct the plaintiff to recommence the action in another state provided that there is an appropriate forum in the other state and provided that defendant consents to submit himself to the more appropriate out-of-state forum. If there is an appropriate forum and defendant consents to be bound in the other forum, the court shall stay the action and the plaintiff shall recommence the action in the out-of-state forum and so notify the court within sixty days. But assume that plaintiff fails to recommence the action in the appropriate forum. Rule 3(D) has been amended to provide that if plaintiff fails to recommence the action in the out-of-state forum within sixty days, the court shall dismiss the action. Note that the dismissal, the only dismissal permitted by the rules because of inappropriate Ohio venue, shall be without prejudice.

Upon analysis, however, this dismissal is more appropriately designated a dismissal for failure to
accomplish no more than a suspension of the action until the venue is cured by transfer to the proper forum. In other words, the defense acts just like an objection.\footnote{183}

b. Insufficiency of Process or Service of Process

The same is true with respect to the defenses of insufficiency of process and insufficiency of service of process. If the defender moves to "dismiss\footnote{184}" for insufficiency of process or insufficiency of service of process, the court may not dismiss the action. If the defenses are valid, the court may quash the insufficient summons and the service thereof, or it may quash the insufficient service of summons. The claimant may then attempt to cure the insufficiency by an amended summons,\footnote{185} or by the valid service of an alias or pluries summons.\footnote{186} If the insufficiency is not cured within a year from the date the complaint was filed,\footnote{187} the defender has the option to move to strike the

\footnote{183} Indeed, in the 1971 Staff Note to Ohio Civil Rule 41(B)(4), the Ohio Rules Advisory Committee consistently refers to this challenge as an objection rather than a defense. See note 178 supra.

\footnote{184} Again, the motion is commonly misdesignated a "motion to dismiss." See, e.g., Rasmussen v. Vance, 34 Ohio Misc. 87, 90, 293 N.E.2d 114, 117 (C.P. Cuyahoga County 1973):

On January 8, 1973, an instrument captioned "Motion to Quash" was filed by counsel for defendant, Marshall L. Vance. This is treated by the court as a special-appearance motion to dismiss because of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. See Civ. R. 12(B), defenses (2), (4), and (5).

In this case, counsel was correct and the court was wrong, at least with respect to defenses (4) and (5). A motion raising either of these defenses is properly designated a motion to quash the summons or a motion to quash the service of the summons. See Hayden v. Ours, 44 Ohio Misc. 62, 337 N.E.2d 183 (3d Dist. Ct. App. 1975).

\footnote{185} OHIO R. Civ. P. 4.6(B) ("The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof, unless the amendment would cause material prejudice to the substantial rights of the party against whom the process was issued."); see Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (6th Dist. 1974).


\footnote{187} As a general rule, the claimant has a full year from the date the complaint was filed with the court in which to obtain valid service; a motion to strike the complaint from the files for failure of commencement or a motion to dismiss for lack of jurisdiction over the person is premature if made before the year expires. As the court noted in Yancey v. Pyles, 44 Ohio App. 2d 410, 413-14, 418, 339 N.E.2d 835, 837, 840 (1st Dist. 1975):

The action would... in conformity with Civil Rule 3(A), have commenced upon the filing of the Complaint with the court on March 1, 1974, . . . requiring the overruling of any Motion to Dismiss on jurisdictional grounds, at least for the period of one year following such filing.

The action of the trial court in granting defendant's Motion to Dismiss prior to the expiration of the period provided by Civil Rule 3(A) for the perfection of service, insofar as it was founded upon a purely procedural requirement for a praecipe which had been eliminated by Civil Rule 4(A), was error.

In Hayden v. Ours, 44 Ohio Misc. 62, 66, 337 N.E.2d 183, 186 (3d Dist. Ct. App. 1975), the court stated:

Plaintiffs have begun the commencement of their cause of action but they have not yet caused them to be commenced because they have not caused summons to be served
complaint from the files for failure of commencement or move to dismiss for lack of jurisdiction over the person.\textsuperscript{188} Thus, if a dismissal is entered in the case it will occur at the end of the year allowed for effective service\textsuperscript{189} and will be a dismissal for lack of jurisdiction over the person, and not for insufficiency of process or insufficiency of service of process. In other words, if the insufficiency defenses are timely and properly asserted, they will suspend the action until the insufficiency is cured or until the year for obtaining effective service expires, whichever occurs first, but they will not lead directly to a dismissal of the action.

c. Failure to Join a Necessary Party

A motion to "dismiss" for failure to join a necessary party\textsuperscript{190} repeats the same pattern. If the motion is timely and properly made, the court cannot dismiss the action; rather, if the absent party is not subject to service of process, the court must overrule the motion and permit the action to proceed; and if the absent party is subject to service of process, the court must order the claimant to join that party.\textsuperscript{191} Thus, where joinder is feasible,\textsuperscript{192} and not

\begin{quote}
upon defendant administrator within one year. Consequently, defendant's motion to dismiss is premature as plaintiffs have until April 8, 1975, in which to accomplish this. Southgate Shopping Center Corp. v. Jones, 49 Ohio App. 2d 358, 361 N.E.2d 460 (5th Dist. 1975), recognized the same principle. After declaring the certified mail service on defendant to be insufficient service because not received by him personally, the court noted: "The plaintiff's right to proceed on his original complaint will require valid service of process upon the defendant." \textit{Id.} at 364, n.*, 361 N.E.2d 460, at 464, n.*. Unfortunately, the court of appeals failed to observe that the year had run at the time it made that statement. Thus, the case raises, but leaves unresolved, the question of whether an appeal stays the running of the year in which effective service must be obtained.

This general rule does not obtain when it is apparent that the claimant can never obtain valid service of process on the defender within the year. \textit{See}, e.g., Barnhart v. Schultz, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), in which the named defendant was dead at the time the complaint was filed and the statute of limitations ran before the claimant discovered the fact of death.

\textsuperscript{185} As indicated in note 187 \textit{supra}, either motion will normally be premature if made before the year expires. But if it is apparent that the insufficiency cannot be cured and that the claimant will never be able to obtain effective service on the defender, the motion to strike or the motion to dismiss for lack of jurisdiction may be presented with the motion to quash for insufficiency of process or insufficiency of service of process, and the court may grant such motions before the year has run. (However, if the defender opts for a motion to dismiss for lack of jurisdiction over his or her person, he or she will probably waive the defense of failure of commencement. \textit{See} text accompanying note 213 \textit{infra}. Accordingly, one wants to exercise one's options with a considerable amount of care.)

In such case, is a motion to quash for insufficiency absolutely necessary? Probably not, but if there has been an ineffective attempt at service, the record may reflect good service on its face. Thus, if the record is not supplemented by a court order quashing the service, an appellate court might deem itself bound by the record and, finding a conflict between the record and a court order striking the complaint for failure of commencement or dismissing the action for lack of jurisdiction over the person, it might reverse. Accordingly, the motion to quash serves the useful purpose of clarifying the record and its employment is advisable. \textit{See}, \textit{e.g.}, Krabill v. Gibbs, 41 Ohio St. 2d 1, 235 N.E.2d 514 (1968).

\textsuperscript{189} \textit{But see} the exception set out at notes 187 and 188 \textit{supra}.

\textsuperscript{190} Again, the motion is typically misdesignated a motion to dismiss. It is more properly designated a motion to compel the joinder of a necessary party. \textit{See}, \textit{e.g.}, the text accompanying notes 137-41.

\textsuperscript{191} \textbf{Ohio R. Civ. P. 19(A)}: A [necessary] person who is subject to service of process shall be joined as a party in the action. . . . If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). . . . If he should join as a plaintiff but refuses to do so, he may be made a

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\item[185] As indicated in note 187 \textit{supra}, either motion will normally be premature if made before the year expires. But if it is apparent that the insufficiency cannot be cured and that the claimant will never be able to obtain effective service on the defender, the motion to strike or the motion to dismiss for lack of jurisdiction may be presented with the motion to quash for insufficiency of process or insufficiency of service of process, and the court may grant such motions before the year has run. (However, if the defender opts for a motion to dismiss for lack of jurisdiction over his or her person, he or she will probably waive the defense of failure of commencement. \textit{See} text accompanying note 213 \textit{infra}. Accordingly, one wants to exercise one's options with a considerable amount of care.)

In such case, is a motion to quash for insufficiency absolutely necessary? Probably not, but if there has been an ineffective attempt at service, the record may reflect good service on its face. Thus, if the record is not supplemented by a court order quashing the service, an appellate court might deem itself bound by the record and, finding a conflict between the record and a court order striking the complaint for failure of commencement or dismissing the action for lack of jurisdiction over the person, it might reverse. Accordingly, the motion to quash serves the useful purpose of clarifying the record and its employment is advisable. \textit{See}, \textit{e.g.}, Krabill v. Gibbs, 41 Ohio St. 2d 1, 235 N.E.2d 514 (1968).

\textsuperscript{189} \textit{But see} the exception set out at notes 187 and 188 \textit{supra}.

\textsuperscript{190} Again, the motion is typically misdesignated a motion to dismiss. It is more properly designated a motion to compel the joinder of a necessary party. \textit{See}, \textit{e.g.}, the text accompanying notes 137-41.

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excused for good cause, a well-taken defense of failure to join a necessary party merely suspends the action until joinder is accomplished, or until the claimant refuses to obey the order compelling joinder. In this latter event, the court may dismiss the action for failure to obey a court order, but such a dismissal is a sanction under Rule 41(B)(1), and not a dismissal for failure to join a necessary party.

Therefore, these four defenses merely suspend the action pending (1) a transfer of the action to a proper forum, (2) the amendment of an insufficient summons, or the service of a sufficient summons, (3) the effective service of a sufficient summons, or (4) the joinder of a necessary party. In short, they act just like objections in that they suspend the action pending cure. They do not lead directly to a dismissal of the action and if the action is dismissed, it will be for a reason other than improper venue, insufficiency of process, insufficiency of service of process or failure to join a necessary party.

The rule of waiver which governs these four defenses also bears some resemblance to the rule of waiver which governs objections. As a general rule it may be said that an objection directed to a statement of claim is waived if it is not properly asserted by motion made prior to the service of a responsive pleading when a responsive pleading is required. These four defenses are directed to a statement of claim. Unlike objections, however, they may be asserted by motion made prior to the service of a responsive pleading when a responsive pleading is required, or they may be asserted as defenses in the responsive pleading. But if any of these four defenses is available to the defender at the time any Rule 12 motion is made prior to the service of the responsive pleading, the defense must be included in the motion or it is waived. Thus, if the defender exercises the option of asserting any Rule 12 defendant, or, in a proper case, an involuntary plaintiff.

Ohio R. Civ. P. 19.1(A) contains essentially the same language. But, Ohio R. Civ. P. 19.1(B) notes an exception to the rule requiring the court to order joinder if the absent party is subject to service of process: “If a party to the action or a person described in subdivision (A) shows good cause why that person should not be joined, the court shall proceed without requiring joinder.” See also the authorities cited in note 176 supra.

192 I.e., the absent party is subject to service of process.
193 See Ohio R. Civ. P. 19.1(B), discussed at note 191 supra.
194 In Ledwell v. May Co., 54 Ohio Misc. 43, 48, 377 N.E.2d 798, 801-02 (C.P. Cuyahoga County 1977), the court stated:

The department [of public welfare], as a subrogee of Ledwell’s father’s right of action against defendants, is an indispensable [sic] party. Plaintiff has failed to join the department even though it has been asserted in defense that the department paid Ledwell’s medical expenses. The evidence further shows that plaintiff does not intend to join the department in this action but rather prefers to obtain a recovery herein and then consult with the department concerning a possible pay back. . . . While the normal remedy for failure to join an indispensable [sic] party is an order under Civ. R. 19 directing that the party be joined, the preference of plaintiff not to join the department . . . indicates that it is more appropriate for this court to dismiss Ledwell’s father’s claim, without prejudice, under Civ. R. 41(B)(1).

195 See Ohio R. Civ. P. 12(B), quoted at note 173 supra.
196 Ohio R. Civ. P. 12(C):

A party who makes a motion under [Rule 12] must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule. (emphasis added)

The only exceptions noted in Rule 12(H) are the Rule 12(B)(6) defense of failure to state a claim.
defense or objection by a pre-responsive pleading motion these four defenses are subjected to the same rule of waiver which governs objections in general; that is, if they are not asserted by motion made prior to the service of the responsive pleading, they are waived, and may not be asserted in the responsive pleading.

The four remaining Rule 12(B) affirmative defenses in the nature of a plea in abatement are also irregular in one way or another. To illustrate the principal irregularities we must begin with a restatement of some general rules governing the assertion of affirmative defenses in the nature of a plea in abatement. First, affirmative defenses in the nature of a plea in abatement must normally be asserted as defenses in the responsive pleading. Second, if they are not properly pleaded in the responsive pleading, or an amendment thereto made as a matter of course, they are waived. Finally, when the validity of the defense is adjudicated by the court and is found to be well-taken, the action will be dismissed otherwise than on the merits. With these three general rules in mind, the irregularities of the four affirmative defenses about to be discussed can be more readily perceived.

d. Lack of Subject Matter Jurisdiction

The defense of lack of jurisdiction over the subject matter, like a true affirmative defense in the nature of a plea in abatement, leads directly to a dismissal of the action otherwise than on the merits. However, the responsive pleading is not the only vehicle for its assertion, nor is its assertion limited to a motion or pleading; as Rule 12(H)(2) tells us, the defense is properly asserted “by suggestion of the parties or otherwise.” Accordingly, the defense may be raised by any method which brings the lack of subject matter jurisdiction to the attention of the court. Further, the defense is not waivable. As Rule 12(H)(2) puts it, the court shall dismiss the action whenever it appears that the court lacks jurisdiction of the subject matter. Thus, the

upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of jurisdiction of the subject matter, and the objection of failure to state a legal defense to a claim. Thus, the four defenses discussed in the text are governed by the rule of waiver set out in Rule 12(C).

197 As we shall see infra at pages 387-401, these general rules are also riddled with exceptions, but not to the extent that the exceptions wholly consume the rule.

198 Ohio R. Civ. P. 12(B) (“Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required . . .”). This is the general rule governing the pleading of affirmative defenses in the nature of a plea in bar, as well as affirmative defenses in the nature of a plea in abatement.

199 Ohio R. Civ. P. 12(H) sets forth the following by way of a general rule: “A party waives all defenses . . . which he does not present . . . by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A).”


201 See, e.g., Ryan v. Andrews, 50 Ohio App. 2d 72, 361 N.E.2d 1086 (1st Dist. 1976), in which it was held that the defense was properly asserted by a untimely motion for a directed verdict which was improperly pleaded as part of an answer.


Of course, what is said here is said of subject matter jurisdiction as it is generally understood, that is, subject matter jurisdiction over a class of cases. When used in the more limited sense of subject matter jurisdiction over a particular case within a class, it is subject to a different rule of
defense of lack of subject matter jurisdiction is irregular in the sense that it is not subject to either of the first two general rules governing affirmative defenses in the nature of a plea in abatement.

e. Lack of In Personam Jurisdiction

The defense of lack of jurisdiction over the person is also regular in the sense that if well-taken, it leads directly to a dismissal otherwise than on the merits. It deviates from the first general rule, however, in that there is express rules authorization for its assertion by motion made prior to the service of the responsive pleading. But the rule of waiver to which it is subject is another question. As previously noted, this defense may be raised by a Rule 12 motion. Further, it is not one of the defenses itemized in the exception clauses of Rules 12(H)(1) and (2). Therefore, it would initially appear to be subject to the Rule 12(G) rule of waiver; that is, if the defender makes any Rule 12 motion and does not include therein the defense of lack of jurisdiction over the person the defense is waived. This conclusion is probably sound when the question of commencement under Rule 3(A) is either not in issue or its resolution is apparent. Suppose, for example, that an ineffective service has been attempted on a defender who is out of state and who is not subject to service of process under Ohio Civil Rules 4.3 through 4.5. Barring the unlikely event of a waiver of service or the entry of a general appearance it is apparent that the action cannot be commenced against that defender because effective service of process cannot be obtained in the one-year post-filing period ordained by Civil Rule 3(A). In such a case, the defense of lack of jurisdiction over the person of the defender is not premature. Accordingly, if the defender moves to quash the insufficient service of summons under the provisions of Rule 12(B)(5), and fails to join the Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person in that motion, the latter defense may be deemed waived under the provisions of Rule 12(G).
The conclusion that the Rule 12(G) rule of waiver applies is somewhat less certain when the question of commencement under Rule 3(A) is indirectly involved. Suppose that a claimant files a complaint asserting a claim against two defenders. Service of process is promptly and effectively obtained on defender one, but no service of any kind is obtained on defender two. Within 60 days following the filing of the complaint defender one serves his answer to the complaint and his cross-claim against defender two. At this point, the court does not have jurisdiction over the person of defender two with respect to either the claim or the cross-claim; but because the claimant has a year in which to obtain service on defender two, defender two cannot yet assert the defense of lack of jurisdiction over the person against the claimant. Until the one-year post-filing period expires, the defense is premature. However, since no service of summons is required on the cross-claim, the one-year post-filing period does not apply directly to the cross-claim; with respect to that claim, the defense of lack of jurisdiction over the person is a mature defense. This presents two questions: if defender two directs a Rule 12 motion against the cross-claim of defender one and does not include a motion to dismiss the cross-claim for lack of jurisdiction over the person of defender two, is the defense of lack of jurisdiction waived as to the cross-claim? And if it is waived as to the cross-claim, is it waived as to the claim as well?

The second question is easily answered. The court either has jurisdiction service of process, and that to adhere to the letter of Rule 12(G) would be to fly in the face of Rule 1(B). While the latter argument has much to be said for it, the courts have a notorious bias in favor of claimants, and the former argument is more likely to prevail.

Would the same waiver — and the consequent entry of an appearance — pertain if a motion to strike the complaint from the files for failure of commencement is coupled with the motion to quash for insufficiency of service of process? Here, the answer is clearly in the negative. When the claimant has failed to obtain effective service of process within the one-year post-filing period, and it is apparent that he or she cannot do so, the appropriate vehicle for raising the defense of failure of commencement is the motion to strike the complaint from the files; the defense of lack of jurisdiction over the person is clearly inherent in that motion, since that defense is the very essence of failure of commencement. Further, since no action comes into existence in this circumstance, there is no action which can be dismissed. Therefore, a motion to dismiss the action for lack of jurisdiction over the person would be logically inconsistent with the point made by the motion to strike the complaint from the files. Thus, the failure to join a motion to dismiss for lack of jurisdiction over the person with a motion to quash for insufficiency of service of process, and to strike the complaint from the files for failure of commencement, does not amount to a waiver of the defense of lack of jurisdiction over the person and does not effectuate an appearance in the action.

Of course, when dealing with a single defender, and the nub of his or her defense is failure of commencement under the provisions of Rule 3(A), that defender should never move to dismiss for lack of jurisdiction over his or her person. Logically, a request for dismissal is a concession that there is an action in existence which can be dismissed. But if there is an action in existence which can be dismissed, the defense of failure of commencement — and the corresponding motion to strike the complaint from the files — does not lie. In short, the motion to dismiss for lack of jurisdiction over the person, being inconsistent with the motion to strike the complaint from the files for failure of commencement, waived the defense of failure of commencement and cured the lack of commencement. Accordingly, if the action is dismissed for lack of jurisdiction over the person after the statute of limitations has run, the dismissal will be a failure of the action otherwise than on the merits and under the provisions of Ohio Rev. Code Ann. § 2305.19 (Page 1954), the Savings Statute, a new action may be commenced within one year from the date of failure. That would not be the case if the complaint was stricken from the files for failure of commencement after the statute of limitations had run. See, e.g., Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966). Thus, when the defender employs the motion to dismiss for lack of jurisdiction over the person in these circumstances, the claimant may get a second bite at the apple.

See notes 187 and 188 supra.
over the person of the defender or it does not; and if it has jurisdiction, it has it for the whole of the action, not for just a part of it. Therefore, if the failure to include the defense in the Rule 12 motion asserted against the cross-claim is a waiver of the defense vis-à-vis the cross-claim, it is also a waiver of the defense vis-à-vis the claim.

That brings us to the heart of the matter — the first question. The defense is premature as to the claim, but ripe as to the cross-claim; it cannot be asserted by motion against the claim, but it must be asserted by motion against the cross-claim if any Rule 12 motion is directed to the cross-claim; and if a Rule 12 defense is waived as to the cross-claim it is waived as to the claim as well. Further, if it is asserted by motion against the cross-claim, it will waive the Rule 3(A) defense of failure of commencement because a motion to dismiss the cross-claim is inconsistent with the theory that no action exists against defender two which will support the cross-claim. An obvious solution to the problem is to include the defense of lack of jurisdiction over the person in the answer to the cross-claim, but this solution is unsatisfactory if the second defender wishes to assert any Rule 12 objection to the cross-claim since it would force him to waive the objection. If the second defender has such an objection, he is faced with a clear Hobson's choice. He must either follow the answer route mentioned above and waive the objection or he must assert the objection by a Rule 12 motion. But if he does the latter, the language of Rule 12(G) requires him to join with that motion a motion to dismiss for lack of jurisdiction over the person or waive the defense of lack of jurisdiction over the person. If he joins the motion to dismiss, he waives the defense of failure of commencement that has not yet matured, and if he does not join the motion to dismiss, he waives both the defense of lack of jurisdiction over his person and the defense of failure of commencement, neither of which defenses is mature as to the claim.

Since these conclusions are wholly inconsistent with the provisions of Ohio Civil Rule 1(B), they must be rejected. In the light of Rule 1(B), the only conclusion that makes sense is the conclusion that if the defense is premature as to the claim, it is likewise premature as to the cross-claim. Therefore, it need not be asserted against the cross-claim until it may be asserted against the claim. This conclusion does not do violence to Rule 12(G) because the rule of waiver expressed therein applies only to defenses that are "then available" to the defender, and if a defense is deemed premature, it is not "available" under Rule 12(G).

211 See the last paragraph of note 209 supra. That an action may fail of commencement as to one of two defenders, see Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977). The second defender cannot avoid the dilemma by moving to strike the cross-claim from the files, because the motion to strike is also premature until the expiration of the one-year post-filing period. See notes 187 and 188 supra.

212 As noted previously, Rule 12 objections to a statement of claim must be asserted by a Rule 12 motion made prior to the service of the responsive pleading.

213 "[After Thomas Hobson . . . of Cambridge, England, who owned livery stables and let horses in strict order according to their position near the door], a choice of taking what is offered or nothing at all." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 890 (college ed. 1956).

214 "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." OHIO R. CIV. P. 1(B).
That brings us to the case where commencement is directly at issue. Assume that a single claimant sues defendants one and two. Good service is obtained on defender one, but insufficient service is obtained on the second defender. To avoid the threatened entry of a default judgment, defender two intends to serve a motion to quash the service of summons. She cannot join with that motion a motion to strike the complaint from the files for failure of commencement, because the action has been commenced against the first defender. Thus the only defense available to her that will preserve failure of commencement is the defense of lack of jurisdiction over her person. Under these circumstances, must she join a motion to dismiss for lack of jurisdiction over her person with her motion to quash for insufficiency of service of process, or must she see that defense waived under the provisions of Ohio Civil Rule 12(G)?

The rule of waiver in Rule 12(G) applies only to defenses that are "then available" to the defender when a Rule 12 motion is made. But as we have repeatedly seen, the defense of lack of jurisdiction over the person is premature until the expiration of the one-year post-filing period. Therefore, the question is: Is a premature defense an "available" defense within the meaning of Ohio Civil Rule 12(G)?

No reported decision answers the question directly, but State ex rel. Keating v. Pressman indirectly suggests the proper answer. In substance that case holds that a Rule 12(D) motion for a preliminary hearing is an

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215 See Ohio R. Civ. P. 12(G), quoted in note 196 supra.
216 Ryder Truck Lines, Inc. v. Victory Express, Inc., 67 Ohio Op. 2d 220 (8th Dist. Ct. App. 1974), comes closest. In that case, the plaintiff's claim was in part founded upon a written contract of indemnity, but a copy of the contract was not attached to the complaint as required by Rule 10(D). Defendant moved for a definite statement, asking that a copy of the contract be attached, and the court granted the motion. After defendant complied with the court's order it moved for change of venue. Plaintiff opposed the motion on the ground that this defense had been waived because it had not been included in the motion for a definite statement as required by Rule 12(G). The trial court agreed and overruled the motion. On appeal, the defendant argued that until it obtained a copy of the written contract, it did not know that it had an improper venue defense; therefore Rule 12(G) did not apply because the improper venue defense was "unavailable" to defendant at the time it moved for a definite statement. The Eighth District Court of Appeals expressed some sympathy for defendant's theory but found, on the facts of record, that the defendant should have known of the improper venue defense at the time it moved for a definite statement. Accordingly, the appellate court affirmed the trial court's conclusion that the defense of improper venue had been waived under the provisions of Rule 12(G). The decision suggests, however, that the court might have agreed with the defendant had it found any factual support for defendant's argument. Thus one might tentatively infer from this case that an unknown and undiscoverable defense is not an "available" defense until it either becomes known or becomes reasonably discoverable.

Thus, Civ. R. 12(D) withholds from the trial court the power to defer hearing and determination of a Civ. R. 12(B)(6) motion to dismiss until after commencement of trial. "On application of any party," the trial court must hear and determine a motion to dismiss for failure to state a claim upon which relief can be granted, before proceeding to the trial of the cause. Additionally, the motion to dismiss, of itself, represents a request for a ruling of the court and it need not be reiterated by subsequent motions. Id. at 163-64, 311 N.E.2d at 526.

The same rule may be inferred from Rule 12(A). After specifying the time limits for the service of the responsive pleading, Rule 12(A)(2) states: The service of a motion permitted under [Rule 12] alters these periods of time as follows: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of
integral, though unexpressed, aspect of every other Rule 12 motion which asserts a defense and as a consequence the court must rule on every such motion within a reasonable time after it is made and, in any event, it must rule on it prior to the commencement of trial. This, of course, presupposes that the defense presented by the Rule 12 motion is ripe for adjudication. To be consistent with the theory of this case, a Rule 12 motion may only present a defense that is ripe for adjudication; that is, a defense that is mature. Or put another way, only mature defenses are “available” for presentation by a Rule 12 motion. If this interpretation is correct, it follows that a premature defense is not an “available” defense within the meaning of Rule 12(G). Therefore, in the context of our example, it may be concluded that since the defense of lack of jurisdiction over the person is premature, it is not an “available” defense and the motion to dismiss for lack of jurisdiction over the person need not be joined with the motion to quash for insufficiency of service of process.218 In a word, the Rule 12(G) rule of waiver does not apply when commencement is directly at issue.219

It does not follow that the defense of lack of jurisdiction over the person is not waived if not asserted during the one-year post-filing period. There remains the Rule 12(H) rule of waiver; the general rule of waiver applicable to all affirmative defenses in the nature of a plea in abatement.

Unlike Rule 12(G), Rule 12(H) does not limit its waiver provisions to defenses “then available” to the defender. In pertinent part, the rule states:

A party waives all defenses . . . which he does not present either by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A), except [here follows an itemization of excepted defenses and objections which does not include the defense of lack of jurisdiction over the person].

service of the motion, shall be served within fourteen days after service of the pleading which complies with the court’s order.

This implies an immediate ruling on any Rule 12 motion served prior to the service of the responsive pleading; were it otherwise, the case would be delayed indefinitely since the defender is under no obligation to serve a responsive pleading until the court rules on his or her Rule 12 motion. See Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (10th Dist. 1978). But the court cannot make an immediate ruling on a motion that presents a premature defense. Therefore, premature defenses may not be asserted by a Rule 12 motion prior to the service of a responsive pleading, and it follows that they are not “available” defenses within the meaning of Rule 12(G).

218 This conclusion is reinforced by our previously expressed thesis, see note 209 supra, that a motion to dismiss for lack of jurisdiction over the person waives the defense of failure of commencement because the dismissal of an action is inconsistent with the non-existence of that same action. It would be ludicrous to say — in the context of our example — that the only way the defender could preserve the defense of failure of commencement is by making a motion which, by its very nature, waives that defense. Note carefully, however, that we are talking about a motion to dismiss as a waiver of the defense of failure of commencement. The defense of lack of jurisdiction over the person is consistent with the defense of failure of commencement (indeed, the former is the very essence of the latter), and the assertion of the defense of lack of jurisdiction over the person in the responsive pleading would not result in a waiver of the defense of failure of commencement.

219 This statement, of course, presupposes that the one-year post-filing period has not run at the time that defender makes his or her Rule 12 motion. If the defender manages to spin out the year without making any response whatsoever, the Rule 12(G) rule of waiver becomes fully applicable to any Rule 12 motion made following the expiration of that year.
Accordingly, if the defender is compelled to serve a responsive pleading within the year following the filing of the complaint, and the court lacks jurisdiction over the defender's person at the time that responsive pleading is served, the defender must include the defense of lack of jurisdiction over the person in that pleading or it is waived. In other words, the defense must be asserted within the year if a responsive pleading is served even though the court may not adjudicate the validity of the defense until the year has expired. Under Rule 12(H), "prematurity" or "unavailability" is not a matter of any pleading consequence.

f. Failure to Join an Indispensable Party

When measured by the general rules which began this discussion, the only thing that is "regular" about the defense of failure to join an indispensable party is that it results in a dismissal otherwise than on the merits, and even that is not always true. In some instances, the defense will not result in a dismissal at all; rather, objection-like, it will merely suspend the action until the absent party has been joined. This is generally the case when the absent indispensable party is subject to service of process. Instead of dismissing the action for nonjoinder, the court must order the claimant to join the absent party. Only if the claimant refuses to obey this order will the action be dismissed; then it will be dismissed for failure to comply with a court order, and not for failure to join an indispensable party. On the other hand, if the absent party remains truly indispensable after the application of the four tests set out in Rule 19(B), and that party is not subject to service of process and will not voluntarily appear in the action, then the action must be dismissed otherwise than on the merits.

Like the other Rule 12(B) affirmative defenses, the defense of failure to join an indispensable party may be asserted by motion made prior to the service of the responsive pleading or it may be asserted as a defense in the responsive pleading. Unlike the bulk of the other Rule 12(B) defenses, however, the defense of failure to join an indispensable party is not subject to the Rule 12(G) rule of waiver. By the express terms of Rules 12(B), 12(G) and 12(H), the defense of failure to join an indispensable party may be asserted at any one of six time points: (1) by motion made prior to the service of the responsive pleading, (2) in the responsive pleading, (3) in an amendment of

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220 Ohio R. Civ. P. 41(B)(4); see also the discussion in note 176 supra.
221 Ohio R. Civ. P. 19(A); see Mann v. Hamilton County Bd. of Elections, 37 Ohio Misc. 3, 305 N.E.2d 820 (C.P. Hamilton County 1973); see also Riveria Pools, Inc. v. Buckeye Hills, Inc., No. 77-18 (2d Dist. Ct. App. Aug. 1, 1978), as abstracted in 51 Omo B. 1241 (Oct. 2, 1978). Because the provisions of Rule 19(A) which require the joinder of an absent party subject to service of process are the same for both necessary and indispensable parties, reference should also be had to the discussion and the authorities cited in notes 176, 191 and 194 supra.
222 Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (C.P. Cuyahoga County 1977), quoted in note 194 supra.
223 Ohio R. Civ. P. 19(B) and 41(B)(4); see also notes 175 and 176 supra.
224 Ohio R. Civ. P. 12(B). If the absent indispensable party is subject to service of process or indicates a willingness to join the action voluntarily, the motion should be designated as a motion to compel the joinder of an indispensable party; if the absent indispensable party is not subject to service of process and there is no indication that he or she will waive service or voluntarily join the action, the motion should be designated a motion to dismiss for failure to join an indispensable party.
the responsive pleading made as a matter of course under Rule 15(A), (4) in a
later pleading if one is permitted, (5) by a Rule 12(C) motion for judgment on
the pleadings, or (6) at the trial on the merits. The phrase “at the trial on the
merits” has not yet been defined by any reported Ohio decision but there is
reason to believe that it means at any time during the trial but prior to the entry
of final judgment.225 The defense is waived only if it is not presented at some
time prior to the entry of final judgment in the trial court.

This sixth time point presents some interesting and unresolved problems.
Suppose that a new trial is granted pursuant to Rules 59 or 60(B), and the
defense of failure to join an indispensable party was not raised prior to entry
of final judgment in the original trial. May it now be raised at the new trial?
One can argue that since the new trial becomes the trial on the merits, the
defense is within the sixth time point if it is asserted prior to entry of final
judgment in the new trial. On the other hand, if one adheres to the former
statutory definition of a “new trial,” one can argue that it is limited to a re-
examination of the “issues” raised in the original trial, and since the “issue” of
non-joinder was not raised in the original trial, it cannot be raised in the new
trial.226 In rebuttal it may be said that the technical argument about a new trial being a “re-examination” of “issues” raised in the original trial is all very
fine, but the whole point of the defense of failure to join an indispensable
party is that it is contrary to equity and good conscience to proceed to
judgment in the absence of an indispensable party.227 If the absent party is
indispensable and cannot be joined, it is just as much against equity and good
conscience to proceed to judgment in the new trial as it would have been in the
original trial. Therefore, to prevent an inequitable result in the new trial, the
defense may be raised at any time prior to the entry of final judgment in the
new trial. In the author’s opinion this last argument should prevail, but
whether the courts will agree is another matter.

Suppose that the defense was not raised prior to the entry of final judgment
in the original trial. May it be raised by a timely motion for judgment
notwithstanding the verdict pursuant to Rule 50(B)? Probably not. The
language of Rule 12(H)(1) is clear: “at the trial on the merits” simply does not
include a post-judgment motion made after the trial has ended. But what if the

225 See Peters v. Durroh, 28 Ohio App. 2d 245, 277 N.E.2d 69 (10th Dist. 1971); Browne,
Finality, supra note 119, at 65-67.

226 See OHIO REV. CODE ANN. § 2321.17 (Page 1954) (repealed 1971): “A new trial is a re-
examination, in the same court, of the issues after a final order, judgment, or decree by the court.”
In Heller v. Heller, No. 34381 (8th Dist. Ct. App. Feb. 4, 1976), the court of appeals noted that the
former statutory provision remained “an accurate definition of a new trial” even though Section
2321.17, Ohio Revised Code, had been repealed.

“A trial is a judicial examination of the issues, whether of law or of fact, in an action or
proceeding.” OHIO REV. CODE ANN. § 2311.01 (Page 1954). The term “issues,” as used in that
section, is defined as follows: “Issues arise on the pleadings where a fact or conclusion of law is
maintained by one party and controverted by the other.” OHIO REV. CODE ANN. § 2311.01 (Page
1954). Therefore, since the defense of failure to join an indispensable party was not asserted in the
responsive pleading, it was not an “issue” in the original trial, and cannot be re-examined in the
new trial. Since it cannot be “re-examined” in the new trial, it is not then the subject of judicial
examination and cannot be raised in the new trial.

227 OHIO R. Cov. P. 19(B): “If a person as described in subdivision (A)(1), (2), or (3) hereof
cannot be made a party, the court shall determine whether in equity and good conscience the
action should proceed among the parties before it, or should be dismissed, the absent party being
thus regarded as indispensable.”
motion for judgment notwithstanding the verdict is made after the return of the verdict but prior to the entry of judgment? Here the answer may be otherwise because the "trial" is not technically ended until final judgment is entered.

Finally, may the defender rely upon the sixth time point and withhold the nonjoinder defense until the statute of limitations has run? In the syllabus of Motorists Mutual Insurance Co. v. Bates the court states that

[w]here one party to an action does not object by a motion or pleading to the failure of the other party to join an indispensable party until after the statute of limitations against the inclusion of such indispensable party has expired, the objection is waived.

But in Motorists Mutual, the absent party was a necessary party under the provisions of Rule 19(A)(3) and not an indispensable party. Further, it is clear that the court relied solely upon the general rules of waiver, and gave no consideration to the exception contained in Rule 12(H)(1). Therefore, while

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228 In Latimer v. Morris, 27 Ohio App. 2d 66, 272 N.E.2d 494 (1971): Civil Rule 58(B) now prescribes that a "motion for a new trial shall be served not later than fourteen days after the entry of the judgment." It will be observed that this part of the Civil Rule establishes the latest time at which such motion may be filed but does not purport to establish the earliest time. The conclusion is inevitable that procedure under the civil rules does not preclude the filing of a motion for a new trial after a jury verdict has been rendered and before judgment has been rendered thereon.

229 Id. at 67-68, 272 N.E.2d at 495. Ohio R. Civ. P. 50(B) stipulates that the motion for judgment notwithstanding the verdict may likewise be made "not later than fourteen days after entry of judgment." Therefore, if Latimer is correct with respect to the timing of the motion for a new trial, the same rule should apply to the motion for judgment notwithstanding the verdict.


May Co. v. Trusnik, 54 Ohio App. 2d 71, 375 N.E.2d 72 (8th Dist. 1977) supplies an illustration by way of analogy. The May Company sued for breach of an installment agreement and Trusnik counterclaimed for breach of warranty. The trial court granted the May Company summary judgment on its claim, and Trusnik appealed. The appeal was dismissed pursuant to Rule 54(B) for want of a final order because Trusnik's counterclaims remained pending. Upon remand of the case to the trial court, the May Company filed a motion in the trial court requesting that the original order be amended to show that the counterclaims of Leonard E. Trusnik had been dismissed. The trial court did so and Trusnik again appealed, alleging that it was error for the trial court to dismiss the counterclaim when there was no motion to dismiss before the court. The Eighth District Court of Appeals held that the motion to amend the original order was, in effect, "a motion to dismiss which defendant could have contested. It was within the court's discretion to grant the motion, thereby dismissing the counterclaims." Id. at 76, 375 N.E.2d at 76. Thus, the "motion to dismiss" for failure to state a claim upon which relief could be granted was made after the hearing on the merits, but prior to the entry of a final judgment. Because the defense of failure to state a claim upon which relief may be granted is subject to the same rule of waiver as the defense of failure to join an indispensable party (it may be asserted as late as "at the trial on the merits"), it would seem that the nonjoinder defense may also be asserted after the hearing on the merits but prior to entry of final judgment.

231 Id. at 1, 295 N.E.2d at 447 (syllabus para. no. 2).

232 In pertinent part, the court said:

Civ. R. 19 requires the joinder of all persons needed for a just adjudication in a case like this. However, defendant raised no objection by motion or pleading as allowed by Civ. R. 12(G) and 12(H) and Civ. R. 15(A). Instead, defendant waited until the statute of limitations had run against the inclusion of the plaintiff's insured as a party. Accordingly, the objection to the absence of the insured as a party plaintiff is deemed waived.

Id. at 5, 295 N.E.2d at 447. From the reference to civil rule 15(A), it is clear that the court examined only so much of civil rule 12(H) as reads "[a] party waives all defenses and objections which he

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the rule stated in the syllabus is probably correct when applied to the defense of failure to join a necessary party it is incorrect when applied to the defense of failure to join an indispensable party, and should not be followed.

If anything, the late assertion of the defense of failure to join an indispensable party (the nonjoinder defense) waives the defense of the statute of limitations (the limitations defense), at least where the absent indispensable party is a party-claimant. To begin with, the limitations defense is subject to the broad rule of waiver contained in Rule 12(H); if the limitations defense is not asserted in the responsive pleading, or an amendment thereto made as a matter of course, it is waived. Accordingly, if the defender did not include the limitations defense in his or her responsive pleading, it may be deemed waived and the late assertion of the nonjoinder defense does not revive it.

But this argument will not lie if the limitation defense was not available to the defender at the time the responsive pleading was served; one cannot waive that which does not exist. Therefore, the claimant might attempt the following alternative argument: the object of the nonjoinder defense is to compel the joinder of the absent indispensable party-claimant. Thus the assertion of the nonjoinder defense must waive any impediment which would prevent such a joinder. The limitations defense would be such an impediment. It follows, then, that the limitations defense is waived by the assertion of the nonjoinder defense.

This argument cannot prevail, however, if the inference upon which it is based cannot be drawn. Thus, if the defender asserts both the limitations defense and the nonjoinder defense in a supplemental responsive pleading served after the statute of limitations has run one cannot infer that the object does not present by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A). If the absent party in this case was truly indispensable, the relevant portion of Civil Rule 12(H) would have been: "except (1) the defense of failure to join an indispensable party . . . may be made by a later pleading if one is permitted, by motion for judgment on the pleadings or at the trial on the merits." This latter portion of the rule follows immediately after the reference to civil rule 15(A).

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233 Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). Of course, as Mills indicates, the defense sometimes may be raised by a motion made prior to the service of the responsive pleading, but we are dealing here with the usual case, not the exceptional situation. For sake of completeness, however, the rule of waiver may be put this way: where a defender does not assert the limitations defense by motion or pleading, the defense is waived.

234 Cf. Layne v. Huffman, 43 Ohio App. 2d 53, 333 N.E.2d 147 (10th Dist. 1974), aff'd, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975) (interpreting Rule 19.1), where the court said:

Defendant contends that the conclusion we have reached requires him to ask to be sued by someone who has not sued him. This is only partially correct. Defendant has an option of either asking to be sued or consenting to be sued in a separate action if the party who has not yet brought suit decides to do so. Rather than requiring defendant to do anything, Civ. R. 19.1 affords the defendant the opportunity of avoiding multiple litigation arising out of the same controversy by requiring that joinder be made. . . . Thus, Civ. R. 19.1 confers upon the defendant a right to require a joinder which he may or may not exercise as he sees fit.

Id. at 60-61, 333 N.E.2d at 152. The language of Rule 19.1 and Rule 19 is substantially the same. See note 191 supra. Therefore, what is said here of Rule 19.1 applies with equal force to Rule 19.

235 As to the assertion of the nonjoinder defense by supplemental responsive pleading, see Ohio R. Civ. P. 12(H)(1) (referring to "a late pleading if one is permitted"). As to the assertion of the limitations defense by supplemental responsive pleading, cf. Riley v. City of Cincinnati, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976) (disallowing the raising of the affirmative defense of accord and satisfaction in an amended answer only because the party seeking to plead it was not a party to the settlement agreement).
of the nonjoinder defense is to compel joinder and that impediments to that joinder are waived. Accordingly, the claimant might attempt this alternative: a Rule 19 indispensable party-claimant must, of necessity, be a real party in interest. Thus, the real impact of the nonjoinder defense is that the action is not prosecuted in the name of all the real parties in interest. But Rule 17(A) stipulates that an action shall not be dismissed for that reason until a reasonable time has been allowed after objection for the joinder of the absent real party in interest. Further, Rule 17(A) states that "[s]uch . . . joinder . . . shall have the same effect as if the action had been commenced in the name of the real party in interest." If the absent party is joined, the joinder will relate back to the date the original complaint was filed. Therefore, the original complaint having been filed within the statutory period of limitations, the joinder of the absent party will defeat the limitations defense by means of the relation back doctrine.

Against this argument, however, stands the ambiguous case of Motorist Mutual Insurance Co. v. Cook in which the First District Court of Appeals prohibited the substitution of the real party in interest after the statute of limitations had run. While the basis for the court's decision remains somewhat unclear, the case might be read to prohibit the joinder of an indispensable real party in interest as well. Accordingly, as a fourth alternative, the claimant may wish to take refuge in the following argument which is based on the analogous application of Rule 15(C): if the complaint was served upon the

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236 31 Ohio App. 2d 1, 285 N.E.2d 389 (1st Dist. 1971).
237 Joseph Jacobs, Motorist Mutual's insured, was struck and injured by Pinkie Mae Cook's automobile while Jacobs was crossing the street. Under the uninsured motorist provision of its policy, Motorist Mutual paid him $1,560.08. In return, Jacobs executed a trust agreement in which he retained the right of action against Cook and agreed to hold the proceeds of such action in trust for Motorist Mutual. There was no subrogation agreement between Motorist Mutual and Jacobs; in the absence of such an agreement, it is doubtful that Motorist Mutual was the subrogee of Jacobs. See Smith v. Travelers Ins. Co., 50 Ohio St. 2d 43, 362 N.E.2d 264 (1977). Thus, as to the right of action against Cook, Jacobs remained the real party in interest and Motorist Mutual became the cestui que trust of the first $1,560.08 of any recovery that matured from that action. Nevertheless, Motorist Mutual brought an action against Cook in its own name. When Cook's attorney objected that Motorist Mutual had no right of action against Cook, the trial court permitted Motorist Mutual to substitute Jacobs as the plaintiff. Thereupon Cook's attorney moved to dismiss on the ground that the substitution had taken place after the statute of limitations had run. The trial court overruled the motion, and the court of appeals reversed on appeal. The reason for the reversal is not entirely clear. Apparently, the court of appeals thought that the substitution had taken place under the provisions of Rule 25(C) (transfer of interest) rather than Rule 17(A). In any event, the court of appeals did not discuss the "relation back" clause of Rule 17(A), but said:

Where an insurer of a person injured by a defendant brings a civil action in its own name, it is error for a trial court to allow an amendment to the petition substituting the injured party in the place of such insurer after the statute of limitations regarding that particular action and injury has run.

31 Ohio App. 2d at 1, 285 N.E.2d at 390 (syllabus para. no. 1).

238 In pertinent part, the rule states:
Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake
defender before the statute of limitations had run, then, from the assertion of the defense of nonjoinder it may be inferred that within the period provided by law for commencing the action against him the defender had received such notice of the absent indispensable party's claim that he would not be prejudiced in maintaining his defense on the merits to that claim, and that he knew or should have known that, but for a mistake concerning the identity of the proper parties, the absent party would also have brought the action against him. Therefore, since the claim asserted in the amended pleading joining the absent indispensable party-claimant arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amended pleading relates back to the filing of the first pleading, and the limitations defense is inapplicable.

The above arguments are applicable only if the absent indispensable party-claimant is subject to service of process or is willing to join the action voluntarily. If neither is the case, the action must be dismissed for want of an indispensable party. As we have seen, however, such a dismissal is otherwise than on the merits, and under the provisions of the Savings Statute, a new action on the same claim may be commenced within a year of the dismissal.

If the original claimant can induce the absent claimant to join in a second action, may the second action be brought within a year of the dismissal of the first? Probably not. The Savings Statute saves only the action of the original claimant and not the action of the claimant who was not joined in the original action. As to this latter claimant, the statute of limitations bars his or her claim, and therefore the second action is barred because of the nonjoinder of an indispensable party who cannot be joined.

This latter situation aside, however, the statute of limitations defense can generally be avoided on one theory or another when the absent indispensable party is a party-claimant who is either subject to service of process or willing to join the action voluntarily. Therefore, the timing of the nonjoinder defense is largely irrelevant.

The proverbial wicket becomes a bit stickier when the absent indispensable party is a party-defender. Except in unusual circumstances the original defender cannot waive any defenses on behalf of the absent defender. Therefore, as a general rule it cannot be said that the assertion of the nonjoinder defense after the statute of limitations has run amounts to a waiver of the limitations defense vis-à-vis the absent defender. Accordingly, it would seem that the absent defender cannot be joined after the statute has run unless he or she expressly or impliedly waives the limitations defense or unless the

concerning the identity of the proper party, the action would have been brought against him.

Ohio R. Civ. P. 15(C). This rule applies analogously to the joinder of claimants after the statute of limitations has run. See the 1966 Federal Rules Advisory Committee Note to Federal Rules of Civil Procedure 15(c):

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.


In an action commenced, or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date.
claimant can demonstrate compliance with the requirements of Rule 15(C) and thus accomplish a relation back to the date the original complaint was filed.\textsuperscript{240} If the absent defender cannot be joined, the case must be dismissed. Further, the fact that the dismissal is otherwise than on the merits is of no moment in this situation since the Savings Statute will save the case only as to the original defender. Thus, the same nonjoinder/limitations defense remains available in any new action which the claimant might attempt within the year following the dismissal of the original action.

Accordingly, in this situation we must squarely face the question whether the defender can reserve the nonjoinder defense until the statute of limitations has run. While it may not be very palatable, the only reasonable answer appears to be that the defender can.\textsuperscript{241} Rule 12(H)(1) expressly states that the defense can be raised for the first time “at the trial on the merits.” If that happens to be after the statute of limitations has barred an action against an unjoined, indispensable co-defender, so much the worse for the claimant; he or she always has a remedy in malpractice against his or her attorney.\textsuperscript{242}

g. Failure to State a Claim Upon Which Relief Can Be Granted

Finally, we arrive at the last Rule 12(B) affirmative defense, the defense of failure to state a claim upon which relief can be granted. Like the defense of failure to join an indispensable party, this defense wears two hats; but unlike the nonjoinder defense, neither hat belongs to an affirmative defense in the nature of a plea in abatement.

The defense of failure to state a claim upon which relief can be granted challenges substantive defects in a pleading. Very basically these defects are of two types: (1) defects which may be cured by an amendment alleging additional facts, or otherwise, and (2) defects which are incurable.\textsuperscript{243} However, an action may not be dismissed for failure to state a claim upon which relief can be granted unless the defect challenged is incurable, \textit{i.e.} unless it appears beyond doubt from the face of the pleading that the claimant can prove no set of facts entitling him or her to recovery.\textsuperscript{244} If this test is not met the pleading is either sound as it stands or it is curable. In the latter case the defense of failure to state a claim acts as an objection; it suspends the action until the pleading is cured.\textsuperscript{245} On the other hand, where this test is met, the action must be dismissed upon the merits.\textsuperscript{246} Therefore, when an action is properly dismissed under this test, the defense of failure to state a claim upon


\textsuperscript{241} See, e.g., Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.E.2d 362 (8th Dist. 1974), in which the nonjoinder defense was successfully withheld until after the statute of limitations had run. A motion to certify the record was overruled by the Ohio Supreme Court on October 4, 1974. \textit{Id.} at 325, 319 N.E.2d at 367.

\textsuperscript{242} See generally note 5 supra.

\textsuperscript{243} See the authorities cited in note 4 supra.

\textsuperscript{244} See GTE Automatic Elec., Inc. v. ARC Indus., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1978), in which the Ohio Supreme Court quotes from \textit{Link v. Wabash R.R. Co.}, 370 U.S. 626, 634, n.10 (1962), as follows: “And if an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” 47 Ohio St. 2d at 152, 351 N.E.2d at 117.

\textsuperscript{245} Cf. Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973) (overruling the granting of a motion for judgment on the pleadings and allowing the filing of an amended complaint).

\textsuperscript{246} \textit{Ohio R. Civ. P.} 41(B)(3).
which relief can be granted is an affirmative defense in the nature of a plea in bar.

In addition to the above irregularity this defense is irregular in that there is express rules authority for its assertion by motion made prior to the service of the responsive pleading.\textsuperscript{247} Again, it is irregular in that it is subject to the same rule of waiver as the defense of failure to join an indispensable party.\textsuperscript{248} Thus, in a word, when measured by the general rules applicable to affirmative defenses in the nature of pleas in abatement, there is absolutely nothing regular about this defense.

In summary, affirmative defenses of the second class — affirmative defenses in the nature of a plea in abatement — may be divided into three broad subclasses: (1) the "irregular" defenses governed by Rule 12(B), (2) other "irregular" defenses such as the defense of failure of commencement, and (3) the "regular" defenses which consist of new matter extrinsic to the statement of claim that is consistent with the existence of the claim, but not logically inferable from a denial of the allegations of the statement of claim. In this latter subclass are included such defenses as failure to exhaust administrative remedies, lack of capacity to sue or be sued, misnomer, the pendency of another action between the parties, and the like.\textsuperscript{249}

The only thing which defenses in this second class have in common is that if they are asserted in the responsive pleading, they must be asserted "affirmatively;" that is, they must be set forth in such a way that the pleading in which they are found formulates in a simple, concise, and direct manner the issue to be resolved by the trial court.\textsuperscript{250} In addition, most of them do not challenge the merits of the claim itself; if they lead directly to a dismissal of the action, the dismissal will be otherwise than on the merits.\textsuperscript{251}

We have not attempted an exhaustive list of affirmative defenses because that would require a book in itself; rather, we have attempted to state some general characteristics by which affirmative defenses may be identified and by which they may be distinguished from objections and argumentative denials. As we have seen, these characteristics are three in number: (1) new matter that is extrinsic to the statement of claim, (2) which confesses the claim, and (3) has the direct potential of preventing recovery on the claim. Only affirmative defenses have all three of these characteristics; objections may share the first two, but they merely suspend the action and cannot directly

\textsuperscript{247} \textit{Ohio R. Civ. P. 12(B).} In this instance, custom and propriety coincide; the motion asserting the defense is properly designated a motion to dismiss for failure to state a claim upon which relief can be granted.

\textsuperscript{248} \textit{See} text accompanying note 225 \textit{supra.}

\textsuperscript{249} \textit{See generally} 1 \textit{Ohio Jur. 3d Actions} §§ 127-175 (1977).

\textsuperscript{250} \textit{Mills v. Whitehouse Trucking Co.}, 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974).

\textsuperscript{251} The defenses of failure to state a claim upon which relief can be granted, and failure of commencement, are the two principal exceptions to this second rule of commonality. In a given case, the defense of failure to state a claim upon which relief can be granted can challenge the merits of a claim, and can lead directly to a dismissal on the merits. The defense of failure of commencement may result in the complaint being stricken from the files for lack of commencement. While such a result is a disposition of the action, it is a disposition which is \textit{neither} on the merits \textit{nor} otherwise than on the merits; it is, in effect, a judicial determination that no action ever came into existence.
prevent recovery on the claim; argumentative denials may share the first and
the third, but they do not confess the claim.

C. COUNTERCLAIMS DISTINGUISHED

There is one last pleading device that appears to share all three
characteristics: the counterclaim. Thus counterclaims must be distinguished
from affirmative defenses.

The affirmative demand for judgment is the principal badge of distinction.
In a sense, both a defense and a counterclaim contain a demand for judgment.
In the defense, however, the demand for judgment is negative and implied
while in the counterclaim it is affirmative and expressed. The defense
implies demands that the claimant be denied the relief sought, while the
counterclaim expressly demands that the defender-counterclaimant be
granted the relief sought. Accordingly, whenever a particular allegation of
operative fact requires the affirmative grant of relief — that is, whenever it
requires the court to do more than simply deny relief to the claimant — it is a
counterclaim rather than a defense, and must be concluded by "a demand for
judgment for the relief to which [the pleader] deems himself entitled." 252

The essentially negative nature of some counterclaims make this test
difficult to apply. Claims for reformation or rescission or claims for
recoupment or set-off which equal or exceed the amount of the claimant's
claim are illustrative. Not only do claims such as these share the three
characteristics of an affirmative defense but they also seem to require no more
of the court than a simple denial of relief to the claimant.

The appearance, however, is deceiving. Unlike the affirmative defense,
these claims neither defeat the claimant's claim on the merits, nor require the
termination of the action. Rather, they require that the action proceed to a
determination on the merits of the defender's claim. Nevertheless, to the
extent that they are valid, these claims will prevent the claimant's recovery.
Reformation and rescission accomplish this end not by defeating the
claimant's claim on the merits but by destroying the basis for the claimant's
claim. They require an affirmative declaration by the court which removes the
occasion for the claimant's claim either by changing the nature of the
relationship between the claimant and defender (reformation) or by
nullifying any relationship between the claimant and defender (rescission).
Recoupment and set-off accomplish this end not by defeating the claimant's
claim on the merits but by establishing an equal or superior claim in the
defender which cancels out the claimant's right to recover. They require an
affirmative judgment by the court which cancels the claimant's recovery by
establishing the defender's right to recover of the claimant an amount equal to
or greater than the amount the claimant may recover of the defender. Thus,
since these devices require an affirmative judgment or decree by the court
which establishes the merits of the defender's claim, and since they neither
defeat the merits of the claimant's claim nor terminate the action, they are
counterclaims rather than affirmative defenses. Accordingly, to be properly

252 Ohio R. Civ. P. 8(A) (2).
pleaded, they must be pleaded with a demand for judgment for the relief to which the defender feels entitled. 253

1. Counterclaim as Affirmative Defense

But what consequence follows if counterclaims such as these are pleaded without a demand for judgment, or if defenses are pleaded with a demand for judgment; what is the consequence if a counterclaim is pleaded as an affirmative defense, and an affirmative defense is pleaded as a counterclaim? Normally, there should be no substantive consequence. As Rule 8(C) provides: “When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there has been a proper designation.” Unless the defender’s pleading is sham, frivolous or vexatious on its face justice will ordinarily require the court to treat his or her allegations in accordance with their true substantive nature.

Procedurally, however, the matter may be otherwise. As a general rule every statement of claim requires a responsive pleading and a reply is the responsive pleading that is ordinarily directed to a statement of claim appearing as a counterclaim. Rule 7(A) specifies, however, that a reply to a counterclaim is required only if the counterclaim is designated as such. Therefore, unless the court requires an amendment which properly designates the defenses and counterclaims in the defender’s pleading the claimant need not serve a reply to a counterclaim pleaded as an affirmative defense, but must serve a reply to an affirmative defense pleaded as a counterclaim. 254 In either event, however, a literal following of the rules is bound to produce later difficulties. Suppose, for example, that a counterclaim is improperly pleaded as an affirmative defense. If the claimant adheres to the language of the rules and observes the form rather than the substance he or she need not serve a reply. But if the claimant does not serve a reply the affirmative defense of the statute of limitations could be waived. 255 Therefore, if the claimant has any doubt about the substantive nature of the defender’s pleading he or she should call for a judicial determination of that matter before deciding whether or not to serve a reply. If the defender’s pleading

253 Id.

254 As said in Ohio R. Civ. P. 7(A): “There shall be ... a reply to a counterclaim denominated as such.” (emphasis added) Of course, this can be read as requiring a reply only when the allegations denominated a “counterclaim” amount to a true counterclaim in substance. If that is the case, no reply would be required when an affirmative defense is improperly pleaded and denominated as a “counterclaim.” But this places the burden of determination on the claimant, and if he or she fails to serve a reply on the assumption that the defender’s “counterclaim” is not a true counterclaim, he or she may reap a default judgment, and whether erroneously entered or not, such a default judgment is bound to produce more difficulties than rewards. Therefore, that discretion which is the better part of valor requires a reply whenever the defender’s responsive pleading employs the denomination “counterclaim.”

255 While there is a great deal of uncertainty surrounding the applicability of various statutes of limitations to counterclaims, a fairly good rule of thumb to follow is this: if, at the time the statement of claim is filed, the statute of limitations would have barred the assertion of the counterclaim as an independent claim, then the statute of limitations also bars its assertion as a counterclaim; but if the statute of limitations would not have barred the assertion of the counterclaim as an independent claim at the time the statement of claim is filed, then it does not bar its assertion as a counterclaim even though the statute runs before the counterclaim is actually asserted in the responsive pleading.
contains an "affirmative defense" that is substantively a counterclaim the
claimant may obtain that judicial determination by a motion to strike the
insufficient defense from the pleading; if the defender's pleading contains a
"counterclaim" that is substantively an affirmative defense the judicial
determination may be obtained by a motion for a definite statement, a motion
to strike an insufficient claim from the pleading or a motion to dismiss for
failure to state a claim upon which relief can be granted — whichever is most
appropriate in the circumstances.

2. The Cross-Demand Statute and Common Law Recoupment

This brings us to the Cross-Demand Statute which reads:

When cross demands have existed between persons under such
circumstances that if one had brought an action against the other a
counterclaim could have been set up, neither can be deprived of the
benefit thereof by assignment by the other, or by his death. The two
demands must be deemed compensated so far as they equal each
other.\(^\text{256}\)

The key to this statute is in the last sentence which, under the
circumstances described in the statute, gives a defender the option of either
asserting the cross demand by way of counterclaim or asserting it as an
affirmative defense to the claimant's claim to the extent that it equals the
claimant's claim. Of course, if the defender's cross demand exceeds the
claimant's claim and the defender wishes to recover the full amount of the
cross demand, the cross demand must be asserted by way of a
counterclaim,\(^\text{257}\) but if the defender's cross demand is equal to, or less than, the
claimant's claim or if the defender is willing to forfeit the difference between
the cross demand and the claimant's claim under the proper circumstances the
co-existence of the claim and the cross demand may be asserted as an
affirmative defense to the claim.\(^\text{258}\)

What are these "proper circumstances"? To begin with, the statute speaks
of cross demands which have existed between persons. At a minimum, any
litigation in which the statute applies must involve a claimant who has a claim
against a defender, and a defender who has or had a claim against the claimant
— the cross demands. To distinguish these two claims the term "claim" will be
used to refer to the claimant's claim against the defender and the term "cross
demand" will be used to refer to the defender's claim against the claimant.
Further, the statute applies in the case of an assignment by either party, or in
the case of the death of either party.

Second, the claim must be presently enforceable in an action at law or in
equity. This is not so much a requirement of the statute as it is of civil litigation
generally; if the claim is not legally enforceable, it may be disposed of on that
ground and the occasion for employing the Cross-Demand Statute does not
arise. With respect to the cross demand, however, the statute speaks in the

\(^{256}\) \text{Ohio Rev. Code Ann. § 2309.19 (Page 1954).}
\(^{257}\) \text{See, e.g., Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 363 N.E.2d 772
(8th Dist. 1976).}
\(^{258}\) \text{Cohn v. Krauss, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (1st Dist. Ct. App. 1943).}

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past tense — "[w]hen cross demands have existed between persons. . . ."

Thus, it is not essential that the cross demand be presently enforceable in an action at law or in equity; subject to the qualification made below, it is sufficient if the cross demand was legally enforceable at some time in the past. Indeed, the prime purpose of the statute is to permit the assertion of the cross demand as a defense when it cannot be asserted as a counterclaim. Therefore, the present legal enforceability of the cross demand is material only when the defender attempts to assert it as a counterclaim; it is not material when the defender attempts to assert it by way of a defense to the claim under the terms of the Cross-Demand Statute.²⁵⁹

²⁵⁹ In Benson, Adm'rx v. Rosine, 76 Ohio App. 439, 64 N.E.2d 845 (6th Dist. 1945), the court of appeals found that the defender's cross demand was not enforceable as a counterclaim because it had not been presented to the administratrix within four months of her appointment. The court went on to say, however:

But this did not dispose of the only problem in the matter. Although the defendant's claim as stated in his third amended cross-petition was not available to him for an independent adjudication against the estate, could it stand as an affirmative defense to all or any part of plaintiff's claim?

In other words, to whatever extent the claims of the defendant equalled those of the plaintiff, they "must be deemed compensated."

Giving the defendant the benefit of the liberal construction and cross-demand statutes, the parties were each entitled to have their respective claims determined, and, to the extent the defendant could establish his claim up to the amount of that established by the plaintiff, he had the right to have plaintiff's claim "deemed compensated."

Id. at 442-43, 445, 64 N.E.2d at 846-47.

Likewise, in Shriner v. Price, 74 Ohio App. 373, 59 N.E.2d 152 (1st Dist. 1944), the First District Court of Appeals found the defender's cross demand barred as a counterclaim because it was not timely presented to the executor, but held:

Not having presented such claim to the estate it is undoubtedly true that Schnicke never could have initiated an independent action based upon such claim, the statutory time for filing having elapsed. This situation, however, would not necessarily result in preventing his advancing such claim as a defense, if, on the contrary, action were instituted against him by the estate.

It is undoubtedly the general rule that even though a claim is barred at the time an action is instituted against a defendant, he may set up such claim as a setoff or defense to the extent such claim will equalize the claim of the plaintiff. He may not recover more than the plaintiff's claim, but may meet it to the extent his claim equals that of the plaintiff. [The court then cites the cross demand statute as one of the authorities for this position.]

Id. at 377-78, 59 N.E.2d at 154.

Both of these cases relied upon what was said in the fifth paragraph of the syllabus of In re Estate of Butler, 137 Ohio St. 96, 28 N.E.2d 186 (1940). The same is true with respect to Cohn v. Krauss, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (1st Dist. Ct. App. 1943). Here, the court of appeals found that four of the defenders' five counterclaims were barred as counterclaims by the expiration of the statute of limitations. But it also found that three of the four counterclaims "had a concurrent existence as matured claims" with the claim of the claimant, and said:

This situation presents the question of to what extent these barred causes of action are available as a defense. [At this point in the opinion, the court quotes the language of the cross demand statute, then § 11321, General Code, now § 2309.19, Revised Code.]
A hasty reading of some of the cases might lead to the conclusion that the preceding statement is true only if the presently unenforceable cross demand is a demand in the nature of a recoupment rather than a demand in the nature of a set-off. Such a conclusion would be erroneous. A closer reading of those

Supreme Court in the case of In Re Estate of Butler, 137 Ohio St. 96, the fifth paragraph of the syllabus of which is:

'Defenses are not barred by the statute of limitations, and cross-demands must be deemed compensated as soon as they mature insofar as they are equal to each other.'

And at page 108, the Court said:

'It is a general rule that defenses are not barred by the statute of limitations and that cross-demands must be deemed compensated as soon as they mature insofar as they are equal to each other. See § 11321 GC; [other citations omitted].'

It is true that the facts would indicate that in that case the same result might have ensued under the doctrine of recoupment, but the court both in the syllabus and the opinion bases its decisions upon the operation of § 11321 GC and stated broadly that mature cross-demands must be deemed compensated.

Id. at 154, 157, 67 N.E.2d at 66, 68.


Thus, in Conway v. Ogier, 115 Ohio App. 251, 184 N.E.2d 681 (10th Dist. 1961), it is said:

'A claim of malpractice asserted as here, in an action for the value of the services from which the malpractice arises, is a cross-demand within Section 2309.19, Revised Code. It arises from the same transaction and subject of action, and came into existence simultaneously with the plaintiff's claim for services. Cross-demands are not barred by limitations but, as the statute provides, "must be deemed compensated so far as they equal each other." It also constitutes a proper claim for common-law recoupment and, for that additional reason, is not barred.

Id. at 252-53, 184 N.E.2d at 683-84 (citations omitted).

Again, in Cohn v. Krauss, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (1st Dist. Ct. App. 1943) we find:

'Notwithstanding the broad sweep of statutory enactments making the rule of compensation applicable to all instances of mutual set-offs and counterclaims, there is discovered a tendency in many jurisdictions to limit its application to set-offs and counterclaims relating to the same subject-matter, which, in effect, limits it to recoupment which is available as a defense in the absence of a statute.

Id. at 155, 67 N.E.2d at 86. But as indicated in the previous note, the court also went on to find that this limitation did not apply to the Ohio cross demand statute.

Actually, as Conway indicates, Ohio subscribes to two distinct doctrines which avoid the bar of the statute of limitations when a defendant sets up an otherwise time-barred cross demand as an affirmative defense to the claimant's claim. The first is the subject here under discussion — the cross demand statute — and the second is the ancient common law doctrine that a cross demand in the nature of recoupment may be pleaded as an affirmative defense to the extent that it is equal to, or less than, the amount of the claim. As to this latter common law doctrine, see also Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953); Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 363 N.E.2d 772 (8th Dist. 1976); Nasby Bldg. Co. v. Walbridge Bldg. Co., 6 Ohio App. 104 (6th Dist. 1916); Akron Nat'l Bank & Trust Co. v. Roundtree, 10 Ohio Op. 3d 355 (9th Dist. Ct. App. 1998); Cohn v. Krauss, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (1st Dist. Ct. App. 1943); National City Bank Installment Loan v. Gutschow, No. 37803 (8th Dist. Ct. App. Oct. 26, 1978), as abstracted in 51 Ohio B. 1706 (Dec. 18, 1978). Unfortunately, some of the decisions have lumped the two together as a single doctrine, and this has been, in part, responsible for the erroneous conclusion that the cross demand statute applies only to cross demands in the nature of recoupment. See, e.g., Benson, Adm'rx v. Rosine, 76 Ohio App. 439, 64 N.E.2d 845 (6th Dist. 1945); Akron Nat'l Bank & Trust Co. v. Roundtree, 10 Ohio Op. 3d 355 (9th Dist. Ct. App. 1998).

Both Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 363 N.E.2d 772 (8th Dist. 1976) and Akron Nat'l Bank & Trust Co. v. Roundtree, 10 Ohio Op. 3d 355 (9th Dist. Ct. App. 1978) define a recoupment as "a demand arising from the same transaction as the plaintiff's claim." Actually, Ohio subscribes to the somewhat broader common law definition. As Judge Clark tells us:

But by the time of Henry VIII, a defendant was allowed to introduce new matter which would tend to defeat or diminish the plaintiff's recovery. This was known as recoupment. At first it was limited to a showing of payment, or of former recovery.
decisions will reveal that the Cross-Demand Statute was either not mentioned at all\(^2\) or, if it was raised, it was found inapplicable on other grounds.\(^3\) 

Later, recoupment was developed so as to allow a defendant to show for the purpose of reducing the plaintiff's recovery any facts arising out of the transaction sued upon or connected with the subject thereof, which facts might have founded an independent action in favor of the defendant against the plaintiff. . . . It was not necessary that the opposing claims be liquidated, or that they be of the same character; i.e., a claim in "tort" could be set off against one in "contract." It was essential, however, that the claims of both plaintiff and defendant involve the same "subject-matter," or arise out of the "same transaction," and that they be susceptible of adjustment in the same action.

Clark, supra note 38, at 634-35 (emphasis added).

It was this fully developed common law concept of recoupment which Ohio adopted as its definition of "counterclaim." Thus, Section 94 of the Code of Civil Procedure, 1853, states:

The counterclaim, mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. (emphasis added)


But the first Code of Civil Procedure retained the distinction between recoupment and set-off. Section 97 defined a set-off in the following terms: "A set-off can only be pleaded in an action founded on contract, and must be a case [sic] of action arising upon contract or ascertained by the decision of the court." See id. at 63.

The amendments of 1947, however, abolished the distinction between recoupment and set-off, and both were subsumed under the term "counterclaim." Thus, Ohio Rev. Code Ann. § 2309.16 (Page 1954) (repealed 1971) read:

A counterclaim is a cause of action existing in favor of one or more defendants against one or more plaintiffs or one or more defendants, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract or ascertained by the decision of a court.

In an editorial comment to this section, it is noted:

By the 1947 amendment of this section and the repeal of GC § 11319 [the statutory descendent of § 97 of the Code of Civil Procedure (1853)], the distinction between counterclaim [i.e., recoupment] and set-off is abolished. The new counterclaim includes what was formerly a counterclaim or a set-off, or both. By the amendment, the counterclaim and what was formerly a set-off are apparently broadened in scope. The former set-off could be pleaded only in an action founded on contract. It is not so limited by the amendment. Also, the former set-off was a cause of action existing in favor of a defendant against a plaintiff only. The new counterclaim (including the former set-off) is a cause of action existing in favor of one or more defendants against one or more plaintiffs [i.e., the modern compulsory or permissive counterclaim under Ohio Civil Rules 13(A) and (B)] or one or more defendants [i.e., the modern cross-claim under Ohio Civil Rule 13(G)], or both.

Under the rules, the term "counterclaim" also embraces both recoupment and set-off, but the old distinction between the two was partially revived by the rules distinction between compulsory and permissive counterclaims. Compare:

Ohio Civil Rule 13(A):

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . .

Ohio Civil Rule 13(B):

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

While these parallels are not perfect, they are close enough to require some thought.


\(^3\) Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953); and possibly, Kocsorak v.
Rather, these cases were concerned with the ancient common law doctrine that a demand in the nature of recoupment which was equal to or less than the amount of the claim, could be pleaded as a defense when it was time-barred as a counterclaim. It has also been suggested that an unliquidated tort cause of action is not a "demand" within the meaning of the statute. As stated, the suggestion is too broad in scope.

Historically, cross demands in the nature of set-offs were required to be liquidated but an unliquidated tort claim could be presented by way of a cross demand in the nature of a recoupment. Thus it is not essential in every case that the demand be liquidated; the question whether an unliquidated demand is a proper cross demand within the meaning of the statute turns upon whether the cross demand is in the nature of recoupment or in the nature of set-off. Even this construction may be too narrow; the statute speaks of a cross demand which "could have been set up" by a counterclaim, and Rules 13(A) and (B) define a counterclaim as "any claim" against an opposing party. There

The Cleveland Trust Co., 151 Ohio St. 212, 85 N.E.2d 96 (1949). In both of these cases, the cross demand statute was inapplicable because the claim and the cross demand did not mutually co-exist as legally enforceable claims.

264 See the authorities cited in note 260 supra, and in particular, Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953); Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 336 N.E.2d 772 (8th Dist. 1976). That the concept of recoupment was originally defensive in nature, see Clark, supra note 38, at 834-35, as quoted in note 261 supra. Indeed, prior to 1853, it appears that recoupment could only be used defensively. It was not until the enactment of Section 94 of the Code of Civil Procedure (1853), that it could be employed offensively as a counterclaim. This novelty was not well received by contemporaneous commentators.

265 This can best be illustrated by a comparison of the statute as originally enacted in 1853, with the statute as it reads after the amendment of 1947:

SECTION 99, CODE OF 1853:
When cross-demands have existed between persons under such circumstances, that if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other.

SECTION 11321, GC, AS AMENDED, 1947:
When cross-demands have existed between persons under such circumstances that if one had brought an action against the other, a counterclaim could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other.

(For the language of Section 99, Code of 1853, see Report of the Commissioners on Practice and Pleadings 63 (1853); for the language of Section 11321, General Code, as amended in 1947, see 122 Laws of Ohio 676, 677 (1947). This latter language remains in effect today. Compare Ohio Rev. Code Ann. § 2309.19 (Page 1954) (repealed 1971)).

The original language of the statute corresponded to the distinction drawn between counterclaims (i.e., recoupment) and set-offs by Sections 94 and 97 of the Code of Civil Procedure (1853). See note 261 supra. When the 1947 amendment abolished the distinction, and combined both recoupments and set-offs under the single term "counterclaim," the cross demand statute was amended accordingly, and the reference to set-off was deleted. Thus, it is clear that the term "counterclaim" in the Cross Demand Statute has the same meaning as the term "counterclaim" in Ohio Rev. Code Ann. § 2309.19 (Page 1954) and as we have seen in note 261 supra, that latter term includes both recoupment and set-off.

266 See, e.g., paragraph 7 of the syllabus of Johndahl v. Columbus Trotting Ass'n, Inc., 104 Ohio App. 118, 118, 147 N.E.2d 101, 103 (10th Dist. 1958), which states: "A prior unliquidated tort cause of action is not a 'demand' within the meaning of the provision of Section 2309.19, Revised Code, that cross-demands must be deemed compensated so far as they equal each other."

267 See 1 S. Nash, Pleading and Practice Under the Codes of Ohio, New York, Kansas and Nebraska 236-37 (4th ed. 1874).

268 See Clark, supra note 38, at 635 as quoted in note 261 supra.
is nothing in the language of the rule that requires the claim to be liquidated before it could be asserted as a counterclaim. Therefore, it appears likely that the question of liquidity under the rules is immaterial, since the precedents requiring liquidated demands in the case of cross demands in the nature of a set-off have been superseded by the broadened rules definition of "counterclaim."

Third, at some point the claim and the cross demand must share a mutual co-existence as legally enforceable causes of action. While the cross demand need not be legally enforceable at the time it is asserted as a defense it must have been legally enforceable at some time in the past when it co-existed with the claim which was then, and which continues to be, legally enforceable. Of course, to say that the cross demand must have been legally enforceable at some time in the past is not to imply that it cannot be legally enforceable in the present. Subject to some qualifications to be made below, if the claim and the cross demand are both legally enforceable causes of action at the time the defender is required to serve his responsive pleading, the defender has the option of asserting the cross demand as a counterclaim or as a defense under the Cross-Demand Statute.

269 Walter v. National City Bank, 42 Ohio St. 2d 524, 330 N.E.2d 425 (1975); Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953); Kocsorak v. The Cleveland Trust Co., 151 Ohio St. 212, 85 N.E.2d 96 (1949); In reEstate of Butler, 137 Ohio St. 96, 28 N.E.2d 186 (1940). In Walter, the defender conceded that the cross demand statute did not apply because the claim and the cross demand never shared a mutual co-existence as legally enforceable causes of action; in Summers and Kocsorak, the court found that the cross demand statute did not apply for the same reason; only in Butler was there found that mutual co-existence which permitted the application of the statute.

270 We should note here that this is an overly cautious statement of the rule; a caution that is required by the uncertainty surrounding the application of the statute of limitations to counterclaims. It may very well be that a more accurate statement would put the rule in these words: "Subject to some qualifications to be made below, if the claim and the cross demand are both legally enforceable causes of action at the time the action is commenced .. ." Authority exists for the proposition that a counterclaim is not barred by the statute of limitations at the time it is pleaded, if it was not some time-barred at the time the complaint is filed. See, for example, paragraph 2 of the syllabus of McEwing v. James, 36 Ohio St. 152 (1880), which states: "The statute of limitations ceases to run against a set-off from the date of the commencement of the action in which it is pleaded."

271 See, e.g., Gerstner v. Burke, 16 Ohio Op. 2d 266, 173 N.E.2d 139 (1st Dist. Ct. App. 1960), in which the court of appeals held that a presently existing cross demand could be used as a defense to the extent that it was not barred by the statute of limitations. The Gerstner situation may be described simplistically as follows: On October 2, 1957, claimant commenced his action for the unpaid balance of a note dated July 27, 1950. As a defense under the cross demand statute, defender claimed compensation for legal services provided to claimant from 1942 to 1952. A six-year statute of limitations applied to this cross demand. The court said:

Any claim that the defendant may have had after July 27, 1950 can be 'compensated as far as' it and the plaintiff's claim 'equal each other' if such claim of the defendant be substantiated. Should such claim be for services which have been performed between October 2, 1957, the date of the filing of the within petition, and October 2, 1951, it is not barred by the Statute of Limitations. However, should the said claim be for services performed between July 27, 1950, and October 2, 1951, then such claim would be barred by the said Statute of Limitations.

Id. at 267, 173 N.E.2d at 140-41.

Although a motion to certify the record to the supreme court was overruled on March 1, 1961, it is questionable that the court's calculations are correct. The conclusion drawn by the court is arguably proper if the cross demand was asserted as a counterclaim, but if the cross demand was asserted as a defense, it would seem more correct to say that the defender could set off any claim for services accruing between July 27, 1950, and the date the action was commenced. See In re Estate of Butler, 137 Ohio St. 96, 28 N.E.2d 186 (1940).
The mutual co-existence of the claim and the cross demand may be affected by the statute of limitations. If, for example, the cross demand is senior to the claim, only that portion of the cross demand not barred by the statute of limitations when the claim comes into existence may be set up as a defense to the claim. \(^{272}\)

In any event, if the claim and the cross demand do not have "a concurrent existence as matured claims," \(^{273}\) the use of the cross demand statute is precluded. It does not necessarily follow, however, that the defender is precluded from asserting the cross demand as a defense to the claim. If the cross demand is a demand in the nature of recoupment, it may be asserted as a defense under the common law doctrine of recoupment even though it would be time-barred as a counterclaim at the time the action on the claim was commenced. \(^{274}\)

Finally, the cross demand must be such that it could have been asserted by way of counterclaim if, during that period of mutual co-existence as legally enforceable causes of action, the claimant had commenced an action on the claim. Note carefully that an action need not actually have been commenced nor a counterclaim asserted. The test question must be phrased hypothetically: if the claimant had commenced an action on the claim, could the defender have asserted the cross demand by way of counterclaim? If the answer to the test question is in the affirmative the last requirement of the Cross-Demand Statute is satisfied; but if the answer is in the negative the statute does not apply. Under the former statutory definition of "counterclaim," this

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\(^{272}\) See Gerstner v. Burke, 16 Ohio Op. 2d 266, 173 N.E.2d 139 (1st Dist. Ct. App. 1960), as set out in note 271 supra. With respect to that portion of the cross demand that predated the existence of the claim, the court of appeals said:

"Now since the date of the signing of the note was July 27, 1950, any claim of the defendant prior to July 27, 1944, is barred by the Statute of Limitations, but the claims of the defendant between July 27, 1944 and July 27, 1950 are within the time of the Statute of Limitations (six years), and are, therefore, if substantiated, not barred by the said Statute of Limitations."

\(^{271}\) at 267, 173 N.E.2d at 140. But as to the correctness of the court's calculations, see note 271 supra. Since the defender's cross demand continued to accrue into 1952, it would seem that the correct measurement should be 1944 to 1952.

The Gerstner court's calculations would be correct if the defender's cross demand had finally accrued prior to the accrual date of the claim. In such case, the terminal date for the legal enforceability of the cross demand would be the date on which the claim accrued; that is, July 27, 1950, minus six years. See, e.g., Cohn v. Krauss, 45 Ohio L. Abs. 148, 154, 67 N.E.2d 62, 66 (1st Dist. Ct. App. 1943), which stated:

"It will be observed that as to all the causes of action set forth in the defendant's third amended answer and cross-petition, excepting the second one, the statutory period of five years had not run when the plaintiff's note became due and his cause of action accrued. They therefore had a concurrent existence as matured claims enforced [sic] in independent actions. The second was barred at that time."


\(^{274}\) Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953); Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 363 N.E.2d 772 (8th Dist. 1976). Paragraph 3 of the Rivera syllabus sums it up:

"The defense of recoupment is not barred by the Statute of Limitations [where the establishment of the defense emerges from the transaction] upon which the complaint is based. Recoupment defeats the plaintiff's claim up to but not to exceed the amount of the claim. Recoupment is a defense and cannot be the basis for affirmative relief."

\(^{272}\) at 338, 363 N.E.2d at 773 (syllabus para. no. 3).
requirement could be troublesome, but under the much broader definition of "counterclaim" found in Rule 13, it should prove much easier to satisfy.

When these four requirements are met the claim and the cross demand automatically cancel each other to the extent that they are equal to each other. As stated in the syllabus of In re Estate of Butler: "Defenses are not barred by the statute of limitations, and cross demands must be deemed compensated as soon as they mature insofar as they are equal to each other."

But the statute states that "neither can be deprived of the benefit thereof by assignment by the other, or by his death." Are these words of limitation, or are they words of illustration? Put another way, does the statute apply only in those cases where an assignment by, or the death of, one party would deprive the other party of the right to present his or her cross demand by way of counterclaim?

The United States Court of Appeals for the Sixth Circuit construes the section as words of limitation:

This statute merely provides that a right to set off is not defeated by an assignment or by death of one of the parties to the debtor-creditor relationship. The section declares an automatic setoff upon death or assignment by providing that the two demands shall be deemed

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276 In essence, Ohio R. Civ. P. 13 defines a "counterclaim" as "any claim" which the defender has against the opposing party. See Ohio R. Civ. P. 13(A) and 13(B), as quoted in note 261 supra. The only meaningful rules restriction on the assertion of a cross demand by way of counterclaim is the following phrase found in Ohio R. Civ. P. 13(A): "and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Although this phrase is not found in Rule 13(B), it must also be read into that rule by necessity.

This phrase must be read as referring to indispensable parties; if the adjudication of a cross demand would require the presence of an unjoined indispensable party, and that absent party is neither willing to join the action voluntarily nor subject to being brought in by service of process, then the court cannot acquire jurisdiction of his or her person, and the cross demand cannot be presented by way of counterclaim. But since truly indispensable parties are relatively rare, this requirement should not impose serious restrictions on the right to counterclaim, nor on the corresponding right to employ the cross demand statute.

277 137 Ohio St. 96, 28 N.E.2d 186 (1940).

278 Id. at 96, 28 N.E.2d at 187-88 (syllabus para. no. 5).

The United States District Court for the Northern District of Ohio dissents from this view. In Baker v. National City Bank of Cleveland, 387 F. Supp. 1137, 1144 (N.D. Ohio 1974), the court states:

The statutory language [cross] demands must be deemed compensated so far as they equal each other is not self-executing. Were a contrary statutory construction adopted a bank depositor who is also indebted to a bank upon a demand loan would never in fact have a bank account since all deposited funds would be automatically set off against the depositor's loan account.

But this overlooks the fact that the statute has no legal effect on the ongoing relationship between the parties; it has legal effect only when that relationship is terminated by the commencement of an action by one of the parties, and the assertion of the cross demand as a defense by the other. In other words, the legal effect of the statute relates back to the period of mutual co-existence only when the cross demand is properly pleaded as a defense to the claim; the cross demands must be deemed compensated at the time of the action, and not during the period of the ongoing relationship between the parties. It should go without saying that the cross demand relates back only to the extent that it has not been satisfied during the ongoing relationship.
compensated. It does not deal with the mechanics of effecting a setoff in other circumstances.\textsuperscript{279}

In a footnote to the above statement, the court continued: "We are aware that some courts have construed similar statutes as effecting automatic setoff in other circumstances. However, the Supreme Court of Ohio does not appear to have adopted such a construction."\textsuperscript{280}

While it may be true that the Ohio Supreme Court has never \emph{expressly} extended the statute to cases not involving death or assignment neither has it expressly limited the statute to such cases. As far as the supreme court's decisions are concerned, the question is still open.

The answer must be found in the language of the statute; the key phrase appears to be "neither can be deprived of the benefit thereof." "Thereof" must refer back to the defender's potential right to counterclaim had the claimant commenced an action on the claim. If that is so, and if these are words of limitation, then the statute would apply only when an assignment of the claim would terminate the right to counterclaim, or when the right to counterclaim would not survive the death of the other party.

When the Cross-Demand Statute was first enacted in 1853,\textsuperscript{281} a number of causes of action did not survive the death of either party to the action.\textsuperscript{282} In particular, a cause of action for personal injury did not survive the death of the tortfeasor.\textsuperscript{283} If the defender had a potential cross demand for personal injury against the claimant's decedent which co-existed with the decedent's potential claim against the defender, the death of the claimant's decedent would destroy the defender's right of counterclaim. Accordingly, the statutory reference to the death of the other party as an occasion for depriving the defender of the benefit of the counterclaim had some meaning. But with the 1893 amendments\textsuperscript{284} the Survival Statute was expanded to the point where almost all causes of action could be said to survive the death of the potential

\begin{footnotes}
\footnote{279}{Baker v. National City Bank of Cleveland, 511 F.2d 1016, 1017-18 (6th Cir. 1975).}
\footnote{280}{\textit{Id.} at 1018, n.1 (citation omitted). See Comment, 53 Calif. L. Rev. 224 (1965).}
\footnote{281}{51 LAWS OF OHIO 57, 73 (1853).}
\footnote{282}{For a general survey of Ohio law concerning the survival of causes of action see 1 Ohio Jur. 3d Actions §§ 150-60 (1977).}
\footnote{283}{The Code of Civil Procedure § 398 (1853), provided as follows:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same.}
\footnote{284}{Report of the Commissioners on Practice and Pleadings 159 (1853); see also 51 LAWS OF OHIO 57, 122 (1853).}
\footnote{90 LAWS OF OHIO 139, 140 (1893). Except that the words "liable thereto" have been substituted for "liable to the same," this language has been carried over into the present Ohio Savings Statute. See OHIO REV. CODE ANN. § 2305.21 (Page 1954).}
\end{footnotes}
defendant although there are still some which may not survive the death of the potential plaintiff.\textsuperscript{285}

Therefore, if the section at issue involves words of limitation, as a practical matter the application of the Cross-Demand Statute is limited to situations in which the assignment of the claim has terminated the defendant’s right to counterclaim;\textsuperscript{286} that is, situations in which the defendant could have asserted the cross demand by way of counterclaim had the assignor commenced an action on the claim prior to the assignment but in which he or she cannot assert the cross demand by way of counterclaim if the assignee commences an action on the claim subsequent to the assignment. If that be so, the applicability of the Cross-Demand Statute must have been further limited by section 4993 of the Revised Statutes of 1880, which provided: “[a]n action must be prosecuted in the name of the real party in interest, . . . but when a party asks that he may recover by virtue of an assignment, the right of set-off, counterclaim, and defense, as allowed by law, shall not be impaired.”\textsuperscript{287}

As a general rule, it may be said that under this statutory language, the defender retains the right to counterclaim against the assignee if he could have counterclaimed against the assignor had the assignor brought an action on the claim, except when the claim assigned is on a negotiable instrument, and the assignee takes it as a holder in due course.\textsuperscript{288} When this is combined with the


\textsuperscript{286} Certain pending counterclaims may abate on the death of the claimant (the defender on the counterclaim). Ohio Rev. Code Ann. § 2311.21 (Page Supp. 1978) (claims for libel, slander, malicious prosecution, nuisance and for official misconduct of a county court judge). However, if the cause of action asserted in the counterclaim survives the death of the claimant (as almost all will), a proper party (usually, the personal representative of the deceased) may be substituted and the counterclaim may proceed to judgment. Ohio R. Civ. P. 25(A). Therefore, it will be a most unusual case in which the death of the other party (i.e., the claimant) will deprive the defender of his or her right to assert the cross demand by way of counterclaim, and it may fairly be said, as a practical matter, that death is no longer a meaningful factor in the operation of the cross demand statute.

\textsuperscript{287} This provision was the statutory successor to sections 25 and 26 of the Code of Civil Procedure (1853) which provided:

§ 25. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven.

§ 26. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed: but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due.

51 Laws of Ohio 57, 61 (1853). Of section 26, the commissioners had this to say: “Section 26 very properly saves any set-off or other defense a party may have, notwithstanding the rule in section 25.” Report of the Commissioners on Practice and Pleadings 34 (1853).

In time, section 4993 of the Revised Statutes of 1880 became section 11241, General Code. In 1947, this section was amended to conform to the merger of counterclaims and set-offs. The amendment read: “An action must be prosecuted in the name of the real party in interest . . . When a party asks that he may recover by virtue of an assignment, the right of counterclaim, and defense, as allowed by law, shall not be impaired.” 122 Laws of Ohio 676 (1947). This language was carried over into Ohio Rev. Code Ann. § 2307.05 (Page 1954) and remained without change until superseded by Ohio R. Civ. P. 17(A). One should note that Ohio R. Civ. P. 17(A) makes no reference to the right of counterclaim and defense not being impaired when an action is brought by an assignee.

\textsuperscript{288} Fuller v. Steiglitz, 27 Ohio St. 355 (1875). For a general survey of the law governing counterclaims by and against assignees, see 14 Ohio Jur. 2d Counterclaim §§ 33-40 (1955).
1893 amendment to the Survival Statute, the occasions for employing the Cross-Demand Statute are reduced almost to the point of disappearance.

Suffice it to say that the Ohio decisions have not limited the use of the Cross-Demand Statute to cases in which the right to counterclaim was defeated by an assignment of the claim, or by the death of the other party. The statute has been successfully asserted (or would have been successfully asserted if the four requirements had been met) in a number of cases in which neither an assignment nor the death of the other party had any effect on the defender's right to counterclaim. Rather, in almost all of these cases, the principal issue was whether the Cross-Demand Statute was available when a counterclaim would have been barred by the statute of limitations. Where the four requirements of the statute have been met, the courts have generally held that it was available.

In sum, when a counterclaim is barred by the statute of limitations or otherwise but the four requirements of the Cross-Demand Statute are met, the defender may assert his or her cross demand as an affirmative defense to the claimant's claim to the extent that that cross demand is equal to or less than the claim. But if a counterclaim remains viable at the time the defender serves his

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289 See notes 284 and 285 supra and accompanying text.


That the running of the statute of limitations against a counterclaim may be one of the principal factors triggering a use of the cross demand statute is evidenced by the remarks in 14 Ohio Jur. 2d Counterclaim §§ 22-23 (1955), which state in part:

§ 22. Claim Barred by Statute of Limitations — Unless the defendant's claim is purely defensive, as by way of recoupment, or has coexisted with the plaintiff's claim, it is essential to the allowance of a counterclaim that the action in which it is set up be commenced within the period of the statute of limitations pertaining to the claim of the defendant. Thus, whatever would be barred by limitations if separately asserted, is not, on proper plea being asserted against it, available as a set-off or counterclaim.

§ 23. Effect of Coexistence of Cross Demand — When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands must be deemed compensated so far as they equal each other. Accordingly, the statute of limitations does not defeat a counterclaim which falls within this 'compensation statute' and which was not barred when the plaintiff's claim arose. In other words, a counterclaim, even though barred by a statute of limitations at the time the plaintiff files his action, may be used to reduce or balance the plaintiff's recovery, if the defendant's claim and that of the plaintiff have coexisted. (citations omitted)

Given the cases upon which he relies (generally, the cases cited at the beginning of this note, save Conway v. Ogier, 115 Ohio App. 251, 184 N.E.2d 681 (10th Dist. 1961), which was not available at the time of the principle writing, but which is included in the cumulative supplement), the author of these two sections quite rightly makes no reference to assignment or death being limiting factors on the use of what he terms the "compensation statute."

Although the argument is somewhat tenuous, the same conclusion may be drawn from the language of the statute itself. As originally drafted, the statute linked the concept of mutual compensation to deprivation by assignment or death. Thus, "neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." 51 LAWS OF OHIO 57, 73 (1853), Code of Civil Procedure § 99 (1853), but the 1947 amendment of the statute severs the link, and makes the concept of mutual compensation independent of deprivation by assignment or death: "neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so are as they equal each other." 122 LAWS OF OHIO 676, 677 (1947), codified at OHIO REV. CODE ANN. § 2309.19 (Page 1954). For the full comparative text of the original draft and the amendment, see note 265 supra.
or her responsive pleading 291 the defender has the option of asserting his or her cross demand either by way of counterclaim or by way of affirmative defense under the statute. This is true when the cross demand does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim — when the cross demand would qualify as a permissive counterclaim under the provisions of Rule 13(B). Whether it is true when the cross demand qualifies as a compulsory counterclaim — one arising out of the transaction or occurrence that is the subject matter of the opposing party's claim which does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction — is another matter.

Rule 13(A) provides in material part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

On its face, this would seem to preclude the use of the cross demand as an affirmative defense if the cross demand is legally enforceable as a compulsory counterclaim at the time the defender serves his or her responsive pleading. If the cross demand is legally enforceable as a compulsory counterclaim, it must be asserted as a counterclaim, and may not be set up as an affirmative defense.

While that conclusion may be in accord with the letter of the rule, it is not in accord with its spirit. "The purpose of the compulsory counterclaim is to avoid a multiplicity of suits by requiring in one action the litigation of all claims arising from an occurrence."292 If the cross demand which would otherwise qualify as a compulsory counterclaim is pleaded as an affirmative defense this purpose is achieved. Therefore, the better rule would appear to be: if the cross demand is legally enforceable at the time the defender serves his or her responsive pleading, and if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of an indispensable party of whom the court cannot acquire jurisdiction, the defender has the option of asserting the cross demand (1) as a compulsory counterclaim under the provisions of Rule 13(A), (2) as an affirmative defense under the provisions of Ohio Revised Code Section 2309.19 (if it meets the four requirements of the statute), or (3) as an affirmative defense under the common law doctrine of recoupment. Of course, if the cross demand exceeds the claimant's claim, it may only be pleaded as an affirmative defense to the extent that it equals the claim; that is, if the defender pleads the cross demand as an affirmative defense rather than as a compulsory counterclaim the right to obtain relief for the excess of the cross demand over the claim will be waived.293 Thus if the

291 See note 270 supra.
292 Ohio Rules Advisory Committee Staff Note to Ohio R. Civ. P. 13(A).
293 Broadway Mgmt., Inc. v. Godale, 55 Ohio App. 2d 49, 378 N.E.2d 1072 (9th Dist. 1977); Rosenberg v. Cattarello, 49 Ohio App. 2d 87, 359 N.E. 2d 467 (8th Dist. 1976). As these cases note, the failure to assert the cross demand as a compulsory counterclaim waives the right to assert the cross demand, or any part of it, in a separate suit.
cross demand as counterclaim would exceed the amount of the claim, and if it would be legally enforceable as a compulsory or permissive counterclaim, there is no particular advantage in pleading it as an affirmative defense except that, as an affirmative defense, it would defeat the need to transfer the case to a court of competent jurisdiction if, as a counterclaim, it would exceed the jurisdiction of the court in which the action was commenced. 294

This brings us, full circle, to our starting point. As a general rule a legally enforceable cross demand is either a compulsory or permissive counterclaim under the provisions of Ohio Civil Rule 13, and must be pleaded as such with a Rule 8(A)(2) demand for judgment for the relief to which the defender deems himself or herself entitled on the cross demand.

To this general rule there are two exceptions: (1) if the legally enforceable cross demand qualifies as a cross demand under Ohio Revised Code Section 2309.19, or (2) if it is in the nature of common law recoupment it may, at the option of the defender, be pleaded as an affirmative defense to the claim. Conversely, if a cross demand which qualifies as a statutory cross demand or as a common law recoupment is pleaded as a compulsory or permissive counterclaim at a time when it would be legally unenforceable as such it may, under the last sentence of Rule 8(C), be treated as an affirmative defense to the claim, if justice so requires. 295

III. PLEADING THE AFFIRMATIVE DEFENSE

Ohio Civil Rule 12(B) prescribes the vehicle to be used in presenting the affirmative defense: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required ...." The rule speaks in mandatory terms; every defense shall be asserted in the responsive pleading. 296 Despite this mandatory language, there are a number of exceptions to the general rule that affirmative defenses are presented in the responsive pleading. These exceptions shall be considered below but for the moment we shall concentrate on the general rule which applies in the vast majority of cases.

A. THE GENERAL RULE

1. The General Standard: Nominal Pleading

Rule 8(E)(1) specifies how the defense is to be pleaded: "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of

294 Ohio R. Civ. P. 13(J) provides: "In the event that a counterclaim ... exceeds the jurisdiction of the court, the court shall certify the proceedings in the case to the court of common pleas." But this provision applies only when the "counterclaim" seeks affirmative relief; it has no application when the subject matter of the counterclaim is pleaded as an affirmative defense under either the cross demand statute or the common law doctrine of recoupment.

295 The sentence in question provides that: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation."

296 "Like denials, affirmative defenses are always made by answer (Civ R 8(C))." 2 S. Jacoby, Ohio Civil Practice § T 9.09 (1976). It is clear from the context, however, that Professor Jacoby is here speaking of those affirmative defenses provided for by Ohio R. Civ. P. 8(C).
pleading . . . are required." The Ohio Supreme Court's paraphrase of this standard is slightly more informative though essentially the same: the averments setting forth the affirmative defense must "formulate in a simple, concise, and direct manner the issue to be resolved by the trial court."

The Ohio Rules Advisory Committee Staff Notes explain that this standard may be satisfied by a pleading couched in general terms provided that the claimant receives fair notice of the defense asserted and some of the commentators go so far as to say that it is sufficient if the defense is pleaded by name only. Nominal pleading may indeed be adequate for those affirmative defenses listed in Rules 8(C) and 12(B) but the defender may have to go further for other affirmative defenses. In general the key to the pleading question is fair notice and avoidance of surprise. It should be remembered that these defenses must be pleaded affirmatively because their existence could not logically be deduced from a denial of the allegations of the statement of claim. Thus, to be adequate, the "simple, concise, and direct" averment of the defense must give such notice of the nature of the defense that a reasonably observant opposing party will not be surprised by the introduction of evidence in support of the defense at the time of trial. It is

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297 See also 11 West's Ohio Practice: Civil Procedure Forms § 10.1 Comment, at 379 (1973), where it is stated:

Affirmative defenses should be pleaded in compliance with Civil Rule 8(E)(1), that is, they should be stated simply and concisely and directly. There is no requirement that they be pleaded with particularity, and it is common to plead them generally. Civil Rule 8(E)(1) says, "No technical forms of pleadings or motions are required."


299 See the Ohio Rules Advisory Committee Staff Note to Rule 8(C), which states in pertinent part:

Under the rule, as under the code, an affirmative defense serves the function of avoiding surprise.

. . .

Under the equivalent Federal Rule 8(c) the cases have held that an affirmative defense may be pleaded in general terms and is adequate so long as the plaintiff receives fair notice of the defense.

Most of the commentators on the Ohio Rules tend to echo this statement in one form or another. See, e.g., 1 W. Knepper, Ohio Civil Practice with Forms § 3.02(C) (rev. 1970) ("And if an affirmative defense is pleaded in general terms, in the federal courts it is sufficient.") (footnote omitted); see also the authorities cited in notes 297 supra, and 300 infra.

300 See, e.g., McCormac, supra note 35, § 7.14, at 159, where it is said: "These defenses should be alleged by a short and plain statement which usually requires giving notice of the defense by its name only except when otherwise required by the Civil Rules. The specific facts concerning the defense can be ascertained through the usual discovery process." To the same effect, see 4 Anderson's Ohio Civil Practice § 153.08, at 413 (1975), which states: "The principles of simplified rule pleading apply to affirmative defenses as well as to other defenses. Hence defendant may allege that plaintiff is 'contributorily negligent' without setting forth further 'facts' particularizing that negligence."

301 The standard established in the federal practice to determine if a defense must be pleaded affirmatively under Rule 8(c), Fed. R. Civ. P., is whether it arises by logical inference from the averments of the adverse party's pleading or if it is in the nature of an avoidance. Will the adverse party be taken by surprise, if the defense is not pleaded affirmatively? These are mere guidelines. In each instance, unless there is precedent, the pleader must make his own determination.

1 W. Knepper, Ohio Civil Practice with Forms § 3.02(B), at 73 (rev. 1970).

302 Thus, in Perry v. Bronn, 75 Ohio Op. 2d 212, 220 (10th Dist. Ct. App. 1975), the court of appeals states: "The purpose of Civ. R. 8(C) in requiring the party to set forth matters of avoidance and affirmative defenses is to avoid the element of surprising the opposing party at trial." And in his concurring opinion, Judge Whiteside says: "The requirement of pleading [the
sufficient if the pleading gives fair notice of the nature of the defense. The facts upon which the defense is based need be set forth only to the extent necessary to exhibit the nature of the defense. If the claimant wishes to know the factual basis the usual discovery process may be employed to this end. 303

2. Beyond the General Standard: Capacity and Fraud

In at least two instances, however, the defender must go beyond this general standard of pleading. First, when the defender desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge. 304

The “supporting particulars” are, of course, the facts upon which the challenge to legal existence or capacity is based. Thus when a defender asserts this defense the facts upon which the defense is based must also be alleged to the extent that they are known to the defender. A bare assertion of lack of capacity or lack of legal existence will not suffice to raise the defense. 305

Second, “[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.” 306 Fraud is not only the basis for a statement of claim, it is also an affirmative defense. 307 When asserted as an affirmative defense it is an averment of fraud within the meaning of the rule. 308 Therefore, when fraud is asserted as an affirmative defense the “circumstances” constituting fraud must be stated with particularity.

There is no general agreement as to the meaning of the word “circumstances.” At least one federal court has taken the position that “circumstances” means the elements of fraud and has suggested that it is “reasonable and necessary” that the pleading “state generally facts establishing each and every element essential to a cause of action for fraud.” 309

In effect, this would make the former code standard of fact pleading affirmative defense] is predicated upon the necessity of notice to the opposing party so that he will be prepared at trial to meet the evidence [on which the affirmative defense is based] with contrary evidence of his own, if available.” Id. at 222 (Whiteside, J., concurring).

303 See the authorities cited in note 300 supra.

Indeed, the use of discovery by the claimant may foreclose any objection he or she may have to the adequacy of the defender’s pleading. As it is noted in Perry v. Bromm, 75 Ohio Op. 2d 212, 220 (10th Dist. Ct. App. 1975): “We do not believe that in the manner in which this case developed, with the particular discovery procedures utilized, there was reasonably any great element of surprise in the third-party defendant Sears’ evidence adduced on the matter of custom and usage.”

304 OHIO R. CIV. P. 9(A).


306 OHIO R. CIV. P. 9(B).

307 OHIO R. CIV. P. 8(C).


309 Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 226 (N.D. Ill. 1969). In this case, fraud was alleged as a basis for recovery in the statement of claim, and not as a defense in the responsive pleading. But if the court is correct in its interpretation of the word “circumstances,” the same rule should apply when fraud is asserted as an affirmative defense.
applicable to the affirmative defense of fraud. On the other hand, another federal court has said:

In the ordinary fraud case 'the circumstances constituting fraud' means merely the time, place and content of the false representation, the fact misrepresented, and an identification of what has been obtained. If these are set forth, then the circumstances of this fraud have been stated with particularity, and Rule 9(b) has been complied with.\(^{310}\)

The various commentators on the Ohio Rules of Civil Procedure tend to echo this division of authority. Professor Harper appears to give qualified approval to the "elements" school of thought\(^ {311} \) while Judge McCormac appears to subscribe to the "time and place" school.\(^ {312} \) Other commentators have straddled the issue and recommend adherence to both points of view.\(^ {313} \)

The reported Ohio decisions are no more helpful than the commentators. In *Klott v. Associates Real Estate*,\(^ {314} \) the trial court sustained a motion to


\(^{311}\) Thus, in 4 ANDERSON'S OHIO CIVIL PRACTICE § 151.11, at 310-11 (1973), it is said:

> In a fraud action, as in any other action, the elements of a fraud action should be pleaded. In fact, by pleading the elements of fraud in a particular factual context, plaintiff will have pleaded his fraud action with "particularity."

> . . .

Although fraud should be pleaded with "particularity," plaintiff should not file a complaint burdened with evidentiary detail. On at least one occasion the United States Supreme Court has commented that although fraud should be pleaded with particularity that does not mean that the pleading of fraud should be interpreted so strictly as to lose sight of the simplified pleading doctrine enunciated by *Conley v. Gibson* and Federal Rule 8(a). (Citations omitted).


\(^{312}\) The circumstances constituting fraud and mistake must be stated with particularity. This requirement should be construed in conjunction with the requirement that allegations must be as short and plain as is reasonable under the circumstances. . . . It means something more than being able to use the naked terms and should mean something less than being required to spell out the entire elements of fraud. A short statement of the circumstances from which the fraud or mistake arose should be sufficient.

McCORMAC, supra note 35, § 5.10 at 102-03 (footnotes omitted).

\(^{313}\) In general, the circumstances of fraud would be the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was procured by the fraud.

Although the Civil Rules do not require the statement of a cause of action, nevertheless, it would be prudent for the pleader to cover all elements of fraud. In Ohio, the traditional action for fraud contains the following elements: intentional misrepresentation of a matter with the intent to mislead another and actual justified reliance by that person and consequent injury to that person.

11 WEST'S OHIO PRACTICE: CIVIL PROCEDURE FORMS § 11.21, Comment (1973). "The pleading of elements plus circumstances is most likely to adequately counter any possible objections under the rule, in view of some of the restrictions that have been imposed in certain types of cases. And, it seems to accord more nearly with the wording of the subdivision." 3 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE, Form 9:10, n.1, at 9-14 (1970).

Knepper is somewhat less definitive. He notes the existence of both schools of thought, recommends that attention be paid to the elements of fraud, and concludes that "this requirement of Civil Rule 9(B) should be read in conjunction with Rule 8(A) and (E)(1), which calls for a 'short and plain' statement, requires averments to be 'simple, concise, and direct' and declares that, 'no technical forms of pleading or motions are required.' " 1 W. KNEPPER, OHIO CIVIL PRACTICE WITH FORMS § 2.03(B), at 55-56 (rev. 1970).

\(^{314}\) 41 Ohio App. 2d 118, 322 N.E.2d 690 (10th Dist. 1974).
dismiss claimants' second cause of action which was premised on fraudulent concealment and the Tenth District Court of Appeals affirmed. Although the appellate court did not enunciate what is the proper standard for pleading fraud under Rule 9(B) it did measure the allegations of the second cause of action against the elements of a cause of action for fraud, and this tends to support the "elements" theory. On the other hand, in Roy and Co. v. Walker,\(^3\) the affirmative defense of fraud in the inducement was pleaded in general terms which would satisfy the "time and place" standard but not the "elements" standard. The Franklin County Municipal Court held:

Under Civ. R. 8(C), fraud in the inducement is such matter constituting an avoidance or affirmative defense which must be set forth in a pleading. Defendant, while not using the word 'fraud' in her answer, has set forth an affirmative defense in general terms which must be considered adequate as it gives plaintiff fair notice of the defense.\(^3\)

However, since the court makes no mention of Rule 9(B), one suspects that it may have been unaware of the applicability of this latter rule. This suspicion casts some doubt on the value of the opinion.

While it is clear enough that "the circumstances constituting fraud" must be pleaded "with particularity," it remains unclear just what those "circumstances" are. Until a definitive answer to the question is promulgated the prudent defender should take Milligan's advice\(^3\) and so frame the responsive pleading as to satisfy both standards. The essential point to be noted is that under either standard the defender must engage in more extensive fact pleading than would otherwise be required by the general standard set down in Rule 8(E)(1).

3. Mode of Pleading Affirmative Defenses

There remains the problem of the mode in which the affirmative defense should be pleaded. If the defender denies the essential allegations of the statement of claim in one part of the responsive pleading, and in another part asserts an affirmative defense which "confesses" those same essential allegations, the two defenses may be inconsistent. That in itself is no problem since Rule 8(E)(2) explains that "[a] party may also state as many separate . . . defenses as he has regardless of consistency and whether based on legal or equitable grounds." But such an inconsistency may cause the defender difficulties if the claimant invokes the rule from Gerrick v. Gorsuch:\(^3\)

Where a defendant has specifically denied in one part of his answer a material fact which the plaintiff has alleged and must prove in order to establish his case and the defendant has also in another part of such answer made affirmative allegations which necessarily amount to an


\(^{316}\) Id. at 71, 302 N.E.2d at 910.


\(^{318}\) Gerrick v. Gorsuch, 172 Ohio St. 417, 178 N.E.2d 40 (1961) (syllabus para. no. 1).
admission of such material fact, the defendant is bound by such judicial admission and the plaintiff need not offer any evidence tending to prove such fact.\(^{319}\)

In other words, when the denial defense and the affirmative defense are inconsistent affirmative allegations of fact in the affirmative defense which "confess" corresponding allegations of fact in the statement of claim nullify the denial of those allegations contained in the denial defense. Of course this nullification will make no difference if the affirmative defense is well taken because the defendant will prevail on the "avoidance" aspect of the affirmative defense. If the affirmative defense is not well taken, and the denial defense is nullified by the judicial admission contained in the affirmative defense, the claimant wins on the pleadings.

It is doubtful whether this rule of judicial admission should retain any viability under the civil rules. If the rules permit the pleading of inconsistent defenses, then it would seem to follow that each must be treated as being independent of the other; each must be treated in isolation, as if the other did not exist. Otherwise, if one were allowed to impinge upon the other with fatal effect, the benefit of being able to plead inconsistently would cease to exist and the provision of Rule 8(E)(2) would have no real meaning. Rather, in the light of Rule 8(F), it must be said that the judicial admission rule is a trap for the unwary that has been made obsolete by the enactment of the civil rules.\(^{320}\)

Be that as it may, the prudent defender who wishes to avoid any lingering aftereffect which the judicial admission rule might have can do so by phrasing the affirmative defense in the hypothetical mode, or it may be pleaded as an alternative to the denial defense. Both forms of pleading are authorized by Rule 8(E)(2), which states in pertinent part: "A party may set forth two or more statements of a . . . defense alternately or hypothetically, either in one . . . defense or in separate . . . defenses."\(^{321}\)

4. Separate Statement and Numbering

Except in that rare case in which a general denial is authorized\(^{322}\) every

\(^{319}\) Id.

\(^{320}\) Ohio R. Civ. P. 8(F) provides: "All pleadings shall be so construed as to do substantial justice." Although this rule does not have much in the way of substantive content, the Ohio courts have made pertinent remarks about it:

An important principle underlying the adoption of the Civil Rules is that the rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson (1957), 355 U.S. 41, 48, Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 92, 326 N.E.2d 267, 270 (1975). "Further, all pleadings shall be construed as to do substantial justice. Civil Rule 8(F). This emphasizes the fact that pleadings shall be construed liberally in order that the substantive merits of the action may be served. Civil Rule 8(F); Rules Advisory Committee Staff Notes." Hersch v. Debreczeni, 33 Ohio App. 2d 235, 239, 294 N.E.2d 918, 921 (8th Dist. 1973).

\(^{321}\) See, e.g., 11 West's Ohio Practice: Civil Procedure Forms § 10.11 (1973), which gives the following example of the hypothetical modes of pleading:

SECOND DEFENSE: If the defendant negligently injured the plaintiff, as alleged in the plaintiff's complaint, the plaintiff was guilty of contributory negligence in that he failed to heed the signals and warnings given by the defendant, and was, at the time of the accident, in the place where the accident occurred notwithstanding and in defiance of the signals and warnings; and this negligence on the part of the plaintiff contributed to the alleged injury of the plaintiff.

\(^{322}\) Under the provisions of Ohio R. Civ. P. 8(F), a general denial is permitted only when the
responsive pleading will contain a defense consisting of admissions and denials of the averments of the statement of claim. For convenience this defense may be called the "denial defense." If, in addition to the denial defense, the defender also has one or more affirmative defenses, his or her responsive pleading will consist of two or more defenses. This brings into play Rule 10(B) which stipulates that "each defense other than denials shall be stated in a separate . . . defense whenever a separation facilitates the clear presentation of the matters set forth." Although, by its express terms, the rule does not require a separation in every case it is best to treat it as if it were mandatory in every case. By doing so one fosters good pleading habits which may save him or her when "a clear presentation of the matters set forth" would require a separation. Likewise (although the civil rules do not expressly require it), each defense should be numbered. Thus, as a practical matter, it may be said that each defense in the responsive pleading should be separately stated and numbered. As a general rule this separation and numbering may be accomplished by subject headings which precede each statement of defense, e.g., "First Defense," "Second Defense," etc. 323

5. The Order of Presentation

The rules do not mandate an order in which the various defenses must be presented and it is safe to say that they may be presented in any order which "facilitates the clear presentation of the matters set forth" in the responsive pleading. Again, however, Form 15 in the Appendix of Forms provides an "approved" guide which may be followed. 324 Let us suppose that the defender has several affirmative defenses, a denial defense, a counterclaim and a cross-claim to present in the responsive pleading. The approved order of presentation would be as follows: (1) Rule 12(B) affirmative defenses; (2) the denial defense; (3) Rule 8(C) and the other affirmative defenses; (4) the counterclaim; (5) the cross-claim. This order is not mandatory. It is simply a rule-of-thumb guide to a well-organized responsive pleading.

B. Exceptions to the General Rule

1. The First Rule 12(B) Exception

The rules indicate several exceptions to the general rule that all affirmative defenses must be asserted in the responsive pleading. The first is presented in Ohio Civil Rule 12(B): "Every defense . . . shall be asserted in the responsive pleading . . . if one is required." 325 In general it may be said that defender intends to controvert all the averments of the statement of claim, including averments of the ground upon which the court’s jurisdiction depends. As the Ohio Rules Advisory Committee Staff Note to this rule states, a defender "is seldom in a position to deny in good faith all allegations in a plaintiff’s pleading."

323 See Form 15 in the Appendix of Forms attached to the Ohio Rules of Civil Procedure. As Ohio R. Civ. P. 84 notes: "The forms contained in the Appendix of Forms which the supreme court from time to time may approve are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which these rules contemplate." Thus, Form 15 should be a safe guide to follow in this respect.

For a more detailed analysis of the basic rules of form see Browne, Civil Rule 10(B) and the Three Basic Rules of Form Applicable to the Drafting of Documents Used in Civil Litigation, 8 CAP. U. L. REV. 199 (1978).

324 See note 323 supra.

325 (Emphasis added).
there are two situations in which affirmative defenses may be available to a pleader but cannot be asserted in a responsive pleading because no responsive pleading is required. The first situation involves affirmative defenses to a counterclaim that is improperly pleaded in the form of an affirmative defense, and the second involves the claimant’s affirmative defenses to the affirmative defenses asserted in the defender’s responsive pleading.

As noted earlier, a reply to a counterclaim is required only when the counterclaim is denominated as such. Therefore, if a defender improperly pleads a counterclaim in the form of an affirmative defense and labels it as such the claimant cannot, as a matter of course, serve a reply thereto. But if the claimant is convinced that the defender’s pleading is properly a counterclaim, and if the claimant has an affirmative defense to it, how will that affirmative defense be asserted?

To begin with, the claimant need not assert it at the pleading stage. In this situation the last sentence of Rule 8(D) is applicable. It provides: “Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.” Likewise, the following sentence from Rule 12(B) becomes applicable by analogy: “If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.” In this situation, therefore, the rules assume the existence of an affirmative defense to the defender’s averments and permit the claimant to introduce evidence in support of that affirmative defense at the trial; the claimant need do nothing at the pleading stage to preserve the right to prove the affirmative defense at the trial. Of course, in the unlikely event that the court on its own motion has exercised the authority granted it by the last sentence of Rule 8(C) and has journalized an order in which it indicates that the “affirmative defense” will be treated as the counterclaim it ought to be, then the situation is changed and the claimant should assert the affirmative defense in a reply to the counterclaim. Absent a journalized order to this effect the claimant may rely upon the rules and need not plead the affirmative defense.

If the claimant is uneasy about relying upon assumptions, presumptions and inferences drawn from the rules, he or she may do one of three things to rationalize the situation. As indicated earlier the claimant may challenge the

326 Ohio R. Civ. P. 7(A).

327 Id. In pertinent part, Ohio R. Civ. P. 7(A) states: “There shall be ... a reply to a counterclaim denominated as such. ... No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.”

328 (emphasis added). Before going further, we must say a word about the phrase “or permitted” as it appears in this rule. As indicated in note 327 supra, the court, by order, may permit a reply to an answer. Therefore, if such an order has been journalized, a reply to the answer is “permitted,” and Rule 8(D) would not be applicable. In such a case, the affirmative defense could be asserted in the reply to the answer. But if no such order has been journalized, a response to the improperly pleaded counterclaim is neither required nor permitted, and Rule 8(D) becomes fully applicable.

329 In pertinent part, that sentence reads: “When a party has mistakenly designated ... a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.”

330 See pages 366-371 supra for a discussion of the 12(F) objection.
validity of the "affirmative defense" by a motion to strike an insufficient
defense from the pleading. If the court grants this motion it should order an
amended pleading which properly pleads the "affirmative defense" as a
counterclaim. The claimant may then assert the affirmative defense to the
counterclaim by way of a reply. Alternatively, the claimant may move for an
order treating the "affirmative defense" as a counterclaim as provided in Rule
8(C). When such an order is journalized the claimant may serve and file a reply
to the counterclaim in which the affirmative defense thereto is asserted.\footnote{331}
Finally, the claimant could move for an order permitting him or her to serve
and file a reply to the answer. In this reply the affirmative defense to what is in
fact a counterclaim could be asserted. While this last method is a viable one it
leaves unresolved the question whether the defender's pleading is an
affirmative defense or a counterclaim, which tends to generate confusion in
the record. Accordingly, it is the least preferable of the three.

A somewhat similar situation arises when the claimant has an affirmative
defense to a properly pleaded affirmative defense in the defender's
responsive pleading.\footnote{332} Again, Rules 8(D) and 12(B) come into play. Since no
responsive pleading to the defender's responsive pleading is required or
permitted the claimant need not assert his or her affirmative defense to the
affirmative defense in a pleading; rather, the defender's affirmative defense is
deemed avoided and the claimant may introduce evidence of his or her
affirmative defense to the affirmative defense at the trial.

Once more, however, the claimant has an alternative to relying upon the
letter of the rules. He or she may move for an order permitting a reply to the
answer. If the court journals such an order the claimant may then assert the
affirmative defense to the defender's affirmative defense in the reply.

This alternative method has a virtue and vices from the the claimant's
point of view. The virtue is that all of the issues are raised by the pleadings and
are clearly indicated in the record and at-trial objections on the ground of
variety are thereby obviated. One vice is that the claimant loses the element
of surprise which the rules provide and the defender will be better prepared
to counter the claimant's evidence. Another vice is the care with which the
reply must be drafted. A reply is governed by all the rules applicable to an
answer. Accordingly, if the defender's affirmative defense contains untrue
allegations of fact the claimant's reply must deny those allegations or they will
be deemed admitted.\footnote{333} Such an implied admission may destroy the force of

\footnote{331} While a journalized order treating the "affirmative defense" as a counterclaim should be
sufficient to justify the service and filing of a reply to a counterclaim, there would be less confusion in
the record if the court would simply order the defender to amend the responsive pleading and
properly plead the "affirmative defense" as a counterclaim. See, e.g., Kindt v. Cleveland Trust
Co., 26 Ohio Misc. 1, 266 N.E.2d 84 (C.P. Cuyahoga County 1971).

\footnote{332} Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (9th Dist. 1927), is the classic example
of an affirmative defense (estoppel) to an affirmative defense (fraud). See, e.g., Driscoll v.
Austintown Assoc., 42 Ohio St. 2d 263, 328 N.E.2d 395 (1975); Gates Mills Inv. Co. v. Village of
(Oct. 9, 1978) (both involving the affirmative defense of onerous or vain act to the affirmative
defense of failure to exhaust administrative remedies); Allen v. Mitchell, 75 Ohio Op. 2d 255 (10th
Dist. Ct. App. 1975) (involving the affirmative defense of mutual mistake of fact to the affirmative
defense of release).

\footnote{333} O'Connor C. Civ. P. 8(D): "Averments in a pleading to which a responsive pleading is required,
other than those as to the amount of damage, are admitted when not denied in the responsive
pleading."
the claimant’s affirmative defense. Therefore, in drafting the reply, the claimant must be as cognizant of Rules 8(B) and 8(D) as he or she is of Rule 8(C). A reply which contains only the affirmative defense to the affirmative defense has the potential of turning into a disastrous judgment against the claimant on the pleadings should it appear from the face of the pleadings (and the absence of denials in the reply) that the claimant’s affirmative defense is not well taken.  

2. The Second Rule 12(B) Exception

The second exception is likewise found in Rule 12(B). In pertinent part, that rule states: “Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader by made by motion: . . . .” The excepted defenses are lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, failure to join a necessary party under Rules 19 or 19.1, and failure to join an indispensable party under Rule 19.

Rule 12 gives the defender the option of asserting these defenses in a motion made prior to the service of the responsive pleading or in the responsive pleading. Further, when Rule 12(B) is read in conjunction with Rule 12(H) it is clear that Rule 12 also gives the defender the option of asserting lack of jurisdiction over the subject matter, failure to state a claim upon which relief can be granted, and failure to join an indispensable party under Rule 19 by means of a motion made after the service of the responsive pleading but prior to the entry of final judgment in the action.

However, the previously discussed rules of waiver make the exercise of the first option something of a chancy proposition. If we divide these defenses into three classes, and if we assume that the defender has asserted at least one Rule 12 defense or objection by a motion made prior to the service of the responsive pleading, the principle rule of waiver may be summarized in the following table:

<table>
<thead>
<tr>
<th>CLASS</th>
<th>DEFENSES INCLUDED</th>
<th>APPLICABLE RULE OF WAIVER</th>
</tr>
</thead>
<tbody>
<tr>
<td>II.</td>
<td>a. Failure to state a claim upon which relief can be granted.</td>
<td>Waived if not asserted prior to the entry of final judgment in the action.</td>
</tr>
<tr>
<td></td>
<td>b. Failure to join an indispensable party under Ohio Civil Rule 19.</td>
<td></td>
</tr>
</tbody>
</table>

334 See Browne, Finality, supra note 119, at 117-19.

335 Of course, over-simplifications such as this tend to contain some minor, technical inaccuracies, and the reader should be aware that the summarization may not be completely reliable in every case. There is no substitute for a careful reading of the rules themselves.
III.  a. Lack of jurisdiction over the person.
    b. Improper venue.
    c. Insufficiency of process.
    d. Insufficiency of service of process.
    e. Failure to join a necessary party under Ohio Civil Rules 19 or 19.1.

Thus, with respect to those defenses in Class III, the exercise of the first option tends to be an either-or, all-or-nothing, proposition. If the defender asserts any Rule 12 objection, or any Class I, Class II or Class III defense by motion made prior to the service of the responsive pleading all Class III defenses then available must be included in that motion or the omitted Class III defenses will be waived.

No such disability attends the exercise of the second option vis-à-vis the defenses in Class I and Class II. The defender may, at his or her option, assert all of them in a motion made prior to the service of the responsive pleading, in the responsive pleading, or by motion made at the trial and prior to the entry of final judgment. Or some of them may be asserted in the motion made prior to the service of the responsive pleading, some of them in the responsive pleading, and some of them by motion made at the trial prior to the entry of final judgment. In other words, with respect to these defenses, the defender has something of a free choice as to when and how they may be asserted.

But Class II defenses are subject to a subsidiary rule of waiver which flows from the exercise of the first option. If the defender asserts any Rule 12 objection, or any Class I, II or III defense by motion made prior to the service of the responsive pleading, all Class II defenses then available must be included in that motion or the defender will waive the right to assert the omitted Class II defenses by a Rule 12(B)(6) or 12(B)(7) motion to dismiss made prior to the service of a responsive pleading.\(^{336}\)

Whether this subsidiary rule of waiver also precludes the assertion of the omitted Class II defense by a Rule 56(B) motion for summary judgment made prior to the service of the responsive pleading is an open question. The letter

\(^{336}\) See Ohio R. Civ. P. 12(G) and 12(H), which provide in pertinent part:

Rule 12(G): If a party makes a motion under [Rule 12] and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion . . . any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

Rule 12(H): A party waives all defenses and objections which he does not present . . . by motion as hereinafter provided . . . , except (1) the defense of failure to state a claim upon which relief can be granted, [and the defense of] failure to join an indispensable party . . . may be made by a later pleading, if one is permitted, by motion for judgment on the pleadings or at the trial on the merits. . . .

In this context, the term "later pleading" must be understood to mean the responsive pleading. Thus, if a defender omits a Class II defense from his or her Rule 12 motion made prior to the service of the responsive pleading, that defense may be asserted in the responsive pleading, by a motion for judgment on the pleadings, or by a motion made at the trial prior to the entry of final judgment, but it may not be asserted by a second Rule 12 motion made prior to the service of the responsive pleading.
of Rules 12(G) and 12(H) would seem to preclude the use of any second motion prior to the service of the responsive pleading but Rule 56(B) stipulates that the motion for summary judgment may be made "at any time." Thus there is an apparent conflict between the letter of the rules. If there is any answer to the question it must be found in what is written between the lines. On one hand it can be said that the internal evidence clearly indicates that the word "motion" as used in Rule 12 means a Rule 12 motion. Therefore, only a second Rule 12 motion is precluded by the subsidiary rule of waiver and a Rule 56(B) motion for summary judgment remains available to the defender. On the other hand it can be said that it is just as clear that Rule 12 contemplates a two-step procedure at best — one motion, followed by a responsive pleading if the motion is not successful. To permit the interposition of a Rule 56(B) motion for summary judgment between the Rule 12 motion and the responsive pleading would frustrate the intent of the rule. Therefore, the Rule 56(B) motion for summary judgment is not available to the defender.

Both of these arguments are credible and it is difficult to choose between them.

One might manipulate the "intent" of the rules in a number of other ways. For example, one might say that it is the intent of the rules to prohibit more than one dilatory motion prior to the service of the answer. Therefore, if the grant of the motion for summary judgment would result in an order granting leave to amend the statement of claim or an order requiring the joinder of the missing indispensable party the motion for summary judgment is prohibited; but if the grant of the motion for summary judgment would have the direct effect of terminating the litigation the motion for summary judgment is permissible. This requires a determination of the merits of the motion before one can determine whether the motion itself lies. Such a result is absurd on its face. It is also absurd to prohibit a purely dilatory second motion before pleading (whether it is a Rule 12 or Rule 56(B) motion) but to allow the same dilatory effect to flow from a motion for judgment on the pleadings made after the service of the responsive pleading. Yet it is clear from the language of Rules 12(G) and 12(H) that this latter motion can be used to assert a purely dilatory Class II defense omitted from the Rule 12 motion made prior to the service of the responsive pleading. Thus, no matter how one approaches the problem, one ends with an absurd result.

The author favors the thesis that Rule 56 is independent of Rule 12 and was never intended to mesh with it. Rule 56 is an alternative to Rule 12 and, as such, is subject to its own provisions and not those of Rule 12. Therefore, the "at any time" language of Rule 56(B) should be given effect and the omitted Class II defense may be asserted by a Rule 56(B) motion for summary judgment made prior to the service of a responsive pleading but after the service of the Rule 12 motion from which it was omitted.

3. The Mills Exception

The third exception might be called the Mills rule, after its origin in Mills v.
Whitehouse Trucking Co.\textsuperscript{339} The Mills rule states that when the bar of the statute of limitations is apparent from the face of the statement of claim the statute of limitations defense may be raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted.\textsuperscript{340}

This particular application of the rule can be criticized on both substantive and procedural grounds. Substantively, the running of the statute of limitations does not, of itself, prevent a court from granting relief on a time-barred claim. As the statute notes: "A civil action, . . . can be commenced only within the period prescribed in sections 2305.03 to 2305.22, inclusive, of the Revised Code. When interposed by proper plea by a party to an action mentioned in such sections, lapse of time shall be a bar thereto."\textsuperscript{341} Thus it is the interposition of the bar of the statute of limitations "by proper plea" that defeats the right to obtain relief upon a time-barred claim. Until that interposition occurs the claimant's pleading does state a claim upon which relief can be granted. If the bar of the statute is never interposed "by proper plea" it continues to state a claim upon which relief can be granted.\textsuperscript{342}

Indeed, the Mills court was well aware of the fact that the complaint before it, though time-barred on its face, stated a claim upon which relief could be granted, since it held the limitations defense could not be raised in the responsive pleading by language which made reference only to the failure of the complaint to state such a claim.\textsuperscript{343} Rather, what the Mills court was seeking was a procedural device which would permit the assertion of the limitations defense by a motion made prior to the service of the responsive pleading. As the court stated:

\textsuperscript{339} 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974); see also note 74 supra and accompanying text.

\textsuperscript{340} "Appellee is correct insofar as it maintains that a Civ. R. 12(B)(6) motion will lie to raise the bar of the statute of limitations when the complaint shows on its face the bar of the statute." Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 58, 320 N.E.2d 668, 671 (1974).

\textsuperscript{341} OHIO REV. CODE ANN. § 2305.03 (Page 1954).

\textsuperscript{342} See, e.g., H. E. Culbertson Co. v. Warden, 123 Ohio St. 297, 298-300, 175 N.E. 205, 205-06 (1931), where it is noted:
The contractor filed a general demurrer, alleging: "The petition does not state a cause of action against this defendant." The briefs of counsel for the contractor, which are not a part of the record, argued the two-year statute of limitations. The demurrer was overruled, and thereupon the contractor filed a separate answer in the nature of a general denial, which did not allege the defense of limitation. It follows that neither the railroad nor the contractor literally followed the procedure defined by Section 11309 and 11310, General Code.

The judgment being in favor of the plaintiff, the petition in error in the Court of Appeals alleged, among other assignments of error, "the petition shows on its face that the action therein attempted to be stated is barred by the statute of limitation." The judgment against the contractor, the H. E. Culbertson Company, was affirmed, on the ground that the statute of limitation had not been specially pleaded either by demurrer or answer.

Inasmuch as a majority of this court concur in the views of the Court of Appeals on the subject of the statute of limitations, the judgment will not be disturbed on that ground.

In other words, a statement of claim, time-barred on its face, states a claim upon which relief can be granted, and continues to state such a claim unless and until the bar of the statute of limitations is interposed by a proper plea.

\textsuperscript{343} Appellee's first defense, "the complaint fails to state a claim against the defendant, City of Hillsboro, upon which relief can be granted," clearly fails to allege affirmatively the bar of the statute of limitations to the present action nor does it formulate in a simple, concise, and direct manner the issue to be resolved by the trial court.

\textsuperscript{344} Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 58, 320 N.E.2d 668, 670 (1974).
The purpose behind the allowance of a Civ. R. 12(B) motion to dismiss based upon the statute of limitations is to avoid the unnecessary delay involved in raising the bar of the statute in a responsive pleading when it is clear on the face of a complaint that the cause of action is barred. The allowance of Civ. R. 12(B) motion serves merely as a method for expeditiously raising the statute of limitations defense.\(^{344}\)

Unfortunately, the court seized upon the wrong motion and this has caused a great deal of difficulty.\(^{345}\) To make matters worse the \textit{Mills} rule is a mere dictum because the case itself did not involve a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted.\(^{346}\) However, the dictum was carried over into the syllabus\(^{347}\) so it cannot be ignored.

The first difficulty is the extent to which the rule should be applied. Since \textit{Mills} dealt with the statute of limitations defense it seems fair to say that that affirmative defense may be raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. But is the rule limited to that defense, or does it also apply to other affirmative defenses?

\(^{344}\) Id. at 60, 320 N.E.2d at 671.

\(^{345}\) An \textit{Ohio} R. Civ. P. 56(B) motion for summary judgment should have been the obvious choice. As previously noted in this article at part III(B)(4), that motion can be made “at any time.” Perhaps the court was dissuaded from choosing the motion for summary judgment by the prevailing mythology in Ohio that the motion for summary judgment cannot be used unless it is supported by one or more of the types of documentary evidence in testimonial form prescribed by \textit{OHIO} R. Civ. P. 56(C). \textit{See, e.g.,} Pacific Fin. Loans v. Goodwin, 41 \textit{Ohio} App. 2d 141, 143, 324 N.E.2d 578, 580 (8th Dist. 1974), where the existence of the mythology is noted in the following terms: “Without accepting what may be an implicit premise of the first assignment of error — that summary judgment is never appropriate on the pleadings without supporting evidence or otherwise — we conclude that the court erred in granting summary judgment in this case.” In the \textit{Mills} case no supporting documentary evidence would be required since the bar of the statute of limitations appeared from the face of the pleadings. Thus, if the supreme court was under the impression that a motion for summary judgment had to be supported by such evidence, it might have concluded that the motion would not lie in \textit{Mills}.

A second obvious choice would have been the motion to strike the complaint from the files for failure of commencement. As we have seen from the language of \textit{OHIO REV. CODE ANN.} § 2305.03 (Page 1954), \textit{quoted in the text accompanying note 341 supra}, the limitations defense goes to the question of commencement. If the complaint is not filed within the statute of limitations, the action is not commenced. As Kossuth v. Bear, 161 \textit{Ohio} St. 378, 119 N.E.2d 285 (1954), demonstrated, the proper means of disposing of an action that has not been commenced is the motion to strike the complaint from the files.

\(^{346}\) \textit{See} the quotation in note 343 supra, which clearly indicates that the defense of failure to state a claim upon which relief can be granted was raised in the defender’s responsive pleading.

\(^{347}\) The syllabus reads:

\begin{quote}
Where the bar of the statute of limitations is not presented as a defense either by motion before pleading pursuant to Civ. R. 12(B), or affirmatively in a responsive pleading pursuant to Civ. R. 8(C), or by amendment made under Civ. R. 15, then the defense is waived under Civ. R. 12(H), and a motion raising the defense at trial is not timely made.\end{quote}


\(^{348}\) The Ohio Supreme Court has said that dicta in its syllabi do not have the force of law. \textit{State ex rel. Board of Educ. v. Morton}, 44 \textit{Ohio} St. 2d 151, 339 N.E.2d 663 (1975); \textit{DeLozier v. Sommer}, 38 \textit{Ohio} St. 2d 268, 313 N.E.2d 386 (1974); \textit{Williamson Heater Co. v. Radich}, 128 \textit{Ohio} St. 124, 190 N.E. 403 (1934). But if the supreme court did not recognize a statement as dictum when it drafted the syllabus, will a prudent attorney trust his or her own judgment in that respect? Rather, the rule of prudence is that every statement in a syllabus has the force of law until and unless the supreme court says that it does not because it is dictum.
Both of the cases upon which the Mills court relied dealt with the statute of limitations defense. Thus it could be argued that the Mills rule is limited to that defense. But both of those cases also noted that the limitations defense is one which could have been raised by special demurrer and, to a large extent, the decision turned upon that point. Accordingly, it might be said that the Mills rule should apply to any affirmative defense which could have been raised by special demurrer under the former code practice. If that be the case the affirmative defenses of lack of legal capacity to sue or be sued, the pendency of another action between the same parties for the same cause, and the nonjoinder of necessary or indispensable parties could also be raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted if these defenses appeared from the face of the statement of claim.

On the other hand, if the content of the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not limited by its title (that is, if the motion can be used as a vehicle for raising an affirmative defense that does not go directly to the manner in which the claim is stated), and if the purpose behind the use of the motion is to obtain an expeditious adjudication of a defense that is apparent from the face of the claimant’s pleading, then there is no reason in principle why the use of the motion should be restricted to either the statute of limitations defense or to the other defenses which could have been raised by the former special demurrer. Accordingly, the Mills rule carried to its logical conclusion would indicate that any affirmative defense that is both discernible and determinable from the face of the claimant’s pleading may be raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. There is some indication that the courts have taken the rule this far.

The second difficulty is the scope of the motion’s inquiry: may the motion be used only when the affirmative defense is discernible and determinable from the face of the claimant’s pleading or may it also be used when the affirmative defense is discernible and determinable from the face of the record as that record exists at the time the motion is made? Traditionally, the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted has been limited to the four corners of the claimant’s statement of claim; in Mills the bar of the statute of limitations appeared from the face of the plaintiffs’ amended complaint. The same conclusion might be inferred from Stephens v. Boothby, 40 Ohio App. 2d 197, 318 N.E.2d 535 (3d Dist. 1974).
the Mills court relied held that the scope of the inquiry extended to the record and was not limited to the face of the claimant’s pleading. Some of the post-rule decisions of the lower courts appear to follow this expanded view and do not limit the motion to dismiss to the face of the claimant’s pleading. But these cases are not so clear-cut that it can be said that it is a conscious departure from the traditional scope of the Rule 12(B)(6) motion to dismiss.

The third difficulty concerns the applicable rule of waiver. As we have previously noted, the defense of failure to state a claim upon which relief can be granted may be asserted in a Rule 12(B)(6) motion to dismiss made prior to the service of the responsive pleading, in the responsive pleading, in an amendment of the responsive pleading made as a matter of course, in a later pleading if one is permitted, in a motion for judgment on the pleadings, or by a motion made at the trial on the merits. In a nutshell, the defense of failure to state a claim upon which relief can be granted is waived only if it is not asserted by some means prior to the entry of final judgment in the action. But under the Mills rule the defense asserted by the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not the defense of failure to state a claim upon which relief can be granted; it is some other defense which cannot be asserted by a Rule 12 motion. Under the Mills rule this other defense — whatever it might be — may be called “a failure to state a claim upon which relief can be granted” for the purpose of asserting it by a Rule 12(B)(6) motion but it cannot be treated as a failure to state a claim upon which relief can be granted; rather, it must be treated as the defense that it is. If it is to be asserted in the responsive pleading it cannot be asserted in the language of Rule 12(B)(6) but must be asserted in the language of Rule 8(E)(1). It is subject to the rule of waiver applicable to affirmative defenses.

354 Thus, in Wentz v. Richardson, 165 Ohio St. 558, 560-61, 138 N.E.2d 675, 677 (1956), the supreme court said:

Treating the defendants’ motions to dismiss as special demurrers based on the statute of limitations, plaintiffs, as did the Court of Appeals, rely on Section 11309, General Code, Section 2309.08, Revised Code, which states, among other things, that the defendant may demur to a petition where it appears on its face that ‘the action was not brought within the time limited for the commencement of such actions,’ and on Section 11311, General Code, Section 2309.10, Revised Code, which provides that “when, on the face of a petition, no ground of demurrer appears, the objection may be taken by answer.”

We are of the opinion that these statutory provisions are not exclusive and are not dispositive of the problem presented in the cases before us. We are further of the opinion that, where a petition is challenged by a motion to dismiss on the ground that the cause of action stated therein is barred by the statute of limitations and the record then before the court clearly shows that the action is so barred, no good or sufficient reason arises to preclude the court from saying so then and there and dismissing the action.

We realize that ordinarily where the bar of the statute does not appear on the face of the petition an answer is required to raise the question, but we think an exception to that rule should be made where the record before the court demonstrates that no summons was served on the defendant until after the period of limitation had run, and that, therefore, the action brought against his is not maintainable.


356 See Ohio R. Civ. P. 12(G) and 12(H).

357 Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 58, 320 N.E.2d 668, 670 (1974): “Appellee’s first defense, ‘the complaint fails to state a claim against the defendant, City of
generally and not subject to the special rule of waiver applicable to the defense of failure to state a claim upon which relief can be granted. Therefore, under the Mills rule an affirmative defense other than a Rule 12(B) affirmative defense may be asserted by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, but it cannot be pleaded as the defense of failure to state a claim upon which relief can be granted. If it is so pleaded it is not properly before the court and is waived. The real tragedy of the Mills rule is neither the difficulties which flow from it, nor the destruction of that scheme of pleading which the Ohio Rules Advisory Committee had so carefully crafted with a view toward eliminating the "loose and irregular practice" which Mills has reintroduced. The tragedy is that the Mills rule is wholly unnecessary. When formulating its rule of expediency, the Mills court relied primarily on Wentz v. Richardson, and upon a paraphrase of the Wentz decision which appeared in the first paragraph of the syllabus of Aetna Casualty & Surety Co. v. Hensgen. But Wentz was decided at a time when the motion for summary judgment was unknown in Ohio practice. It is clear from what is said in Wentz that the motion to dismiss approved therein was an expedient made necessary by the absence of a summary judgment proceeding. Thus, the Mills expedient was premised on the Wentz expedient, which in turn was premised on the absence of a summary judgment proceeding. But a summary judgment proceeding is now available in Ohio Rule 56. Further, unlike its statutory predecessor, which was in effect when Hensgen impliedly approved the Wentz expedient, a Rule 56(B) motion for summary judgment may be made "at any time."

Hillsboro, upon which relief can be granted, clearly fails to allege affirmatively the bar of the statute of limitations to the present action nor does it formulate in a simple, concise, and direct manner the issue to be resolved by the trial court."
Therefore, there is no need now to corrupt the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted to obtain a vehicle for the expedient assertion of an affirmative defense that is discernible and determinable from the face of the claimant's pleading or from the face of the record. The Rule 56(B) motion for summary judgment is available for that purpose. Indeed, the Rule 56(B) motion can go further than the Mills motion to dismiss. Since the Rule 56(B) motion for summary judgment may be supported by documentary evidence in testimonial form, while the Mills motion to dismiss may not, the Rule 56(B) motion for summary judgment can go beyond the face of the pleadings or the face of the record and can assert a defense which is neither discernible nor determinable from the face of either.

4. The Rule 56 Exception

From what has just been said, it should be apparent that the Rule 56(B) motion for summary judgment is the fourth exception to the general rule that all affirmative defenses other than those listed in Rule 12(B) must be asserted in the responsive pleading.

The motion for summary judgment may be used to advantage when an affirmative defense is both discernible and determinable from the face of the claimant's pleading, but the unique advantage of the motion for summary judgment is its power to go beyond the face of the pleadings and sift the claimant's evidence so as to ascertain whether an actual need for a trial exists.\(^{365}\) Whenever the validity of an affirmative defense appears from the face of the pleadings or the record, or whenever the defender believes he can demonstrate the validity of an affirmative defense through the use of the documentary evidence listed in Rule 56(C), the motion for summary judgment may be used as an expeditious means of asserting the affirmative defense prior to the service of the responsive pleading.

When the motion for summary judgment is made prior to the service of the responsive pleading it plays a dual role; it not only serves as the vehicle for the initial assertion of the affirmative defense but it also serves as the vehicle by which the defender obtains an adjudication as to the validity of that defense. As a general rule, however, when the motion for summary judgment is made subsequent to the service of the responsive pleading it may only be used as the vehicle by which the defender obtains an adjudication of an affirmative defense previously asserted in the responsive pleading. In other words, as a general rule a post-responsive pleading motion for summary judgment cannot be used as the vehicle for the initial assertion of the affirmative defense.\(^ {366}\) The general rule of waiver compels this result; if the affirmative defense has not been asserted by motion made prior to the service of the responsive pleading, or in the responsive pleading itself, it is waived and cannot be asserted for the

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\(^{365}\) Harless v. Willis Day Warehousing Co., 54 Ohio St. 2d 64, 375 N.E.2d 46 (1978); Cunningham v. J. A. Myers Co., 176 Ohio St. 410, 200 N.E.2d 305 (1964).

first time by a motion made after the service of the responsive pleading. However, when the affirmative defense has been asserted in the responsive pleading the motion for summary judgment made subsequent to the service of that responsive pleading provides an expeditious means of obtaining a pre-trial adjudication of the validity of the defense.

The general rule of waiver and its consequent limitation on the use of the post-responsive pleading motion for summary judgment does not apply to the defenses of lack of jurisdiction over the subject matter of the action, failure to state a claim upon which relief can be granted and failure to join an indispensable party. As previously noted, the defense of lack of subject matter jurisdiction is never waived and the defenses of failure to state a claim and failure to join an indispensable party are waived only if they are not asserted at some time prior to the entry of the final judgment in the action. Therefore, any one or more of these three defenses may be both raised and determined by a motion for summary judgment made after the service of the responsive pleading.

5. **The Rule 12(C) Exception**

The fifth exception to the general rule is the motion for judgment on the pleadings. Since this motion cannot be made until after the pleadings are closed, the general rule of waiver applicable to affirmative defenses limits the use of the motion. As a general rule the motion for judgment on the pleadings may be used only to obtain the adjudication of an affirmative defense that has previously been asserted in the responsive pleading; an affirmative defense that has not been asserted in the responsive pleading will normally be waived by the time the pleadings are closed. It cannot, therefore, be raised for the first time by a motion for judgment on the pleadings.

Again, however, the defenses of lack of jurisdiction over the subject

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368 As it is said in Fleming v. American Capital Corp., 1 Ohio Op. 3d 265 (10th Dist. Ct. App. 1976): "Technically, the correct procedure to be utilized is to assert the affirmative defense of *res judicata* as required by Civ. R. 8(C), followed by a motion for summary judgment submitting by affidavit the record of the proceedings in the prior action between the parties." In Hamilton v. East Ohio Gas, 47 Ohio App. 2d 55, 58, 351 N.E.2d 775, 777 (9th Dist. 1973), the court stated: "If all or any one of those causes of actions [sic] are barred by R. C. 4123.74 or 4123.74.1, the defendants should properly plead their contention as a defense, and then it could be tested by a proper motion under Civil Rule 56, or otherwise."

369 Oho R. Civ. P. 12(H) does not mention the motion for summary judgment as being one of the vehicles for asserting these defenses. However, it must be remembered that Oho R. Civ. P. 56(B) is an alternative to Oho R. Civ. P. 12, and the former may generally be used in lieu of the latter at the option of the movant. In any event, there is authority for the proposition that these defenses may be asserted by a motion for summary judgment. See Tiefel v. Gilligan, 40 Ohio App. 2d 491, 321 N.E.2d 247 (10th Dist. 1974); Fleming v. American Capital Corp., 1 Ohio Op. 3d 265 (10th Dist. Ct. App. 1978).

370 Oho R. Civ. P. 12(C): "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

371 Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). Of course, as *Mills* indicates, an affirmative defense may also be raised by a motion made prior to the service of the responsive pleading. But if it is so raised, the motion raising it will also serve as the vehicle for obtaining its adjudication. Therefore, in such case, there would be no need for a subsequent motion for judgment on the pleadings. Accordingly, as far as the motion for judgment on the pleadings is concerned, the only relevant affirmative defenses are those asserted in the responsive pleading.
matter, failure to state a claim upon which relief can be granted, and failure to
join an indispensable party are exceptions to this general rule because they are
exceptions to the general rule of waiver. Any one or more of these three
defenses may be raised for the first time by a motion for judgment on the
pleadings. 372

Raising the affirmative defense by motion for judgment on the pleadings is
one thing, but obtaining an adjudication as to its validity by such a motion is
another. The motion for judgment on the pleadings is limited to the face of the
pleadings on file with the court. It cannot be supported by facts outside the
court. 373 Therefore, the motion for judgment on the pleadings cannot be used to obtain an adjudication of the validity of the
affirmative defense unless that validity can be determined solely from the
allegations in the pleadings. 374 This is true whether the affirmative defense is
one which has been raised in the responsive pleading or one of the three
exceptional defenses which may be raised for the first time by the motion for
judgment on the pleadings. Since the allegations of the responsive pleading
(including the allegations of the affirmative defense) are deemed to be denied
or avoided 375 the defender may obtain an adjudication of the validity of the
affirmative defense by motion for judgment on the pleadings only if that
validity is apparent from the face of the claimant’s pleadings. 376 As far as
affirmative defenses are concerned the motion for judgment on the pleadings
has very limited value.

Indeed, given the general availability of the Rule 56(B) motion for
summary judgment, and given its ability to carry along with it the evidence
needed to support it, there is very little point in using either the Mills motion to
dismiss for failure to state a claim upon which relief can be granted or the Rule
12(C) motion for judgment on the pleadings. Nevertheless, the availability of
these two motions presents some pleading problems for the claimant.
Suppose that the claimant cannot properly plead the claim without pleading
the time and place of the occurrence or transaction underlying the claim.
Suppose further that if time and place are alleged, it will appear from the face
of the claim that the action was not brought within the time limited by statute
for the commencement of the action. Finally, suppose that the claimant

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372 As Ohio R. Civ. P. 12(H)(1) expressly provides, “the defense of failure to state a claim upon
which relief can be granted, the defense of failure to join an indispensable party, [and] the
defense of lack of jurisdiction of the subject matter . . . may be made . . . by motion for
judgment on the pleadings. . . .”

373 As stated in Conant v. Johnson, 1 Ohio App. 2d 133, 135, 204 N.E.2d 100, 101 (4th Dist.
1964): “The law is well established that in passing on a motion for judgment on the pleadings, only
statements in the pleadings can be considered. Evidence in any form cannot be considered.” And
again, in Peterson v. Teodosio, 94 Ohio St. 2d 181, 297 N.E.2d 113, (1973) the court states: “Civ.R.
12(C) is a continuation of the former statutory practice and presents only questions of law, and
determination of the motion for judgment on the pleadings is restricted solely to the allegations in
the pleadings.” Id. at 166, 297 N.E.2d at 117 (citation omitted).

374 See, e.g., Peterson v. Teodosio, 94 Ohio St. 2d 181, 297 N.E.2d 113 (1973). In substance, it
appeared from the face of the complaint in that case that the action had not been commenced
within the statute of limitations. The defendant raised the bar of the statute of limitations as an
affirmative defense in the answer, and then moved for judgment on the pleadings with respect to
that defense. The Ohio Supreme Court held that in such circumstances, judgment on the
pleadings was properly entered for the defendant.

375 Ohio R. Civ. P. 8(D).

376 See Browne, Finality, supra note 119, at 116-20.
knows of facts (such as the defender’s periodic absence from the state) which will take the case out of the statute of limitations. Must the claimant plead these latter facts? If not, how is the claimant to present them if the defender challenges the statement of claim by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or a Rule 12(C) motion for judgment on the pleadings?

As to the first question, the Ohio Supreme Court seems to be divided. In one case it suggests that the claimant must plead these exculpatory facts. In another it suggests that pleading such facts would violate Rule 8(C). Until the question is settled the prudent attorney will plead the exculpatory facts. If pleading them is a violation of Rule 8 the worst that can be expected is a Rule 12(F) motion to strike immaterial matter from the statement of claim. Such a motion will be fatal only if the claimant’s attorney is completely incompetent.

As to the second question, it would seem that an amended statement of claim is the only means of putting these exculpatory facts before the court once the challenge has been made by either the Rule 12(B)(6) or Rule 12(C) motion. If leave of court is required for such an amendment it must ordinarily be granted.

Finally, it should be noted that if an affirmative defense is raised by a motion under one of these exceptions to the general rule, the basic standard of pleading to which the defender must adhere is that set out in Rule 7(B)(1): “A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.”

C. A SUMMARY OF PLEADING AFFIRMATIVE DEFENSES

In sum, the general rule is that all affirmative defenses save those listed in Rule 12(B) must be asserted in the responsive pleading. The defender has the option of asserting the Rule 12(B) defenses either in the responsive pleading,

377 In Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973), the court said: Prior to the adoption of the Civil Rules, this court held that where it appeared from a plaintiff’s petition, in an action for relief on the ground of fraud, that the cause of action accrued more than four years before the action was commenced, an averment that the fraud was not discovered until within four years of bringing the action was required to bring the pleading within the saving exception of the statute.

We can conceive of no reason why the rule should be different under the Civil Rules. The rules are structured to allow prompt and summary disposition of cases at early stages in cases where recovery could not under any circumstances be made. The Federal Rules of Civil Procedure have been interpreted to require, when a complaint on its face is barred by a statute of limitation, that it is the duty of the pleader to assert exceptions to the statute. *Kincheloe v. Farmer* (1954), 214 F.2d 604, *cert. denied*, 348 U.S. 920 (citations omitted).

*Id.* at 174, 297 N.E.2d at 121-22.

378 Thus, in Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 60, 320 N.E.2d 668, 672 (1974), the court stated: "To hold otherwise would effectively place the burden of affirmatively pleading compliance with the statute of limitations upon the plaintiff, contrary to the express mandate of Civ. R. 8(C), and contravene the intent of the Ohio Civil Rules to expedite the formulation of issues prior to trial."

379 Although the grant or denial of leave to amend a pleading is discretionary, where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion.

Peterson v. Teodosio, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 122 (1973).
or by an appropriate motion made prior to the service of the responsive pleading. This general rule applies only when a responsive pleading is required. If none is required the affirmative defense may be asserted at trial by the introduction of evidence in support thereof or by means of a court-ordered reply.

There is authority for the proposition that an affirmative defense other than one named in Rule 12(B) may be asserted by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted if the defense is both discernible and determinable from the face of the claimant’s pleading. There is also authority for the proposition that any affirmative defense may be raised by a Rule 56(B) motion for summary judgment. In general, however, this is true only if the motion for summary judgment is made prior to the service of the responsive pleading. If the motion for summary judgment is made subsequent to the service of the responsive pleading its office will generally be limited to obtaining an adjudication of an affirmative defense previously asserted in the responsive pleading.

Finally, if the affirmative defense is both discernible and determinable from the face of the pleadings, and if it has been asserted in the responsive pleading, either party may obtain a determination as to its validity by a Rule 12(C) motion for judgment on the pleadings; but if the party seeking such a determination by motion for judgment on the pleadings is the defender the affirmative defense must generally be both discernible and determinable from the face of the claimant’s pleadings alone.

IV. THE RULE OF WAIVER AND SOME WAYS OF AVOIDING IT

A. THE RULE OF WAIVER

The rule of waiver may be stated as follows:

1. The defense of lack of jurisdiction over the subject matter is never waived; it may be asserted at any time.

2. The defenses of failure to state a claim upon which relief can be granted and failure to join an indispensable party under Rule 19 are waived if they are not asserted by some appropriate pleading or motion prior to the entry of final judgment in the action.

3. All other affirmative defenses are waived if they are not presented by motion before service of the responsive pleading, or if they are not presented affirmatively in the responsive pleading.
4. In addition to being subject to the above rules of waiver, the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, and failure to join a necessary party under Rules 19 or 19.1 are waived if they are omitted from a Rule 12 motion which the defender has elected to make prior to the service of the responsive pleading. 383

Because the defenses listed in paragraphs 2 and 4 of the rule of waiver are basically dilatory in nature the rule is generally applied with stringency. The other defenses, however, are more substantive, and the rule of waiver summed up in paragraph 3 is applied with far less rigidity.

B. AVOIDANCE MECHANISMS

The following pages examine some of the ways in which the effect of waiving affirmative defenses may be avoided. In all cases, it is assumed that the affirmative defense has technically been waived because it has not been asserted by motion made prior to the service of the responsive pleading nor asserted in the responsive pleading. Also, assumed is a situation in which a responsive pleading is required or permitted by the Civil Rules.

1. Amendment as a Matter of Course

The first avoidance mechanism is found in Rule 12(H): "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A). . . ." 384

Rule 15(A) states:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. 385

The affirmative defense is technically waived if it is omitted from the responsive pleading and not raised by motion made prior to the service of that responsive pleading; but it can be saved if it is raised by an amendment of the responsive pleading made as a matter of course. 386


384 (Emphasis added).

385 Id.

An amendment that may be made as a matter of course is one that may be made as a matter of right; that is, the amender need not obtain leave of court or consent from any other party to the litigation. The amender may exercise the power of amendment simply by serving a copy of the amended pleading on the attorneys for all other parties to the action and by filing the original of the amended pleading, and a proof of its service, with the court not later than the third day after the service. However, the power to amend a pleading as a matter of course is a circumscribed power.

The first limitation is the number of times the power may be exercised. As noted in the rule, "a party may amend his pleading once as a matter of course." If a defender has previously amended his or her responsive pleading as a matter of course and failed to include the omitted affirmative defense in that amendment this exception to the rule of waiver will not be available as a vehicle for introducing the omitted affirmative defense.

The second limitation is temporal. The rule provides two distinct time limitations, and in determining which of the two applies, one must give careful attention to the phrase "to which no responsive pleading is permitted." Rule 7(A) specifies those pleadings which are permitted under the rules. The principal provision of that rule may be diagramed as follows:

<table>
<thead>
<tr>
<th>STATEMENT OF CLAIM:</th>
<th>REQUIRED RESPONSIVE PLEADING:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaint</td>
<td>Answer</td>
</tr>
<tr>
<td>Counterclaim denominated as such</td>
<td>Reply to a counterclaim</td>
</tr>
<tr>
<td>Cross-claim</td>
<td>Answer to a cross-claim</td>
</tr>
<tr>
<td>Third-party complaint</td>
<td>Third-party answer</td>
</tr>
</tbody>
</table>

After listing the above pleadings, the rule closes with the following sentence: "No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." The answer, the reply to a counterclaim, the answer to a cross-claim and the third-party answer are pleadings which the defender would be amending as a matter of course. But as Rule 7(A) indicates after they have been served "no other pleading shall be allowed." Therefore, in the normal situation, these are pleadings "to which no responsive pleading is permitted." But as the rule also indicates, "the court may order a reply to an answer or a third-party answer." If it does the reply is a "permitted" responsive pleading, and the answer or the third-party answer becomes a pleading to which a responsive pleading is permitted. Therefore,

388 Ohio R. Civ. P. 5(A) and 5(B). The rules with respect to service are somewhat more complex than the text would indicate, but what is said in the text is true in the vast majority of cases.
389 Ohio R. Civ. P. 5(D); see also Westmoreland v. Valley Homes Corp., 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975), for the general rules governing the service and filing of amended pleadings.
390 Jasterbowski v. Michos, 44 Ohio App. 2d 201, 205, 337 N.E.2d 627, 630 (8th Dist. 1975): "[Civil Rule 15 (A)] establishes a schedule with conditions governing when pleadings may be amended. . . ."
391 Jones & Laughlin Steel v. Board of Revision, 40 Ohio St. 2d 61, 320 N.E.2d 658 (1974).
392 Whether the word "answer" as used in this sentence includes an answer to a cross-claim remains uncertain. The internal evidence suggests that it does not, but as far as the reported Ohio decisions are concerned, the question appears to be open.
as far as the answer and third-party answer are concerned, the choice of time limitation will depend upon whether or not the court has ordered a reply by a journalized court order.

If such an order has been entered the first time limit applies and the defender may amend his or her pleading as a matter of course at any time before the reply is served. Note carefully that the rule speaks in terms of service rather than filing. This may present something of a problem because the defender may not discover the fact of service until after it has occurred. Service by mail, for example, is complete upon mailing. If the reply is served by mail the defender is not likely to learn of the service until the mail is received — some two or three days after that event has occurred. Once service has taken place — whether the defender is aware of it or not — the right to amend as a matter of course is terminated. Therefore, if the defender intends to exercise this power in the face of a court order permitting a reply, he or she must act with some diligence.

Suppose, however, that the defender's amended answer and the claimant's reply are both served on the same day. In all probability the first service in point of time controls. If the amended answer was served prior to the service of the reply it is good; but if the reply was served first the amended answer is irregular and subject to being stricken from the files on motion. Since one never knows when the precise moment of service may become material one should develop the habit of making a note of it to the extent possible. The postmarked envelope in which mail service is received should always be retained with the document served and all documents that are served personally should be immediately date-time stamped when they are received.

If an order permitting a reply has not been entered, or if no reply is permitted under the provisions of Rule 7(A), the second time limit applies. This time limit has a two-fold nature. Under this provision the defender may amend his or her pleading as a matter of course by serving the amended pleading (1) before the action has been placed upon the trial calendar but (2) within twenty-eight days after the service of the original pleading. Once the action has been placed on the trial calendar the right to amend as a matter of course is terminated. It will be a rare case that is ready for the trial calendar at this early stage of the proceedings, however. Therefore, this particular limitation is unlikely to prove a serious handicap. If the action is not "placed upon the trial calendar" by a properly entered court order or its equivalent the applicability of this first time limitation is subject to challenge.

As to the second limitation, one should again note that the key word is "service" and not "filing." The date of service on the proof of service accompanying the original pleading will control, and the twenty-eight-day period begins to run on the day following that date. Note, too, that the service of the amended pleading must occur within this twenty-eight-day period.

390 Ohio R. Civ. P. 5(B).
Should the twenty-eighth day expire without service having been made, the right to amend as a matter of course ceases to exist.

Finally, it should be noted that if a journalized court order permits a reply to an answer or third-party answer the claimant may include in that reply any affirmative defense he or she has to a defender's affirmative defense in the answer or third-party answer. It follows that if the claimant inadvertently omits an affirmative defense from the reply the omission may be supplied by an amendment of the reply made as a matter of course. Since the reply is a pleading to which no responsive pleading is permitted, the claimant's amendment as a matter of course will always be subject to the second temporal limitation discussed above.

2. Amendment by Leave of Court

In substance, Ohio Civil Rule 15(A) provides that if a party cannot amend his or her pleading as a matter of course, he or she may amend "only by leave of court or by written consent of the adverse party." If either of the two principal limitations on the right to amend as a matter of course prevents the exercise of that right, may the defender supply the omitted affirmative defense by means of an amendment made with leave of court? One would think not; one would assume that since Rule 12(H) limits the right of amendment to amendments made as a matter of course, an amendment made with leave of court would be precluded. But neither the courts nor the

[396] Thus, the old maxim expressio unius est exclusio alterius: the expression of one thing implies the exclusion of other things of the same class.

[397] In Lloyd v. William Fannin Bldrs., 40 Ohio App. 2d 507, 320 N.E. 2d 738 (10th Dist. 1973), the defender was given leave of court to supply an omitted statute of limitations defense by way of an amended answer some two years after the complaint was filed. DeChant v. Penn-Ohio Developers, No. 37745 (8th Dist. Ct. App. Oct. 26, 1978), as abstracted in 51 Ohio B. 1707 (Dec. 18, 1978), also permits the assertion of the statute of limitations defense by an amended answer served and filed with leave of court under Ohio Civil Rule 15(A), but the abstract does not indicate the time sequence. In Elliott v. Bronders Ford Sales, Inc., No. L-78-051 (6th Dist. Ct. App. Aug. 25, 1978), as abstracted in 51 Ohio B. 1293 (Oct. 9, 1978), the defender was given leave of court to plead contributory negligence by way of amendment on the day the trial began. But in Stratman v. Atkinson, 40 Ohio App. 2d 337, 319 N.E.2d 372 (1st Dist. 1974), the court held that it was not an abuse of discretion to deny leave to amend on the eve of trial some three years after the complaint had been filed.

See also Board of Comm'rs v. McQuary, 26 Ohio Misc. 239, 265 N.E.2d 812 (2nd Dist. Ct. App. 1971), which appears to be of the opinion that the "amendment as a matter of course" language in Rule 12(H) applies only to the affirmative defenses named in Rule 12(B). Those affirmative defenses may only be supplied by an amendment as a matter of course; all other affirmative defenses may be supplied by either type of amendment.

The Ohio Supreme Court has not dealt with the question directly, but its concurrence in the amendment with leave of court process may be inferred from what are admittedly equivocal remarks in Riley v. Cincinnati, 46 Ohio St. 2d 297, 348 N.E.2d 135 (1976); Layne v. Huffman, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975); Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 25, 320 N.E.2d 668 (1974). The Mills syllabus states:

Where the bar of the statute of limitations is not presented as a defense either by motion before pleading pursuant to Civ. R. 12(B), or affirmatively in a responsive pleading pursuant to Civ. R. 8(C), or by amendment made under Civ. R. 15, then the defense is waived under Civ. R. 12(H), and a motion raising the defense at trial is not timely made. Id. at 55, 320 N.E.2d at 669 (syllabus) (emphasis added). Rule 12(H) limits the right of amendments to amendments made as a matter of course under Rule 15(A). Rule 15(A), however, covers both amendments as a matter of course and amendments made with leave of court. When the Mills syllabus refers to Rule 15, does it mean (1) all of Rule 15; (2) all of Rule 15(A) (which would include both types of amendment); or (3) only that portion of Rule 15 to which Rule 12(H) makes reference, that is, only Rule 15(A) amendments made as a matter of course? An argument can be made for any one of those three propositions, but the correct answer is known only to the
commentators\textsuperscript{398} read that restriction into the rule. Both take the position that the courts may grant leave to supply an omitted affirmative defense by means of an amended pleading. Put another way, the second avoidance mechanism is an amendment made with leave of court; the omitted affirmative defense is saved if it is raised by an amendment of the responsive pleading made with the permission of the court.

Whether such leave should be granted is a matter which lies in the trial court's sound discretion. But it may generally be said that a denial of leave to file an amended responsive pleading is an abuse of discretion if (1) the defender can set forth a defense upon which relief can be denied, (2) the amended responsive pleading is tendered timely and in good faith, (3) the amendment would not cause undue delay or result in prejudice to adverse parties, and (4) no other reason is apparent or disclosed for denying leave.\textsuperscript{399}

3. Amendment with Adverse Party's Consent

If an amendment of the responsive pleading with leave of court is the second avoidance mechanism, its Rule 15(A) companion ought to be the third;

Supreme Court, and it has not yet told us!

\textit{Layne} is even more equivocal. It simply says: "It is clear that no motion, pleading or amendment was made by Mr. Huffman raising his Civ. R. 19.1(A) defense." Layne v. Huffman, 42 Ohio St. 2d at 289, 327 N.E.2d at 769. This broad reference to "amendment" could support any one of the three propositions stated above. But from the internal evidence it appears that the court is referring to an amendment with leave of court since only that amendment was possible under the factual circumstances of the case.

In \textit{Riley}, the court said:

Appellant maintains that the trial court erred in refusing to allow it to file an amended answer pursuant to Civ. R. 15(A) and (E), raising a new affirmative defense of accord and satisfaction which it says is the result of the aforesaid covenant. It is true that in construing the language contained in Federal Rule of Civ. Procedure 15(a), which is substantially identical to the Ohio rule, the Supreme Court of the United States, in \textit{Foman v. Davis} (1962), 371 U.S. 178, 182, stated:

"If the underlying facts or circumstances relied upon . . . may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Unfortunately this court long ago decided that the matter contained in the aforesaid covenant was not such as would constitute the affirmative defense of accord and satisfaction.

\textit{Riley v. City of Cincinnati}, 46 Ohio St. 2d at 295-96, 348 N.E.2d at 141. If the Ohio Supreme Court had a Rule 15(A) amendment with leave of court in mind, the quotation from the United States Supreme Court is pertinent (see Peterson v. Teodosio, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 122 (1973) ), but if it had a Rule 15(A) amendment as a matter of course in mind, the quotation makes no sense at all. The inference remains that the Ohio Supreme Court was thinking of an amendment made with leave of court, and from this it may be inferred that it would concur in such a procedure if the matter in question amounted to a proper affirmative defense.

See 4 \textit{Anderson's Ohio Civil Practice} § 153.09 (1975); 1 W. Knepper, \textit{Ohio Civil Practice With Forms} § 3.08(G) (rev. 1970); 3 W. Milligan, \textit{Ohio Forms of Pleading and Practice}, Foth 8:439, n.1 (1970); but see McCormac, supra note 35, § 7.36, in which Judge McCormac appears to take the position that Ohio Civil Rule 12(H) means what it says, and only amendments as a matter of course are permitted. But in a later supplement, he notes the ambiguous reference to "Civ. R. 15" in Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974), and equivocates a bit with a general reference to the liberal amendment provisions of Ohio Civil Rule 15. See J. McCormac, supra note 35, § 7.33 at 46.

that is, an omitted affirmative defense may be saved by means of an amendment made with the written consent of the adverse party. Indeed, there is far more justification for treating this amendment device as an avoidance mechanism than there is for the amendment with leave of court since the written consent of the adverse party must surely be viewed as a waiver of the waiver. By the same token, however, the device will seldom be available because the adverse party is not likely to waive the right to argue that the defender has waived the affirmative defense by omitting it from the original responsive pleading.

If an adverse party should give his or her written consent to an amendment supplying the omitted affirmative defense it should be noted that that written consent is all that is required; with it, the defender may exercise the power of amendment as a matter of right and the trial court cannot prevent the defender from doing so. Note carefully, however, that the consent must be in writing; the oral consent of the adverse party will not do. Since the rule requires a written consent one may infer that it is the intent of the rule that the consent be expressed in some sort of document. A document qualifies as a "paper," and such a document containing the written consent of the adverse party would qualify as a "paper provided for by these rules."

Under the provisions of Rule 7(B)(3), the document containing the written consent must be signed in accordance with Rule 11. The rule requirement that the consent be in writing implies an intent that the consent be made a matter of record. Accordingly, the signed document containing the consent should be filed with the court before the defender attempts to exercise the power of amendment. Whether a copy of the document must be served on the attorneys for the other parties in the action is unclear. No formal service on the "adverse party" should be required, since it is assumed that the party's attorney will retain a copy of the document after signing it. Formal service on the attorneys for other parties will be required if the document is deemed to be a paper "similar" to a "written notice [or] appearance." Since that question does not yet have an authoritative answer the prudent defender will make service under the provisions of Rule 5.

4. Motion for Summary Judgment

In some cases, the fourth avoidance mechanism may be a motion for summary judgment made subsequent to the service of the responsive pleading. Earlier in this article it was noted that as a general rule the post-responsive pleading motion for summary judgment could not be used to raise affirmative defenses for the first time because those affirmative defenses were waived by being omitted from the responsive pleading. In most cases that

400 Ohio R. Civ. P. 7(B)(3) provides: "The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules."

401 Ohio R. Civ. P. 11 provides in material part: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address."

402 See pages 432-33 supra for a discussion of this issue. We also noted that the defenses of lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted,
general rule is sound and the motion for summary judgment will not lie. But if a summary judgment motion raising an omitted affirmative defense is made within twenty-eight days after the service of the original responsive pleading, and if there has been no previous amendment of the responsive pleading as a matter of course, it can be argued that the motion for summary judgment is the equivalent of an amendment made as a matter of course and, if otherwise proper, should be entertained. Further, if the motion is made after the time for amending as a matter of course has expired, or when an amendment as a matter of course is otherwise prohibited, there is authority for the proposition that the motion should be entertained if it raises a defense which the court would permit the defendant to assert by way of an amendment made with leave of court.

Under this view, the motion for summary judgment is seen as the expeditious equivalent of a motion for leave to amend, the consequent amendment, and the application for an adjudication of the affirmative defense raised by the amendment. Thus, the single motion for summary judgment does the job of three separate documents and should be entertained whenever the court, in the exercise of its sound discretion, would permit the three separate documents.

What has been said in the previous paragraph assumes a protest by the claimant on the ground that the omitted affirmative defense has been waived and the rejection of that protest by the court on Rule 15(A) grounds, which the court applies by analogy to the motion for summary judgment. It goes without saying, however, that if the claimant fails to challenge the motion on the ground of waiver, the affirmative defense is "tried" with the implied consent of the parties.

5. The Chutzpah Gambit

Raising a waived affirmative defense by a motion for summary judgment is simply a variant of what might be termed the "chutzpah gambit." In its essence, the chutzpah gambit is the late assertion of an affirmative defense by one means or another, with the hope that neither the court nor the adverse
party will raise the question of waiver. The fifth avoidance mechanism is another variant of this gambit. It is exercised by the introduction of evidence in support of the affirmative defense at the trial of the action.

This use of the gambit is premised on the principle that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."\(^{406}\) If the evidence in support of the waived affirmative defense is received without the claimant objecting thereto\(^{407}\) on the ground of variance from the pleadings\(^{408}\) the issue raised by such evidence will be tried with the implied consent of the parties and the affirmative defense established by such evidence must be treated in all respects as if it had been timely raised in the responsive pleading.\(^{409}\) In such case it is preferable that the pleadings be amended to conform to the evidence but it is not essential that the defender do so.\(^{410}\)

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\(^{408}\) Variance is the only authorized ground for objection. Thus: "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, . . . ." Ohio R. Civ. P. 15(B); see also Jones & Laughlin Steel Corp. v. Board of Revision, 40 Ohio St. 2d 61, 64, 320 N.E.2d 658, 660 (1974), where it is said: "No objection was made that such evidence was not in conformity with the pleadings, . . . ."; and Judge Whiteside's concurring opinion in Perry v. Bronn, 75 Ohio Op. 2d 212, 221-22 (10th Dist. Ct. App. 1975) (Whiteside, J., concurring), where he notes:

As to the second assignment of error, defendant Bronn did not object to the evidence of custom and usage at trial upon the basis that it was not pleaded. Rather, the objection was upon the grounds of relevancy. . . . Bronn did not, at trial, raise the issue of surprise or failure to plead. See Civ. R. 15(B).

\(^{409}\) See the authorities cited in note 406 supra. Although dealing with a claim rather than an affirmative defense, Murray v. Marbro Builders, Inc., 53 Ohio App. 2d 1, 7, 371 N.E.2d 218, 222 (1st Dist. 1977), puts the rule in a nutshell:

Marbro, in its third assignment [of error], asserts that the trial court erred in failing to make any disposition of a claim which, although not raised by the pleadings, was nevertheless tried by the implied consent of the parties pursuant to Civ. R. 15(B), viz., the right to payment for or possession of an air hammer sold to Murray by Marbro. . . . No objection was made to the introduction of this testimony, and, therefore, the claim which it presents must be treated in all respects as if it had been raised in the pleadings. Civ. R. 15(B).

\(^{410}\) As stated in Allen v. Mitchell, 75 Ohio Op. 2d 255, 262 (10th Dist. Ct. App. 1975): "Although the pleadings should be amended to conform to such evidence and to raise such issues, failure to amend does not affect the result of the trial." See also Steinbeck v. Philip Stenger Sons, 46 Ohio

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Although the civil rules enjoin the court to be liberal in receiving evidence in support of issues not raised by the pleadings and in permitting the correlative amendment of the pleadings to conform to such evidence, the court does have the discretionary power to refuse such evidence if the claimant objects thereto. The objection must be based on a theory of variance from the issues raised by the pleadings, but a mere variance alone

Ohio R. Civ. P. 15(B) provides for the amendment of the pleadings in the following terms: Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues.

Although the language of the rule suggests that amendments to conform to the evidence must await the motion of a party for leave to amend, there is some slight and ambiguous authority for the proposition that the court may order the amendment on its own motion. See Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972).

Ohio R. Civ. P. 15(B): "[T]he court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby. . . ." Jones & Laughlin Steel Corp. v. Board of Revision, 40 Ohio St. 2d 61-64, 320 N.E.2d 658, 660 (1974), epitomizes the equally liberal attitude of the Ohio Supreme Court toward the reception of such evidence and the amendment of the pleadings to conform thereto: "No objection was made that such evidence was not in conformity with the pleadings, and, had an objection been entered, Civ. R. 15(B) provides for amendment at that time." In other words, amendment is practically a right even in the face of an objection to the variance.


Although the scanty abstracts do not make it clear, a timely and cogent objection to a variance may have been the reason the defender was unable to avoid the rule of waiver in Daniels v. Bowers, No. 11-78-2 (3rd Dist. Ct. App. Oct. 31, 1978), as abstracted in 51 Ohio B. 1621 (Dec. 4, 1978), and Somerville v. J.C. Penney Co., Inc., No. E-77-45 (6th Dist. Ct. App. May 19, 1978), as abstracted in 51 Ohio B. 884 (July 17, 1978). As Somerville simply states: "No error was committed by the trial court in not charging the jury on contributory negligence. Defendant failed to affirmatively plead contributory negligence as required by Civ. R. 8(C) and the issue was not tried by expressed or implied consent. Civ. R. 15(B)." Daniels is equally uninformative as to why this variant of the chutzpah gambit failed. It states:

Civ. R. 8(C) requires that a party shall set forth in his pleading affirmative defenses, and Civ. R. 12(H) states that a party waives all defenses not presented in the responsive pleadings or amendments thereof. In waiving the defense, defendant is not entitled to a jury charge on the issue. The court noted that Civ. R. 15(B) allows issues not raised by the pleadings to be tried by express or implied consent of the parties and tested as if raised in the pleadings, but that no such consent was present here.

See the authorities cited in note 408 supra. As these authorities indicate, the objection to the variance is customarily made at the trial when the defender attempts to introduce evidence in support of the waived affirmative defense. In George Whalley Co. v. National City Bank, 55 Ohio App. 2d 205, 380 N.E.2d 742 (8th Dist. 1977), however, the claimant took a novel approach. Anticipating that the defender would introduce evidence with respect to a defense which the claimant deemed waived, the claimant "sought by motion in limine to prevent the trial of these issues. In waiving the defense, defendant is not entitled to a jury charge on the issue. The court noted that Civ. R. 15(B) allows issues not raised by the pleadings to be tried by express or implied consent of the parties and tested as if raised in the pleadings, but that no such consent was present here.

The precise limits of the motion in limine have never been charted with absolute accuracy. See Davis, Motions in Limine, 15 CLEV.-MAR. L. REV. 255 (1966); Rothblatt & Leroy, Motion in Limine Practice, 20 AM. JUR. TRIALS 441 (1973); and Annot, 63 A.L.R. 3d 311 (1975). In general, it has been used to obtain a pretrial prohibition on the introduction of admissible testimony in those instances when the prejudicial nature of such testimony outweighs its probative value. State v. Spahr, 47 Ohio App. 2d 221, 353 N.E.2d 624 (2d Dist. 1976).

The use of the motion to bar evidence in support of a waived affirmative defense would not be within this traditional use. But since the motion is a flexible instrument directed to the trial
will not bar the evidence of the affirmative defense. The claimant must also demonstrate to the court that he or she will be so prejudiced in the maintenance of the action on the merits that a continuance to meet the new evidence will not be sufficient to overcome the prejudice.\textsuperscript{414}

If the affirmative defense is well-taken it will either avoid the claim or abate the action and the claimant will be greatly prejudiced thereby "in maintaining his action . . . upon the merits."\textsuperscript{415} This is not the type of prejudice which the rule contemplates, however. The rule has no objection in principle to the claimant losing because the court permits the late assertion of an affirmative defense over the claimant's objection;\textsuperscript{416} rather, "prejudice," as used in the rule, means undue difficulty in gathering rebuttal evidence because of the passage of time, the death of witnesses, the faltering of memory, etc. In other words, to avoid the introduction of evidence in support of the waived affirmative defense the claimant must practically make out a case of laches or estoppel as part of his or her objection; nothing less than that will do.\textsuperscript{417} Since the claimant will seldom be in a position to satisfy that standard of "prejudice" this variant of the \textit{chutzpah} gambit should be successful whenever the defender can satisfy the court that "the presentation of the merits of the action will be subserved"\textsuperscript{418} by the court's consideration of the waived affirmative defense.

6. \textit{Pretrial Order}

Rule 16 may provide the basis for the sixth avoidance mechanism. That rule notes, \textit{inter alia}:

> The court may, and on the request of either party shall, make a written order which recites the action taken at the [pretrial] court's discretion, and since its use frequently speeds the progress of the trial by eliminating in-trial controversies over the admissibility of testimony, there is no reason in principle why it cannot be used to obtain a pretrial ruling on the admissibility of evidence related to a waived affirmative defense. Indeed, such a use would seem to be well within the mandate of Rule 1(B), which enjoins the elimination of delay, unnecessary expense and all other impediments to the expeditious administration of justice.

\textsuperscript{414} \textit{Ohio R. Civ. P. 15(B)}:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

\textsuperscript{415} See \textit{Ohio R. Civ. P. 15(B)}, as quoted in note 414 supra.


\textsuperscript{417} Of course, as Judge Whiteside's concurring opinion in \textit{Perry} indicates, the claimant may always add a claim of surprise to buttress the objection on the ground of variance. Perry v. Bronn, 75 Ohio Op. 2d 212, 222 (10th Dist. Ct. App. 1975) (Whiteside, J., concurring), as \textit{quoted} in note 408 supra. But mere surprise can generally be neutralized by a continuance, and Rule 15(B) specifies that "[t]he court may grant a continuance to enable the objecting party to meet such evidence." Thus, in any case in which a continuance will eliminate the effect of surprise, the surprise will not be sufficient to bar the admission of evidence with respect to the waived affirmative defense.

\textsuperscript{418} \textit{Ohio R. Civ. P. 15(B)}, as quoted in note 414, supra.
conference. The court shall enter the order and submit copies to the parties. The order, subject to Rule 60(A), shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Further, subsections (2) and (4) of Rule 16 note that the court may use a pretrial conference to simplify the issues and amend the pleadings. If the court schedules a pretrial conference the defender may be able to convince the court that one of the issues to be covered at the trial is the issue raised by the waived affirmative defense. If the defender is successful, and the affirmative defense is included in the written pretrial order as an issue to be decided at trial, the waiver is overcome by that provision of Rule 16 which stipulates that the pretrial order "shall control the subsequent course of the action." Conversely, if a properly pleaded affirmative defense is not included in the pretrial order, and if the pretrial order is not modified at the trial to include such defense, the issues raised by that defense cannot be tested at the trial, and the defense will be lost. Thus, the pretrial order is something of a two-edged sword.

7. Evidence Supporting Other Claims or Defenses

The seventh avoidance mechanism is the astute use of evidence introduced in support of other claims or defenses. Suppose, for example, that claimant sues defender for injuries to claimant arising out of the negligent operation of defender's automobile. Defender's answer denies negligence and defender's counterclaim sues claimant for injuries to defender arising out of the negligent operation of claimant's automobile. Claimant's reply denies negligence. In theory, both parties have waived the affirmative defense of contributory negligence since neither has pleaded it. But suppose that at the trial, both introduce evidence of the other's negligent operation of the respective vehicles and that reasonable minds could draw different conclusions from that evidence. In such case, the defense of contributory negligence appears from the evidence of record and either party would be entitled to have a jury charge on that issue. Likewise, the existence of an unpleaded affirmative defense may appear from the claimant's evidence or from the evidence which the defender has introduced in support of other properly pleaded defenses. In either case the defender is entitled to an instruction on the unpleaded affirmative defense.

419 See, e.g., Shapiro v. Kilgore Cleaning & Storage Co., 108 Ohio App. 402, 411, 156 N.E.2d 866, 871-72 (8th Dist. 1959), where it is said:

When this trial commenced, the presumption of law was that neither of the litigants were negligent, and whether one or the other, or both, were negligent was a question of proof. The proof offered was the testimony of the two contradictory eye witnesses, coupled with physical facts shown to exist after the collision. The jury, in consideration of the evidence, could have found that the negligence of the plaintiff, the negligence of the defendant, or the negligence of both, proximately caused the collision.

It is well settled in this state that contributory negligence is an affirmative defense which may arise through either the pleadings, the evidence, or both. . . .


421 See, e.g., George Whalley Co. v. National City Bank, 55 Ohio App. 2d 205, 214-15, 380 N.E.2d 742, 548-49 (8th Dist. 1977), where the court stated:
8. The Coattail Coupler

An eighth avoidance mechanism may be described as the "coattail coupler." Basically, it consists of the sheer good luck of having an inattentive claimant and an active codefendant. For example, in Rudnay v. Corbett,\textsuperscript{423} Rudnay brought suit against Holt and Corbett, each of whom answered separately. Holt's answer raised the affirmative defense of the statute of limitations; Corbett's answer did not raise any affirmative defenses. Thereafter, both defenders moved for summary judgment on the grounds that the court did not have subject matter jurisdiction and that the action had not been commenced within the statutory period of limitations. This motion was overruled. Immediately prior to trial, Holt made an oral motion to dismiss the action on the ground that it was barred by the running of the statute of limitations. Corbett did not join in this motion nor did she make any motion of her own. In time the trial court granted this motion and dismissed the action as to both defenders. Rudnay appealed, but only on the ground that the trial court had applied the wrong statute of limitations. With respect to Corbett the appellate court said, "[s]ince appellant did not assign as error the dismissal of the complaint as to appellee Corbett for the reason such party failed to set forth affirmatively the defense of the statute of limitations, pursuant to Civ. R. 8(C), we do not consider this question."\textsuperscript{424} Thus, through the inattentiveness of the claimant, Corbett was able to couple on to the coattails of her codefender and make use of an affirmative defense which she had waived.\textsuperscript{425}

[Plaintiff] now complains that the trial court erred in not ruling on the motion. Giving the most favorable consideration to plaintiff's contention and assuming such judicial omission to be error, the error is harmless. For it is apparent that either defendant's Second Defense to Counts One and Two or its Second Defense to Count Three, both alleged in its answer, is sufficient to legitimize evidence supporting defenses under R.C. 1303.42.\textsuperscript{422}

As to the argument that the issue should not have been given to the jury because it was not pleaded, we note that Civil Rule 15(B), which allows the amendment of pleadings to conform to the evidence, expressly recites that '[f]ailure to amend as provided herein does not affect the result of the trial of these issues.' A corollary of the rule that it is error for a judge to submit to a jury a question of fact that does not arise from the evidence (Cincinnati Traction Co. v. Forrest (1905), 73 Ohio St. 1) is the absence of error where a charge is predicated upon facts in evidence. Where such facts support an issue not pleaded but contemplated by and amenable to the provisions of Rule 15(B), it is not error for the court to charge accordingly.\textsuperscript{423} Steinbeck v. Philip Stenger Sons, 46 Ohio App. 2d 22, 31-32, 345 N.E.2d 633, 639 (1st Dist. 1975). For the converse of this rule, see Daniels v. Bowers, No. 11-78-2 (3d Dist. Ct. App. Oct. 31, 1978), as abstracted in 51 Ohio B. 1626 (Dec. 4, 1978); Somerville v. J.C. Penney Co., Inc., No. E-77-45 (6th Dist. Ct. App. May 19, 1978), as abstracted in 51 Ohio B. 884 (July 17, 1978).

As we have seen above, an unpleaded affirmative defense will normally be "amenable to the provisions of Rule 15(B)" even in the face of an objection to receipt of the evidence in support of that defense. How much more so will that be the case here when the evidence necessary to support the defense is properly received under the aegis of some other properly pleaded defense.\textsuperscript{423} 53 Ohio App. 2d 311, 374 N.E.2d 171 (8th Dist. 1977).\textsuperscript{424} Rudnay v. Corbett, 53 Ohio App. 2d 311, 312-13, 374 N.E.2d 171, 173 (8th Dist. 1977).\textsuperscript{425} As it turned out, her victory was a Pyrrhic one; the appellate court agreed with Rudnay, and reversed on the ground that the trial court had applied the wrong statute of limitations. Id. at 318, 374 N.E.2d at 175-76.

A more successful application of the coattail coupler is suggested by Woodgeard v. Miami Valley Hosp. Soc'y, 47 Ohio Misc. 43, 354 N.E.2d 720 (C.P. Montgomery County 1975). Woodgeard sued the hospital and a Dr. Laughlin for medical malpractice. Since it appeared from the face of the complaint that the action had not been commenced within the one-year statute of limitations, the hospital moved and filed a Rule 12(B)(6) motion to dismiss for failure to state a
As an avoidance mechanism, the coattail coupler exhibits the following characteristics: (1) the waiver of an affirmative defense by one defender, (2) the proper assertion of that same affirmative defense by a codefender, (3) an adjudication of the validity of that affirmative defense which results in the avoidance of the claim or the abatement of the action as to both defenders, (4) the claimant’s failure to protest that adjudication with respect to the defender who waived the defense and did not join in its later assertion.

9. The Maladroit Maneuver

The final avoidance mechanism bears some resemblance to both the chutzpah gambit and the coattail coupler. Like the former, it requires only one defender; like the latter, it relies upon judicial error in adjudicating the validity of the affirmative defense; and like both, it relies upon the inattentiveness of the claimant. For want of a better name it might be called the “maladroit maneuver” since its success depends upon the misapplication of the Rules of Civil Procedure by all parties to the transaction — the defender, the claimant and the judge. It may be identified by the following signs: (1) the defender waives an affirmative defense by failing to plead it in the responsive pleading or in a motion served prior to the service of the responsive pleading; (2) the defender thereafter asserts the affirmative defense by means of an improper or unauthorized vehicle; 426 (3) the claimant does not challenge the affirmative defense on the ground of waiver nor does he or she challenge the vehicle by which the affirmative defense is first asserted; 427 (4) the court passes on the defense and avoids the claim or abates

claim upon which relief can be granted. Dr. Laughlin did not join in this motion, and as far as can be determined from the report, he had done nothing in the case at the time the hospital’s motion was served. In granting the motion to dismiss, the court noted:

Wherefore, for the reasons as aforesaid, this court sustains the motion of the defendant seeking an order of the court dismissing the captioned complaint for failure to state a claim upon which relief can be granted. The motion under discussion in the captioned cause was filed by only the defendant hospital. However, the court’s decision as it applies to the defendant hospital would, of necessity, operate to dismiss the captioned complaint against the remaining defendant, Doctor Laughlin. Therefore, the captioned cause is dismissed, with prejudice, with costs to be paid by the plaintiff. Case dismissed.

Id. at 46, 354 N.E.2d at 722 (emphasis in the original). Although this is a clear example of the coattail coupler in action, it does not necessarily illustrate its use as a waiver avoidance mechanism since it is not clear from the report whether Dr. Laughlin had waived the limitations defense or not.

426 See, e.g., Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 351 N.E.2d 775 (9th Dist. 1973), in which the defender attempted to assert the affirmative defense of immunity from suit under the Workers’ Compensation Act, OHIO REV. CODE ANN. Chapter 4123 (Page 1954), by means of an oral Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief could be granted. Not only did the validity of this defense not appear from the face of the claimant’s statement of claim, but also the motion was not made until after the service of the responsive pleading. Although the appellate court reversed the grant of the motion on the ground that the validity of the defense did not appear from the face of the statement of claim, it intimated that the defense itself would remain available to the defendant and its validity could be determined at a trial on the merits.

427 In Fleming v. American Capital Corp., 1 Ohio Op. 3d 265 (10th Dist. Ct. App. 1976), the defender attempted to raise the affirmative defense of res judicata by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted when the applicability of that defense did not appear from the face of the statement of claim. The trial court erroneously granted the motion and the claimant appealed. In affirming the trial court, the court of appeals noted:

No assignment of error has been raised concerning the procedure utilized by the trial court in rendering judgment for appellees. Technically, the correct procedure to be...
the action without noting that the defense has been waived or that the method of its presentation is wholly improper under the rules.

In sum, an affirmative defense is waived if it is not asserted in the responsive pleading or by a motion made prior to the service of the responsive pleading. But this general rule of waiver can frequently be avoided by an amended responsive pleading served as a matter of course, with leave of court, with the written consent of the adverse party, or by one of the other avoidance mechanisms such as the written pretrial order, the coattail coupler, the maladroit maneuver, the various variants of the *chutzpah* gambit, or the astute employment of evidence introduced in support of the claim or other defenses.

### C. Supplemental Pleadings

But it will not do to leave this matter of waiver without noting that the general rule applies only to affirmative defenses that are available to the defender at the time he or she must serve the responsive pleading. If the affirmative defense matures or comes into existence after that time it is an after-acquired affirmative defense. As such, it may be asserted by means of a supplemental responsive pleading under the provisions of Rule 15(E).428

The availability of the supplemental pleading, however, raises an

utilized is to assert the affirmative defense of *res judicata* as required by Civ. R. 8(C), followed by a motion for summary judgment submitting by affidavit the record of the proceedings in the prior action between the parties. However, there is no prejudice in the procedure utilized by the trial court which was, as a practical matter, more expedient as it is clear that the sole issue, determinative of whether *res judicata* applies to defeat the present case, was what transpired in the previous action between the parties.

*Id.* Although this case is not technically within the maladroit maneuver category because the affirmative defense had not been waived at the time it was improperly asserted by the Rule 12(B)(6) motion, it aptly illustrates the effect of the claimant's failure to lodge the appropriate challenges.

Likewise, in Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 351 N.E.2d 775 (9th Dist. 1973), there was no challenge to the affirmative defense on the ground of waiver, nor to the vehicle by which that defense was presented; rather, the only challenge appears to have been to the substantive applicability of the defense:

The appellants' brief does not specify any assignments of error, but it does indicate certain questions which they believe to be raised, and it sets forth their belief that the trial court erred in granting defendants' motion to dismiss.

We have considered all of the record submitted to us, and we have determined that the findings of fact and conclusions of law made by the trial court, in sustaining defendant's motion to dismiss, are not supported by the record.

*Id.* at 57, 351 N.E.2d at 776-77. Either the court failed to note that the affirmative defense upon which the trial court's decision turned had been waived under the general rule of waiver or it determined that the claimant had waived that waiver by failing to challenge on that ground. In any event, it strongly intimated that the defense remained viable and could be tested on remand:

We are not hereby deciding, in this appeal, the question of the applicability of R.C. 4123.74 and 4123.74.1 to intentional torts. We reserve those issues until they are properly [sic] presented for our review

If all or any one of those causes of actions [sic] are barred by R.C. 4123.74 or 4123.74.1, the defendants should properly plead their contentions as a defense, and then it could be tested by a proper motion under Civil Rule 56, or otherwise.

*Id.* at 57-58, 351 N.E.2d at 777.

interesting question with respect to the rule of waiver — if the defender does not move for leave to assert the after-acquired affirmative defense by way of a supplemental responsive pleading has the defender waived that defense? Since there is no reported Ohio decision on point the answer is far from clear. However, if one keeps in mind the purpose behind the requirement that affirmative defenses be pleaded specially — the avoidance of surprise at the time of trial — one is inclined to favor a theory of waiver. On the other hand, since the service of a supplemental responsive pleading is a matter within the court's discretion and not the defender's right one can argue that the supplemental pleading is optional with the defender; if the defender does not choose to exercise that option the affirmative defense may be asserted for the first time at the trial on the merits. It is in this limbo that we must leave the question for want of an authoritative decision. Suffice it to say that if a rule of waiver applies, it will be as much subject to the various avoidance mechanisms as is the general rule of waiver found in Rule 12(H).

V. CONCLUSION

Affirmative defenses consist of allegations of new facts which are consistent with the claim alleged by the claimant but which have the effect of either defeating that claim on the merits or abating the action in which that claim is presented. In other words an affirmative defense consists of new matter which confesses the claimant's claim and either avoids it or abates recovery on it.

Because these new facts are consistent with the claim they are not logically inferable from a real or hypothetical denial of the claimant's allegations. Therefore, to prevent the claimant from being surprised at the trial the new facts underlying the affirmative defense must be specially pleaded.

Since the purpose of special pleading is the elimination of surprise the
affirmative defense must be pleaded in such a way as to formulate in a simple, concise, and direct manner the issue to be resolved by the trial court. In the case of most well-known affirmative defenses this standard is met if they are simply pleaded by name only.

As a general rule the vehicle for the assertion of an affirmative defense is the responsive pleading. If no responsive pleading is required or permitted the affirmative defense may be asserted at the trial through the introduction of evidence in support of the defense. In appropriate cases an affirmative defense may also be asserted by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a Rule 56(B) motion for summary judgment made prior to the service of the responsive pleading.

The claimant's affirmative defenses to the defender's affirmative defenses are presumed and need not be pleaded. However, if the claimant possesses such defenses and the court orders a reply to an answer or third-party answer the claimant's defenses must be included in that reply.

If an affirmative defense is not properly pleaded in the responsive pleading, or if it is not properly raised by a motion made prior to the service of the responsive pleading, it is waived. In many cases, however, this waiver may be avoided by the service of an amended responsive pleading containing the affirmative defense. Although the civil rules suggest that such an amended responsive pleading is permitted only if the amendment may be made as a matter of course it is generally agreed that the amendment may also be made with leave of court or with the written consent of the adverse party. Additionally, if an unpleaded affirmative defense is actually tried with the express or implied consent of the parties it shall be treated in all respects as if it had been properly raised in the pleadings and the pleadings may be, but need not be, amended to conform to the evidence. While this rule applies only to the affirmative defense actually contested at the trial on the merits it has been extended in principle to any assertion of an unpleaded affirmative defense. In a word, whenever the claimant fails to challenge the assertion of an unpleaded affirmative defense on the ground of waiver, the waiver of that defense is itself waived. If the validity of the defense is determined by the court, it will be deemed "tried" by the implied consent of the parties.

Despite these various methods for avoiding the effect of a waiver, there is no guarantee that an initial waiver can be overcome. Therefore, when one is in doubt as to whether a particular defense is an affirmative defense or not the prudent course is to plead it as if it were such a defense. As Judge McCormac puts it:

The pleader must determine whether his defense is merely a denial of allegations in plaintiff's complaint or whether it constitutes new matter setting up a confession and avoidance defense. In question of doubt, it is recommended that the defense be pleaded affirmatively. No harm can result and the burden of proof should remain the same under the substantive law even if defendant undertook to plead a defense that could have been raised under a denial.433

A failure to take this prudent course may well result in actionable malpractice.

433 E.g., those listed in OHIO R. Civ. P. 8(C).
434 McCormac, supra note 35, § 7.05 at 168.