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Have District Courts "Answered" the Supreme Court's Call for More Pleading Replies?

Rule 7(a)(7) after *Cunningham v. Cornell*

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One year ago, the U.S. Supreme Court issued a decision in *Cunningham v. Cornell University* that addressed the bar for pleading a prohibited transaction claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").[1] Although *Cunningham* focused on ERISA pleading, the case is also notable because the Court expressly reminded district courts that they "can use existing tools at their disposal to screen out meritless claims before discovery."[2] In particular, the Court highlighted Federal Rule of Civil Procedure 7(a)(7), which allows district courts to order a plaintiff to reply to a defendant's answer with specific, nonconclusory factual allegations to further support its claim. If the plaintiff cannot plausibly do so, the district court can dismiss the plaintiff's suit prior to discovery.

In this client alert, we summarize the *Cunningham* decision, review lower courts' use of Rule 7(a)(7) in the year since *Cunningham* was issued, and offer practical guidance for federal litigants going forward.

Prohibited Transaction Claims and the Supreme Court's Decision in *Cunningham*

A. Overview of ERISA's Prohibited Transactions and Exemptions

ERISA regulates private retirement and health plans to protect plan participants and their beneficiaries.[3] Every plan subject to ERISA must name at least one plan fiduciary (*i.e.*, the individual or entity responsible for the operation and administration of the plan).[4] Under ERISA, the fiduciary cannot enter the plan into a transaction "if [the fiduciary] knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest."[5] ERISA defines "part[ies] in interest" broadly to include any "entities providing services to [the] plan."[6] In practice, this section creates a particular bind for pension plans, especially large ones, which "will almost always find it necessary to employ outside firms to provide services that the plan[s] need[]."[7] Upon engagement, that service provider becomes a "party in interest" under the statute.[8] And accepting the outside firm's

[1] 604 U.S. 693 (2025).

[2] *Id.* at 708.

[3] *Id.* at 695–96.

[4] *Id.* at 696 (citing 29 U.S.C. § 1102(a)(1)).

[5] *Id.* at 697 (quoting 29 U.S.C. § 1106(a)(1)(C)).

[6] *Id.* at 697 (alteration in original) (quoting 29 U.S.C. § 1002(14)) (internal quotation marks omitted).

[7] *Id.* at 710 (Alito, J., concurring).

[8] *Id.* at 710 (Alito, J., concurring) (citing 29 U.S.C. § 1002(14)(B)).

"furnishing of goods, services, or facilities" then becomes a prohibited transaction between the plan and the outside firm.[9]

A separate section of the statute enumerates 21 exemptions to these types of prohibited transactions, including one particularly important exemption for "any transaction that involves '[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.'"[10]

The 21 statutory exemptions—in particular the exemption covering transactions for the provision of necessary services at a reasonable cost—make permissible broad categories of transactions that would otherwise be prohibited under ERISA. However, prior to *Cunningham*, courts had struggled to decide *when* they may determine the applicability of any exemptions: at the pleading stage, before discovery, or at a later stage in the litigation after the defendant has likely incurred significant costs in defending against the claims.

B. The *Cunningham* Decision and the Court's Process-based Message

In *Cunningham,* defendant Cornell University was the named administrator, and thus a fiduciary, of two retirement plans for Cornell employees.[11] Cornell retained two financial services institutions to offer investment options to plan participants and to act as recordkeepers for the plans.[12] Employees who participated in the plans sued Cornell and other fiduciaries, alleging that the plans engaged in prohibited transactions with parties in interest (*i.e.*, the two financial services institutions retained by the plans) for the furnishing of services (*i.e.*, administrative and recordkeeping services).[13]

The issue before the Supreme Court in *Cunningham* was whether the plaintiffs stated a claim by alleging that the transactions were prohibited or whether the plaintiffs also had to allege facts showing that no statutory exemption applied to make the transactions permissible. In addressing this issue, the Supreme Court resolved a circuit split over whether the exemptions are themselves elements of a prohibited transaction claim (which the plaintiff must address on the face of the complaint) or whether they are affirmative defenses (which the plaintiff need not address until raised in a defendant's answer).[14]

The court of appeals below—the Second Circuit—adopted the former approach, holding that a plaintiff bringing a prohibited transaction claim must affirmatively plead facts alleging that no exemption applies and that the district court may dispose of the case at the motion to dismiss stage if the plaintiff fails to do

[9] *Id.* at 711 (Alito, J., concurring).

[10] *Id.* at 697 (alteration in original) (quoting 29 U.S.C. § 1108(b)(2)(A)).

[11] *Id.* at 697–98; *see also* 29 U.S.C. § 1002(14)(A) (defining a "fiduciary" to include "any administrator . . . of [an] employee benefit plan").

[12] *Id.* at 698.

[13] *Id.* at 698.

[14] *Id.* at 699–700; *compare also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 600–02 (8th Cir. 2009) (holding that exemptions are affirmative defenses to a prohibited transaction claim) *with Cunningham v. Cornell University*, 86 F.4th 961, 975 (2d Cir. 2023) (holding that exemptions are incorporated as elements of a prohibited transaction claim), *rev'd and remanded*, 604 U.S. 693 (2025) ("*Cunningham* Second Circuit").

so plausibly.[15] Relying on the canon of statutory construction disfavoring "absurd results," the Second Circuit reasoned that reading the prohibited transaction provision in isolation from the separate exemption provision would mean that ERISA "prohibit[ed] payments by a plan to any entity providing it with any services."[16] It concluded that the exemptions are incorporated into the prohibited transaction provision because the provision expressly references the exemption provision and because other characteristics of the statute reflect Congress' intention not to require the assertion of exemptions as affirmative defenses.[17] It thus affirmed the trial court's decision that the defendant fiduciaries retained the burden of persuasion on any applicable exemptions.[18]

By contrast, the Eighth Circuit had previously held that the exemptions were properly understood to be affirmative defenses.[19] Thus, under the Eighth Circuit's view, a plaintiff had to plead nothing more than the existence of a prohibited transaction.[20]

The Supreme Court reversed the Second Circuit and largely adopted in the Eighth Circuit's approach.[21] It reasoned that the structure and language of the exemption provision suggested the exemptions were affirmative defenses, and it concluded that the impracticability of pleading the absence of all 21 exemptions reinforced that conclusion.[22] Both the majority opinion of Justice Sotomayor and the concurring opinion of Justice Alito acknowledged concerns about the "avalanche of meritless litigation" that might ensue if the exemptions were not treated as a pleading requirement.[23] To address these concerns, the Supreme Court advised district courts to use "tools" in their toolbox to "ward off meritless litigation."[24] In addition to imposing cost-shifting under ERISA where appropriate, the Supreme Court identified the following generally applicable tools "to screen out meritless claims before discovery":

- **Rule 7(a)(7) replies to answers:** Ordering a plaintiff to reply to an answer under Federal Rule of Civil Procedure 7(a)(7), which would require the plaintiff to put forward specific and nonconclusory factual allegations to show that any exemptions raised in the answer do not apply;
- **Justiciability dismissals:** Dismissing for lack of Article III standing when a constitutional injury-in-fact is not identified; and
- **Sanctions:** Imposing Rule 11 sanctions in cases where an exemption obviously applies and plaintiff and counsel lack a good faith basis to believe otherwise.[25]

[15] *Cunningham* Second Circuit, 86 F.4th at 968.

[16] *Id.* at 973.

[17] *Id.* at 975.

[18] *Id.* at 977.

[19] *Braden*, 588 F.3d at 601–02.

[20] 604 U.S. at 700 (citing *Braden*, 588 F.3d 585, 600–602).

[21] *Id.* at 700–01.

[22] *Id.* at 694, 701–02.

[23] *Id.* at 707; *see also id.* at 710 (Alito, J., concurring) (joining majority opinion in full and elaborating on the ways in which "straightforward application of established rules has the potential to cause—and, indeed, I expect it will cause—untoward practical results").

[24] *Id.* at 708–09.

[25] *Id.* at 708–09; *id.* at 711 (Alito, J., concurring).

Justice Alito's concurrence called the Rule 7(a)(7) reply to an answer "the most promising of these" tools.[26] Although he noted it is not a "commonly used procedure," he "strongly" urged district courts to "consider utilizing this option" to dispose of meritless claims promptly and save the costs, burdens, and windfall of unjustified discovery and related settlements on such claims.[27]

The Evolution of Rule 7(a)(7)

A. The Restrained Roots of Rule 7(a)(7)

Historically, district courts have held that replies to answers under Rule 7(a)(7) should be permitted only in exceptional situations. For example, in 1959, a decision in the Southern District of New York held that Rule 7(a)(7) replies "should not be ordered unless there is a clear and convincing factual showing of necessity or other extraordinary circumstances of a compelling nature."[28] Many other district courts adopted similarly restrictive approaches to ordering Rule 7(a)(7) replies.[29]

There is good reason to be generally restrictive with replies to answers. Allegations standing alone have no evidentiary value, so they will either be proven at trial or unnecessary to the resolution of the case. As one district court summed it up recently:

> *If the Court allows this reply, should [defendant] also be allowed a surreply, or some other form of response? To the extent such issues remain in dispute, both parties will have the opportunity to present their positions through testimony and evidence at trial. And to the extent any issues do not remain in dispute . . . there is little reason to continue litigating them on this Court's docket.*[30]

It is therefore unsurprising that district courts have rarely ordered replies to answers under Rule 7(a)(7). The vast majority of decisions addressing Rule 7(a)(7) involve the district court denying *a plaintiff's attempt* to reply to an answer. Most often, a *pro se* plaintiff, unfamiliar with federal procedure and mistakenly treating pleadings as evidence, will attempt to reply to the defendant's answer, resulting in the district court informing the plaintiff that a reply was neither permitted nor warranted.[31]

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[26] *Id.* at 711 (Alito, J., concurring).

[27] *Id.* (Alito, J., concurring).

[28] *Moviecolor Ltd. v. Eastman Kodak Co.*, 24 F.R.D. 325, 326 (S.D.N.Y. 1959).

[29] *See, e.g., Mission Appliance Corp. v. Ajax Thermostatic Controls Co.*, 8 F.R.D. 588, 588 (N.D. Ohio 1948) ("Whether there is to be a reply to an answer is a matter for the discretion of the court and a reply will not be ordered unless there is a substantial reason therefor.").

[30] *See Pitz v. Gonzalez*, No. 25-cv-04454-LJC, 2025 WL 2106512, at *2 (N.D. Cal. July 28, 2025).

[31] *See, e.g.*, *Mills v. Jones*, No. 1:21-cv-01193-ADA-HBK, 2022 WL 993066, at *1 (E.D. Cal. Oct. 25, 2022) (denying *pro se* plaintiff's motion for reply where not warranted); *Quigley v. Rivera*, No. 3:19-cv-482-AVC, 2020 WL 5820565, at *2 (D. Conn. Sept. 30, 2020) (denying *pro se* plaintiff's motion for more time to reply because the court did not order reply); *Clark v. Gardner*, No. 9:17-cv-00366-DNH-TWD, 2018 WL 11578622, at *1 n.3 (N.D.N.Y. July 5, 2018) (noting that *pro se* plaintiff's reply is not "properly before the Court"); *Chandler v. Graham*, No. 9:16-cv-0348-DNH-ATB, 2016 WL 4411407, at *2 (N.D.N.Y. Aug. 19, 2016) (denying incarcerated *pro se* plaintiff law library access in order to prepare a reply where reply was "not necessary"); *Rodriguez v. Goetz*, No. 1:9-cv-3728-LAP, 2010 WL 451032, at *3 (S.D.N.Y. Feb. 1, 2010) (denying incarcerated *pro se* plaintiff an extension of time to file a reply to an answer where reply was not "necessary"); *Garner v. Morales*, 237 F.R.D. 399, 400 (S.D. Tex. 2006) (same); *Blackmon v. Kukua*, No. C-

B. The Supreme Court's History of Suggesting Replies

Cunningham is not the first case in which the Supreme Court has advised lower courts to use pleading replies as a gatekeeping mechanism. In its 1998 decision in *Crawford-El v. Britton*, the Court identified Rule 7(a)(7) as an important tool for safeguarding "the substance of the qualified immunity defense" in the context of Section 1983 civil rights claims against state officials.[32]

Specifically, the Supreme Court held that accepting the bare allegation of a public official's wrongful motive in a Section 1983 case could subject officials to "unnecessary and burdensome . . . trial proceedings"—that is, unless the court ordered a reply to an answer under Rule 7(a)(7), which would require the plaintiff to substantiate the claim of improper motive with factual allegations sufficient to defeat the public official's qualified immunity defense.[33] Following *Crawford-El*, multiple federal courts of appeals have echoed this rationale in the context of Section 1983 cases, urging district courts to test qualified immunity defenses early using Rule 7(a)(7).[34]

But the Supreme Court's invitation in *Crawford-El* did not change much about Rule 7(a)(7) practice in the district courts. Even before *Crawford-El*, many district courts in the Fifth Circuit required Section 1983 plaintiffs to reply to qualified immunity defenses raised in an answer before ruling on a motion to dismiss or motion for summary judgment.[35] While other courts have, on occasion, adopted this approach,[36] it has

08-273, 2009 WL 382611, at *1 (S.D. Tex. Feb. 2, 2009) (treating statement in incarcerated *pro se* plaintiff's filing as a request to file a reply to an answer and denying the request as unnecessary).

[32] 523 U.S. 574, 597–98 (1998).

[33] *Id.* at 598.

[34] *See, e.g.*, *Thomas v. Indep. Twp.*, 463 F.3d 285, 301 (3d Cir. 2006) ("When presented with a complaint that does not lend itself to an early resolution of the qualified immunity issue, a district court . . . may order the plaintiff to reply to the defendant's answer pleading qualified immunity."); *Doe v. Cassel,* 403 F.3d 986, 989 (8th Cir. 2005) ("In rejecting a heightened pleading requirement, however, we do not leave government officials and the district courts at the mercy of overly aggressive plaintiffs. . . . For example, the district court can order the plaintiff to reply to the defendant's answer under Rule 7(a) . . . ." (internal citations and quotations omitted)); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 67 (1st Cir. 2004) ("[T]he demise of our traditional heightened pleading standard does not leave either government officials or district courts at the mercy of overly aggressive plaintiffs. . . . [T]he [Supreme] Court has taken pains to assure its audience that a number of alternatives are available to aid trial courts in early detection of potentially meritless claims. A trial court may, for example, order the plaintiff to reply to the defendant's answer to the complaint." (internal citations and quotations omitted)).

[35] *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995) ("[T]he court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist."); *see also Dellucky v. St. George Fire Protection Dist.*, No. 1:21-cv-287-BAJ-EWD, 2022 WL 22835278, at *4 (M.D. La. Jan. 28, 2022) (noting that court had directed a Rule 7(a)(7) reply to address qualified immunity defense); *Brown v. Landry*, No. 6:15-cv-2724, 2016 WL 2851569, at *1 (W.D. La. May 13, 2016) (same); *Payne v. City of Hammond*, No. 1:15-cv-1022, 2016 WL 1031341, at * 13 (E.D. La. Mar. 15, 2016) (granting defendants' motion to require plaintiff to reply to qualified immunity affirmative defense raised in answer); *Henrise v. Horvath*, 94 F. Supp. 2d 765, 767 (N.D. Tex. 2000) (holding that, "[s]ince [Section 1983] Plaintiff's Complaint is lacking in specificity, Defendants are entitled to an order requiring Plaintiff to file a reply pursuant to Rule 7" to address qualified immunity defense).

[36] *See, e.g.*, *Charnesky v. Lourey*, No. 18-cv-2748-ECT-KMM, 2019 WL 1505995, at *8 (D. Minn. Apr. 5, 2019) (granting defendants' motion to order Section 1983 plaintiff to reply to qualified immunity defense raised in answer); *Zion v. Nassan*, 727 F. Supp. 2d 388, 404–05 (W.D. Pa. 2010) (*sua sponte* ordering Section 1983 plaintiff to reply to qualified immunity defense raised in answer).

not become a consistent practice outside of the Fifth Circuit.[37]

Outside of the Section 1983 qualified immunity context, there is no area of law in which district courts have regularly required replies to answers under Rule 7(a)(7).[38]

C. Evolving Trends in Rule 7(a)(7) After *Cunningham*

A review of recent district court decisions reveals that there has been no major change in lower courts' application of Rule 7(a)(7) since the Supreme Court issued *Cunningham* a year ago. This is perhaps unsurprising given the muted district court reaction to *Crawford-El* and the relatively short span of time since *Cunningham*'s issuance.

To date, only three district courts have directly cited *Cunningham* to require a reply to an answer for the purposes of assessing an affirmative defense.

Two of those cases—*Dalton v. Freeman*[39] in the Eastern District of California and *Stern v. JPMorgan Chase & Co.*[40] in the Southern District of New York—concerned the same ERISA issue addressed in *Cunningham.* Each required a reply consistent with the Supreme Court's invitation. In *Dalton*, plan beneficiaries sued, among others, plan provider Alerus Financial, alleging that Alerus engaged in a prohibited transaction by approving a transfer of plan assets to a party in interest.[41] Alerus raised the "adequate consideration" statutory exemption in its answer and moved to require plaintiffs to reply under Rule 7(a)(7).[42] The court granted Alerus' motion, finding that it had "put forward clear, substantive factual allegations in support of [its] affirmative defense."[43] Similarly, in *Stern*, among the claims that JPMorgan employee plaintiffs brought against JPMorgan was a claim that it had entered into a prohibited transaction under ERISA by engaging

[37] *See, e.g.*, *Kiss v. Cook*, No. 3:16-cv-864-LEK-DEP, 2017 WL 3738646, at *1–2, *4 (N.D.N.Y. Aug. 29, 2017) (noting that magistrate judge denied Section 1983 plaintiff's motion to reply to defendant's answer raising a qualified immunity defense and holding that "[t]he time to rebut a defense is generally after the conclusion of discovery because a court usually cannot assess the merits of a defense on a barren record"); *Kregler v. City of N.Y.*, 608 F. Supp. 2d 465, 475 (S.D.N.Y. 2009) (ordering preliminary hearing under Federal Rule of Civil Procedure 12(i) rather than Rule 7(a)(7) reply to address qualified immunity defense); *Bell v. City of Cleveland*, 548 F. Supp. 2d 444, 448 (N.D. Ohio 2008) (declining to order Rule 7(a)(7) reply in Section 1983 excessive force action where officer's intent or motive is not determinative); *Chappell v. City of Pittsburg*, No. 04-cv-4400, 2005 WL 756617, at *7–8 (N.D. Cal. Mar. 25, 2005) (declining to grant Section 1983 plaintiff's Rule 12(e) motion for a more definite statement or to order Rule 7(a)(7) reply where "plaintiff's factual allegations are sufficient to allow defendants to raise a qualified immunity defense").

[38] *See, e.g.*, *Armstrong Pump, Inc. v. Hartman*, No. 10-cv-4467, 2012 WL 1795060, at *1 (W.D.N.Y. May 15, 2012) (granting plaintiff leave to amend its answer to defendant's counterclaim and permitting defendant to reply to amended counterclaim, without explanation as to why reply was warranted); *Miller v. Abercrombie & Kent, Inc.*, No. 08-cv-61471, 2009 WL 259672, at *1 (S.D. Fla. Feb. 4, 2009) (granting plaintiff's motion to reply to defendant's answer where the court found reply unnecessary but nevertheless saw "no harm in allowing" one); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 540 F. Supp. 2d 759, 795–96 (S.D. Tex. 2007) (holding that, while parties on both sides made improper submissions (including an impermissible reply to answer), the court would consider all submissions because they "sharpened the focus" on certain issues).

[39] No. 2:22-cv-00847-DJC-DMC, 2025 WL 3771345 (E.D. Cal. Dec. 31, 2025).

[40] No. 1:25-cv-097, 2026 WL 654714 (S.D.N.Y. Mar. 9, 2026).

[41] 2025 WL 3771345, at *1.

[42] *Id.* at *2.

[43] *Id.*

a plan benefit manager.[44] The court denied JPMorgan's motion to dismiss the prohibited transaction claim, finding that the plaintiffs' allegations were sufficiently plausible, but held that JPMorgan "may have ample defenses" and thus ordered a Rule 7(a)(7) reply before the answer was even filed.[45]

In the third case, *Eli Lilly and Co. v. Revive Rx, LLC*,[46] the Southern District of Texas ordered the plaintiff in a state-law unfair competition suit to file a Rule 7(a)(7) reply addressing certain statutory exemptions raised in the defendant's answer.[47] In that case, drug manufacturer Eli Lilly sued pharmacy Revive Rx under numerous states' unfair competition laws, alleging that Revive RX abused FDA regulations in order to sell inferior and unsafe "knockoff" versions of Eli Lilly's proprietary weight loss medications.[48] Revive Rx moved to dismiss certain state-law unfair competition claims on the ground that those laws categorically exempt claims concerning the "[FDA-]regulated conduct" at issue.[49] The court denied Revive Rx's motion to dismiss these claims because, under *Cunningham*, the statutory exemptions were affirmative defenses and not elements of the claims themselves.[50] Nevertheless, the court found that a subset of the invoked statutory exemptions may apply and ordered Eli Lilly to reply to the Revive Rx's forthcoming answer by alleging facts establishing that the statutory exemptions *do not* apply.[51] This decision suggests that lower courts may gradually be receptive to finding more applications for the "gatekeeping" function of Rule 7(a)(7) outside the areas of law expressly identified by the Supreme Court in cases like *Cunningham* and *Crawford-El*.

Any such shift is occurring gradually, however. Nearly all rulings in the past year addressing Rule 7(a)(7) have, as before, arisen in the context of district courts denying plaintiffs leave to reply to an answer where the plaintiff has misunderstood the distinction between pleadings and evidence.[52] And during this same time period, certain district courts have cited *Cunningham* in ruling on ERISA prohibited transaction claims without ordering a reply under Rule 7(a)(7).[53]

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[44] 2026 WL 654714, at *4.

[45] *Id.* at *14–15.

[46] 812 F. Supp. 3d 708 (S.D. Tex. 2025).

[47] *Id.* at 751.

[48] *Id.* at 722–25.

[49] *Id.* at 723, 736.

[50] *Id.* at 736–37.

[51] *Id.* at 738, 751.

[52] *See, e.g.*, *Krumback v. Wasko*, No. 4:24-cv-04156-KES, 2025 WL 2986255, at *2 (D.S.D. Oct. 23, 2025) ("A reply to an answer is only permitted if the court orders a reply. . . . Defendants' answer does not contain any matters for which a reply is warranted."); *Pitz*, 2025 WL 2434240, at *1.

[53] *See, e.g.*, *Doherty v. Bristol-Myers Squibb Co.*, No. 24-cv-06628-MMG, 2025 WL 2774406 (S.D.N.Y. Sept. 29, 2025) (applying *Cunningham* and declining to dismiss prohibited transaction claim on the ground that it failed to allege non-application of exemption without preemptively ordering plaintiffs to reply to any anticipated affirmative defenses in forthcoming answer, unlike in *Stern*, *see supra* note 40). Shortly after issuing its decision on the motion to dismiss, the court granted Bristol-Myers Squibb's motion to certify an interlocutory appeal of the complex standing issue raised in the motion to dismiss and staying the case pending the outcome of the appeal. Order Granting Mot. Interlocutory Appeal, *Doherty v. Bristol-Myers Squibb Co.*, No. 24-cv-06628-MMG (S.D.N.Y. 2025), ECF No. 101.

Takeaways for Litigants

Although *Cunningham* has not sent any immediate shockwaves through the judiciary, litigants can take a few things from the evolution of Rule 7(a)(7) to date.

First, despite the Supreme Court's repeated and recent guidance, Rule 7(a)(7) remains little-known and little-used, so litigants should generally not expect district courts to apply Rule 7(a)(7) on their own initiative. Instead, litigants should affirmatively raise the issue in motion practice or as otherwise appropriate.[54]

Second, the circumstances warranting the application of Rule 7(a)(7) are not limited to those expressly identified by the Supreme Court in *Crawford-El* (qualified immunity defenses) and *Cunningham* (ERISA statutory exemptions). Rather, a Rule 7(a)(7) reply may be appropriate whenever an affirmative defense could efficiently end the case early. Some examples include:

- **Business torts**: As the recent *Eli Lilly* decision showed, Rule 7(a)(7) may be a useful tool for determining prior to discovery whether statutory exemptions bar certain state-law unfair competition claims.[55]
- **Securities litigation**: In an insider trading civil enforcement action, it is an affirmative defense that the defendant traded pursuant to a binding contract that was executed prior to receipt of the material non-public information.[56] To the extent the SEC cannot plead any non-conclusory facts rebutting this affirmative defense, defendants should consider whether a Rule 7(a)(7) motion may facilitate the resolution of the case before discovery. Similarly in Section 16(b) short-swing profit litigation, defendants can invoke numerous defenses that a plaintiff need not plead around.[57]
- **Bankruptcy preference litigation**: Section 547(b) of the Bankruptcy Code broadly prohibits insolvent debtors from making pre-bankruptcy transfers to creditors on a preferential basis, while Section 547(c) sets forth numerous affirmative defenses for such transfers, including transfers made in the "ordinary course of business."[58] Although a recent amendment to the Code requires a trustee to take account of these defenses, that change has not significantly impacted the pleading of preference claims.[59] Transferees with meritorious defenses should consider whether a Rule 7(a)(7) reply would expedite the proceedings and shield them from discovery and further motion practice.

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[54] *See, e.g.*, *Armstrong*, 2012 WL 1795060 at *1 (permitting a Rule 7(a)(7) reply at the request of the defendant).

[55] *Eli Lilly*, 812 F. Supp. 3d. at 737, 751 (ordering plaintiff to reply to defendant's forthcoming answer to rebut affirmative defenses invoking statutory exemptions to state unfair competition laws).

[56] Rule 10b5-1(c), 17 C.F.R. § 240.10b5-1(c).

[57] *See, e.g.*, Rule 16b–3, 17 C.F.R. § 240.16b–3 (exempting certain transactions directly between an issuing company and its officers or directors); Rule 16b–5, 17 C.F.R. § 240.16b–5 (exempting bona fide gifts and inheritances); Rule 16b–7, 17 C.F.R. § 240.16b–7 (exempting transactions pursuant to mergers); *see also Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 207 (2d Cir. 2006) (holding that "Congress explicitly delegated to the Commission the policymaking authority" to exempt transactions from Section 16(b) "as not comprehended within [its] purpose").

[58] 11 U.S.C. § 547(b)–(c).

[59] *See* Daniel H. Tabak, Randall W. Bryer, and Christine M. Jordan, *Courts Remain Uncertain on How to Apply the New Due Diligence Requirement for Preference Claims*, Cohen & Gresser (June 22, 2023) https://www.cohengresser.com/app/uploads/2023/06/Courts-Remain-Uncertain-on-How-to-Apply-the-New-Due-Diligence-Requirement-for-Preference-Claims-2.pdf.

Third, litigants seeking to use Rule 7(a)(7) should frame their requests as promoting efficiency and judicial economy. As noted above, Rule 7(a)(7) is a discretionary rule and judges considering a request for a reply may be particularly interested in how a reply will streamline, rather than complicate, the proceedings. Because, by its terms, Rule 7(a)(7) does not require judges to order a plaintiff to reply to *all* of a defendant's answer,[60] litigants should consider tailored requests that would reduce the burden on their adversary and the evaluating courts. For example, in one case, the District of Minnesota granted a request for a reply to just two paragraphs of an answer that could lead to dispositive motion practice.[61]

Fourth, where a Rule 7(a)(7) reply may end the case without the need for discovery, litigants should also consider seeking a discovery stay pending resolution of the issues addressed in any such reply. Discovery is not automatically stayed during the pleading stage, but "[u]pon a showing of good cause[,] a district court has considerable discretion to stay discovery pursuant to [Federal] Rule [of Civil Procedure] 26(c)."[62] Some courts have found that such a stay is appropriate pending review of a Rule 7(a)(7) reply—particularly in the qualified immunity context, where the Supreme Court has instructed district courts to consider whether it is possible to adjudicate potential immunities "prior to permitting *any discovery at all*."[63] Thus, while a discovery stay pending the court's review of any Rule 7(a)(7) reply is no guarantee, courts may be inclined to stay discovery in the right circumstances—for instance, where the defendant has an apparently meritorious affirmative defense and discovery would be expensive, complex, or otherwise burdensome.

[60] *See* Rule 7(a)(7).

[61] *See Charnesky*, 2019 WL 1505995 at *8.

[62] *Republic of Turkey v. Christie's, Inc.*, 316 F. Supp. 3d 675, 677 (S.D.N.Y. 2018) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 26(c)(1)(A)–(B) ("The court may, for good cause, issue an order to protect a party or person . . . including . . . forbidding the disclosure or discovery [or] specifying terms, including time . . . for the disclosure or discovery.").

[63] *Crawford-El*, 523 U.S. at 597–98 (emphasis added); *see Charnesky*, 2019 WL 1505995 at *8 (maintaining discovery stay pending adjudication of qualified immunity issues through Rule 7(a)(7) reply); *Brown*, 2016 WL 2851569 at *1 (ordering limited discovery as to qualified immunity following Section 1983 plaintiff's Rule 7(a)(7) reply but staying all other discovery).

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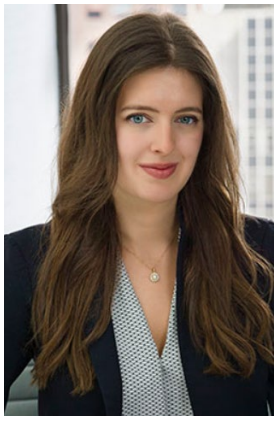

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