

A purchaser filed a federal diversity action against a seller, alleging breach of contract. The seller answered the complaint and included as a separate defense an allegation that the purchaser had brought and lost a similar contract claim against a different seller three years earlier, and that this history represented a pattern of filing frivolous lawsuits. The purchaser believes that the earlier lawsuit was factually completely different from the current one and is therefore irrelevant.

What is the purchaser's best response to the seller's answer?

- A. File a reply that includes a denial of the separate defense.
- B. Move for sanctions against the seller for asserting a frivolous defense.
- C. Move to amend the complaint to add allegations about the differences between the lawsuits.
- D. Move to strike the separate defense as irrelevant.

## Explanation:

### FRCP 12 motions

**12(b)** Motion asserting any of the following defenses:

- Lack of subject-matter or personal jurisdiction
- Improper venue
- Insufficient process or service of process
- Failure to state claim upon which relief can be granted
- Failure to join required party

**12(c)** Motion for judgment on the pleadings

**12(e)** Motion for more definite statement in pleading

**12(f)** Motion to strike insufficient defense or immaterial matter from pleading

**FRCP** = Federal Rule of Civil Procedure.

Under Federal Rule of Civil Procedure 12(f), a party may **move to strike** an **insufficient defense** or any redundant, scandalous, impertinent, or **immaterial matter** from an opposing party's **pleading**. A party must make this motion:

- before responding to the pleading if a response is allowed (eg, when the defendant's answer contains a counterclaim or the court orders a reply) *or*
- within 21 days after being served with the pleading if a response is not allowed.\*

Here, the purchaser believes that the seller's separate defense is irrelevant (ie, immaterial). Therefore, the purchaser's best response is to move to strike this defense from the answer. The motion must be filed within 21 days after the seller's answer was served because the answer does not contain a counterclaim and the court has not ordered a reply.

\*The court may also strike defenses and matters in pleadings at any time on its own initiative (ie, sua sponte).

**(Choice A)** A reply is a response to an answer that can only be filed pursuant to a court order (not seen here).

**(Choice B)** A court may impose **sanctions** on a party that asserts a *frivolous* claim or defense—ie, one that has no factual or legal basis and was asserted to harass, delay, or embarrass. Since there is no indication that the seller asserted the defense for any of these illegitimate purposes, the court is unlikely to grant a motion for sanctions.

**(Choice C)** A plaintiff may move to amend the complaint to correct errors and omissions, allege new claims, or change the defendant. However, an amendment to respond to allegations in the defendant's answer is not allowed.

**Educational objective:**

A party can move to strike from a pleading an insufficient defense or any redundant, scandalous, impertinent, or immaterial matter. A party must make this motion (1) before responding to the pleading or (2) within 21 days after being served with the pleading if a response is not allowed.

**References**

- Fed. R. Civ. P. 12(f) (motion to strike).

Copyright © 2019 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.