How to Win Without a Lawyer

Affirmative Defenses

Defendant's Right to Fight Back

This class gives you *defenses with teeth!*

Imagine a basketball team extremely talented on offense but clumsy when it comes to snatching the ball from the other team and swishing the net at their own goal! They do a good job making points once they get hold of the ball, but they can't take the ball away from their opponents nor keep the other side from making points!

Good teams defend *affirmatively,* snatching the ball from their opponents and making points for themselves.

Smart lawsuit defendants defend *affirmatively.*

Whether plaintiff or defendant, you *must* understand defenses.

Plaintiffs must overcome defendants' defenses.

Defendants must allege and prove defenses.

Both sides need to understand them.

That's what you're going to learn in this class.

- Defenses that attack and fight back!
- Defenses that score points!
- Defenses that *win!*

  Basketball players must grab the ball from their opponents as often as possible, drive toward their own goal as powerfully as they can, and score as many points as possible for their own team ... *if they want to win.*

  If a basketball team does nothing more than defend their own basket without ever getting control of the ball to score points, they have no chance whatever.

  The same applies in legal battles.

  Plaintiffs file complaints. (You learned about complaints in the previous class.)

  Defendants may file answers to the plaintiff's complaint and think the battle is on.

  That is *always* a case-losing mistake!

  Smart defendants file answers *with affirmative defenses that actively pursue points rather than merely defending against the tactics of the offense.*

  The plaintiff's complaint *affirmatively* alleges the ultimate facts

plaintiff claims he can prove. His complaint is an *affirmative* action. A complaint has teeth!

The defendant's answer, by itself (without *affirmative defenses*), has no *teeth!*

It's just an answer. Nothing more.

It merely answers allegations of the complaint, admitting or denying what plaintiff alleged.

By itself, an answer, gives defendant no way to plead his defense *affirmatively*.

A defendant who merely "answers" a complaint, without filing affirmative defenses along with his answer, is like a prize-fighter entering the ring with both hands tied behind his back. He can bob and weave in defense. He can dodge the punches and dance like a butterfly. But, he can't hit back!

Affirmative defenses give the defendant a way to *hit back,* to allege his own ultimate facts that, if proven, give him victory in court.

Affirmative defenses should **always** be filed when defendant files an Answer to the complaint.

Affirmative defenses allow defendants to allege ultimate facts that establish the essential elements (just like the elements of causes of action you learned in the preceding class).

The defendant can then go about *affirmatively* proving the ultimate facts of his defenses in order to win, while the plaintiff goes about trying to prove the ultimate facts of his causes.

Without affirmative defenses, defendant is always on defense ... *never a winning position!*

When filing an Answer and Affirmative Defenses you must also file any cross-claims, counterclaims, or third-party complaints needed to bring related issues and possibly other parties before the court. Failure to file these at the time of filing your Answer and Affirmative Defenses waives your right to do so later (unless you satisfy the court you didn't know the related issues and parties at the time and need to amend). You also *must* demand jury trial at the time of filing your Answer and Affirmative Defenses (if you want a jury) or you waive your right to jury in civil cases.

Sound simple?

It is.

And *you* are about to master the process!

In the following pages we examine the most common affirmative defenses and list the essential elements of each (just as we did for complaints).

The availability of any particular defenses depends on the facts of your particular case, however it's nearly always possible to include one or two.

The defenses explained in this class will help you win cases in foreclosure, credit card debt, collection, family law, fraud, slander, personal injury, etc.

Every defendant must know how to use these defenses, no matter what the case is about.

If you are sued, be *certain* to file ALL the affirmative defenses you may have and support them with ultimate facts to establish ALL the essential elements of each.

This is how defendants win.

Suppose you were served with the following complaint:

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2011-1234

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT,

Defendant.

_____/

COMPLAINT

PLAINTIFF Peter Plaintiff sues Danny Defendant for money damages and states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for money damages for breach of contract in excess of $15,000 exclusive of court costs and attorneys fees.

2. At all times material to this lawsuit, Plaintiff was a resident of Sunshine County, Florida.

3. At all times material to this lawsuit, Danny Defendant was a resident of Sunshine County.

4. All acts necessary to the bringing of this lawsuit occurred or accrued in Sunshine County.

5. This Court has jurisdiction.

GENERAL FACTUAL ALLEGATIONS

6. On 17 May 2004 Plaintiff and Defendant entered into a written contract whereby Defendant promised to spray Plaintiff's 5-acre strawberry farm with insecticide every week for 8 weeks while Plaintiff was away on vacation in Hawaii.

7. A copy of the written contract is attached as Exhibit 1.

8. Plaintiff paid Defendant $3,000 at the time of execution of the contract in settlement of all of the Plaintiff's obligations under the contract.

9. During Plaintiff's absence, Defendant failed to spray the strawberries at any time, breaching the contract.

10. As a direct result, plaintiff's strawberries valued in excess of $15,000 were destroyed by insects, and Plaintiff proximately suffered substantial money damages.

WHEREFORE Peter Plaintiff demands judgment for money damages against Danny Defendant, together with such other and further relief as the Court may deem reasonable and just under the circumstances, and further plaintiff demands jury trial on all issues so triable.

_____

Peter Plaintiff, Plaintiff

Your Answer to the Complaint might look like the following example. [In most jurisdictions, papers filed with the court would be double-spaced with at least a 1-inch margin. We're not doing that here to save space. Just remember you must check your local jurisdiction's *official* rules to see if they have specific requirements for spacing, text size, margin width, paper weight, paper size, paper color, etc. What's important is what goes *on* the paper, not how it's arranged,

but judges and court clerks appreciate your following their format, because it make *their* life easier.]

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2011-1234

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT,

Defendant.

_____/

ANSWER AND AFFIRMATIVE DEFENSE

DEFENDANT Danny Defendant answers the complaint and states:

1. Denied.

2. Without knowledge.

3. Admitted.

4. Without knowledge.

5. Admitted for jurisdictional purposes only.

6. Admitted.

7. Admitted.

8. Denied.

9. Denied.

10. Without knowledge.

WHEREFORE Danny Defendant demands judgment against plaintiff, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

AFFIRMATIVE DEFENSES

1. Failure of Consideration: Plaintiff did not pay defendant $3000 as alleged. Defendant has not received any money whatever from Plaintiff.

2. Estoppel: Plaintiff promised and agreed to provide insecticide to spray the strawberries but failed and refused to do so in spite of repeated demands by Defendant.

3. Lack of Subject Matter Jurisdiction: Plaintiff is not entitled to recover consequential damages from breach of a contract that does not contemplate such damages but is limited to the contract amount of $3,000, which is within the exclusive jurisdiction of the Small Claims Division of this Court. This Circuit Court lacks jurisdiction to hear cases where the amount in controversy is less than $15,000.

_____

Danny Defendant, Defendant

Note that the first part of this Answer (*before* the affirmative defenses) fails to state anything that might provide an *affirmative* argument in defense, i.e., it has no "teeth" to bite back with!

The answer, by itself, denies a few of the allegations ... and that's *all* it does.

Denials are not *affirmative.*

They aren't even defenses!

They merely deny. They assert *nothing*. They demand *nothing.* They *do nothing of value!*

They have no teeth.

On the other hand, affirmative defenses are *affirmative!*

That's why we call them *affirmative* defenses!

Affirmative defenses allege facts that, if proven by a preponderance of admissible evidence, destroys the plaintiff's case and gives defendant the victory.

Thus, both parties are put to their proofs.

As Sherlock Holmes would say, "The game is afoot!"

The defendant is not merely stuck with proving the *negative* of the plaintiff's complaint. After all, proving negatives is often impossible.

Instead, defendant has *affirmatively* asserted defenses based on facts he hopes to *prove* and, thereby, *puts plaintiff on the defensive!*

If defendant foolishly fails to state affirmative defenses, he saddles himself with the heavy and often impossible burden of proving the negative of what plaintiff alleges in the complaint - i.e., defendant has nothing to argue beyond showing that plaintiff lied ... not nearly enough clout!

If this is all defendant has to work with, plaintiff has a decided advantage.

If, instead, defendant files at least one affirmative defense, he stands on far firmer ground. If he alleges more than one affirmative defense his position is that much stronger. He has the advantage of something *positive* to prove ... much easier than proving negatives!

If defendant then proceeds to prove one or more of his affirmative defenses by establishing the essential facts with the greater weight of admissible evidence, he wins.

It's that simple!

In the following pages we examine the most common affirmative defenses that courts recognize. Defenses set out here are commonplace. Judges deal with them on a regular basis. There is nothing "bizarre" or "creative" about them. You can use them with confidence (if the facts of your case allow).

But first, some defenses to avoid like the plague!

Beware of the "too-good-to-be-true" defenses offered by internet amateurs and misguided anti-government movement mongers!

Today's internet, like yesterday's barbershops and beauty salons, is a place where risky rumors, tall tales, and outlandish opinions run rampant.

Search the internet for "courtroom defense", and you'll find dozens of dumb ideas with fatal flaws and legal loopholes through which you could throw an angry cat.

They may "sound" legal, but sounding so doesn't make them so.

They may have dozens of high-sounding courtroom terms and be presented in a format that for all the world looks like it was prepared by a really smart cookie.

But, beware!

The most dangerous defenses are those that sound sure-fire.

Dangerous defenses promise to get you "off the hook" with little or no effort.

The most hare-brained slippery-slope schemes seem legitimate, offered by amateur internet lawyers and self-styled "patriots" angry at "Big Brother" or by website charlatans out to make a fast buck selling whatever nonsense they can dress up with fancy legalese and serve with empty promises of immediate success.

But!

What *you* need must be recognized by the courts.

Anything else is, well ... *stupid!*

A few dangerous daffy defenses are:

- Plaintiff spelled my name in ALL CAPITAL LETTERS, so I don't have to answer the complaint, because I don't spell my name that way.
- There's a gold fringe on the American flag in the corner of the courtroom telling me the judge is presiding over an Admiralty Court. This case is not an admiralty case, so I don't have to answer the complaint.
- I haven't given the court permission to deprive me of my rights.
- My rights as an American citizen give me sovereign power to command my government, so I can direct the government's complaint to be withdrawn. [I received email from a fellow recently who convinced a family being sued by the county to make this argument in defense. He was not their friend. They lost their home.]

- You cannot sue me, because I denounced my American citizenship. [I recommend a wonderful story for *everyone* who cares about justice. *The Man Without a Country* by Edward Everett Hale (1917).] By making this hateful claim, people show themselves "traitors" to our legal heritage, bringing the court's wrath upon them deservedly, instead of escaping the consequence of their own actions!
- I copyrighted my name. You cannot use it in pleadings against me without my permission!

  The list goes on ... *annoyingly.*

  Ignore these crazy defenses and the myriad other wacky ideas promoted on the internet these days by unscrupulous, self-styled legal gurus who offer seminars and internet courses purporting to offer "easy solutions" by which you can avoid your financial, social, and moral responsibilities by trickery, deceit, and "legal end-run actions".

  Once these go to court, they are ridiculed and cast aside.

  * Defenses marked with an asterisk should be raised by preliminary motion *before* filing Answer. All such motions should be set for hearing and argued in court as soon as possible. If a motion fails, defendant should file these as Affirmative Defenses with his Answer.

  Those who rely on them, instead of learning how to properly defend by filing affirmative defenses (and motions explained in a later class) find the foolishness of relying on "too good to be true" defenses.

  Honesty is still the best policy.

  Use affirmative defenses the courts recognize.

  The following are some the courts will not ignore.

Learn them well and use them if the facts allow!

WARNING: Affirmative defenses must be filed with your Answer ... not later!

Absolute immunity means you can't be sued ... *with some exceptions.*

There are *always* exceptions.

Certain officers and government employees enjoy "absolute immunity", a rock-solid affirmative defense to lawsuits brought against them arising from actions taken *within the scope of their authority.*

If the Sheriff's deputy stops you on a busy street where you were driving recklessly at high speeds and delays you from making an appointment at your hair dresser, you can sue, *but you will not win!*

If the same deputy yanks open the door of your car with a malicious grin, clamps an iron grip on your left ankle, drags you forcefully across a parking lot with your head banging against the pavement, clamps handcuffs on your wrists so tightly your fingers turn blue from lack of blood flow, then stomps on your stomach before shoving you angrily into the back seat of his squad car, banging your head so hard against the door frame you can no longer remember the names of your own children, you *may* have a lawsuit that will defeat his immunity ... *if you can prove he acted outside the scope of his lawful authority.*

Individuals seldom have "absolute immunity".

You can't get vaccinated for it at your doctor's office.

Officers and government employees have it by default ... *with exceptions.* So long as acts of an officer or government employee

(e.g., judge, prosecutor, Sheriff, senator, mayor, or county commissioner) act lawfully within the scope of their delegated authority, this affirmative defense protects them *absolutely* from lawsuits brought by disgruntled people disappointed with the "official acts" of those officers or employees.

The hole lies in whether and to what extent an officer or employee was just "doing his job" or whether he was acting "on his own", perhaps out of malice or gross negligence. The hole is clouded over with a grey fog of uncertainty in most cases.

The immunity only disappears when it's crystal clear that the events giving rise to the lawsuit were beyond the scope of delegated authority. The officer or government employee may then be sued as an individual, stripped of the cloak and badge of his office - *just like anyone else*.

Don't simply list the "name" of your affirmative defenses, as many foolish lawyers do (not having the benefit of this course). Do as you do when filing a complaint. Separate the defenses as you do with counts in a complaint and allege all ultimate facts necessary to establish each essential element of every defense. This is the powerful way to defend!

If a judge, for example, enters an unpleasant order against you, there are remedies our law provides. Appeals or motions can be filed in an attempt to set aside the order. If the judge acts within the law (even if you disagree with the judge *and* the law) the judge is absolutely immune from a lawsuit challenging his ruling.

On the other hand, if a judge intentionally violates the law (and you can prove it), the judge has stepped outside the protection of his authority. He no longer has immunity. You can sue him and win ... *if*

you can prove he acted outside the scope of his authority. This is a heavy burden. In most cases you must prove the judge acted invidiously, i.e., with unlawful intent to harm you. This is akin to criminal intent, not mere negligence or stupidity. Otherwise, if judges were exposed to lawsuits every time they made a ruling that disgruntled one of the parties, no one would agree to sit as judge and be exposed to the public's attacks!

Elements

1. Defendant is a government agent or employee.
2. Defendant is insulated from suit by a valid immunity.
3. Defendant acted within the scope of his authority relevant to all allegations of the complaint.

An accord arises where two parties agree to settle some prior existing debt by the substitution of performance different from the original obligation.

A strange fellow with camera and sunglasses promises to sell his dancing bull to a circus owner for $200.

The circus owner ponies up the $200, and the little guy pockets the cash.

After delivery of the bull, the circus owner discovers the big brown fellow can only juggle bowling pins and cannot really dance, other than to shuffle back and forth a bit if someone whistles a catchy tune.

If the short guy with the camera and sunglasses offers the circus owner his camera in place of the clumsy-footed bull, we say the parties reached an accord.

If the camera is delivered to the circus owner, and the circus owner accepts, we say the accord has been satisfied.

If the circus owner later wishes to sue, the strange little guy in the sunglasses has this defense.

While it's true the original agreement was a dancing bull for $200, that agreement was replaced by a new agreement (sometimes called a novation).

The old agreement is as if it never existed ... *since it was replaced by the substitute.*

The accord and satisfaction erase the former obligation.

Think of it as a compromise.

Performance of the second offer satisfies the first.

This is only true, however, if there is first an accord.

If the circus owner demands the strange little man's sunglasses *and* camera, and the strange little man refuses to part with his shades but continues to offer the camera, there is no accord.

If there is no accord, there can be no accord and satisfaction, of course.

For an accord to take place in the first place, the parties must agree to substitution in lieu of the initial promise.

The little guy with the bull and clever sense of humor cannot unilaterally deliver his camera *or* his sunglasses to discharge his debt for the $200 received, unless the circus owner agrees to accept the substitute.

If a creditor accepts a debtor's substitute promise, and debtor faithfully performs the substitute, the creditor loses his right to sue.

There's been an accord and satisfaction discharging the original debt.

If a debtor is sued by a creditor after reaching an accord and performing the substitute in satisfaction, he can file this affirmative defense with his answer to the complaint and, if he's able to prove the accord and satisfaction (i.e., the creditor agreed to take the substitute and the debtor delivered the substitute) then debtor is absolved of liability on the debt.

Elements

For a defendant to adequately plead the defense of accord and satisfaction, he must allege ultimate facts sufficient to establish the following essential elements:

1. Existence of a pre-existing dispute over an enforceable obligation.
2. Both parties intended to settle their dispute by entering into a substitute agreement.
3. Both parties acted in accordance with the substitute agreement, i.e., the defendant tendered and plaintiff accepted the agreed upon substitute performance.

If all three factual elements of this defense are proven to exist, defendant's obligation should be discharged and plaintiff's case is defeated on defendant's motion supported by evidence of the accord and its satisfaction.

Comments

In order to comprise a complete defense, the agreed upon performance must *fully* discharge the pre-existing obligation.

Partial satisfaction is no defense.

This may be used if a natural disaster, such as extreme weather conditions or similar event beyond the control of defendant, makes performance impossible.

An act of God is any event beyond the reach of human control:

- Tornado
- Earthquake
- Hurricane
- Flood
- Volcano
- Avalanche
- Giant asteroid crashing into Earth.

If the act of God (sometimes referred to as *force majeure)* prevents defendant from performing some obligation, this defense can affirmatively protect him from various claims.

For example, if an avalanche *absolutely* prevents defendant from performing some contractual obligation, the court should excuse his performance. [See affirmative defense of "impossibility" below.]

If a lava flow from a recently erupted volcano prevents defendant from delivering goods to a distant city on schedule, the court should excuse his performance.

On the other hand, if defendant could have gotten past the lava flow

but elected to pull off the road for a few hours to watch the pyrotechnic display, his delay was not *absolutely* caused by an event beyond his control. The court will not excuse his tardiness.

The defense is available *only* when non-performance is beyond defendant's *reasonable* ability to cure.

Which raises the issue of "reasonableness" again.

It is not reasonable to require defendant to put on his asbestos shoes and sprint across the glowing molten rock to make his delivery on time! Reasonableness introduces the grey area of fact-finding and evidence-weighing that goes to the heart of every case in court.

This defense works only if all essential elements are present.

Elements

1. Defendant acted reasonably, and
2. Defendant was *absolutely* prevented from performing by an act of God.

On the other side of the proverbial coin, if defendant is accused of causing damages that were, in fact, caused by an act of God, this defense applies to insulate defendant from plaintiff's claims.

In any case where an act of God is involved in the essential facts *and* defendant can show by admissible evidence he acted reasonably, this defense may be available.

Many causes on which a court can grant relief require defendant to

be in the presence of plaintiff or plaintiff's property at the time of events giving rise to the cause.

For example, a complaint for assault requires plaintiff to allege and prove defendant threatened plaintiff with physical harm at at time when defendant had the *present ability to do so.*

And, of course, a complaint for battery requires plaintiff to allege and prove defendant actually touched plaintiff.

Finally, a claim for theft or conversion, for example, requires plaintiff to allege and prove defendant was at the place where plaintiff's property was located when the theft or conversion took place.

These claims cannot prevail if defendant can establish he was somewhere else at the time.

Elements

1. Plaintiff's claim is based on defendant acting in the presence of plaintiff or plaintiff's property.
2. Defendant was somewhere else at the time.

   Suppose plaintiff was in Cincinnati when he claims defendant battered him. If defendant can show he was 4,135 miles away in Paris at a convention of art dealers, he wins.

   You can't batter someone on the other side of the planet (unless you use a remote-control robot or hire a thug to do the job for you).

   If a dispute is submitted to arbitration, and arbitration results in an award, this defense prevents the losing party from succeeding with a subsequent lawsuit based on the same facts and issues.

   Arbitration judgments are usually final.

The loser can't force the winner into court for another bite at the apple ... unless the loser can prove some material fraud in the arbitration proceedings.

First - The dispute must be legally subject to arbitration. If arbitration was not, in the first place, legally required, the arbitration award may be set aside by the court in a subsequent lawsuit challenging the arbitration.

Many giant companies intimidate people into agreeing to arbitration *after the fact*. Unless there is a pre-existing legal basis for requiring arbitration, either party reserves the right to take his dispute to court.

The basis for requiring arbitration may be in a contract, it may arise as a matter of law, or it may be ordered by a court in certain circumstances.

If there is no basis for arbitration in contract or law, one is *not* compelled to arbitrate but may, instead, go directly to court.

Second - The dispute must, in fact, be submitted to arbitration. The arbitration must proceed in accordance with the arbitration rules. The arbitrator must be properly authorized. There must be a final decision.

A failed arbitration, obviously, does not give rise to this defense.

If a dispute is properly submitted for arbitration before an authorized arbitrator, and an arbitration award is properly reached without fraud or undue influence, the dispute is settled. Thereafter, if the disgruntled loser brings a lawsuit to re-liitgate the same facts or issues, the case will be dismissed if defendant files *and proves the essential elements* of this defense.

Elements

1. Dispute was lawfully subject to arbitration.
2. Dispute was duly submitted for arbitration.
3. An arbitration award was made in accordance with the rules of arbitration.
4. No fraud or undue influence materially affected the decision.

If you hire a lawyer to file paperwork and appear for you in court, and the facts support this defense so the case should never have been filed against you in the first place, be certain your lawyer moves the court for an order awarding you all your court costs and attorney's fees *and sets the motion for hearing to get it ruled upon at once so you don't have to pay your lawyer*.

Don't simply list the "name" of your affirmative defenses, as many foolish lawyers do (not having the benefit of this course). Do as you do when filing a complaint. Separate the defenses as you do with counts in a complaint and allege all ultimate facts necessary to establish each essential element of every defense. This is the powerful way to defend!

State in your defense:

- when arbitration was held,
- where it was held,
- before whom it was held,
- that the rules were followed, and
- that an award was properly granted.

Finally, attach a *certified* copy of the arbitration award!

Some activities are so inherently dangerous, our courts allow a defense against plaintiffs who voluntarily participate.

For example, if plaintiff expressly assumes the risk of sky-diving, the courts will (if defendant pleads the affirmative defense of "assumption of risk") deem that plaintiff "knew or should have known" the inherent risk involved in the sport. Plaintiff will be treated as having voluntarily waived the right to sue for damages resulting from a broken ankle or other injury resulting from this foreseeably dangerous activity.

However, if the jump school staff packs a chute negligently and injury results, this defense disappears, because it was not "reasonably foreseeable" that dirty laundry would fill the skies when plaintiff pulled the ripcord on his way down.

The defense lies *only* where a reasonable person should recognize the foreseeable danger.

This defense protects defendants from lawsuits resulting from losses resulting from any activity that threatens foreseeable damages, provided plaintiff's damages result from factors common to the activity.

Bungee-jumping, kick-boxing, and horseback-riding are all activities courts deem to have foreseeable adverse consequences that a reasonable person knows about or *should* know about - so the defense of assumption of risk will prevent judgment for resulting injuries.

Elements

1. Plaintiff elected to participate in an activity inherently dangerous.
2. Defendant did not act negligently.
3. Plaintiff's injuries were reasonably foreseeable.

   The defense disappears where defendant acts negligently.

   If a riding stable puts newbie riders on cantankerous stallions known to delight in throwing people off their back, or a bungee-jump operator fails to replace his worn-out rubber-bands, the defense will not apply.

   Several states have enacted statutes to specifically protect riding stable operators, provided the stable acts with reasonable care to prevent *foreseeable* injury to its riders.

   Contact sports like soccer, football, karate and other martial arts disciplines, basketball, and any competition involving foreseeable risk of serious injury is included in the ambit of this defense, IF injury results *and plaintiff knew or should have known the risk*.

   If the risk is hidden or unknown, the defense does not apply.

   Plaintiff need not sign a paper acknowledging risk (though, of course, this creates a stronger defense for potential defendants). If a court can infer from facts presented that plaintiff "knew or should have known" the severity of foreseeable risk and proceeded to participate without regard for the risk, the requirements for this defense are met.

   Assumption of risk may not be a complete bar to plaintiff's recovery. The case may turn on whether and to what degree plaintiff assumed the *entire* risk and whether and to what degree the defendant is

partially responsible.

See also comparative negligence and contributory negligence in this class.

This is another name for "duress". Please see discussion of duress below.

Plaintiff is often partially responsible for his own damages.

Where this is true, plaintiff cannot recover that portion of damages caused by himself.

He is said to be comparatively negligent.

The court uses a *balancing* test to determine who is most negligent and apportions damages accordingly.

The doctrine of comparative negligence is not recognized in all states. Consult your local statutes and appellate decisions that control your trial court.

If plaintiff runs a stop sign and is hit by defendant's truck traveling 120 mph, *both* parties are somewhat responsible for plaintiff's injuries.

Plaintiff for running the stop sign.

Defendant for speeding.

Elements

1. Plaintiff was at least partially responsible for his damages.
2. But for plaintiff's own action, plaintiff would have suffered no

damages.

3. Defendant should be held responsible for only that portion of plaintiff's damages proximately resulting from defendant's sole action.

   Under common law doctrine of "contributory negligence" [Please read about contributory negligence below.] a plaintiff whose own wrong was the proximate cause of his injury was barred from recovering, even if defendant was partially negligent.

   A fellow who injures his head when his wagon hits a log in the road might sue the person who caused the log to be in the way.

   However another doctrine of common law says each of us has a responsibility to "look where we're going".

   So, if plaintiff wasn't looking where he was going (and defendant can *prove* this) then under the common law doctrine of "contributory negligence" the negligent plaintiff could not recover, even if defendant was himself negligent.

   However, under comparative negligence doctrine (adopted by many states in abrogation of common law, i.e., in spite of common law) the courts apply a "but for" analysis and apportion damages accordingly.

   But for plaintiff's own negligence, the injury would never have occurred.

   However, but for defendant's negligence, the injury also would not have occurred.

   The court decides the degree of the parties' respective negligence and applies this factor as a percentage to determine the amount of harm caused by defendant alone and, consequently, the amount of

money (if any) to be awarded to plaintiff.

Consider the plaintiff who wasn't wearing a seatbelt at the time of an accident. He sues for money damages resulting from his injuries. Using the "but for" test, the court can conclude that *but for* his failure to wear a seatbelt, his injuries would not have been so severe as those for which he has brought his lawsuit. Or, even, had it not been for his failure to use the seatbelt he would have suffered no injuries at all. The amount of his recovery will be reduced (under the comparative negligence doctrine) by that part of the injury resulting from his own negligence.

In many jurisdictions, violation of any statutory proscription that causes or tends to contribute to a plaintiff's injury (such as failure to wear a seatbelt) raises this defense and may be an absolute bar to recovery.

If defendant raises this affirmative defense, he puts the issue of the plaintiff's own negligence squarely before the court. The court must then decide how much or to what degree plaintiff's negligence caused plaintiff's injury and reduce the award - or eliminate it entirely.

If both are equally at fault, plaintiff's recovery will be reduced by one-half.

See also contributory negligence below.

This affirmative defense applies in many different types of cases.

It arises where a plaintiff attempts to sue for damages resulting from an act to which he knowingly and intelligently consented.

For example, one cannot succeed with a lawsuit for conversion of a bicycle, if plaintiff gave defendant permission to use the bicycle.

The claim known as conversion requires that defendant take possession of plaintiff's property without permission.

A lawsuit founded in conversion, therefore, will not succeed if defendant pleads and proves the affirmative defense of consent. This is true even where plaintiff gave only temporary permission and defendant continued to hold the property beyond the date when it was requested to be returned. Plaintiff may have a claim for breach of contract, however he cannot prevail with a claim for conversion if he gave his consent to defendant's "taking possession".

If a patient submits to surgery, after reading and signing a consent form clearly explaining risks inherent in the operation, the patient cannot prevail with a lawsuit for damages that result from those specified risks, if the surgeon files the affirmative defense of consent, unless patient can prove he was in in a drug-induced state or otherwise suffering from some debilitation that impaired his understanding at the time he read and signed the consent form.

If plaintiff's consent is not "informed consent", the defense fails.

One cannot legally "consent" to something about which he has limited or false knowledge.

Consent courts recognize is "knowing and intelligent".

A drunk or drugged individual lacks legal capacity to consent, as does a child or person suffering from mental defect.

Elements

- Plaintiff's consent was voluntary,
- Plaintiff's consent was informed, and
- Plaintiff's consent was identified to specific risk rather than general.

General consent may lack sufficient specificity to create a legal defense. Simply knowing some risk may be inherent does not sufficiently identify the risks so plaintiff has actual knowledge of the risk, rather than a mere vague understanding.

If you allow someone to paint your house pink, and later decide to sue because you don't like pink, the affirmative defense of consent will lie to protect the painter. If the painter *alleges all ultimate facts necessary to establish the defense and subsequently proves all those facts by the greater weight of admissible evidence*, the painter will be protected from plaintiff's complaint, because plaintiff consented to having a pink house.

Consent is an absolute defense against plaintiffs who *knowingly* and *intelligently* agree to be exposed to a circumstance that later causes them injury.

If plaintiff negligently contributes to the event giving rise to his claim, defendant may have this affirmative defense.

The defense erases defendant's liability for damages the plaintiff was partially responsible for causing.

The doctrine derives from common law, but is abrogated in many jurisdictions (replaced by statute and/or case law). Many jurisdictions prefer comparative negligence (see above) where both parties are partially responsible for the injuries complained of, and damages are apportioned between the parties accordingly.

For example, a newspaper-reading jay-walker voluntarily exposes himself to being run over by a passing vehicle. His own action *contributes* to his injury. He may, in fact, be the *sole cause* of his injury so, under this doctrine, he will be barred from recovering in court.

The first test is whether the plaintiff's own act was the *proximate cause* of his injury.

The court applies a "but for" analysis.

If it is shown that *but for* plaintiff's own act the injury would not have occurred, then this defense results in plaintiff's getting nothing!

Consider the young fellow reading a newspaper as he steps off the curb. If he looked both ways before stepping off the curb, he'd have no injury at all. No injury to complain about.

In such cases this defense may be an absolute bar to recovering damages.

Now consider a defendant who lives in one of those states where an annual vehicle inspection is required. Suppose defendant's brakes were bad, and he failed to have his vehicle inspected when inspection was due. Suppose that *but for* his bad brakes he could have stopped in time to avoid hitting the negligent newspaper-reading jay-walker.

What then?

How does the defense apply when *both* parties are partially responsible?

Different jurisdictions treat this defense differently.

Historically, if *but for* plaintiff's act there would be no injury, even if defendant contributed in some way (like not having his brakes inspected) the defense was an absolute bar to plaintiff's recovery.

This harsh rule has been replaced with a "comparative negligence" doctrine that apportions injury between the parties when actions of *both* contributed to the injury. [See comparative negligence above.]

In some jurisdictions, these two defenses overlap.

As with all complaints and defenses in this course, always consult current statutes and appellate court decisions before relying on legal doctrines subject to occasional revision.

The better rule is for contributory negligence to act as an absolute bar *only* where plaintiff was the sole cause of his own injury. When defendant's acts in no way contributed to plaintiff's injury, or plaintiff had within his power and control the ability to avoid injury through plaintiff's own reasonable exercise of due diligence and reasonable care, this defense should be an absolute bar to plaintiff's recovery.

On the other hand, if plaintiff's exercise of due diligence and reasonable care could *not* have prevented plaintiff's injury, this defense does *not* bar recovery.

Elements

1. Plaintiff was at least partially responsible for his damages.
2. But for plaintiff's own action, plaintiff would have suffered no damages.
3. Defendant should be held responsible for only that portion of plaintiff's damages proximately resulting from defendant's sole action.

   Where defendant's act contributes even *partially* to plaintiff's injuries, courts in nearly all jurisdictions apply comparative negligence, resulting in apportionment of fault (and therefore apportionment of money damages). This, of course, is measured in accordance with the degree to which plaintiff's acts directly or indirectly caused his own injury.

If a creditor files a lawsuit to collect a debt that's been discharged in bankruptcy, the defendant need only file this affirmative defense, alleging all ultimate facts necessary to establish the essential elements and attaching a *certified* copy of the bankruptcy petition *and* the order of discharge.

Case closed.

Failure to file a *certified* copy of the bankruptcy petition *and* the bankruptcy court's discharge order falls short of the mark.

The bankruptcy petition should list the creditor from whom protection was sought.

The order of discharge will show conclusively that bankruptcy protection was granted.

A common bankruptcy error is not listing all the debtor's creditors in the petition. Unless a creditor is listed in the petition, the debt will not be discharged.

Only those debts listed in the petition are discharged.

Therefore, if you're sued by a creditor, but your debt has been discharged in bankruptcy, file this affirmative defense along with *certified* copies alleging the ultimate facts necessary to establish the essential elements of this defense.

Elements

- Debtor/defendant at one time owed the debt to creditor/plaintiff
- Creditor and debtor's debt were listed in the bankruptcy petition
- The debt to plaintiff was discharged by a bankruptcy court order.

Once discharged, the debt is forever barred.

Once discharged, all lawsuits brought to collect such a debt will fail.

Duress is a cause of action and a defense.

It arises where one person "forces" another to take some action damaging to himself in circumstances that allowed no other reasonable course.Â

Coercion is not a proper way to get others to do things, and if one party coerces another to do something injurious to the other, then the injured party has a cause of action for duress to recover his damages.

If, on the other hand, one is coerced into signing a contract, for example, and the person coercing sues the person coerced for breach of contract, then the person sued has the defense of duress.

As a defense, then, duress provides an opportunity to argue one should not be bound by a contract he was coerced into signing or by an act he was coerced into performing.

The fact issue before the court in such cases is whether and to what extent the power of duress was irresistible. The court will decide whether the party coerced had alternative choices by which he might have avoided the result.

For example, if one says to the other, "I won't go to the prom with you unless you sign this contract," that's not sufficient grounds for coercion. In the first place, there are alternatives, like not going to the prom with that person. Who'd want to, anyway?

On the other hand, if one says to another, while pointing a loaded

.38 revolver to the other's head, "Sign zee paper, old man!" duress is available as a defense if the pistol-weilding plaintiff dares sue to enforce the contract he obtained by duress. The coerced defendant will have this defense and prevail *if* he can prove he had no alternative by which he could avoid being shot!

The dividing line between these two extremes is somewhere in the middle.

Where is the issue for the court to decide?

Elements

1. Defendant involuntarily responded to threatening demands of plaintiff.
2. The threatened harm was imminent and unavoidable.
3. Defendant had no reasonable alternative.
4. Plaintiff is now suing to compel defendant to fulfill obligations obtained by plaintiff's threat.

Note the word "reasonable" in the second element.

An old man coerced at gunpoint could disarm his assailant by picking up a chair and beating his tormentor senseless. But, our courts refuse to require such "unreasonable" alternatives.

Coercion must be real, imminent, and reasonably unavoidable.

Comments

If a party claims he was coerced into signing a contract during a long-distance telephone call from another 500 miles away threatening to punch him in the nose, the court will deny this

defense, because the allegedly threatened party had reasonable alternatives. The threat was not imminent. The threatened party could notify police. The threatened party could take any of several alternative courses to avoid being punched in the nose.

If a plaintiff can show the court that defendant acted out of his own will, i.e., the act did not result from threat, the party alleging to have acted under duress loses his defense.

The defense lies only where the act was involuntary and compelled by imminent threat.

Duress is similar to undue influence, another cause of action arising where free will of an individual has been overcome by influence of another. See "Undue Influence" below for details on this related cause of action.

Duress is like coercion.

Both are defenses to a lawsuit where defendant's alleged wrongful acts resulted from threat or force.

Physical force suffices, e.g., a gun to the head.

Threat of harm to one's family suffices.

Threat of damage to one's business or reputation suffices.

Imagined or impossible threats will not suffice.

Some courts recognize the defense when a person is so strapped financially that his freedom of choice is unjustly limited, i.e., he simply "can't say no". Such a defense, of course, is harder to establish, since a reasonable person might conclude there were

reasonable alternatives. Of course that judgment depends on one's viewpoint, i.e., whether one knows what it's like to be on the brink of bankruptcy.

It is not a proper way to get others to do things.

Our courts frown on it.

See defense of coercion above for more.

The economic loss rule is an affirmative defense (in many jurisdictions) preventing plaintiffs from double-dipping for damages where both negligence and breach of contract are claimed.

Knowing when it applies and when it does not is key to understanding this defense.

Plaintiffs often file complaints for breach of contract and for negligence in performance of the terms of the underlying contract. If successful, on both counts, however, plaintiff might be over-compensated by double-dipping. The economic loss rule prevents plaintiffs from collecting for both types of damages in the same lawsuit *in certain situations*.

A Florida strawberry farmer sued a chemical company when a batch of fertilizer turned out to be herbicide. The bags were mislabeled. The herbicide killed acres of strawberry plants.

The farmer included a count for breach of contract and another for negligence.

Since the farmer contracted for fertilizer and received herbicide instead, he sued for breach of contract.

Since negligence was the only explanation how plant-killing herbicide could end up in bags marked "fertilizer", the farmer also

sued for negligence.

The farmer won on both counts.

The economic loss rule did not apply.

Distinguish this first case with another.

A farmer sued a tractor manufacturer for breach of contract and negligence when a faultily designed part on the tractor caused the tractor to fail. As a result the farmer couldn't get his crops in on time and lost money.

The court said the bargained-for consideration was a tractor, *not crops safely gathered into a barn*.

When the bad part caused the tractor to fail, only the tractor was damaged by defendant's negligence ... not the farmer's crops (as was the case with the poisoned strawberries).

The contract for a working tractor was breached by delivery of a faulty tractor, so the farmer won his breach of contract count.

However, the negligence in the tractor did not *proximately* cause crop damage. The farmer was not permitted to recover for negligence. The damages caused by negligence did not result in loss of property *other* than the tractor.

To allow the farmer to recover for breach of contract to deliver a functioning tractor *and* for negligence that damaged *only* the tractor would result in double-dipping. The court restricted the farmer's

recovery to breach of contract and denied the negligence count.

The economic loss rule barred recovery for lost crops resulting solely from a faulty tractor, since the farmer bargained *only* for a working tractor, not crops safely in the barn.

In the first case, a negligently delivered chemical damaged *other* property. The economic loss rule did not prevent recovery for both breach of contract *and* damages resulting from bone-headed negligence that packed herbicide in fertilizer bags that damaged *other property.*

The key to when the Economic Loss Rule defense may apply is when damage due to negligence results in damage to *other* property, i.e., property other than what was bargained for in the contract.

In the second case, a negligently manufactured tractor damaged *only* itself, not the farmer's crops.

When one is prevented from enjoying the benefit of a contract by negligence that only affects the thing bargained for, recovery must be by breach of contract alone.

You cannot double-dip.

When negligently labeled "fertilizer" destroyed fields of strawberries, the farmer was awarded damages for breach of his contract (he paid for fertilizer and was entitled to recover the cost of that fertilizer under breach of contract) and he was awarded damages for the negligent delivery of herbicide labeled as harmless fertilizer (he was entitled to recover the value of his lost crop, since he did not bargain for herbicide).

Both contract and negligence law may be used to get damages if

something *other* than the bargained-for thing is damaged by defendant's negligence.

In its most fundamental form, estoppel arises where one party leads another to believe some fact, the second party reasonably relies on the fact, then the first party changes position and seeks to stand on a different fact.

The courts say the first party is stuck with the first fact.

He is said to be *estopped* to deny the initial fact.

The second party is permitted to rely on the fact initially presented by the first party.

If plaintiff balloon operator leads defendant to believe the fee for a balloon ride will be $60, yet once the balloon sets down the balloon operator demands $75 from his passenger defendant, then if the balloon operator sues defendant for the difference of $15, the defendant has an estoppel defense.

The plaintiff is estopped, and defendant may rely on plaintiff's initial statement of fact.

A party may estop himself by words or conduct.

Having set upon some particular course of action that leads another to reasonably believe a set of facts, a party may not change his position if doing so would cause unjust damage to another.

He is estopped to do so.

Consider a grove owner who contracts with a truck driver to deliver grapefruit. Suppose the grove owner refuses to provide the truck driver with grapefruit to deliver. The grove owner cannot successfully sue the truck driver for loss of customers who didn't get

grapefruit when it was the grove owner, himself, who prevented delivery.

He is estopped.

The second party must *reasonably* rely on the words or acts of the first party.

Further, for the estoppel doctrine to apply, the first party's change of position must threaten to cause an unjust or inequitable burden on the second party.

When these elements exist, the affirmative defense of estoppel will lie to protect the second party from the consequence of relying on acts or words of the first party who subsequently chooses to change his position by some fact contrary to what was presented at the beginning.

Estoppel is related to the defense of *res judicata* (the thing has been ruled upon), wherein parties are bound by a previous court decision as to certain facts that one of the parties wishes to re-litigate.

The party wishing another bite at the apple, so to speak, is estopped.

Similarly, the defense of laches stands on estoppel principles, since plaintiff is estopped to delay bringing his case. [See defense of laches below.]

The defense of estoppel exists in equity to protect one who relies on some set of facts present or past that are communicated or demonstrated by acts or words of another.

Elements

1. Estopped party knew or ought to know the facts communicated or

demonstrated were not true or were subject to be changed,

2. Estopped party intentionally or negligently caused another to reasonably rely on those facts,
3. Estopped party subsequently seeks to assert a different set of facts that would cause an unjust result.

Estoppel relates to facts present or past.

Promissory estoppel relates to future facts and applies when one person tries to withdraw or alter a promise made to another who justifiably relied on the initial promise to his detriment.

Even if there is no enforceable contract, our courts enforce such promises to protect parties who *detrimentally rely* on the dishonesty of crooked promissors who knew or should have known the promised facts were false or likely to be altered.

This doctrine is sometimes also called "detrimental reliance".

This affirmative defense is useful in breach of contract cases where plaintiff claims defendant failed to uphold his end of a bargain.

Suppose you hire a fellow to mow your lawn every Tuesday while you're away on vacation. You promise to pay $50 for each mowing (it's a big lawn). You give him $200 up front (enough for 4 weeks of mowing) and leave for your long-awaited trip.

When you return three months later you discover weeds have taken over. The city has fined you $500 for not tending to your landscaping.

So, you sue the lawn guy for damages, including the $500 fine.

If defendant is on his legal toes, he'll file the defense of "failure of consideration". He will allege sufficient ultimate facts to establish the

essential elements of the defense, including the fact that he mowed four times on successive Tuesdays, but you were gone longer than four weeks. He was only paid for four weeks.

A contract is only enforceable by plaintiff if plaintiff performs his part of the bargain.

Failure of consideration is fatal to the contract ... and to the case.

Consideration may be money, services, or goods - anything bargained-for that goes to the heart of the agreement contemplated by both parties to a contract.

If one side fails to provide the consideration he promised, he cannot successfully sue for damages on the contract if defendant raises this defense and proves the essential facts.

In some jurisdictions, failure to demand may be an affirmative defense.

For example, the elements for breach of contract are

1. existence of an enforceable contract,
2. an act by defendant in breach of the contract,
3. damages to plaintiff resulting from the breach and,
4. in *some* jurisdictions, a demand for performance before bringing suit.

   In those jurisdictions and causes of action where demand is required, failure to demand is fatal and gives the defendant this affirmative defense.

Another example is conversion, where defendant takes possession of property of plaintiff without lawful authority. In some jurisdictions the courts require the plaintiff to make formal demand for return of the thing taken before filing a lawsuit for conversion.

In such cases, if plaintiff has not made demand, the defendant has this affirmative defense.

Plaintiff's failure to demand becomes a defense when defendant can show he lacked intent to breach the contract or to convert the property and would've promptly returned the property if plaintiff demanded its return.

The defense may also prevail if defendant can convince the court he mistakenly believed he had a lawful right to do as he did.

Very gray area. Check local statutes and appellate decisions that control your trial court before relying on this affirmative defense.

No lawsuit should be permitted to go forward if someone with a vested interest in the outcome is not made a party and allowed to participate.

To proceed without affording that additional interested person an equal opportunity to argue for his or her individual interests isn't fair.

If final judgment cannot be entered without affecting the interests of such an "indispensable party", the outcome may be challenged as unjust.

In such cases, the indispensable party must be joined to the case.

The indispensable party may need to be added as co-defendant or joined as a co-plaintiff.

* Defenses marked with an asterisk should be raised by preliminary

motion *before* filing Answer. All such motions should be set for hearing and argued in court as soon as possible. If a motion fails, defendant should file these as Affirmative Defenses with his Answer.

Not all "necessary" parties are "*indispensable".*

To proceed to judgment without requiring all *indispensable* parties to be joined could result in injustice to the already-joined parties as well as those excluded.

Generally, courts will not dismiss a case simply because all potential plaintiffs have not joined in the fray. Instead they will order the indispensable parties to be joined, if possible.

Courts wish to avoid unnecessary repeat litigation. Failure to join indispensable parties will likely result in just that ... repeat litigation, more costs to the court, more delay for the parties who've already tried their case.

There are times, however, when all potential plaintiffs are not available or are unascertainable, in which case it would be unjust to deny existing plaintiffs their day in court simply because others are not available to participate.

Similarly, there are times when all potential defendants are not available (including those whose interests will be affected by the outcome, even though they are not included in the fray). Again, it would be unjust to deny plaintiffs their day in court against the defendants they can round up, simply because some defendants cannot be found.

A case may involve title to real property. The interests of two or more owners may be affected by the outcome. Yet, perhaps only one owner has been joined to the case. Since the outcome will affect the

rights of all owners not yet joined to the case, courts are unable to enter a truly final judgment without denying due process to the absent owners. In such cases, this defense will prevent the case from proceeding or, at least, delay the proceedings until all possible efforts are made to locate the missing parties.

The issue should be raised first by motion to dismiss before filing an answer and, failing that, should be filed with the answer as an affirmative defense.

In some cases, if it is discovered the absent party is, in fact, *indispensable* for a complete adjudication of the issues, the court may be prohibited from entering final judgment, or its orders may be subject to reversal or remand on appeal.

Some cases require that a bond be posted to protect some interest pending outcome of the proceedings.

Therefore, in such proceedings, failure to post the required bond forms the basis for an affirmative defense.

The requirement of a bond is typical in actions seeking an injunction, because enforcing an injunction before all the facts are in could foreseeably cause injury to an innocent party.

The bond required to protect a potentially innocent defendant is calculated by considering the value of foreseeable damages that might injure defendant, if plaintiff's case fails.

Bonds typically tendered to and held by the clerk of court pending the outcome of such cases.

The court may require plaintiff to post a bond simply to protect defendant from foreseeable injury resulting from an unjust interruption of defendant's life.

Failure to post a bond, where justice demands, gives rise to this defense.

Every cause of action (or claim on which the court can grant relief) must be alleged by stating ultimate facts that establish all essential elements of the cause of action.

It's like listing ingredients for a recipe.

If any ingredient is missing, the recipe is not complete. The court cannot "cook the dish".

* Defenses marked with an asterisk should be raised by preliminary motion *before* filing Answer. All such motions should be set for hearing and argued in court as soon as possible. If a motion fails, defendant should file these as Affirmative Defenses with his Answer.

Failure to state sufficient ultimate facts to establish all essential elements of a cause of action is a defense that first should be asserted by a motion to dismiss "for failure to state a cause of action".

In an action for breach of contract, plaintiff must allege sufficient ultimate facts to establish at least three essential elements:

1. existence of an enforceable contract,
2. an act by defendant breaching the contract, and
3. damages to the plaintiff that proximately result from the breach.

Suppose plaintiff files a lawsuit for breach of contract but fails to allege sufficient *ultimate facts* to establish the third element, i.e., that he suffered damages as a proximate result of the breach. Merely stating plaintiff suffered "damages" is not enough. Plaintiff must allege *"ultimate facts"* that establish all essential elements. For

example, he might allege his strawberry fields were destroyed or that he lost business to a competitor, adding additional ultimate facts as necessary to fully explain how the loss was a proximate result of the breach.

Failure to allege all ultimate facts necessary to establish all essential elements exposes the plaintiff to a motion to dismiss for failure to state a cause of action.

Then, if the court does not dismiss plaintiff's case upon defendant's motion, then defendant should file this affirmative defense with his answer to preserve the issue in his favor.

Merely stating, "The parties entered into a contract, the defendant breached the contract, and plaintiff suffered damages," is not enough.

Fraud as an affirmative defense must be pled with *specificity*.

It's not enough to merely allege the other party is guilty of fraud.

One must spell out fraudulent details with *specificity* so the court and all parties *know* what material misrepresentation was made that gives rise to the alleged fraud.

In other words, the defensive pleading must be precisely accurate and complete.

Fraud as an affirmative defense depends upon showing plaintiff intentionally misrepresented a material fact that goes to the heart of the claim on which he brings his suit.

The fact plaintiff *is* a fraud, or that plaintiff misrepresented facts other than those related to the lawsuit before the court, has no relation to this defense.

For fraud to support an affirmative defense, circumstances and material facts of the fraud must be pled with *specificity.*

In some jurisdictions, if the requisite allegations are not set out in full, the defense is treated as waived.

General allegations, vague references, or conclusions of fraud fall short.

Fraud must be pleaded with *particularity*.

Suppose plaintiff obtained a contract by making fraudulent claims. Suppose he was selling a house he knew was infested with termites, with a roof that leaked during even the lightest rain, and a furnace that simply didn't work at all. Further suppose he misrepresented these things to a buyer who, reasonably relying on the false statements of seller, entered the deal and used his life savings to make a down payment on that house.

Months later, buyer is late on a payment and seller sues.

Buyer has the defense of fraud.

However, again, if defendant/buyer merely lists "fraud" as an affirmative defense, without alleging in detail the ultimate facts necessary to establish the elements of fraud, his defense is likely to fail.

It's not enough to say, "Seller made material misstatements of fact about the house." The court will require, if the defense is to stand, that defendant's allegations be specific.

Defendant must allege *all* ultimate facts necessary to *specify* fraud, e.g., quoting what seller said and how seller's representations were false and known to be false at the time.

General allegations are insufficient for two reasons.

1. The court may treat the defense as waived.
2. The plaintiff has a right to know the facts of the defense.

A defendant who fails to allege sufficient ultimate facts in defense is like a plaintiff who fails to allege sufficient ultimate facts in his complaint.

What facts are the respective parties required to prove?

Further, even if the defense is allowed, if defendant fails to allege the facts he needs to prove to win, the playing field can get very muddy very quickly as the plaintiff tries to hide the ball.

Defendants with this defense may also elect to file a counterclaim based on fraud as a cause of action ... which, again, they must plead with *particularity*.

No court process can lawfully enforce the performance of a futile act.

If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order.

It's like trying to get one gear to turn another when the cogs are not meshed. No twisting on one will ever transfer power to the other.

Even if a court order compelled the turning of one gear, the order would be an absolute waste of time and, therefore, contrary to the fair administration of justice and appealable.

No court can compel a futile act.

Therefore a defendant, sued by a plaintiff seeking to enforce a futile act, has this affirmative defense (if a motion to dismiss fails).

Suppose a rancher sues to have his up-stream neighbor break down a dam across a creek, claiming his cattle are being deprived of needed water. If removing the dam will not divert water onto the complaining rancher's property, the court should not enter an order requiring the up-stream neighbor to break the dam. The order would compel a futile act.

A defense raising the issue of futility gives defendant an *affirmative* mechanism to show the court plaintiff's case is all wet.

Circumstances are rare where this defense may apply, yet the defense is tried and true for those threatened by stupid or vengeful plaintiffs having no valid basis for demanding judicial assistance in circumstances where such assistance would be to no avail.

It is a fundamental maxim of justice that the law will not enforce a futile act.

Some jurisdictions have statutory protections to limit the civil liability of persons rendering assistance in "emergency" situations.

These statutes limit liability for those who act with "reasonable care" to assist others in distress. They do *not* limit liability for those who act without reasonable care.

Further, the statute *only* limit liability for those who also do not charge money, i.e., for those who offer their assistance "gratuitously".

He who charges money or demands any value whatever for rendering assistance to another is not protected by the Good Samaritan defense. Such persons are held to the highest standard of duty.

Where such statutes exist, a person gratuitously offering assistance

to another in distress is immune from lawsuits brought by persons claiming they were injured as a result of the gratuitously rendered assistance ... unless the person rendering aid does so without exercising that degree of care expected from reasonable persons.

There must exist an imminent threat of bodily harm or substantial property loss for the defense to take hold.

Officious intermeddling does not constitute a "good Samaritan" deed. If an obvious need is not present, sticking your nose where it isn't wanted will not be protected by this defense.

On the other hand, if you see someone obviously bleeding from an arterial wound pumping bright red blood in giant spurts, immediate assistance is required to save their life. In that circumstance, the Good Samaritan Act (if your state has one) will be an affirmative defense against a lawsuit for damages claimed to result from your attempt to stop the bleeding ... provided you acted with *reasonable* care under the circumstances.

If you attempt to stop the bleeding by jumping up-and-down on the wound, you will not be protected by this defense.

If you tie a tourniquet too tightly, stopping the flow of blood and saving the person's life, but fail to loosen the tourniquet occasionally to prevent cell damage to the affected part, and the damaged person files a lawsuit for damages caused by the too tight tourniquet, you *will* be protected by the Good Samaritan Act - because the degree of care required is only that of a reasonable person, i.e., an average person. You will not be held to the higher standard of that would be required of a medical professional or EMT.

If one has not actually begun to render assistance, regardless of preparatory actions taken by him to do so, the law will not hold him

liable where the assumed duty has not begun.

One is only liable to act with reasonable care *after* he assumes a duty by beginning.

However, once one begins to render assistance, the duty to use reasonable care attaches. The one rendering care cannot abandon the injured person until professional help is on the scene without becoming liable for the consequences. Should he abandon the scene, after beginning to render assistance and before professional help arrives to take over, he may be held liable for all of the wounded person's injuries resulting from his attempts and abandoned efforts.

Assist where you are able to do so, knowing you're immune from suit brought for damages resulting from your *reasonable* exercise of due care. This is the right thing to do.

But! Remember that once you begin you cannot abandon the victim until professional help arrives.

Our courts will not enforce an illegal contract.

Nor will our courts entertain actions by wrongdoers wishing to obtain a benefit from their wrongdoing.

A murderer who poisons his wealthy aunt after discovering he is named as sole beneficiary in her will cannot hope to receive anything from the poor old lady's estate.

It is a general rule!

Take for example a gambling agreement between two parties located in a state that does not allow gambling. If the loser welches, the winner cannot take him to court. The court isn't interested in helping him profit from his illegal activity.

More obvious, suppose Jimmy the Geek hires Three-Fingers McFee to take out the crime boss of another family. Three-Fingers does the job and returns to Jimmy with the victim's right ear as proof. Jimmy refuses to pay (not very clever, of course), so Three-Fingers has no remedy at law. He can put a few holes in Jimmy to get his attention, but he cannot get his money through the courts. Obvious, of course, but it makes the point clearly.

The affirmative defense of illegality provides an absolute bar to a plaintiff seeking to recover in court for loss resulting from an illegal act.

Make a deal outside the law, and you'll have no recourse in the courts.

Seek to recover a gambling debt in court, and this defense will be an absolute bar.

Pay for stolen merchandise, and you'll have no remedy in the courts if the merchandise turns out to be defective. (And, if it's determined that you knew the merchandise is stolen when you received it, you will be exposed to criminal penalties. Makes no sense to go to court over it.)

It is the fruit of a poisoned tree.

The law will not require an impossible act.

If defendant is prevented by some circumstance beyond his control to perform some obligation, and plaintiff sues for damages, this defense will succeed.

The defense arises primarily in contract cases where defendant is sued for failure to perform a promise, but it may apply in other circumstances as well, where defendant was prevented through no

fault of his own.

To be impossible in the eyes of a court, the thing must be *absolutely* impossible.

Climbing a rock face at Yosemite may be incredibly difficult and probably impossible for most of us, but it is not *absolutely* impossible. Some skilled climbers have made it to the top, even grappling under the horizontal outcropping where they hang like spiders crawling on the ceiling of a room. Therefore, since some have accomplished the feat, it is not *absolutely* impossible.

In order for this defense to apply, the act complained of must be *impossible.*

In an old English case we studied in law school, a cargo was commissioned in Singapore to bring tea to England. The ship was lost in a storm, its crew drowned, the cargo ruined. Those expecting to sell the tea and make a profit sued. The courts ruled that the shipper could not be held liable for an impossible act, since the ship was lost. This may not make much sense until we see it was not the ship with which the buyers made their deal but with the shipper. Once it was impossible to deliver the tea, the shipper was absolved of liability using this defense.

Impossibility does not provide a defense if impossibility was reasonably foreseeable by the defendant but not foreseeable by the plaintiff. In other words, if defendant knew he could not perform because of some circumstance beyond his control, yet led plaintiff to believe performance was forthcoming, plaintiff's suit will not be defeated by the impossibility defense.

If impossibility was foreseeable from plaintiff's point of view, however, and not from defendant's point of view, defendant will have

the defense of estoppel. See estoppel above.

If impossibility was not foreseeable by either party, and performance was prevented or delayed by some circumstance beyond defendant's power to control, this defense may remove or at least mitigate defendant's obligation to compensate plaintiff for damages resulting from non-performance.

An ocean front land-owner contracts with a builder to erect a 25-story condominium on his beach property. The builder pulls a permit and begins construction after receiving partial payment to cover costs for the first phase. A few weeks after work begins, the state legislature passes a law stopping all construction of beach front condominiums exceeding 15 stories. Contractor stops work. Land-owner sues.

Because the law created an impossibility beyond contractor's control, this defense will protect the contractor from suit for non-performance - provided contractor did not know in advance of the impending legislation and had no duty to inquire prior to starting construction. Contractor may be entitled to the fair market value of services performed and goods delivered to the jobsite, but probably would be denied recovery of his anticipated profit for a completed job, since he was not allowed to complete.

The land-owner has no recourse against contractor, since the event preventing performance was beyond contractor's control.

The land-owner's only recourse is with the legislature.

Venue is often confused with jurisdiction.

They are two separate things.

Venue is *where* a court sits.

Jurisdiction is *what* the court can decide.

Two very different things!

Improper venue defenses generally don't dispose of cases.

They move them.

* Defenses marked with an asterisk should be raised by preliminary motion *before* filing Answer. All such motions should be set for hearing and argued in court as soon as possible. If a motion fails, defendant should file these as Affirmative Defenses with his Answer.

Venue may be controlled by statute.

It may also be a matter of "where" the events giving rise to the lawsuit took place.

Or, it may be determined by "where" the evidence is, "where" essential witnesses reside, etc.

It is often a matter of convenience, determining "where" a case is most likely to result in a fair and just outcome.

You've no doubt heard of criminal defense lawyers trying to move a case to another town where the defendant, perhaps a surrilous scofflaw, is not so well known and therefore, presumably, likely to have a better chance with an unbiased jury.

The purpose may be in part to conserve judicial economy by not permitting cases to be brought in courts where delays and unnecessary expenses may result because evidence, parties, or events giving rise to the claims are located elsewhere, however the legitimate basis for it is to obtain a just outcome fair to both sides.

Although all state courts have "jurisdiction" to hear every kind of state case throughout the state, venue rules require cases to be filed

only where "venue" is proper.

Failure to file in a proper venue gives rise to a Motion for an Order Changing Venue. Such motions almost always succeed.

For example, a Miami plaintiff will not succeed with a lawsuit filed in Dade County against a Fort Lauderdale resident (Broward County) if the Miamian's damages occurred in Broward County - even though the two cities are less than 30 miles apart and virtually one metropolis - becauses Dade County is not a proper venue such cases.

To require the Fort Lauderdale resident to come to Miami to defend would unduly prejudice him, delay proceedings, and increase the cost to taxpayers.

Improper venue frustrates the efficient administration of justice.

It also creates a prejudicial burden on the defendant.

In general, venue is proper in the county where defendant resides (or, if a corporation, where it has an office for customary business), where events giving rise to the claim (cause of action) accrued, or where property involved in the litigation is located.

A defendant sued in an improper venue should first move to have the case dismissed or transferred and, failing that, should preserve this issue by filing this affirmative defense with his answer.

When one employee is injured by another employee of the same

employer, this defense protects the employer from liability *if employer did not contribute in any way to the injury.*

Where employer puts employees in places where work exposes employees to hazards they cannot avoid by using reasonable care, the employer has a duty to warn his employees and provide sufficient safety measures to protect them from harm.

If one employee injures another in such a hazardous working environment, and the injury results from the hazard *as opposed to a fellow servant's separate negligence or intentional disregard*, then this defense will *not* protect the employer.

On the other hand, if one employee's negligence or intentional disregard is the proximate cause of another employee's injury, this defense may be available to protect the employer, since the employer literally "had nothing to do with it".

Often, when an employee is injured on the job, the first person to be sued is the employer, because it's presumed the employer has "deep pockets".

If employer fails to require employees to wear goggles, for instance, where eye injury from flying objects is reasonably foreseeable, then if one employee's negligence causes eye injury to another employee resulting from flying objects, employer is *not* protected by this defense.

The measure is always to what extent employer had a duty to prevent his employee's injury.

If employer has a duty, employer remains liable.

If employer "had nothing to do with it", i.e., had no knowledge of a foreseable injury and in all other respects provided well for his

employees' safety, then if one employee injures another employee this defense will protect the employer from liability.

The defense of "insufficiency of process" arises when the clerk's summons attached to the copy of the complaint is defective

The summons and complaint are called the court's "process".

If the process is insufficient in some regard, the court never has jurisdiction over the person served - even if they *do* receive the summons and copy of the complaint.

If the summons has not been signed by a court officer, for example, or if a copy of the complaint was not attached to the summons when served, the process is insufficient to confer jurisdictional power on the court.

Insufficiency of process is a weak link in the chain that ties defendant to court power. If the process is insufficient, the court has not yet acquired jurisdiction over the defendant, and any orders entered in the case against the defendant are void *ab initio* ... i.e., from the outset.

This defense does *not* arise when a party has not yet been served with a summons and copy of the complaint. That defense is called insufficiency of *service* of process. See below.

When one is served with improper process, he has a duty to assert his defense. He cannot choose to believe he is free to ignore the service. Many people make this mistake ... and lose. The technicality they rely upon is ignored by the courts. One cannot wait until the court enters judgment, by default or otherwise, and then make the argument that proper service was never effected.

* Defenses marked with an asterisk should be raised by preliminary

motion *before* filing Answer. All such motions should be set for hearing and argued in court as soon as possible. If a motion fails, defendant should file these as Affirmative Defenses with his Answer.

Once defendant knows a lawsuit has been filed against him, he must take *affirmative* action to participate or he will be deemed to have waived his defenses.

Ignoring service brings certain disaster.

The defense will be waived if the court determines the process served

1. substantially complies with the rule and
2. defendant is not prejudiced by the alleged defect

This defense arises when *service* of process (not the process itself) fails.

The purpose of process is to put the defendant on notice that

1. defendant has been sued,
2. what the suit is about, and
3. failure to respond before the deadline stated in the summons will result in the court entering default judgment against defendant and, in some cases, issuance of a warrant for defendant's arrest.

Suppose plaintiff uses mail to deliver the summons and copy of complaint, and the rules in effect require service by other means (e.g., service by a Sheriff's deputy or process server specially authorized by the court to serve process on defendants).

The process itself may be good, but *service* may be insufficient to give defendant "actual notice" that he's been served.

In such cases, the court never acquires jurisdiction over the defendant.

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Suppose a process server delivers service to the wrong person at the wrong address. Process is fine. All the papers are in proper order, duly signed, etc. If the defendant has been served, he would be on notice that a lawsuit was filed against him and that failure to respond would result in default.

But, the defendant was *not* served.

The service of process was insufficient.

Or, if process is served by someone who's not duly authorized to serve process, *service* of process is insufficient.

It is an error to learn of attempted service and attempt to evade service. Hiding from service has serious pitfalls. Most jurisdictions hold that once a defendant has *actual knowledge* that a lawsuit has been filed against him, he must appear to defend or be found in default ... even when service was insufficient. See the discussion above under insufficiency of process.

The first response of defendant who learns a lawsuit has been filed but that service was not properly effected should be to file a motion for an order quashing the insufficiently served process or a motion to dismiss for insufficiency of process.

Failing that, he should file this affirmative defense with his answer to preserve the issue.

Of course, once defendant makes an appearance this defect will soon be cured.

If plaintiff sues for an injunction when the wrong he seeks to prevent by an injunction could be fully compensated by an award of money damages, the court should dismiss the action.

Injunctions are only proper where money damages cannot cure the threatened harm. An essential element for an injunction to issue is allegation and proof that money damages alone cannot compensate plaintiff for the threatened harm.

This argument should be raised by a motion to dismiss *before* filing an answer.

Then, if the motion is denied, the defense should be filed with defendant's answer.

If plaintiff has been beaten within an inch of his life, an injunction cannot restore him to the condition he enjoyed before the beating. The best the court can do is award plaintiff money damages to be paid by the defendant.

When an award of money would justly compensate plaintiff for his injuries, the court should not enter an injunction, because there has been no "irreparable harm". If the harm can be cured by money, an injunction is improper.

The decision whether money alone is sufficient to protect plaintiff is not based on whether defendant has sufficient means to satisfy a money judgment. The decision rests squarely on whether money alone would (if money were available) prevent or cure the threatened injury.

If a money amount cannot be calculated that would protect plaintiff

from a threatened injury (as would be the case, for example, if an upstream dam was planned to divert water to a valley different from where plaintiff has his ranch and thirsty cattle, entry of an injunction is proper.

Otherwise, no.

The affirmative defense of laches rests on the idea that one who unreasonably delays pursuing his remedy in court (while witnesses die, evidence dries up, and memories fade) should not be permitted to sue ... even if the statute of limitations has not yet expired.

This defense lies where the plaintiff's intentional delay prejudices the defendant.

Elements

1. A genuine basis for plaintiff's lawsuit, i.e., defendant's acts gave rise to the complaint (otherwise the defense is not necessary),
2. For an unreasonable time before filing suit, plaintiff knew the facts giving rise to his claim,
3. Plaintiff had a reasonable opportunity to file sooner,
4. Plaintiff unreasonably delayed,
5. Defendant did not know plaintiff would file suit sooner or later, and
6. Defendant would be prejudiced if plaintiff is allowed to proceed.

   The question for the court is whether and to what extent plaintiff's delay has weakened defendant's ability to defend.

   If a key defense witness is extremely ill at the time of events giving rise to plaintiff's claim, plaintiff may think to himself, "Old Mrs. Peters may kick off any day now. Why not wait till she's safely out of the

way before I sue Jones?" With Mrs. Peters "safely out of the way", defendant may have a much harder time defending himself. Therefore, if defendant can show the elements listed above, he may avoid the plaintiff's late-filed lawsuit altogether by asserting this defense.

Delay may actually preclude the court from arriving at a just result because the span of time makes it too difficult to find the truth of matters asserted by the respective parties.

In some states a defense of laches will not be heard until the statute of limitations has run. In other states this is not true.

Problems arise when the statute is tolled for one reason or another, i.e., when the clock is stopped. Consult local statutes and case law.

Defenses

Excuse

Once defendant shows the elements of this defense exist, the burden shifts to plaintiff to show his delay in filing suit was reasonable. Perhaps he could not sooner obtain the evidence he needed. Perhaps he knew of the wrong but didn't know the wrongdoer's identity. Under such circumstances, plaintiff may be excused from filing sooner.

Infants

An infant (which term in law generally means anyone younger than the statutory minimum age required to bring suit) is excused from filing suit during the period of his incapacity. However, as soon as he is of age the law imputes to him a duty to timely file an action against

those he claims caused him injury during his minority.

Comments

If laches is not affirmatively pled at the start of a case, it may be deemed waived.

The burden of proving each element of the defense is, of course, on the defendant. In some jurisdictions it must be proved by "clear and convincing evidence" (a higher evidentiary standard than a mere greater weight or predominance of the evidence).

Unlike statutes of limitations that apply to actions in law, laches is a defense in equity that looks behind the scenes, so-to-speak. Laches examines the prejudicial effect of intended delay. Statutes of limitations simply tick off time and mechanically bar suits thereafter. Laches only bars suits when not to do so would threaten an avoidable injustice.

The mere passage of time does not give rise to this defense. Each of the elements must be alleged and proven.

Courts obtain jurisdiction over persons by the service of process. See insufficiency of process and insufficiency of service of process above.

Without jurisdiction over the person, no order of the court can be effective to command such person to do anything whatever. This is sometimes called *in personam* jurisdiction (i.e., jurisdiction over the person).

Service of process alone, however, is not enough.

Suppose an Alabama resident decides to visit the new aquarium in Atlanta. As soon as he enters the Peach State he's hit by a Georgia

driver soaked to the gills in moonshine. Our Alabama fellow suffers substantial damage to his vehicle, and weeks later his throat makes frog-like sounds when he tries to sing Irish folk tunes. He clearly has damages and a right to sue.

But, suppose the injured Alabamian returns home, recovers from his injuries, and decides to sue the Georgia driver in an Alabama court.

Too bad. So sad. Won't work.

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Georgia residents cannot be sued in Alabama's state courts for events occurring entirely within Georgia's borders.

Alabama's state courts have no jurisdiction over the person of Georgia residents, unless they cause harm *within* Alabama.

A motion to dismiss for lack of jurisdiction over the person should be filed and, if that motion fails, this affirmative defense should be filed with the answer to preserve the issue.

If a Georgia resident causes injury in Florida before returning to his home state, courts in the Sunshine State can exercise long-arm jurisdiction. Most states have long-arm jurisdiction. A Floridian injured by a Georgian vacationing in Florida can file suit in a Florida court and have the Georgia resident served *in Georgia* using Florida's long-arm statute. (Every state has one. Consult the *official* rules in your state to learn how.)

If everything is done as the long-arm statute requires, Florida obtains personal jurisdiction over the Georgia resident, just as if the

Georgia resident resided in Florida and was served with process in Florida.

It takes a bit of extra time, but it works!

Causing or contributing to damages in a foreign state subjects defendants to jurisdiction in the state where they cause their damage.

This defense may be raised at any time.

It should be raised as soon as possible.

1. With a motion to dismiss before the answer is filed
2. If the motion to dismiss fails then by affirmative defense with answer

If plaintiff sues defendant in state court to preclude patent infringement, defendant would prevail, because federal courts have exclusive jurisdiction to hear patent cases. State courts do not.

On the other hand, if plaintiff sues in state court for loss of earnings due to some matter remotely related to patent infringement, but not the infringement itself, the federal courts do not have exclusive jurisdiction, and this defense would fail.

Subject matter jurisdiction is sometimes limited by the amount of money plaintiff puts into controversy.

County court may not have subject matter jurisdiction over a case claiming millions after a nearsighted surgeon removed plaintiff/pianist's left thumb instead of a wart on the poor fellow's nose! The amount in controversy may exceed what the county court can award.

To bring an action in federal court based on diversity of citizenship (where plaintiff and defendant reside in separate states) requires

plaintiff to claim at least $75,000 in damages (as of this writing). Failure to allege the minimum amount is fatal. Even if the plaintiff alleges the minimum of $75,000, this defense will operate if defendant can prove damages plaintiff alleges do not comport with plaintiff's actual losses.

I won a case several years ago when plaintiff residing in Illinois brought a case in federal court against my client, a Florida-based moving van company. Plaintiff presented a laundry list of damages, all of which amounted to things like a scratched refrigerator door, broken picture frame, and other incidentals that could not have cost more than $5,000 to fix or replace. The federal court was only too glad to grant my motion to dismiss.

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A common situation arises when plaintiff sues in the wrong court. Inexperienced lawyers and *pro se* non-lawyers sometimes bring suit in the highest trial court level when their case should have been brought in small claims. In such cases this defense should be raised by motion to dismiss for lack of subject matter jurisdiction and, if the motion fails, should be preserved by affirmative defense when the answer is filed.

I once succeeded in having a very complicated case against my client dismissed for lack of subject matter jurisdiction when the other side sued under a particular statute that required five factual elements. Only four were present. Since the court's jurisdiction to *hear* the matter in the first place stood solely on the wording of that

statute, the court lacked jurisdiction to decide the case with only four of the five fact elements present. The judge had no choice but to dismiss the case against my client.

If the court lacks subject matter jurisdiction, and defendant raises and *proves* the elements of this defense, the judge's hands are tied.

This defense arises when plaintiff sues for trespass or conversion or similar cause of action alleging defendant unlawfully and without authority or permission entered upon or took possession of plaintiff's property.

The property could be farm land and the offense nothing more than walking on the land to hunt pheasant.

The property could be a bicycle taken by defendant for a brief ride around the block.

The property could be intellectual, such as a copyright to plaintiff's book, painting, or other protected creation.

However, if plaintiff grants defendant license to use, possess, or enter on plaintiff's property (either formally or implied at law), defendant has an affirmative defense that is absolute.

Plaintiff's permission or consent destroys plaintiff's case.

License may be granted by someone who only *appears* to be plaintiff, e.g., a person holding out as an officer of plaintiff's corporation but lacking, in fact, authority to license use of plaintiff's property. Plaintiff's license may be granted by plaintiff or an agent of plaintiff having actual authority or only *apparent* agency to grant license on plaintiff's behalf.

Proving license may be no more difficult than presenting a ticket stub or written agreement reciting sufficient detail to advise the court

that permission was granted.

It could be in the form of a hand-written letter or a formal contract.

If the license is in writing, properly authenticated, signed, and dated, defendant has an absolute defense to any action brought by plaintiff claiming damages resulting from defendant's use of plaintiff's property.

If permission was merely verbal, however, and no corroborating witnesses were present to support defendant's assertion that he had a legal right by way of plaintiff's license to use plaintiff's property, the court may inquire into the circumstances to determine if defendant is telling the truth and plaintiff did, indeed, give permission ... actual or implied.

What constitutes license may be little more than a nod of the head.

However, nodding heads are extremely difficult to get into evidence!

This defense defeats complaints for account stated.

(Please see explanation of account stated in the class on Complaints.)

In order for plaintiff to prevail on claim for account stated, he must allege and prove there was a histroy of prior dealings between the parties, i.e., a reasonably long history of periodic billing the defendant timely and routinely paid over an extended course of time prior to the lawsuit.

Since this "prior course of dealing" is an essential element of plaintiff's case, this affirmative defense asserts there was no prior course of dealing which, if proved, ends the case.

One way to defeat a complaint for account stated is to show the debt

claimed is *new*, i.e., there was no prior course of dealing between the parties or, at best, a very short period with few transactions.

Sending an invoice or other demand for payment of a debt that includes language such as, "Failure to dispute the amount of this debt will result in the legal conclusion that the debt is owed," may intimidate unwary people into paying the claimed debt, however such a demand is without legal effect and does not give rise to account stated.

Failure to respond to a demand letter, without more, is insufficient to give rise to this cause of action.

Suing for account stated when essential elements are clearly absent, may expose the party bringing the action to a counterclaim for abuse of process if it can be shown plaintiff intended to intimidate debtor and *there was no prior course of dealing*.

Payment of a debt is an absolute defense.

To prevail, defendant need only tender admissible evidence to show all amounts payable, including interest (if applicable), are fully paid.

Payment in full satisfies every debt!

Suppose bank lends $10,000 to borrower who signs and delivers a promissory note the bank holds. Suppose the lender decides to use the borrower's house in the islands for a three-week vacation, and the parties agree the value of the vacation will cancel the obligation of the note. The obligation to pay has been satisfied, even though the borrower paid no cash to the lender. There is more than one way to settle a debt.

The affirmative defense of payment applies either way.

The problem many people run into is failure to insist on a receipt or

other written evidence of payment - *identifying the debt, signed and dated, with amount of payment clearly indicated.*

This occurs a great deal in child support cases, where non-custodial parents provide cash to former spouses *without getting receipts identifying the funds as child support.* Things go well for awhile. Then a disagreement erupts. Suddenly, the parent who's been faithfully paying his or her obligation is served with a motion to compel payment, alleging *no* payment has been made. Of course it's a lie. Of course it's not fair. But, it happens all the time when non-custodial parents fail to obtain proof of payment.

The best way to satisfy money obligations is with a check designating on the line provided to say what the check is "for" that the amount is "Satisfaction of child support for the month of March 2006" or similar words that estop [See the affirmative defense of estoppel above.] the recipient from claiming the check was for anything else. Once endorsed and negotiated, the cancelled check is *prima facie* evidence that the debt has been extinguished.

In lieu of using a check, if cash (or other value, e.g., property) is tendered to pay a debt, then a *signed and dated* receipt should be obtained from the recipient, identifying the amount of value given and received and clearly specifying the debt toward which the payment is made. The original of such a receipt is *prima facie* evidence the obligation was satisfied by the amount tendered.

Absence of proof of payment destroys this defense.

If plaintiff sues for breach of some obligation, and plaintiff (by word or deed) released defendant from that obligation, defendant should file this affirmative defense (after moving the court to dismiss before filing an answer).

Once a party is released from obligation, plaintiff cannot succeed suing that party for breach of the obligation - *if* defendant files this affirmative defense *and* proves the essential elements of the defense by a preponderance of admissible evidence.

Release may operate in several ways.

The happy soldier with his discharge papers cannot be prosecuted for dereliction of duty. He has been released, discharged, no longer under his former obligations.

On the other hand, for his defense to stand, the release must be clear and unambiguous.

To be effective, a release cannot be vague, or ambiguous. If it is susceptible of multiple interpretations, then any reasonable interpretation may be attached to it - including those having nothing to do with release.

If in writing, a release should specify obligations being released including, if necessary, the scope of release in time and geographical area. Some releases written by persnickety lawyers may include terms like "from the beginning of time" and "in all places whatsoever and without restriction".

When a client fires an incompetent lawyer and dares to hire another to take his place, the replacement lawyer may file a paper with the court that in some jurisdictions requires the client's signature as well. The paper is called a "notice of appearance". It clearly states the second lawyer is replacing his predecessor and that all future filings are to be served on the replacement lawyer. Once this paper is filed, the initial lawyer is *released* from the responsibility to continue representing his former client.

The replaced lawyer will remain responsible to deliver papers from his file to the replacement lawyer (if his bill was paid), and he will be responsible for his prior incompetence, yet he will thereafter have no duty to represent his client, because the notice of appearance releases him.

If verbal, of course, statements constituting release must meet the requirements of a writing *and* be witnessed by credible persons who can attest to the terms of the release if called upon to do so in case of a lawsuit.

If a release is communicated by actions (as opposed to written or spoken words) the actions evidencing release must be similarly clear and unequivocal, capable of only one interpretation, i.e., a clear and unconditional release of defendant's obligations.

Under recent federal banking regulations, many banks no longer return originals of canceled checks. Under the new law, electronic copies of negotiated checks are admissible as evidence. Original checks with endorser's original "wet ink" signature on the back are, of course, much stronger evidence.

For example, suppose a creditor accepts partial payment as complete satisfaction of a prior debt. The debtor may make a notation on his check that the amount is "payment in full". If the creditor negotiates the check, his accepting and negotiating the check with the notation printed clearly and *conspicuously* may constitute a legal release of the debtor's obligation to pay the balance. If the creditor brings a lawsuit seeking to recover the alleged unpaid balance of the debt, the defendant can file this affirmative defense and his cancelled check as *conspicuous* evidence in support of the defense.

Whatever the form of release, if defendant can present clear and convincing evidence the former obligation has, in fact, been canceled by some act of the person to whom the obligation is allegedly owed, this defense is absolute.

The meaning of this Latin phrase is simply "the thing has been already adjudged".

The decision is already in the court's file.

It will not be tried again.

If plaintiff sues to rehash issues already resolved by a court, defendant should file a motion for an order dismissing the complaint, raising *res judicata* as his defense, attaching a certified copy of the final order from the previous case.

If this motion fails, defendant should preserve the issue by filing this affirmative defense with his answer.

Suppose a court ruled last year a particular parcel of real property belongs to Mr. White and not to Mr. Green. If Green sues over the issue of title to that same parcel, this defense applies as a complete bar.

If defendant properly raises the defense and subsequently proves the essential elements of fact, plaintiff's attempt to get another bite at the apple is doomed.

No court should alter any material decision of an earlier court, unless the second court is an appellate division having control over the initial court.

The United States Supreme Court, for example, can change the decision of any state court or inferior federal court.

One trial level court, however, cannot overrule or otherwise alter the material parts of the previous decision of another trial court. The courts are on an equal footing. Neither has power over the other. A circuit court sitting in the civil division should not be permitted to overrule or materially alter the decision of another circuit court sitting in the probate division.

Defendant faced with such a situation should file this affirmative defense (if his motion to dismiss fails) and proceed with discovery to obtain admissible evidence to show a prior court decision has already decided the matter by a final judgment.

This poor fellow needs to study this course!

Self-defense is not defense against "self".

Self-defense is action to prevent injury to oneself.

Self-defense can also apply loosely to action to protect one's property or a separate person in peril and *their* property.

Self-defense can even apply to words or other communications offered to prevent injury.

Suppose you threaten to hit me with a beer bottle. I wave an umbrella over my head shouting, "Hit me with that bottle, and I'll break your arm with his umbrella!"

If you sue me for assault, I have self-defense in my favor.

Suppose you actually start beating me with that beer bottle. I haul off with my umbrella and break your arm.

If you sue me for battery, I have this defense to defeat you.

Any communication or act done in defense of personal safety or private property is a lawful defense.

If you are in the act of stealing potatoes from my garden, and I run toward you waving a shovel over my head, shouting, "Get out of my garden or I'll pound you with this spade," I have an affirmative defense to your cause of action against me for assault.

If you continue stealing my potatoes and I break your arm with my shovel, your lawsuit against me will result in my filing this affirmative defense to protect my property.

I have a right to protect my property ... *provided I act reasonably.*

If you threaten to hit me over the head with a pillow, and I break your leg using a steel crow-bar, however, I cannot claim self-defense, because my response was not reasonable under the circumstances.

You may plead self-defense if you are threatened with imminent harm to personal safety or private property, and your defensive action is reasonable under the circumstances.

You will not be be excused for killing or severely maiming potato thieves. The law forgives only reasonable force suitable to repel the immediate threat.

You can, however, chase thieves out of your garden with a shovel and even smack them on the backside as they run. However, once the threat disappears, you must stop acting in self-defense, for it is no longer "self-defense".

If you are threatened with imminent death or serious bodily harm, many jurisdictions honor your right to use deadly force in response.

If it's possible to withdraw from a threatening situation, however, the

law favors your doing so. But, in many jurisdictions you are not *required* to retreat. You may "stand your ground" and defend yourself with force appropriate to the immediate threat.

Use of defensive force greater than reasonably necessary, is *not* an affirmative defense to a lawsuit for damages.

Use only such force as is reasonably necessary under the circumstances.

If plaintiff files a lawsuit alleging material facts plaintiff knew were false at the time he filed, his complaint may be stricken as sham.

If only ancillary facts are false and known to be false at the time of filing, those allegations may be striken as sham.

What applies in pleadings also applies to motions and all other papers filed with the court.

A motion for an order striking sham is an excellent (but seldom used) tactic to force the issue of your opponent's outright dishonesty and disregard for the honor of the court. By filing the motion you put the other side's veracity into question and, if you've done your discovery well (explained fully in another class in this course) you'll be able *prove* the other side knew what he said in his papers was false *and tried to get away with it!*

This is always good for your side.

As a defense, like others, this should be asserted by motion to strike sham *prior* to filing an answer. If that fails, be certain to include it as an affirmative defense when you file your answer to preserve the issue.

A motion to strike sham must assert

1. a material allegation of the paper submitted is false and
2. party submitting the paper knew the allegation was false at the time of filing.

   A false allegation must be *material* for this defense to stand. The false allegation must go to the heart of at least one cause of action.

   Sham pleadings are taken seriously by good judges!

   Proving an allegation false is not easy. It is extremely difficult at the beginning of a case, when there has not yet been sufficient opportunity to get much discovery, to prove that the other fellow *knew* the material allegations made were false at the time they were made.

   Therefore, if a motion for an order to strike sham fails, defendant should file this affirmative defense to preserve the point and give him a clear target for further action that may give him the victory after he has an opportunity to get discovery and put admissible evidence into the court file.

   The statute of frauds was inherited from English jurisprudence and remains as a vital part of our common law, amended in part by statute.

   If a lawsuit is brought over a verbal agreement for the sale of "goods" (i.e., tangible personal property), nearly all states will refuse to hear the case if the value of the goods exceeds a certain minimum amount, unless there is a written contract spelling out the terms. Typically, disputes of sale of goods for lesser amounts is handled in small claims court, and no written contract is required.

   Suppose, for example, the jacket on the manequin sells for $499.99, and the salesperson allows the customer to wear the jacket home

upon his promise to pay for the jacket the next day. In Florida (and other states) where the limit for sale of goods without a written contract is $500 (as of this writing), that verbal contract can be enforced in court (provided the salesman can get the proof he needs to win).

If the same jacket in another store sells for $501, and the salesperson allows the customer to wear the jacket home upon his word of honor he will pay for it the next day, we say the sale is outside the statute of frauds, and the salesman is without a remedy for breach of contract. He may bring a complaint for unjust enrichment (see in the class on Complaints), but he cannot sue for an amount in excess of the maximum unless he has a contract *in writing.*

If parties reach an agreement for services capable of being performed within the space of one year (as the law reads in Florida and other states at the time of this writing) the courts will hear a breach of contract suit and enforce a verbal agreement. If the agreement is for services that cannot be performed within the space of one year, the agreement will not be enforced unless in writing signed by the party against whom the action is brought.

As with many other defenses, this should be first raised with a motion to dismiss. Then, if the motion to dismiss fails, the issue should be preserved by filing this affirmative defense with the answer and proceeding with discovery to prove the elements with admissible evidence.

Though statutes of fraud differ somewhat between jurisdictions, however commonalities do exist. The purpose is everywhere the same: to minimize fraud.

Courts will not wait forever to hear a complaint.

Though cases like murder remain viable forever, nearly every civil case must be brought before a deadline tolls.

This deadline is set out by statute in most states.

You guessed.

It's called the statute of limitations ... and it sets different deadlines for different types of cases.

One must consult the local statutes to determine what limitations apply, because they can change unexpectedly. As some wise man once said long ago, "No one is safe when the legislature is in session!"

Wise litigants mark their calendars and start counting time from the moment a possible cause of action arises, because once the deadline passes the cause is dead. That's why it's called a deadline.

This defense should asserted by motion to dismiss *before* filing an answer. If the court does not dismiss, defendant should file as an affirmative defense with his answer.

Keep in mind what you learned about the defense of lack of jurisdiction. It can be argued that a court lacks jurisdiction to hear a case after the statute of limitations has run, so it is vital to preserve this defensive issue by filing it as an affirmative defense, because later when you've had the advantage of gathering evidence throught discovery you may be able to show the date on which the clock started ticking!

If the time from that date until the time the plaintiff filed his suit exceeds the limitation, the court has lost jurisdiction, and the case must be dismissed or else any judgment resulting will be overturned

on appeal as void *ab initio*.

Not all causes of action have the same time limitations.

For example, a case brought to enforce a negotiable instrument generally may be brought much later than a case of medical malpractice or breach of contract.

The only way to be certain of the deadlines is by going to the statutes itself and by reading the applicable appellate decisions that control your trial court judge.

For example, in many states the clock starts ticking to limit the time for bringing a case for medical malpractice as soon as plaintiff knows *or should have known* a negligent medical act caused plaintiff's injury. Plaintiff cannot wait for a convenient time to bring his suit. He has only a statutorily-specified period from the date on which he knew *or should have known* of the negligent act and its damage-causing consequence.

The statute of limitations is usually an absolute bar.

It must, however, be properly asserted in the record.

If an alleged slander is true, there can be no action.

If an alleged fraud is not false, this defense will win the day.

Plaintiff has the burden of proving falseness.

Defendant does not have a burden to prove truth.

If plaintiff alleges in his complaint, "Defendant robbed me," yet plaintiff cannot prove defendant stole anything, this defense will close the issue in defendant's favor. Defendant will use what's taught in this course to force plaintiff to prove his allegations of theft.

If plaintiff alleges defendant committed fraud when he advertised a

used car as having been only driven by a little old lady once each week to go to church, but plaintiff cannot prove that the car was driven by anyone else for any other purpose, defendant will stand on this defense and win. Defendant will use what's taught in this course to force plaintiff to prove his allegations of fraud.

If plaintiff alleges defendant defamed him by publishing on the internet that plaintiff did time in Folsom Prison, and plaintiff *did* spend time in Folsom Prison, defendant will use what's taught in this course to prove plaintiff is an ex-con.

It's putting the ball in the other guy's court.

If you tell your neighbor, "Our mailman a communist," and it gets back to the Post Office, and your mailman loses his job, prepare for battle.

But, if you prove your mailman *is* a communist, this defense will protect you.

"He who comes to equity must come with clean hands."

This ancient maxim is as binding today as it was many centuries ago.

Those who seek the benefits of equity must not have contributed to the problems for which they need a remedy. Such persons are said to have unclean hands.

Every injunction is a remedy in equity. Therefore, one who's acted with bad faith in some way to contribute to his own problems should be denied the remedy. He has unclean hands .

If a plaintiff wrongfully defrauded defendant yet seeks an injunction, the defendant should file unclean hands as an affirmative defense with his answer, explaining how the plaintiff is not without fault in the

very thing for which he seeks the court's equitable remedy.

The court should look beyond the bare allegations of pleadings when asked to deny an injunction for unclean hands. Factors to be considered include:

- Necessity of interest sought to be preserved or protected.
- Unreasonable delay of plaintiff to timely seek the remedy.
- Misconduct of plaintiff in regard to the interest.

The wrongs of plaintiff that constitute "unclean hands" must relate to the subject matter of the equitable remedy sought. The fact plaintiff brutally murdered his mother-in-law with a chainsaw three years ago is not the kind of "unclean hands" this defense contemplates.

Unclean hands is rather like estoppel in that it looks into how a party has contributed to his own problems.

Suppose a property owner deceitfully prepares a deed purposely mis-describing property boundaries. He takes the buyer's money and tenders the deed. The buyer, relying on the deed and its boundary description, builds a house that encroaches on seller's own property.

Buyer based his actions on the seller's property description, so buyer has "clean hands". He in no way has done wrong.

Seller, however, has very "unclean hands".

So, if plaintiff sues for an injunction requiring his new neighbor to move the house, this defense will defeat the dishonest plaintiff's efforts - because the wrong of plaintiff relates directly to the subject matter of the remedy sought.

When a party seeks equitable relief for damages caused even

partially by his own acts, the defendant should file this affirmative defense to preserve the issue and use discovery to find admissible evidence to prove plaintiff has unclean hands.

If a party becomes the unwitting victim of a contract, deed, mortgage, promissory note, or other agreement procured by fraud, overreaching, or other unjust means, this affirmative defense should be pleaded with defendant's answer.

Courts should not enforce an unconscionable agreement.

This is true even when injury results from victim's own foolishness, lack of caution, and failure to act reasonably.

If the injury results from the wrongful act of another, the courts should cure the injury.

This affirmative defense is a first step toward obtaining that relief from the court, because it puts the court on notice of the issues to be tried.

Elements

1. The agreement was *outrageously* unfair.
2. Preceding events luring the victim were *outrageously* unfair.

   This first element is called substantive unconscionability, i.e., the terms of agreement itself are unreasonably favorable to plaintiff bringing suit to enforce.

   The second element is called procedural unconscionability, i.e., there was an absence of any meaningful choice on the part of defendant. Perhaps he was too feeble. Perhaps he lacked all understanding of technical aspects of promises made to him. Either way, there was no meeting of the minds essential to formation of an

enforceable agreement, and therein lies the gist of this defense.

It has been said at common law an unconscionable contract is one that "no man in his right mind not under delusion would make on the one hand, and no fair and honest man would attempt to enforce on the other."

Some authorities examine the respective bargaining powers of the parties, i.e., the ability of one to understand the terms and conditions communicated by the other.

Synonyms for unconscionable include "shocking the conscience", "monstrously harsh", "grossly unfair", etc.

Unconscionability as an affirmative defense must be pled, or it may be waived.

Waiver arises when plaintiff waived the right or privilege on which he sues.

The right or privilege waived must, of course, first exist, or there is nothing to be waived.

The waiver must be knowing, i.e., plaintiff cannot be said to have waived a right or privilege without knowing (or having constructive knowledge) of the fact.

Finally, plaintiff must have waived with actual intention to relinquish the right or privilege.

Elements

1. Plaintiff possessed a right or privilege upon which he's brought a complaint.

2. Plaintiff waived the right or privilege.

3. Plaintiff knew or should have known he waived the right or privilege.

4. Plaintiff intended by his waiver to relinquish the right or privilege.

For the court to *imply* waiver from plaintiff's conduct, facts relied on to demonstrate the waiver occurred must be "clear and convincing". Mere inferences are not enough, however probable they may seem. In the absence of direct facts demonstrating waiver, defendant must meet a heavy burden for the court to *imply* a waiver.

In some jurisdictions, waivers cannot be established unless evidenced by some express writing demonstrating plaintiff had knowledge of the waiver and its consequence.

The best defense is a good offense!

Where have we heard that before?

This fat fish swimming peacefully among sharks has the right idea. Swim softly and carry a big club with sharp spikes on the end!

No need to attack others, unless they attack you - but when they *do* attack one is wise to have an *affirmative* defense, a strike-back response with teeth!

If you read the typical affirmative defense pleadings filed by typical lawyers you'll find they often list only the "name" of each affirmative defense *without alleging any of the ultimate facts necessary to establish the defendant's right to rely on the defenses.*

This is a big mistake.

But, that's what law schools are turning out these days for the $200,000 it costs to attend 3 years of law school with tuition, books, and living expenses. (They could do better by signing their students

up with a subscription to my course!)

YOU are not going to make this stupid mistake nearly every lawyer makes.

You won't merely list the names of your defenses (e.g., laches, license, or payment).

You will allege with each the *ultimate facts* that show you are entitled to the protection of each defense, and then you will prove each of those ultimate facts to win your case as a defendant.

This is smart.

This is the **Jurisdictionary**® way of doing things!

Just as you've learned about drafting a complaint, case-winning litigants allege each and every ultimate fact necessary to establish each and every essential element of their case - whether they're the plaintiff or defendant - every fact you need to *prove* to prevail.

To merely list the names of your affirmative defenses weakens your case. You and the court end up confused as to which facts you need to prove to win!

Remember: Affirmative defenses are *affirmative*, not defensive.

Defendants *never* should let themselves be put on the defense.

Use affirmative defenses to take the ball from the plaintiff and drive for the goal on our end of the court. Then pound away at the plaintiff discovery and motions until the weight of admissible evidence in favor of your defenses is greater than weight of admissible evidence in favor of his complaint.

That's why we urge defendant to use *affirmative* defenses. Nothing less is good enough!

Winning defendants "turn the tables" on plaintiffs by *affirmatively* alleging facts in defense that (if proven by admissible evidence) defeat plaintiffs' claims.

Once affirmative defenses properly pleaded, all that remains is to *prove* the alleged facts by the greater weight of admissible evidence.

The contest becomes one of *who can pile up the most evidence!*

That's how wise defendants win!

This also has the advantage of eliminating water-muddying arguments over relevance down the line when plaintiff refuses to respond to discovery requests. By alleging what you need to prove to win, you've clearly established what facts are relevant. If sufficient facts are not alleged, it's anyone's guess what is and what is not "discoverable".

Stop worrying how other people do things.

Stop worrying how big shot lawyers do things.

Do things *right!*

Begin your defense on a solid footing.

Put plaintiff on the defense!

Then use your discovery tools (covered in a later class) to *keep* him on the defense!

This is how defendants win!

Defend *affirmatively!*

MICHELLE GOMEZ: Your subscription expires October 26, 2020

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one*

correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.

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