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# **Jurisdiction**<sup>®</sup>

## **Presents**



# **Affirmative Defenses**

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## *Table of Contents*

Table of Contents .....	2
Affirmative Defenses .....	4
Introduction .....	7
Absolute Immunity .....	11
Accord and Satisfaction .....	13
Act of God.....	15
Alibi .....	17
Arbitration and Award .....	19
Assumption of Risk.....	22
Coercion.....	24
Comparative Negligence.....	25
Consent .....	27
Contributory Negligence.....	30
Discharge in Bankruptcy.....	32
Duress .....	33
Economic Loss Rule .....	35
Estoppel.....	38
Failure of Consideration .....	40
Failure to Demand.....	42
Failure to Join an Indispensable Party * .....	43
Failure to Post Bond.....	45
Failure to State Cause of Action * .....	46
Fraud .....	48
Futile Act .....	50
Good Samaritan Defense .....	51
Illegality .....	53
Impossibility .....	54
Improper Venue * .....	56
Injury by Fellow Servant .....	58
Insufficiency of Process * .....	59
Insufficiency of Service of Process.....	60
No Irreparable Harm .....	61
Laches .....	62
Lack of Jurisdiction over Subject Matter *.....	64
Lack of Jurisdiction over the Person * .....	66
License .....	68
No Prior Course of Dealing .....	70
Payment.....	71
Release .....	73
Res Judicata .....	75
Self-Defense.....	76
Sham .....	78

Statute of Frauds .....	80
Statute of Limitations.....	82
Truth.....	84
Unclean Hands .....	86
Unconscionability .....	88
Waiver.....	89
Pleading Affirmative Defenses.....	90
Conclusion .....	93

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.



## *Affirmative Defenses*

Imagine a basketball team possessing only defensive skills, without the ability to grab the ball from opposing players and shoot for points at their own goal!

What chance would they have?

If you're on the defense in a lawsuit, you need to defend *affirmatively!*

Take the ball from the other side and drive toward your own goal.

This tutorial shows you how.

When a plaintiff sues a defendant, the plaintiff files a paper called a Complaint<sup>1</sup> in which he states the basis for his lawsuit by *affirmatively* alleging ultimate facts he claims he can prove (facts he *must prove* to win his case).

The plaintiff's Complaint is an *affirmative* action ... i.e., it has teeth!

If the defendant cannot successfully move the court to have the case dismissed or stricken, he must file an Answer to the plaintiff's Complaint – however, an answer by itself (i.e., without *affirmative defenses*) has no *teeth*.

An answer, by itself, merely “answers” the complaint *one paragraph at a time*.

An answer, by itself, either admits, denies, or states defendant has insufficient knowledge to respond to what the complaint alleges.

An answer, by itself, provides no mechanism for a defendant to *affirmatively* plead his case.

An answer, by itself, is non-aggressive.

An answer, by itself, provides the defendant with no mechanism to *affirmatively* state the defendant's position in response to the complaint.

Therefore, the defendant who merely “answers” the plaintiff's complaint, without also filing affirmative defenses along with his answer, straps himself with a legal burden that can kill his case even before he's begun to fight.

It's like playing basketball purely from a defensive posture.

Affirmative defenses should **always** be filed along with defendant's answer.

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<sup>1</sup> In some cases the complaint may be called a petition.

Affirmative defenses give defendants an *affirmative* position from which to argue *why* defendant is not responsible for the damages sought by the plaintiff and what the defendant intends to *prove* so the court can see the flaws in the plaintiff's case.

Without affirmative defenses, the defendant is always on the defense.

Not a good way to win the game!

This simplified tutorial shows how and why defendants should file affirmative defenses every time the filing of an answer is required.<sup>2</sup>

Affirmative defenses should *always* be filed with the answer, because without them the defendant cannot state his own case.

The answer, by itself, does nothing but respond to each of the allegations made by the plaintiff in the complaint.<sup>3</sup>

By also filing affirmative defenses along with his answer, the defendant can assert *affirmatively* the grounds (if he has any) for his arguments why the court should deny the plaintiff's claims.

If the defendant can then *prove* the essential factual grounds for any affirmative defense he has are true (by the greater weight of admissible evidence) he wins.

Without affirmative defenses the defendant can only win by proving the factual grounds alleged in the plaintiff's complaint are false.

It's always harder to prove a negative.

In the following pages we examine the most common affirmative defenses and show you how to use them to get your defensive position *affirmatively* into the court's record ... so you can aggressively defeat the claims of those who sue you.<sup>4</sup>

Whether you have one of these defenses depends, of course, on the facts of your

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<sup>2</sup> In many cases, the defendant can avoid being required to file an answer by moving the court to dismiss the complaint, to strike all or portions of the complaint, or to require the plaintiff to file an amended complaint that eliminates vague or ambiguous language.

<sup>3</sup> You should also understand that, in addition to [Affirmative Defenses](#), you must file with your answer any counterclaims, cross-claims, or third-party complaints you may have that are based on what you know at the time you file the answer, or you waive your right to file them later. If you later discover evidence that gives you the basis for a counterclaim, cross-claim, or third-party complaint (i.e., *after* you file your answer) you may move the court to allow you to file these additional pleadings, but only if you did not know you had a basis for filing them when you filed your answer.

<sup>4</sup> We recommend you study our tutorial on Claims so you will better understand the essential facts necessary to effectively state claims against which affirmative defenses are filed. It helps to understand causes of action that constitute the plaintiff's claims before you try to understand defenses to those claims.

case.

All cases are different to some degree.

The facts are seldom exactly the same.

Our tutorial explains what affirmative defenses do and, for many of these, we give examples of fact circumstances where an affirmative defense might apply.

If you are sued, be absolutely *certain* to file all the affirmative defenses you have.

This is how defendants win.





It has no teeth.

It is merely defensive.

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

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

If defendant *proves* the essential facts alleged by any of his affirmative defenses, he wins.

Thus, the two parties are put to their respective proofs.

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

Each party has something to prove.

The defendant is not merely stuck with the task of proving the *negative* of the plaintiff's complaint.

Proving negatives is sometimes impossible.

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

If a defendant foolishly fails to state affirmative defenses, he saddles himself with the heavy and often impossible burden of proving the negative of what the plaintiff says in the complaint – i.e., the defendant has nothing to argue beyond showing the plaintiff lied. If this is all the defendant has to work with, the plaintiff has a decided advantage.

If, instead, the 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.

If the 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 really that simple!

In the following pages we examine the most common affirmative defenses that courts recognize. The 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).

Please be cautious of those who offer outlandish, hare-brained or slippery-slope schemes as defenses that are not commonly used and will never be recognized by our



courts. Since we first established our website on the internet in 1997, **Jurisdiction**<sup>®</sup> has learned of defenses offered by amateur lawyers and internet charlatans that are nothing short of ridiculous. They'd be comical but for the fact they are hazardous to your lawsuit health ... and the disastrous consequences to those who use them.

A few examples of these dangerous defenses follow.

- The 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 in admiralty, so I don't have to answer the complaint.
- As one of the American People, my individual sovereignty gives me the power to command our government, so I direct the government's complaint be withdrawn.<sup>6</sup>
- You cannot sue me, because I have denounced my American citizenship.<sup>7</sup>

Please do not try to use these crazy defenses or any of the dozens of wacky ideas like them that are being promoted on the internet by unscrupulous, self-styled legal gurus who offer seminars or internet courses that purport to show you how you can avoid your financial or social responsibilities by trickery, deceit, or "legal end-run actions".

Honesty is still the best policy.

Learn the affirmative defenses that courts recognize.

Defenses the courts cannot ignore.

Defenses that are tried and true.

Rely on **Jurisdiction**<sup>®</sup> to show you defenses that work!

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<sup>6</sup> We actually received emails from a fellow who convinced friends to make this argument when they were sued by the county commissioners. He convinced them they were "one of the American People" and, since the American People have power over government, that his friends had the power to withdraw the commissioners' complaint! We anticipate jail time will be served by all in due course.

<sup>7</sup> We recommend a wonderful story for *everyone* who cares about our nation. [The Man Without a Country](#) by Edward Everett Hale (1917). Some people are so extreme as to claim they cannot be sued by our government, because they are no longer citizens! This argument will not work. In fact, by making this hateful claim, you show yourself a "traitor" to our nation and bring the court's wrath upon yourself.

## *Absolute Immunity*

Many officers and agents of our government are accorded what is called “absolute immunity”, a defense to actions brought against them *with certain exceptions you should know*.

So long as acts of an officer or agent of government (e.g., a judge, senator, mayor, or county commissioner) are lawfully within the scope of their delegated authority, the affirmative defense of absolute immunity protects *absolutely* from lawsuits brought by disgruntled people disappointed with the “official acts” of those officers or agents.

The hole in this defense, of course, lies in whether and to what extent the officer or agent was doing his job when events giving rise to the lawsuit occurred. If an officer or agent acts beyond the scope of his delegated official authority, the immunity disappears. The officer or agent may then be sued as an individual – just like anyone else.

If a judge, for example, makes a ruling unfavorable to you, there are remedies the law provides. Appellate review or motions to set aside the judgment.

If the judge acts within the law, however (even if you disagree with the law) the judge is immune from a lawsuit challenging the judge’s ruling.

Judges, if sued, are protected by the defense of absolute immunity.

On the other hand, if a judge intentionally violates the law (and you can prove it),<sup>8</sup> then the judge has stepped outside the scope of his authority. He no longer has absolute immunity. You can sue him *if you can prove he acted outside the scope of his authority*. This, of course, is a heavy burden to carry. The judge must have acted invidiously, with almost criminal intent and not mere negligence. Otherwise, if our judges were exposed to lawsuits every time they made a ruling that disagreed with one of the parties to a lawsuit, no one would agree to sit as judge in this country!

Think about it.

At least one party to *every* lawsuit has a ruling that disagrees with them.

Without absolute immunity for judges, our court system would quickly grind to a

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<sup>8</sup> Not merely that the judge’s interpretation of the law is different from yours but that the judge, for reasons personal to himself, intentionally violates the law in order to “get you”.



screeching halt. And that would be good for nobody!

Absolute immunity protects government officers and agents from litigation if their acts are within the scope of their authority.

If a police officer handcuffs you and gruffly shoves you in the back of his police car to haul you off to jail, and you subsequently prove you are innocent, you cannot sue the police officer. He has absolute immunity ... *so long as he is doing his job!*

If the police officer grins with malice as he tightens the handcuffs until the blood can no longer reach your fingers. If he breaks your arm *on purpose* as he shoves you into the back seat of his car. If he kicks you in the stomach, causing internal bleeding, when you were in no way resisting arrest. Or, if he does any such thing that is beyond the scope of his authority, the immunity vanishes.

If you sue an agent or officer of government, your first hurdle will be to get past the immunity issue ... and that requires *proof* of action outside the scope of authority. A very heavy burden indeed.

Remember: without the immunity defense, our government could not function.

## *Accord and Satisfaction*

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

For example, consider the case of a farmer who promises to sell his prize bull to his neighbor for \$200, but failed to advise his neighbor that the bull was dead. Suppose the neighbor ponies up the \$200 before he is told the sad truth. The neighbor has a claim for breach of contract and would probably prevail if he filed a lawsuit.

However, if the owner of the dead bull promised to substitute his best sheep dog for the bull, and the neighbor accepts this offer of substitution, the parties are said to have reached an accord.

The first contract is replaced by a new agreement.

The second contract voids the first.<sup>9</sup>

Now, if the farmer actually delivers his sheep dog to the neighbor, performing his part of the new bargain, there has also been a satisfaction.



If the disgruntled neighbor decides he doesn't like the sheep dog and tries to sue the farmer for breach of the bull contract, the defendant can raise the affirmative defense of "accord and satisfaction" *as an affirmative defense to breach of the bull contract*.

While it is true the farmer promised a prize bull, it is also true the buyer agreed to an accord when he said he would accept the sheep dog as a substitute. Delivery of the dog substitute constitutes satisfaction. Thus, accord and satisfaction is a complete *affirmative* defense to the neighbor's attempted breach of contract suit based on the bull bargain.

Accord and satisfaction erases the former obligation.

The earlier contract is treated as if it never existed, since the promise of a bull has been erased by the promise and delivery of a sheep dog instead!

Think of it as compromise.

Performance of the second promise satisfies the first.

This is only true, however, if there is first an accord, i.e., if the parties *agree* to a

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<sup>9</sup> A contract that replaces a previous contract is also sometimes called a novation.

substitute in lieu of the first promise. The man owing a bull cannot unilaterally deliver a dog to discharge his debt unless the buyer first agrees to accept a dog in full satisfaction of the promise to deliver a bull.

Similarly, if the dog is not delivered there is no satisfaction.

If a creditor accepts a debtor's substitute promise, and the debtor performs fully on the substitute promise, the creditor loses his right to sue. There has been an accord and satisfaction of the original debt ... an affirmative defense all courts recognize.

If a debtor is sued after reaching an accord and satisfying the accord by delivering the substitute, he should file this affirmative defense with his answer to the complaint. He should not delay raising the defense until a later time when it may be deemed waived.

If the debtor proves accord and satisfaction by the greater weight of admissible evidence (i.e., if he proves the creditor agreed to take the substitute and that the debtor delivered the substitute) the debtor is absolved of all further liability on the debt.

For a defendant to adequately plead the defense of accord and satisfaction, he must allege ultimate facts sufficient to establish the following 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 debtor tendered and the creditor accepted the substitute performance agreed upon.

If all three factual elements of this defense are proven to exist, any claim raised by a plaintiff on the pre-existing agreement should be discharged by the court (after proof, of course), and the plaintiff's case should be dismissed on defendant's motion after hearing and presentation of evidence of the accord and satisfaction.

In order to comprise a complete defense, the agreed upon performance must fully discharge the underlying debt. Partial satisfaction is no defense.

## *Act of God*

This affirmative defense may be used against certain classes of claim if a natural disaster, extreme weather conditions, or other event beyond the control of mankind makes performance by the defendant impossible.

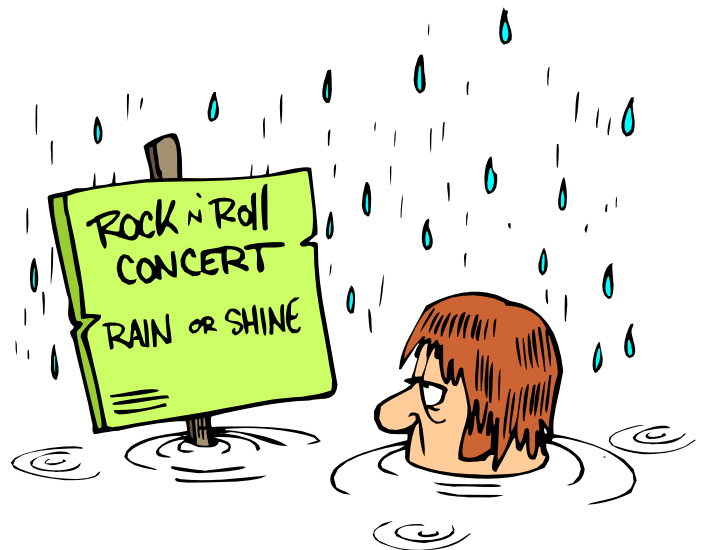
An act of God is any event beyond the control of mankind. Tornado. Earthquake. Hurricane. Flood. Volcano. Avalanche. Giant asteroid crashing into Earth. If the event intervenes to prevent the defendant's act, then this affirmative defense is available to protect the defendant from two kinds of claim.

On the one hand, as in a case based on breach of contract, for example, if the defendant was unable to perform the duties imposed on him by his contractual promises because an act of God *absolutely* prevented him, then the court should excuse him from performing.<sup>10</sup>

Delivery of goods to a distant city may be interrupted by a hurricane. If it was impossible for the defendant to deliver the goods in a timely manner, the defendant may be absolved of liability for breach of contract. On the other hand, if the defendant delayed in starting delivery, but could have delivered *before* the hurricane if he'd started sooner, then the defense is dead – because the act of God did not *absolutely* prevent performance.

This defense works only if defendant acted reasonably in all other respects and was utterly prevented by the act of God will this defense lie.

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



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<sup>10</sup> See also the defense of “impossibility”.

Any time an act of God *absolutely* prevents a defendant's act, and the defendant acted reasonably in all other respects, this affirmative defense is available – provided, of course, the defendant can prove the essential fact elements by the greater weight of the admissible evidence.

## *Alibi*

Many claims (i.e., causes of action on which the court can grant relief) require that the defendant be in the presence of the plaintiff at the time of the event giving rise to the cause of action, the event allegedly causing the plaintiff's injury.

For example, a cause of action for battery requires the plaintiff to allege and prove the defendant touched the plaintiff, i.e., that there was actual contact. The elements of this cause of action are:

1. Plaintiff suffered a harmful or offensive contact caused by defendant.
2. Defendant intended the contact and the resulting harm or offense or acted with reckless disregard for whether or not his acts would result in the contact complained of and the harm or offense caused thereby.
3. Defendant acted unlawfully or without authority or consent.
4. Plaintiff suffered damages as a direct result of the battery.

It should be clear that the defendant must be where the plaintiff is, or at least within reach of the proverbial "ten-foot pole" or some other means of actual *contact* in order for this cause of action to work.

Now, suppose the plaintiff was in Cincinnati when the alleged contact took place, while the defendant was 4,135 miles away in Paris at a convention of art dealers. If the defendant alleges this affirmative defense and subsequently proves the facts alleged, he wins ... since his alibi is an affirmative defense to battery.

You can't batter someone who is on the other side of the planet.

Assault is another such cause of action requiring the defendant to be where the alleged offense occurs or, at least, to be within "reach" of the defendant.

The elements of assault are:

1. An intentional threat or offer to cause bodily injury by force, or force directed toward another, regardless of whether any injury is caused.
2. The threat was not lawful nor authorized by the plaintiff.



3. Circumstances surrounding the threat created a well-founded (i.e., reasonable) fear of imminent peril of bodily injury.
4. It was apparent to the plaintiff that defendant had immediate ability to cause the threatened injury if the defendant was not prevented.
5. Plaintiff suffered damages as a direct result.

Notice that element #4 requires the plaintiff to prove defendant had the *present* ability to carry out his threat. Either he was standing in the same room or was in control of a weapon that would allow him to injure the plaintiff *presently*. A radio-controlled bomb might allow the defendant to be at some great distance from plaintiff. A scope-mounted rifle might also. However, in most circumstances that the plaintiff might allege when filing a complaint sounding in assault, the defendant must be “nearby”, at least.

Therefore, if the defendant files this affirmative defense and subsequently proves he was in a distant city at the time of the alleged assault,<sup>11</sup> he wins.

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<sup>11</sup> Please note that battery requires actual touching. Assault does not.

## *Arbitration and Award*

If disputed issues are subject to arbitration procedures,<sup>12</sup> and if the dispute goes to arbitration, and if the arbiter or arbitration board makes an award to the prevailing party, then a lawsuit brought on the same disputed issues will be dismissed if the defendant files the affirmative defense of “arbitration and award”.

Once you’ve won in an official arbitration, *you’ve won!*

The loser can’t force you into court to get another opinion or another bite at the apple.<sup>13</sup>

The disputed issues must, however, be subject to arbitration procedures. Many giant companies intimidate people into agreeing to arbitration *after the fact*. Unless there is some pre-established basis for requiring a dispute to be submitted to arbitration, either party reserves the right to take his dispute to the courts.



The basis for requiring arbitration may be in a contract or it may be as a matter of law. If there is no basis in contract or law, then one is *not* compelled to arbitrate disputes but may, instead, go directly to court.<sup>14</sup>

Second, the dispute must, in fact, be submitted to arbitration – and the arbitration must take place before an authorized arbiter or arbitration board. In many cases this is decided by contract or law. If it is not decided, then the parties must agree to the arbiter or arbitration board. If they cannot agree, the disgruntled party may apply to the courts for appointment of an arbiter or arbitration board – but the underlying disputed issues will

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<sup>12</sup> Many contracts, for example, provide that in the event of dispute the parties agree to arbitration, i.e., that neither can bring a lawsuit but must, instead, submit their issues to an arbiter or arbitration board as specified in the contract both parties agreed to. Another good reason to *read* all contracts before you sign them. An arbitration provision usually means you cannot sue. Your only recourse in the event of breach is to submit your complaint for non-judicial arbitration – and the arbitration decision is final.

<sup>13</sup> Unless they can prove fraud in the arbitration proceedings.

<sup>14</sup> This assumes, of course, that the matter in dispute is subject to litigation. For example, not all disputes are recognized as “claims on which the court can grant relief” (i.e., causes of action the court recognizes), and some complaints are barred by the statute of limitations or the amount in controversy. More about these points of litigation in our other tutorials. [www.jurisdictionary.com](http://www.jurisdictionary.com)

not be decided by the court – only the identity of the arbiter or arbitration board and, perhaps, the time and place for same and who will pay the costs.

Finally, the dispute must have been *decided* by the arbiter or arbitration board before this affirmative defense is viable.

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

Moreover, the decision must be proper. An improper arbitration does not result in an enforceable award. Fraud, undue influence, or failure to follow the rules for arbitration will nullify the arbitration decision.

If, however, a dispute is properly submitted for arbitration before an authorized arbiter or arbitration board, and an arbitration award is properly reached without fraud or undue influence, the dispute is settled – and a lawsuit later brought to settle the same dispute will be dismissed if the defendant files *and proves the facts of* his affirmative defense of “arbitration and award”.

Proof of course, is substantiated by tender into the court record of admissible evidence of all three elements:

- Dispute was lawfully subject to arbitration.
- Dispute was duly submitted for arbitration.
- An arbitration award was made in accordance with the rules of arbitration.

Unless such proof is self-authenticating,<sup>15</sup> it may be necessary to subpoena the arbiter or arbitration board to get admissible evidence into the record. Once admissible evidence is presented to *prove* the three elements have been met, the court should dismiss the case.

If you are represented by a lawyer to whom you’ve been required to pay fees to file your paperwork and appear for you in court to assert this defense, and the facts support the defense, so that the case should never have been filed against you in the first place, be certain your lawyer moves the court for an award of all your court costs and attorney’s fees.

As with all affirmative defenses, don’t take the lazy lawyer’s way of doing things. Don’t simply list your affirmative defense without stating the facts you intend to prove in support of your defense.

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<sup>15</sup> Self-authenticating documents include official documents under seal. See our tutorial on Evidence. [www.jurisdictionary.com](http://www.jurisdictionary.com)

For example, state when arbitration was had, where it was had, before whom it was had, that the rules were followed, and that an award was granted.

In addition, refer to copies of the admissible documents you will present to the court in due course, and attach copies of those papers to your responsive pleading and affirmative defense.<sup>16</sup>

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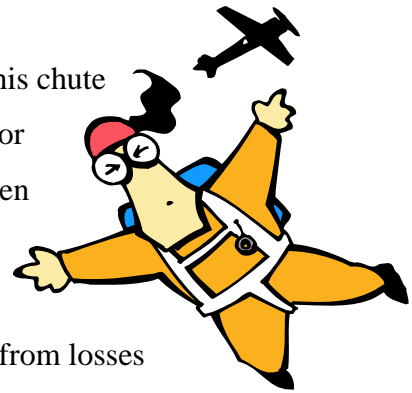
<sup>16</sup> In most cases it is not a good idea to file original documents with the court clerk for fear they may be lost or misplaced. File copies with your documents and state that you will file the originals in open court. That way you don't run the risk of losing documents you may not be later able to replace.

## *Assumption of Risk*

Some activities are so inherently dangerous, that the courts will allow a defense against plaintiffs who voluntarily engage in such activities.

For example, if a plaintiff expressly assumes the risk of sky-diving, the courts will (if the defendant pleads the affirmative defense of “assumption of risk”) deem that the plaintiff “knew or should have known” of the inherent risk involved and that he voluntarily waived the right to sue for damages resulting from a broken ankle or other injury resulting from the foreseeably dangerous activity.

If, however, the staff operating the jump facility packed his chute negligently, and the injury results from such “gross negligence” or “wanton disregard for the foreseeable adverse consequences”, then the people operating the jump facility are not immune, and the defense of assumption of risk will not prevail.



This defense protects defendants from lawsuits resulting from losses resulting from any activity that threatens foreseeable damages, provided the 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 – so the affirmative defense of assumption of risk will lie to prevent a judgment for resulting injuries.

The defense will *not* prevail where the defendant acted negligently, such as if a defendant bungee-jump operator fails to maintain his rubber-bands or the riding stable puts a newbie rider on a cantankerous stallion known to have a proclivity for throwing people off his back.<sup>17</sup>

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

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

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<sup>17</sup> 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.

The plaintiff need not sign a paper acknowledging the risk (though, of course, this creates an even stronger defense). If the court can infer from facts presented that the plaintiff understood the severity of foreseeable risk he was taking and proceeded to participate without regard for the risk, then the requirements for this defense are met.

This defense does not exist, however, where defendant was wantonly or recklessly negligent (e.g., a parachute club that stores old rags in a parachute bag).

Finally, assumption of risk is not a complete bar to the plaintiff's recovery. The issue is whether and to what degree the plaintiff assumed the entire risk ... and whether and to what degree the defendant is at least partially responsible.

See also comparative negligence and contributory negligence below.

## *Coercion*

This is another name for the affirmative defense known as “duress”.

Please see the explanation for duress below under that alphabetical heading.

## Comparative Negligence

In many cases, the plaintiff is at least partially responsible for his own damages. Where this is true, the plaintiff cannot recover that portion of damages caused by himself.<sup>18</sup> He is said to be comparatively negligent.

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

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

Under the common law doctrine of "contributory negligence"<sup>19</sup> the plaintiff whose own wrong was the proximate cause of his injury was barred from recovering under common law, even if the defendant was partially negligent. A fellow thrown from his wagon when it hits a log in the road might sue the person who caused the log to be in the way, however another doctrine of law says that each of us has a responsibility to "look where we're going". So, if the plaintiff wasn't looking where he was going (and defendant can *prove* this by the greater weight of admissible evidence), then under the common law doctrine of "contributory negligence" the negligent plaintiff could not recover, even if defendant was himself negligent.



Under comparative negligence doctrine (adopted by many states in abrogation of the common law, i.e., contrary to the common law) we apply the "but for" analysis and apportion damages accordingly.

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

However, at the same time, but for the defendant's negligence, the injury would not have occurred.

The jury then 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.

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<sup>18</sup> The doctrine of comparative negligence is not recognized in all states. Consult your local statutes and appellate decisions that control your trial court.

<sup>19</sup> Please read about contributory negligence below.

The amount of awardable money damages is determined by comparison of the negligence of both parties.

Take for example the case where a person who wasn't wearing a seatbelt at the time of an accident 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, so 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 raises this defense.<sup>20</sup>

If the defendant in such a case raises the affirmative defense of comparative negligence, he puts the issue of plaintiff's own negligence squarely before the court. The jury can then decide how much or to what degree plaintiff's own negligence caused the plaintiff's injury and reduce the award – or in rare cases eliminate it entirely.

If both parties are equally at fault, the amount of plaintiff's recovery should be reduced by one-half.

See also contributory negligence below.

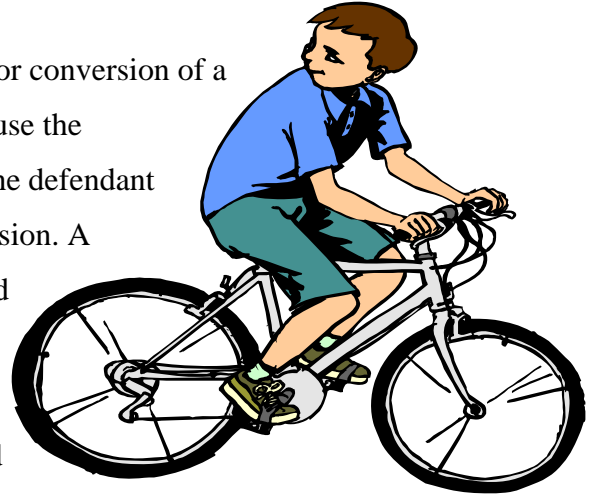
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<sup>20</sup> As with all these defenses, research the statutes and appellate decisions that control your trial court so you know where the lines are drawn.

## Consent

This affirmative defense applies in many different types of cases, 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 the plaintiff gave the defendant permission to use the bicycle.<sup>21</sup> The claim known as conversion requires that the defendant take possession of the plaintiff's property without permission. A lawsuit founded in conversion, therefore, will not succeed if the defendant pleads and proves the affirmative defense of consent. This is true even where the plaintiff gave only temporary permission and defendant continued



to hold the property beyond the date when it was requested to be returned. The plaintiff may have a claim for breach of contract, however he cannot prevail with a claim for conversion if he gave his consent to the defendant's "taking possession".

If a patient submits to surgery, after reading (when not in a drug-induced state that would impair his understanding) and signing a consent form that clearly identifies the 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.

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

That is to say one cannot legally "consent" to something about which he has limited knowledge.

The consent that courts recognize is "knowing and intelligent".

Thus, a drunk or drugged individual lacks the capacity to consent, as does a child or a person suffering from some mental defect.

In order for this defense to lie, plaintiff's consent must be (1) voluntary, (2) informed, and (3) identified to the specific risk rather than general.

General consent may not be sufficiently specific to create the defense. Simply

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<sup>21</sup> To learn more about the claim (cause of action) known as "conversion" and other claims courts recognize, refer to our tutorial Claims. [www.jurisdictionary.com](http://www.jurisdictionary.com)

knowing that “some” risk may be inherent does not sufficiently identify specific risks such that the plaintiff has actual knowledge of the risks, rather than a vague understanding.

If you allow someone to paint your house pink, and later decide to sue the painter because you don’t like pink, the affirmative defense of consent will lie to protect him. If the painter files this defense by *alleging all facts necessary to sustain the defense and subsequently proves all those facts by the greater weight of admissible evidence*, then the painter will be protected from the plaintiff’s complaint, because the plaintiff consented to the house being painted pink in the first place.

Battery is a claim including as one of its essential fact elements that the defendant *touched* the plaintiff without consent, i.e., the uninvited touching of another. It doesn’t matter whether the touching causes physical injury, so long as some damage to the plaintiff results. I know of one case where a carpet layer touched his female customer on the shoulder with his outstretched finger to emphasize the point that he was not going to use scrap carpet pieces to repair a hole in the customer’s hallway runner. Such repairs were not in their carpeting contract, but the lady insisted. His touch caused no physical injury whatever. All he did was *touch* her without her consent. She sued him for loss of consortium, a claim that arises where someone claims they are no longer able to enjoy intimate contact with their mate as a direct result of the act complained of. If, on the other hand, the carpet layer had requested permission to touch the woman on her shoulder, and the woman gave permission, then the defense of “consent” would prevent her from claiming damages in a lawsuit.

Remember: One must do more than lazy lawyers do when they file affirmative defenses by merely listing the names of the defenses. Smart litigants allege *all* the fact elements necessary to *prove* their affirmative defenses then proceed to prove *all* those facts by the greater weight of admissible evidence.<sup>22</sup>

Consent is an absolute defense against plaintiffs who *knowingly* and *intelligently*

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<sup>22</sup> Just because some lawyers do things a certain way doesn’t mean that’s the *proper* way to do things. Many lawyers are lazy. Other lawyers are ignorant of what it actually takes to win lawsuits, having “ivory tower” law school educations and no common-sense or practical experience winning cases based on the elements. Anyone who takes the time to read more than a few appellate decisions will soon come to the conclusion that there’s a better way to do things than the way many lawyers do them. The **Jurisdiction**<sup>®</sup> way! [www.Jurisdiction.com](http://www.Jurisdiction.com)

agree to any circumstance that later causes them injury for which they seek damages in a lawsuit.

## *Contributory Negligence*



If a plaintiff negligently contributed to the event giving rise to plaintiff's claim, the defendant may have grounds for the defense of contributory negligence, which may eliminate his responsibility for plaintiff's damages.

This doctrine derives from common law, but has been abrogated in many jurisdictions that now prefer the comparative negligence doctrine where both parties are at least partially responsible for the injuries complained of.

For example, the newspaper-reading jay-walker clearly and voluntarily exposes himself *negligently* to the danger of being run over by a passing vehicle. His own negligence *contributes* to the circumstances that directly result in his injury. He is, in fact, the *sole cause* of his injury ... so, under this doctrine, he is barred from recovering in a lawsuit.

The first test in such circumstances is whether the plaintiff's own negligence was the *direct and proximate cause* of his injury.

The court applies a "but for" analysis. If it is shown that *but for* plaintiff's own negligence the injury would not have occurred at all, then this defense may result in the plaintiff getting nothing!

Take for example our young man reading the newspaper as he steps off the curb. If he'd watched where he was going, looked both ways before stepping into the street, he'd have no injury to complain about. In such cases this defense may utterly protect the defendant.

Now consider a case where the defendant lives in one of those states where an annual vehicle inspection is required. Suppose further, the defendant's his brakes were bad but he failed to have his vehicle inspected within the time limit required by state law. Suppose also that *but for* his bad brakes he would have been able to stop in time to avoid hitting the negligent newspaper-reading jay-walker.

How does the defense apply in such situations where *both* parties are at least to some degree negligent?

Different state jurisdictions treat this defense differently.

Historically, if the plaintiff's negligence was the *sole cause* of his injuries, this defense was an absolute bar to the plaintiff's recovery in a lawsuit.

In more recent times, this harsh rule has been replaced with the "comparative negligence" doctrine that apportions injury between the parties when *both* are found to be negligent *and* the negligence of both contributed to the injury.<sup>23</sup>

In some jurisdictions, the two defenses overlap.<sup>24</sup>

The better rule is that contributory negligence is an absolute bar to recovery *only* where the plaintiff was absolutely at fault, i.e., that the defendant's negligence in no way contributed to the injury or that the plaintiff had within his power and control the ability to avoid the injury through the exercise of due diligence and reasonable care.

To put it differently, if the defendant's exercise of due diligence and reasonable care could not have prevented plaintiff's injury, this defense is an absolute bar.

Where defendant's negligence contributes at least *partially* to plaintiff's injuries, however, courts in nearly all jurisdictions entertain the comparative negligence defense, resulting in apportionment of fault (and therefore the amount of money damages) in accordance with the degree to which plaintiff's own negligence directly or indirectly caused his own injury.

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<sup>23</sup> See also comparative negligence above.

<sup>24</sup> As with all defenses set out in this tutorial, consult your local state statutes and appellate court decisions controlling your trial court for details of this defense and how it is applied locally

## *Discharge in Bankruptcy*

If a creditor files a lawsuit to collect a debt that's been discharged in bankruptcy, the defendant need only file this affirmative defense along with the ultimate facts needed to prove the defense, referencing an attached *certified* copy of the bankruptcy court's order discharging the debt.

Case closed.

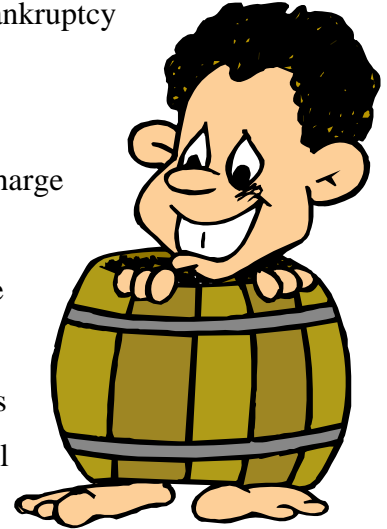
Failure to file a *certified* copy of the bankruptcy court's discharge order, however, misses the mark.

Also important is to be prepared to file *certified* copies of the bankruptcy petition that lists the creditor's debt as one of those that was presented to the bankruptcy court for discharge. One of the errors many people make when seeking relief in bankruptcy is not to list all of their creditors, failing to understand that unless the creditor is listed the debt is not discharged when the final order comes through.

Only those debts listed in the petition are discharged.

Therefore, if you are a defendant sued by a creditor, and your debt has been discharged by the bankruptcy court, file this affirmative defense and be prepared to back up your defense with *certified* copies that clearly show the court that (1) the creditor was listed in the petition and (2) the debt was discharged by the bankruptcy court's order.

Once discharged, the debt is forever barred ... as are all lawsuits brought to collect such discharged debts.



## Duress

Duress is a defense to any lawsuit brought for damages resulting from an act of the defendant that he was forced into by threat or other coercion.

In all cases physical force suffices, e.g., a gun to the head.

The threat or other form of coercion must, however, be imminent and real. An imagined or impossible threat will not suffice.



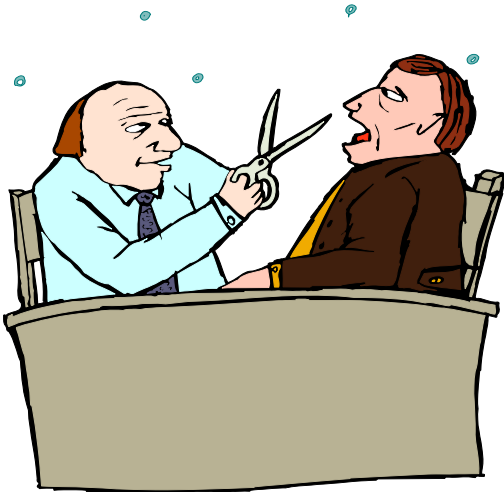
In some jurisdictions even financial force may give rise to this defense, e.g., when a person is so strapped financially that his freedom of choice is unjustly limited, i.e., he simply “can’t say no”. These defenses, of course, are harder to establish.

Duress arises when one person “forces” another to take some action damaging to himself in circumstances that allow no other reasonable course.

Coercion is another name for this defense.

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

Our courts frown on it.



If one party coerces another to sign a contract under duress, for example, and the coercing party sues the person coerced for breach of contract, then the person sued has the affirmative defense of duress. If he pleads the defense by *alleging* all facts necessary to support the defense and *proves* all the alleged facts by a preponderance of admissible evidence, he wins.

The plaintiff’s case goes away!

One cannot be bound by a contract, or any other obligation or duty, if the contract, obligation, or duty

was imposed by force or unconscionable circumstance.

The fact issue before the court in such cases is always whether and to what extent the power of duress was in fact *irresistible*. If the party coerced had alternative choices by which he might have avoided the result, then the defense fails.

For example, if one demands, “I won’t go to the prom with you unless you sign this contract,” that’s not sufficient grounds for coercion. You have other choices.

On the other hand, if one demands, while pointing a loaded .38 revolver to your head, “Sign zee paper, old man!” ... and your quivering hand signs the paper ... and you are sued for breach of the promise contained therein ... you have this defense.

If you *allege* and *prove* all the facts necessary to sustain the defense, you win.

The coerced party only wins, however, if he can prove that he had no reasonable alternative by which he could avoid doing what was demanded.

The dividing line between these two extremes (the prom and the pointed gun), of course, is somewhere in the middle ... that mysterious gray area our courts refer to as the “reasonable person standard”.

Where is the fulcrum on which the court’s decision rests?

If it’s too much like the “prom” threat, then the defendant has no defense.

If it’s anything like the “pistol” threat, not only will the defendant win but, if the defendant can prove the facts of his defense, the plaintiff may end up in prison where he belongs!

If a defendant claims he was forced to sign a contract while on a long-distance phone call with someone 500 miles away, who threatened to punch him in the nose if the contract wasn’t signed, a court will rule the threatened party had reasonable alternatives. The threat was not imminent. The threatened party could take any of several alternative courses to avoid being punched, each a reasonable alternative that defeats the defense.

A defendant coerced at gunpoint cannot be expected to disarm someone with a pistol, unscrew a table leg, and beat the pistol-packing plaintiff to death. Our courts do not require such an “unreasonable” alternative.

Coercion must be real, material (go to the heart of the lawsuit), and be reasonably unavoidable in order for the affirmative defense of duress to be effective.

## *Economic Loss Rule*

The economic loss rule is an affirmative defense (viable in many jurisdictions) to prevent plaintiffs from double-dipping ... doubling their damages for the same loss.

Many times plaintiffs file an action for breach of contract and also for negligence in performance of the contract. If successful, the plaintiff would be unfairly advantaged by double-dipping. The economic loss rule prevents plaintiffs from collecting for both types of damages in the same lawsuit.

When sued for both breach of contract and negligence in performance of the same contract, the savvy defendant files this affirmative defense to prevent double-dipping.

For example, a case involving a contract between a strawberry farmer and a chemical company was filed in Florida when a batch of fertilizer the farmer ordered turned out instead to contain herbicide that killed his strawberry plants. The farmer's case included a count for breach of contract and another count for negligence. Since the farmer contracted for fertilizer and received herbicide instead, he sued for breach of contract damages. Since the packaging of plant-killing herbicide in bags clearly marked "fertilizer" could only result from bone-headed negligence, 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 negligently designed

part on the tractor caused the tractor to fail, and the farmer couldn't get his crops in on time. The faulty tractor resulted from negligence. The court said in this case, however, that the bargained-for consideration was a tractor, *not crops safely gathered into a barn.*

When the tractor failed to work, only the tractor was damaged by the defendant's negligence. The contract for a working tractor was breached by delivery of a faulty tractor, so the farmer won his breach of contract

count. The tractor did not *directly* cause the crop damage, so 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 (i.e., the property the farmer contracted for). To allow the farmer to recover for breach of the contract to deliver a working tractor *and* for negligence that damaged *only* the tractor would result in double-dipping, so the court restricted the farmer's recovery to breach of contract and denied the negligence count. The economic loss rule barred his recovering for lost crops resulting solely from a faulty tractor, since it was *only* a working tractor the farmer bargained for.

In the first case, a negligently delivered chemical damaged *other* property,<sup>25</sup> so the economic loss rule did not prevent recovery for both breach of contract and damages resulting from the bone-headed negligence that packed herbicide in bags labeled fertilizer.

In the second case the negligently manufactured tractor damaged itself *only*, not the farmer's crops. The court applied the economic loss rule to bar the farmer from recovering damages for negligence that resulted in crops left to rot in the field because the tractor malfunctioned.

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

The negligence count will not be heard unless the defective thing bargained for also damaged *other* property.

You cannot double-dip.

Since the negligently manufactured tractor damaged *only* itself and not the crops, the farmer was required to seek recovery solely on his breach of contract count.

When negligently packaged herbicide destroyed fields of strawberries, however, the farmer was permitted to recover damages both for breach of his contract (he paid for fertilizer and was entitled to recovery of the cost of that fertilizer under his breach of contract claim) and for the negligent delivery of herbicide that destroyed his crop that gave him the right to also recover the value of the strawberries destroyed by herbicide he did not bargain for.

The economic loss rule applies to restrict recovery to the contract count when a

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<sup>25</sup> The key to recognizing when the Economic Loss Rule defense may apply is when damage due to negligence results in loss of *other* property, i.e., property other than what was bargained for in the contract.

negligent act damages *only* the thing bargained for. In such cases the injured party is said to have lost only the economic value of his bargain.

If the injured party also suffers damages to *other* property, however, the economic loss rule does not apply, and the plaintiff is allowed to recover for the loss of his bargain and the value of damages to the other property.

Both contract and negligence law may be used to get a judgment for damages if something *other* than the bargained-for thing is damaged by the defendant's negligence.

## *Estoppel*

In its most fundamental form, an estoppel defense arises where one party leads another to believe some set of facts, the second party reasonably relies on those facts, then the first party changes position and seeks to stand on a different set of facts. The courts say the first party is *estopped* to deny the initial facts, and the second party is justified in continuing to rely on the facts initially represented by the first party.



If a plaintiff leads a defendant to believe, for example, that the fee for a balloon ride is \$50, yet after the balloon sets down he tries to charge the defendant \$75, defendant has an estoppel defense ... *if he can prove the plaintiff unjustifiably changed position.*

The first party may estop himself by words or conduct.

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

Consider the grove owner who contracts with a truck driver to deliver grapefruit yet fails and refuses to provide the truck driver with grapefruit to deliver. The owner of the grove cannot successfully sue the truck driver for loss of customers who didn't get any grapefruit when it was he, himself, who prevented delivery. He is estopped.

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

To allow the first party to take a different position must threaten 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 the acts or words of the first party who subsequently wishes to change his position by arguing some fact contrary to what was represented at the beginning.

Estoppel is related to the affirmative defense of *res judicata* (the thing has been ruled upon), wherein the 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.<sup>26</sup>

Similarly, the affirmative defense of laches stands on estoppel principles, since the plaintiff is estopped to delay bringing his case.<sup>27</sup>

The defense of equitable estoppel stands to protect one who relies on some set of facts present or past that are communicated or demonstrated by acts or words of another who (1) knows or ought to know the facts communicated or demonstrated are not true, (2) intentionally or negligently causes another to reasonably rely on those facts, and (3) subsequently seeks to assert a different set of facts that would cause an unjust result. Courts will not allow it if the doctrine of estoppel is raised.<sup>28</sup>

Equitable 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 promise to his detriment. Even if there is no enforceable contract, our courts will enforce such promises to protect parties who *detrimentally rely* on the dishonesty of a crooked promisor who knew or should have known the promised facts were false. This doctrine is sometimes also called “detrimental reliance”.

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<sup>26</sup> See the affirmative defense of *res judicata* below.

<sup>27</sup> See the affirmative defense of laches below.

<sup>28</sup> **Jurisdiction**<sup>®</sup> wants to know why this and other essential doctrines of American justice are not taught in our schools. Please contact us if you wish to support our efforts to get these teachings into the schools so our children can grow up better understanding the principles of fairness and honesty that are imposed on litigants in court *but not yet taught to our children in the schools!* No wonder there are so many lawsuits making lawyers rich in this country. Nobody taught us what justice is! If you agree the time for change is now, please contact us by email. [lawbook@jurisdiction.com](mailto:lawbook@jurisdiction.com)

## *Failure of Consideration*

This affirmative defense is useful in breach of contract cases where the plaintiff claims the defendant failed to uphold his end of the bargain, and the defendant wishes to make clear that the plaintiff didn't do his part, either – such as failure to pay for services or failure to deliver goods or pay the price for same.



A plaintiff may only recover for breach of contract if he, himself, has performed his end of the bargain – such as paying the price the parties bargained for.

Many times, of course, this is not the case. Money or other consideration for the contract is not turned over, so the non-payer cannot enforce the contract.

Suppose, for example, you hire a fellow to mow your lawn every Tuesday while you're away on vacation. You promise to pay him \$50 for each mowing (it's a big lawn), and you give him \$200 up front before leaving for your vacation (enough for 4 weeks of mowing). You return three months later to discover the weeds have taken over and the city has fined you \$500 for not tending to your landscaping.

So, you sue the mower for damages, including the \$500 fine.

If the mower is on his legal toes, he'll file the affirmative defense of "failure of consideration", setting forth the essential facts necessary to show you paid for only four weeks and that he mowed all four times. If he can prove these facts by a preponderance of admissible evidence, he wins.

A contract is only enforceable by the plaintiff if the plaintiff performs his part of the bargain – i.e., if the plaintiff delivers the bargained-for consideration contemplated by the contract.

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

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

If one side fails to provide the consideration he promised, he cannot successfully sue for damages on the contract, if the defendant raises this affirmative defense and proves the essential facts in support by the greater weight<sup>29</sup> of admissible evidence.

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<sup>29</sup> Greater weight and preponderance mean the same thing when balancing admissible evidence in court.

## *Failure to Demand*

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, and (3) damages to the plaintiff resulting from the breach. In some jurisdictions, however, plaintiffs are required to make a formal demand for performance (payment of money, performance of services, or delivery of goods) as a pre-requisite to filing a lawsuit on the contract.

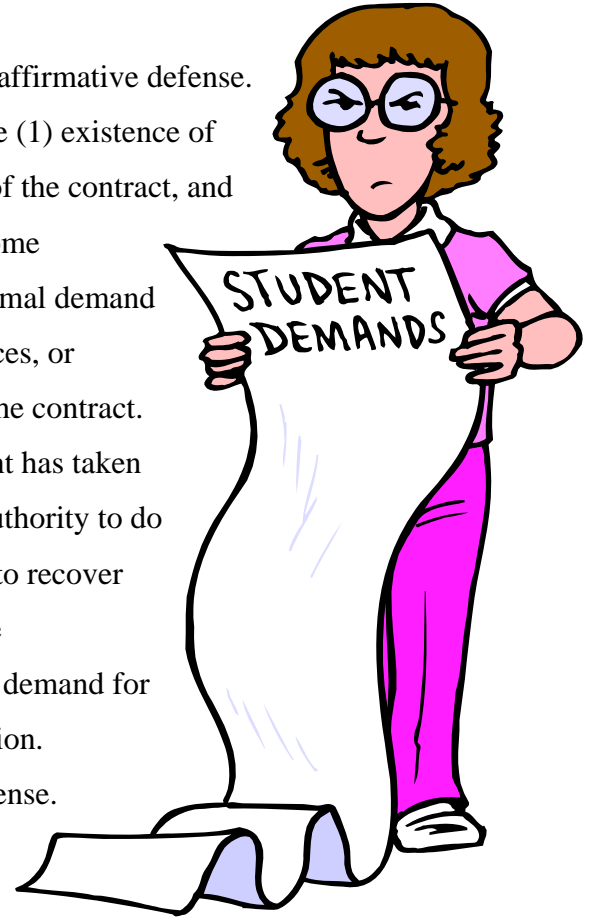
Another example is conversion, where the defendant has taken possession of the property of the plaintiff without lawful authority to do so (the civil court version of theft that entitles the plaintiff to recover the fair market value of the thing taken). However, in some jurisdictions the courts require the plaintiff to make formal demand for return of the thing taken before filing a lawsuit for conversion.

In such cases the defendant has this affirmative defense.

Plaintiff's failure to demand (see notes above) may be a defense if defendant can show he lacked intent to breach the contract or convert the property and that he would've promptly returned the property if the plaintiff demanded its return.

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

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



## *Failure to Join an Indispensable Party \**

This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer (as indicated by the asterisk).

It is proper where someone who has an interest in the case such that a final decree cannot be made without either affecting the interest or leaving the case unresolved or contrary to the requirements of justice.

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

Not all “necessary parties” are *indispensable*.

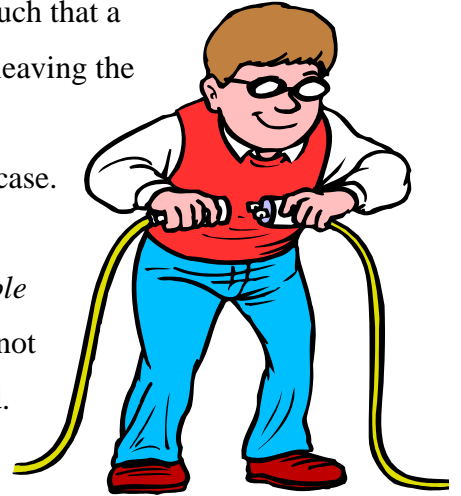
To allow a case to proceed without requiring all *indispensable* parties to be made parties to the lawsuit could result in an injustice not only to the parties included but also to the party who was not joined.

Generally, courts will not dismiss a case simply because all potential plaintiffs have not joined in the fray.

The courts do wish to avoid subsequent litigation, so there is good reason to join all potential plaintiffs when possible, however there are times when all the potential plaintiffs are not available or are unascertainable, in which case it would be unjust to deny the existing plaintiffs their day in court simply because others are not available to participate.

Consider, however, a case involving title to real property where the interest of two or more owners will be affected by the outcome yet only one owner has been joined to the case. Since the outcome will affect the rights of the owner(s) not yet joined to the case, the courts are unable to enter final judgment without denying due process to the absent owner(s).

In such cases, this defense will prevent the case from proceeding.



\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

It should first be asserted by motion to dismiss and, failing that, should be filed with the answer as an affirmative defense.

If it is later shown by the greater weight of admissible evidence that the absent party complained of is, in fact, *indispensable* for a complete adjudication of the issues of the case, the court may be prohibited from entering final judgment.

## *Failure to Post Bond*



Some jurisdictions require the posting of a bond to protect the foreseeable injury to a defendant in certain types of cases – most notably actions for injunctive relief – so, if no bond is posted, the defendant has this affirmative defense (which may also be presented by motion to dismiss for failure to post the required bond).<sup>30</sup>

The amount of bond is calculated in relation to the amount of money damages a wrongfully-issued injunction might cause the defendant.<sup>31</sup> In many jurisdictions, if no bond is posted, the injunction cannot be lawfully enforced.<sup>32</sup>

Courts typically do not issue injunctions to enforce contracts. The proper action to enforce a contract is called “specific performance” in which case (if sufficient proof is shown) the court may issue an injunction to require the defendant to perform provisions of a legally-binding contract.

Non-compete provisions in written agreements (e.g., contracts for employment) are typically enforced by injunctions (if sufficient proof is shown). Restrictions apply if services of the party to be enjoined are of particular value to the community (e.g., doctor or other medical services provider). Further, if the conditions of the covenant (e.g., length of time or size of geographic area) are unreasonable, courts will not enforce the covenant.

Injunctions to prevent unauthorized use of trade secrets or solicitation of business from proprietary customer lists belonging to others are typically granted, also.

In all such cases, however, many courts require a bond to protect the defendant from foreseeable injury resulting from interruption of the defendant’s life.

Failure to post the required bond, therefore, gives rise to this affirmative defense.

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<sup>30</sup> To learn more about motions to dismiss, see our tutorial *Motions & Hearings*. [www.jurisdictionary.com](http://www.jurisdictionary.com)

<sup>31</sup> In a case brought for an injunction, the “defendant” may be called the “respondent”, instead. Same thing.

<sup>32</sup> Check local statutes and appellate decisions in your state.

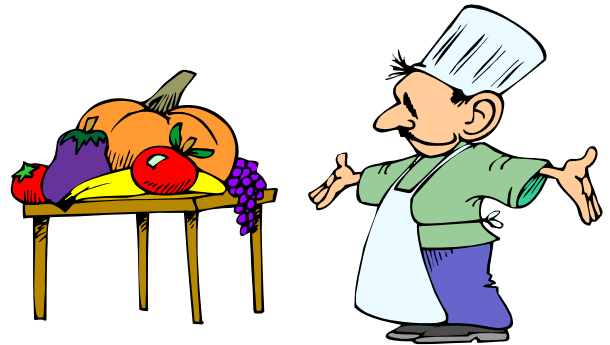
## *Failure to State Cause of Action \**

Every cause of action (or claim on which the court can grant relief)<sup>33</sup> must be alleged by stating ultimate facts that support all essential elements of the cause of action.<sup>34</sup>

It's sort of like listing the ingredients for a recipe.

If any ingredients of the recipe are missing, the recipe is not complete, and the court cannot "cook the dish".

Failure to state sufficient ultimate facts to support 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" or, as the federal courts put it, "for failure to state a claim on which the courts can grant relief".



This is one of those defenses that can (and should) also be asserted by a motion *before* filing an answer. (Please note the asterisk to the right of the title. You'll find an asterisk marking other affirmative defenses discussed in this tutorial, indicating they *should* also be asserted by motion.). If the motion to dismiss succeeds, no answer or affirmative defense is required, since the complaint is dismissed. If the motion does not succeed, and the court allows the case to go forward so that the defendant must file an answer, a wise defendant will re-state his assertion that the plaintiff has failed to state a cause of action by filing this affirmative defense along with his answer.

For example, in an action for breach of contract, the plaintiff must allege ultimate facts sufficient to assert three essential elements: (1) existence of an enforceable contract, (2) an act by the defendant in breach of the contract, and (3) damages to the plaintiff that directly result from the breach. Suppose, then, that a lawsuit is filed for breach of contract in which the plaintiff fails to allege *ultimate facts* that he suffered damages as a direct

<sup>33</sup> Courts have power to grant relief only for certain causes or claims. In many state courts these are called causes of action. In federal court they are often called "claims on which the court can grant relief".

<sup>34</sup> In federal court this affirmative defense is called "failure to state a claim on which the court can grant relief".

result of the breach. Merely stating that the defendant suffered “damages” is not enough. The plaintiff must allege the “*ultimate facts*” that support that essential element, such as stating that his strawberry fields were destroyed or that he lost business to a competitor, adding additional ultimate facts as necessary that explain how the loss was a direct result of the breach.

Failure to allege all ultimate facts necessary to assert all essential elements exposes the plaintiff to a motion to dismiss for failure to state a cause of action and, if the court does not dismiss the plaintiff’s case (usually allowing the plaintiff a reasonable time to amend his pleading to correct the defect), the defendant should file this affirmative defense to preserve the point in his favor.

Merely stating, for example, “The parties entered into a contract, the defendant breached the contract, and plaintiff suffered damages as a direct result is not enough.” The plaintiff must allege sufficient *ultimate facts* to assert *all* essential elements of every one of his causes of action, or he has not met the requirements of the rules, and his case is subject to dismissal.

If the court does not dismiss upon motion, then this affirmative defense should be filed to preserve the point in favor of the defendant ... and give the defendant something *affirmative* to prove as he puts admissible evidence into the record in opposition to the plaintiff’s case.

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

## *Fraud*

Fraud as an affirmative defense (and as a claim or cause of action) must be pled with *specificity*.

It is not enough to merely allege the other party is guilty of fraud. One must spell out fraudulent details with *specificity* so the court knows what material misrepresentation

was made that gives rise to the alleged fraud. In other words, the defensive pleading must be both complete and accurate.

Fraud as an affirmative defense depends upon a showing (by a preponderance of the admissible evidence) that plaintiff (by words or deed) intentionally misrepresented a material fact that goes to the heart of the claim(s) on which he brings his suit.

The fact that plaintiff *is* a fraud, or that he has misrepresented facts other than those related to the lawsuit before the court, has no relation to this defense and cannot support it.

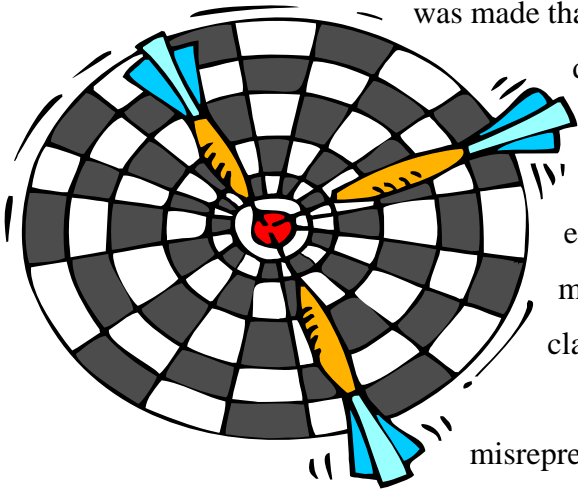
In order for fraud to support an affirmative defense, circumstances and material facts of the fraud must be pled with *specificity*, and all essential fact elements must be stated.

In many jurisdictions, if allegations are not set out in full, the defense is treated as waived. General allegations, vague references, or simple conclusions of fraud do not meet the requirements.

When one pleads fraud he must do so with *particularity*.

Suppose the 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 that he misrepresented these things to the buyer who, reasonably relying on the false statements of the seller, entered into the deal and used his life savings to make the down payment on that house.

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



Buyer has the defense of fraud.

However, merely listing “fraud” as his affirmative defense, without spelling out in detail the facts that go to the heart of the matter may result in having this defense waived.

It’s not even enough to say, “Seller made material misstatements of fact when he represented the house.”

You need more.

Defendant must set out *all* the material facts supporting his allegation that the plaintiff defrauded him – *specifically* quoting seller in each and every misrepresentation, and for each such misrepresentation explaining how the false statement *reasonably* induced buyer to buy.

General allegations are insufficient for two reasons.

1. The court may treat them as waived.
2. They do not provide the defendant with target facts for him to prove in support of his defense, i.e., without alleging the facts he intends to prove he is like the plaintiff who fails to allege all the essential facts of his claims (causes of action). He leaves himself in a weak position from which it is more difficult to obtain discovery and assert proof.

Interestingly, defendants with this affirmative defense will usually also have fraud as a counter-claim ... which, again, they must plead with *particularity* in order to win.

## *Futile Act*

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 two are not meshed with each other. No amount of twisting on one will ever transfer power to the other. Even if a court order compelled the turning of one gear, if the desired effect was to make the other gear turn, the courts' order would be an absolute waste of time.

A futile act.

Therefore the 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, yet removing the dam will not divert water onto the complaining rancher's property. The rancher seeks an order that would compel a futile act. This defense will raise the issue of futility and give defendant the mechanism for showing the court *affirmatively* that the plaintiff's case is all wet.

These circumstances are rare, of course, 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.

The law will not enforce a futile act.<sup>35</sup>

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<sup>35</sup> This is one of the fundamental maxims of law.

## *Good Samaritan Defense*

Some jurisdictions have enacted statutory protections that limit the liability of persons who render assistance, medical or otherwise, in “emergency” situations.

These statutes do not remove liability for those who act without reasonable care, however those who render assistance *gratuitously*<sup>36</sup> and do so with reasonable care are immune from lawsuits brought by persons who claim they were damaged as a result of the gratuitous rendering of assistance.

There must exist an imminent threat of bodily harm or substantial property loss.<sup>37</sup> Official intermeddling does not constitute a “good Samaritan” deed. If an obvious need is not present, then sticking your nose in where it isn’t wanted will not be protected.



On the other hand, if you see someone obviously bleeding to death from an arterial wound that’s pumping bright red blood three feet into the air above their prostrate body, the Good Samaritan Act (if your state has enacted one) will be an affirmative defense against a lawsuit brought against you for damages claimed to result from your attempt to stop the bleeding ... provided you act with *reasonable* care.

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 the damages caused by the too tight tourniquet, you *will* be protected by the Good Samaritan Act – because the degree of care required by the law is only that of a reasonable person, i.e., an average person. You will not be held to the higher standard of a medical professional or EMT.

Again, if you file this affirmative defense, be certain to spell out all the facts that give rise to the defense, facts you will then proceed to prove by the greater weight of

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<sup>36</sup> He who charges money or demands any value whatever for rendering assistance is not protected by any Good Samaritan Act. He is held to the highest standard of duty.

<sup>37</sup> Consult the statutes in your state to be aware of any specific fact circumstances necessary for the Good Samaritan Act to be used as an affirmative defense.

admissible evidence to win your case.

If the defendant has not actually undertaken to begin rendering service, regardless of preparatory actions taken by him, the law will not hold him liable where the assumed duty has not begun. He is only liable to act with reasonable care *after* he assumes that duty by beginning. However, once he assumes the duty by *beginning* to render assistance, he cannot abandon the injured person until professional help is on the scene. Should he abandon the scene, after beginning to render assistance and before professional help is on scene to take over, he may be held liable for all of the wounded person's injuries.

Please assist where you are able to do so, knowing you're immune from a lawsuit brought for damages resulting from your *reasonable* exercise of due care, but remember that once you begin rendering assistance you cannot abandon the victim until professional help arrives.<sup>38</sup>

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<sup>38</sup> Again, before relying on this defense, be certain you have read and understand the statutory provisions in your state and any appellate decisions that may interpret the scope of those statutes and their application.

## *Illegality*

It is a general rule that controls the trial courts in all jurisdictions that a contract arising from an illegal act (e.g., gambling) or one seeking to enforce performance of an illegal act (e.g., a mob hit) cannot be enforced in our courts.

The affirmative defense of illegality, therefore, provides an absolute bar to a plaintiff seeking to recover in court for loss resulting from such a contract or agreement.

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 you know the merchandise is stolen you will be exposed to criminal penalties as well.



The principle spills over into other areas of law, also. For example, a murderer cannot inherit from his victim nor recover life insurance proceeds.

Such is the fruit of a poisoned tree.

He who enters into an illegal contract or bargains with another to perform an illegal act does so without resort to the courts if the deal falls through.

The law will not enforce an illegal act.<sup>39</sup>

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<sup>39</sup> Another fundamental maxim of law.

## *Impossibility*

A defendant may be excused from performing certain acts if prevented by some circumstance beyond his control. In such cases, he has this affirmative defense that arises primarily in contract cases where the defendant is sued for failure to perform a promise.

In order to be impossible in the eyes of the court, a thing must be utterly and absolutely *impossible*.

Climbing the rock face slopes of Mount Everest may be incredibly difficult. Nearly impossible, even. However some people have made it to the top, so it is not a clearly *impossible* act.

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

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

If impossibility was foreseeable from plaintiff's point of view, and not from the defendant's point of view, defendant will also have the defense of estoppel.<sup>40</sup>

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



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<sup>40</sup> See affirmative defense of estoppel above.

Suppose an ocean front land-owner contracts for a builder to erect a 25-story condominium on his beach property. The builder begins construction after receiving partial payment to cover his costs for the first phase of building. Within weeks, however, the state legislature passes a law forbidding construction of beach front condominiums exceeding 15 stories. The contractor stops work. The land-owner sues.

Because the law creates an impossibility beyond the contractor's control, this affirmative defense will protect the contractor – provided the contractor did not know of the impending legislation and had no duty to inquire prior to starting construction. In such cases, the 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. The land-owner has no recourse against the contractor, since the event preventing performance was beyond the contractor's control.

## *Improper Venue \**

Venue is often confused with jurisdiction. They are two separate things.

Venue is *where* the court sits.

Jurisdiction is *what* the court can hear.

Improper venue defenses generally don't dispose of cases. They move them.

The asterisk (\*) on the title of this and other defenses in this tutorial indicates this is one of those defenses that can (and should) be brought by motion to dismiss first. Then, if the motion fails, defendant should file this affirmative defense to preserve the issue. In that way, defendant may continue to argue the case is not *where* it should be and, perhaps at some later time (after he's used his five discovery tools to obtain evidence that the case is in the wrong court), convince the judge to transfer venue to a proper court.

Generally, venue may be controlled by statute. The purpose is to conserve judicial economy by not permitting cases to be brought in courts where delays and unnecessary expenses may result because the evidence, parties, or events giving rise to the claims are located elsewhere.

For example, all courts have jurisdiction to hear cases involving breach of contract between parties located anywhere in Florida. A plaintiff in Orlando (Orange County) cannot, however, file a lawsuit in his local courthouse against a defendant who resides in Tampa (Hillsborough County), even though the two counties are only some 50 miles apart.

This is all the more true if the events giving rise to the plaintiff's claims took place in Tampa and the evidence needed to resolve the parties' issues is also in Tampa. To require the defendants to come to Orlando to present their case would unduly prejudice the defendants, delay the proceedings, and increase the cost to taxpayers by allowing litigation to take place inefficiently.

Improper venue militates against the swift and efficient administration of justice.

In most cases it also creates an unjust burden on the party most distant.



In general,<sup>41</sup> venue is proper in the county where the defendant resides (or, if a corporation, where it has or usually keeps an office for customary business), where the 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 to a proper venue and, failing that, should preserve this issue by filing this affirmative defense with his answer.

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

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<sup>41</sup> Consult the statutes and appellate decisions that control your trial court.

## *Injury by Fellow Servant*

Where an employee is injured by another employee of the same employer, this defense protects the employer from legal liability *if the employer did not contribute in any way to the injury.*

Where the employer puts his employees in places where the work exposes the employees to hazards they cannot avoid by the use of reasonable care and at the same time perform their duties, then the employer has a duty to both warn the employees and provide sufficient safety measures to protect them from harm.

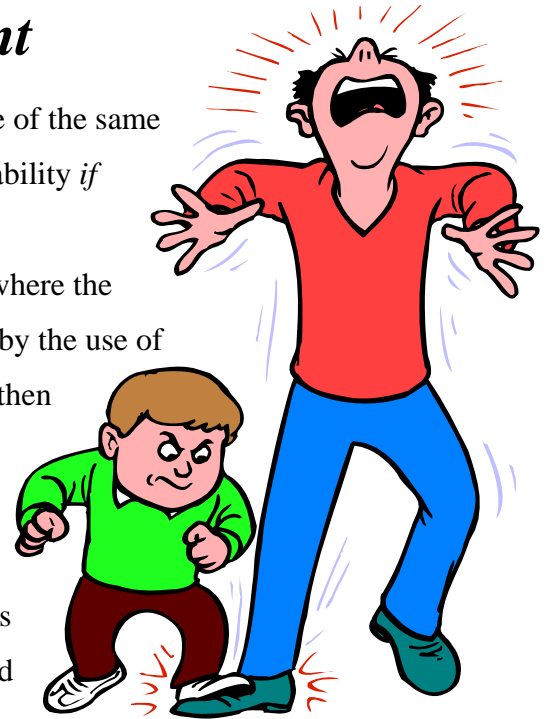
If one employee injures another in such a hazardous working environment and the injury results from the hazard *as opposed to the fellow servant's separate negligence or intentional disregard*, then in that case this defense will not protect the employer.

On the other hand, if one employee's negligence or intentional disregard is the proximate cause of another employee's injury, some jurisdictions provide this defense for the employer who is sued (generally because the employer is seen as the "deep pocket").

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

The measure is always to what extent the employer had a duty to prevent injury to his employees – whether from negligence or intent of his employees or natural causes.

If the employer has a duty, the employer remains liable.



## *Insufficiency of Process \**



This defense does not arise when a party is not served with a summons and complaint. That defense is called insufficiency of *service* of process.

The defense of “insufficiency of process” arises when the summons is defective (e.g., unsigned) or when a copy of the complaint was not attached to the summons when served.

There’s a break in the chain.

The process is insufficient ... giving rise to this defense.

When one is served with improper process,<sup>42</sup> he has a duty to assert his defense, either in a motion to dismiss or by affirmative defense, or both. He cannot choose to believe he is free to ignore the attempted service. Many people make this mistake ... and lose. The technicality they rely upon is simply ignored by the courts. One cannot wait until the court enters judgment, by default or otherwise, and then make one’s first appearance with the argument that proper service was never effected.

Once the defendant is aware that a lawsuit against him has been filed, he must *affirmatively* participate.

Imagining one can ignore improper service leads to disaster.

If a court determines that insufficient process (1) substantially complies with the rule and (2) the defendant has not been prejudiced by the defect, the defense is waived.

Once a defendant has “actual notice” that a lawsuit has been filed against him, the courts deem he has a duty to assert this defense ... and failure is fatal.

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

<sup>42</sup> Process is a set of papers including, minimally, a properly issued summons and a copy of the complaint.

## *Insufficiency of Service of Process*



This defense arises when *service* (and not the process itself) is defective or insufficient as a matter of law to put the defendant on notice that a lawsuit has been filed to which he is obligated to file a timely response.

Suppose the plaintiff uses the mail to deliver the summons and a copy of his complaint when the rules require service of process by other means. The process is good, but the *service* is insufficient to give the court jurisdiction over the person of the defendant.

Suppose the process server delivers the complaint and summons in person but to the wrong person and the wrong address. The process is fine. Duly issued by the court. The process is otherwise perfectly capable of putting the defendant on notice that a lawsuit has been filed. However, since process was delivered to the wrong party, the *service* is insufficient, and this motion should be filed.

Similarly, if process is served by someone who is not judicially authorized to serve process, then *service* of process is insufficient, and this defense is available.

As for the too-frequent error of those who, learning of attempted service on them, undertake to avoid or evade service, choosing to hide rather than respond, most states take the position that once a defendant has *actual knowledge* that a lawsuit has been filed against them, they must appear to defend or be found in default. See the discussion above under insufficiency of process.

The first response of a defendant who learns a lawsuit has been filed but that service has not been properly effected is to move the court to quash the insufficiently served process or a motion to dismiss for insufficiency of process. Failing that, he should (if service is not properly effected thereafter) file this affirmative defense to preserve the issue.

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

## *No Irreparable Harm*

If a plaintiff sues for an injunction when the wrong plaintiff seeks to prevent by means of the injunction could be fully compensated by awarding money damages alone, the court should not issue the injunction. The affirmative defense of “no irreparable harm” should be filed with defendant’s answer.

An essential element for an injunction to issue is allegation and proof that money damages alone will not compensate the plaintiff.

If the plaintiff has been beaten nearly 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 money damages from the defendant.

Whenever a plaintiff seeks an injunction where an award of money would adequately and justly compensate him for the injury he claims should entitled him to an injunction, then (after proof) the court should deny issuance of the injunction.

The decision as to whether an award of money alone is sufficient to protect the plaintiff is not based on whether the 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 plaintiff alleges.<sup>43</sup>

If a money amount cannot be calculated that would protect the plaintiff from the threatened injury, then entry of an injunction is proper.

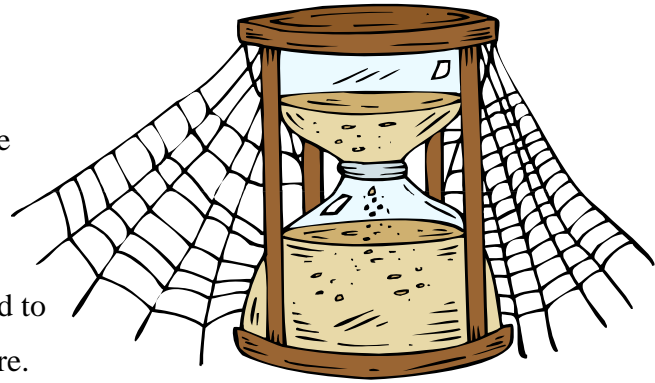


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<sup>43</sup> In cases where an injunction is sought, the plaintiff is sometimes called the petitioner, and defendant is called the respondent.

## *Laches*

Laches is an affirmative defense that rests on the concept that one who delays unreasonably in pursuing his remedy in court, especially where his voluntary delay prejudices the other party, should not be permitted to sue. The decision is based on elements, just as claims are.



In order for the defense of laches to be effective, defendant must prove each of the following elements:

1. Some genuine basis for the plaintiff's lawsuit, i.e., conduct on the part of the defendant giving rise to the complaint (otherwise the defense is not necessary).
2. Plaintiff had knowledge of defendant's conduct giving rise to the complaint for an unreasonable time before filing suit.
3. Plaintiff had a reasonable opportunity to file suit sooner.
4. Plaintiff unreasonably delayed filing suit.
5. Defendant didn't know the plaintiff would sue.
6. Injury or prejudice to defendant if relief is granted on the complaint.

The fundamental doctrine underlying the defense of laches is whether and to what extent the plaintiff's delay has lessened the defendant's ability to defend. For example, if a key witness has died during the interval, defendant may have a harder time proving he is not liable for the damages plaintiff seeks. In some cases, delay may actually preclude the court from arriving at a just result because the span of time has made it too difficult to determine the truth of matters asserted by the respective parties.

The defense of laches may be heard even before the statute of limitations has run. Problems arise when the statute is tolled for one reason or another, i.e., when the legal clock is stopped but real time ticks on. Consult local statutes and case law.

Once a defendant has succeeded in showing the elements of this defense exist, the burden then shifts to the plaintiff to show his delay in filing suit was through no fault of his own. Perhaps he was unable to sooner obtain necessary evidence. Perhaps he knew of the wrong but did not know the identity of the wrongdoer. Under such circumstances as these, the plaintiff may be excused from filing late, and the defense of laches fails.

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

legal incapacity, however as soon as he is of age the law imputes to him a duty to timely file an action against those who he claims caused him injury during his minority. (For details, see local statutory authority and case law.)

Laches is an affirmative defense that must be raised by the responsive pleading (i.e., the answer) or (if permitted in the jurisdiction) reasonably soon thereafter. If it is not affirmatively pled at the beginning of the case, it is deemed to have been waived.

The burden of proving each and every element of this defense is, of course, on the defendant. In most jurisdictions it must be proved by clear and convincing evidence (as opposed to the greater weight or predominance of 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, to examine the prejudicial effect of the delay and applies the defense to prevent injustice.

Statutes of limitations simply tick off the time and more or less mechanically bar suits at law thereafter.

Laches only bars suits in equity when not to do so would cause an injustice because of plaintiff's unreasonable, unexcused delay.

Application of the doctrine depends on the facts of each individual case.

The mere passage of time does not give rise to this defense.

Each of the essential elements must be alleged and proven.

## *Lack of Jurisdiction over Subject Matter \**



This defense may be raised at any time but, of course, should be raised as soon as it is known to the defendant.

This may occur in many ways.

For example, suppose plaintiff sues defendant in state court to preclude copyright infringement. Federal courts (at the time of this writing) have *exclusive jurisdiction* to hear matters involving copyright infringement, so the defendant would prevail with this defense.

On the other hand, if plaintiff sues defendant in state court for loss of earnings due to some matter only remotely related to copyright protection, rather than infringement, then the federal courts do not have exclusive jurisdiction, and this defense would fail.

Subject matter jurisdiction is sometimes limited by the amount of money that the plaintiff puts into controversy when he files his suit. To bring an action in federal court based on diversity of citizenship,<sup>44</sup> for example, requires that the plaintiff claim at least \$75,000 in damages. Failure to allege the minimum amount is fatal. Even if the plaintiff alleges the minimum of \$75,000, this defense will operate if the defendant can prove the damages plaintiff alleges do not comport with plaintiff's actual losses.<sup>45</sup>

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

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<sup>44</sup> Where plaintiff and defendant reside in separate states.

<sup>45</sup> I won a case some years ago where a plaintiff residing in Illinois brought a case in federal court against my client, a Florida-based moving van company. The plaintiff presented a laundry list of damages in his complaint, all of which amounted to things like a scratched refrigerator door, a 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, because it lacked subject matter jurisdiction over the controversy that involved less than \$75,000.

to *hear* the matter in the first place stood solely on the wording of that statute, the court lacked jurisdiction to hear 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 the defendant raises and *proves* the elements of this defense, the judge's hands are tied.

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

## *Lack of Jurisdiction over the Person* \*

In order for a court to have jurisdiction over a person, as opposed to *in rem* jurisdiction (i.e., jurisdiction over a subject matter) the person must be served with process,<sup>46</sup> i.e., a summons and copy of the complaint.



However, service of process alone does not insure that the court has jurisdiction over the person.

Without jurisdiction over the person, no order of the court can be effective to command such person to do anything whatever. The court has no power over a person unless it also has *in personam* jurisdiction (i.e., jurisdiction over the person).

For example, suppose an Alabama resident drives into Georgia to see the new aquarium in Atlanta. After crossing the border to leave his home state he is hit by a drunk driver, resulting in substantial damage to his vehicle and severe personal injury to himself.

Suppose further that the injured person returns to his Alabama home, recovers from his injuries, and decides to sue the drunk driver in an Alabama court.

Too bad.

So sad.

Georgia residents cannot be sued in Alabama's state courts,<sup>47</sup> unless the Georgia resident cause the damages while within the state boundaries of Alabama. If the cause of action (claim) arose out of events that took place outside Alabama, then the Alabama state courts do not have *in personam* jurisdiction over the Georgia defendant ... whether or not the Georgia defendant is served with a copy of the complaint and summons from the Alabama court.

<sup>46</sup> See insufficiency of process and insufficiency of service of process.

<sup>47</sup> The suit might be brought in federal court under diversity citizenship if the amount in controversy exceeds \$75,000, in which case the federal court would have jurisdiction over the Georgia resident.

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

On the other hand, if the drunk Georgia driver drives down to Florida where he causes injury or damages before returning to Georgia, the state courts of Florida have what is called long-arm jurisdiction.<sup>48</sup> The Florida resident can file suit in a Florida court and have the Georgia resident served *in Georgia*. If everything is done precisely as the long-arm statute requires, it is as if the Georgia resident resided in Florida.

Causing or contributing to damages in a foreign state subjects the defendant to jurisdiction in that state's trial courts.

\* Defenses marked with an asterisk may, at the option of the defendant, be asserted by a motion and, in most jurisdictions, such motions must be made *before* filing an answer or affirmative defenses. If such a motion should fail, defendant should file the affirmative defense with his answer anyway in order to preserve the issue that he may later be able to prove by the greater weight (preponderance) of admissible evidence after having had an opportunity to use his five discovery tools to get at the facts.

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<sup>48</sup> Most states have long-arm jurisdiction. Check your local statutes and appellate decisions that control your trial court.

## *License*

The affirmative defense of license exists where, for example, the plaintiff sues for trespass or conversion or some other cause of action alleging the defendant unlawfully and without authority or permission entered upon or took exclusive possession or use of the 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 the defendant for a brief ride around the block.

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

Without a license to possess or use the property of another, the plaintiff has a cause of action by right and is entitled to judgment for all provable damages directly resulting from the defendant's unauthorized acts.

If, however, the plaintiff grants defendant license to use, possess, or enter upon plaintiff's property, then defendant has an affirmative defense that is absolute.

Having permission from the plaintiff destroys the plaintiff's case.

In many cases, license may be granted by someone who only *appears* to be the plaintiff, e.g., a person holding out as an officer of plaintiff's corporation but lacking, in fact, the authority to license use of plaintiff's property. The plaintiff's license must be duly granted by either the plaintiff or an agent of the plaintiff having actual or apparent agency rights to grant the 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, the 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 the plaintiff's license to use plaintiff's property, then the court may inquire into the circumstances to determine if the defendant is telling the truth and plaintiff did, indeed, give permission.

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

However, head nods are extremely difficult to get into evidence!

## *No Prior Course of Dealing*

This is a defense to a lawsuit based on a cause of action for account stated.<sup>49</sup>

In order for a plaintiff to prevail on a claim (cause of action) for account stated, he must allege and prove there were prior dealings between the parties and a reasonably long history of periodic billing that the defendant timely and routinely paid over an extended course of time prior to the lawsuit. Since this is an element of the plaintiff's case, the affirmative defense of "No Prior Course of Dealing" is offered to show the essential element of this cause of action does not exist.



The most common way to defeat an action for account stated is to show that the debt claimed is *new*, i.e., that there was no prior course of dealing between the parties or, at best, only a very short period with very 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. Such a demand, however, does not give rise to a cause of action for "account stated".

A lawsuit on this cause of action may result in an unjust judgment if the defendant is unfamiliar with the law – in particular, the essential fact elements of the cause of action that the plaintiff must allege and prove by the greater weight of admissible evidence.

Savvy litigators familiar with **Jurisdiction**<sup>®</sup> teachings will not be taken in.

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 that the plaintiff intended to intimidate the debtor and *there was no prior course of dealing*.

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<sup>49</sup> Please see details about this cause of action in our tutorial on Claims. [www.Jurisdiction.com](http://www.Jurisdiction.com)



## *Payment*

Payment of a debt is, of course, an absolute defense.

To prevail, the defendant need only tender to the court admissible evidence to demonstrate that all funds payable under the terms of the debt, including interest (if applicable), have been fully paid and the debt otherwise fully satisfied.

For example, suppose a lender provides \$10,000 to a borrower who signs and delivers a promissory note that the lender holds. Now suppose the lender decides he wants to use the borrower's house in the islands for a three-week vacation, and the parties agree that 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.

The affirmative defense of payment applies either way.

The problem many people run into (and I've seen it year-after-year) is failure to insist on a receipt or other written evidence of payment – *signed and dated with amount of payment clearly indicated*.

This occurs a great deal in child support cases, where the non-custodial parent provides cash directly to the former spouse. Things go along well for awhile, until some disagreement erupts between the parties. Suddenly, the parent who's been faithfully paying his or her obligation is served with a motion to compel payment – a motion alleging that *no* payment has been made. Of course it's a lie. Of course it's not fair. But, it happens all the time when the non-custodial parent fails 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<sup>50</sup> 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

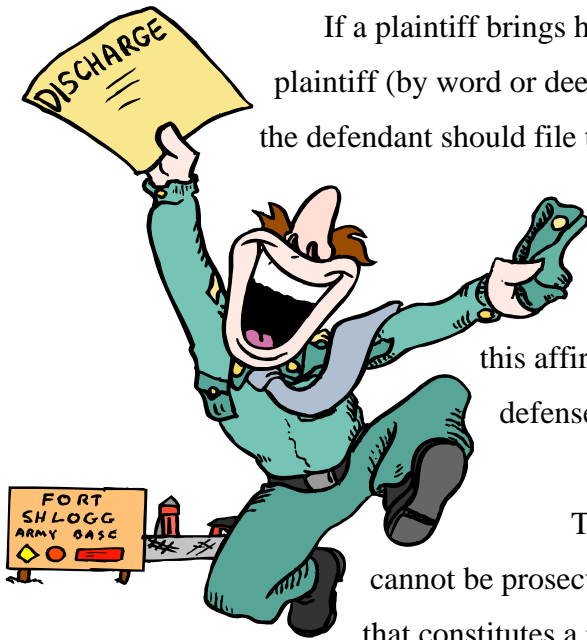
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<sup>50</sup> See the affirmative defense of estoppel above.

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.

## Release



If a plaintiff brings his complaint alleging breach of some obligation, and the plaintiff (by word or deed) has released the defendant from that obligation, then the defendant should file this affirmative defense.

Once a party has been released from an obligation, the plaintiff cannot succeed in suing that party for breach of the obligation – *if* the defendant files this affirmative defense *and* proves the factual elements of the defense by a preponderance of the admissible evidence.

Release may operate in several ways.

The happy soldier with his discharge papers, for example, cannot be prosecuted for dereliction of duty. He has been discharged, and that constitutes a release from his previous obligations.

On the other hand, in order for this defense to stand, the release must be clear and unambiguous. A release that is unclear or susceptible of multiple interpretations is not a release at all.

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

When a client fires an incompetent lawyer and hires another to take his place, the replacement lawyer will 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 of continuing to prosecute the case for his former client.<sup>51</sup>

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<sup>51</sup> The replaced lawyer will remain responsible to deliver papers from his file to the replacement (if his bill was paid), and he will be responsible for any consequences of his prior incompetence, yet he will have no duty to continue representing his client, because the notice of appearance releases him.

If verbal, of course, statements constituting an effective release must not only meet the requirements of a writing but must also be witnessed by credible persons who can attest to the terms of the release if called upon to testify on the defendant's behalf.

If a release is communicated by actions, as opposed to written or spoken words, then the actions evidencing the release must similarly be clear and unequivocal, incapable of being interpreted in any way other than a clear release of the defendant's obligations.

For example, suppose a creditor accepts partial payment as complete satisfaction of a prior debt. Consider the situation where a debtor makes a notation on his check that the amount of the check is "payment in full". If the creditor accepts and negotiates the check, in many jurisdictions his accepting and negotiating the check with the notation printed clearly and *conspicuously* on the check constitutes release of the balance of the former obligation.<sup>52</sup> If the creditor subsequently brings a lawsuit seeking to recover the balance of the debt (i.e., the full amount of the original obligation less the amount of the check in partial payment) then the defendant would file this affirmative defense and be prepared to present the original canceled check bearing the creditor's endorsing signature and *conspicuous* notation as evidence in support of the defense.<sup>53</sup>

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

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<sup>52</sup> In the absence of fraud or overreaching, of course.

<sup>53</sup> Under new federal banking regulations, many banks no longer return originals of canceled checks. Under the new law, electronic copies of the checks are admissible as evidence in court. Original checks with the endorser's original signature on the back are, of course, much stronger evidence.

## *Res Judicata*

The meaning of this Latin phrase is simply that “the thing has already been adjudicated”. The decision is already in the court’s file.

If a plaintiff brings suit involving issues that have already been resolved by a court of competent jurisdiction, the defendant should first file a motion to dismiss raising the issue of *res judicata* and, if possible, attaching certified copies of papers from the earlier case file to show that the issues have, in fact, been previously adjudged.

If this motion fails and the court refuses to dismiss, then the defendant should preserve the issue by filing this affirmative defense with his answer.<sup>54</sup>

For example, suppose a case last year decided conclusively that a parcel of real property belongs to Mr. White and not to Mr. Green. If Green brings another case in which the issue of title to that same parcel is raised in any way, this defense applies. If the defendant properly raises the defense and subsequently proves the essential fact elements, the plaintiff’s attempt to get another bite at the apple is defeated.

One court should not be permitted to override or alter any material decision of an earlier court, unless the second court is an appellate division 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, should not be permitted to overrule or otherwise alter the material parts of the previous decision of another trial court over which it lacks appellate power. 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.

The 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 that a prior court decision has already decided the matter by a final judgment.

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<sup>54</sup> Remember that one is limited in the number of affirmative defenses he may file only by the number of affirmative defenses the facts present.



## *Self-Defense*

Any act or communication done in pure self-defense is an affirmative defense.

Suppose you threaten to hit me with a beer bottle, and I wave an umbrella over my head shouting, “I’ll crush your head with this umbrella.”

If you sue me for assault (my threat to do you bodily harm coupled with the present ability to carry out the threat), I have this affirmative defense: self defense.

Suppose you actually start beating me with that beer bottle, and I haul off with my umbrella and break your arm. If you sue me for your broken arm, I have this affirmative 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.

I have a right to protect my property ... *provided I act reasonably.*<sup>55</sup>

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

You may defend an action against you on the grounds of self-defense, provided you were threatened with imminent harm to personal safety or private property – and your defensive force was reasonable under the circumstances.

One cannot be excused for killing or severely maiming potato thieves. The law

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<sup>55</sup> In most jurisdictions at the time of this writing.

allows only so much force as is reasonably necessary under the circumstances.

You can, however, chase them out of your garden with a shovel and even use the shovel to smack them on the backside as they run. Once the threat disappears, however, you must stop acting in self-defense ... for then it is no longer “self-defense”.

If it is possible to withdraw from threatening situations, the law requires you to do so, rather than causing unnecessary physical harm to others.

In most jurisdictions you are not required to retreat.

Use of force or threat of force greater than reasonably necessary, even acting in self-defense, is *not* an affirmative defense to a lawsuit for resulting damages.

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

## *Sham*

If the plaintiff files a lawsuit alleging material facts the plaintiff knew were false at the time the lawsuit was filed, his complaint is subject to dismissal as a sham.

This is one of those defenses that should be asserted by motion at the outset by a motion to strike sham. (We do not mark this defense with an asterisk, since the official rules do not list this as one of the defenses a pleader may assert by motion at his option, *though, of course, the official rules should list it as such, as you will understand as you read on.*)

A motion to strike a sham pleading must assert (1) that a material allegation of the sham pleading is false and (2) that the pleader knew or should have known the allegation was false at the time the pleading was filed. If the defendant can prove both elements, the court should strike the pleading (or, at least, the false part of the pleading).

If the motion to strike sham fails and the defendant is required to file an answer, then this affirmative defense should be filed with the answer in order to preserve the issue and give the defendant something *affirmative* to prove on his own behalf.

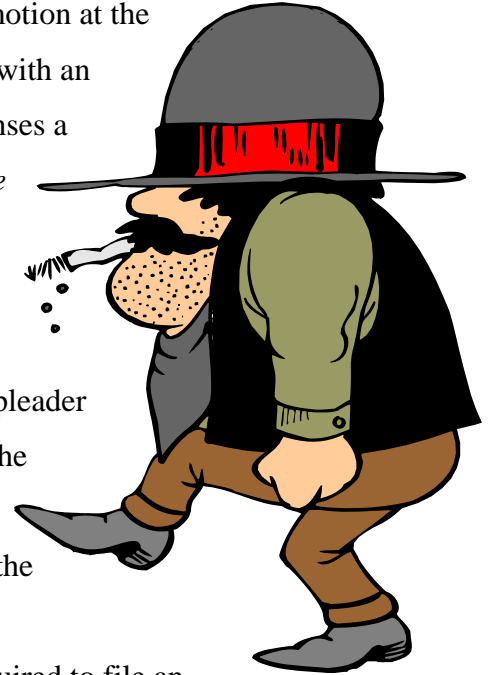
The false allegation must be *material* for this defense to stand, i.e., the allegation must go to the heart of at least one cause of action. Another way to put it is to say that the allegation, if removed from the case, would materially alter the plaintiff's claim such that the plaintiff could not win without proving the allegation to be true.

A "material" fact is one that must affect the outcome.

If a false allegation is not *material* then neither motion to strike sham nor this affirmative defense of sham will be effective against it.

Sham pleadings are taken seriously by good judges who hate falsehoods in their courtrooms *and punish them severely when discovered.*

The problem faced by defendants is that *proving* an allegation to be false is not easy. In order to get a case stricken for sham, one must prove the false allegation was



both false and *known* to be false by the pleader. This is extremely difficult at the outset of most cases, when the defendant has not yet had an opportunity to use his five discovery tools to get the evidence necessary to prove the falsehood.

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

## *Statute of Frauds*

As with certain other defenses, this one 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 and proceeding to prove the elements with admissible evidence.

Statutes of frauds differ among jurisdictions, however fundamental commonalities exist. The most common use of the statute of frauds is to defeat an action for breach of contract where the contract is unenforceable pursuant to a local statute. The statute may not be called a “statute of frauds”, however it will spell out certain circumstances where a plaintiff is barred from suing on contracts that fail to meet certain requirements.

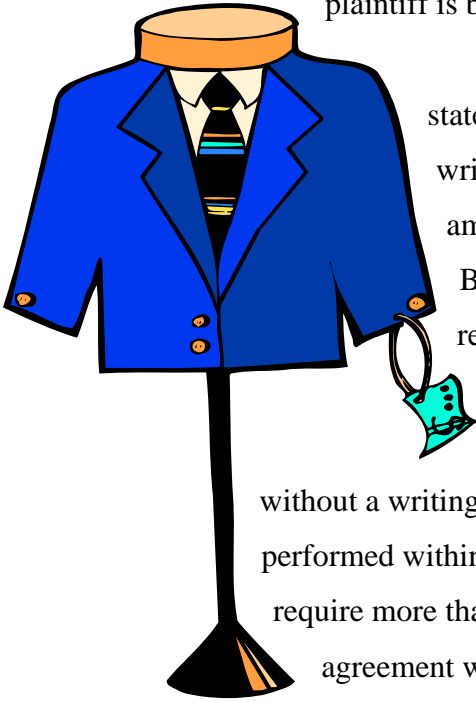
For example, in a dispute over sale of goods such as clothing,<sup>56</sup> a state might allow a lawsuit to be brought without a written contract (or written memorandum evidencing a binding verbal agreement) if the amount in controversy is less than some stated amount, e.g., \$500.

But, if the amount in controversy exceeds that amount, the state may require a writing or deny the plaintiff’s right to sue.

In a dispute over performance of services such as mowing hay in a farmer’s field, a state might allow a lawsuit to be brought without a writing evidencing the agreement if the service was capable of being performed within the space of one year. But, if the service was such that it would require more than one year to complete, or if the service contemplated by the

agreement was such that it was ongoing and likely to continue more than one year, the state may require a writing or deny the plaintiff’s right to sue.

Statutes of frauds derive from English common law and get their name because they are enacted to prevent fraud resulting from one person asserting the existence of a contract without having any evidence beyond his “word of honor” to prove the obligation of such contract. Courts are reluctant to hear, much less to enforce, contracts for sale of goods costing more than a few hundred dollars or for performance of services that require



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<sup>56</sup> Goods, as opposed to services, are tangible items of personal property, as opposed to real property.

more than a few months of time, unless there is a written contract or memorandum setting out the terms of the parties' agreement.

As with other defenses discussed in this tutorial, you must consult the statutes and controlling appellate decisions in your trial court's jurisdiction before asserting this (or any other) affirmative defense. Prepare yourself by learning not only what the statutes say but also what the appellate courts say about the statutes!

Too many people lose needlessly because they choose to interpret what a statute seems to say. Many times a statute may seem to mean one thing to you yet be controlled by appellate decisions that see it entirely differently.

Don't rely on statutes alone.

Read the appellate decisions that interpret the statute, decisions that control the trial judge.<sup>57</sup>

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<sup>57</sup> If you have access to a competent law library, you will find a set of books entitled "Statutes Annotated" where cases are cited that interpret each statute that has been discussed on appeal. By starting here and reading all the cases affecting a particular statute, you become an expert on that particular matter and can instruct the court in a way that controls the judge's decisions.

## *Statute of Limitations*

This defense should be first asserted by motion to dismiss. If the court does not dismiss, the defendant should file his answer with this affirmative defense (among others that may also apply), since a case brought beyond the deadline established by the statute of limitations is a case over which the court lacks subject matter jurisdiction ... an issue that can be raised at any time *but must be properly preserved*.



The issue of jurisdiction is preserved (if the court does not dismiss first by granting the motion to dismiss), by filing this defense.

If the defendant subsequently proves by the greater weight of admissible evidence that the case is, in fact, barred by the limitations statutes, he wins.

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 time constraints imposed is by studying the statutes and controlling appellate decisions in your trial court's jurisdiction.

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

In most jurisdictions, the statute of limitations is an absolute bar.

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

If the defendant's initial motion to dismiss based on the limitations statute fails, he must preserve the issue by filing this affirmative defense. Then, in the course of the case as evidence is discovered and made part of the court record, the defendant may

ultimately prove the plaintiff's window of opportunity passed by before the case was filed and, if the defendant follows **Jurisdiction**<sup>®</sup> teachings, the case must be dismissed sooner or later.

Failure to file this affirmative defense after the court denies a motion to dismiss based on the limitations statutes may effectively waive the defendant's right to pursue a remedy that is rightfully his.

So, if the motion to dismiss is denied, the wise defendant will file this affirmative defense and proceed with discovery to unearth admissible evidence to prove the statute ran out before the plaintiff filed the lawsuit.

Even if the trial judge ignores the evidence, the defendant will have made a record for an effective appeal.

This is how you win!

## Truth



**HONEST JOHN'S  
RE-DEPLOYED  
AUTO MOBILES**

If an allegedly defamatory statement is true, there can be no action, and plaintiff has the burden of proving falsity. The defendant does not

have the burden to prove truth. This raises an important fact about arguments in general in that it is far harder to prove a falsehood than to prove a truth ... another reason why wisdom counsels against bringing an action for defamation except in the most extreme cases where it is necessary to do so.

Allegedly defamatory statements made in judicial proceedings are privileged. If this were not so, every party prevailing in a lawsuit could sue the other party for making false statements during the case. Statements made "out in the hall", however, are not privileged.

Courts may refuse to hear cases brought against representatives of religious orders or denominations because of the First Amendment proscription against government being entangled with religion, however the allegedly false and defamatory statement must be so entangled with religion that the court would be unable to sort out the truth without crossing the First Amendment line.

If the allegedly defamatory statement is made about a collective, race, religion, or other large group, the courts may refuse to hear the case. Of course, if the statement is, "Bob and Harry are thieves," that's not a large group, and the injured person has a cause of action. On the other hand, if the statement is, "All Nazis are murderers," no court will hear an action brought by a single member of the Nazi party claiming he or she has been injured by the statement because he or she, individually, is not a murderer.

If the would-be plaintiff is a public official, he or she must prove the defendant acted with actual malice, i.e., intent to injure by making false statements. Actual malice is proven by showing the statements were known to be false or were made with a reckless disregard for whether they were true or false. The reason more public officials don't file

suit against comedians and media pundits is that doing so exposes them to discovery of their own closeted skeletons and, as stated above, wisdom counsels against suing for defamation except where absolutely necessary.

Everyone is entitled to an opinion. If you say to a neighbor, “I think our mailman is a Communist,” the mailman cannot sue, because you’re entitled to an opinion, right or wrong.

If you say, “Our mailman *is* a Communist,” and it gets back to the Post Office, and your mailman loses his job, prepare for battle.

Only pure opinion is protected.

Truth is a defense against defamation (slander or libel).

## *Unclean Hands*



An injunction, being an equitable remedy, should not be granted when the party seeking it has not acted in good faith.

The maxim in equity is, “He who comes to equity must come with clean hands.”

Thus, if a plaintiff has wrongfully defrauded the defendant when he seeks an injunction, the court should deny him ... *if* the defendant pleads unclean hands as an affirmative defense and explains how the plaintiff has unclean hands.

The court should not merely consider the allegations of the pleadings when asked to deny an injunction for unclean hands.

Other factors should be considered *and proved*:

- Nature of the interest to be protected.
- Relative adequacy of other available, less-restrictive remedies.
- Unreasonable delay of plaintiff to seek the remedy.
- Relative hardship likely to be caused to defendant.
- Possible prejudice to defendant of defending in underlying lawsuit.
- Related misconduct of plaintiff.
- Interests of third persons and of the public.
- Practicality of framing and enforcing the injunction.

The wrongs of the plaintiff that constitute “unclean hands” must relate to the subject matter of the equitable remedy being 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.

The defense is akin to estoppel.

Suppose a property owner deceitfully prepares a deed purposely mis-describing the property boundaries and conveys same to a buyer who builds a house that encroaches on the seller’s own property – because the boundary description in the deed was wrong.

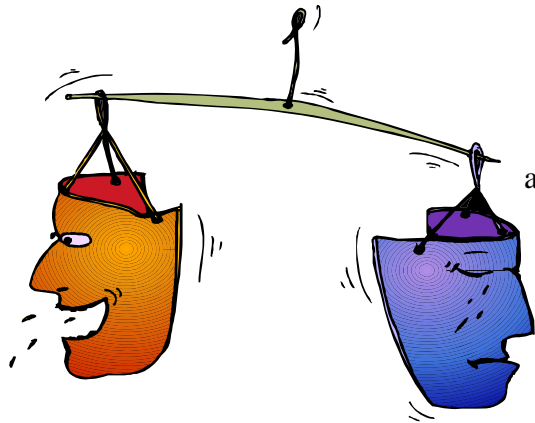
The buyer, basing his measurements on the property description in his deed, certainly doesn't have "unclean hands". The plaintiff does.

Now, if the plaintiff comes to court and sues in equity for an injunction requiring the new neighbor to move his house, the neighbor has this defense – because the wrong of the plaintiff relates to the subject matter of the equitable remedy sought.

Plaintiff has unclean hands.

Whenever one party seeks judicial relief for damages caused even partially by his own acts, the defendant should file this affirmative defense to preserve the issue and do all he can to discover admissible evidence to prove by a preponderance of the evidence that plaintiff has unclean hands.

The maxim is, "He who comes to equity must come with clean hands."



## *Unconscionability*

The defense of unconscionability is related to the cause of action for rescission. The gist is that if a party has become the unwitting victim of a contract procured by fraud, overreaching, or otherwise by unjust means, the court should not enforce that contract, even though the plaintiff is a victim of his own foolishness and lack of caution.

To prevail with this defense, the defendant must show the court that the contract, in itself (i.e., aside from related factors) was outrageously unfair and that the proceedings leading up to the parties' entering into the contract were also outrageously unfair.

The first requirement is called substantive unconscionability, wherein the terms of the contract itself are deemed to be unreasonably favorable to the plaintiff seeking to sue on the contract.

The second requirement is called procedural unconscionability, wherein there was lack of any meaningful choice on the part of the defendant when he entered the contract. Perhaps he was too feeble, or perhaps he lacked all understanding of technical aspects of the promises made to him. Either way, there was no meeting of the minds essential to the formation of an enforceable contract.

Therein lies the gist of this defense.

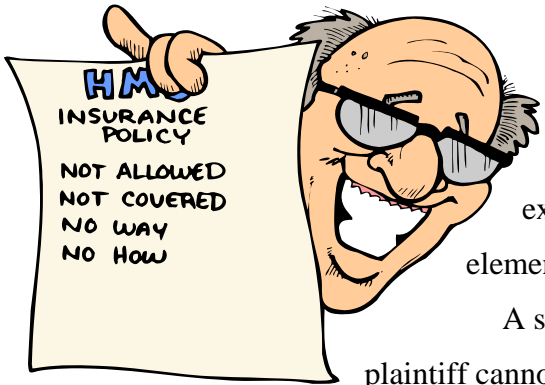
It has been said at common law that an unconscionable contract is one that “no man in his right mind would make on the one hand, and no fair and honest man would attempt to enforce on another.”

Some authorities refer to the respective bargaining powers of the parties and the ability of the one to understand the terms and conditions communicated by the other.

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

Unconscionability is an affirmative defense that must be pled at the outset of the case or it is waived.

## Waiver



Waiver is an affirmative defense that arises when plaintiff has waived the right or privilege upon which he sues. The right or privilege waived must, of course, first exist, or there is nothing to be waived, so this is one of the elements.

A second element is that the waiver must be knowing, i.e., the plaintiff cannot waive a right or privilege without knowing (or having constructive knowledge) of the fact.

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

In order to successfully assert this defense, the defendant must allege (in his initial response to the complaint) that

1. Plaintiff possessed a right or privilege upon which he has brought his lawsuit.
2. Plaintiff waived the right or privilege by word or conduct.
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 the waiver from the plaintiff's conduct, facts relied upon to demonstrate that the waiver occurred must be clear and convincing.

Mere inferences are not enough ... however probable they might be.

In the absence of direct facts demonstrating waiver, the defendant must meet a heavy burden for the court to imply a waiver.

In some jurisdictions, particular waivers cannot be established unless evidenced by some express writing that demonstrates knowledge of the act and its consequence.

See local statutes and case law for details in your jurisdiction.

## *Pleading Affirmative Defenses*

When pleading affirmative defenses, remember that merely reciting the names of the defenses (e.g., laches, license, or payment) is not nearly enough.

As is the case when drafting a complaint, you need to allege each and every essential fact in support of each of your defenses, i.e., every fact you need to *prove* in order to prevail with each and every one of your defenses.

Many lawyers make the mistake of merely listing the names of the defenses, thinking they need do no more than list them ... and that is not nearly enough.

To merely list the names of your defenses undermines your case as a defendant.

Remember: Affirmative defenses are intended to be *affirmative*, not defensive.

As defendants, we *never* want to be on the defense.

We use affirmative defenses to take the ball from the other side and drive toward the goal on our end of the court until our score (weight of admissible evidence) is greater than the score marked up by the other side.

That's why we insist on using *affirmative* defenses.

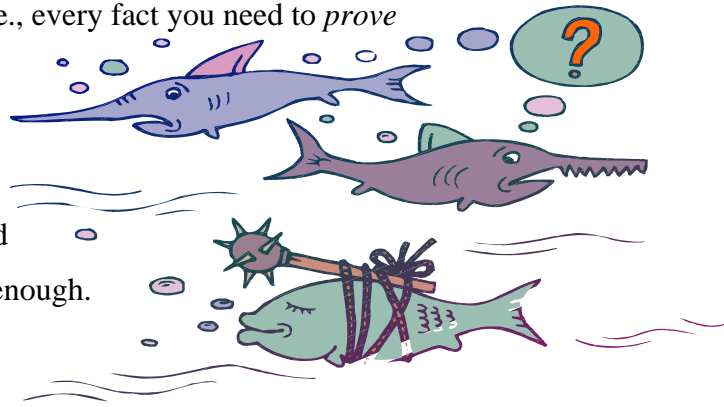
When pleading affirmative defenses, one is attempting to "turn the tables" on the plaintiff – to assert facts which (if proven by the greater weight of admissible evidence) result in victory for the defendant.

Therefore, it is imperative (and good pleading practice) to allege each and every essential fact necessary to establish that the defendant does, in fact, have the defenses he claims ... and then to use your five discovery tools to get those facts established on the court's record by the greater weight of admissible evidence.

Once the affirmative defenses are stated and essential facts alleged, it remains only to *prove* those facts by the greater weight of admissible evidence.

That's how defendants win!

Nothing more is needed.



But, suppose a novice or amateur attorney or *pro se* litigant unfamiliar with our **Jurisdiction**<sup>®</sup> teachings were to file the affirmative defense of accord and satisfaction, for example, yet fail to set out the facts of the accord or the facts of the satisfaction. As with the example given in our text above, if the neighbor agreed to accept the farmer's prize sheep dog in lieu of the dead bull, and the sheep dog was in fact delivered and accepted by the neighbor, then these are facts the defendant needs to *allege and prove* in order for his affirmative defense to provide the protections he seeks.

The wise affirmative defense pleader alleges all facts essential to his affirmative defenses, instead of merely listing the names of those defenses and leaving the barn door open, so to speak.

By *affirmatively* alleging the facts of his defenses, he sets the stage for a battle that leads to victory.

The wise defendant *affirmatively* states all of the facts he intends to prove, the facts he must prove if his affirmative defenses are to have the effect he desires.

This also has the added advantage of eliminating arguments down the line when the plaintiff refuses to respond to discovery requests, alleging the requests are not likely to lead to admissible evidence. When it is clear to the court *by the facts alleged in support of the defendant's affirmative defense pleadings* that possession of a sheep dog is relevant to the satisfaction angle of the defense, the court will be more inclined to compel the plaintiff to produce financial records showing how much he pays for dog food each week. If the defendant merely listed "Accord and Satisfaction" without setting out the facts, he might have a devilish time convincing the court that plaintiff's expenditures for dog food are relevant to the proceedings.

Treat your affirmative defenses as you would a claim (cause of action).<sup>58</sup>

In an action for breach of contract, for example, you wouldn't leave out the allegations that a contract was entered, that the contract was legally enforceable, and that the contract contemplated that the defendant would perform certain acts in exchange for plaintiff's performance of other acts. If the contract was in writing, you'd attach a copy to

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<sup>58</sup> Study our tutorial on Claims (Causes of Action) and our other materials on pleadings to learn more about why it's important to allege all of the essential fact elements in both complaints as well as defenses.

your complaint. If you paid the defendant money, you'd attach receipts or cancelled checks. You'd allege all facts that you must *prove* in order to win.

Why then, as a defendant, would you not take the same precautions to make a clear record of the facts supporting your defenses – facts you must *prove* in order to win?

Stop worrying how other people do things.

Stop worrying how big shot lawyers do things.

Most lawyers I met in more than 20 years of fighting in state and federal courts followed the lead of older lawyers who, in turn, got their start learning from their early employers. Many lawyers simply parrot the practices of others. So, the errors of past legal practice and protocol are passed down to the present generation of professional lawyers. In my experience, perhaps no more than 10% of the lawyers I met were creative thinkers. Most were parrots.

So what if other lawyers merely list the affirmative defenses of their clients?

It may come as no surprise to learn that many defense lawyers don't file any affirmative defenses whatever. They do what they get paid for ... and not a stitch more.

Don't be like the typical lawyer who does as little as possible and charges as much as possible for doing it.

You owe it to yourself to *make a winning record as defendant*. That record can only begin by not merely naming your affirmative defenses but by also stating all of the essential facts necessary to establish those defenses as a matter of law *if those facts can be proven by the greater weight of admissible evidence!*

Begin your defense on a solid footing.

Put the plaintiff immediately on the defense ... where he belongs.

The rest of the process is in keeping him on the defense until you have a chance to use your five discovery tools to prove all the essential facts of your affirmative defenses and move the court for judgment in your favor ... as the law requires.

## *Conclusion*

Every lawsuit begins with a Complaint that states the plaintiff's position.

The defendant's Answer by itself does not state the defendant's position. It only serves to answer what the plaintiff claimed.

If you are a defendant you need *more!*

Too many defendants (including many with lawyers who should know better) lose needlessly, all because they filed an Answer without Affirmative Defenses.

The plaintiff's complaint asserts *affirmative* claims.

Therefore, the defendant's answer needs to assert *affirmative* defenses.

Otherwise, the defendant starts off at a severe disadvantage, being able only to argue against the complaint and not for his own defenses.

If a fact is not alleged, it is not a proper matter for the court to consider in determining the outcome. Therefore, we urge you to *always* file affirmative defenses when you answer a plaintiff's complaint and set out all the essential facts necessary to *prove* the elements of your defenses.

The Answer by itself is not an *affirmative* pleading. It is merely an answer.

By filing affirmative defenses along with your answer and supporting those with allegations of all facts necessary to prove your defenses, you make clear to the court what your defensive position is and create opportunities to *prove* you are falsely accused!

The foregoing gives you a secure starting point for understanding these defenses and how they're applied. Before proceeding to court with an affirmative defense based solely on what's written here, however, research the statutes and appellate court decisions in your trial court's jurisdiction to discover details unique to your own case. By doing so, you establish a solid footing from which you cannot be moved by the efforts of opposing parties. You'll have citations to law that control your judge, and you'll have confidence



to argue those points based not on your own understanding but on the official position of those who control your trial judge ... the appellate courts.

Control your judge!

This is how you win!

A plaintiff's right to sue should always be challenged by affirmative defenses.

We explained the more common affirmative defenses and fact elements you must plead as defendant to defeat the plaintiff's case.

Dig deeper.

Apply what you've learned here to your own set of facts.

Use common-sense.

Go on the offense with your defense.

Don't wait for the plaintiff to prove the facts alleged in his complaint, while you are strapped by weak defensive pleadings that state no facts you can *affirmatively* prove to defeat the plaintiff's claims.

State your own facts.

Defend *affirmatively!*

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*Together we are teaching America what Justice is, how to get it, how to protect it for others.*