

Table of Contents

Chapter 1: Foundations for Legal and Affirmative Defenses	1
1-1 INTRODUCTION.....	1
1-1:1 Purpose of Book.....	1
1-2 NATURE OF AFFIRMATIVE DEFENSES.....	2
1-2:1 Affirmative Defenses Confess and Avoid the Claims.....	2
1-3 DEFENSES ARE PERMITTED IN CERTAIN PLEADINGS AND MOTIONS.....	5
1-3:1 The Florida Rules of Civil Procedure Permit Defenses in Certain Pleadings.....	5
1-3:2 Drafting Requirements for Affirmative Defenses	6
1-3:3 The Florida Rules of Civil Procedure Permit Motions to Dismiss to Assert Affirmative Defenses	7
1-4 LEGAL DEFENSES DISTINGUISHED FROM AFFIRMATIVE DEFENSES.....	7
1-4:1 Legal Defenses Attack the Claimant’s Prima Facie Claims	7
1-5 FOUNDATIONS FOR DEFENSES.....	9
1-5:1 Defenses and the Common Law	9
1-5:1.1 Florida Common Law Gives Rise to Affirmative Defenses.....	9
1-5:1.2 No Federal Common Law to Create Affirmative Defenses.....	10
1-5:2 Civil Code and Statutory Defenses	11
Chapter 2: Pleading and Proving Affirmative Defenses.....	13
2-1 PLEADING AFFIRMATIVE DEFENSES.....	13
2-1:1 Florida’s Fact Pleading Standard.....	13
2-1:2 Pleading the Elements of Each Defense.....	14
2-1:3 Defenses Should Designate Their Corresponding Claims	15
2-1:4 Denials Are Not Affirmative Defenses.....	16

Table of Contents

2-1:5	Impact of <i>Iqbal</i> and <i>Twombly</i> in Florida.....	17
2-1:5.1	Pleading Florida Defenses in Federal Actions.....	17
2-1:5.2	<i>Iqbal</i> and <i>Twombly</i> Provide Persuasive, Minimum Pleading Standards	18
2-2	HEIGHTENED PLEADING STANDARDS	19
2-2:1	Rule 1.140 Defenses	19
2-2:2	The Federal Rule Omits Florida Rule 1.140's Requirement to Allege With Particularity.....	21
2-2:3	Florida Rule 1.120 Objections	22
2-2:3.1	Lack of Capacity to Sue	23
2-2:3.2	Fraud Allegations Must Be Specific	25
2-2:3.3	Allegations of Mistake Must Be Specific.....	26
2-2:3.4	Conditions Precedent.....	27
2-2:3.5	Special Damage	31
2-3	DEALING WITH DEFICIENTLY PLEADED DEFENSES	32
2-3:1	Motion for More Definite Statement	32
2-3:2	Motions to Strike and Dismiss Defenses.....	33
2-4	BURDEN TO PROVE DEFENSES	34
2-4:1	Defendants Bear the Burden to Prove Affirmative Defenses	34
2-4:2	Burden Shifting.....	35
2-5	APPLICABLE BURDEN STANDARDS	35
2-5:1	Preponderance of the Evidence	35
2-5:2	Clear and Convincing	36
	Chapter 3: Rule 1.140(b) Legal Defenses and Objections.....	37
3-1	USING RULE 1.140 LEGAL DEFENSES AND OBJECTIONS.....	37
3-1:1	Asserting Defenses by Pre-Answer Motion.....	38
3-1:1.1	Waiver of Defenses Not Joined in Initial Motion	38
3-1:1.2	Using the Proper Motion for Each Defense and Objection	40
3-1:2	Incorporating Rule 1.140 Defenses into Responsive Pleading	41
3-1:2.1	Preservation of Defenses Joined in Responsive Pleading	42
3-1:3	Pleading Rule 1.140 Defenses With Particularity	42

Table of Contents

3-1:4	Use of Material or Evidence Outside the Four Corners of the Prior Pleading	43
3-1:5	Using Affirmative Defenses in Rule 1.140 Motions	45
3-2	LACK OF JURISDICTION OVER THE SUBJECT MATTER	46
3-2:1	Governing Rule: 1.140(b)(1)	46
3-2:2	Bases for Defense.....	46
3-2:2.1	Exclusive and Original Jurisdiction of the Florida Courts	48
3-2:2.2	Separation of Powers Doctrine May Bar Subject Matter Jurisdiction	50
3-2:2.3	Arbitration Clauses Do Not Deprive Court of Subject Matter Jurisdiction	50
3-2:2.4	Federal Preemption.....	51
3-2:2.5	Statutes of Repose or Nonclaim and Subject Matter Jurisdiction	51
3-2:2.6	Failure to Exhaust Administrative Remedies	52
3-2:2.7	Local Action Rule.....	53
3-2:2.8	Res Judicata as an Affirmative Defense.....	54
3-2:2.9	Lack of Standing as an Affirmative Defense	54
3-3	LACK OF JURISDICTION OVER THE PERSON.....	55
3-3:1	Jurisdiction Over the Person	55
3-3:2	Governing Rule and Statutes	56
3-3:2.1	Rule 1.140(b)(2) – Lack of Personal Jurisdiction	56
3-3:2.2	Insufficient Process and Service Undermines Personal Jurisdiction	57
3-3:2.3	Florida’s Long-Arm Statute, Section 48.193, Florida Statutes	57
3-3:3	Bases for Personal Jurisdiction.....	57
3-3:3.1	Overview of Personal Jurisdiction Defense...	57
3-3:3.2	Strict Construction of Florida’s Long-Arm Statute	60
3-3:3.3	Specific and General Jurisdiction-Florida’s Long-Arm Statute	60
3-3:4	Specific Jurisdiction	63
3-3:4.1	Specific Jurisdiction’s Connexity Requirement	63
3-3:4.2	Requirement of Personal Action/Inaction ...	64

Table of Contents

3-3:4.3	Long-Arm Statute and Operation of a Business in Florida	66
3-3:4.4	Corporate Shield Doctrine.....	69
3-3:4.5	Breach of a Contract in Florida.....	70
3-3:4.6	Committing a Tortious Act Within Florida.....	71
3-3:5	General Jurisdiction.....	73
3-3:6	Sufficient Minimum Contacts to Satisfy Procedural Due Process	74
3-3:7	Waiver of Personal Jurisdiction Defense.....	76
3-3:7.1	Waiver If Not Timely Asserted	76
3-3:7.2	Waiver If Defendant Seeks Affirmative Relief	76
3-3:8	Procedure for Invoking Defense of Lack of Personal Jurisdiction	78
3-3:8.1	Evidentiary Submissions and Burden-Shifting	78
3-3:9	Using Discovery to Test Lack of Jurisdiction Defense	80
3-4	IMPROPER VENUE.....	81
3-4:1	Governing Rules and Statutes.....	81
3-4:1.1	Rule 1.140(b)(3).....	81
3-4:1.2	Rule 1.060.....	81
3-4:1.3	Chapter 47, Florida Statutes.....	82
3-4:1.4	Motion to Dismiss for Forum Non Conveniens	84
3-4:2	Bases for Defense and Motion to Abate and Transfer	84
3-4:2.1	Improper Venue Motion and Procedure.....	84
3-4:2.2	Forum Selection Clauses or Arbitration Clauses	85
3-4:2.3	Home Venue Privilege.....	86
3-4:3	Forum Non Conveniens and Motions to Dismiss	86
3-5	INSUFFICIENCY OF PROCESS.....	87
3-5:1	Defense or Objection for Insufficiency of Process.....	87
3-5:2	Bases for Defense.....	87
3-6	INSUFFICIENCY OF SERVICE OF PROCESS	89
3-6:1	Governing Rule and Statutes	89
3-6:1.1	Rule 1.140(b)(5).....	89
3-6:1.2	Florida Statutes Governing Service of Process	89
3-6:2	Bases for Objection and Defense.....	93

Table of Contents

	3-6:2.1	Lack of Compliance With Service of Process Rules	93
	3-6:3	Burden in Moving to Quash or Dismiss for Insufficient Service of Process	93
3-7		FAILURE TO STATE A CAUSE OF ACTION	94
	3-7:1	Failure to State a Claim	94
	3-7:1.1	Opportunities to Assert Failure to State a Claim or Defense	94
	3-7:2	Bases for Defense.....	95
	3-7:2.1	Failure to Allege Elements or Ultimate Facts.....	95
	3-7:2.2	Failure to Allege Claims With Requisite Particularity	96
	3-7:2.3	Motion to Dismiss Based on an Affirmative Defense	96
	3-7:2.4	Claim or Defense Barred, Precluded, or Estopped by Doctrine or Rule	96
	3-7:2.5	Failure to Attach Necessary Exhibit	97
	3-7:2.6	Improper Commingling of Claims	98
	3-7:2.7	Improper Damages Do Not Invalidate an Otherwise Cognizable Claim	98
	3-7:3	Failure to State a Claim Defenses After the Pleading Stage and Through Trial	98
	3-7:4	Failure to State a Defense, as Opposed to a Claim....	101
	3-7:5	Plaintiff Must Timely Amend.....	101
3-8		FAILURE TO JOIN INDISPENSABLE PARTIES	101
	3-8:1	Pre-Answer Motion or Responsive Pleading Defense ...	101
	3-8:2	Bases for Defense	101
	3-8:3	Opportunities to Raise Defense	102
 Chapter 4: Motions Useful to the Defense			103
4-1		INTRODUCTION	103
4-2		MOTION FOR JUDGMENT ON THE PLEADINGS	104
	4-2:1	Basis for Motion	104
	4-2:2	Burden for Movant	104
	4-2:3	Partial Judgment on the Pleadings Might Not Be Permitted	105
4-3		MOTION FOR MORE DEFINITE STATEMENT	106
	4-3:1	Basis for Motion	106
4-4		MOTION TO STRIKE MATTER FROM PLEADING	107
	4-4:1	Basis for Motion	107
	4-4:2	Burden for Movant	109

Table of Contents

4-5	MOTION TO DISMISS FOR FORUM NON CONVENIENS	109
4-5:1	Basis for Motion	109
4-5:2	Burden for Movant	109
4-6	MOTION TO STRIKE SHAM PLEADINGS.....	112
4-6:1	Basis for Motion	112
4-6:2	Burden for Movant	113
4-7	MOTION TO COMPLY WITH FLORIDA RULES OF CIVIL PROCEDURE	114
4-7:1	Failure to Attach Instrument	115
4-7:2	Misjoinder of Parties	116
4-7:3	Mistaken Designation of Affirmative Defense as Counterclaim or Counterclaim as Affirmative Defense	116
4-7:4	Misjoinder of Claims or Defenses	117
4-7:5	Failure to State Short and Plain Statements of Ultimate Facts	117
4-8	MOTION TO INVOLUNTARILY DISMISS ACTION	118
4-8:1	Basis for Motion	118
4-8:2	Burden for Movant	118
4-9	MOTION TO TRANSFER ACTION	119
4-10	MOTION FOR SUMMARY JUDGMENT.....	119
4-10:1	Governing Rule in State Court.....	120
4-10:2	Summary Judgment versus Motion to Strike Affirmative Defenses.....	121
4-10:3	Motions for Partial Summary Judgment.....	121
4-10:4	Movant's and Non-Movant's Burdens Regarding Defenses	122
4-10:5	Effect of Pending Discovery and Summary Judgment.....	130
4-10:6	Finality of Summary Judgment and Strategy	131
	Chapter 5: Reply Pleading	133
5-1	INTRODUCTION.....	133
5-1:1	Function of the Reply.....	133
5-1:2	Form and Timing.....	134
5-1:3	Mandatory Reply to Assert Legal Excuse or Justification to Adverse Affirmative Defenses	135
5-2	CONTENTS OF A REPLY	135
5-2:1	Defenses to the Defenses.....	135
5-2:2	Factual Allegations	136
5-2:3	Exclude Mere Factual Denials of Defenses.....	136

Table of Contents

5-3 WAIVER OF DEFENSES NOT ASSERTED IN REPLY 137

5-4 THERE IS NO REPLY TO A REPLY..... 137

Chapter 6: Affirmative Defenses 139

6-1 ABANDONMENT 139

 6-1:1 Explanation of Defense 139

 6-1:2 Elements of Abandonment 139

 6-1:3 Notable Authority on Abandonment 139

 6-1:4 Application of Abandonment 140

 6-1:4.1 Causes of Action or Defenses 140

 6-1:4.2 Nature of Defense 140

 6-1:4.3 Notes on Trial by Jury 140

 6-1:5 Drafting Authorities and Forms 141

 6-1:5.1 Form Defense of Abandonment 141

6-2 ABSTENTION 141

 6-2:1 Explanation of Defense 141

 6-2:2 Elements of Abstention 143

 6-2:2.1 *Pullman* Abstention Doctrine 143

 6-2:2.2 *Burford* Abstention Doctrine 143

 6-2:2.3 *Younger* Abstention Doctrine 143

 6-2:3 Notable Authority on Abstention 144

 6-2:4 Application of Abstention 144

 6-2:4.1 Applicable Causes of Action
 or Defenses 144

 6-2:4.2 Nature of Defense 144

 6-2:4.3 Notes on Trial by Jury 144

 6-2:5 Drafting Authorities and Forms 145

 6-2:5.1 Form Defense of Abstention
 (*Pullman* Abstention Doctrine) 145

 6-2:5.2 Form Defense of Abstention
 (*Burford* Abstention Doctrine)..... 145

 6-2:5.3 Form Defense of Abstention
 (*Younger* Abstention Doctrine) 146

6-3 ACCORD AND SATISFACTION 146

 6-3:1 Explanation of Defense 146

 6-3:2 Elements of Accord and Satisfaction 146

 6-3:3 Notable Authority on Accord and Satisfaction 147

 6-3:4 Application of Accord and Satisfaction 148

 6-3:4.1 Applicable Causes of Action
 or Defenses 148

 6-3:4.2 Nature of Defense 148

 6-3:4.3 Notes on Trial by Jury 148

Table of Contents

6-3:5	Drafting Authorities and Forms	148
6-3:5.1	Statutory Forms.....	148
6-3:5.2	Form Defense of Accord and Satisfaction – Form 1.967, Fla. R. Civ. P....	149
6-4	ACQUIESCENCE; BOUNDARY-BY-ACQUIESCENCE....	149
6-4:1	Explanation of Defense	149
6-4:2	Elements of Acquiescence	150
6-4:3	Notable Authority on Defense	150
6-4:4	Application of Acquiescence	150
6-4:4.1	Applicable Causes of Action or Defenses	150
6-4:4.2	Nature of Defense	150
6-4:5	Drafting Authorities and Forms	151
6-4:5.1	Form Defense of Waiver (Written)	151
6-5	ACT OF STATE DOCTRINE	151
6-5:1	Explanation of Defense	151
6-5:2	Elements of Act of State Doctrine.....	151
6-5:3	Notable Authority on Act of State Doctrine.....	151
6-5:4	Application of Act of State Doctrine.....	152
6-5:4.1	Applicable Causes of Action or Defenses	152
6-5:4.2	Notes on Trial by Jury	152
6-5:5	Drafting Authorities and Forms	153
6-5:5.1	Form Defense of Act of State Doctrine...	153
6-6	ADHESION CONTRACTS (CONTRACTS OF ADHESION)	153
6-6:1	Explanation of Defense	153
6-7	ADVERSE INFERENCE EXCEPTION	153
6-7:1	Explanation of Defense	153
6-7:2	Elements of Adverse Inference Exception.....	153
6-7:3	Notable Authority on Adverse Inference Exception....	154
6-7:4	Application of Adverse Inference Exception.....	154
6-7:4.1	Applicable Causes of Action or Defenses ...	154
6-7:5	Drafting Authorities and Forms	154
6-7:5.1	Form Defense of Adverse Inference Exception.....	154
6-8	ADVICE OF COUNSEL	155
6-8:1	Explanation of Defense	155
6-8:2	Elements of Advice of Counsel	155
6-8:3	Notable Authority on Advice of Counsel	156
6-8:4	Application of Advice of Counsel	156

Table of Contents

	6-8:4.1 Applicable Causes of Action or Defenses	156
	6-8:4.2 Notes on Trial by Jury	156
6-8:5	Drafting Authorities and Forms	156
	6-8:5.1 Form Defense of Advice of Counsel.....	156
6-9	ALCOHOL OR DRUG DEFENSE (§ 768.36, FLA. STAT.).....	157
	6-9:1 Explanation of Defense	157
	6-9:2 Elements of Defense.....	157
	6-9:3 Notable Authority on Defense.....	159
	6-9:4 Application of Defense.....	159
	6-9:4.1 Applicable Causes of Action or Defenses	159
	6-9:4.2 Notes on Trial by Jury	159
	6-9:5 Drafting Authorities and Forms	160
	6-9:5.1 Jury Instructions.....	160
	6-9:5.2 Form Defense of Alcohol or Drug Defense (§ 768.36, Fla. Stat.)	160
6-10	ALTERATION OF INSTRUMENT	160
	6-10:1 Explanation of Defense	160
	6-10:2 Elements of Alteration of Instrument.....	162
	6-10:3 Notable Authority on Alteration of Instrument	162
	6-10:4 Application of Alteration of Instrument	163
	6-10:4.1 Applicable Causes of Action or Defenses	163
	6-10:4.2 Nature of Defense	163
	6-10:4.3 Notes on Trial by Jury	163
	6-10:5 Drafting Authorities and Forms	163
	6-10:5.1 Statutory Bases: Sections 673.4061 and 673.4071.....	163
	6-10:5.2 Form Defense of Alteration of Instrument	165
	6-10:5.2a Alteration of Instrument (§ 673.4061, Fla. Stat.)	165
	6-10:5.2b Alteration of Instrument (§ 673.4071, Fla. Stat.)	165
6-11	ANTICIPATORY REPUDIATION	166
	6-11:1 Explanation of Defense	166
	6-11:2 Elements of Defense.....	166
	6-11:3 Notable Authority on Defense.....	167
	6-11:4 Application of Defense.....	167

Table of Contents

	6-11:4.1	Applicable Causes of Action or Defenses	167
	6-11:4.2	Notes on Trial by Jury	167
6-11:5		Drafting Authorities and Forms	168
	6-11:5.1	Jury Instructions.....	168
	6-11:5.2	Form Defense	168
6-12		ARBITRATION AND AWARD	168
	6-12:1	Explanation of Defense	168
	6-12:2	Elements of Arbitration and Award	169
	6-12:3	Notable Authority on Arbitration and Award	169
	6-12:4	Application of Arbitration and Award	170
	6-12:4.1	Applicable Causes of Action or Defenses	170
	6-12:5	Drafting Authorities and Forms	170
	6-12:5.1	Statutory Basis.....	170
	6-12:5.2	Form Defense	170
	6-12:5.2a	Arbitration and Award	170
6-13		ASSUMPTION OF RISK	171
	6-13:1	Explanation of Defense	171
	6-13:2	Elements of Assumption of Risk.....	171
	6-13:3	Notable Authority on Assumption of Risk.....	171
	6-13:4	Application of Assumption of Risk.....	172
	6-13:4.1	Applicable Causes of Action or Defenses	172
	6-13:4.2	Notes on Trial by Jury	172
	6-13:5	Drafting Authorities and Forms	172
	6-13:5.1	Statutory Forms.....	172
	6-13:5.2	Jury Instructions.....	172
	6-13:5.3	Form Defense of Assumption of Risk – Fla. R. Civ. P. Form 1.972.....	172
6-14		AVOIDABLE CONSEQUENCES	173
	6-14:1	Explanation of Defense	173
6-15		BONA FIDE ERROR.....	174
	6-15:1	Explanation of Defense	174
	6-15:2	Elements of Defense.....	174
	6-15:3	Notable Authority on Defense	175
	6-15:4	Application of Defense.....	175
	6-15:4.1	Applicable Causes of Action or Defenses	175
	6-15:5	Drafting Authorities and Forms	175
	6-15:5.1	Form Defense	175

Table of Contents

6-16	BONA FIDE PURCHASER FOR VALUE.....	176
6-16:1	Explanation of Defense	176
6-16:2	Elements of Defense	176
6-16:3	Notable Authority on Defense	177
6-16:4	Application of Defense	177
6-16:4.1	Applicable Causes of Action or Defenses	177
6-16:4.2	Nature of Defense	178
6-16:5	Drafting Authorities and Forms	178
6-16:5.1	Form Defense	178
6-17	BUSINESS COMPULSION	178
6-17:1	Explanation of Defense	178
6-17:2	Elements of Defense	179
6-17:3	Notable Authority on Defense	179
6-17:4	Application of Defense	181
6-17:4.1	Applicable Causes of Action or Defenses	181
6-17:4.2	Notes on Trial by Jury	181
6-17:5	Drafting Authorities and Forms	181
6-17:5.1	Form Defense	181
6-18	BUSINESS JUDGMENT RULE	182
6-18:1	Explanation of Defense	182
6-18:2	Elements of Business Judgment Rule.....	183
6-18:3	Notable Authority on Business Judgment Rule	183
6-18:4	Application of Business Judgment Rule.....	191
6-18:4.1	Applicable Causes of Action or Defenses	191
6-18:5	Drafting Authorities and Forms	191
6-18:5.1	Form Defense of Business Judgment Rule	191
6-19	CESSATION OF BUSINESS—§ 542.335, FLA. STAT.....	192
6-19:1	Explanation of Defense	192
6-19:2	Elements of Defense	193
6-19:3	Notable Authority on Defense	193
6-19:4	Application of Defense	193
6-19:4.1	Applicable Causes of Action or Defenses	193
6-19:5	Drafting Authorities and Forms	193
6-19:5.1	Statutory Forms.....	193
6-19:5.2	Form Defense	193

Table of Contents

6-20	COLLATERAL ESTOPPEL – ISSUE PRECLUSION.....	194
6-20:1	Explanation of Defense	194
6-20:2	Elements of Defense	195
6-20:3	Notable Authority on Defense	195
6-20:4	Application of Defense	198
	6-20:4.1 Applicable Causes of Action or Defenses	198
6-20:5	Drafting Authorities and Forms	198
	6-20:5.1 Form Defense	198
6-21	COMPARATIVE NEGLIGENCE	199
6-21:1	Explanation of Defense	199
6-21:2	Elements of Defense	199
6-21:3	Notable Authority on Defense	200
6-21:4	Application of Defense	202
	6-21:4.1 Applicable Causes of Action or Defenses	202
	6-21:4.2 Notes on Trial by Jury	202
6-21:5	Drafting Authorities and Forms	202
	6-21:5.1 Statutory Forms.....	202
	6-21:5.2 Jury Instructions.....	202
	6-21:5.3 Form Defense	202
6-22	CONDITION PRECEDENT	203
6-22:1	Explanation of Defense	203
	6-22:1.1 Distinguishing Conditions Precedent to Formation and Conditions Precedent to Performance.....	204
	6-22:1.2 Specific Denial Pleading Burden	205
6-22:2	Elements of Defense	206
6-22:3	Notable Authority on Defense	206
6-22:4	Application of Defense	208
	6-22:4.1 Applicable Causes of Action or Defenses	208
6-22:5	Drafting Authorities and Forms	208
	6-22:5.1 Jury Instructions.....	208
	6-22:5.2 Form Defense	208
6-23	CORPORATE SHIELD DOCTRINE.....	209
6-23:1	Explanation of Defense	209
6-23:2	Elements of Defense	210
6-23:3	Notable Authority on Defense	210
6-23:4	Application of Defense	211

Table of Contents

	6-23:4.1 Applicable Causes of Action or Defenses	211
	6-23:5 Drafting Authorities and Forms	211
	6-23:5.1 Form Defense	211
6-24	DEAD AND BURIED DOCTRINE – DISSOLVED ENTITY	212
	6-24:1 Explanation of Defense	212
	6-24:2 Elements of Defense	213
	6-24:2.1 Dissolution of a Florida Corporation	214
	6-24:3 Notable Authority on Defense	218
	6-24:4 Application of Defense	218
	6-24:4.1 Applicable Causes of Action or Defenses	218
	6-24:4.2 Notes on Trial by Jury	219
	6-24:5 Drafting Authorities and Forms	219
	6-24:5.1 Jury Instructions	219
	6-24:5.2 Form Defense	219
6-25	DISCHARGE IN BANKRUPTCY	219
	6-25:1 Explanation of Defense	219
	6-25:2 Elements of Defense	220
	6-25:3 Notable Authority on Defense	220
	6-25:4 Application of Defense	221
	6-25:4.1 Applicable Causes of Action or Defenses	221
	6-25:5 Drafting Authorities and Forms	221
	6-25:5.1 Form Defense	221
6-26	DOOR CLOSING STATUTES	221
	6-26:1 Explanation of Defense	221
	6-26:2 Elements of Defense	222
	6-26:3 Notable Authority on Defense	222
	6-26:4 Application of Defense	225
	6-26:4.1 Applicable Causes of Action or Defenses	225
	6-26:4.2 Notes on Trial by Jury	225
	6-26:5 Drafting Authorities and Forms	225
	6-26:5.1 Form Defense	225
6-27	DURESS	226
	6-27:1 Explanation of Defense	226
	6-27:2 Elements of Defense	226
	6-27:3 Notable Authority on Defense	226
	6-27:4 Application of Defense	228

Table of Contents

	6-27:4.1	Applicable Causes of Action or Defenses	228
	6-27:5	Drafting Authorities and Forms	228
	6-27:5.1	Form Defense	228
6-28		ECONOMIC LOSS RULE	229
	6-28:1	Explanation of Defense	229
	6-28:2	Elements of Defense	230
	6-28:3	Notable Authority on Defense	230
	6-28:4	Application of Defense	231
	6-28:4.1	Applicable Causes of Action or Defenses	231
	6-28:5	Drafting Authorities and Forms	231
	6-28:5.1	Form Defense	231
6-29		ELECTION OF REMEDIES	232
	6-29:1	Explanation of Defense	232
	6-29:2	Elements of Defense	233
	6-29:3	Notable Authority on Defense	233
	6-29:4	Drafting Authorities and Forms	234
	6-29:4.1	Form Defense	234
6-30		EQUITABLE ESTOPPEL	234
	6-30:1	Explanation of Defense	234
	6-30:2	Elements of Equitable Estoppel	235
	6-30:3	Notable Authority on Estoppel	235
	6-30:4	Application of Estoppel	237
	6-30:4.1	Applications to Claims and Defenses	237
	6-30:4.2	Nature of Defense	238
	6-30:4.3	Notes on Trial by Jury	238
	6-30:5	Drafting Authorities and Forms	238
	6-30:5.1	Jury Instructions	238
	6-30:5.2	Form Defense	240
6-31		FAILURE OF CONSIDERATION AND WANT OF CONSIDERATION	241
	6-31:1	Explanation of Defense	241
	6-31:2	Elements of Defenses	241
	6-31:3	Notable Authority on Defenses	242
	6-31:4	Application of Defense	243
	6-31:4.1	Applicable Causes of Action or Defenses	243
	6-31:5	Drafting Authorities and Forms	243
	6-31:5.1	Statutory Forms	243
	6-31:5.2	Note on Jury Trial	243
	6-31:5.3	Jury Instructions	243

Table of Contents

	6-31:5.4 Form Defense – Failure of Consideration	243
	6-31:5.5 Form Defense – Want of Consideration	244
6-32	FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES	245
	6-32:1 Explanation of Defense	245
	6-32:2 Elements of Defense	245
	6-32:3 Notable Authority on Defense	245
	6-32:4 Application of Defense	248
	6-32:4.1 Applicable Causes of Action or Defenses	248
	6-32:4.2 Notes on Trial by Jury	248
	6-32:5 Drafting Authorities and Forms	248
	6-32:5.1 Jury Instructions	248
	6-32:5.2 Form Defense	249
6-33	FARAGHER/ELLERTH VICARIOUS LIABILITY DEFENSES	249
	6-33:1 Explanation of Defense	249
	6-33:2 Elements of Defense	250
	6-33:3 Notable Authority on Defense	250
	6-33:4 Application of Defense	251
	6-33:4.1 Applicable Causes of Action or Defenses	251
	6-33:4.2 Notes on Trial by Jury	251
	6-33:5 Drafting Authorities and Forms	252
	6-33:5.1 Jury Instructions	252
	6-33:5.2 Form Defense	252
6-34	FORFEITURE	252
	6-34:1 Explanation of Defense	252
	6-34:2 Elements of Defense	253
	6-34:3 Notable Authority on Defense	253
	6-34:4 Application of Defense	254
	6-34:4.1 Applicable Causes of Action or Defenses	254
	6-34:5 Drafting Authorities and Forms	254
	6-34:5.1 Form Defense	254
6-35	FRAUD	254
	6-35:1 Explanation of Defense	254
	6-35:2 Elements of Fraud	255
	6-35:3 Notable Authority on Defense	256
	6-35:4 Application of Defense	258

Table of Contents

	6-35:4.1	Applicable Causes of Action and Defenses.....	258
	6-35:5	Drafting Authorities and Forms	259
	6-35:5.1	Jury Instructions.....	259
	6-35:5.2	Form Defense	260
6-36		FRUSTRATION OF PURPOSE.....	260
	6-36:1	Explanation of Defense	260
	6-36:2	Elements of Defense.....	261
	6-36:3	Notable Authority on Defense.....	261
	6-36:4	Application of Defense.....	262
	6-36:4.1	Applicable Causes of Action or Defenses	262
	6-36:4.2	Notes on Trial by Jury	263
	6-36:5	Drafting Authorities and Forms	263
	6-36:5.1	Form Defense	263
6-37		GOOD FAITH.....	263
	6-37:1	Explanation of Defense	263
	6-37:2	Elements of Defense.....	265
	6-37:3	Notable Authority on Defense.....	265
	6-37:4	Application of Defense.....	268
	6-37:4.1	Applicable Causes of Action or Defenses	268
	6-37:4.2	Notes on Trial by Jury	269
	6-37:5	Drafting Authorities and Forms	269
	6-37:5.1	Jury Instructions.....	269
	6-37:5.2	Form Defense	270
	6-37:5.2a	Form Defense (Civil Rights Violation, 42 U.S.C. § 1983)	270
	6-37:5.2b	Form Defense (§ 673.4201, Fla. Stat., Good Faith and Commercial Reasonableness).....	270
6-38		ILLEGALITY.....	271
	6-38:1	Explanation of Defense	271
	6-38:2	Elements of Defense.....	271
	6-38:3	Notable Authority on Defense.....	272
	6-38:4	Application of Defense.....	273
	6-38:4.1	Applicable Causes of Action or Defenses	273
	6-38:5	Drafting Authorities and Forms	273
	6-38:5.1	Form Defense	273
6-39		IMMUNITY.....	274

Table of Contents

6-39:1	Explanation of Defense	274
6-39:2	Elements of Defense	274
6-39:3	Notable Authority on Defense	274
6-39:4	Application of Defense	280
6-39:4.1	Applicable Causes of Action or Defenses	280
6-39:4.2	Notes on Trial by Jury	280
6-39:5	Drafting Authorities and Forms	280
6-39:5.1	Jury Instructions	280
6-39:5.2	Form Defense	280
6-40	IMPOSSIBILITY OF PERFORMANCE	281
6-40:1	Explanation of Defense	281
6-40:2	Elements of Defense	281
6-40:3	Notable Authority on Defense	282
6-40:4	Application of Defense	284
6-40:4.1	Applicable Causes of Action or Defenses	284
6-40:4.2	Notes on Trial by Jury	284
6-40:5	Drafting Authorities and Forms	284
6-40:5.1	Form Defense	284
6-41	IMPRACTICABILITY OF PERFORMANCE (COMMERCIAL IMPRACTICABILITY)	285
6-41:1	Explanation of Defense	285
6-41:2	Elements of Defense	287
6-41:3	Notable Authority on Defense	287
6-41:4	Application of Defense	289
6-41:4.1	Applicable Causes of Action or Defenses	289
6-41:4.2	Notes on Trial by Jury	289
6-41:5	Drafting Authorities and Forms	289
6-41:5.1	Jury Instructions	289
6-41:5.2	Form Defense	289
6-42	IN PARI DELICTO	290
6-42:1	Explanation of Defense	290
6-42:2	Elements of Defense	290
6-42:3	Notable Authority on Defense	290
6-42:4	Application of Defense	291
6-42:4.1	Applicable Causes of Action or Defenses	291
6-42:4.2	Nature of Defense	292
6-42:4.3	Notes on Trial by Jury	292
6-42:5	Drafting Authorities and Forms	292

Table of Contents

	6-42:5.1	Form Defense	292
6-43		INDEPENDENT TORT DOCTRINE	293
	6-43:1	Explanation of Defense	293
	6-43:2	Elements of Defense	295
	6-43:3	Notable Authority on Defense	295
	6-43:4	Application of Defense	297
	6-43:4.1	Applicable Causes of Action or Defenses	297
	6-43:4.2	Notes on Trial by Jury	298
	6-43:5	Drafting Authorities and Forms	298
	6-43:5.1	Jury Instructions	298
	6-43:5.2	Form Defense	298
6-44		INJURY BY FELLOW SERVANT	299
	6-44:1	Explanation of Defense	299
	6-44:2	Elements of Defense	300
	6-44:3	Notable Authority on Defense	300
	6-44:4	Application of Defense	303
	6-44:4.1	Applicable Causes of Action or Defenses	303
	6-44:4.2	Notes on Trial by Jury	303
	6-44:5	Drafting Authorities and Forms	304
	6-44:5.1	Jury Instructions	304
	6-44:5.2	Form Defense	304
6-45		INTERVENING CAUSE	304
	6-45:1	Explanation of Defense	304
	6-45:2	Elements of Defense	305
	6-45:3	Notable Authority on Defense	305
	6-45:4	Application of Defense	306
	6-45:4.1	Applicable Causes of Action or Defenses	306
	6-45:4.2	Notes on Trial by Jury	306
	6-45:5	Drafting Authorities and Forms	306
	6-45:5.1	Jury Instructions	306
	6-45:5.2	Form Defense	307
6-46		INTRACORPORATE CONSPIRACY DOCTRINE (SINGLE ENTITY CONSPIRACY DOCTRINE)	307
	6-46:1	Explanation of Defense	307
	6-46:2	Elements of Defense	309
	6-46:3	Notable Authority on Defense	309
	6-46:4	Application of Defense	310
	6-46:4.1	Applicable Causes of Action or Defenses	310

Table of Contents

6-46:4.2 Notes on Trial by Jury 310

6-46:5 Drafting Authorities and Forms 311

6-46:5.1 Form Defense 311

6-47 JUDICIAL ESTOPPEL 311

6-47:1 Explanation of Defense 311

6-47:2 Elements of Defense 312

6-47:3 Notable Authority on Defense 312

6-47:4 Application of Defense 314

6-47:4.1 Applicable Causes of Action
or Defenses 314

6-47:4.2 Nature of Defense 314

6-47:5 Drafting Authorities and Forms 314

6-47:5.1 Jury Instructions 314

6-47:5.2 Form Defense 314

6-48 JUSTIFICATION 315

6-48:1 Explanation of Defense 315

6-48:2 Elements of Defense 315

6-48:3 Notable Authority on Defense 316

6-48:4 Application of Defense 316

6-48:4.1 Applicable Causes of Action
or Defenses 316

6-48:4.2 Notes on Trial by Jury 316

6-48:5 Drafting Authorities and Forms 317

6-48:5.1 Jury Instructions 317

6-48:5.2 Form Defense 317

6-49 LACHES 318

6-49:1 Explanation of Defense 318

6-49:2 Elements of Laches 318

6-49:3 Notable Authority on Defense 318

6-49:4 Application of Defense 321

6-49:4.1 Applicable Causes of Action
or Defenses 321

6-49:4.2 Nature of Defense 321

6-49:4.3 Notes on Trial by Jury 321

6-49:5 Drafting Authorities 322

6-49:5.1 Form Defense 322

6-50 LACK OF CAPACITY 322

6-50:1 Explanation of Defense 322

6-50:2 Elements of Lack of Capacity 324

6-50:3 Notable Authority on Defense 324

6-50:4 Application of Defense 324

Table of Contents

6-50:4.1 Applicable Causes of Action
or Defenses 324

6-50:5 Drafting Authorities and Forms 325

6-50:5.1 Form Defense 325

6-50:5.1a Form Defense – Mental
Incapacity 325

6-50:5.1b Form Defense – Legal
Incapacity (Other)..... 325

6-51 LICENSE 326

6-51:1 Explanation of Defense 326

6-51:2 Elements of Defense 326

6-51:3 Notable Authority on Defense 326

6-51:4 Application of Defense 327

6-51:4.1 Applicable Causes of Action
or Defenses 327

6-51:4.2 Notes on Trial by Jury 327

6-51:5 Drafting Authorities and Forms 327

6-51:5.1 Form Defense 327

6-52 LITIGATION PRIVILEGE 328

6-52:1 Explanation of Defense 328

6-52:2 Elements of Defense 329

6-52:3 Notable Authority on Defense 329

6-52:4 Application of Defense 330

6-52:4.1 Applicable Causes of Action
or Defenses 330

6-52:4.2 Notes on Trial by Jury 331

6-52:5 Drafting Authorities and Forms 331

6-52:5.1 Form Defense 331

6-53 MERE CONDUIT (COMMERCIAL CONDUIT)..... 332

6-53:1 Explanation of Defense 332

6-53:2 Elements of Defense 333

6-53:3 Notable Authority on Defense 333

6-53:4 Application of Defense 335

6-53:4.1 Applicable Causes of Action
or Defenses 335

6-53:4.2 Notes on Trial by Jury 336

6-53:5 Drafting Authorities and Forms 336

6-53:5.1 Jury Instructions..... 336

6-53:5.2 Form Defense 336

6-54 MERGER AND INTEGRATION 336

6-54:1 Explanation of Defense 336

6-54:2 Elements of Defense 338

Table of Contents

6-54:3	Notable Authority on Defense	339
6-54:4	Application of Defense	340
6-54:4.1	Applicable Causes of Action or Defenses	340
6-54:5	Drafting Authorities and Forms	340
6-54:5.1	Form Defense	340
6-55	MISTAKE.....	341
6-55:1	Explanation of Defense	341
6-55:2	Elements of Defense.....	343
6-55:2.1	Mutual Mistake of Fact.....	343
6-55:2.2	Unilateral Mistake of Fact.....	344
6-55:2.3	Mutual Mistake of Law.....	345
6-55:3	Notable Authority on Defense	345
6-55:4	Application of Defense.....	347
6-55:4.1	Applicable Causes of Action or Defenses	347
6-55:4.2	Nature of Defense	348
6-55:5	Drafting Authorities and Forms	348
6-55:5.1	Jury Instructions.....	348
6-55:5.2	Form Defenses.....	350
6-55:5.2a	Form Defense – Mutual Mistake of Fact	350
6-55:5.2b	Form Defense – Unilateral Mistake of Fact	351
6-55:5.2c	Form Defense – Mistake of Law	351
6-56	MITIGATION OF DAMAGES	352
6-56:1	Explanation of Defense	352
6-56:2	Elements of Defense.....	353
6-56:3	Notable Authority on Defense	353
6-56:4	Application of Defense.....	355
6-56:4.1	Applicable Causes of Action or Defenses	355
6-56:4.2	Nature of Rule.....	355
6-56:4.3	Notes on Trial by Jury	355
6-56:5	Drafting Authorities and Forms	355
6-56:5.1	Jury Instructions.....	355
6-56:5.2	Form Defense	356
6-57	MODIFICATION.....	357
6-57:1	Explanation of Defense	357
6-57:2	Elements of Defense.....	357
6-57:3	Notable Authority on Defense	357

Table of Contents

6-57:4	Application of Defense	358
6-57:4.1	Applicable Causes of Action or Defenses	358
6-57:4.2	Notes on Trial by Jury	358
6-57:5	Drafting Authorities and Forms	359
6-57:5.1	Jury Instructions.....	359
6-57:5.2	Form Defense	359
6-58	NECESSITY OR BUSINESS NECESSITY	359
6-58:1	Explanation of Defense	359
6-58:2	Elements of Defense	362
6-58:3	Notable Authority on Defense	362
6-58:4	Application of Defense.....	364
6-58:4.1	Applicable Causes of Action or Defenses	364
6-58:4.2	Notes on Trial by Jury	364
6-58:5	Drafting Authorities and Forms	364
6-58:5.1	Jury Instructions.....	364
6-58:5.2	Form Defense	365
6-59	NEGLIGENCE OF NON-PARTY (<i>FABRE</i> DEFENDANTS)	365
6-59:1	Explanation of Defense	365
6-59:2	Elements of Defense	366
6-59:3	Notable Authority on Defense	367
6-59:4	Application of Defense.....	369
6-59:4.1	Applicable Causes of Action or Defenses	369
6-59:4.2	Notes on Trial by Jury	369
6-59:5	Drafting Authorities and Forms	369
6-59:5.1	Jury Instructions.....	369
6-59:5.2	Form Defense	369
6-60	NEGLIGENT MISREPRESENTATION	370
6-60:1	Explanation of Defense	370
6-60:2	Elements of Defense	371
6-60:3	Notable Authority on Defense	371
6-60:4	Application of Defense.....	371
6-60:4.1	Applicable Causes of Action or Defenses	371
6-60:4.2	Notes on Trial by Jury	372
6-60:5	Drafting Authorities and Forms	372
6-60:5.1	Jury Instructions.....	372
6-60:5.2	Form Defense	372
6-61	NOVATION	373

Table of Contents

6-61:1 Explanation of Defense 373

6-61:2 Elements of Defense 374

6-61:3 Notable Authority on Defense 374

6-61:4 Application of Defense 376

 6-61:4.1 Applicable Causes of Action
 or Defenses 376

 6-61:4.2 Notes on Trial by Jury 376

6-61:5 Drafting Authorities and Forms 377

 6-61:5.1 Jury Instructions 377

 6-61:5.2 Form Defense 377

6-62 **PART PERFORMANCE OR PARTIAL
PERFORMANCE** 378

6-62:1 Explanation of Defense 378

6-62:2 Elements of Defense 379

6-62:3 Notable Authority on Defense 379

6-62:4 Application of Defense 381

 6-62:4.1 Applicable Causes of Action
 or Defenses 381

 6-62:4.2 Nature of Defense 381

 6-62:4.3 Notes on Trial by Jury 381

6-62:5 Drafting Authorities and Forms 381

 6-62:5.1 Form Defense 381

6-63 **PAYMENT** 382

6-63:1 Explanation of Defense 382

6-63:2 Elements of Defense 382

6-63:3 Notable Authority on Defense 382

6-63:4 Application of Defense 384

 6-63:4.1 Applicable Causes of Action
 or Defenses 384

 6-63:4.2 Notes on Trial by Jury 384

6-63:5 Drafting Authorities and Forms 384

 6-63:5.1 Statutory Forms 384

 6-63:5.2 Form Defense 384

6-64 **PREEMPTION** 384

6-64:1 Explanation of Defense 384

6-64:2 Elements of Defense 387

6-64:3 Notable Authority on Defense 387

6-64:4 Application of Defense 390

 6-64:4.1 Applicable Causes of Action
 or Defenses 390

 6-64:4.2 Notes on Trial by Jury 390

6-64:5 Drafting Authorities and Forms 390

Table of Contents

	6-64:5.1	Jury Instructions.....	390
	6-64:5.2	Form Defense	390
6-65	PRIOR BREACH / FIRST BREACH DOCTRINE.....		391
	6-65:1	Explanation of Defense	391
	6-65:2	Elements of Defense	392
	6-65:3	Notable Authority on Defense	393
	6-65:4	Application of Defense	394
	6-65:4.1	Applicable Causes of Action or Defenses	394
	6-65:4.2	Notes on Trial by Jury	394
	6-65:5	Drafting Authorities and Forms	394
	6-65:5.1	Form Defense	394
6-66	PRIVILEGE		394
	6-66:1	Explanation of Defense	394
	6-66:2	Elements of Defense	395
	6-66:3	Notable Authority on Defense	396
	6-66:4	Application of Defense	396
	6-66:4.1	Applicable Causes of Action or Defenses	396
	6-66:5	Drafting Authorities and Forms	396
	6-66:5.1	Form Defenses.....	396
	6-66:5.1a	Form Defense – Absolute Privilege.....	396
	6-66:5.1b	Form Defense – Qualified Privilege.....	397
6-67	PROMISSORY ESTOPPEL.....		397
	6-67:1	Explanation of Defense	397
	6-67:2	Elements of Defense	398
	6-67:3	Notable Authority on Defense	398
	6-67:4	Application of Defense	399
	6-67:4.1	Applicable Causes of Action or Defenses	399
	6-67:4.2	Notes on Trial by Jury	399
	6-67:5	Drafting Authorities and Forms	400
	6-67:5.1	Jury Instructions.....	400
	6-67:5.2	Form Defense	400
6-68	RATIFICATION		400
	6-68:1	Explanation of Defense	400
	6-68:2	Elements of Defense	401
	6-68:3	Notable Authority on Defense	401
	6-68:4	Application of Defense	403

Table of Contents

	6-68:4.1 Applicable Causes of Action or Defenses	403
	6-68:4.2 Notes on Trial by Jury	403
6-68:5	Drafting Authorities and Forms	404
	6-68:5.1 Jury Instructions.....	404
	6-68:5.2 Form Defense	405
6-69	RECOUPMENT.....	406
	6-69:1 Explanation of Defense	406
	6-69:2 Elements of Defense.....	407
	6-69:3 Notable Authority on Defense.....	408
	6-69:4 Application of Defense.....	408
	6-69:4.1 Applicable Causes of Action or Defenses	408
	6-69:4.2 Nature of Defense	408
	6-69:4.3 Notes on Trial by Jury	409
	6-69:5 Drafting Authorities and Forms	409
	6-69:5.1 Form Defense	409
6-70	RELEASE.....	409
	6-70:1 Explanation of Defense	409
	6-70:2 Elements of Defense.....	410
	6-70:3 Notable Authority on Defense.....	410
	6-70:4 Application of Defense.....	412
	6-70:4.1 Applicable Causes of Action or Defenses	412
	6-70:4.2 Notes on Trial by Jury	412
	6-70:5 Drafting Authorities and Forms	412
	6-70:5.1 Statutory Forms.....	412
	6-70:5.2 Form Defense	412
	6-70:5.2a Form Defense – Written Release.....	412
	6-70:5.2b Form Defense – Oral Release.....	413
6-71	RES JUDICATA—CLAIM PRECLUSION	413
	6-71:1 Explanation of Defense	413
	6-71:2 Elements of Defense.....	414
	6-71:3 Notable Authority on Defense.....	414
	6-71:4 Application of Defense.....	416
	6-71:4.1 Applicable Causes of Action or Defenses	416
	6-71:5 Drafting Authorities and Forms	417
	6-71:5.1 Form Defense	417
6-72	RESCISSION.....	417

Table of Contents

6-72:1	Explanation of Defense	417
6-72:2	Elements of Defense	418
6-72:3	Notable Authority on Defense	418
6-72:4	Application of Defense	419
6-72:4.1	Causes of Action or Defenses	419
6-72:4.2	Nature of Defense	419
6-72:4.3	Notes on Trial by Jury	419
6-72:5	Drafting Authorities and Forms	420
6-72:5.1	Form Defense	420
6-73	<i>ROOKER-FELDMAN</i> DOCTRINE	420
6-73:1	Explanation of Defense	420
6-73:2	Elements of Defense	422
6-73:3	Notable Authority on Defense	422
6-73:4	Application of Defense	423
6-73:4.1	Applicable Causes of Action or Defenses	423
6-73:4.2	Notes on Trial by Jury	423
6-73:5	Drafting Authorities and Forms	423
6-73:5.1	Jury Instructions	423
6-73:5.2	Form Defense	423
6-74	SET-OFF	424
6-74:1	Explanation of Defense	424
6-74:2	Elements of Defense	425
6-74:3	Notable Authority on Defense	425
6-74:4	Application of Defense	427
6-74:4.1	Applicable Causes of Action or Defenses	427
6-74:4.2	Notes on Trial by Jury	427
6-74:5	Drafting Authorities and Forms	427
6-74:5.1	Jury Instructions	427
6-74:5.2	Form Defense	428
6-75	SOVEREIGN IMMUNITY	428
6-75:1	Explanation of Defense	428
6-75:2	Elements of Defenses	429
6-75:3	Notable Authority on Defense	429
6-75:4	Application of Defense	438
6-75:4.1	Applicable Causes of Action or Defenses	438
6-75:4.2	Notes on Trial by Jury	438
6-75:5	Drafting Authorities and Forms	438
6-75:5.1	Jury Instructions	438
6-75:5.2	Form Defense	438

Table of Contents

6-76 SPLITTING CAUSE OF ACTION
(RULE AGAINST) 439
6-76:1 Explanation of Defense 439
6-76:2 Elements of Defense 440
6-76:3 Notable Authority on Defense 440
6-76:4 Application of Defense 441
6-76:4.1 Applicable Causes of Action
or Defenses 441
6-76:5 Drafting Authorities and Forms 441
6-76:5.1 Form Defense 441
6-77 STANDING 441
6-77:1 Explanation of Defense 441
6-77:2 Elements of Defense 444
6-77:2.1 Standing at Commencement of
Action and at Judgment 445
6-77:3 Notable Authority on Defense 445
6-77:4 Application of Defense 448
6-77:4.1 Applicable Causes of Action
or Defenses 448
6-77:4.2 Nature of Defense 448
6-77:4.3 Notes on Trial by Jury 448
6-77:5 Drafting Authorities and Forms 448
6-77:5.1 Form Defense 448
6-78 STATUTE OF FRAUDS 449
6-78:1 Explanation of Defense 449
6-78:2 Elements of Defense 450
6-78:3 Notable Authority on Defense 450
6-78:4 Application of Defense 455
6-78:4.1 Applicable Causes of Action
or Defenses 455
6-78:4.2 Notes on Trial by Jury 455
6-78:5 Drafting Authorities and Forms 456
6-78:5.1 Statutory Forms 456
6-78:5.2 Form Defense 456
6-79 STATUTE OF LIMITATIONS 456
6-79:1 Explanation of Defense 456
6-79:1.1 Statutory Bases for Limitations
Defenses 458
6-79:1.2 Accrual of Claims 458
6-79:1.2a Delayed Discovery Doctrine ... 459
6-79:1.2b Accrual of Fraud Claims 460

Table of Contents

	6-79:1.2c	Accrual of Product Liability Claims.....	460
	6-79:1.3	Tolling of Claims	462
	6-79:1.4	Equitable Tolling of Claims	464
	6-79:1.5	Continuing Violation Doctrine	465
	6-79:1.6	Continuing Tort Doctrine	466
	6-79:1.7	Waiver of the Statute of Limitations Defense	466
	6-79:1.8	Laches and the Statute of Limitations (Statutory Laches)	467
	6-79:1.9	Statutes of Repose or Nonclaim Statutes Distinguished	467
	6-79:1.10	The Relation-Back Doctrine	469
6-79:2		Elements of Defense	470
6-79:3		Notable Authority on Defense	470
6-79:4		Application of Defense	472
	6-79:4.1	Applicable Causes of Action or Defenses	472
	6-79:4.2	Nature of Defense	473
	6-79:4.3	Notes on Trial by Jury	473
6-79:5		Drafting Authorities and Forms	473
	6-79:5.1	Statutory Forms.....	473
	6-79:5.2	Jury Instructions.....	473
	6-79:5.3	Form Defense	477
	6-79:5.3a	Form Defense (Form 1.965, Fla. R. Civ. P.).....	477
	6-79:5.3b	Form Defense (Expanded; Breach of Contract).....	477
6-80		STATUTE OF REPOSE	478
	6-80:1	Explanation of Defense	478
	6-80:1.1	Statutes of Limitation Distinguished	479
	6-80:2	Elements of Defense	480
	6-80:3	Notable Authority on Defense	480
	6-80:4	Application of Defense	482
	6-80:4.1	Applicable Causes of Action or Defenses	482
	6-80:4.2	Notes on Trial by Jury	483
	6-80:5	Drafting Authorities and Forms	483
	6-80:5.1	Jury Instructions.....	483
	6-80:5.2	Form Defense	483
6-81		UNCLEAN HANDS	484
	6-81:1	Explanation of Defense	484

Table of Contents

6-81:2 Elements of Defense 484
6-81:3 Notable Authority on Defense 485
6-81:4 Application of Defense 486
 6-81:4.1 Applicable Causes of Action
 or Defenses 486
 6-81:4.2 Nature of Defense 486
 6-81:4.3 Notes on Trial by Jury 486
6-81:5 Drafting Authorities and Forms 486
 6-81:5.1 Form Defense 486
6-82 UNCONSCIONABILITY 487
 6-82:1 Explanation of Defense 487
 6-82:2 Elements of Defense 489
 6-82:3 Notable Authority on Defense 489
 6-82:4 Application of Defense 491
 6-82:4.1 Applicable Causes of Action
 or Defenses 491
 6-82:4.2 Nature of Defense 491
 6-82:5 Drafting Authorities and Forms 492
 6-82:5.1 Form Defense 492
6-83 UNDUE INFLUENCE 492
 6-83:1 Explanation of Defense 492
 6-83:2 Elements of Defense 493
 6-83:3 Notable Authority on Defense 493
 6-83:4 Application of Defense 495
 6-83:4.1 Applicable Causes of Action
 or Defenses 495
 6-83:4.2 Nature of Defense 495
 6-83:4.3 Notes on Trial by Jury 495
 6-83:5 Drafting Authorities and Forms 495
 6-83:5.1 Jury Instructions 495
 6-83:5.2 Form Defense 496
6-84 UNJUST ENRICHMENT 496
 6-84:1 Explanation of Defense 496
 6-84:2 Elements of Defense 497
 6-84:3 Notable Authority on Defense 498
 6-84:4 Application of Defense 499
 6-84:4.1 Applicable Causes of Action
 or Defenses 499
 6-84:4.2 Notes on Trial by Jury 499
 6-84:5 Drafting Authorities and Forms 500
 6-84:5.1 Jury Instructions 500
 6-84:5.2 Form Defense 500

Table of Contents

6-85	USURY	501
6-85:1	Explanation of Defense	501
6-85:2	Elements of Defense	501
6-85:3	Notable Authority on Defense	502
6-85:4	Application of Defense	503
6-85:4.1	Applicable Causes of Action or Defenses	503
6-85:4.2	Nature of Defense	503
6-85:5	Drafting Authorities and Forms	504
6-85:5.1	Form Defense	504
6-86	VICARIOUS LIABILITY	504
6-86:1	Explanation of Defense	504
6-86:2	Elements of Defense	505
6-86:3	Notable Authority on Defense	505
6-86:4	Application of Defense	507
6-86:4.1	Applicable Causes of Action or Defenses	507
6-86:4.2	Notes on Trial by Jury	508
6-86:5	Drafting Authorities and Forms	508
6-86:5.1	Jury Instructions	508
6-86:5.2	Form Defense	508
6-87	VOLUNTARY PAYMENT	508
6-87:1	Explanation of Defense	508
6-87:2	Elements of Defense	509
6-87:3	Notable Authority on Defense	510
6-87:4	Application of Defense	511
6-87:4.1	Applicable Causes of Action or Defenses	511
6-87:4.2	Notes on Trial by Jury	511
6-87:5	Drafting Authorities and Forms	511
6-87:5.1	Jury Instructions	511
6-87:5.2	Form Defense	512
6-88	WAIVER	512
6-88:1	Explanation of Defense	512
6-88:1.1	Implied Waiver	513
6-88:2	Elements of Defense	513
6-88:3	Notable Authority on Defense	514
6-88:4	Application of Defense	515
6-88:4.1	Applicable Causes of Action or Defenses	515
6-88:4.2	Nature of Defense	515
6-88:4.3	Notes on Trial by Jury	515

Table of Contents

6-88:5 Drafting Authorities and Forms 516
6-88:5.1 Statutory Forms..... 516
6-88:5.2 Jury Instructions..... 516
6-88:5.3 Form Defense 517
6-88:5.3a Form Defense of
Waiver (Written) 517
6-88:5.3b Form Defense of
Waiver (Oral) 517
6-89 WAY OF NECESSITY 517
6-89:1 Explanation of Defense 517
6-89:2 Elements of Defense 518
6-89:3 Notable Authority on Defense 520
6-89:4 Application of Defense 521
6-89:4.1 Applicable Causes of Action
or Defenses 521
6-89:4.2 Notes on Trial by Jury 522
6-89:5 Drafting Authorities and Forms 522
6-89:5.1 Jury Instructions..... 522
6-89:5.2 Form Defense 522

Chapter 6 Appendix: Claims and Defenses Checklist..... 523

Appendix 533
1-001 MOTION TO STRIKE IMPROPER REPLY PLEADING... 537
1-002 MOTION TO STRIKE AFFIRMATIVE DEFENSES..... 539
1-003 MOTION TO STRIKE AFFIRMATIVE DEFENSES,
INCLUDING FOR WAIVER OF DEFENSES BY
DEFENDANTS..... 543
1-004 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (NONCLAIM STATUTE)..... 549
1-005 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (DOOR CLOSING
STATUTE WITH EXTRINSIC EVIDENCE) 552
1-006 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (JURISDICTIONAL
STATUTE)..... 555
1-007 MOTION TO DISMISS FOR LACK OF PERSONAL
JURISDICTION..... 558
1-008 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION 562

Table of Contents

1-009	MOTION TO ABATE OR TRANSFER FOR IMPROPER VENUE FOR INDIVIDUAL DEFENDANT	565
1-010	MOTION TO ABATE OR TRANSFER FOR IMPROPER VENUE FOR DOMESTIC CORPORATE DEFENDANT WITH EXTRINSIC EVIDENCE	567
1-011	AFFIDAVIT IN SUPPORT OF MOTION TO ABATE OR TRANSFER FOR IMPROPER VENUE FOR DOMESTIC CORPORATE DEFENDANT	570
1-012	MOTION TO ABATE OR TRANSFER FOR IMPROPER VENUE FOR FOREIGN CORPORATE DEFENDANT WITH EXTRINSIC EVIDENCE	573
1-013	MOTION TO QUASH FOR INSUFFICIENCY OF PROCESS	576
1-014	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (NO PERSONAL SERVICE).....	579
1-015	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (IMPROPER SERVICE ON MINOR).....	582
1-016	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC CORPORATION)....	586
1-017	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (FOREIGN CORPORATION).....	590
1-018	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC PARTNERSHIP)	594
1-019	MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC LIMITED PARTNERSHIP)	598
1-020	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM	602
1-021	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (INCLUDING NEGATION OF CLAIM BY EXHIBIT TO PLEADING UNDER FLA. R. CIV. P. 1.130).....	609
1-022	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (FAILURE TO ALLEGE FRAUD WITH PARTICULARITY REQUIRED BY FLA. R. CIV. P. 1.120(B)).....	615

Table of Contents

1-023 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (FAILURE TO COMPLY WITH FLA. R. CIV. P. 1.110)..... 620

1-024 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (MISJOINDER OF CLAIMS—FLA. R. CIV. P. 1.110)..... 623

1-025 MOTION TO ABATE AND DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY 627

1-026 MOTION FOR JUDGMENT ON THE PLEADINGS..... 630

1-027 MOTION FOR MORE DEFINITE STATEMENT 634

1-028 MOTION TO STRIKE MATTER FROM PLEADING..... 639

1-029 MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES 642

1-030 INTERROGATORIES FOR PLAINTIFF’S JURISDICTIONAL DISCOVERY FROM DEFENDANT PERTAINING TO BUSINESS’S MINIMUM CONTACTS WITH FLORIDA 645

1-031 REQUEST FOR PRODUCTION OF DOCUMENTS FOR PLAINTIFF’S JURISDICTIONAL DISCOVERY FROM DEFENDANT PERTAINING TO BUSINESS’S MINIMUM CONTACTS WITH FLORIDA 657

1-032 MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO STRIKE AFFIRMATIVE DEFENSES BY DEFENDANT..... 666

1-033 RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANT 675

1-034 GENERAL REPLY 681

Table of Cases..... 691

Index..... 747

