

# Chapter 1

## Foundations for Legal and Affirmative Defenses

### 1-1 INTRODUCTION

#### 1-1:1 Purpose of Book

This book aids practitioners in identifying relevant defenses and pleading those defenses in a manner resistant to attack or dismissal. Although many practice manuals offer an obligatory section on historical common-law considerations, this book focuses on some basic concepts that are assembled not for their historical interest but because these concepts guide and shape the case law governing the pleading, striking, and dismissal of affirmative defenses.

The last decade witnessed a tremendous spike in foreclosure filings,<sup>1</sup> particularly in Florida.<sup>2</sup> A peculiar side effect of these cases has been the proliferation of certain defenses and more sophisticated defense strategies that featured the use of affirmative defenses to prolong the pleading phase of cases and keep trial and

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<sup>1</sup> See *In re Task Force on Residential Mortg. Foreclosure Cases*, Fla. Admin. Order No. AOSC09-8, at 1 (Mar. 27, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-8.pdf> (last visited July 30, 2019).

<sup>2</sup> Over a 36-month period (Fiscal Year 2005-2006 to Fiscal Year 2007-2008), real property/mortgage foreclosure filings increased by 396 percent in Florida's trial courts. Regrettably, during the same time period, the clearance rate for real property/mortgage foreclosure cases decreased by 52 percent, from 94 percent in Fiscal Year 2005-2006 to 42 percent in Fiscal Year 2007-2008. Florida had the third highest rate of mortgage foreclosures in the country with one in every 158 housing units in foreclosure. *In re Certification of Need for Additional Judges*, 29 So. 3d 1110, 1113 (Fla. 2010) (footnote, citation omitted).

resolution at bay. Certainly, dilatory tactics and so-called sand-bagging are as old as the courts. But this decade, in the opinion of the authors, featured a concentrated dose of motion practice that regarded the pleading of affirmative defenses. While the flurry of activity served to educate the judiciary and promote stricter controls on the pleading of affirmative defenses, the lack of understanding about affirmative defenses on the part of many practitioners came to the forefront.

## 1-2 NATURE OF AFFIRMATIVE DEFENSES

### 1-2:1 Affirmative Defenses Confess and Avoid the Claims

An affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action. The plaintiff is not required to prove that the affirmative defense does not exist.<sup>3</sup> The affirmative defense inherits its role from the common-law pleading practice of confession and avoidance. Similarly, federal courts have explained that, by its very definition, an affirmative defense is established only when a defendant admits the essential facts of a complaint and sets up other facts in justification or avoidance.<sup>4</sup> Generally, if a defendant established an affirmative defense the defendant is entitled to judgment even if the plaintiff can prove its case by a preponderance of the evidence.<sup>5</sup> “Affirmative defenses do not simply deny the facts of the opposing party’s claim. They raise some new matter which defeats an otherwise apparently valid claim.”<sup>6</sup> An affirmative defense is not made out as a matter of pleading by merely demanding proof of a fact alleged positively in the bill.<sup>7</sup>

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<sup>3</sup> *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010) (citing *Langford v. McCormick*, 552 So. 2d 964, 967 (Fla. 1st DCA 1989); see also *Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc.*, 538 So. 2d 1382, 1383 (Fla. 5th DCA 1989); Black's Law Dictionary 482 (9th ed. 2009)).

<sup>4</sup> *Lynch v. Cont'l Grp., Inc.*, No. 12-21648-CIV-SEITZ/SIMONTON, 2013 U.S. Dist. LEXIS 5840, at \*10 (S.D. Fla. Jan. 15, 2013) (quoting *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005)).

<sup>5</sup> *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999); *Pena v. Coastal QSR, LLC*, No. 2:10-cv-60-FtM-29DNF, 2010 U.S. Dist. LEXIS 43461, at \*4 (M.D. Fla. May 4, 2010).

<sup>6</sup> *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 452 (Fla. 2005) (quoting *Wiggins v. Portmay Corp.*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983)).

<sup>7</sup> *Kent v. Knowles*, 101 Fla. 1375, 1381 (Fla. 1931); *Yaeger & Bethel Hardware Co. v. Pritz*, 69 Fla. 8, 10 (Fla. 1915).

Looking to examples of common affirmative defenses, such as those listed in the Florida Rules of Civil Procedure,<sup>8</sup> the nature of the “affirmative” defense is apparent. Take, for instance, the affirmative defense of release. Consider that release in conjunction with a claim of breach of contract. Company A and Company B were parties to a contract for Company B to provide 25 classic automobiles. Company B furnished 23 automobiles and, declaring those models to be so spectacular and valuable, refused to provide any additional cars. Company A held Company B in breach and sent a demand letter from legal counsel. The next day, Company B located a very fine specimen of a rare auto, and offered it to Company A for an advantageous price along with a written release of all claims. Company A, desirous of the rare auto, snapped it up and signed the release. Then Company A proceeded to file an action for breach against Company B. Among the other defenses available, Company B alleged an affirmative defense of release consistent with the form set forth in the Florida Rules of Civil Procedure.<sup>9</sup> Company B added the necessary material called for in the note to the form, i.e., the date of the release (which the form presumes is a written release), attaching and incorporating same to the defenses consistent with Rule 1.130(a), Florida Rules of Civil Procedure. It is not enough for Company B to simply assert that Company A released it. Company B need not do much more to allege the defense, but Company B must do that much. In this situation, Company B then has to authenticate the written release, argue through the interpretation of the release, and explain how it applies to the particular claims being asserted by Company A. Company A has the opportunity to file a reply to Company B’s release affirmative defense. For example, Company A might reply with a defense of mutual mistake to Company B’s release affirmative defense. Then, if Company A can make its prima facie case for breach of contract, Company B not only has the burden of proof and persuasion on its release defense and any other defenses, but it must also contend with Company A’s mutual-mistake defense to the release defense.

Affirmative defenses are more than pure conclusions of law. Florida law obligates a defendant to plead the defense with

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<sup>8</sup> Fla. R. Civ. P. 1.110(d).

<sup>9</sup> Form 1.970, Fla. R. Civ. P.

“certainty,” including allegations of sufficient facts to support the defense.<sup>10</sup> When a defendant merely alleges conclusions of law unsupported by allegations of ultimate fact, such defenses are legally insufficient.<sup>11</sup> Such legally insufficient defenses are subject to being struck under Rule 1.140(f), which permits the courts to strike “any insufficient defense.”<sup>12</sup>

Though arguably more liberal in its pleading standard, federal law requires that affirmative defenses included in an answer must provide “a short and plain statement of the claim showing the pleader is entitled to relief.”<sup>13</sup> A pleader must, however, plead enough facts to state a plausible basis for the claim.<sup>14</sup> The “affirmative” role of the defendant pleading and proving an affirmative defense is captured in this federal opinion:

An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it . . . . When this happens, the party defending becomes, in so far, the actor or plaintiff. In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary’s contention and setting up an affirmative defence, takes the role of actor . . . — must satisfy the court of the truth

<sup>10</sup>. *Zito v. Washington Fed. Sav. & Loan Ass’n of Miami Beach*, 318 So. 2d 175, 176 (Fla. 3d DCA 1975), *cert. denied*, 330 So. 2d 23 (Fla. 1976); *Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982).

<sup>11</sup>. *Chris Craft Indus., Inc. v. Van Valkenberg*, 267 So. 2d 642, 645 (Fla. 1972); *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198 (Fla. 1965); *Fuller, Inc. v. Frank F. Jonsberg, Inc.*, 107 Fla. 330, 144 So. 653 (1932); *L. B. McLeod Const. Co. v. Cooper*, 134 So. 224 (1931); *Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982); *Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981).

<sup>12</sup>. *Chris Craft Indus., Inc. v. Van Valkenberg*, 267 So. 2d 642, 645 (Fla. 1972); *Fuller, Inc. v. Frank F. Jonsberg, Inc.*, 107 Fla. 330, 144 So. 653 (1932).

<sup>13</sup>. *Pena v. Coastal QSR, LLC*, No. 2:10-cv-60-FtM-29DNF, 2010 U.S. Dist. LEXIS 43461 (M.D. Fla. May 4, 2010) (quoting Fed. R. Civ. P. 8 (a)(2)). See the discussion on this standard in Chapter 2, § 2-1:5.2.

<sup>14</sup>. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-66 (2007). “An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence.” *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999).

and adequacy of the grounds of his claim, both in point of fact and law.<sup>15</sup>

An affirmative defense is resolved exclusive of the prima facie case by the claimant. For example, a defendant might not dispute that a plaintiff has proved a prima facie case, and yet can try its affirmative defenses.<sup>16</sup>

In the course of an action, the defendant has the burden of proving an affirmative defense.<sup>17</sup> To that end, the defendant bears the burden of proving each element of an affirmative defense.<sup>18</sup>

### **1-3 DEFENSES ARE PERMITTED IN CERTAIN PLEADINGS AND MOTIONS**

#### **1-3:1 The Florida Rules of Civil Procedure Permit Defenses in Certain Pleadings**

The Florida Rules of Civil Procedure provide for three basic forms of pleading: complaints or petitions, answers, and replies.<sup>19</sup> Other than these three basic forms, more specifically described in Rule 1.100(a), no other pleadings are allowed.<sup>20</sup> The first instance for the assertion of affirmative defenses in the pleadings is, of course, an answer.<sup>21</sup> At the next, third, and final pleading stage, if an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance.<sup>22</sup> So, there are two basic

<sup>15</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 n.17 (1989) (J. Stevens, dissenting), overruled on other grounds, superseded by statute, as stated in *El v. SEPTA*, 479 F.3d 232, 240-41 (3d Cir. 2006).

<sup>16</sup> See *Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947 (Fla. 4th DCA 2004).

<sup>17</sup> See *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957); *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010).

<sup>18</sup> *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010); *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1269 n.5 (Fla. 1987); *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957); *Cullum v. Packo*, 947 So. 2d 533, 536 (Fla. 1st DCA 2006); *Braid Sales & Mktg., Inc. v. R & L Carriers, Inc.*, 838 So. 2d 590, 592 (Fla. 5th DCA 2003); *Pierson v. State Farm Mut. Auto. Ins. Co.*, 621 So. 2d 576, 578 (Fla. 2d DCA 1993); *Henderson Dev. Co. v. Gerrits*, 340 So. 2d 1205, 1206 (Fla. 3d DCA 1976).

<sup>19</sup> Fla. R. Civ. P. 1.100(a). Of course, this three-part set also applies to, and commences with, counterclaims, cross-claims, and third-party complaints.

<sup>20</sup> Fla. R. Civ. P. 1.100(a). *Accord* Fla. R. Civ. P. 1.110(h) (providing for subsequent pleadings but for post-judgment claims, e.g., proceedings supplementary).

<sup>21</sup> Fla. R. Civ. P. 1.100(a). *Accord* Fla. R. Civ. P. 1.110(d).

<sup>22</sup> Fla. R. Civ. P. 1.100(a).

levels of pleading at which affirmative defenses may be asserted. Yet, practitioners often neglect or determine not to file a reply with affirmative defenses to the defenses raised in the preceding answer pleading. As discussed further in this book, the use or neglect of the reply pleading can play a critical role in the adjudication of a case. The filing of a reply pleading that merely presents a general denial of the factual allegations of the affirmative defenses is not only a nullity, it is a wasted opportunity to assert defenses to the defenses.

This three-stage pleading construct also falls over cross-claims and third-party claims.<sup>23</sup> Similarly, when subsequent pleadings are permitted or necessary following the entry of final judgment, such as for a proceeding supplementary, the Florida Rules of Civil Procedure permit the assertion of defenses again.<sup>24</sup> Specifically, when any subsequent proceeding results in a pleading in the strict technical sense under Rule 1.100(a), the response by opposing parties will follow the same course as though the new pleading were the initial pleading. Thereafter, the authority for defenses under Rule 1.140 will apply.<sup>25</sup>

### 1-3:2 Drafting Requirements for Affirmative Defenses

Rule 1.110(f) sets forth key pleading requirements for defenses. Specifically, the rule directs that “[a]ll averments of claim or defense shall be made in consecutively numbered paragraphs.” While many practitioners often stop numbering in their responses to the corresponding, numbered paragraphs of the prior pleading, Rule 1.110(f) requires numbering of the paragraphs for each defense.<sup>26</sup> The reason for the numbering of defenses is that it permits the parties and the court to refer back to the particular defense in all subsequent pleadings.<sup>27</sup> The best practice is to confine and organize the answer in this pattern: (1) admissions; (2) denials,

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<sup>23</sup> Fla. R. Civ. P. 1.100(a).

<sup>24</sup> Fla. R. Civ. P. 1.110, Committee Notes, 1971 Amendment.

<sup>25</sup> Fla. R. Civ. P. 1.110, Committee Notes, 1971 Amendment.

<sup>26</sup> Fla. R. Civ. P. 1.110(f). *See also* Fla. R. Civ. P. 1.110, Authors’ Comment—1967 (“Defenses should be set forth in separately numbered paragraphs.”).

<sup>27</sup> Fla. R. Civ. P. 1.110(f).

in whole or in part; (3) lack of knowledge of the allegations in the complaint; and, finally, (4) affirmative defenses.<sup>28</sup>

**1-3:3 The Florida Rules of Civil Procedure  
Permit Motions to Dismiss to  
Assert Affirmative Defenses**

A motion to dismiss may assert an affirmative defense as a ground only within the limitations of Rule 1.110(d), which requires that the affirmative defense appears on the face of a prior pleading.<sup>29</sup> Where the court must consider evidence or allegations that are extrinsic to the four corners of the prior pleading, a motion to dismiss traveling on an affirmative defense is not proper.

While a defense of statute of limitations might seem like a simple example of an affirmative defense suitable for a Rule 1.110(d) motion to dismiss, certain questions must be answered. For example, consider a breach of contract complaint: First, does the prior pleading allege a date certain of a breach? If so, a motion might be appropriate. If not, and the breach is alleged in general or vague terms not fixed in time, the prior pleading likely does not give sufficient information within its four corners to apply a statute of limitations defense. Second, if the applicable limitations period for the particular targeted cause of action (i.e., breach of contract) has expired, is there basis for an argument deflecting the statute of limitations (e.g., accrual, tolling, waiver, equitable estoppel)?

**1-4 LEGAL DEFENSES DISTINGUISHED  
FROM AFFIRMATIVE DEFENSES**

**1-4:1 Legal Defenses Attack the Claimant's  
Prima Facie Claims**

In contrast with affirmative defenses, a legal defense or plain “defense” does not raise new matters extraneous to a plaintiff’s claims and does not generally confess and avoid the claims. Rather a defense simply attacks the prima facie claim, including through specific denials of elements, authority, or facts supporting the

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<sup>28</sup> Fla. R. Civ. P. 1.110 Authors’ Comment—1967 (citing *Pearson v. Sindelar*, 75 So. 2d 295 (Fla. 1954)).

<sup>29</sup> Fla. R. Civ. P. 1.140 Author’s Comment—1967; Fla. R. Civ. P. 1.110(d).



prima facie case. A defense that points out a defect in a plaintiff's prima facie case is not an affirmative defense.<sup>30</sup> While such a defense might be labeled an "affirmative" defense, the defense is better characterized and treated as a specific denial of the plaintiff's prima facie case.<sup>31</sup>

The Florida Rules of Civil Procedure distinguish between two categories of defenses: defenses in law and defenses in fact.<sup>32</sup> Similarly, the legal defenses of Rule 1.140(b) bear no overlap with the stock, non-exhaustive list of affirmative defenses enumerated in Rule 1.110(d). Rule 1.140(b) legal defenses might require some facts or evidence, such as jurisdictional affidavits or declarations supporting a motion to dismiss for lack of personal jurisdiction, but these defenses are generally not confessions and avoidances that introduce extraneous, factual issues to the case.

For example, failure to state a claim<sup>33</sup> is generally not made in the manner of an affirmative defense.<sup>34</sup> Usually, such a motion or defense necessarily focuses on the four corners of the prior pleading and attacks the quality, completeness, or applicability of the cause of action. Although the well-pleaded allegations of the prior pleading are assumed to be true for consideration of a

<sup>30</sup>. *Zito v. Washington Fed. Sav. & Loan Ass'n of Miami Beach*, 318 So. 2d 175, 176 (Fla. 3d DCA 1975), *cert. denied*, 330 So. 2d 23 (Fla. 1976) (citing 25 Fla. Jr. Pleadings § 24 (1959)); *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988) (citing *Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986) (quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1270, at 289 (1969))).

<sup>31</sup>. See *Chetu, Inc. v. Salihu*, No. 09-60588-CIV-COHN/SELTZER, 2009 U.S. Dist. LEXIS 103910, at \*7-8 (S.D. Fla. Oct. 26, 2009) (citing *Premium Leisure, LLC v. Gulf Coast Spa Mfrs., Inc.*, No. 8:08-cv-1048-T-24 EAJ, 2008 U.S. Dist. LEXIS 64098, 2008 WL 3927265, at \*3 (M.D. Fla. Aug. 21, 2008)). See also 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1269 (3d ed. 2004) ("In attempting to controvert an allegation in the complaint, a defendant occasionally may label his negative averment as an affirmative defense rather than as a specific denial.").

<sup>32</sup>. Fla. R. Civ. P. 1.140(b) ("Every defense *in law* or *in fact* to a claim for relief in a pleading shall be asserted in the responsive pleading.") (emphasis added).

<sup>33</sup>. Fla. R. Civ. P. 1.140(b)(6); Fed. R. Civ. P. 12(b)(6).

<sup>34</sup>. *U.S. Distribs., Inc. v. Block*, No. 09-21635-CIV-HUCK/O'SULLIVAN, 2010 U.S. Dist. LEXIS 5140, at \*12-13 (S.D. Fla. Jan. 22, 2010) (noting the parties raised "legal defenses (e.g., failure to state a claim) as affirmative defenses. These defenses are more properly disposed of through dispositive motions."). Contrast *Pena v. Coastal QSR, LLC*, No. 2:10-cv-60-FtM-29DNF, 2010 U.S. Dist. LEXIS 43461, at \*5 (M.D. Fla. May 4, 2010) ("Failure to state a claim upon which relief may be granted is an affirmative defense recognized" in Fed. R. Civ. P. 12(b)(6)).



motion to dismiss for failure to state a cause of action,<sup>35</sup> this is not the “confession” of the sort contemplated with an affirmative defense, such as relief. This defense or objection of failure to state a claim focuses on the allegations and legal entitlement of claimant, as opposed to introducing extraneous facts and matters to avoid liability, such as a written release of claims.

## 1-5 FOUNDATIONS FOR DEFENSES

### 1-5:1 Defenses and the Common Law

#### 1-5:1.1 Florida Common Law Gives Rise to Affirmative Defenses

Many affirmative defenses arise from common law or common-law principles.<sup>36</sup> Case law will inform the practitioner as to the elements of the defense that need be alleged or proven, whether the defense applies to legal or equitable claims, and more.

Case law can constrain the use or application of a defense as to certain causes of action. Similarly, statutes can abrogate affirmative defenses. It is critical for defendants to consider whether case law or a statute constrains the availability or application of common law defenses. For example, in 1996, the Supreme Court of Florida held that the Medicaid Third-Party Liability Act is facially constitutional, including with regard to its abrogation of affirmative defenses.<sup>37</sup>

<sup>35</sup>. See *Wallace v. Dean*, 3 So. 3d 1035, 1042-43 (Fla. 2009) (citing *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983) (emphasis supplied) (citing *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972); *Popwell v. Abel*, 226 So. 2d 418 (Fla. 4th DCA 1969)); *AIA Mobile Home Park, Inc. v. Brevard Cnty.*, 246 So. 2d 126, 127 (Fla. 4th DCA 1971) (quoting Fla. Jur., Pleading, §§ 128, 129).

<sup>36</sup>. See *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 330, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)) (referencing endurance of common-law principles, including defenses, recognized in ordinary tort litigation, interaction with legislation); *Earth Trades, Inc. v. T&G Corp.*, 108 So. 3d 580 (Fla. 2013) (discussing common-law roots of in pari delicto defense); *Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239, 1253 (Fla. 1996) (regarding statutory abrogation of common-law affirmative defenses).

<sup>37</sup>. *Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239, 1253 (Fla. 1996); see also *Smiley v. State*, 966 So. 2d 330, 335-36 (Fla. 2007).

### 1-5:1.2 No Federal Common Law to Create Affirmative Defenses

There is no federal, general common law.<sup>38</sup> While federal statutes and code might give rise to affirmative defenses (e.g., statutory exemption or immunity), there is not a body of federal common law that must be cross-referenced in Florida federal cases. Provided Florida state law applies to the claims and defenses, in whole or in part, then practitioners must consult Florida common law. In diversity jurisdiction actions, Florida's federal courts look to substantive Florida law on affirmative defenses.<sup>39</sup>

Yet even when Florida substantive law applies in federal cases, the federal courts continue to utilize federal law on pleading standards.<sup>40</sup> In those circumstances, Federal Rule of Civil Procedure 8 still governs the pleading requirements for affirmative defenses.<sup>41</sup> Under Federal Rule 8, a party “must affirmatively state any avoidance or affirmative defense.”<sup>42</sup> Rule 8 does not require detailed factual allegations. Rather, a defendant must give the plaintiff “fair notice” of the nature of each defense and the grounds upon which it rests.<sup>43</sup> In short, each affirmative defense must frame the issue as relevant, there must be substantial legal

<sup>38</sup>. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (U.S. 1994).

<sup>39</sup>. See *Brescher v. Von Stein*, 904 F.2d 572, 584 n.19 (11th Cir. 1990); *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (applying Florida substantive law, but holding that federal procedural law governs); *First Coast Energy, L.L.P. v. Mid-Continent Cas. Co.*, No. 3:12-cv-281-J-32MCR, 2012 U.S. Dist. LEXIS 165705, at \*7 (M.D. Fla. Nov. 20, 2012) (“State rules that define the elements of . . . affirmative defenses . . . are so obviously substantive that their applications in diversity actions is required.”) (citation, internal quotes omitted); *Dunning v. Thuyen*, No. 8:11-cv-2340-T-33TGW, 2012 U.S. Dist. LEXIS 34838, at \*4 (M.D. Fla. Mar. 15, 2012); *Brewer v. Stop Stick, Ltd.*, No. 2:04-cv-613-FtM-33DNF, 2005 U.S. Dist. LEXIS 35261, at \*5-6 (M.D. Fla. Oct. 14, 2005); *But see Coquina Invs. v. Rothstein*, No. 10-60786-Civ-COOKE/BANDSTRA, 2011 U.S. Dist. LEXIS 121039 (S.D. Fla. Oct. 19, 2011) (looking to various federal jurisdictions outside of Florida on when duty to mitigate is triggered).

<sup>40</sup>. *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986); *Dunning v. Thuyen*, No. 8:11-cv-2340-T-33TGW, 2012 U.S. Dist. LEXIS 34838, at \*3-5 (M.D. Fla. Mar. 15, 2012).

<sup>41</sup>. *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (“A federal court need not adhere to a state's strict pleading requirements but should instead follow Fed. R. Civ. P. 8(a).”).

<sup>42</sup>. Fed. R. Civ. P. 8(c).

<sup>43</sup>. *Dunning v. Thuyen*, No. 8:11-cv-2340-T-33TGW, 2012 U.S. Dist. LEXIS 34838, at \*3-5 (M.D. Fla. Mar. 15, 2012) (citation omitted).

and factual questions, and each defense must give the plaintiff fair notice of the nature of the defense.

There is precedent, however, to support defense pleading that merely presents statements of law or legal conclusions as affirmative defenses, as such pleading could be deemed to “serve the laudable purpose of placing” the plaintiff and the court on notice of certain issues the defendant intends to assert against the claims.<sup>44</sup>

## 1-5:2 Civil Code and Statutory Defenses

In addition to affirmative defenses from the common law, defenses can be found in the Florida Statutes, federal code, and other authorities. The Florida Statutes provide numerous affirmative defenses. For example, Section 768.095, Florida Statutes, provides an affirmative defense to defamation for employers.<sup>45</sup> Also in the defamation space is Section 770.01, Florida Statutes, which can be utilized for, inter alia, an affirmative defense of failure to meet a condition precedent.<sup>46</sup> Defamation claims premised upon the dissemination of information through Internet publications require pre-suit notice under Section 770.01.<sup>47</sup>

<sup>44</sup> *Inlet Harbor Receivers, Inc. v. Fid. Nat'l Prop. & Cas. Ins. Co.*, No. 6:08-cv-346-Orl-19DAB, 2008 U.S. Dist. LEXIS 111216, 2008 WL 3200691, at \*1 (M.D. Fla. Aug. 6, 2008); *Dunning v. Thuyen*, No. 8:11-cv-2340-T-33TGW, 2012 U.S. Dist. LEXIS 34838, at \*3-5 (M.D. Fla. Mar. 15, 2012) (declining to strike affirmative defenses).

<sup>45</sup> *Linafelt v. Beverly Enters.-Fla., Inc.*, 745 So. 2d 386, 388 (Fla. 1st DCA 1999).

<sup>46</sup> Section 770.01, Florida Statutes (2011)—which applies to defamation actions filed in federal court. *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987).

<sup>47</sup> *Alvi Armani Med., Inc. v. Hennessy*, 629 F. Supp. 2d 1302, 1308 (S.D. Fla. 2008) (citations omitted).

