Chapter 2

Pleading and Proving Affirmative Defenses

2-1 PLEADING AFFIRMATIVE DEFENSES

2-1:1 Florida's Fact Pleading Standard

There are three basic steps in pleading defenses. First, determine which defenses fit the facts and theories gained from investigating the case. Second, ascertain the pleading standard applicable to that particular defense. Third, plead the defense in the correct manner. As easy as it sounds, many lawyers nonetheless ignore these simple steps. In place of proper affirmative defenses they offer a list naming defenses. Such pleading practices do not serve clients and undermine a defense, even in the short run, risking waiver and constraint of defenses.

As one court explained, "Unlike the pleading requirements in the federal courts where notice pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact pleading."[1] Florida uses "what is commonly considered ... a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged."[2] The reason for the rule is to apprise other parties of the nature of the contentions that they will be called upon to meet, and "to enable the court to decide

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1. *Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So. 2d 220, 221-222 (Fla. 4th DCA 2005) (quoting *Ranger Constr. v. Martin Cos.*, 881 So. 2d 677, 680 (Fla. 5th DCA 2004)).

2. *Brown v. Gardens by the Sea South Condo. Ass'n*, 424 So. 2d 181, 183 (Fla. 4th DCA 1983).

whether same are sufficient."[3] Pleadings "must contain ultimate facts supporting each element of the cause of action."[4] Although, the "formalistic rules of common law pleading have been replaced by the more liberal 'notice pleading,'" parties must do more than plead "the naked legal conclusion."[5]

2-1:2 Pleading the Elements of Each Defense

Defenses, just like causes of action, have elements.[6] It is the defending party's burden to plead and prove the elements of each affirmative defense.[7] It is not sufficient to simply list various affirmative defenses in a responsive pleading. Just like a statement of claim, "the requirement of certainty will be insisted upon in the pleading of a defense.[8] The requirement of certainty means the defendant must allege the ultimate facts and the elements of the defense.[9]

For example, a deficient defense of waiver might read:

First Affirmative Defense
Waiver

1. Plaintiff waived all claims.

This proffered defense is devoid of any ultimate facts, offering only a conclusory statement that names the defense. The example

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3. *Brown v. Gardens by the Sea South Condo. Ass'n*, 424 So. 2d 181, 183 (Fla. 4th DCA 1983).

4. *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981).

5. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 527 So. 2d 211, 212 (Fla. 3d DCA 1987), disapproved of on other grounds, 537 So. 2d 561 (Fla. 1988). *See also Rios v. McDermott, Will & Emery*, 613 So. 2d 544, 545 (Fla. 3d DCA 1993) (regarding pleading of affirmative claims for relief).

6. *See Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) (setting forth various defenses' elements, including waiver); *Lynch v. Cont'l Group, Inc.*, No. 12-21648-CIV-SEITZ/SIMONTON, 2013 U.S. Dist. LEXIS 5840 *10 (S.D. Fla. January 15, 2013); *Sace BT S.p.A. v. Italkitchen Int'l, Inc.*, No. 11-21663-CIV-LENARD/O'SULLIVAN, 2012 U.S. Dist. LEXIS 1860 *3 (S.D. Fla. January 6, 2012).

7. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010); *Dorse v. Armstrong World Industries, 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).

8. *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).

9. *S. Fla. Coastal Elec., Inc. v. Treasures on the Bay II Condo Ass'n*, 89 So. 3d 264, 267 (Fla. 3d DCA 2012) ("A properly pled affirmative defense includes ultimate facts sufficient to provide notice of the proof the defendant intends to rely upon to defeat the plaintiff's claim.") (citing *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)).

above is indicative of a "boilerplate" allegation. It has no supporting allegations of fact. A better defense of waiver would incorporate the elements:

First Affirmative Defense
Waiver

1. Plaintiff waived the claims it states in Count 1 for breach of the "Primary Agreement." Plaintiff signed a subsequent agreement (the "Subsequent Agreement") that altered the price fixed in the Primary Agreement. The Subsequent Agreement, a copy of which is attached hereto, states in section 1.1 that Plaintiff waives all claims arising under the Primary Agreement through the date of the Primary Agreement. The breaches Plaintiff alleges in this action regard terms of the Primary Agreement that were modified by and through the Subsequent Agreement. As such, Plaintiff knowingly waived its claims.

In the first example, the plaintiff merely states what the defense is. The defendant offers the ultimate conclusion of *law*, i.e., that the plaintiff waived its claims. In the second example, the defendant alleges the ultimate facts supporting the waiver defense: a subsequent agreement waived the claims made in this action.

2-1:3 Defenses Should Designate Their Corresponding Claims

A common frustration in pleading concerns defenses that do not identify the claims to which they apply or are intended. Certainly, there are defenses that cannot apply to particular claims. Under the notion of giving fair notice to the opposing side, a defense ought to state which claims it purports to address.

This deficiency could be met with a motion to strike or dismiss the defenses,[10] a motion for a more definite statement,[11] or the

[10] Fla. R. Civ. P. 1.140(b). *See also Royal Palm Sav. Ass'n v. Pine Trace Corp.*, 716 F. Supp. 1416, 1420 (M.D. Fla. 1989) (moving to strike defenses on this basis).

[11] Fla. R. Civ. P. 1.140(e).

like. But at least one federal court in Florida has rejected such a deficiency as a basis to strike a defense unless the defense has no relation to the controversy, would confuse the issues, or prejudice the claimants.[12] As such, it may be that the best course is to move for a more definite statement under Rule 1.140(e), Florida Rules of Civil Procedure, in order to obtain an order or response from the opposing party designating, and thus limiting, the application of the defenses. Indeed, when a reply is still available to a party, that party "cannot reasonably be required to frame a responsive pleading"[13] and assert defenses to the defenses unless it is clear which prima facie claims the defenses are meant to address. Thereafter, if a party fails to comply with an order of the court for a more definite statement, the court may strike the defenses.[14] Notably, a motion for more definite statement under Rule 1.140(e), Florida Rules of Civil Procedure, that is not concurrent with, or accompanied by a motion on the defenses or objections of Rule 1.140(b), Florida Rules of Civil Procedure, risks waiver of those Rule 1.140(b) defenses, if any.[15] Therefore, the best practice is to join a motion for more definite statement along with other, available motions under Rule 1.140 subprovisions (b), or (f).

In any event, to lessen the risk of an order striking defenses or to avoid motion practice and conserve resources, a practitioner should consider identifying the claims to which each defense refers.

2-1:4 Denials Are not Affirmative Defenses

A defense that merely denies an allegation of the prima facie claims is not an affirmative defense.[16] For example, in a foreclosure

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12. *Barnhart v. Am. Home Mortg. Servicing, Inc.*, No. 2:11-cv-569-FtM-99SPC, 2012 U.S. Dist. LEXIS 13351 **9-10 (M.D. Fla. Feb. 3, 2012).

13. Fla. R. Civ. P. 1.140(e).

14. Fla. R. Civ. P. 1.140(e).

15. Fla. R. Civ. P. 1.140(h)(1) ("A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or...."). *But see* Fla. R. Civ. P. 1.140 Author's Comment – 1967 ("Motions for a more definite statement or to strike a portion of a pleading might well be excepted from the joinder requirement; but as a practical matter the revisions of the pleading required by the granting of such motions would not be likely to afford ground for any defense or objection other than those excepted from the waiver provision of Rule 1.140(h).").

16. *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. Jur. Pleadings § 24 (1959)).

of mortgage case, the following allegation was held to not constitute an affirmative defense: "Defendant affirmatively states that the note was not in default and the Plaintiff had ample funds of the Defendant's to apply to the note."[17] "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."[18] An affirmative defense is not made out as a matter of pleading by merely demanding proof of a fact alleged positively in the bill.[19] 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.[20]

Similarly, the federal courts of Florida will either strike specific denials that are not affirmative defenses, or simply treat the defense as a specific denial.[21]

2-1:5 Impact of *Iqbal* and *Twombly* in Florida

2-1:5.1 Pleading Florida Defenses in Federal Actions

In abbreviated terms, *Bell Atlantic Corp. v. Twombly* (*Twombly*) raised the federal notice pleading standard to a "more fact-based 'plausibility' standard."[22] Thereafter, *Ashcroft v. Iqbal*,[23] (*Iqbal*) confirmed the widespread applicability of the *Twombly* standard. With particular regard to *Twombly*'s application to affirmative defenses, the vast majority of federal district courts in Florida have held *Twombly*'s plausibility standard applies to affirmative

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17. *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).

18. *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)).

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

20. *See Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947 (Fla. 4th DCA 2004).

21. *Lynch v. Cont'l Group, Inc.*, No. 12-21648-CIV-SEITZ/SIMONTON, 2013 U.S. Dist. LEXIS 5840 *10 (S.D. Fla. January 15, 2013); *F.D.I.C. v. Bristol Home Mortgage Lending, LLC*, 2009 U.S. Dist. LEXIS 74683, 2009 WL 2488302, *3 (S.D. Fla. 2009).

22. Manuel John Dominguez, William B. Lewis, and Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 Fla. Bar J. 77 (June 2010).

23. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

defenses.[24] Florida's federal courts are looking for "actual facts" to support the defenses in order to meet the *Iqbal* and *Twombly* standards.[25]At this juncture, this manual does not seek to tackle the broad and dynamic body of law on pleading under *Iqbal, Twombly*, and the Federal Rules of Civil Procedure, save to raise the concern for reference in Florida state court actions and to direct practitioners to educate themselves further on the impact of these decisions in Florida federal actions.

2-1:5.2 *Iqbal* and *Twombly* Provide Persuasive, Minimum Pleading Standards

Generally, the Federal Rules of Civil Procedure present a pleading standard that is more liberal than Florida's "strict pleading requirements."[26] It follows that developments in federal pleading standards must give rise to a minimum pleading standard for Florida's stricter pleading requirements. Federal notice pleading standards under Rule 8, Federal Rules of Civil Procedure, have become stricter following the U.S. Supreme Court's 2007 decision *Bell Atlantic Corp. v. Twombly*.[27]

While Florida does not follow *Iqbal* and *Twombly*, Florida courts do look to federal jurisprudence on the Federal Rules of Civil Procedure as persuasive authority.[28] As such, it is helpful to be cognizant of federal case law construing the pleading of Florida-based defenses. Given that so many reasoned, federal opinions from Florida are published on motions to strike affirmative defenses,

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[24] Manuel John Dominguez, William B. Lewis, and Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 Fla. Bar J. 77 (June 2010); *see also Ocean's 11 Bar & Grill, Inc. v. Indem. Ins. Corp. RRG*, No. 11-61577-CIV-ALTONAGA/Simonton, 2012 U.S. Dist. LEXIS 157585 *50 (S.D. Fla. Nov. 2, 2012) ("A majority of lower courts have found that affirmative defenses must satisfy the heightened pleading standard" of *Twombly* and *Iqbal*) (citing *Castillo v. Roche Labs. Inc.*, No. 10-20876-CIV, 2010 U.S. Dist. LEXIS 87681 (S.D. Fla. Aug. 2, 2010)).

[25] *Lynch v. Cont'l Group, Inc.*, No. 12-21648-CIV-SEITZ/SIMONTON, 2013 U.S. Dist. LEXIS 5840 **15-16 (S.D. Fla. January 15, 2013).

[26] *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (contrasting with pleading requirements of Fed. R. Civ. 8(a)(2)) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

[27] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[28] *See* Fla. R. Civ. P. 1.140 Author's Comment – 1967 ("The rule is similar to Federal Rule 12" and federal authorities "should be consulted for persuasive interpretations by the federal courts."); *see also Marine Transport Lines, Inc. v. Green*, 114 So. 2d 710, 715 (Fla. 1st DCA 1959) (regarding earlier version of Fla. R. Civ. P. 1.140).

practitioners will find a fount of case law and should consider expanding their research to canvass this persuasive law.

2-2 HEIGHTENED PLEADING STANDARDS

2-2:1 Rule 1.140 Defenses

But for exceptional applications, generally the defenses of rule 1.140(b), Florida Rules of Civil Procedure, are not affirmative defenses. These defenses attack or object to the prima facie claims or architecture of the claimant's case, including:

(1) lack of jurisdiction over the subject matter,
(2) lack of jurisdiction over the person,
(3) improper venue,
(4) insufficiency of process,
(5) insufficiency of service of process,
(6) failure to state a cause of action, and
(7) failure to join indispensable parties.[29]

They are defenses, but not in the nature of a confession and avoidance and therefore not affirmative in nature. Rule 1.140, Florida Rules of Civil Procedure, and its authors' comment regard the dichotomy of both "legal" and "factual" defenses.[30] The rule 1.140(b), Florida Rules of Civil Procedure, defenses do not usually introduce extraneous facts or issues that would avoid defenses.[31] As such, these defenses – while often mislabeled as "affirmative" defenses – are simply legal defenses.

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[29] Fla. R. Civ. P. 1.140(b).

[30] In discussing the seven legal defenses of Rule 1.140(b) that may be presented as pre-pleading motions, the authors' comment also uses the term "objections," further distinguishing the nature of these defenses from affirmative defenses. Fla. R. Civ. P. 1.140 Authors' Comment – 1967 ("The pleader may prefer to raise by motion certain defenses or objections....") ("If a motion is made on any one of such defenses or objections, all other defenses or objections provided under Rule 1.140 to be raised by motion, and then available, must be joined....").

[31] Exceptions can be imagined, of course. For example, it would not be incorrect for a defendant to move to dismiss under Rule 1.140(b)(1), lack of jurisdiction over the subject matter, by introducing an extraneous matter such as claimant's failure to place documentary stamps on the note being sued upon. The argument might be that the court lacks subject matter jurisdiction over the claim for payment as Section 201.08(1)(b), Florida Statutes, mandates that a note for which documentary stamps have not been duly paid "shall not be enforceable in any court of this state" until the tax is paid. Thus, the court cannot entertain an action and must dismiss the claims. *Accord Somma v. Metra Elecs. Corp.*, 727 So. 2d 302, 304 (Fla. 5th DCA 1999) (holding that a defense under section 201.08, Fla. Stat., is not an affirmative defense). Similarly, with motions to dismiss for lack of subject matter jurisdiction, the trial court may look to facts gathered

Rule 1.140, Florida Rules of Civil Procedure, directs that "[e]very defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required," but the seven defenses or objections of Rule 1.140(b) "may be made by motion at the option of the pleader...."[32] The defenses in Rule 1.140(b) may be raised by motion *rather* than in the responsive pleading.[33] These defenses are waived if not asserted in the initial responsive pleading or motion.[34] But Rules 1.140(h)(1) and 1.190(e) have been reconciled to mean that if a defendant is without knowledge to present a defense in a responsive pleading, but later acquires such knowledge through due diligence, the court may permit the defendant to add that defense as long as the amendment does not affect the substantial rights of the plaintiff.[35]

There is a heightened pleading standard for the defenses of Rule 1.140(b), Florida Rules of Civil Procedure.[36] Specifically, the rule directs: "The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion."[37] Failure to meet that heightened pleading standard for these defenses will subject such defenses to

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outside the pleadings, including affidavits. *Fong v. Forman*, 105 So. 3d 650, n.1 (Fla. 4th DCA 2013); *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 357 (Fla. 2d DCA 2005); *Morgan v. Dep't of Envtl. Prot.*, 98 So. 3d 651, 653 (Fla. 3d DCA 2012) ("A trial court may look to facts gathered outside the pleadings, including affidavits, to determine subject matter jurisdiction.").

32. Fla. R. Civ. P. 1.140(b).

33. Fla. R. Civ. P. 1.140(b); *Host Marriott Tollroads, Inc. v. Petrol Enters.*, 810 So. 2d 1086, 1089 (Fla. 4th DCA 2002) ("Rule 1.140 does not require that the defendant file a separate motion asserting the defense of improper venue, after having raised the defense in its first responsive pleading. Additionally, there is no case law setting forth such a requirement."); *Ader v. Temple Ner Tamid*, 339 So. 2d 268, 270 (Fla. 3d DCA 1976).

34. Fla. R. Civ. P. 1.140(b); *accord* Fla. R. Civ. P. 1.140(g)-(h) (preserving certain defenses). *See also Host Marriott Tollroads, Inc. v. Petrol Enters.*, 810 So. 2d 1086, 1089 (Fla. 4th DCA 2002).

35. *Rahabi v. Fla. Ins. Guar. Ass'n*, 71 So. 3d 241, 244 (Fla. 4th DCA 2011) (citing *Wayne Creasy Agency, Inc. v. Maillard*, 604 So. 2d 1235, 1236 (Fla. 3d DCA 1992) (denial of leave to amend an answer is an abuse of discretion where the proffered amendment indicates that the defendant could prevail with the assertion of a properly available defense and the plaintiff would not be prejudiced by the amendment)).

36. Fla. R. Civ. P. 1.140(b).

37. Fla. R. Civ. P. 1.140(b); *see also Roach v. Totalbank*, 85 So. 3d 574, 578 (Fla. 4th DCA 2012).

striking.[38] For example, when a defendant simply filed a responsive pleading denying the allegation that venue was proper, the court concluded that the venue point was waived because of insufficient particularity in the defendant's answer. The defendant argued that the incorporation of a contract in the plaintiff's pleading, which included a venue provision, adequately put the plaintiff on notice of the venue argument.[39] The Court of Appeals of Florida, Third District disagreed with this argument, as well, citing the particularity requirement set forth in Rule 1.140(b), Florida Rules of Civil Procedure.[40]

Additionally, affirmative defenses may be used to support the types of defenses and motions of Rule 1.140(b).[41] Specifically, Rule 1.110(d) provides "[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)...."[42] If the affirmative defense girding the Rule 1.140(b) defense is not apparent from the face of the prior pleading, a motion to dismiss is not proper and the extraneous, affirmative defense would require a motion for summary judgment.[43] In other terms, the basis for the affirmative

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38. *Roach v. Totalbank*, 85 So. 3d 574, 578 (Fla. 4th DCA 2012); *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1114 (Fla. 3d DCA 2006); *Three Seas Corp. v. FFE Transp. Servs.*, 913 So. 2d 72, 74-75 (Fla. 3d DCA 2005); *Tip Top Enters. v. Summit Consulting, Inc.*, 905 So. 2d 201, 202 (Fla. 3d DCA 2005); *Spinner v. Wainer*, 430 So. 2d 595, 596 n.1 (Fla. 4th DCA 1983) (comparing the standard to that for stating grounds for summary judgment under Fla. R. Civ. P. 1.510); *Miller v. Marriner*, 403 So. 2d 472, 475 (Fla. 5th DCA 1981); *Rodeway Inns of Am. v. Alpaugh*, 390 So. 2d 370, 374 (Fla. 2d DCA 1980); *Ader v. Temple Ner Tamid*, 339 So. 2d 268, 270 (Fla. 3d DCA 1976).

39. *Three Seas Corp. v. FFE Transp. Servs.*, 913 So. 2d 72, 74-75 (Fla. 3d DCA 2005).

40. *Three Seas Corp. v. FFE Transp. Servs.*, 913 So. 2d 72, 74-75 (Fla. 3d DCA 2005).

41. Fla. R. Civ. P. 1.110(d).

42. Fla. R. Civ. P. 1.110(d). *See also Williams v. Gaffin Indus. Servs.*, 88 So. 3d 1027, 1029 (Fla. 2d DCA 2012) (quoting *Vause v. Bay Med. Ctr.*, 687 So. 2d 258, 261 (Fla. 1st DCA 1996) ("Even a relatively straightforward affirmative defense, such as one based upon the statute of limitations, is not a basis for dismissal unless the complaint affirmatively and clearly shows the conclusive applicability of the defense."); *Board of County Comm'rs v. Aetna Cas. & Sur. Co.*, 604 So. 2d 850, 851 (Fla. 2d DCA 1992); *Vaswani v. Ganobsek*, 402 So. 2d 1350, 51 (Fla. 4th DCA 1981) (res judicata defense not apparent from prior pleading) (citing *Frank v. Campbell Property Management, Inc.*, 351 So. 2d 364 (Fla. 4th DCA 1977)); *Margerum v. Ross Builders, Inc.*, 427 So. 2d 261 (Fla. 5th DCA 1983) (statute of limitations); *Ecological Science Corp. v. Boca Ciega Sanitary Dist.*, 317 So. 2d 857, 859 (Fla. 2d DCA 1975) (election of remedies); *Glass v. Armstrong*, 330 So. 2d 57, 58 (Fla. 1st DCA 1976).

43. *Ehmann v. Florida National Bank of Ocala*, 515 So. 2d 1063 (Fla. 5th DCA 1987).

defense must be apparent from the celebrated "four corners" of the prior pleading.[44]

2-2:2 The Federal Rule Omits Florida Rule 1.140 Requirement to Allege With Particularity

The federal counterpart to Rule 1.140(b), Florida Rules of Civil Procedure, is Rule 12(b), Federal Rules of Civil Procedure. Notably, the federal rule omits the heightened pleading standard of Rule 1.140(b), Florida Rules of Civil Procedure. Specifically, where Florida's rule requires that the defending party must allege the grounds upon which the Rule 1.140(b) defenses are made "with particularity in the responsive pleading or motion," no such requirement appears in Rule 12(b), Federal Rules of Civil Procedure.

Given the impact of *Iqbal* and *Twombly*, however, the difference in the facial requirements of Rule 12(b), Federal Rules of Civil Procedure, should not be mistaken as an invitation to make vague allegations on the federal equivalents of the Rule 1.140(b) defenses. Conversely, litigants in state court should look to federal case law and use it persuasively as a baseline standard for striking insufficiently pleaded defenses.

2-2:3 Florida Rule 1.120 Objections

Rule 1.120, Florida Rules of Civil Procedure, governs the pleading of special matters. Several matters require heightened pleading for either or both plaintiffs and defendants. If not properly drafted in accordance with the rule, claims or defenses are subject to being struck or dismissal. While these matters may not constitute affirmative defenses, they are defenses or objections in a manner similar to the defenses and objections of Rule 1.140(b), Florida Rules of Civil Procedure. As such, these matters demand consideration when evaluating whether a plaintiff has stated a legally cognizable claim or a defendant has stated a legally sufficient defense. Rule 1.120 applies to:

(a) Capacity;
(b) Fraud, Mistake, Condition of the Mind;

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[44] *Vause v. Bay Med. Ctr.*, 687 So. 2d 258, 261 (Fla. 1st DCA 1996) ("If the court is required to consider matters outside the four corners of the complaint, then the cause is not subject to dismissal on the basis of the affirmative defense.").

(c) Conditions Precedent;
(d) Official Document or Act;
(e) Judgment or Decree;
(f) Time and Place; and
(g) Special Damage.[45]

If a defending party realizes such a deficiency in the claimant's pleading, that deficiency might be the basis for a motion to dismiss for failure to state a claim. Common examples are fraud-based claims or defenses; when fraud is not alleged with the requisite particularity required by Rule 1.120(b), Florida Rules of Civil Procedure, the claims or defenses will be subject to motions to dismiss or strike as deficient. Similarly, a claimant's failure to adequately allege capacity under Rule 1.120(b) might open the pleading to a motion to dismiss for lack of subject matter jurisdiction or failure to state a claim for the party's lack of standing. A condition precedent defense or negative averment in a responsive pleading is subject to striking or, should it survive to the point of trial, to nullification if it is too general or evasive. Both sides must identify compliance or noncompliance with the special matters of Rule 1.120 in order to evaluate the sufficiency of both claims and defenses.

2-2:3.1 Lack of Capacity to Sue

"Capacity to sue" is an absence of legal disability that would deprive a party of the right to come into court.[46] This concept differs from "standing," which requires that an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position.[47] Capacity to sue is a concept distinct from whether one is a real party in interest.[48]

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45. Fla. R. Civ. P. 1.120.

46. *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 n.1 (Fla. 4th DCA 1982) (citing 59 Am. Jur. 2d Parties § 31 (1971)).

47. *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 n.1 (Fla. 4th DCA 1982) (citing *Argonaut Ins. Co. v. Commercial Standard Ins. Co.*, 380 So. 2d 1066 (Fla. 2d DCA), pet. for *rev. denied*, 389 So. 2d 1108 (Fla. 1980)).

48. *Walter E. Heller & Co. v. Pointe Sanibel Dev. Corp.*, 392 So. 2d 306, 308 n.1 (Fla. 3d DCA 1980) (citing *Catalfano v. Higgins*, 4 Storey 548, 54 Del. 548, 182 A.2d 637 (1962), *rev'd on other grounds*, 5 Storey 548, 55 Del. 470, 188 A.2d 357 (1962)). The *Catalfano* case relates examples of how one could be the real party in interest and yet lack capacity to sue, e.g., a person who has become mentally incompetent or an infant. Conversely, one could

Capacity bears a mixed pleading standard. For claimants, the pleading burden is not heightened or specific. For example, it is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except as necessary to show the jurisdiction of the trial court.[49] But, when an initial pleading is served on behalf of a minor party, the pleading "shall specifically aver the age of the minor party."[50]

For defendants, the denial of, or objection to capacity bears a heightened pleading standard. The rule provides that when a party desires to raise an issue as to (1) the legal existence of any party, (2) the capacity of any party to sue or be sued, or (3) the authority of a party to sue or be sued in a representative capacity, "that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge."[51] Merely answering with a lack of knowledge as to capacity is not sufficient to preserve this objection or affirmative defense.[52] As is clear from the rule, a general denial of capacity or standing is not one made specifically and with particularity, as is required by Rule 1.120(a), Florida Rules of Civil Procedure.[53] Failure to raise such an objection could lead to waiver, though liberal leave to amend and correct this deficiency is liberally given under Rule 1.190(a), Florida Rules of Civil Procedure.[54]

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have capacity to sue and yet not be the real party in interest, such as a plaintiff that assigned all of its rights prior to filing suit.

49. Fla. R. Civ. P. 1.120(a).

50. Fla. R. Civ. P. 1.120(a).

51. Fla. R. Civ. P. 1.120(a). *See also Underwriters at La Concorde v. Airtech Servs.*, 493 So. 2d 428, 429 (Fla. 1986) (Boyd, J., dissenting); *Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249, 252-53 (Fla. 1st DCA 2012).

52. *Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc.*, 927 So. 2d 259, 261-62 (Fla. 2d DCA 2006).

53. *Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc.*, 927 So. 2d 259, 262 (Fla. 2d DCA 2006) (citing *Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991)).

54. *Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc.*, 927 So. 2d 259, 262 (Fla. 2d DCA 2006) (citing *McDonough Equip. Corp. v. Sunset Amoco West, Inc.*, 669 So. 2d 300 (Fla. 3d DCA 1996)).

A defending party must address the lack of capacity by specific, negative averment in its responsive pleading.[55] A proper, specific denial of capacity under Rule 1.120(a) shifts the burden back to the claimant to prove its capacity.[56] In practical terms, this vehicle is preferable to presenting the capacity issue in the structure of an affirmative defense as it relieves the defendant of its burden[57] to prove that affirmative defense. Notably, however, lack of standing is an affirmative defense that must be raised in a responsive pleading.[58]

Capacity deficiencies under Rule 1.120(a) may be addressed by motion, including through a motion to dismiss, to drop improperly joined parties, or to strike.[59] A motion to dismiss for failure to state a claim can appropriately attack a facial defect concerning capacity to sue.[60] In order to move to dismiss on the basis of a specific, negative averment such as capacity, the defect would have to appear on the face of the prior pleading.[61]

2-2:3.2 Fraud Allegations Must Be Specific

Rule 1.120(b) requires heightened pleading of fraud or mistake, while permitting condition of the mind (malice, intent, knowledge, mental attitude) to be averred generally. The rule reads, in part:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake

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55. *But see Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249, 252 (Fla. 1st DCA 2012); *Talan v. Murphy*, 443 So. 2d 207, 208 (Fla. 3d DCA 1983).

56. *Berg v. Bridle Path Homeowners Ass'n*, 809 So. 2d 32, 34 (Fla. 4th DCA 2002).

57. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010) (citing *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957)).

58. *Wells Fargo Bank, N.A. v. Reeves*, 92 So. 3d 249, 253 (Fla. 1st DCA 2012).

59. *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 n.1 (Fla. 4th DCA 1982) (quoting *Wittington Condo. Apts., Inc. v. Braemar Corp.*, 313 So. 2d 463, 466 (Fla. 4th DCA 1975), *cert. denied*, 327 So. 2d 31 (Fla. 1976)).

60. *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 n.1 (Fla. 4th DCA 1982) (citing *Klebanow v. New York Produce Exchange*, 344 F.2d 294 (2d Cir. 1965) (holding a complaint's facial defect can be attacked appropriately for lack of capacity to sue pursuant to Federal Rule of Civil Procedure 9(a) (upon which Fla. R. Civ. P. 1.120(a) was patterned identically) by a motion to dismiss which can be justified under Fed. R. Civ. P. 12(b)(6), i.e., failure to state a claim upon which relief can be granted)).

61. *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 n.1 (Fla. 4th DCA 1982) (citing *Seminole Tribe of Florida, Inc. v. Courson*, 183 So. 2d 569 (Fla. 2d DCA 1966)).

> shall be stated with such particularity as the circumstances permit.[62]

Fraud can be the basis of both claims and defenses.[63] Mistake often appears as an affirmative defense to contract claims. Both plaintiff and defense counsel must be aware of the heightened pleading standard for fraud or mistake in order to properly draft claims and defenses and to identify weaknesses in the opposing side's pleadings.

The "particularity" of Rule 1.120(b), Florida Rules of Civil Procedure, for fraud has been construed to mean that in addition to alleging the elements of fraud or fraudulent inducement (or another fraud-based claim or defense), the pleader has to identify certain aspects of the alleged misrepresentations. The requisite particularity required by Florida Rule of Civil Procedure 1.120(b), has been construed to mean that the party must allege (1) *who* made the false statement, (2) *what* is the substance of the false statement, (3) *when*, i.e., the time frame in which it was made and (4) *where/how*, or the context in which the statement was made.[64] Merely alleging the legal conclusion that a fraud took place is not sufficient to meet the particularity standard of Rule

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62. Fla. R. Civ. P. 1.120(b).

63. *See Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003) (evaluating fraud defense under particularity standard of Fla. R. Civ. P. 1.120(b)); *Cady v. Chevy Chase Sav. & Loan*, 528 So. 2d 136, 138 (Fla. 4th DCA 1988) (same); *Peninsular Florida Dist. Council of Assemblies of God v. Pan Am. Inv. & Dev. Corp.*, 450 So. 2d 1231, 1232 (Fla. 4th DCA 1984).

64. *Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 861-862 (Fla. 4th DCA 2012) (quoting *Bankers Mut. Capital Corp. v. U.S. Fid. & Guar. Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001)). *See also Someplace New, Inc. v. Francois*, 51 So. 3d 1215, 1217 (Fla. 4th DCA 2011); *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009) ("The factual basis for a claim of fraud must be pled with particularity and must specifically identify misrepresentations or omissions of fact, as well as time, place or manner in which they were made."); *Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So. 2d 1157, 1159-1160 (Fla. 3d DCA 2008); *Robertson v. PHF Life Ins. Co.*, 702 So. 2d 555, 556 (Fla. 1st DCA 1997) (finding that "allegations of fraud [were not] pled with specificity [and] . . . complaint fails to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false and misleading"); *Peninsular Florida Dist. Council of Assemblies of God v. Pan American Inv. & Dev. Corp.*, 450 So. 2d 1231, 1232 (Fla. 4th DCA 1984) ("When fraud is asserted as a claim or defense, the facts and circumstances constituting the fraud must be pled with specificity, Fla.R.Civ.P. 1.120(b), and all essential elements of fraudulent conduct must be stated, i.e., that plaintiff relied to his detriment on a false statement concerning a material fact made with knowledge of its falsity and an intent to induce reliance.").

1.120(b).[65] For example, it was not sufficient for a plaintiff to allege that defendants provided "incorrect and incomplete charts to the [peer review organization] regarding plaintiff's patients" as that allegation is merely consistent with negligent conduct, does not identify what was omitted and does not set forth facts amounting to fraud.[66]

When one party fails to allege fraud with the requisite particularity, another party may attack the deficient pleading with a motion to dismiss for failure to state a claim.[67]

2-2:3.3 Allegations of Mistake Must Be Specific

Mistake can be a matter of special pleading in both claims[68] and defenses.[69] Just like fraud, Rule 1.120(b) requires allegations supporting mistake. Thus, defendants should analyze mistake-based claims like reformation or rescission in order to evaluate whether the plaintiff has alleged the claim with the particularity required by Rule 1.120(b), Florida Rules of Civil Procedure. Although the case law on dismissal of mistake-based claims is sparse in comparison to that regarding fraud-based claims, defendants should cite to the fraud cases, as the particularity requirement is the same as that applicable to mistake allegations. Rule 1.120(b) applies to "all averments" of mistake, not just affirmative claims for relief. The rule's pleading with particularity requirement therefore applies to defenses, as well. Plaintiffs facing mistake-based defenses should likewise consider whether defenses are not pleaded just with the requisite ultimate facts, but also with the requisite particularity.

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65. *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009).

66. *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009).

67. *See Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 861-862 (Fla. 4th DCA 2012); *Strack v. Fred Rawn Constr., Inc.*, 908 So. 2d 563, 565 (Fla. 4th DCA 2005); *Peninsular Fla. Dist. Council of Assemblies of God v. Pan Am. Inv. & Dev. Corp.*, 450 So. 2d 1231 (Fla. 4th DCA 1984).

68. *Arvida Corp. v. Nu-Way Plumbing, Inc.*, 295 So. 2d 118 (Fla. 4th DCA 1974) (holding rescission count based on mistake to the particularity standard of Fla. R. Civ. P. 1.120(b)). *See also City-Wide Sanitation Co. v. Pembroke Pines*, 214 So. 2d 485, 486 (Fla. 4th DCA 1968); *Williams v. Guyton*, 167 So. 2d 7, 9 (Fla. 3d DCA 1964) (requiring specificity in reformation claim based on mistake under prior rule).

69. *See, e.g., KT Holdings USA, Inc. v. Akerman, Senterfitt & Edison*, 34 So. 3d 61, 66 (Fla. 3d DCA 2010) (not referencing Fla. R. Civ. P. 1.120(b) but regarding failure to plead "mutual mistake" defense with specificity in related action).

2-2:3.4 Conditions Precedent

A condition precedent has been defined as "one which calls for the performance of some act, or the happening of some event after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend."[70]

The denial of the occurrence of conditions precedent "is not an 'affirmative defense,' which relates only to matters of 'avoidance.'"[71] "Rather, it is a special form of denial that must be pled with specificity."[72] This statement might challenge practitioners, as the defense of failure to meet a condition precedent suffers some incongruent handling in case law. Rule 1.120 does not expressly present failure to meet a condition precedent as an affirmative defense. The rule directs "[a] denial of performance or occurrence" of a condition precedent "shall be made specifically and with particularity."[73] If treated like lack of capacity to sue under subprovision (a) of this rule, the pleading burden shifts back to the claimant once the defendant has made the requisite, specific denial. Thus, the burden to prove satisfaction of the condition precedent is, and remains, a component of the plaintiff's prima facie case. Dicta in opinions from the federal courts of Florida supports the conclusion that a condition precedent is something other than an affirmative defense.[74]

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[70] *Alvarez v. Rendon*, 953 So. 2d 702, 708 (Fla. 5th DCA 2007) (citing *Cohen v. Rothman*, 127 So. 2d 143, 147 (Fla. 3d DCA 1961)).

[71] *Motor v. Citrus County Sch. Bd.*, 856 So. 2d 1054, 1056 n.1 (Fla. 5th DCA 2003) (Torpy, J., concurring) (citing Fla. R. Civ. P. 1.110(d)).

[72] *Motor v. Citrus County Sch. Bd.*, 856 So. 2d 1054, 1056 n.1 (Fla. 5th DCA 2003) (Torpy, J., concurring) (citing Fla. R. Civ. P. 1.120(c)).

[73] Fla. R. Civ. P. 1.120(c).

[74] *See, e.g., Howard v. Henderson*, No. 8:04-CV-312-T-30TBM, 2006 U.S. Dist. LEXIS 644, **2-3 (M.D. Fla. Jan. 4, 2006) (finding that exhaustion of remedies for incarcerated plaintiff's civil rights claim is *not* an affirmative defense, but a condition precedent to filing suit); *Dunkin v. FNU Perez*, No. 5:09-cv-459-Oc-31TBS, 2011 U.S. Dist. LEXIS 142581 *9 n.10 (M.D. Fla. 2011) (citing *Howard* for same); *Nicarry v. Cannaday*, No. 6:03-CV-87-ORL-28DAB, 2006 U.S. Dist. LEXIS 95074 **13-14 (M.D. Fla. Dec. 7, 2006) (holding that Eleventh Amendment immunity is not an affirmative defense, but rather a condition precedent, which acts as a "jurisdictional bar" precluding the court from hearing claims); *Garcia v. Givens*, No. 1:09-cv-00134-MP-AK, 2011 U.S. Dist. LEXIS 15350 *9 (N.D. Fla. Feb. 15, 2011) (citing *Nicarry* for same); *O'Connor v. Brown*, No. 03-20716-CIV-MORENO, 2006 U.S. Dist. LEXIS 19454, **6-7 (S.D. Fla. March 30, 2006). On the substantive law, however, the U.S. Supreme Court has held that exhaustion of remedies *is* an affirmative defense under the Prison Litigation Reform Act of 1995. *Jones v. Bock*, 549 U.S. 199, 212 (U.S. 2007). For the purposes of this discussion, however, the concern is the courts' distinguishing between affirmative defenses and conditions precedent. *See also EEOC v. Bev. Distribs. Co., LLC*, 2012 U.S. Dist. LEXIS 177351 (D. Colo. 2012) (quoting *EEOC v. Burlington N.*,

The distinction between whether the defense is a specific denial or an affirmative defense is significant because it determines who carries the burden. When framed as an affirmative defense, a condition precedent defense becomes – consistent with other affirmative defenses and the general rule – the burden of the defendant.

Florida case law generally refers to this defense as an "affirmative defense." In dicta or in passing, other courts have recognized assertions of failure to comply with contractual conditions precedent as a viable affirmative defense.[75] In *Custer Med. Ctr. v. United Auto. Ins. Co.*, the Supreme Court of Florida held that a defending party's *specific* assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense, for which the defensive pleader has the burden of pleading and persuasion.[76] One subsequent opinion confined *Custer* to its concern over compulsory medical examinations (CME), and the insurance contract provisions that require them, holding that the non-occurrence of a CME is a "condition subsequent" and therefore an affirmative defense that the insurer has to plead and prove.[77] In practical terms, however, defendants should be prepared to bear the burden of proving the defense, even if or while concurrently

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No. CIV-07-734-D, 2008 U.S. Dist. LEXIS 93320, 2008 WL 4845308, at *2 n.6 (W.D. Okla. June 23, 2008) (unpublished) ("a lack of reasonable conciliation is not an affirmative defense to liability but a condition precedent to prosecuting the action — the remedy for a violation is a stay of the case until conciliation efforts are completed, not dismissal of the case."); *Thompson v. Diamond State Ins. Co.*, No. 4:06cv154, 2007 U.S. Dist. LEXIS 43541, **13-14 (E.D. Tex. June 15, 2007) ("Although a condition precedent is technically not an affirmative defense, ... courts in this circuit have recognized challenges to condition precedent made through affirmative defenses.")(citing *Mellon Bank v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1008, n.6 (3d Cir. 1980) ("Aetna misled the court by incorrectly pleading the nonoccurrence of the condition precedent as an 'Affirmative Defense.'"); *U. S. Bank, N.A. v. Detweiler*, 191 Ohio App. 3d 464, 472 (Ohio Ct. App. 2010) ("It has been held that a term in a mortgage such as one requiring prior notice of a default and/or acceleration to the mortgagor, is not an affirmative defense but rather a condition precedent.") (citations omitted); *Bank of Am., N.A. v. Eisenhauer*, 2010 Tex. App. LEXIS 5519 **28-29 (Tex. Civ. App. July 15, 2010); *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 729 (Tex. Civ. App. 2003) ("Failure to meet conditions precedent is not an 'affirmative defense'") ("When a plaintiff avers generally that all conditions precedent have been performed, he is required to prove the performance of only those conditions precedent specifically denied by the defendant. The effect of this rule is to shift the burden of pleading to the defendant, *but not the burden of proof*....") (emphasis added) (citation omitted).

75. *See, e.g., 1500 Coral Towers Condo. Ass'n v. Citizens Prop. Ins. Corp.*, 2013 Fla. App. LEXIS 1753 *3, 38 Fla. L. Weekly D 302 (Fla. 3d DCA Feb. 6, 2013).

76. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010).

77. *State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So. 3d 793, 802 (Fla. 5th DCA 2011).

arguing that the claimant must prove satisfaction of conditions precedent in making a prima facie case.

The standard of particularity and specificity is high. In *Godshalk v. Countrywide Home Loans Servicing, L.P.*,[78] the Court of Appeal of Florida, Fifth District, held that denial of the defense of a failure to meet conditions precedent denial, alleging failure of the mortgagee to give proper notice of default to the mortgagor-defendant, must be so particular and specific that the denial identifies the particular contract-provision that required the subject notice.[79] In an extensive dissenting opinion, Judge Griffin detailed the text of the defense, which is instructive as an example:

> 8. Denied. Neither the Plaintiff nor any other person has provided any of the notices required by the document that the Plaintiff purports to be the applicable mortgage in this matter.[80]

Judge Griffin's dissent offered that with the addition of three words, the mortgagor's defense would have been sufficient to win the appeal:

> 8. Denied. Neither the Plaintiff nor any other person has provided any of the notices [*including paragraph*] required by the document that the Plaintiff purports to be the applicable mortgage in this matter.[81]

While the thrust of the dissent is that the majority was imposing too strict a requirement upon the defendant under Rule 1.120(c), Florida Rules of Civil Procedure, the majority's holding is nonetheless a warning to defendants to carefully draft these denials. *Godshalk*'s chapter-and-verse standard for particularity is not yet universal. In an older opinion from the Court of Appeals of Florida, Fourth District, a mortgagee-bank argued that a similar lack of notice defense (i.e., failure to meet a condition precedent)

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78. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626 (Fla. 5th DCA 2012).

79. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626 (Fla. 5th DCA 2012).

80. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626, 627 (Fla. 5th DCA 2012) (Griffin, J., dissenting).

81. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626, 628 (Fla. 5th DCA 2012) (Griffin, J., dissenting) (italics in original).

was legally insufficient as the defense did not refer to any language from the mortgage.[82] At that time, the Court of Appeals of Florida, Fourth District, rejected the lender's argument and noted that the lender failed to cite authority requiring this defense to contain such a reference.[83]

A claimant's failure to satisfy a condition precedent might not prove fatal to the claims, and the claims might be abated so that the claimant would be permitted an opportunity to cure and amend its pleading. For example, a condition precedent in the mechanic's lien statute may be performed after suit is filed, so long as the claimant alleges performance in an amended pleading.[84] The key questions are whether the condition precedent is a judicial condition precedent and whether failure to meet this condition prejudiced the defendant.[85] When a statute provides a precondition to suit – as opposed to a precondition to judgment – a late attempt at compliance might be deemed futile, and might permit dismissal of an action for failure to state a cause of action.[86] For example, when a statute dictates notice requirements as a condition precedent to maintaining a suit against a government entity, a party's failure to allege compliance with the condition precedent can be a basis to dismiss for failure to state a cause of action.[87]

2-2:3.5 Special Damage

Rule 1.120(g) governs pleading items of special damage. This subprovision states: "When items of special damage are claimed,

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82. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

83. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

84. *Holding Elec., Inc. v. Roberts*, 530 So. 2d 301 (Fla. 1988). *See also Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979); *McMahan Construction Co. v. Carol's Care Center, Inc.*, 460 So. 2d 1001 (Fla. 5th DCA 1984). *But see Mardan Kitchen Cabinets, Inc. v. Burns*, 312 So. 2d 769 (Fla. 3d DCA 1975) (dismissing on condition precedent defense as requisite affidavit not filed until immediately before trial, and so held futile and prejudicial).

85. *See Holding Elec., Inc. v. Roberts*, 530 So. 2d 301 (Fla. 1988).

86. *See, e.g., Howard v. Henderson*, No. 8:04-CV-312-T-30TBM, 2006 U.S. Dist. LEXIS 644, **2-3 (M.D. Fla. Jan. 4, 2006) (citing *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10th Cir. 2003) (finding that the PLRA's exhaustion requirement is not an affirmative defense, but rather must be pled by the inmate in his complaint, and failure to do so is tantamount to failing to state a claim upon which relief may be granted)).

87. *See Menendez v. N. Broward Hosp. Dist.*, 537 So. 2d 89, 91 (Fla. 1988).

they shall be specifically stated."[88] Special damages are considered to be the natural but not the necessary result of an alleged wrong or breach of contract. Conversely, general damages are those that the law presumes actually and necessarily result from the alleged breach or wrong.[89]

In terms of strategy, and unlike instances of deficient allegations of fraud or mistake, a defendant might elect to eschew motion practice over deficient allegations of special damage. The rule does not require a defendant to deny allegations of special damage with, for example, the particularity and specificity required in answering allegations of capacity or satisfaction of conditions precedent. Given the courts' liberal permission to amend pleadings under Rule 1.190, Florida Rules of Civil Procedure, a defendant might well guard an argument on special damages pleading deficiency until trial.[90] It is at trial that a plaintiff's failure to plead special damages will be of moment, as a defendant might move in limine to bar evidence or argument on special damages.[91]

2-3 DEALING WITH DEFICIENTLY PLEADED DEFENSES

2-3:1 Motion for More Definite Statement

Rule 1.140(e), Florida Rules of Civil Procedure, permits a motion to demand a more definite statement of claims or defenses. The rule provides, in part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a

88. Fla. R. Civ. P. 1.120(g). *See also Sys. Components Corp. v. Fla. DOT*, 14 So. 3d 967, 977 (Fla. 2009); *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004) (quotation omitted).

89. *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1292 (Fla. 4th DCA 2002) (quoting *Augustine v. S. Bell Tel. & Tel. Co.*, 91 So. 2d 320, 323 (Fla. 1956)).

90. *See, e.g., Spectrum Interiors, Inc. v. Exterior Walls, Inc.*, 65 So. 3d 543, 546 (Fla. 5th DCA 2011); *Robbins v. McGrath*, 955 So. 2d 633, 634 (Fla. 1st DCA 2007).

91. *See, e.g., Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1292 (Fla. 4th DCA 2002).

> responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.[92]

When a party's concern is vagueness or ambiguity in the pleading (claim or defense), the proper motion to address that concern is a motion for more definite statement, as opposed to a motion to dismiss for failure to state a claim or defense.[93] For example, when a party uses an unfamiliar, uncommon, or novel title for a claim or defense, a motion for more definite statement is a useful tool.[94]

Another benefit of the Rule 1.140(e) motion for more definite statement is that the nonmovant's failure to obey a court order granting such a motion is grounds for an involuntary dismissal of the subject claims or defenses.[95]

The motions to strike insufficient claims or defenses and motions for more definite statement are not mutually exclusive; there are situations in which either or both motions might be appropriate.[96]

2-3:2 Motions to Strike and Dismiss Defenses

The Florida Rules of Civil Procedure and Federal Rules of Civil Procedure both permit parties to move to strike defenses.[97] Florida provides two modes of striking affirmative defenses, each of which bears a different standard for the movant.[98] Specifically,

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92. Fla. R. Civ. P. 1.140(e).

93. *Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 566 (Fla. 1971); *see also Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. 5th DCA 1981).

94. *See Manka v. DeFranco's Inc.*, 575 So. 2d 1357, 1360 (Fla. 1st DCA 1991).

95. *Clay v. Margate*, 546 So. 2d 434, 435 (Fla. 4th DCA 1989).

96. *See Wilson v. Clark*, 414 So. 2d 526, 528-29 (Fla. 1st DCA 1982).

97. Fla. R. Civ. P. 1.140(c), (f); Fed. R. Civ. P. 12(f). As an aside, practitioners should ask for defenses to be "struck" rather than "stricken." The term "stricken" is an archaism and its use is ill-advised. Bryan A. Garner, Garner's Modern American Usage 751 (Oxford Univ. Press 2003).

98. *Chris Craft Indus., Inc. v. Van Valkenberg*, 267 So. 2d 642, 645 (Fla. 1972).

Rule 1.140(f), Florida Rules of Civil Procedure, permits the courts to strike "any insufficient defense" or a defense that is "redundant, immaterial, impertinent, or scandalous matters from any pleading at any time."[99]

As explained in greater detail in this chapter, affirmative defenses must consist of more than denials of the claimant's cause of action or pure conclusions of law. Florida law obligates a defendant to plead the defense with "certainty," including allegations of sufficient facts to support the defense.[100] When a defendant merely alleges conclusions of law unsupported by allegations of ultimate fact, such defenses are legally insufficient.[101] Such legally insufficient defenses are subject to being struck under Rule 1.140(f), Florida Rules of Civil Procedure, which permits the courts to strike "any insufficient defense."[102]

Oftentimes, practitioners will encounter judges who will not grant motions to strike or dismiss defenses for the pleading party's failure to allege the elements of those defenses. Such a judicial philosophy runs against, and effectively nullifies, the authority set forth in Rule 1.140(b), Florida Rules of Civil Procedure, which permits judges to strike defenses that fail to state a legal defense.[103]

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99. Fla. R. Civ. P. 1.140(f). *Accord* Fla. R. Civ. P. 1.140(b) ("[T]he objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply."). *See also 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).

100. *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).

101. *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*, 101 Fla. 441, 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).

102. *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).

103. Henry P. Trawick, Jr., Florida Practice and Procedure, § 11.4 n.3 (2010 ed.). *See also* Manuel John Dominguez, William B. Lewis, and Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 Fla. Bar J. 77 (June 2010) (making a similar analogy that the federal notice pleading standard "largely neutralized" motions to strike under Rule 12(f), Federal Rules of Civil Procedure).

2-4 BURDEN TO PROVE DEFENSES

2-4:1 Defendants Bear the Burden to Prove Defenses

The defendant has the burden of proving an affirmative defense.[104] Further, the burden of proving each element of an affirmative defense rests on the party asserting that defense.[105] 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.[106] So, in identifying and pleading defenses, practitioners should not delay in plotting out the evidence they will need to prove the defenses. The strength or weakness of the claimant's prima facie case will dictate the prioritization of effort and resources between proving up defenses and attacking the prima facie claim, but both burdens must be contemplated throughout the case. Conversely, claimants not only have to prove their prima facie case, but they must anticipate the defenses that will survive pleading-motion practice and determine how they will attack the defendant's affirmative defenses.

2-4:2 Burden Shifting

"Strictly speaking, the burden of proof does not shift during the course of the trial. It remains with the party on whom it is cast by law."[107] While courts may comment or observe that an affirmative defense or plea can facilitate a "burden shift,"[108] the claimant must nonetheless prove up its case, and the proponent of an affirmative defense can, in turn, meet its burden of producing evidence to prove up its defense. In this sense, the "the burden may shift several times in one case."[109]

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104. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010) (citing *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957)).

105. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096-97 (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).

106. *See Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947 (Fla. 4th DCA 2004).

107. *In re Estate of Ziy*, 223 So. 2d 42, 43 (Fla. 1969) (quoting 13 Fla.Jur. Evidence § 59).

108. *Kincaid v. World Ins. Co.*, 157 So. 2d 517, 522 (Fla. 1963).

109. *In re Estate of Ziy*, 223 So. 2d 42, 43 (Fla. 1969) (quoting 13 Fla.Jur. Evidence § 59).

2-5 APPLICABLE BURDEN STANDARDS

2-5:1 Preponderance of the Evidence

There are opinions that suggest that the default burden of proof applicable to an affirmative defense in a civil matter is the preponderance of the evidence standard.[110] Preponderance of the evidence is defined as evidence that, as a whole, shows that the fact sought to be proved is more probable than not.[111] This standard is one and the same with the "greater weight of the evidence" standard.[112]

The burden of proof for affirmative defenses seems to be an area ripe for argument and research particular to each case. In the proffer of standard jury instructions to the Supreme Court of Florida for civil cases, the committee stated that it "takes no position on the burden of proof that will be applicable to affirmative defenses. If the court determines that the burden of proof for any affirmative defense is the 'greater weight of the evidence,' the instruction should be modified and instruction 401.3 should also be given."[113] For example, the failure of consideration affirmative defense requires a preponderance of the evidence burden.[114]

2-5:2 Clear and Convincing

Still, some defenses must be proven by clear and convincing evidence. For example, the affirmative defense of usury requires

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[110] *Wolkowsky v. Kirchick*, 85 Fla. 210, 211 (Fla. 1923) (holding that with regard to waiver defense, it is an "affirmative defense and the burden of establishing it by a preponderance of the evidence rested upon the defendants."); *American Sec. Co. v. Goldsberry*, 69 Fla. 104, 116 (Fla. 1915); *Pinney v. Pinney*, 46 Fla. 559, 572 (Fla. 1903) (construing a fraud-based defense, holding "matters set up by way of avoidance, must be proved by the defendant, and the burden is upn [sic] him to establish such matters by a preponderance of the testimony.") (citations omitted); *Tyler v. Toph*, 51 Fla. 597, 600-601 (Fla. 1906) (construing novation or waiver defense(s)).

[111] *Dufour v. State*, 69 So. 3d 235, 252 (Fla. 2011) (quoting *State v. Edwards*, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)).

[112] *See Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000) ("A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,'" or "evidence that 'more likely than not' tends to prove a certain proposition." (quoting Black's Law Dictionary 1201 (7th ed. 1999); citing *American Tobacco Co. v. State*, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) (quoting *Bourjaily v. United States*, 483 U.S. 171, 175, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987))).

[113] *In re Standard Jury Instructions in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 773 (Fla. 2010) (Note on Use for 414.2 (Summary of Claims)).

[114] *Ferry-Morse Seed Co. v. Hitchcock*, 426 So. 2d 958, 961 (Fla. 1983); *Captains Table, Inc. v. Khouri*, 208 So. 2d 677, 679 (Fla. 4th DCA 1968).

this higher standard.[115] Laches must be proven "by very clear and positive evidence."[116] This standard seems to be particular for the laches defense.[117]

Similarly, the affirmative defense of abandonment – at least in federal jurisprudence – requires a "strict" burden of proof.[118]

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115. *Phillips v. Lindsay*, 102 Fla. 935, 136 So. 666, 668 (Fla. 1931); *Naples Cay Dev. Corp. v. Ferris*, 555 So. 2d 1272, 1273 (Fla. 2d DCA 1989); *Diversified Enterp., Inc. v. West*, 141 So. 2d 27, 29 (Fla. 2d DCA 1962); *In re Transcapital Fin. Corp.*, 433 B.R. 900, 907 (Bankr. S.D. Fla. 2010).

116. *Van Meter v. Kelsey*, 91 So. 2d 327, 332 (Fla. 1956).

117. *Accord Bethea v. Langford*, 45 So. 2d 496 (Fla. 1949); *Smith v. Bithlo*, 344 So. 2d 1288, 1289 (Fla. 4th DCA 1977).

118. *Cumulus Media, Inc. v. Clear Channel Communs., Inc.*, 304 F.3d 1167, 1175 (11th Cir. 2002) (citing, inter alia, *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984)).