

Table of Contents

Chapter 1: Foundations for Legal and Affirmative Defenses	1
1-1 INTRODUCTION.....	1
1-1:1 Purpose of Book.....	1
1-2 NATURE OF AFFIRMATIVE DEFENSES.....	2
1-2:1 Affirmative Defenses Confess and Avoid the Claims.....	2
1-3 DEFENSES ARE PERMITTED IN CERTAIN PLEADINGS AND MOTIONS.....	5
1-3:1 The Florida Rules of Civil Procedure Permit Defenses in Certain Pleadings.....	5
1-3:2 Drafting Requirements for Affirmative Defenses	6
1-3:3 The Florida Rules of Civil Procedure Permit Motions to Dismiss to Assert Affirmative Defenses	7
1-4 LEGAL DEFENSES DISTINGUISHED FROM AFFIRMATIVE DEFENSES.....	8
1-4:1 Legal Defenses Attack the Claimant’s Prima Facie Claims	8
1-5 FOUNDATIONS FOR DEFENSES.....	9
1-5:1 Defenses and the Common Law	9
1-5:1.1 Florida Common Law Gives Rise to Affirmative Defenses.....	9
1-5:1.2 No Federal Common Law to Create Affirmative Defenses.....	10
1-5:2 Civil Code and Statutory Defenses	11
Chapter 2: Pleading and Proving Affirmative Defenses	13
2-1 PLEADING AFFIRMATIVE DEFENSES.....	13
2-1:1 Florida’s Fact Pleading Standard.....	13
2-1:2 Pleading the Elements of Each Defense.....	14
2-1:3 Defenses Should Designate Their Corresponding Claims	16
2-1:4 Denials Are Not Affirmative Defenses.....	17

Table of Contents

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

Table of Contents

3-1:4 Use of Material or Evidence Outside
the Four Corners of the Prior Pleading42

3-1:5 Using Affirmative Defenses in Rule 1.140 Motions45

3-2 LACK OF JURISDICTION OVER
THE SUBJECT MATTER46

3-2:1 Governing Rule: 1.140(b)(1)46

3-2:2 Bases for Defense.....46

3-2:2.1 Exclusive and Original Jurisdiction
of the Florida Courts48

3-2:2.2 Separation of Powers Doctrine May
Bar Subject Matter Jurisdiction49

3-2:2.3 Arbitration Clauses Do Not Deprive
Court of Subject Matter Jurisdiction50

3-2:2.4 Federal Preemption.....50

3-2:2.5 Statutes of Repose or Nonclaim and
Subject Matter Jurisdiction51

3-2:2.6 Failure to Exhaust Administrative
Remedies52

3-2:2.7 Local Action Rule.....53

3-2:2.8 Res Judicata as an Affirmative Defense.....53

3-2:2.9 Lack of Standing as an
Affirmative Defense54

3-3 LACK OF JURISDICTION OVER THE PERSON55

3-3:1 Jurisdiction Over the Person55

3-3:2 Governing Rule and Statutes56

3-3:2.1 Rule 1.140(b)(2) – Lack of Personal
Jurisdiction56

3-3:2.2 Insufficient Process and Service
Undermines Personal Jurisdiction57

3-3:2.3 Florida’s Long-Arm Statute,
Section 48.193, Florida Statutes57

3-3:3 Bases for Personal Jurisdiction.....57

3-3:3.1 Overview of Personal Jurisdiction Defense ...57

3-3:3.2 Strict Construction of Florida’s
Long-Arm Statute60

3-3:3.3 Specific and General Jurisdiction-Florida’s
Long-Arm Statute60

3-3:4 Specific Jurisdiction63

3-3:4.1 Specific Jurisdiction’s Connexity
Requirement63

3-3:4.2 Requirement of Personal Action/Inaction ...64

Table of Contents

	3-3:4.3	Long-Arm Statute and Operating a Business or Business Venture in Florida	66
	3-3:4.4	Corporate Shield Doctrine.....	69
	3-3:4.5	Breach of a Contract in Florida.....	70
	3-3:4.6	Committing a Tortious Act Within Florida.....	72
	3-3:5	General Jurisdiction.....	73
	3-3:6	Sufficient Minimum Contacts to Satisfy Procedural Due Process	75
	3-3:7	Waiver of Personal Jurisdiction Defense.....	77
	3-3:7.1	Waiver If Not Timely Asserted	77
	3-3:7.2	Waiver If Defendant Seeks Affirmative Relief	77
	3-3:8	Procedure for Invoking Defense of Lack of Personal Jurisdiction	79
	3-3:8.1	Evidentiary Submissions and Burden-Shifting	79
	3-3:9	Using Discovery to Test Lack of Jurisdiction Defense	80
3-4		IMPROPER VENUE.....	81
	3-4:1	Governing Rules and Statutes.....	81
	3-4:1.1	Rule 1.140(b)(3)	81
	3-4:1.2	Rule 1.060.....	82
	3-4:1.3	Chapter 47, Florida Statutes.....	82
	3-4:1.4	Motion to Dismiss for Forum Non Conveniens	84
	3-4:2	Bases for Defense and Motion to Abate and Transfer	85
	3-4:2.1	Improper Venue Motion and Procedure.....	85
	3-4:2.2	Forum Selection Clauses or Arbitration Clauses	86
	3-4:2.3	Home Venue Privilege.....	86
	3-4:3	Forum Non Conveniens and Motions to Dismiss	87
3-5		INSUFFICIENCY OF PROCESS.....	87
	3-5:1	Defense or Objection for Insufficiency of Process.....	87
	3-5:2	Bases for Defense.....	88
3-6		INSUFFICIENCY OF SERVICE OF PROCESS	90
	3-6:1	Governing Rule and Statutes	90
	3-6:1.1	Rule 1.140(b)(5)	90
	3-6:1.2	Florida Statutes Governing Service of Process	90
	3-6:2	Bases for Objection and Defense.....	94

Table of Contents

3-6:2.1 Lack of Compliance With Service
of Process Rules 94

3-6:3 Burden in Moving to Quash or Dismiss
for Insufficient Service of Process 94

3-7 FAILURE TO STATE A CAUSE OF ACTION 95

3-7:1 Failure to State a Claim 95

3-7:1.1 Opportunities to Assert Failure to State
a Claim or Defense 95

3-7:2 Bases for Defense 96

3-7:2.1 Failure to Allege Elements
or Ultimate Facts 96

3-7:2.2 Failure to Allege Claims With Requisite
Particularity 96

3-7:2.3 Motion to Dismiss Based on
an Affirmative Defense 96

3-7:2.4 Claim or Defense Barred, Precluded,
or Estopped by Doctrine or Rule 97

3-7:2.5 Failure to Attach Necessary Exhibit 97

3-7:2.6 Improper Commingling of Claims 98

3-7:2.7 Improper Damages Do Not Invalidate
an Otherwise Cognizable Claim 99

3-7:3 Failure to State a Claim Defenses After the
Pleading Stage and Through Trial 99

3-7:4 Failure to State a Defense, as Opposed to a Claim.... 101

3-7:5 Plaintiff Must Timely Amend 101

3-8 FAILURE TO JOIN INDISPENSABLE PARTIES 102

3-8:1 Pre-Answer Motion or Responsive Pleading Defense... 102

3-8:2 Bases for Defense 102

3-8:3 Opportunities to Raise Defense 103

Chapter 4: Motions Useful to the Defense 105

4-1 INTRODUCTION 105

4-2 MOTION FOR JUDGMENT ON THE PLEADINGS 106

4-2:1 Basis for Motion 106

4-2:2 Burden for Movant 106

4-2:3 Partial Judgment on the Pleadings
Might Not Be Permitted 107

4-3 MOTION FOR MORE DEFINITE STATEMENT 108

4-3:1 Basis for Motion 108

4-4 MOTION TO STRIKE MATTER FROM PLEADING 109

4-4:1 Basis for Motion 109

4-4:2 Burden for Movant 111

Table of Contents

4-5	MOTION TO DISMISS FOR FORUM NON CONVENIENS.....	111
4-5:1	Basis for Motion.....	111
4-5:2	Burden for Movant.....	111
4-6	MOTION TO STRIKE SHAM PLEADINGS.....	114
4-6:1	Basis for Motion.....	114
4-6:2	Burden for Movant.....	115
4-7	MOTION TO COMPLY WITH FLORIDA RULES OF CIVIL PROCEDURE.....	116
4-7:1	Failure to Attach Instrument.....	117
4-7:2	Misjoinder of Parties.....	118
4-7:3	Mistaken Designation of Affirmative Defense as Counterclaim or Counterclaim as Affirmative Defense.....	118
4-7:4	Misjoinder of Claims or Defenses.....	119
4-7:5	Failure to State Short and Plain Statements of Ultimate Facts.....	120
4-8	MOTION TO INVOLUNTARILY DISMISS ACTION.....	120
4-8:1	Basis for Motion.....	120
4-8:2	Burden for Movant.....	121
4-9	MOTION TO TRANSFER ACTION.....	121
4-10	MOTION FOR SUMMARY JUDGMENT.....	121
4-10:1	Governing Rule in State Court.....	122
4-10:2	Summary Judgment versus Motion to Strike Affirmative Defenses.....	123
4-10:3	Motions for Partial Summary Judgment.....	124
4-10:4	Movant’s and Non-Movant’s Burdens Regarding Defenses.....	125
4-10:5	Effect of Pending Discovery and Summary Judgment.....	132
4-10:6	Finality of Summary Judgment and Strategy.....	134
	Chapter 5: Reply Pleading.....	137
5-1	INTRODUCTION.....	137
5-1:1	Function of the Reply.....	137
5-1:2	Form and Timing.....	138
5-1:3	Mandatory Reply to Assert Legal Excuse or Justification to Adverse Affirmative Defenses.....	139
5-2	CONTENTS OF A REPLY.....	139
5-2:1	Defenses to the Defenses.....	139
5-2:2	Factual Allegations.....	140
5-2:3	Exclude Mere Factual Denials of Defenses.....	141

5-3 WAIVER OF DEFENSES NOT ASSERTED IN REPLY 142

5-4 THERE IS NO REPLY TO A REPLY..... 142

Chapter 6: Affirmative Defenses 143

6-1 ABANDONMENT 143

6-1:1 Explanation of Defense 143

6-1:2 Elements of Abandonment 144

6-1:3 Notable Authority on Abandonment 144

6-1:4 Application of Abandonment 144

6-1:4.1 Causes of Action or Defenses 144

6-1:4.2 Nature of Defense 145

6-1:4.3 Notes on Trial by Jury 145

6-1:5 Drafting Authorities and Forms 145

6-1:5.1 Form Defense of Abandonment 145

6-2 ABSTENTION 146

6-2:1 Explanation of Defense 146

6-2:2 Elements of Abstention 147

6-2:2.1 *Pullman* Abstention Doctrine 147

6-2:2.2 *Burford* and *Thibodaux* Abstention
Doctrine 147

6-2:2.3 *Younger* Abstention Doctrine 148

6-2:3 Notable Authority on Abstention 148

6-2:4 Application of Abstention 149

6-2:4.1 Applicable Causes of Action
or Defenses 149

6-2:4.2 Nature of Defense 149

6-2:4.3 Notes on Trial by Jury 149

6-2:5 Drafting Authorities and Forms 149

6-2:5.1 Form Defense of Abstention
(*Pullman* Abstention Doctrine) 149

6-2:5.2 Form Defense of Abstention
(*Burford* Abstention Doctrine)..... 150

6-2:5.3 Form Defense of Abstention
(*Younger* Abstention Doctrine)..... 150

6-3 ACCORD AND SATISFACTION 151

6-3:1 Explanation of Defense 151

6-3:2 Elements of Accord and Satisfaction..... 151

6-3:3 Notable Authority on Accord and Satisfaction..... 152

6-3:4 Application of Accord and Satisfaction 153

6-3:4.1 Applicable Causes of Action or
Defenses 153

6-3:4.2 Nature of Defense 153

Table of Contents

	6-3:4.3	Notes on Trial by Jury	153
6-3:5		Drafting Authorities and Forms	153
	6-3:5.1	Statutory Forms.....	153
	6-3:5.2	Form Defense of Accord and Satisfaction – Form 1.967, Fla. R. Civ. P....	153
6-4		ACQUIESCENCE; BOUNDARY-BY-ACQUIESCENCE....	154
	6-4:1	Explanation of Defense	154
	6-4:2	Elements of Acquiescence	155
	6-4:3	Notable Authority on Defense.....	155
	6-4:4	Application of Acquiescence	155
	6-4:4.1	Applicable Causes of Action or Defenses	155
	6-4:4.2	Nature of Defense	155
	6-4:5	Drafting Authorities and Forms	156
	6-4:5.1	Form Defense of Waiver (Written)	156
6-5		ACT OF STATE DOCTRINE.....	156
	6-5:1	Explanation of Defense	156
	6-5:2	Elements of Act of State Doctrine.....	156
	6-5:3	Notable Authority on Act of State Doctrine.....	157
	6-5:4	Application of Act of State Doctrine.....	157
	6-5:4.1	Applicable Causes of Action or Defenses	157
	6-5:4.2	Notes on Trial by Jury	158
	6-5:5	Drafting Authorities and Forms	158
	6-5:5.1	Form Defense of Act of State Doctrine... ..	158
6-6		ADHESION CONTRACTS (CONTRACTS OF ADHESION)	158
	6-6:1	Explanation of Defense	158
6-7		ADVERSE INFERENCE EXCEPTION	158
	6-7:1	Explanation of Defense	158
	6-7:2	Elements of Adverse Inference Exception.....	159
	6-7:3	Notable Authority on Adverse Inference Exception....	159
	6-7:4	Application of Adverse Inference Exception.....	159
	6-7:4.1	Applicable Causes of Action or Defenses ...	159
	6-7:5	Drafting Authorities and Forms	160
	6-7:5.1	Form Defense of Adverse Inference Exception.....	160
6-8		ADVICE OF COUNSEL.....	160
	6-8:1	Explanation of Defense	160
	6-8:2	Elements of Advice of Counsel	161
	6-8:3	Notable Authority on Advice of Counsel	161
	6-8:4	Application of Advice of Counsel	161

Table of Contents

6-8:4.1 Applicable Causes of Action
or Defenses 161

6-8:4.2 Notes on Trial by Jury 162

6-8:5 Drafting Authorities and Forms 162

6-8:5.1 Form Defense of Advice of Counsel..... 162

6-9 ALCOHOL OR DRUG DEFENSE
(§ 768.36, FLA. STAT.)..... 162

6-9:1 Explanation of Defense 162

6-9:2 Elements of Defense 163

6-9:3 Notable Authority on Defense 164

6-9:4 Application of Defense 165

6-9:4.1 Applicable Causes of Action
or Defenses 165

6-9:4.2 Notes on Trial by Jury 165

6-9:5 Drafting Authorities and Forms 165

6-9:5.1 Jury Instructions..... 165

6-9:5.2 Form Defense of Alcohol or
Drug Defense (§ 768.36, Fla. Stat.) 166

6-10 ALTERATION OF INSTRUMENT 166

6-10:1 Explanation of Defense 166

6-10:2 Elements of Alteration of Instrument..... 167

6-10:3 Notable Authority on Alteration of Instrument 168

6-10:4 Application of Alteration of Instrument 168

6-10:4.1 Applicable Causes of Action or
Defenses 168

6-10:4.2 Nature of Defense 169

6-10:4.3 Notes on Trial by Jury 169

6-10:5 Drafting Authorities and Forms 169

6-10:5.1 Statutory Bases: Sections 673.4061
and 673.4071..... 169

6-10:5.2 Bank Defenses for Alteration of
Instrument 170

6-10:5.3 Form Defense of Alteration of
Instrument 171

6-10:5.3a Alteration of Instrument
(§ 673.4061, Fla. Stat.) 171

6-10:5.3b Alteration of Instrument
(§ 673.4071, Fla. Stat.) 171

6-11 ANTICIPATORY REPUDIATION 172

6-11:1 Explanation of Defense 172

6-11:2 Elements of Defense 173

Table of Contents

6-11:3	Notable Authority on Defense.....	173
6-11:4	Application of Defense.....	174
6-11:4.1	Applicable Causes of Action or Defenses	174
6-11:4.2	Notes on Trial by Jury	174
6-11:5	Drafting Authorities and Forms	174
6-11:5.1	Jury Instructions.....	174
6-11:5.2	Form Defense	174
6-12	ARBITRATION AND AWARD	175
6-12:1	Explanation of Defense	175
6-12:2	Elements of Arbitration and Award	175
6-12:3	Notable Authority on Arbitration and Award	175
6-12:4	Application of Arbitration and Award	176
6-12:4.1	Applicable Causes of Action or Defenses	176
6-12:5	Drafting Authorities and Forms	176
6-12:5.1	Statutory Basis.....	176
6-12:5.2	Form Defense	177
6-12:5.2a	Arbitration and Award	177
6-13	ASSUMPTION OF RISK	177
6-13:1	Explanation of Defense	177
6-13:2	Elements of Assumption of Risk.....	177
6-13:3	Notable Authority on Assumption of Risk.....	178
6-13:4	Application of Assumption of Risk.....	178
6-13:4.1	Applicable Causes of Action or Defenses	178
6-13:4.2	Notes on Trial by Jury	178
6-13:5	Drafting Authorities and Forms	179
6-13:5.1	Statutory Forms.....	179
6-13:5.2	Jury Instructions.....	179
6-13:5.3	Form Defense of Assumption of Risk – Fla. R. Civ. P. Form 1.972.....	179
6-14	AVOIDABLE CONSEQUENCES	179
6-14:1	Explanation of Defense	179
6-15	BONA FIDE ERROR.....	180
6-15:1	Explanation of Defense	180
6-15:2	Elements of Defense.....	181
6-15:3	Notable Authority on Defense.....	181
6-15:4	Application of Defense.....	181
6-15:4.1	Applicable Causes of Action or Defenses	181

Table of Contents

6-15:5	Drafting Authorities and Forms	182
6-15:5.1	Form Defense	182
6-16	BONA FIDE PURCHASER FOR VALUE.....	182
6-16:1	Explanation of Defense	182
6-16:2	Elements of Defense	183
6-16:3	Notable Authority on Defense.....	183
6-16:4	Application of Defense.....	184
6-16:4.1	Applicable Causes of Action or Defenses	184
6-16:4.2	Nature of Defense	184
6-16:5	Drafting Authorities and Forms	184
6-16:5.1	Form Defense	184
6-17	BUSINESS COMPULSION	185
6-17:1	Explanation of Defense	185
6-17:2	Elements of Defense	185
6-17:3	Notable Authority on Defense.....	185
6-17:4	Application of Defense.....	187
6-17:4.1	Applicable Causes of Action or Defenses	187
6-17:4.2	Notes on Trial by Jury	187
6-17:5	Drafting Authorities and Forms	188
6-17:5.1	Form Defense	188
6-18	BUSINESS JUDGMENT RULE	188
6-18:1	Explanation of Defense	188
6-18:2	Elements of Business Judgment Rule.....	190
6-18:3	Notable Authority on Business Judgment Rule.....	190
6-18:4	Application of Business Judgment Rule.....	198
6-18:4.1	Applicable Causes of Action or Defenses	198
6-18:5	Drafting Authorities and Forms	199
6-18:5.1	Form Defense of Business Judgment Rule.....	199
6-19	CAT’S PAW.....	199
6-19:1	Explanation of Defense	199
6-19:2	Elements of Defense.....	201
6-19:3	Notable Authority on Defense.....	201
6-19:4	Application of Defense.....	202
6-19:4.1	Applicable Causes of Action or Defenses	202
6-19:4.2	Notes on Trial by Jury	202

Table of Contents

6-19:5	Drafting Authorities and Forms	202
6-19:5.1	Jury Instructions.....	202
6-19:5.2	Form Defense	203
6-20	CESSATION OF BUSINESS—§ 542.335, FLA. STAT.....	203
6-20:1	Explanation of Defense	203
6-20:2	Elements of Defense	204
6-20:3	Notable Authority on Defense	204
6-20:4	Application of Defense.....	205
6-20:4.1	Applicable Causes of Action or Defenses	205
6-20:5	Drafting Authorities and Forms	205
6-20:5.1	Statutory Forms.....	205
6-20:5.2	Form Defense	205
6-21	COLLATERAL ESTOPPEL – ISSUE PRECLUSION.....	205
6-21:1	Explanation of Defense	205
6-21:2	Elements of Defense	206
6-21:3	Notable Authority on Defense	207
6-21:4	Application of Defense.....	209
6-21:4.1	Applicable Causes of Action or Defenses	209
6-21:4.2	Nature of Defense	209
6-21:5	Drafting Authorities and Forms	210
6-21:5.1	Form Defense	210
6-22	COMPARATIVE NEGLIGENCE	210
6-22:1	Explanation of Defense	210
6-22:2	Elements of Defense	211
6-22:3	Notable Authority on Defense	212
6-22:4	Application of Defense.....	214
6-22:4.1	Applicable Causes of Action or Defenses	214
6-22:4.2	Notes on Trial by Jury	214
6-22:5	Drafting Authorities and Forms	214
6-22:5.1	Statutory Forms.....	214
6-22:5.2	Jury Instructions.....	214
6-22:5.3	Form Defense	215
6-23	COMPETITION PRIVILEGE	215
6-23:1	Explanation of Defense	215
6-23:2	Elements of Defense	216
6-23:3	Notable Authority on Defense	217

Table of Contents

6-23:4 Application of Defense 218
6-23:4.1 Applicable Causes of Action
or Defenses 218
6-23:4.2 Notes on Trial by Jury 218
6-23:5 Drafting Authorities and Forms 218
6-23:5.1 Jury Instructions..... 218
6-23:5.2 Form Defense 218
6-24 CONDITION PRECEDENT 219
6-24:1 Explanation of Defense 219
6-24:1.1 Distinguishing Conditions Precedent to
Formation and Conditions Precedent to
Performance..... 220
6-24:1.2 Specific Denial Pleading Burden 221
6-24:2 Elements of Defense 222
6-24:3 Notable Authority on Defense 223
6-24:4 Application of Defense 225
6-24:4.1 Applicable Causes of Action
or Defenses 225
6-24:5 Drafting Authorities and Forms 225
6-24:5.1 Jury Instructions..... 225
6-24:5.2 Form Defense 225
6-25 CORPORATE SHIELD DOCTRINE..... 225
6-25:1 Explanation of Defense 225
6-25:2 Elements of Defense 226
6-25:3 Notable Authority on Defense 227
6-25:4 Application of Defense 228
6-25:4.1 Applicable Causes of Action
or Defenses 228
6-25:5 Drafting Authorities and Forms 229
6-25:5.1 Form Defense 229
6-26 DEAD AND BURIED DOCTRINE –
DISSOLVED ENTITY 229
6-26:1 Explanation of Defense 229
6-26:2 Elements of Defense 231
6-26:2.1 Dissolution of a Florida Corporation..... 231
6-26:3 Notable Authority on Defense 235
6-26:4 Application of Defense 236
6-26:4.1 Applicable Causes of Action
or Defenses 236
6-26:4.2 Notes on Trial by Jury 236
6-26:5 Drafting Authorities and Forms 236
6-26:5.1 Jury Instructions..... 236
6-26:5.2 Form Defense 236

Table of Contents

6-27	DISCHARGE IN BANKRUPTCY	237
6-27:1	Explanation of Defense	237
6-27:2	Elements of Defense	237
6-27:3	Notable Authority on Defense	237
6-27:4	Application of Defense	238
	6-27:4.1 Applicable Causes of Action or Defenses	238
6-27:5	Drafting Authorities and Forms	238
	6-27:5.1 Form Defense	238
6-28	DOOR CLOSING STATUTES	239
6-28:1	Explanation of Defense	239
6-28:2	Elements of Defense	240
6-28:3	Notable Authority on Defense	240
6-28:4	Application of Defense	242
	6-28:4.1 Applicable Causes of Action or Defenses	242
	6-28:4.2 Notes on Trial by Jury	243
6-28:5	Drafting Authorities and Forms	243
	6-28:5.1 Form Defense	243
6-29	DURESS	243
6-29:1	Explanation of Defense	243
6-29:2	Elements of Defense	244
6-29:3	Notable Authority on Defense	244
6-29:4	Application of Defense	246
	6-29:4.1 Applicable Causes of Action or Defenses	246
6-29:5	Drafting Authorities and Forms	246
	6-29:5.1 Jury Instructions	246
	6-29:5.2 Form Defense	246
6-30	ECONOMIC LOSS RULE	247
6-30:1	Explanation of Defense	247
6-30:2	Elements of Defense	248
6-30:3	Notable Authority on Defense	249
6-30:4	Application of Defense	249
	6-30:4.1 Applicable Causes of Action or Defenses	249
6-30:5	Drafting Authorities and Forms	249
	6-30:5.1 Form Defense	249
6-31	ELECTION OF REMEDIES	250
6-31:1	Explanation of Defense	250
6-31:2	Elements of Defense	251
6-31:3	Notable Authority on Defense	252

Table of Contents

6-31:4	Drafting Authorities and Forms	253
	6-31:4.1 Form Defense	253
6-32	EQUITABLE ESTOPPEL	254
6-32:1	Explanation of Defense	254
6-32:2	Elements of Equitable Estoppel.....	254
6-32:3	Notable Authority on Estoppel.....	255
6-32:4	Application of Estoppel.....	256
	6-32:4.1 Applications to Claims and Defenses.....	256
	6-32:4.2 Nature of Defense	257
	6-32:4.3 Notes on Trial by Jury	257
6-32:5	Drafting Authorities and Forms	257
	6-32:5.1 Jury Instructions.....	257
	6-32:5.2 Form Defense	259
6-33	FAILURE OF CONSIDERATION AND WANT OF CONSIDERATION.....	260
6-33:1	Explanation of Defense	260
6-33:2	Elements of Defenses.....	260
6-33:3	Notable Authority on Defenses.....	261
6-33:4	Application of Defense.....	262
	6-33:4.1 Applicable Causes of Action or Defenses	262
6-33:5	Drafting Authorities and Forms	262
	6-33:5.1 Statutory Forms.....	262
	6-33:5.2 Note on Jury Trial.....	263
	6-33:5.3 Jury Instructions.....	263
	6-33:5.4 Form Defense – Failure of Consideration	263
	6-33:5.5 Form Defense – Want of Consideration	263
6-34	FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES	264
6-34:1	Explanation of Defense	264
6-34:2	Elements of Defense	265
6-34:3	Notable Authority on Defense	265
6-34:4	Application of Defense.....	267
	6-34:4.1 Applicable Causes of Action or Defenses	267
	6-34:4.2 Notes on Trial by Jury	268
6-34:5	Drafting Authorities and Forms	268
	6-34:5.1 Jury Instructions.....	268
	6-34:5.2 Form Defense	268

Table of Contents

6-35	<i>FARAGHER / ELLERTH</i> VICARIOUS LIABILITY	
	DEFENSES	269
6-35:1	Explanation of Defense	269
6-35:2	Elements of Defense	269
6-35:3	Notable Authority on Defense	269
6-35:4	Application of Defense	271
	6-35:4.1 Applicable Causes of Action or Defenses	271
	6-35:4.2 Notes on Trial by Jury	271
6-35:5	Drafting Authorities and Forms	271
	6-35:5.1 Jury Instructions	271
	6-35:5.2 Form Defense	271
6-36	FORFEITURE	272
6-36:1	Explanation of Defense	272
6-36:2	Elements of Defense	272
6-36:3	Notable Authority on Defense	273
6-36:4	Application of Defense	273
	6-36:4.1 Applicable Causes of Action or Defenses	273
6-36:5	Drafting Authorities and Forms	273
	6-36:5.1 Form Defense	273
6-37	FRAUD	274
6-37:1	Explanation of Defense	274
6-37:2	Elements of Fraud	275
6-37:3	Notable Authority on Defense	275
6-37:4	Application of Defense	278
	6-37:4.1 Applicable Causes of Action or Defenses	278
6-37:5	Drafting Authorities and Forms	279
	6-37:5.1 Jury Instructions	279
	6-37:5.2 Form Defense	280
6-38	FRUSTRATION OF PURPOSE	280
6-38:1	Explanation of Defense	280
6-38:2	Elements of Defense	281
6-38:3	Notable Authority on Defense	281
6-38:4	Application of Defense	283
	6-38:4.1 Applicable Causes of Action or Defenses	283
	6-38:4.2 Notes on Trial by Jury	283
6-38:5	Drafting Authorities and Forms	283
	6-38:5.1 Form Defense	283

Table of Contents

6-39	GOOD FAITH	284
6-39:1	Explanation of Defense	284
6-39:2	Elements of Defense	285
6-39:3	Notable Authority on Defense	285
6-39:4	Application of Defense	289
6-39:4.1	Applicable Causes of Action or Defenses	289
6-39:4.2	Notes on Trial by Jury	290
6-39:5	Drafting Authorities and Forms	290
6-39:5.1	Jury Instructions.....	290
6-39:5.2	Form Defense	290
6-39:5.2a	Form Defense (Civil Rights Violation, 42 U.S.C. § 1983)	290
6-39:5.2b	Form Defense (§ 673.4201, Fla. Stat., Good Faith and Commercial Reasonableness).....	291
6-40	ILLEGALITY.....	292
6-40:1	Explanation of Defense	292
6-40:2	Elements of Defense	292
6-40:3	Notable Authority on Defense	292
6-40:4	Application of Defense	293
6-40:4.1	Applicable Causes of Action or Defenses	293
6-40:5	Drafting Authorities and Forms	294
6-40:5.1	Form Defense	294
6-41	IMMUNITY	294
6-41:1	Explanation of Defense	294
6-41:2	Elements of Defense	295
6-41:3	Notable Authority on Defense	296
6-41:4	Application of Defense	301
6-41:4.1	Applicable Causes of Action or Defenses	301
6-41:4.2	Notes on Trial by Jury	301
6-41:5	Drafting Authorities and Forms	301
6-41:5.1	Jury Instructions.....	301
6-41:5.2	Form Defense	302
6-42	IMPOSSIBILITY OF PERFORMANCE	302
6-42:1	Explanation of Defense	302
6-42:2	Elements of Defense	303
6-42:3	Notable Authority on Defense	303

Table of Contents

6-42:4	Application of Defense	305
6-42:4.1	Applicable Causes of Action or Defenses	305
6-42:4.2	Notes on Trial by Jury	305
6-42:5	Drafting Authorities and Forms	306
6-42:5.1	Form Defense	306
6-43	IMPRACTICABILITY OF PERFORMANCE (COMMERCIAL IMPRACTICABILITY)	306
6-43:1	Explanation of Defense	306
6-43:2	Elements of Defense	308
6-43:3	Notable Authority on Defense	309
6-43:4	Application of Defense	310
6-43:4.1	Applicable Causes of Action or Defenses	310
6-43:4.2	Notes on Trial by Jury	310
6-43:5	Drafting Authorities and Forms	310
6-43:5.1	Jury Instructions	310
6-43:5.2	Form Defense	311
6-44	IN PARI DELICTO	311
6-44:1	Explanation of Defense	311
6-44:2	Elements of Defense	312
6-44:3	Notable Authority on Defense	312
6-44:4	Application of Defense	313
6-44:4.1	Applicable Causes of Action or Defenses	313
6-44:4.2	Nature of Defense	313
6-44:4.3	Notes on Trial by Jury	314
6-44:5	Drafting Authorities and Forms	314
6-44:5.1	Form Defense	314
6-45	INDEPENDENT TORT DOCTRINE	314
6-45:1	Explanation of Defense	314
6-45:2	Elements of Defense	316
6-45:3	Notable Authority on Defense	316
6-45:4	Application of Defense	319
6-45:4.1	Applicable Causes of Action or Defenses	319
6-45:4.2	Notes on Trial by Jury	319
6-45:5	Drafting Authorities and Forms	320
6-45:5.1	Jury Instructions	320
6-45:5.2	Form Defense	320
6-46	INJURY BY FELLOW SERVANT	321
6-46:1	Explanation of Defense	321

Table of Contents

6-46:2	Elements of Defense	321
6-46:3	Notable Authority on Defense	322
6-46:4	Application of Defense	325
	6-46:4.1 Applicable Causes of Action or Defenses	325
	6-46:4.2 Notes on Trial by Jury	325
6-46:5	Drafting Authorities and Forms	326
	6-46:5.1 Jury Instructions.....	326
	6-46:5.2 Form Defense	326
6-47	INTERVENING CAUSE.....	326
	6-47:1 Explanation of Defense	326
	6-47:2 Elements of Defense	327
	6-47:3 Notable Authority on Defense	327
	6-47:4 Application of Defense	328
	6-47:4.1 Applicable Causes of Action or Defenses	328
	6-47:4.2 Notes on Trial by Jury	328
	6-47:5 Drafting Authorities and Forms	329
	6-47:5.1 Jury Instructions.....	329
	6-47:5.2 Form Defense	329
6-48	INTRACORPORATE CONSPIRACY DOCTRINE (SINGLE ENTITY CONSPIRACY DOCTRINE)	329
	6-48:1 Explanation of Defense	329
	6-48:2 Elements of Defense	331
	6-48:3 Notable Authority on Defense	331
	6-48:4 Application of Defense	333
	6-48:4.1 Applicable Causes of Action or Defenses	333
	6-48:4.2 Notes on Trial by Jury	333
	6-48:5 Drafting Authorities and Forms	333
	6-48:5.1 Form Defense	333
6-49	JUDICIAL ESTOPPEL	334
	6-49:1 Explanation of Defense	334
	6-49:2 Elements of Defense	334
	6-49:3 Notable Authority on Defense	335
	6-49:4 Application of Defense	336
	6-49:4.1 Applicable Causes of Action or Defenses	336
	6-49:4.2 Nature of Defense	336
	6-49:5 Drafting Authorities and Forms	336
	6-49:5.1 Jury Instructions.....	336
	6-49:5.2 Form Defense	337

Table of Contents

6-50	JUSTIFICATION / ECONOMIC PRIVILEGE / PROTECTION PRIVILEGE.....	338
6-50:1	Explanation of Defense	338
6-50:2	Elements of Defense	338
6-50:3	Notable Authority on Defense	339
6-50:4	Application of Defense	340
	6-50:4.1 Applicable Causes of Action or Defenses	340
	6-50:4.2 Notes on Trial by Jury	340
6-50:5	Drafting Authorities and Forms	340
	6-50:5.1 Jury Instructions.....	340
	6-50:5.2 Form Defense	340
6-51	LACHES	341
6-51:1	Explanation of Defense	341
6-51:2	Elements of Laches.....	341
6-51:3	Notable Authority on Defense	342
6-51:4	Application of Defense	344
	6-51:4.1 Applicable Causes of Action or Defenses	344
	6-51:4.2 Nature of Defense	345
	6-51:4.3 Notes on Trial by Jury	345
6-51:5	Drafting Authorities	345
	6-51:5.1 Form Defense	345
6-52	LACK OF CAPACITY	346
6-52:1	Explanation of Defense	346
6-52:2	Elements of Lack of Capacity	347
6-52:3	Notable Authority on Defense	347
6-52:4	Application of Defense	348
	6-52:4.1 Applicable Causes of Action or Defenses	348
6-52:5	Drafting Authorities and Forms	348
	6-52:5.1 Form Defense	348
	6-52:5.1a Form Defense – Mental Incapacity	348
	6-52:5.1b Form Defense – Legal Incapacity (Other).....	349
6-53	LICENSE	349
6-53:1	Explanation of Defense	349
6-53:2	Elements of Defense	350
6-53:3	Notable Authority on Defense	350

Table of Contents

6-53:4	Application of Defense.....	350
6-53:4.1	Applicable Causes of Action or Defenses	350
6-53:4.2	Notes on Trial by Jury	351
6-53:5	Drafting Authorities and Forms	351
6-53:5.1	Form Defense	351
6-54	LITIGATION PRIVILEGE	351
6-54:1	Explanation of Defense	351
6-54:2	Elements of Defense	353
6-54:3	Notable Authority on Defense	354
6-54:4	Application of Defense.....	355
6-54:4.1	Applicable Causes of Action or Defenses	355
6-54:4.2	Notes on Trial by Jury	356
6-54:5	Drafting Authorities and Forms	356
6-54:5.1	Form Defense	356
6-55	MERE CONDUIT (COMMERCIAL CONDUIT).....	357
6-55:1	Explanation of Defense	357
6-55:2	Elements of Defense	358
6-55:3	Notable Authority on Defense	358
6-55:4	Application of Defense.....	361
6-55:4.1	Applicable Causes of Action or Defenses	361
6-55:4.2	Notes on Trial by Jury	361
6-55:5	Drafting Authorities and Forms	361
6-55:5.1	Jury Instructions.....	361
6-55:5.2	Form Defense	361
6-56	MERGER AND INTEGRATION	362
6-56:1	Explanation of Defense	362
6-56:2	Elements of Defense	364
6-56:3	Notable Authority on Defense	364
6-56:4	Application of Defense.....	366
6-56:4.1	Applicable Causes of Action or Defenses	366
6-56:5	Drafting Authorities and Forms	366
6-56:5.1	Form Defense	366
6-57	MISTAKE.....	367
6-57:1	Explanation of Defense	367
6-57:2	Elements of Defense	369
6-57:2.1	Mutual Mistake of Fact.....	369
6-57:2.2	Unilateral Mistake of Fact.....	370
6-57:2.3	Mutual Mistake of Law.....	371

Table of Contents

6-57:3	Notable Authority on Defense	371
6-57:4	Application of Defense	373
6-57:4.1	Applicable Causes of Action or Defenses	373
6-57:4.2	Nature of Defense	374
6-57:5	Drafting Authorities and Forms	374
6-57:5.1	Jury Instructions.....	374
6-57:5.2	Form Defenses.....	376
6-57:5.2a	Form Defense – Mutual Mistake of Fact	376
6-57:5.2b	Form Defense – Unilateral Mistake of Fact	377
6-57:5.2c	Form Defense – Mistake of Law	378
6-58	MITIGATION OF DAMAGES	378
6-58:1	Explanation of Defense	378
6-58:2	Elements of Defense	379
6-58:3	Notable Authority on Defense	379
6-58:4	Application of Defense	382
6-58:4.1	Applicable Causes of Action or Defenses	382
6-58:4.2	Nature of Rule.....	382
6-58:4.3	Notes on Trial by Jury	382
6-58:5	Drafting Authorities and Forms	382
6-58:5.1	Jury Instructions.....	382
6-58:5.2	Form Defense	383
6-59	MODIFICATION.....	384
6-59:1	Explanation of Defense	384
6-59:2	Elements of Defense	384
6-59:3	Notable Authority on Defense	384
6-59:4	Application of Defense	385
6-59:4.1	Applicable Causes of Action or Defenses	385
6-59:4.2	Notes on Trial by Jury	386
6-59:5	Drafting Authorities and Forms	386
6-59:5.1	Jury Instructions.....	386
6-59:5.2	Form Defense	386
6-60	NECESSITY OR BUSINESS NECESSITY	387
6-60:1	Explanation of Defense	387
6-60:2	Elements of Defense	389
6-60:3	Notable Authority on Defense	389

Table of Contents

6-60:4 Application of Defense 391
6-60:4.1 Applicable Causes of Action
or Defenses 391
6-60:4.2 Notes on Trial by Jury 392
6-60:5 Drafting Authorities and Forms 392
6-60:5.1 Jury Instructions..... 392
6-60:5.2 Form Defense 392
6-61 NEGLIGENCE OF NON-PARTY
(*FABRE* DEFENDANTS) 393
6-61:1 Explanation of Defense 393
6-61:2 Elements of Defense 394
6-61:3 Notable Authority on Defense 394
6-61:4 Application of Defense 396
6-61:4.1 Applicable Causes of Action
or Defenses 396
6-61:4.2 Notes on Trial by Jury 396
6-61:5 Drafting Authorities and Forms 397
6-61:5.1 Jury Instructions..... 397
6-61:5.2 Form Defense 397
6-62 NEGLIGENT MISREPRESENTATION 397
6-62:1 Explanation of Defense 397
6-62:2 Elements of Defense 398
6-62:3 Notable Authority on Defense 399
6-62:4 Application of Defense 399
6-62:4.1 Applicable Causes of Action
or Defenses 399
6-62:4.2 Notes on Trial by Jury 399
6-62:5 Drafting Authorities and Forms 399
6-62:5.1 Jury Instructions..... 399
6-62:5.2 Form Defense 400
6-63 NOVATION 401
6-63:1 Explanation of Defense 401
6-63:2 Elements of Defense 401
6-63:3 Notable Authority on Defense 402
6-63:4 Application of Defense 404
6-63:4.1 Applicable Causes of Action
or Defenses 404
6-63:4.2 Notes on Trial by Jury 404
6-63:5 Drafting Authorities and Forms 405
6-63:5.1 Jury Instructions..... 405
6-63:5.2 Form Defense 405

Table of Contents

6-64	OPINION (AS TO DEFAMATION).....	406
6-64:1	Explanation of Defense	406
6-64:2	Elements of Defense	407
6-64:3	Notable Authority on Defense	407
6-64:4	Application of Defense	408
	6-64:4.1 Applicable Causes of Action or Defenses	408
	6-64:4.2 Notes on Trial by Jury	408
6-64:5	Drafting Authorities and Forms	409
	6-64:5.1 Jury Instructions.....	409
	6-64:5.2 Form Defense	409
6-65	OPINION (AS TO FRAUD)	410
6-65:1	Explanation of Defense	410
6-65:2	Elements of Defense	412
6-65:3	Notable Authority on Defense	412
6-65:4	Application of Defense	414
	6-65:4.1 Applicable Causes of Action or Defenses	414
	6-65:4.2 Notes on Trial by Jury	414
6-65:5	Drafting Authorities and Forms	414
	6-65:5.1 Jury Instructions.....	414
	6-65:5.2 Form Defense	415
6-66	PART PERFORMANCE OR PARTIAL PERFORMANCE	415
6-66:1	Explanation of Defense	415
6-66:2	Elements of Defense	416
6-66:3	Notable Authority on Defense	417
6-66:4	Application of Defense	418
	6-66:4.1 Applicable Causes of Action or Defenses	418
	6-66:4.2 Nature of Defense	418
	6-66:4.3 Notes on Trial by Jury	418
6-66:5	Drafting Authorities and Forms	419
	6-66:5.1 Form Defense	419
6-67	PAYMENT	419
6-67:1	Explanation of Defense	419
6-67:2	Elements of Defense	420
6-67:3	Notable Authority on Defense	420
6-67:4	Application of Defense	421
	6-67:4.1 Applicable Causes of Action or Defenses	421
	6-67:4.2 Notes on Trial by Jury	422

Table of Contents

6-67:5 Drafting Authorities and Forms 422
6-67:5.1 Statutory Forms..... 422
6-67:5.2 Form Defense 422

6-68 PREEMPTION..... 422
6-68:1 Explanation of Defense 422
6-68:2 Elements of Defense 424
6-68:3 Notable Authority on Defense 425
6-68:4 Application of Defense..... 427
6-68:4.1 Applicable Causes of Action
or Defenses 427
6-68:4.2 Notes on Trial by Jury 428
6-68:5 Drafting Authorities and Forms 428
6-68:5.1 Jury Instructions..... 428
6-68:5.2 Form Defense 428

6-69 PRIOR BREACH / FIRST
BREACH DOCTRINE..... 429
6-69:1 Explanation of Defense 429
6-69:2 Elements of Defense 430
6-69:3 Notable Authority on Defense 430
6-69:4 Application of Defense..... 431
6-69:4.1 Applicable Causes of Action
or Defenses 431
6-69:4.2 Notes on Trial by Jury 432
6-69:5 Drafting Authorities and Forms 432
6-69:5.1 Form Defense 432

6-70 PRIVILEGE 432
6-70:1 Explanation of Defense 432
6-70:2 Elements of Defense 433
6-70:3 Notable Authority on Defense 434
6-70:4 Application of Defense..... 434
6-70:4.1 Applicable Causes of Action
or Defenses 434
6-70:5 Drafting Authorities and Forms 434
6-70:5.1 Form Defenses..... 434
6-70:5.1a Form Defense – Absolute
Privilege..... 434
6-70:5.1b Form Defense – Qualified
Privilege..... 435

6-71 PROMISSORY ESTOPPEL..... 435
6-71:1 Explanation of Defense 435
6-71:2 Elements of Defense 436
6-71:3 Notable Authority on Defense 437

Table of Contents

6-71:4	Application of Defense.....	437
6-71:4.1	Applicable Causes of Action or Defenses	437
6-71:4.2	Notes on Trial by Jury	438
6-71:5	Drafting Authorities and Forms	438
6-71:5.1	Jury Instructions.....	438
6-71:5.2	Form Defense	438
6-72	PUFFERY.....	439
6-72:1	Explanation of Defense	439
6-72:2	Elements of Defense	441
6-72:3	Notable Authority on Defense.....	441
6-72:4	Application of Defense.....	442
6-72:4.1	Applicable Causes of Action or Defenses	442
6-72:4.2	Notes on Trial by Jury	442
6-72:5	Drafting Authorities and Forms	443
6-72:5.1	Jury Instructions.....	443
6-72:5.2	Form Defense	443
6-73	RATIFICATION	443
6-73:1	Explanation of Defense	443
6-73:2	Elements of Defense	444
6-73:3	Notable Authority on Defense.....	444
6-73:4	Application of Defense.....	446
6-73:4.1	Applicable Causes of Action or Defenses	446
6-73:4.2	Notes on Trial by Jury	446
6-73:5	Drafting Authorities and Forms	447
6-73:5.1	Jury Instructions.....	447
6-73:5.2	Form Defense	448
6-74	RECOUPMENT.....	449
6-74:1	Explanation of Defense	449
6-74:2	Elements of Defense	450
6-74:3	Notable Authority on Defense.....	451
6-74:4	Application of Defense.....	451
6-74:4.1	Applicable Causes of Action or Defenses	451
6-74:4.2	Nature of Defense	451
6-74:4.3	Notes on Trial by Jury	452
6-74:5	Drafting Authorities and Forms	452
6-69:5.1	Form Defense	452
6-75	RELEASE.....	452
6-75:1	Explanation of Defense	452

Table of Contents

6-75:2	Elements of Defense	453
6-75:3	Notable Authority on Defense	453
6-75:4	Application of Defense	455
6-75:4.1	Applicable Causes of Action or Defenses	455
6-75:4.2	Notes on Trial by Jury	455
6-75:5	Drafting Authorities and Forms	455
6-75:5.1	Statutory Forms.....	455
6-75:5.2	Form Defense	455
6-75:5.2a	Form Defense – Written Release.....	455
6-75:5.2b	Form Defense – Oral Release....	456
6-76	RES JUDICATA—CLAIM PRECLUSION	456
6-76:1	Explanation of Defense	456
6-76:2	Elements of Defense	457
6-76:3	Notable Authority on Defense	458
6-76:4	Application of Defense	461
6-76:4.1	Applicable Causes of Action or Defenses	461
6-76:5	Drafting Authorities and Forms	461
6-76:5.1	Form Defense	461
6-77	RESCISSION.....	462
6-77:1	Explanation of Defense	462
6-77:2	Elements of Defense	462
6-77:3	Notable Authority on Defense	463
6-77:4	Application of Defense	464
6-77:4.1	Causes of Action or Defenses.....	464
6-77:4.2	Nature of Defense	464
6-77:4.3	Notes on Trial by Jury	464
6-77:5	Drafting Authorities and Forms	465
6-77:5.1	Form Defense	465
6-78	ROOKER-FELDMAN DOCTRINE	465
6-78:1	Explanation of Defense	465
6-78:2	Elements of Defense	467
6-78:3	Notable Authority on Defense	467
6-78:4	Application of Defense	468
6-78:4.1	Applicable Causes of Action or Defenses	468
6-78:4.2	Notes on Trial by Jury	468
6-78:5	Drafting Authorities and Forms	468
6-78:5.1	Jury Instructions.....	468
6-78:5.2	Form Defense	468

Table of Contents

6-79	SET-OFF.....	469
6-79:1	Explanation of Defense	469
6-79:2	Elements of Defense	470
6-79:3	Notable Authority on Defense	471
6-79:4	Application of Defense	473
	6-79:4.1 Applicable Causes of Action or Defenses	473
	6-79:4.2 Notes on Trial by Jury	473
6-79:5	Drafting Authorities and Forms	473
	6-79:5.1 Jury Instructions.....	473
	6-79:5.2 Form Defense	473
6-80	SOVEREIGN IMMUNITY	474
6-80:1	Explanation of Defense	474
6-80:2	Elements of Defenses.....	475
6-80:3	Notable Authority on Defense	475
6-80:4	Application of Defense	484
	6-80:4.1 Applicable Causes of Action or Defenses	484
	6-80:4.2 Notes on Trial by Jury	484
6-80:5	Drafting Authorities and Forms	485
	6-80:5.1 Jury Instructions.....	485
	6-80:5.2 Form Defense	485
6-81	SPLITTING CAUSE OF ACTION (RULE AGAINST)	485
6-81:1	Explanation of Defense	485
6-81:2	Elements of Defense	486
6-81:3	Notable Authority on Defense	486
6-81:4	Application of Defense	487
	6-81:4.1 Applicable Causes of Action or Defenses	487
6-81:5	Drafting Authorities and Forms	487
	6-81:5.1 Form Defense	487
6-82	STANDING (LACK OF)	488
6-82:1	Explanation of Defense	488
6-82:2	Elements of Defense	491
	6-82:2.1 Standing at Commencement of Action and at Judgment.....	491
6-82:3	Notable Authority on Defense	491
6-82:4	Application of Defense	494
	6-82:4.1 Applicable Causes of Action or Defenses	494

Table of Contents

	6-82:4.2	Nature of Defense	494
	6-82:4.3	Notes on Trial by Jury	495
6-82:5		Drafting Authorities and Forms	495
	6-82:5.1	Form Defense	495
6-83		STATUTE OF FRAUDS	495
	6-83:1	Explanation of Defense	495
	6-83:2	Elements of Defense	496
	6-83:3	Notable Authority on Defense	496
	6-83:4	Application of Defense	502
	6-83:4.1	Applicable Causes of Action or Defenses	502
	6-83:4.2	Notes on Trial by Jury	502
6-83:5		Drafting Authorities and Forms	502
	6-83:5.1	Statutory Forms.....	502
	6-83:5.2	Form Defense	503
6-84		STATUTE OF LIMITATIONS	503
	6-84:1	Explanation of Defense	503
	6-84:1.1	Statutory Bases for Limitations Defenses	504
	6-84:1.2	Accrual of Claims.....	505
	6-84:1.2a	Delayed Discovery Doctrine ...	506
	6-84:1.2b	Accrual of Fraud Claims	506
	6-84:1.2c	Accrual of Product Liability Claims.....	507
	6-84:1.3	Tolling of Claims	509
	6-84:1.4	Equitable Tolling of Claims	511
	6-79:1.5	Continuing Violation Doctrine	512
	6-84:1.6	Continuing Tort Doctrine	513
	6-84:1.7	Waiver of the Statute of Limitations Defense	513
	6-84:1.8	Laches and the Statute of Limitations (Statutory Laches)	513
	6-84:1.9	Statutes of Repose or Nonclaim Statutes Distinguished	514
	6-84:1.10	The Relation-Back Doctrine	516
6-84:2		Elements of Defense	517
6-84:3		Notable Authority on Defense	517
6-84:4		Application of Defense	520
	6-84:4.1	Applicable Causes of Action or Defenses	520
	6-84:4.2	Nature of Defense	520
	6-84:4.3	Notes on Trial by Jury	520

Table of Contents

6-84:5	Drafting Authorities and Forms	520
6-84:5.1	Statutory Forms.....	520
6-84:5.2	Jury Instructions.....	520
6-84:5.3	Form Defense	524
6-84:5.3a	Form Defense (Form 1.965, Fla. R. Civ. P.).....	524
6-84:5.3b	Form Defense (Expanded; Breach of Contract).....	524
6-85	STATUTE OF REPOSE	525
6-85:1	Explanation of Defense	525
6-80:1.1	Statutes of Limitation Distinguished	526
6-85:2	Elements of Defense	527
6-85:3	Notable Authority on Defense	527
6-85:4	Application of Defense	530
6-85:4.1	Applicable Causes of Action or Defenses	530
6-85:4.2	Notes on Trial by Jury	531
6-85:5	Drafting Authorities and Forms	531
6-85:5.1	Jury Instructions.....	531
6-85:5.2	Form Defense	531
6-86	UNCLEAN HANDS	531
6-86:1	Explanation of Defense	531
6-86:2	Elements of Defense	532
6-86:3	Notable Authority on Defense	532
6-86:4	Application of Defense	533
6-86:4.1	Applicable Causes of Action or Defenses	533
6-86:4.2	Nature of Defense	534
6-86:4.3	Notes on Trial by Jury	534
6-86:5	Drafting Authorities and Forms	534
6-86:5.1	Form Defense	534
6-87	UNCONSCIONABILITY	535
6-87:1	Explanation of Defense	535
6-87:2	Elements of Defense	537
6-87:3	Notable Authority on Defense	537
6-87:4	Application of Defense	539
6-87:4.1	Applicable Causes of Action or Defenses	539
6-87:4.2	Nature of Defense	540
6-87:5	Drafting Authorities and Forms	540
6-87:5.1	Form Defense	540

Table of Contents

6-88 UNDUE INFLUENCE 541
6-88:1 Explanation of Defense 541
6-88:2 Elements of Defense 541
6-88:3 Notable Authority on Defense 541
6-88:4 Application of Defense 543
6-88:4.1 Applicable Causes of Action
or Defenses 543
6-88:4.2 Nature of Defense 543
6-88:4.3 Notes on Trial by Jury 543
6-88:5 Drafting Authorities and Forms 544
6-88:5.1 Jury Instructions 544
6-88:5.2 Form Defense 544
6-89 UNJUST ENRICHMENT 545
6-89:1 Explanation of Defense 545
6-89:2 Elements of Defense 546
6-89:3 Notable Authority on Defense 546
6-89:4 Application of Defense 548
6-89:4.1 Applicable Causes of Action
or Defenses 548
6-89:4.2 Notes on Trial by Jury 548
6-89:5 Drafting Authorities and Forms 548
6-89:5.1 Jury Instructions 548
6-89:5.2 Form Defense 549
6-90 USURY 550
6-90:1 Explanation of Defense 550
6-90:2 Elements of Defense 550
6-90:3 Notable Authority on Defense 550
6-90:4 Application of Defense 553
6-90:4.1 Applicable Causes of Action
or Defenses 553
6-90:4.2 Nature of Defense 553
6-90:5 Drafting Authorities and Forms 553
6-90:5.1 Form Defense 553
6-91 VICARIOUS LIABILITY (LACK OF) 554
6-91:1 Explanation of Defense 554
6-91:2 Elements of Defense 555
6-91:3 Notable Authority on Defense 555
6-91:4 Application of Defense 557
6-91:4.1 Applicable Causes of Action
or Defenses 557
6-91:4.2 Notes on Trial by Jury 557

Table of Contents

6-91:5	Drafting Authorities and Forms	557
6-91:5.1	Jury Instructions.....	557
6-91:5.2	Form Defense	557
6-92	VOLUNTARY PAYMENT	558
6-92:1	Explanation of Defense	558
6-92:2	Elements of Defense	559
6-92:3	Notable Authority on Defense	560
6-92:4	Application of Defense.....	561
6-92:4.1	Applicable Causes of Action or Defenses	561
6-92:4.2	Notes on Trial by Jury	562
6-92:5	Drafting Authorities and Forms	562
6-92:5.1	Jury Instructions.....	562
6-92:5.2	Form Defense	562
6-93	WAIVER	562
6-93:1	Explanation of Defense	562
6-93:1.1	Implied Waiver	563
6-93:2	Elements of Defense	564
6-93:3	Notable Authority on Defense	564
6-93:4	Application of Defense.....	566
6-93:4.1	Applicable Causes of Action or Defenses	566
6-93:4.2	Nature of Defense	566
6-93:4.3	Notes on Trial by Jury	566
6-93:5	Drafting Authorities and Forms	566
6-93:5.1	Statutory Forms.....	566
6-93:5.2	Jury Instructions.....	566
6-93:5.3	Form Defense	567
6-93:5.3a	Form Defense of Waiver (Written)	567
6-93:5.3b	Form Defense of Waiver (Oral)	568
6-94	WAY OF NECESSITY	568
6-94:1	Explanation of Defense	568
6-94:2	Elements of Defense	569
6-94:3	Notable Authority on Defense	570
6-94:4	Application of Defense.....	572
6-94:4.1	Applicable Causes of Action or Defenses	572
6-94:4.2	Notes on Trial by Jury	572

Table of Contents

6-94:5 Drafting Authorities and Forms 572
6-94:5.1 Jury Instructions..... 572
6-94:5.2 Form Defense 573

Chapter 6 Appendix: Claims and Defenses Checklist..... 574

Appendix 585
1-001 MOTION TO STRIKE IMPROPER REPLY PLEADING... 589
1-002 MOTION TO STRIKE AFFIRMATIVE DEFENSES..... 592
1-003 MOTION TO STRIKE AFFIRMATIVE DEFENSES,
INCLUDING FOR WAIVER OF DEFENSES BY
DEFENDANTS..... 597
1-004 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (NONCLAIM STATUTE)..... 604
1-005 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (DOOR CLOSING
STATUTE WITH EXTRINSIC EVIDENCE) 608
1-006 MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (JURISDICTIONAL
STATUTE)..... 611
1-007 MOTION TO DISMISS FOR LACK OF PERSONAL
JURISDICTION..... 614
1-008 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION 618
1-009 MOTION TO ABATE OR TRANSFER FOR
IMPROPER VENUE FOR INDIVIDUAL
DEFENDANT..... 621
1-010 MOTION TO ABATE OR TRANSFER FOR
IMPROPER VENUE FOR DOMESTIC CORPORATE
DEFENDANT WITH EXTRINSIC EVIDENCE 624
1-011 AFFIDAVIT IN SUPPORT OF MOTION TO ABATE
OR TRANSFER FOR IMPROPER VENUE FOR
DOMESTIC CORPORATE DEFENDANT..... 627
1-012 MOTION TO ABATE OR TRANSFER FOR
IMPROPER VENUE FOR FOREIGN CORPORATE
DEFENDANT WITH EXTRINSIC EVIDENCE 630
1-013 MOTION TO QUASH FOR INSUFFICIENCY
OF PROCESS 633
1-014 MOTION TO QUASH FOR INSUFFICIENCY OF
SERVICE OF PROCESS (NO PERSONAL SERVICE)..... 636

Table of Contents

1-015 MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (IMPROPER SERVICE ON MINOR)..... 640

1-016 MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC CORPORATION) 644

1-017 MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (FOREIGN CORPORATION)..... 648

1-018 MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC PARTNERSHIP) 653

1-019 MOTION TO QUASH FOR INSUFFICIENCY OF SERVICE OF PROCESS (DOMESTIC LIMITED PARTNERSHIP) 657

1-020 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM 661

1-021 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (INCLUDING NEGATION OF CLAIM BY EXHIBIT TO PLEADING UNDER FLA. R. CIV. P. 1.130)..... 668

1-022 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (FAILURE TO ALLEGE FRAUD WITH PARTICULARITY REQUIRED BY FLA. R. CIV. P. 1.120(B))..... 674

1-023 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (FAILURE TO COMPLY WITH FLA. R. CIV. P. 1.110)..... 679

1-024 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (MISJOINDER OF CLAIMS—FLA. R. CIV. P. 1.110) 682

1-025 MOTION TO ABATE AND DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY 686

1-026 MOTION FOR JUDGMENT ON THE PLEADINGS..... 689

1-027 MOTION FOR MORE DEFINITE STATEMENT 693

1-028 MOTION TO STRIKE MATTER FROM PLEADING..... 699

1-029 MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES 703

1-030 INTERROGATORIES FOR PLAINTIFF’S JURISDICTIONAL DISCOVERY FROM DEFENDANT PERTAINING TO BUSINESS’S MINIMUM CONTACTS WITH FLORIDA 707

Table of Contents

1-031 REQUEST FOR PRODUCTION OF DOCUMENTS
FOR PLAINTIFF’S JURISDICTIONAL DISCOVERY
FROM DEFENDANT PERTAINING TO BUSINESS’S
MINIMUM CONTACTS WITH FLORIDA 719

1-032 MOTION FOR PARTIAL SUMMARY JUDGMENT
AND TO STRIKE AFFIRMATIVE DEFENSES
BY DEFENDANT..... 729

1-033 RESPONSE IN OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT BY DEFENDANT 738

1-034 GENERAL REPLY 744

Table of Cases..... 755

Index 819