

Affirmative Defenses

One or more affirmative defenses should *always* be filed – if you have any, that is.

Affirmative defenses include any defense in fact or law that would prevent plaintiff from winning his case. Common examples include:

- ✓ Statute of Limitations – suit brought beyond statutory limit date
- ✓ Laches – suit brought beyond equitable limit, prejudicing defendant
- ✓ Accord and Satisfaction – parties already settled the dispute
- ✓ Assumption of Risk – plaintiff knowingly exposed himself to danger
- ✓ Statute of Frauds – absence of writing to enforce contract
- ✓ Estoppel – plaintiff's own actions prevent him from seeking a remedy in court

The list is, however, virtually endless and includes any other matter constituting an avoidance or defense. Every defense likely to prevent the plaintiff from winning should be asserted in the answer as an affirmative defense.

An example of form that should suffice in most jurisdictions (check your local rules) follows on the next page:

**IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA**

Case No. 2004-123
Judge Benchpounder

PETER PLAINTIFF,
 Plaintiff,
 v.
DANNY DEFENDANT,
 Defendant.
_____ /

ANSWER AND AFFIRMATIVE DEFENSES

DEFENDANT Danny Defendant answers the complaint of Peter Plaintiff and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.
7. Admitted.

AFFIRMATIVE DEFENSES

Further the defendant asserts the following defenses and states:

8. Plaintiff's action is barred by the applicable statute of limitations. Breach of contract complained of took place more than 5 years prior to the filing of this action and is, pursuant to §95.11 Florida Statutes, barred.
9. Plaintiff's action is barred by the statute of frauds (§725.01 Florida Statutes) that precludes actions to enforce a verbal contract for service to be performed within the space of one year, because the contract complained of contemplated Defendant would work for Plaintiff more

than one year, and contract is not in writing.

10. Plaintiff's action is barred by estoppel, in that Plaintiff's own failure to provide fresh grapefruit to Defendant for delivery to Plaintiff's customers is the cause of failure by the Defendant to deliver and thereby perform the contract.

RESPECTFULLY SUBMITTED this 23 May 2004.

Danny Defendant, Defendant

[Certificate of Service]

That's all there is to this particular affirmative defense, however it cannot be urged too strongly that *all* defenses in fact and law should be asserted with the filing of *every* answer or other responsive pleading, because those stated defenses are the defendant's arsenal, and they need to be made a part of the court's record *at the very beginning of the lawsuit*.

Note that Danny Defendant didn't merely list his affirmative defenses by name. He added ultimate facts to support his defenses. This is always a good idea. Allege the specific ultimate facts necessary to prove all your affirmative defenses, then all you have to do is prove those ultimate facts by a preponderance of the evidence in order to win your lawsuit.

Always make a record of your position at *every* opportunity ... and most especially with affirmative defenses, alleging all ultimate facts necessary to establish each defense, instead of merely listing the names of your defenses.

The filing of an affirmative defense requires the plaintiff to file a reply (if he wishes to avoid the affirmative defense). The reply is discussed next.

To learn more about lawsuit procedure and the rules of evidence, go to our website at www.Jurisdictionary.com