

Chapter 3

Pleadings

By Sandra J. Wunderlich

Much like the frame of a house, the pleadings serve the same purpose in a lawsuit. They are the framework upon which the rest of the case is built. Pleadings determine the claims and defenses that can be asserted in the case. They also provide the roadmap for the fact investigation and the discovery to be conducted. And, they are the starting point for determining whether evidence is relevant, and admissible. Finally, they dictate the amount and type of damages that can be recovered. The pleadings filed in a case may include the following:

- Petition/Complaint
- Answer
- Affirmative Defenses
- Counterclaims
- Crossclaims
- Answer to Crossclaim/Reply to Counterclaim

See state court rules or Fed. R. Civ. P. 7(a) for a list of authorized pleadings, depending upon your forum. Whether you are drafting claims, or responding to claims asserted in another pleading, before you begin, always check the governing rules related to pleadings in the relevant jurisdiction. This includes state or federal rules, as well as local rules of court. Review the rules for the following types of information:

- Deadlines applicable to the pleadings including statutes of limitation or court rules

- Fees that may be required
- Any procedural limitations
- Whether the pleading must be verified
- Any special drafting rules such as whether certain allegations must be alleged with particularity and how to properly allege damages to meet jurisdictional requirements.

This is important so that your pleading is not rejected on procedural grounds, particularly if you file on the last day, you may risk an adverse impact on your client's substantive rights.

Drafting the Pleading

After considering these factors, you must determine whether the forum is a fact or notice pleading jurisdiction. *See* Fed. R. Civ. P. 8. *Fact pleading* requires that the pleading allege facts upon which the claim rests. Its purpose is to inform the opponent of the claims or defenses asserted against it along with the facts that support that claim or defense (understanding that further development of those facts will occur during discovery). It is a higher pleading standard than notice pleading. *Notice pleading* does not require the allegation of facts, but merely sufficient information to put the other party on notice of the claims or defenses asserted. Although Federal Rule of Civil Procedure 8 allows for “notice pleading,” it requires more than mere “naked assertion[s] devoid of ‘further factual enhancement.’” *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) In light of these cases, you should include allegations of fact to support the claims or defenses asserted regardless of the jurisdiction.

Good Faith Basis

Federal Rule of Civil Procedure and most state rule counterparts, require a “good faith basis” to assert claims, and with respect to answers, requires the party to respond to the best of the person's knowledge, information and belief formed after inquiry reasonable under the circumstances. Where the

allegations require facts that will need to be flushed out during discovery, but the party has a good faith belief that the facts as alleged are true, the pleader can use “upon information and belief,” to preface the allegations. Use caution when doing so to avoid potential challenges to the sufficiency of the pleadings.

Plain and Simple Language

Pleadings should use short, simple, fact-based statements rather than lengthy, conclusory statements. This ensures the allegations cover all of the elements and are clearly understood by the court and the opposing party. *See* Fed. R. Civ. P. 7(d), which requires that pleadings contain simple, concise, and direct statements for the allegations.

Pleadings Setting Forth Claims for Relief

The following pleadings are used to state a claim for relief:

1. Petition or Complaint
2. Counterclaim
 - a. Compulsory
 - b. Permissive
3. Crossclaim
4. Third Party Claim

Complaint (or Petition)

The initial pleading to begin the lawsuit is generally called a complaint, but some state courts call it a petition instead. This document sets forth the claims asserted by the party seeking affirmative relief along with factual allegations to support those claims. This document puts the other side on notice of the claims against it along with the relief sought by the filing party, and will determine the evidence that may be presented at trial to support the claims.

Counterclaims

A counterclaim seeks affirmative relief against the party that initiated the lawsuit. There are two types: compulsory and permissive. A *compulsory counterclaim* is required to be brought in the same lawsuit as the original claim, whereas a *permissive counterclaim* may be brought in the same suit but is not waived if it is not brought in the same suit. A counterclaim is compulsory if (a) the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's suit; and (b) it does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. *See* Fed. R. Civ. P. 13(a). If a compulsory counterclaim is omitted from the initial pleading, it may be waived unless the court grants leave to bring the counterclaim at a later date.

Crossclaims

A crossclaim seeks affirmative relief against a co-party in the lawsuit such as a co-defendant. Crossclaims are generally permissive in that they may be brought in the same suit if they arise out of the same transaction or occurrence, but some state courts allow cross claims to be brought in a separate suit. A review of the forum jurisdiction's law is required to determine whether a crossclaim must be asserted in the original action.

Third Party Claims

To obtain complete relief or to make sure all parties who may be responsible for the claims asserted are parties to the lawsuit, the rules allow the addition of a "third party" to the lawsuit. For example, the defendant may name a third party that may be responsible for all or part of the judgment that might be rendered against it. A third party claim brings another party into the original suit if the third party may be liable for part or all of the claims asserted. These claims demand indemnity or contribution. Fed. R. Civ. P. 14. Generally, leave is not required to file a third party claim if filed within 10 days after the filing of the original responsive pleading. The newly added party, may assert counterclaims or defenses, or may counterclaim against

the party that brought the third party into the suit, or may even bring in another third party defendant. The defending party becomes known as the “Third Party Plaintiff” and the party that the Third Party Plaintiff seeks to add is called the “Third Party Defendant.”

- The Third Party Defendant, newly added to the suit, must respond to the complaint and assert any defenses to the claims, any counterclaims against the Third Party Plaintiff or any crossclaim against another Third Party Defendant.
- Similarly, the Plaintiff of the original complaint may assert claims against the Third Party Defendant who has been added to the suit provided the claims arise out of the transaction or occurrence that is the subject of the Plaintiff’s claims against the Third Party Plaintiff.
- If the Third Party Defendant has a claim against another non-party to the suit, the Third Party Defendant can assert a claim against another third party by bringing them into the suit using the same process used to bring in the Third Party Defendant.

Drafting Claims for Affirmative Relief

When drafting claims for affirmative relief, you must include the following in your pleading:

- A statement describing the basis for the court’s jurisdiction
- Claims to be asserted and the elements of each claim
- Relief sought

Statement of the Basis for the Court’s Jurisdiction

One of the first things to be determined when initiating a lawsuit is the forum in which you will file the claims. The forum will have been selected by the claimant when you are filing a counterclaim, crossclaim or third party claim, but you should consider whether that forum is correct, and whether it can be changed. You should determine whether you have a basis for federal jurisdiction, or if you must file in state court, and if so, which state you will

choose as your forum. You should consider whether you can obtain personal jurisdiction over the defendants you intend to sue in each of the forums you are deciding between. You must also determine where venue is proper. After all of the above is determined, you must include a short statement of the basis for the court's subject matter jurisdiction, the basis for the exercise of personal jurisdiction over the parties, and why venue is proper in that court in the pleading for affirmative relief. (Note that a declaratory judgment action may be filed in anticipation of another lawsuit in an attempt by the defending party to choose the forum for the suit because the federal court follows the first to file rule, but this could also result in a consolidation with a second-filed case, or dismissal of the first action if not brought by the actual claimant.)

Claims to Be Asserted

The second step in the process of drafting the pleading is to identify the potential claims to assert. This naturally grows out of conversations with the client, talking to witnesses and reviewing documents. But, even more important, the drafter must know the elements of each claim. Although case law provides guidance, one of the most effective ways to identify and evaluate the elements of the claims is by reviewing the jury instructions that will be applicable to the claim.

Using the jury instructions, you now have a list of the elements of each claim. A convenient way to track the elements and the development of the evidence is a proof checklist. A simplistic example of a proof checklist might look like this:

Example: Claim for Breach of Contract

Element	Witnesses	Exhibits
Existence of Contract	Joe Smith, Bob Jones	Signed Agreement
Meeting of the Minds	Joe Smith, Bob Jones	Emails between Smith and Jones
Consideration	Joe Smith, Bob Jones	Agreement, Check, Invoice

Element	Witnesses	Exhibits
Damages	Joe Smith, Bob Jones; Expert #1	Emails, Invoices, Data, etc.

This proof checklist can be reviewed, amended and consulted throughout the case as the facts develop through discovery. It helps identify the potential witnesses and documents for use at trial and in depositions.

Request for Relief

The final step is to determine the relief available, and if seeking damages, in what amount. All pleadings must make demand for the relief sought, whether it is damages, injunctive relief, attorney’s fees, costs, etc. If seeking damages, the claimant must determine if damages are available, and if so, the appropriate measure for those damages. The claimant must also determine whether the amount of damages must be plead specifically or if the claimant can simply assert that he or she seeks damages in an amount above the jurisdictional threshold of the forum. Because attorney’s fees are generally not recoverable as a matter of right, if sought, the claimant should set forth the basis for the right to recover attorney’s fees. The demand for relief should be set forth in the wherefore clause at the end of the claims for relief. It should also have a catch-all provision such as “and other relief as the court deems just and proper.” Example:

WHEREFORE, Plaintiff prays for judgment in its favor, for damages in an amount to be determined at trial, but in excess of \$10,000, for attorney fees and court costs, and for such other relief as the Court deems just and proper.

Finally, the rules may require claimant to make demand for a jury trial in the first filed pleading. The claimant can always waive the right to a jury trial at a later date so it is advisable to preserve the right to a jury trial at the outset.

Responsive Pleadings

The following pleadings may serve as a response to a complaint or petition:

1. Answer
2. Affirmative Defenses
3. Answer to Cross claim
4. Reply to Counterclaim (timing)
5. Answer to a Third Party Complaint
6. Reply to Affirmative Defenses raised in answer of opposing party
7. Motions to Dismiss, to Strike, for Judgment on the Pleadings, etc.

Drafting Responsive Pleadings

Answer: The initial responsive pleading that sets forth a response to the allegations made by claimant.

- The Answer becomes part of the framework of the lawsuit by setting up the factual disputes and the defenses;
- It should include all defenses to the claims; certain defenses may be waived if not asserted at the earliest opportunity;
- Because additional defenses can arise during the discovery process, the defenses should be periodically reviewed during the course of the case so that newly discovered defenses can be timely asserted.

Process: The first step in the process of developing a responsive pleading is to determine when the response is due to be filed. The method of service dictates the deadline for the responsive pleading in federal court:

- If personally served, the responsive pleading is due 21 days after service. *See* Fed. R. Civ. P. 12(a).
- If served via U.S. mail, the responsive pleading is due 60 days (90 days if the defendant is outside the U.S.) after service of the request for waiver of personal service.
- Answer to Crossclaims and Reply to Counterclaims (21 days from date of service)
- Reply to Counterclaim: 21 days from date of service

It is important to remember that the time for filing a responsive pleading can be extended, but it cannot be shortened.

Consider Possible Procedural Defects

In developing a strategy for the responsive pleading, the defendant should evaluate whether any procedural defects exist:

- Was service proper? Is venue proper?
- Does the Court have jurisdiction over the matter? Can the case be removed to federal court if filed in state court?
- Does the Court have personal jurisdiction over the parties?
- Are all necessary parties joined? Are the parties improperly joined?
- Is there another action pending between the parties?
- Does the plaintiff have the capacity to assert the claim?
- Has the real party in interest brought the suit?
- Are there any procedural requirements such as posting a bond, filing a verified petition, etc. that were not met?

Based upon the evaluation of procedural defects, the defendant must decide whether to respond by filing an answer (or reply to counterclaim) or a motion raising procedural defects. If the defendant files an answer, similar to the claimant's obligation, defendant must conduct a *reasonable inquiry under the circumstances* into the facts alleged before responding to each allegation. Fed. R. Civ. P. 11. Defendant must respond to each allegation to the best of the person's knowledge, information and belief.

Answer

A defendant can respond to each allegation of the petition or complaint in one of the following ways:

- Admit: the allegation is true and is admitted for all purposes;
- Deny: the allegation is a contested issue in the case;

- Without knowledge or information sufficient to form a belief as to the truth of the allegation: after a reasonable inquiry, the defendant does not know the answer, which is effectively a denial
- Calls for a Legal Conclusion: No response required to legal conclusion, but follow up with “to the extent a response is required, it is denied”
- Partial Admission/Partial Denial: Must admit any portion that is true, and deny any portion that is not true; cannot simply deny the entire allegation if a portion of it is true.

The answering party must respond in numbered paragraphs that correspond to the paragraphs of the complaint (even if incorrectly numbered so that it is clear what is admitted or denied). Moreover, if the claimant “incorporates all preceding paragraphs by reference,” then the answering party must answer all allegations in the preceding paragraphs even if they are not directed to that party.

Affirmative Defenses

An affirmative defense is a defense that avoids liability for the defendant, but for which the defendant bears the burden of proof. This is not to be confused with the mere denial of the allegations made by the claimant because the claimant retains the burden of proof for those at all times. A list of potential affirmative defenses to consider is included at the end of this chapter. Every defense, in law or fact, must be asserted in the responsive pleading. *See* Fed. R. Civ. P. 12(b). The assertion of an affirmative defense is subject to the same rules as pleading for affirmative relief—the answering party must determine whether the forum is a notice or fact pleading jurisdiction, and must provide a short and plain statement of the facts supporting the defense. If the answering party asserts a defense but denominates it a counterclaim, and vice versa, the court will treat it as though it was correctly designated. *See* Fed. R. Civ. P. 8(c)(2).

Motions in Lieu of Answer or Other Responsive Pleading

The answering party may file a motion to assert certain defenses in lieu of an answer. If the motion is in lieu of an answer, it must be filed within the time allowed for filing the answer. If the motion is denied, an answer is due within 10 days after the Court rules on the motion. If a motion for more definite statement is granted, the answer is due within 14 days after the filing of the more definite pleading. *See* Rule 12(a)(4).

The rules permit the following motions to be filed in lieu of an answer:

- Motion for More Definite Statement
- Motion to Strike (insufficient defense, redundant, immaterial, impertinent, or scandalous matter)
- Motion to Dismiss for Failure to State a Claim upon which relief can be granted
- Motion for Judgment on the Pleadings

Defendant may file other motions in lieu of an answer to raise procedural defects, or these defenses may be raised in the answer. It is worth noting that these defenses raising procedural defects are not affirmative defenses. Although defendant is required to raise the defenses at the earliest opportunity, after defendant raises the defenses, the burden shifts to the claimant to overcome the defenses.

The following procedural defenses may be raised by motion in lieu of an answer:

- Lack of subject matter jurisdiction (cannot be waived so can be raised at any time in the case)
- Lack of personal jurisdiction
- Insufficiency of Process
- Failure to Join a Necessary Party
- Failure to state a claim upon which relief can be granted (can also be raised at any time)
- Another action pending between the parties
- No Legal Capacity to Sue

- Improper Joinder
- Not the Real Party in Interest
- Plaintiff should furnish costs as security
- Failure to follow procedures such as verified petition; post a bond; etc.
- Improper counterclaim or crossclaim

Venue: Although improper venue is a procedural defect that must be raised at the first opportunity, it generally does NOT toll the deadline for answering.

Removal and Remand

One of the first things to consider when responding to a claim is whether the case can be removed to federal court if it is first filed in state court. The Notice of Removal must be filed within 30 days of service of the initial pleading (this deadline cannot be extended by agreement or otherwise.) If a subsequent pleading or event makes the case removable, the Notice of Removal must be filed within 30 days after “receipt” of the amended pleading that permits removal. The rules provide that a case cannot be removed after one year on the basis of diversity, unless the court finds that claimant acted in bad faith to deprive the answering party of a federal forum. The claimant has 30 days from the date of removal to file a motion to remand, except that a party can challenge the subject matter jurisdiction of the court at any time. *See* 28 U.S.C. §1446 for additional information related to removal procedure.

Warning: If a case is removed and the responsive pleading is filed while the case is pending in federal court, and the case is subsequently remanded, the order of remand is sent to the state court but not the filed pleadings. Thus, any pleadings that were filed in federal court need to be refiled in state court after remand to prevent a default.

Joinder of Claims and Parties

Claims

A party asserting a claim, counterclaim, crossclaim or third party claim may join as many claims as it has against the opposing party, even if one of the claims is contingent. For example, a plaintiff may state a claim for money and a claim for equitable relief.

Parties

Parties may be joined in a single action on certain conditions. Either plaintiffs or defendants may join other parties in the same action if (1) they assert any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, and (2) there are questions of law or fact in common to the parties. The court may order separate trials to protect a party against embarrassment, delay, expense, or other prejudice. When asserting a claim for relief, a party must state the name, if known, of any person who is required to be joined if feasible but is not joined, and the reasons for not joining that person.

A person who is subject to personal jurisdiction and whose joinder will not deprive the court of subject matter jurisdiction, *must* be joined as a party if

- (a) in that person's absence, the court cannot give complete relief to the existing parties; or
- (b) the person claims an interest relating to the subject of the action and is situated so that resolving the case in that person's absence may, as a practical matter,
 - (i) impair or impede that person's ability to protect that interest, or
 - (ii) leave an existing party subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations because of that interest.

If all necessary parties are not before the court, the court must order that a necessary person be made a party to the action. If the person refuses to join

as a plaintiff, he or she may be made a defendant, or an involuntary plaintiff. If the joined party objects to venue, and the joinder would make venue improper, the court must dismiss that party. If the person cannot feasibly be joined, the court must determine whether in equity or good conscience, the action should proceed among the existing parties or if the action should be dismissed. The factors to be considered by the court include

- the extent to which a judgment rendered in the person's absence might prejudice that person or existing parties;
- the extent to which any prejudice could be lessened or avoided by a protective provision in the judgment;
- whether a judgment rendered in the person's absence would be adequate;
- whether plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Misjoinder or Non-joinder of Parties

Misjoinder of parties is not a ground for dismissal of an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Amended Pleadings

Throughout the life of a case, there may be times where the pleadings need to be amended to reflect new facts that have been developed that result in additional claims or defenses not previously known or asserted. Due to the risk of unfair prejudice if the pleadings are amended late in the case, the rules set forth the time frame within which a party can amend his or her pleading. Consult the rules of the jurisdiction to determine the deadline for your case. Amendments outside of this window require consent of opposing counsel or leave of court. The rules provide that a court should “freely give leave when justice so requires.” This has been interpreted as a liberal standard that allows a party to amend as needed provided:

- the party seeking to amend has acted diligently upon the discovery of the need to amend,
- it is not unfairly prejudicial to the other side if the amendment is allowed; and
- the amendment is not futile.

If a party presents evidence at trial that is outside the scope of the pleadings, the trial court may allow that evidence and order the pleadings conformed to that evidence. The court should “freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.” If the opposing party objects, the court may grant a continuance to enable the objecting party to develop evidence in response to the evidence that it believes is outside the scope of the pleadings before amendment. If a party introduces evidence related to an issue that is not in the pleadings, and the opposing party does not object to the admission of that evidence, the issue is deemed to have been tried with the parties’ express or implied consent, and thus, becomes an issue in the case even though it is not presented by the pleadings. Thus, it is important to know the pleadings, and diligently object to the introduction of evidence outside the scope of the pleadings. A party may move at any time, even after judgment is rendered, to amend the pleadings to conform to the evidence. Failure to request the amendment, however, does not affect the result of the trial.

Timeliness of Amended Pleading

Amending the pleadings often raises questions about the statute of limitations and the timeliness of the filing. If the amended claim relates back to the original claims, it dates back to the filing of the original claim. Federal Rule of Civil Procedure 15 provides three instances when the amendment can relate back to the original filing date:

1. When the statute of limitations specifically provides for the relation back;

2. When the amendment asserts a claim or defense that arose out of the same conduct, transaction or occurrence in the original pleading; or
3. If the amendment changes the party or the name of the party against whom the claim is asserted and the amendment arose out of the same conduct, transaction or occurrence in the original pleading, and within the time allowed for service of process:
 - a. the party received notice of the action so that it will not be prejudiced in defending on the merits; and
 - b. knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

If the United States office or agency is added by amendment, the notice requirements are satisfied if process was delivered or mailed to the US attorney or the US attorney's designee, to the Attorney General of the US or to the officer or agency named, within the prescribed period of time.

Supplemental Pleadings

A party may seek leave of court to supplement the pleading with transactions, occurrences or events that occur after the original pleading was filed. This is allowed even if the original pleading is deemed defective.

Interpleader

The law permits a third party to file a lawsuit between two parties for the court to determine the right to property held by the third party. This procedure is called interpleader. It allows a party who has no interest in the property to force the named parties, who potentially have the right to the property held by the third party, to litigate the dispute as to rightful ownership. The property holder who initiates the action is generally referred to as a stakeholder. The money or property involved is called the "res," and all parties having an interest in the "res" are called claimants. The first stage of the interpleader action determines whether the matter is subject to interpleader, and whether the stakeholder should be released of liability for the prop-

erty. The second stage determines the appropriate ownership of the “res.” An interpleader action may be statutory under 28 U.S.C. §1335, or brought under Federal Rule of Civil Procedure 22 (or a state counterpart). The purpose of interpleader is to permit the stakeholder to avoid double or multiple liability to those who claim a competing interest.

Intervention

Intervention allows a non-party to join ongoing litigation, either as a matter of right or with permission of the court in which the case is pending. The purpose of the rule is to allow a party to enter a case if their rights will be affected by the outcome. A non-party may intervene as of right if a federal statute explicitly allows intervention under the circumstances, or the non-party claims an interest relating to the property or transaction at issue. If the latter reason applies, the potential intervenor must show that its ability to protect its interests is not adequately represented by the existing parties to the case. Permissive intervention, which is within the discretion of the court, is allowed if a federal statute provides a conditional right to intervene, or when the claim or defense the non-party wishes to assert shares a common question of law or fact with the main action. The U.S. government may be allowed to intervene if a party’s claim or defense is based upon a statute or executive order administered by the officer or agency of the government, or any regulation, order, or agreement issues under a statute or executive order.

The party seeking to intervene must serve a motion to intervene stating the grounds for intervention, and a pleading that sets out the claim or defense for which intervention is sought. The party seeking to intervene cannot wait to assert its rights, but must act diligently to protect its rights. The court must consider whether a delay in seeking to intervene will unduly prejudice the rights of the original parties. It is worth noting that a party seeking to intervene cannot circumvent the jurisdictional rules if the court’s jurisdiction is based upon diversity jurisdiction. The court must either have federal question jurisdiction or complete diversity. Supplemental jurisdiction is not permitted for intervention, unless they form the same case or controversy.

Substitution of Parties

Sometimes after a case begins, events occur that require the substitution of parties. One of the more common reasons for substitution occurs when a party dies before the claim is resolved. The successor or representative must file a motion for substitution on behalf of the decedent. To do so, the representative files a motion to substitute and serves a notice of hearing on all parties, and any non-parties who have an interest in the matter. There are specific time limitations to file the substitute or the case is subject to dismissal. (For example, Federal Rule of Civil Procedure 25(a) requires that the motion to substitute be filed within 90 days after the statement of notice of the death, or the case must be dismissed.) If the claims simply transfer to the survivors who are already parties, the action need not be dismissed, but can continue against the remaining parties.

If a party becomes incompetent during the pendency of the action, the court may permit the action to proceed by or against the party's representative. The party seeking to pursue the action must file a motion with the court requesting this relief. Similarly, if an interest is transferred to another individual or entity during the pendency of the case, the action may continue against the original party unless the court orders the transferee to be substituted into the action or joined along with the original party. The party seeking to pursue the action must file a motion with the court seeking this relief.

Finally, if the action is asserted against a public officer in an official capacity, the action does not end when that official dies, resigns or ceases to hold office. The successor to that office is automatically substituted as a party to the action. Future pleadings should be in the name of the successor, but it does not affect the substantive rights of the parties if the incorrect name is used. Although a court can order a substitution of the parties' names, the court need not do so for the substitution to be effective.

Miscellaneous Advice for Readable Pleadings

- Use precise language
- If you abbreviate, choose one that makes sense and avoids confusion

- Rather than use Plaintiff or Defendant, use names of parties
- Avoid whining, begging, insulting or inflammatory language
- Avoid overstatements or hyperbole
- Avoid legalese
- Include subheadings to make it easy to read
- Don't overuse defined terms
- Avoid argument (clearly, obviously, etc.)
- Avoid clichés, metaphors and colloquialisms (Sisyphus, cake and eat it too, etc.)
- Proofread before filing
- Make sure your client has approved and reviewed before filing
- Not a one-time deal—review periodically during life of case to see if it needs to be amended and before depositions

List of Affirmative Defenses to Consider

- Accord and Satisfaction
- Arbitration and Award
- Assumption of Risk
- Comparative Fault
- Condition subsequent or other limitations on contract
- Contributory Negligence
- Death of a party
- Duress
- Estoppel
- Excuse for nonperformance
- Exclusivity of remedy such as worker's compensation
- Failure to attach written instrument or otherwise include in pleading
- Failure of Consideration

- Failure to Comply with Administrative Requirements (Filing with agency, timing, etc.)
- Failure to Exhaust Administrative Remedies
- Failure to Mitigate Damages
- Fraud
- Illegality
- Immunity
- Injury by fellow servant
- Justification
- Laches
- Lack of Standing
- License
- Limitation of Liability
- Liquidated Damages Clause cannot be penalty
- Mistake
- Mootness
- Novation
- Payment
- Preemption
- Privilege
- Ratification
- Release
- Res judicata
- Ripeness
- Seller in the Stream of Commerce
- Self Defense
- State of the Art as provided by statute
- Statute of Frauds

- Statute of Limitations
- Subject to arbitration clause
- Truth in Response to Defamation Claim
- Ultra Vires acts of Corporation
- Unavailability of Certain Damages
- Unclean Hands
- Waiver

Conclusion

The purpose of this chapter is to explain the importance of the pleadings in a case, and to identify the various types of pleadings that may be filed. It is also intended to provide guidance to the drafter of the pleading, and alert counsel to possible issues that need to be addressed relative to the pleadings.

AUTHOR

Sandra J. Wunderlich | Tucker Ellis LLP | 314.256.2544 |
sandra.wunderlich@tuckerellis.com