

# **Table of Contents**

## **Volume 1**

### **CHAPTER 1. INTRODUCTION**

#### **I. NATURE OF AFFIRMATIVE DEFENSES**

- § 1:1 Defenses in general
- § 1:2 Pleas in abatement
- § 1:3 Inconsistent defenses and pleas
- § 1:4 Response to affirmative defenses and pleas

#### **II. MANNER OF ASSERTING DEFENSES; BURDEN OF PROOF; WAIVER**

- § 1:5 Manner of asserting affirmative defenses
- § 1:6 Burden of proof—Generally
- § 1:7 Pleading problems
- § 1:8 Degree of burden of proof
- § 1:9 Allocation of burden of proof
- § 1:10 Judicial notice
- § 1:11 Waiver of defense

### **CHAPTER 2. LACK OF PROPER OR EFFECTIVE SERVICE**

#### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 2:1 Service of process in general
- § 2:2 Characteristics of valid summons
- § 2:3 Identity of valid process server
- § 2:4 Manner of proper service
- § 2:5 Personal service—Generally
- § 2:6 —On individuals
- § 2:7 —On corporations and other entities
- § 2:8 —By service on Secretary of State or the like
- § 2:9 Service by mail on persons outside California
- § 2:10 Service with notice and acknowledgement of receipt
- § 2:11 Effect of service by mail
- § 2:12 Substituted service—Generally
- § 2:13 —On entities

- § 2:14 —On individuals
- § 2:15 —On nonresident motorists, boaters and fliers
- § 2:16 Service by publication
- § 2:17 Other forms of service
- § 2:18 Exemption or immunity from service of process
- § 2:19 Return of service
- § 2:20 Defects in name of party served
- § 2:21 Defects in complaint as served
- § 2:22 Defects in summons
- § 2:23 Amended or supplemental summons or complaint

## **II. MANNER OF ASSERTING DEFENSE**

- § 2:24 Pleadings
- § 2:25 Motion
- § 2:26 Appellate review

## **III. BURDEN OF PROOF; WAIVER**

- § 2:27 Burden of proof
- § 2:28 Waiver of defense

## **IV. RELATED DEFENSES AND PRINCIPLES**

- § 2:29 Lack of personal jurisdiction
- § 2:30 Failure to serve or return summons
- § 2:31 Failure to give notice of trial

# **CHAPTER 3. FAILURE TO SERVE AND RETURN SUMMONS**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 3:1 Failure to serve and return summons in general
- § 3:2 Purpose of service and return requirements
- § 3:3 Commencement of action
- § 3:4 When requirements apply—Generally
- § 3:5 —Eminent domain
- § 3:6 —Actions by governments
- § 3:7 —Actions arising under federal law
- § 3:8 —Actions in federal court
- § 3:9 —Other actions
- § 3:10 Time for service—Generally
- § 3:11 —Originally named defendants
- § 3:12 —Fictitious defendants
- § 3:13 —Amended or supplemental complaints

## TABLE OF CONTENTS

|        |  |
|--------|--|
| § 3:14 | Rules applicable to amended and lost summons   |
| § 3:15 | Return of service                              |
| § 3:16 | Exceptions and exclusions—Generally            |
| § 3:17 | —General appearance                            |
| § 3:18 | —Extension by stipulation                      |
| § 3:19 | —Defendant not amenable to process             |
| § 3:20 | —Stay barring service                          |
| § 3:21 | —Validity of service challenged                |
| § 3:22 | —Service impossible, impracticable or futile   |
| § 3:23 | —Estoppel to assert service and return defects |
| § 3:24 | —Insufficient grounds for avoidance            |
| § 3:25 | Effect of dismissal                            |

## II. MANNER OF ASSERTING DEFENSE

|        |                  |
|--------|------------------|
| § 3:26 | Pleadings        |
| § 3:27 | Motion           |
| § 3:28 | Trial            |
| § 3:29 | Appellate review |

## III. BURDEN OF PROOF; WAIVER

|        |                   |
|--------|-------------------|
| § 3:30 | Burden of proof   |
| § 3:31 | Waiver of defense |

## IV. RELATED DEFENSES AND PRINCIPLES

|        |  |
|--------|--|
| § 3:32 | Lack of diligent prosecution (two-year statute)  |
| § 3:33 | Failure to have timely trial (five-year statute) |

# CHAPTER 4. LACK OF PERSONAL JURISDICTION

## I. NATURE AND ELEMENTS OF DEFENSE

|        |   |
|--------|---|
| § 4:1  | Personal jurisdiction in general                                |
| § 4:2  | Citizens, domiciliaries, residents and domestic entities        |
| § 4:3  | Persons physically within territory of State                    |
| § 4:4  | Persons who consent—Generally                                   |
| § 4:5  | —Express consent  |
| § 4:6  | —Implied consent by operation of law                            |
| § 4:7  | —Implied consent by filing suit in California                   |
| § 4:8  | —Implied consent by general appearance                          |
| § 4:9  | Nonresidents  |
| § 4:10 | Purposeful availment of privileges requirement                  |
| § 4:11 | Those whose conduct can be considered to determine jurisdiction |

- § 4:12 General jurisdiction based on wide ranging, substantial activities in State
- § 4:13 Limited jurisdiction for specific causes of action
- § 4:14 Limited jurisdiction arising from conduct within State
- § 4:15 Conduct outside State—Generally
- § 4:16 —Conduct intended to cause effect within State
- § 4:17 —Stream of commerce cases
- § 4:18 —Conduct subject to special regulation in State
- § 4:19 —Citizenship of litigants
- § 4:20 —Characteristics of litigants
- § 4:21 —Interests of State
- § 4:22 —Substantive law to be applied
- § 4:23 —Nature of cause of action
- § 4:24 Special jurisdictional statutes
- § 4:25 Special jurisdictional issues—Parents, subsidiaries and affiliates
- § 4:26 —Alter egos
- § 4:27 —Successors in interest
- § 4:28 —Officers, agents and employees
- § 4:29 —Dissolution, support, custody and the like

## **II. MANNER OF ASSERTING DEFENSE**

- § 4:30 Presenting personal jurisdiction defense in general
- § 4:31 Pleadings
- § 4:32 Motion
- § 4:33 Court's own motion
- § 4:34 Appellate review

## **III. BURDEN OF PROOF; WAIVER**

- § 4:35 Burden of proof
- § 4:36 Waiver of defense

## **IV. RELATED DEFENSES AND PRINCIPLES**

- § 4:37 Lack of subject matter jurisdiction
- § 4:38 Forum non conveniens

# **CHAPTER 5. VENUE**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 5:1 Venue in general
- § 5:2 Venue as non-jurisdictional
- § 5:3 Venue in specific actions

## TABLE OF CONTENTS

### II. VENUE IN REAL PROPERTY ACTIONS

- § 5:4 Real property actions in general
- § 5:5 Cancellation of documents affecting real property
- § 5:6 Reformation of documents affecting real property
- § 5:7 Quiet title and slander of title
- § 5:8 Injury to real property
- § 5:9 Specific performance of contracts affecting real property
- § 5:10 Foreclosure
- § 5:11 Unlawful detainer
- § 5:12 Condemnation
- § 5:13 Partition
- § 5:14 Property in more than one county
- § 5:15 Recovery for work done on real property

### III. VENUE IN OTHER ACTIONS

- § 5:16 Fraud
- § 5:17 Accounting
- § 5:18 Miscellaneous transitory actions
- § 5:19 Mixed actions, including local and transitory claims
- § 5:20 Actions for penalty or forfeiture
- § 5:21 Actions by or against State or public officer
- § 5:22 Actions against public officers
- § 5:23 Actions against State for taking or damaging private property
- § 5:24 Actions against State for death or injury to persons or personal property
- § 5:25 Actions against State by local governmental entities
- § 5:26 Escheat
- § 5:27 Actions required by law to be brought in Sacramento
- § 5:28 Actions by or against city, county, or local agency
- § 5:29 Actions against executors, conservators, trustees and the like
- § 5:30 Actions against corporations and unincorporated associations
- § 5:31 Marital dissolution actions and related actions
- § 5:32 Actions for support
- § 5:33 Contract actions
- § 5:34 Personal injury actions
- § 5:35 Declaratory judgment actions

### IV. GENERALLY APPLICABLE VENUE RULES

- § 5:36 Other venue rules—In general

- § 5:37 Multiple defendants
- § 5:38 Improperly joined defendants
- § 5:39 Multiple causes of action

## **V. MANNER OF ASSERTING DEFENSE**

- § 5:40 Manner of asserting defense in general
- § 5:41 Pleadings
- § 5:42 Motions
- § 5:43 Appellate review

## **VI. BURDEN OF PROOF; WAIVER; RELATED PRINCIPLES AND DEFENSES**

- § 5:44 Burden of proof
- § 5:45 Waiver of defense
- § 5:46 Lack of personal jurisdiction; forum non conveniens

# **CHAPTER 6. FORUM NON CONVENIENS**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 6:1 Forum non conveniens in general
- § 6:2 Forum non conveniens considerations—Generally
- § 6:3 Forum non conveniens factors—Domicile of plaintiff and others
  - § 6:4 —Personal jurisdiction
  - § 6:5 —Relative convenience
  - § 6:6 —Conflict of laws
  - § 6:7 —Relation to forum; public interest
  - § 6:8 —Substantial disadvantages
  - § 6:9 —Enforcement of judgment
  - § 6:10 —Expense
  - § 6:11 —View
  - § 6:12 —Burden on court and jury
  - § 6:13 —Multiplicity of actions
  - § 6:14 —Fair trial
  - § 6:15 —Administrative difficulties
  - § 6:16 —Other considerations
- § 6:17 Irrelevant considerations—Generally
- § 6:18 —Convenience to counsel
- § 6:19 —Size of award
- § 6:20 —Cost to plaintiff to litigate in forum
- § 6:21 —Absence of another pending action
- § 6:22 Dismissal or stay
- § 6:23 Conditional orders

## TABLE OF CONTENTS

- § 6:24 Effect of forum selection clauses in contracts
- § 6:25 Special rules in child custody disputes

## **II. MANNER OF ASSERTING DEFENSE**

- § 6:26 Pleadings
- § 6:27 Motion or demurrer
- § 6:28 Appellate review

## **III. BURDEN OF PROOF; WAIVER**

- § 6:29 Burden of proof
- § 6:30 Waiver of defense
- § 6:31 Lack of personal jurisdiction
- § 6:32 Lack of venue
- § 6:33 Failure to join an indispensable party
- § 6:34 Abstention

## **CHAPTER 7. LACK OF SUBJECT MATTER JURISDICTION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 7:1 Subject matter jurisdiction in general
- § 7:2 Constitutional provisions
- § 7:3 Statutory grants of jurisdiction
- § 7:4 Jurisdiction to determine jurisdiction
- § 7:5 Retention of jurisdiction once acquired
- § 7:6 Transfers to courts with subject matter jurisdiction
- § 7:7 Jurisdiction not defeated by court error
- § 7:8 No stipulation or estoppel to jurisdiction
- § 7:9 Forum selection clauses
- § 7:10 Actions in excess of jurisdiction

### **II. MANNER OF ASSERTING DEFENSE**

- § 7:11 Pleadings
- § 7:12 Motion or demurrer
- § 7:13 Trial
- § 7:14 Appeal

### **III. BURDEN OF PROOF; WAIVER**

- § 7:15 Burden of proof
- § 7:16 Waiver of defense

### **IV. RELATED DEFENSES AND PRINCIPLES**

- § 7:17 Lack of personal jurisdiction

- § 7:18 Lack of venue
- § 7:19 Preemption

## **CHAPTER 8. PRIMARY JURISDICTION**

- § 8:1 Primary jurisdiction in general
- § 8:2 Nature and elements of defense
- § 8:3 Manner of asserting defense
- § 8:4 Burden of proof
- § 8:5 Waiver of defense
- § 8:6 Exhaustion of remedies as related defense

## **CHAPTER 9. FAILURE TO STATE A CAUSE OF ACTION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 9:1 Failure to state a cause of action—In general
- § 9:2 Special case of common counts

### **II. MANNER OF ASSERTING DEFENSE**

- § 9:3 Pleadings
- § 9:4 Motion or demurrer
- § 9:5 Trial
- § 9:6 Post-trial and appeal

### **III. BURDEN OF PROOF; WAIVER**

- § 9:7 Burden of proof
- § 9:8 Waiver of defense

## **CHAPTER 10. UNCERTAINTY OF THE PLEADING**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 10:1 Uncertain pleadings in general
- § 10:2 Ultimate facts
- § 10:3 Conclusions of law
- § 10:4 Common counts
- § 10:5 Specific definitions of uncertainty—Generally
- § 10:6 Specific definition of uncertainty—Items of account
- § 10:7 —Descriptions of land
- § 10:8 —Prior judgment or determination
- § 10:9 —Performance of conditions



## TABLE OF CONTENTS

- § 10:10 —Statute of limitations
- § 10:11 —Statutes and ordinances
- § 10:12 —Libel and slander
- § 10:13 —Fraud
- § 10:14 —Written or oral contract
- § 10:15 —Contract terms

## **II. MANNER OF ASSERTING DEFENSE; WAIVER; RELATED DEFENSES**

- § 10:16 Manner of asserting the defense
- § 10:17 Waiver of defense
- § 10:18 Failure to state cause of action as related defense
- § 10:19 Vagueness as related constitutional defense

## **CHAPTER 11. FAILURE TO VERIFY COMPLAINT OR PETITION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 11:1 Failure to verify—In general
- § 11:2 Form and contents of verification
- § 11:3 Identity of person who verifies

### **II. MANDATORY VERIFICATION**

- § 11:4 Mandatory verification in general
- § 11:5 Interpleader actions
- § 11:6 Quiet title actions
- § 11:7 Special actions to clear title
- § 11:8 Quiet title actions for tax-defaulted properties
- § 11:9 Petitions for extraordinary writs
- § 11:10 Forcible entry and detainer actions
- § 11:11 Petitions to recover escheated property
- § 11:12 Actions under the Family Code and for child, spousal  
or other support
- § 11:13 Actions to restore lost records
- § 11:14 Petitions to perpetuate testimony
- § 11:15 Accusations and petitions to file conspiracy actions  
against attorneys
- § 11:16 Involuntary dissolution of corporation
- § 11:17 Actions against vessels
- § 11:18 Petitions, reports, plans and accounts in probate  
proceedings
- § 11:19 Petitions for approval of settlements and the like
- § 11:20 Fifth Amendment rights and mandatory verification

### **III. OPTIONAL VERIFICATION**

- § 11:21 Optional verification in general
- § 11:22 Pleading an account
- § 11:23 Defendant's denial in actions involving \$1,000 or less
- § 11:24 Actions for preliminary injunctive relief
- § 11:25 Eminent domain actions

### **IV. DEFECTIVE VERIFICATIONS**

- § 11:26 Defective verification

### **V. MANNER OF ASSERTING DEFENSE; CURE; WAIVER**

- § 11:27 Manner of asserting defense
- § 11:28 Amendment to cure defect
- § 11:29 Waiver of defense

### **VI. RELATED DEFENSE**

- § 11:30 Failure to subscribe

## **CHAPTER 12. LACK OF REQUIRED CERTIFICATE, NOTICE, CLAIM OR DEMAND**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 12:1 Prefiling requirements—In general
- § 12:2 Requirements for certificate of merit

### **II. NOTICE REQUIREMENTS**

- § 12:3 Notice in general and new notice requirements
- § 12:4 To health care provider of intent to sue for professional negligence
- § 12:5 To client of arbitration rights
- § 12:6 To California Attorney General
- § 12:7 To defendant of rescission of contract
- § 12:8 Sale or strict foreclosure of personal property collateral
- § 12:9 Event excusing contract performance
- § 12:10 Contractually required notice of claim, injury or loss and insurance notice requirements
- § 12:11 Breach in sales of goods and fund transfers
- § 12:12 Preliminary notices for mechanic's liens, stop notices and payment bond claims

## TABLE OF CONTENTS

### III. DEMAND REQUIREMENTS

- § 12:13 Demand requirements in general
- § 12:14 Libel and slander cases
- § 12:15 Shareholders' derivative actions
- § 12:16 Return of property from depositary or bailee
- § 12:17 Return of converted property
- § 12:18 Consumer class actions

### IV. CLAIM REQUIREMENTS

- § 12:19 Claim requirements in general
- § 12:20 Government Claims Act
- § 12:21 —Actions subject to claim-filing requirement
- § 12:22 —Who may file a claim
- § 12:23 —When claim must be filed
- § 12:24 —Contents of claim
- § 12:25 —Where claim must be filed
- § 12:26 —Amendment of claim
- § 12:27 —Action in response to claim
- § 12:28 —Effect of failure to make claim
- § 12:29 —Relief for lack of timely or proper claim
- § 12:30 —Estoppel or waiver as to claim requirement
- § 12:31 Actions against public entities outside Government Claims Act
- § 12:32 Probate
- § 12:33 Corporations in dissolution
- § 12:34 Financial institutions under liquidation
- § 12:35 Claims against foster parents

### V. REQUIREMENTS FOR COURT ORDER

- § 12:36 Order permitting action to proceed
- § 12:37 SLAPP special motions to strike and the like
- § 12:38 Mandatory alternative dispute resolution efforts

### VI. OTHER ISSUES

- § 12:39 Manner of asserting defense
- § 12:40 Burden of proof
- § 12:41 Waiver of defense
- § 12:42 Statute of limitations as related defense
- § 12:43 Exhaustion

## **CHAPTER 13. FAILURE TO FURNISH SECURITY FOR COSTS**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 13:1 Security for costs—In general
- § 13:2 Shareholders' derivative actions
- § 13:3 Vexatious litigants
- § 13:4 Nonresident litigants
- § 13:5 Actions against architects, engineers, and similar professionals
- § 13:6 Actions against health care professionals
- § 13:7 Actions under Political Reform Act of 1974
- § 13:8 Actions against particular construction projects

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 13:9 Manner of asserting defense
- § 13:10 Burden of proof
- § 13:11 Waiver of defense

## **CHAPTER 14. RES JUDICATA**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 14:1 Fundamental requirements

### **II. REQUIREMENTS AS TO FIRST ACTION**

- § 14:2 Res judicata—In general
- § 14:3 Subject matter jurisdiction
- § 14:4 Personal jurisdiction
- § 14:5 Fair opportunity to litigate
- § 14:6 Finality
- § 14:7 Decision on merits—Generally
- § 14:8 —Dismissals and judgments on demurrer
- § 14:9 —Default judgments
- § 14:10 —Other judgments without trial
- § 14:11 —Nonsuits
- § 14:12 —Judgments after trial or on appeal
- § 14:13 —Extraordinary writs
- § 14:14 —Settlements and consent judgments
- § 14:15 Same cause of action
- § 14:16 —Continuing conduct and successive injuries
- § 14:17 —Bar on matters that might have been litigated

## TABLE OF CONTENTS

- § 14:18 —Bar on unasserted compulsory cross-claims
- § 14:19 Same or lesser burden of proof
- § 14:20 Identity or privity of persons subject to res judicata—  
Generally
- § 14:21 Identity or privity of party—Appearance in same  
capacity
- § 14:22 —Requirement of adversity
- § 14:23 —Those who control litigation
- § 14:24 Privity—Generally
- § 14:25 —Successors in interest
- § 14:26 —Governmental entities
- § 14:27 —Master and servant
- § 14:28 —Principal and agent
- § 14:29 —Principal and surety, indemnitor and indemnitee  
and the like
- § 14:30 —Spouses and family relations
- § 14:31 —Decedent and personal representative; guardian  
and ward
- § 14:32 —Corporations, officers, directors, shareholders and  
alter egos
- § 14:33 —Partners and their partnerships
- § 14:34 —Class actions

## III. TRIBUNALS WHOSE JUDGMENTS MAY HAVE RES JUDICATA EFFECT

- § 14:35 Tribunals—In general
- § 14:36 California superior courts
- § 14:37 California small claims courts
- § 14:38 California appellate courts
- § 14:39 Foreign courts
- § 14:40 Administrative agencies and other nonjudicial bodies
- § 14:41 Arbitrators
- § 14:42 Res judicata in actions concurrently pending in  
different tribunals

## IV. EXCEPTIONS

- § 14:43 Estoppel
- § 14:44 Extrinsic fraud
- § 14:45 Extrinsic mistake
- § 14:46 Manifest injustice

## V. SPECIAL CASES

- § 14:47 Issues only of law

- § 14:48 Unlawful detainer
- § 14:49 Declaratory judgments
- § 14:50 Habeas corpus

## **VI. OTHER CONSIDERATIONS**

- § 14:51 Special statutory expressions or modifications of res judicata
- § 14:52 Arguments that cannot defeat res judicata

## **VII. MANNER OF ASSERTING DEFENSE**

- § 14:53 Manner of asserting defense in general
- § 14:54 Pleadings
- § 14:55 Motion or demurrer
- § 14:56 Trial and appeal

## **VIII. BURDEN OF PROOF; WAIVER**

- § 14:57 Burden of proof
- § 14:58 Waiver of defense

## **IX. RELATED DEFENSES AND PRINCIPLES**

- § 14:59 Collateral estoppel
- § 14:60 Law of the case
- § 14:61 Retraxit
- § 14:62 Stare decisis
- § 14:63 Vexatious litigation
- § 14:64 *Rooker-Feldman* doctrine

# **CHAPTER 15. COLLATERAL ESTOPPEL**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 15:1 Collateral estoppel—In general
- § 15:2 Requirements in common with res judicata
- § 15:3 Requirements different from res judicata—Generally
- § 15:4 Different requirements—Assertion by one not party or privy in prior action
- § 15:5 —Final resolution of issue
- § 15:6 —Actual litigation of issue
- § 15:7 Collateral estoppel based on criminal proceedings
- § 15:8 Exceptions from scope of collateral estoppel
- § 15:9 Exception for new facts or changed circumstances
- § 15:10 Exception for grave injustice or public interest
- § 15:11 Ineffective arguments against collateral estoppel

## TABLE OF CONTENTS

### **II. OTHER ISSUES**

- § 15:12 Manner of asserting defense
- § 15:13 Burden of proof
- § 15:14 Waiver of defense
- § 15:15 Res judicata as related defense
- § 15:16 Quasi-collateral estoppel as a related defense

## **CHAPTER 16. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 16:1 Exhaustion—In general
- § 16:2 Meaning of exhaustion
- § 16:3 Exceptions—Constitutional challenges
- § 16:4 —Futility
- § 16:5 —Cases outside administrative scheme
- § 16:6 —Irreparable harm
- § 16:7 —Bias
- § 16:8 —Class actions
- § 16:9 —Issues of general public concern
- § 16:10 Arguments that do not defeat exhaustion

### **II. MANNER OF ASSERTING DEFENSE**

- § 16:11 Pleadings
- § 16:12 Motion or demurrer
- § 16:13 Trial
- § 16:14 Post-trial and appeal

### **III. BURDEN OF PROOF; WAIVER**

- § 16:15 Burden of proof
- § 16:16 Waiver of defense

### **IV. RELATED DEFENSES AND PRINCIPLES**

- § 16:17 Ripeness and primary jurisdiction
- § 16:18 Exhaustion of nonadministrative remedies
- § 16:19 Exhaustion in labor law

## **CHAPTER 17. DEATH OF REAL PARTY IN INTEREST**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 17:1 Death—In general

- § 17:2 Generally applicable statutory law
- § 17:3 Historic expansion of survivability
- § 17:4 Substitution of personal representative
- § 17:5 Effect on statutes of limitation and similar statutes
- § 17:6 Special case of wrongful death
- § 17:7 Actions for dissolution of marriage
- § 17:8 Arbitration

## **II. DEATH OF PLAINTIFF**

- § 17:9 Plaintiff's death—In general
- § 17:10 Causes of action that are extinguished—Generally
- § 17:11 —Invasion of right of privacy
- § 17:12 —False arrest
- § 17:13 —Malicious prosecution
- § 17:14 —Damages for pain, suffering and disfigurement
- § 17:15 Causes of action and claims that survive—Generally
- § 17:16 —Violation of property rights
- § 17:17 —Recovery of property
- § 17:18 —Wrongful death
- § 17:19 —Unfair insurance practices
- § 17:20 —Fraud and deceit
- § 17:21 —Punitive damages

## **III. DEATH OF DEFENDANT**

- § 17:22 Defendant's death—In general
- § 17:23 Causes of action that are extinguished—Generally
- § 17:24 —Personal service contracts
- § 17:25 —Paternity
- § 17:26 —Appointment of conservator
- § 17:27 —Disciplinary and penal actions
- § 17:28 —Punitive damages
- § 17:29 Causes of action that survive—Generally
- § 17:30 —Personal injuries
- § 17:31 —Property rights
- § 17:32 —Support
- § 17:33 —Attachment and judgment liens on decedent's property
- § 17:34 Probate claims filing requirements

## **IV. MANNER OF ASSERTING DEFENSE**

- § 17:35 Manner of asserting defense in general
- § 17:36 Pleadings or motion
- § 17:37 Trial



TABLE OF CONTENTS

§ 17:38 Post-trial

**V. BURDEN OF PROOF; RELATED DEFENSES  
AND PRINCIPLES**

§ 17:39 Burden of proof

§ 17:40 Lack of capacity to sue as related defense

§ 17:41 Mootness as related defense

**CHAPTER 18. LACK OF CAPACITY TO SUE**

**I. NATURE AND ELEMENTS OF DEFENSE**

§ 18:1 Lack of capacity—In general

**II. INFANCY OR MINORITY**

§ 18:2 Minority—In general

§ 18:3 Appointment of guardian ad litem

§ 18:4 Special appointment of guardian ad litem

§ 18:5 Failure to appoint guardians

§ 18:6 Disaffirmance

§ 18:7 Special case of fetus

§ 18:8 Special case of emancipated minors

**III. OTHER INDIVIDUALS**

§ 18:9 Insane and incompetent persons

§ 18:10 Persons under guardianship or conservatorship

§ 18:11 Personal representatives

§ 18:12 Foreign representatives

**IV. CORPORATIONS**

§ 18:13 Capacity of corporations—In general

§ 18:14 Appearance in propria persona

§ 18:15 Merged corporations

§ 18:16 Dissolved corporations

§ 18:17 Corporations in suspended status

**V. ASSIGNEES**

§ 18:18 Capacity of assignees—In general

§ 18:19 Breach of contract

§ 18:20 Fraud, deceit, and misrepresentation

§ 18:21 Right to contest will

§ 18:22 Conversion

- § 18:23 Breach of fiduciary duty
- § 18:24 Legal malpractice and related torts
- § 18:25 Breach of duty by an insurance company
- § 18:26 Personal torts
- § 18:27 Other torts, penalties and punitive damages

## **VI. OTHER CONSIDERATIONS**

- § 18:28 Subrogees
- § 18:29 Same person as plaintiff and defendant
- § 18:30 Nonentities
- § 18:31 Special purpose definitions of capacity to sue

## **VII. OBSOLETE GROUNDS FOR LACK OF CAPACITY**

- § 18:32 Obsolete grounds—In general
- § 18:33 Persons deprived of civil rights
- § 18:34 Unincorporated associations

## **VIII. MANNER OF ASSERTING DEFENSE; WAIVER**

- § 18:35 Manner of asserting defense in general
- § 18:36 Pleadings
- § 18:37 Motion or demurrer
- § 18:38 Post-trial and appeal
- § 18:39 Waiver of defense

## **IX. RELATED DEFENSES AND PRINCIPLES**

- § 18:40 Lack of capacity to contract
- § 18:41 Lack of capacity to be sued
- § 18:42 Lack of standing

# **CHAPTER 19. LACK OF STANDING OR STATUS AS REAL PARTY IN INTEREST**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 19:1 Standing—In general
- § 19:2 Who is a party to an action
- § 19:3 Requirement that actions be prosecuted by real party in interest
- § 19:4 Timing
- § 19:5 Statutory definitions of real party in interest
- § 19:6 —Corporations, associations and nonprofits

## TABLE OF CONTENTS

- § 19:7 —Taxpayers and citizens
- § 19:8 —Any interested person
- § 19:9 —Any person
- § 19:10 —Aggrieved, injured, adversely affected persons
- § 19:11 —Other definitions
- § 19:12 —Class representatives
- § 19:13 Standing as prudential requirement

## II. MANNER OF ASSERTING DEFENSE

- § 19:14 Pleadings
- § 19:15 Motion or demurrer
- § 19:16 Trial
- § 19:17 Appeal

## III. BURDEN OF PROOF; WAIVER

- § 19:18 Burden of proof
- § 19:19 Waiver of defense

## IV. RELATED DEFENSES AND PRINCIPLES

- § 19:20 Lack of capacity to sue
- § 19:21 Ripeness
- § 19:22 Mootness

# Volume 2

## CHAPTER 20. MISJOINDER OF PARTIES

### I. NATURE AND ELEMENTS OF DEFENSE

- § 20:1 Misjoinder—In general
- § 20:2 Joinder of plaintiffs
- § 20:3 Joinder of defendants
- § 20:4 Approved joinder of parties
- § 20:5 Circumstances in which joinder is clearly improper

### II. MANNER OF ASSERTING DEFENSE; WAIVER

- § 20:6 Manner of asserting defense in general
- § 20:7 Pleadings
- § 20:8 Motion or demurrer
- § 20:9 Appellate review
- § 20:10 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 20:11 Nonjoinder of parties
- § 20:12 Misjoinder of causes of action

## **CHAPTER 21. NONJOINDER OF PARTIES**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 21:1 Nonjoinder—In general
- § 21:2 Parties who may be indispensable

### **II. MANNER OF ASSERTING DEFENSE**

- § 21:3 Pleadings
- § 21:4 Motion or demurrer
- § 21:5 Court's own motion
- § 21:6 Trial
- § 21:7 Post-trial and appellate review

### **III. BURDEN OF PROOF; WAIVER; RELATED DEFENSES AND PRINCIPLES**

- § 21:8 Burden of proof
- § 21:9 Waiver of defense
- § 21:10 Misjoinder of parties as related defense

## **CHAPTER 22. MOOT, HYPOTHETICAL, ABSTRACT ISSUE, ADVISORY OPINION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 22:1 Nonjusticiability—In general
- § 22:2 Mootness
- § 22:3 Advisory opinions

### **II. MANNER OF ASSERTING DEFENSE**

- § 22:4 Pleadings
- § 22:5 Demurrer or motion
- § 22:6 Trial
- § 22:7 Post-trial

### **III. BURDEN OF PROOF; WAIVER**

- § 22:8 Burden of proof
- § 22:9 Waiver of defense

TABLE OF CONTENTS

**IV. RELATED DEFENSES AND PRINCIPLES**

- § 22:10 Standing
- § 22:11 Res judicata
- § 22:12 Judicial abstention

**CHAPTER 23. ANOTHER ACTION PENDING**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 23:1 Another action pending—In general
- § 23:2 Actions pending in same jurisdiction
- § 23:3 Actions pending in different jurisdictions

**II. MANNER OF ASSERTING DEFENSE**

- § 23:4 Pleadings
- § 23:5 Motion or demurrer
- § 23:6 Trial
- § 23:7 Post-trial and appeal

**III. BURDEN OF PROOF; WAIVER OF DEFENSE**

- § 23:8 Burden of proof
- § 23:9 Waiver of defense

**IV. RELATED DEFENSES AND PRINCIPLES**

- § 23:10 Splitting cause of action
- § 23:11 Rule of concurrent exclusive jurisdiction

**CHAPTER 24. ELECTION OF REMEDIES**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 24:1 Election of remedies—In general
- § 24:2 Prejudice requirement
- § 24:3 Knowledge requirement
- § 24:4 Circumstances in which defense applies—Generally
- § 24:5 —Obtaining an attachment
- § 24:6 —Inconsistent claims for damages, rescission and restitution
- § 24:7 —Election of specific performance or damages
- § 24:8 —Inconsistent tort and contract claims
- § 24:9 Conduct not amounting to an election
- § 24:10 Time for election

**II. MANNER OF ASSERTING DEFENSE; WAIVER**

- § 24:11 Pleadings

- § 24:12 Motion or demurrer
- § 24:13 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 24:14 Election to sue particular defendants
- § 24:15 Res judicata and collateral estoppel
- § 24:16 Election of penalty, punitive or multiple damages

## **CHAPTER 25. STATUTE OF LIMITATIONS**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 25:1 Limitations in general
- § 25:2 Statutes of limitation and choice of law
- § 25:3 Accrual of causes of action generally
- § 25:4 Accrual on event or on discovery
- § 25:5 Other accrual rules and running of statute
- § 25:6 Commencement of action stopping statute
- § 25:7 Accrual problems with continuing conduct
- § 25:8 Limitations in special case of civil conspiracy

### **II. SPECIFIC STATUTES OF LIMITATIONS**

- § 25:9 Selection of specific statute of limitations
- § 25:10 Actions on judgment: typically ten years
- § 25:11 Real property actions: three months to five years
- § 25:12 Written contract actions: usually four years
- § 25:13 Commercial Code actions on note: six or ten years
- § 25:14 Actions on abstract or title insurance: two years
- § 25:15 Actions on obligations not founded on writing: two years
- § 25:16 Patent design and construction defects: four years
- § 25:17 Latent design and construction defects: ten years
- § 25:18 Liability created by statute: three years
- § 25:19 Inverse condemnation, nuisance, trespass or injury to real property: three years
- § 25:20 Taking or harming personal property: three years
- § 25:21 Fraud or mistake: three years
- § 25:22 Slander of title: three years
- § 25:23 Actions against directors and shareholders: three years
- § 25:24 Most actions on statute for penalty or forfeiture: one year
- § 25:25 Most personal injury actions: usually one or two years

## TABLE OF CONTENTS

- § 25:26 Childhood sexual abuse, incest and domestic violence:  
three or eight years
- § 25:27 Actions arising from felonies: one year
- § 25:28 Actions to recover for bad checks: one year
- § 25:29 Actions by good faith improver: one year
- § 25:30 Actions against bulk sale buyers and liquidators: one  
year
- § 25:31 Actions based on exposure to hazardous materials:  
one or two years
- § 25:32 Most actions against public officials and entities
- § 25:33 Actions against public defendants with claim-filing  
requirement: six months or one year
- § 25:34 Validation actions
- § 25:35 Legal malpractice: one or four years
- § 25:36 Medical malpractice: one or three years
- § 25:37 Malpractice by other professionals: usually two years
- § 25:38 Breach of fiduciary duty and bad faith actions
- § 25:39 Indemnity, suretyship and subrogation
- § 25:40 Many other circumstances: four years
- § 25:41 Contractual limitations periods

### **III. TOLLING STATUTE OF LIMITATIONS IN PARTICULAR CAUSES OF ACTION**

- § 25:42 Tolling in general
- § 25:43 Tolling in legal malpractice
- § 25:44 Tolling in medical malpractice
- § 25:45 Tolling of insurance and uninsured motorist claims
- § 25:46 Tolling by acknowledgment or part payment of debt
- § 25:47 Tolling by defendant's effort to repair or cure
- § 25:48 Tolling as to premarital agreements
- § 25:49 Tolling if leave of court is required to sue

### **IV. TOLLING STATUTE OF LIMITATIONS FOR PARTICULAR LITIGANTS**

- § 25:50 Tolling for particular litigants—In general
- § 25:51 Tolling for minors as plaintiffs
- § 25:52 Tolling for controlled entities as plaintiffs
- § 25:53 Tolling for mental incompetents as plaintiffs
- § 25:54 Tolling for incarcerated persons and criminal  
defendants
- § 25:55 Tolling for partnerships
- § 25:56 Tolling for members of class action
- § 25:57 Tolling arising from terminated legal service agencies
- § 25:58 Tolling by death of prospective plaintiff

- § 25:59 Tolling by death of prospective defendant
- § 25:60 Tolling based on total unanticipated disability
- § 25:61 Tolling based on absence from State
- § 25:62 Tolling for persons in military service
- § 25:63 Tolling for persons disabled or affected by war or great cruelty
- § 25:64 Tolling against those under restitution order
- § 25:65 Tolling for beneficiaries of fiduciary relation
- § 25:66 Tolling for victims of duress

## **V. OTHER TOLLING EVENTS**

- § 25:67 Specific tolling agreement by parties in case
- § 25:68 Reversal of judgment and tolling for appeals
- § 25:69 Tolling from injunction against filing action
- § 25:70 Pursuit of one of many remedies: equitable tolling
- § 25:71 Tolling for unasserted cross-claim by filing complaint
- § 25:72 Fraudulent concealment and related rules

## **VI. OTHER CONSIDERATIONS**

- § 25:73 Estoppel to assert statute of limitations
- § 25:74 Actions to which no statute of limitations applies
- § 25:75 Exceptions for public entities or public issues
- § 25:76 Unsuccessful means to avoid statute of limitations
- § 25:77 Limitations and doctrine of relation back

## **VII. MANNER OF ASSERTING DEFENSE**

- § 25:78 Pleadings
- § 25:79 Motion or demurrer
- § 25:80 Trial
- § 25:81 Appellate review

## **VIII. BURDEN OF PROOF; WAIVER**

- § 25:82 Burden of proof
- § 25:83 Waiver of defense

## **IX. RELATED DEFENSES AND PRINCIPLES**

- § 25:84 Laches
- § 25:85 Claims requirements
- § 25:86 Incontestability clauses



TABLE OF CONTENTS

**CHAPTER 26. LACHES**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 26:1 Laches—In general
- § 26:2 Unreasonable delay coupled with prejudice
- § 26:3 Insufficiency of mere delay
- § 26:4 Delay that is not unreasonable
- § 26:5 Delay that is unreasonable
- § 26:6 Prejudice
- § 26:7 When laches applies—Generally
- § 26:8 —Rescission
- § 26:9 —Federal, admiralty or common law cases
- § 26:10 —Cases involving value fluctuations
- § 26:11 Inapplicability to actions at law
- § 26:12 Inappropriateness to public interest litigation
- § 26:13 Inapplicability or inappropriateness in other circumstances
- § 26:14 Estoppel to assert laches as defense

**II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF**

- § 26:15 Pleadings
- § 26:16 Motion or demurrer
- § 26:17 Trial
- § 26:18 Post-trial
- § 26:19 Burden of proof and waiver

**III. RELATED DEFENSES AND PRINCIPLES**

- § 26:20 Statute of limitations
- § 26:21 Estoppel
- § 26:22 Stale claims
- § 26:23 Waiver
- § 26:24 Lack of prosecution

**CHAPTER 27. PREMATUREITY**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 27:1 Prematurity in general

**II. MANNER OF ASSERTING DEFENSE; WAIVER**

- § 27:2 Pleadings

- § 27:3 Motion or demurrer
- § 27:4 Trial
- § 27:5 Post-trial
- § 27:6 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 27:7 Exhaustion
- § 27:8 Advisory opinions

## **CHAPTER 28. FAILURE TO COMMENCE TRIAL IN FIVE YEARS OR NEW TRIAL IN THREE YEARS**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 28:1 The five-year rule—In general
- § 28:2 Actions to which five-year rule applies
- § 28:3 Actions to which five-year rule does not apply
- § 28:4 Meaning of “brought to trial”

### **II. EXTENSION OR TOLLING OF TIME**

- § 28:5 In general
- § 28:6 Written stipulation
- § 28:7 Oral agreement on record or entered in minutes
- § 28:8 Suspended jurisdiction of court
- § 28:9 Prosecution stayed or enjoined

### **III. IMPOSSIBILITY, IMPRACTICABILITY OR FUTILITY OF TRIAL**

- § 28:10 Impossibility, impracticability or futility in general
- § 28:11 Arbitration and mediation
- § 28:12 Delay arising from challenge to trial judge
- § 28:13 Delay arising from court error
- § 28:14 Delay arising from court congestion
- § 28:15 Pre-trial appeals and writs
- § 28:16 Period of defendant’s default
- § 28:17 Period of military service
- § 28:18 Pendency of related and multi-party actions and problem of amendments
- § 28:19 Bankruptcy
- § 28:20 Time between defendant’s death and substitution of representative

TABLE OF CONTENTS

**IV. INSUFFICIENT CIRCUMSTANCES FOR TOLLING**

- § 28:21 Insufficient circumstances in general
- § 28:22 Absence of guardian ad litem for plaintiff
- § 28:23 Normal time for place on trial calendar
- § 28:24 Routine litigation delays
- § 28:25 Imprisonment
- § 28:26 Pendency of administrative proceedings
- § 28:27 Trial court set trial beyond five years
- § 28:28 Death, illness or other disability of plaintiff or counsel
- § 28:29 Delay in service of process

**V. MANNER OF ASSERTING DEFENSE**

- § 28:30 Motion
- § 28:31 Trial
- § 28:32 Post-trial

**VI. BURDEN OF PROOF; WAIVER**

- § 28:33 Burden of proof
- § 28:34 Waiver of defense

**VII. RELATED DEFENSES AND PRINCIPLES**

- § 28:35 Failure to prosecute
- § 28:36 Statutes of limitation and laches

**CHAPTER 29. DISCRETIONARY DISMISSAL FOR LACK OF PROSECUTION**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 29:1 Discretionary dismissal in general
- § 29:2 Factors relevant to exercise of discretion
- § 29:3 Factors irrelevant to exercise of discretion

**II. MANNER OF ASSERTING DEFENSE**

- § 29:4 Pleadings
- § 29:5 Motion or demurrer
- § 29:6 Trial
- § 29:7 Appellate review

**III. BURDEN OF PROOF; WAIVER**

- § 29:8 Burden of proof

§ 29:9 Waiver of defense

#### **IV. RELATED DEFENSES AND PRINCIPLES**

§ 29:10 Five-year rule

§ 29:11 Laches

§ 29:12 Failure to serve and return summons and complaint

§ 29:13 Failure to appear

### **CHAPTER 30. ACTS OF GOD**

#### **I. NATURE AND ELEMENTS OF DEFENSE**

§ 30:1 Acts of God in general

§ 30:2 Use of defense

§ 30:3 Statutory definitions of act of God

§ 30:4 Case law definitions of act of God

§ 30:5 Drought

§ 30:6 Rain and flood

§ 30:7 Wind

§ 30:8 Storm

§ 30:9 Lightning

§ 30:10 Ice and freezing conditions

§ 30:11 Earthquake

§ 30:12 Fire

§ 30:13 Actions of animals

§ 30:14 What is not an act of God

#### **II. MANNER OF ASSERTING DEFENSE; WAIVER; BURDEN OF PROOF**

§ 30:15 Manner of asserting defense

§ 30:16 Waiver of defense

§ 30:17 Burden of proof

#### **III. RELATED DEFENSES AND PRINCIPLES**

§ 30:18 Force majeure or vis major

§ 30:19 Unavoidable accident

§ 30:20 Impossibility

### **CHAPTER 31. ADEQUACY OF REMEDY AT LAW**

#### **I. NATURE AND ELEMENTS OF DEFENSE**

§ 31:1 Adequate remedy—In general

## TABLE OF CONTENTS

- § 31:2 Injunctive relief
- § 31:3 Specific performance
- § 31:4 Equitable writs
- § 31:5 Other equitable proceedings
- § 31:6 Relationship between inadequacy of remedy at law and irreparable injury
- § 31:7 Insolvent or judgment-proof wrongdoer

## II. OTHER ISSUES

- § 31:8 Manner of asserting defense
- § 31:9 Burden of proof
- § 31:10 Waiver of defense
- § 31:11 Another action pending, as related defense

## CHAPTER 32. CONSENT

### I. NATURE AND ELEMENTS OF DEFENSE

- § 32:1 Consent—In general
- § 32:2 Manner of giving consent
- § 32:3 Matters to which consent must be given
- § 32:4 Persons who must consent
- § 32:5 Time of giving consent

### II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER

- § 32:6 Manner of asserting defense
- § 32:7 Burden of proof
- § 32:8 Waiver of defense

### III. RELATED DEFENSES AND PRINCIPLES

- § 32:9 Emergency
- § 32:10 Estoppel
- § 32:11 Waiver

## CHAPTER 33. DURESS

### I. NATURE AND ELEMENTS OF DEFENSE

- § 33:1 Duress—In general
- § 33:2 Definitions of duress and menace in statutes and cases
- § 33:3 Unlawfulness or wrongfulness requirement
- § 33:4 Subjective test controls

- § 33:5 Persons who may assert duress or menace
- § 33:6 Persons charged with duress or menace
- § 33:7 Economic compulsion

## **II. MANNER OF ASSERTING DEFENSE, BURDEN OF PROOF, WAIVER**

- § 33:8 Manner of asserting defense
- § 33:9 Burden of proof
- § 33:10 Waiver of defense

## **III. RELATED DEFENSES AND PRINCIPLES**

- § 33:11 Undue influence
- § 33:12 Fraud
- § 33:13 Unconscionability
- § 33:14 Emergency or necessity

# **CHAPTER 34. ESTOPPEL**

## **I. NATURE AND ELEMENTS OF DEFENSE**

- § 34:1 Estoppel—In general
- § 34:2 Requirements—Intentional conduct
- § 34:3 —Relation between conduct and subject matter at issue
- § 34:4 —Ignorance of party asserting estoppel
- § 34:5 —Reasonable or justifiable reliance on conduct
- § 34:6 —Unconscionable injury absent estoppel
- § 34:7 Unavailability for inequitable or illegal ends
- § 34:8 Persons who may assert an estoppel
- § 34:9 Persons who may be estopped

## **II. MANNER OF ASSERTING DEFENSE, BURDEN OF PROOF, WAIVER**

- § 34:10 Manner of asserting defense
- § 34:11 Burden of proof
- § 34:12 Waiver of defense

## **III. RELATED DEFENSES AND PRINCIPLES**

- § 34:13 Unclean hands and unconscionability
- § 34:14 Laches
- § 34:15 Waiver
- § 34:16 Promissory estoppel
- § 34:17 Ratification

## TABLE OF CONTENTS

- § 34:18 Judicial estoppel
- § 34:19 Judicial admission
- § 34:20 Invited error

## **CHAPTER 35. ONE WHO SEEKS EQUITY MUST DO EQUITY**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 35:1 One who seeks equity must do it

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 35:2 Manner of asserting defense
- § 35:3 Burden of proof
- § 35:4 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 35:5 Unclean hands
- § 35:6 Doctrine of superior equities

## **CHAPTER 36. FAILURE TO MITIGATE**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 36:1 Failure to mitigate—In general
- § 36:2 Expense and burden of mitigation
- § 36:3 Collateral source benefits and related issues
- § 36:4 Personal injury cases
- § 36:5 Wrongful termination cases
- § 36:6 Property damage or economic injury cases
- § 36:7 Conversion cases

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 36:8 Manner of asserting defense
- § 36:9 Waiver of defense
- § 36:10 Burden of proof

## **CHAPTER 37. ILLEGALITY**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 37:1 Illegality—In general

- § 37:2 Time of determination
- § 37:3 Construction favoring legality
- § 37:4 Effect of intent
- § 37:5 Partial illegality
- § 37:6 Effect of illegality
- § 37:7 Effect of inequality in fault for illegality
- § 37:8 Repudiation prior to execution of illegal part

## **II. SPECIFIC ILLEGAL CONTRACTS**

- § 37:9 In general
- § 37:10 Avoiding responsibility for fraud
- § 37:11 Avoiding responsibility for willful or reckless injury or negligence
- § 37:12 Avoiding responsibility for violation of law
- § 37:13 Usury
- § 37:14 Restraint of competition and trade
- § 37:15 Violation of licensing requirements
- § 37:16 Restraint of alienation
- § 37:17 Certain contracts of public officers
- § 37:18 Defeating rights of devisee or legatee
- § 37:19 Restraint of marriage, promotion of divorce, and domestic relations
- § 37:20 Gambling or wagering
- § 37:21 Agreements to defraud others
- § 37:22 Other illegal contracts

## **III. ADDITIONAL FACTORS**

- § 37:23 Illegal consideration
- § 37:24 Persons who may assert illegality
- § 37:25 Persons barred by illegality
- § 37:26 Actions that are barred
- § 37:27 Actions that are not barred

## **IV. MANNER OF ASSERTING DEFENSE; WAIVER; BURDEN OF PROOF**

- § 37:28 Manner of asserting defense
- § 37:29 Waiver of defense
- § 37:30 Burden of proof

## **V. RELATED DEFENSES AND PRINCIPLES**

- § 37:31 Unclean hands
- § 37:32 Unconstitutionality



TABLE OF CONTENTS

**CHAPTER 38. IMMUNITY**

**I. NATURE AND ELEMENTS OF DEFENSE**

§ 38:1 Immunity—In general

**II. SPECIFIC STATUTORY IMMUNITIES**

- § 38:2 Statutory immunities available to all persons
- § 38:3 Handling of loaned property by museums
- § 38:4 Delivery of assets subject to security interest
- § 38:5 Escrow agents and missing smoke detectors
- § 38:6 Professionals and their organizations—Generally
- § 38:7 —Architects, engineers, and land surveyors
- § 38:8 —Arbitrators
- § 38:9 —Attorneys
- § 38:10 —Health quality assurance and peer review committees
- § 38:11 —Other peer review committees
- § 38:12 —Referral societies and referrals
- § 38:13 Insurance guarantee and rating organizations
- § 38:14 Sports officials and gaming clubs
- § 38:15 Funeral directors, cemetery authorities, autopsies and the like
- § 38:16 Impaired pharmacists, physical therapists and veterinarians
- § 38:17 Assistance to police and similar public services
- § 38:18 Airport land use damages
- § 38:19 Care for strays and retaliation against dogs killing or injuring animals
- § 38:20 Common carriers and utilities
- § 38:21 Adulterated, misbranded merchandise and food plants
- § 38:22 Hazardous substances and pest control
- § 38:23 Blood alcohol testing
- § 38:24 Immunization and transfusion immunities
- § 38:25 Injuries from natural causes
- § 38:26 Immunities arising from Natural Death Act, End of Life Option Act, and powers of attorney
- § 38:27 Food donations
- § 38:28 Conservators, receivers, trustees and the like
- § 38:29 AIDS and communicable disease related immunities
- § 38:30 Mental illness
- § 38:31 Immunity from damages occurring during or after certain felonies
- § 38:32 Recreational property

- § 38:33 Social hosts
- § 38:34 Gifts to minors
- § 38:35 Corporations and corporate officers, directors, and shareholders
- § 38:36 News reporter's immunity from contempt
- § 38:37 Forbidden causes of action

### **III. IMMUNITIES ARISING FROM A DUTY TO PROVIDE INFORMATION**

- § 38:38 Duty to inform immunities—In general
- § 38:39 Information on candidates, public employees, professional licensees, and undocumented workers
- § 38:40 Insurance information and statements
- § 38:41 Anonymous witness information and required testimony
- § 38:42 Defamation by television and radio
- § 38:43 Informants on child abuse, elder abuse, and similar wrongs
- § 38:44 School counselors, principals, and personnel

### **IV. EMERGENCY AND GOOD SAMARITAN IMMUNITIES**

- § 38:45 Emergency and Good Samaritan immunities—In general
- § 38:46 General Good Samaritan immunities
- § 38:47 School emergencies
- § 38:48 Cardiopulmonary resuscitation and respiratory care
- § 38:49 Paramedics, peace officers, and fire fighters
- § 38:50 Emergency personnel training and emergency volunteers
- § 38:51 Ambulance and rescue services and authorized emergency vehicles
- § 38:52 Choking emergencies
- § 38:53 Disaster services
- § 38:54 Psychotherapists' and attorneys' warnings
- § 38:55 Emergency veterinary services

### **V. STATUTORY IMMUNITIES AVAILABLE TO PUBLIC ENTITIES, PUBLIC EMPLOYEES, AND PUBLIC PERSONS**

- § 38:56 Public entities and public employees
- § 38:57 Public persons
- § 38:58 Actions taken under invalid laws

## TABLE OF CONTENTS

- § 38:59 Actions of others
- § 38:60 Entry on property
- § 38:61 Theft of money from custody
- § 38:62 Errors in identification cards or department of motor vehicles records
- § 38:63 Anatomical gifts
- § 38:64 Joint powers and interstate compact activities
- § 38:65 State Bar use of class action unpaid residuals
- § 38:66 Tax proceedings
- § 38:67 Injuries by National Guard members or militia
- § 38:68 Small claims court advice
- § 38:69 Tunnel traffic involving flammable liquids
- § 38:70 Earthquake related immunities
- § 38:71 Gradual earth movement
- § 38:72 Escheated, unclaimed, or valueless property
- § 38:73 Legislative and quasi-legislative decisions
- § 38:74 Immunities for discretionary acts and omissions

## VI. LAW ENFORCEMENT ACTIVITIES

- § 38:75 Law enforcement immunities—In general
- § 38:76 Execution or enforcement of law
- § 38:77 Police aid to motorists absent accident
- § 38:78 Arrest by officer acting in good faith
- § 38:79 Lack or inadequacy of police protection
- § 38:80 Failure to arrest or retain in custody
- § 38:81 Institution or prosecution of litigation

## VII. PRISONS AND PRISONERS

- § 38:82 Immunities relating to prisoners—In general
- § 38:83 Injuries caused by prisoners
- § 38:84 Injuries suffered by prisoners
- § 38:85 Lack or inadequacy of prisons, personnel, or equipment
- § 38:86 Interference with prisoner's judicial rights
- § 38:87 Failure to provide medical care in prison
- § 38:88 Paroled, released, or escaped prisoners

## VIII. FIRE FIGHTING ACTIVITIES

- § 38:89 Fire fighting immunities—In general
- § 38:90 Contracts for fire protection
- § 38:91 Failure to provide fire protection
- § 38:92 Quality of fire fighting services and equipment
- § 38:93 Transportation of persons injured by fire

**IX. MEDICAL AND PSYCHIATRIC CARE**

- § 38:94 Medical and psychiatric care in general
- § 38:95 Injuries to or by mentally ill
- § 38:96 Interference with patient's judicial review
- § 38:97 Failure to prevent disease
- § 38:98 Failure to make mental or physical examination
- § 38:99 Decisions on confinement and release
- § 38:100 Escaping mental patients
- § 38:101 Failure to admit to medical facility

**X. LICENSING, INSPECTIONS, AND PUBLICATION OF INFORMATION**

- § 38:102 Licensing and permit-granting requirements and revocation
- § 38:103 Licensing of for-hire vessels
- § 38:104 Failure to inspect or negligent inspection
- § 38:105 Misrepresentations
- § 38:106 Publication of information

**XI. PUBLIC PROPERTY**

- § 38:107 Public property immunities—In general
- § 38:108 Natural conditions
- § 38:109 Land failure caused by natural conditions
- § 38:110 Unimproved state lands
- § 38:111 Dangerous conditions on public property
- § 38:112 Hazardous recreational activities
- § 38:113 Design of public construction
- § 38:114 Access roads and trails
- § 38:115 Nondedicated roads
- § 38:116 Roads, streets, and highways
- § 38:117 Effect of weather conditions on roads
- § 38:118 Failure to install traffic or warning signals
- § 38:119 Reservoirs, dams, canals, conduits, and drains
- § 38:120 Flood control activities
- § 38:121 Nuisance

**XII. MISCELLANEOUS STATUTORY PUBLIC IMMUNITIES**

- § 38:122 Activities of commissions and boards
- § 38:123 Schools, school boards, and students
- § 38:124 Punitive damages

**XIII. NONSTATUTORY IMMUNITIES**

- § 38:125 Nonstatutory immunities—In general

## TABLE OF CONTENTS

|          |   |
|----------|---|
| § 38:126 | Suits against United States                   |
| § 38:127 | Suits against State of California             |
| § 38:128 | Suits against other States                    |
| § 38:129 | Suits against foreign sovereigns              |
| § 38:130 | Third parties' reliance on sovereign immunity |
| § 38:131 | Judges  |
| § 38:132 | Quasi-judicial officers                       |
| § 38:133 | Court-appointed officers and court personnel  |
| § 38:134 | Prosecuting attorneys                         |
| § 38:135 | Other governmental officers and employees     |
| § 38:136 | Private person assisting government officials |
| § 38:137 | Legislators                                   |
| § 38:138 | Immunities no longer recognized in California |
| § 38:139 | Immunities never recognized in California     |

## **XIV. MANNER OF ASSERTING DEFENSE**

|          |                  |
|----------|------------------|
| § 38:140 | Pleadings        |
| § 38:141 | Motions          |
| § 38:142 | Appellate review |

## **XV. BURDEN OF PROOF; WAIVER; RELATED DEFENSES**

|          |  |
|----------|--|
| § 38:143 | Burden of proof                          |
| § 38:144 | Waiver of defense                        |
| § 38:145 | Privilege as related defense             |
| § 38:146 | Judgmental immunity as a related defense |
| § 38:147 | Indemnity                                |

# **Volume 3**

## **CHAPTER 39. LACK OF REQUIRED LICENSE, PERMIT, PAYMENT OR FILING**

### **I. NATURE AND ELEMENTS OF DEFENSE**

|        |  |
|--------|--|
| § 39:1 | Lack of required papers—In general                     |
| § 39:2 | Contractors—Generally                                  |
| § 39:3 | —Contractor defined                                    |
| § 39:4 | —Unlicensed partnerships composed of licensed partners |
| § 39:5 | —Public or governmental representatives                |
| § 39:6 | —Public utilities                                      |

- § 39:7 —Oil and gas operations
- § 39:8 —Property owners
- § 39:9 —Specialty contractors
- § 39:10 —Work on personal property
- § 39:11 —Small operations
- § 39:12 —Agriculture and related activities
- § 39:13 —Persons licensed under other laws
- § 39:14 —Materialmen and suppliers
- § 39:15 —Employees
- § 39:16 —Time of procuring license
- § 39:17 —Substantial performance doctrine
- § 39:18 —Limitations on bar on recovery
- § 39:19 Architects and landscape architects
- § 39:20 Engineers and land surveyors
- § 39:21 Structural pest control operators
- § 39:22 Alarm company operators and agents
- § 39:23 Electronic and appliance repair dealers
- § 39:24 Automobile repair dealers
- § 39:25 Real estate brokers and salespersons—Generally
- § 39:26 —Broker and salesperson defined
- § 39:27 —Limitations on bar on recovery
- § 39:28 —Time of procuring license
- § 39:29 Mineral, oil, and gas brokers and salespersons
- § 39:30 Cemetery brokers and salespersons
- § 39:31 Personal property, yacht and ship brokers and salespersons
- § 39:32 Broker-dealers and investment advisors
- § 39:33 Produce dealers and processors of farm products
- § 39:34 Employment managers, labor contractors and talent agents
- § 39:35 Other persons
- § 39:36 Failure to satisfy fictitious business name requirements
- § 39:37 Foreign corporations conducting intrastate business
- § 39:38 Corporations in suspended status or whose powers, rights and privileges have been forfeited

## II. OTHER ISSUES

- § 39:39 Manner of asserting defense
- § 39:40 Burden of proof
- § 39:41 Waiver of defense
- § 39:42 Illegality as related defense

TABLE OF CONTENTS

**CHAPTER 40. MISTAKE**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 40:1 Mistake—In general
- § 40:2 Materiality of mistake

**II. MISTAKE OF FACT**

- § 40:3 Mistake of fact—In general
- § 40:4 Neglect of legal duty
- § 40:5 Unconscious ignorance or forgetfulness
- § 40:6 Belief in nonexistent subject

**III. MISTAKE OF LAW**

- § 40:7 Mistake of law—In general
- § 40:8 Mutual mistake
- § 40:9 Unilateral mistake
- § 40:10 Unilateral mistake not caused by other party

**IV. OTHER ISSUES**

- § 40:11 Manner of asserting defense
- § 40:12 Burden of proof
- § 40:13 Waiver of defense
- § 40:14 Fraud as related defense

**CHAPTER 41. PRIVILEGE**

**I. NATURE AND ELEMENTS OF DEFENSE**

- § 41:1 Privilege—In general

**II. PUBLICATIONS**

- § 41:2 Privileged publications generally
- § 41:3 Publications in discharge of official duty
- § 41:4 Publications in certain proceedings—Generally
- § 41:5 —Proceedings within privilege
- § 41:6 —Expansion beyond defamation
- § 41:7 —Conduct related to protected proceedings
- § 41:8 —Limits on privilege
- § 41:9 Publications by and to persons interested therein
- § 41:10 Fair and true reports in public journals
- § 41:11 Fair and true reports of public meetings
- § 41:12 Constitutional privileges for news media

### **III. JUSTIFICATION**

- § 41:13 Nonstatutory defense
- § 41:14 Defining wrongful or unlawful means
- § 41:15 Protection of one's own interests
- § 41:16 Conduct by one financially interested in another
- § 41:17 Conduct by one responsible for welfare of another
- § 41:18 Defense for one who gives advice

### **IV. OTHER PRIVILEGES**

- § 41:19 Manager's privilege
- § 41:20 Competitor's privilege

### **V. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 41:21 Manner of asserting defense
- § 41:22 Burden of proof
- § 41:23 Waiver of defense

### **VI. RELATED DEFENSES AND PRINCIPLES**

- § 41:24 Immunity
- § 41:25 Consent

### **VII. ADVICE OF COUNSEL**

- § 41:26 Advice of counsel in general
- § 41:27 Advice of counsel elements
- § 41:28 When advice of counsel applies
- § 41:29 When advice of counsel does not apply
- § 41:30 Manner of asserting advice of counsel
- § 41:31 Effect of advice of counsel on discovery
- § 41:32 Trial
- § 41:33 Burden of proof

## **CHAPTER 42. RELEASE**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 42:1 Release—In general
- § 42:2 Void pre-event releases
- § 42:3 Valid pre-event releases
- § 42:4 Post-event releases
- § 42:5 Consideration
- § 42:6 Unknown claims



## TABLE OF CONTENTS

§ 42:7 Release of some or all parties

### **II. MANNER OF ASSERTING DEFENSE**

§ 42:8 Pleadings

§ 42:9 Motion

§ 42:10 Trial

§ 42:11 Post-trial

### **III. WAIVER OF DEFENSE; BURDEN OF PROOF**

§ 42:12 Waiver of defense

§ 42:13 Burden of proof

### **IV. RELATED DEFENSES AND PRINCIPLES**

§ 42:14 Indemnity agreements

§ 42:15 Settlement

§ 42:16 Covenant not to sue and covenant not to execute

§ 42:17 Retraxit

§ 42:18 Satisfaction of judgment

## **CHAPTER 43. SETTLEMENT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

§ 43:1 Settlement—In general

§ 43:2 Effect of settlement

§ 43:3 Enforcement of settlement

§ 43:4 Relief from settlement

§ 43:5 Persons affected by settlement

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

§ 43:6 Manner of asserting defense

§ 43:7 Burden of proof

§ 43:8 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

§ 43:9 Release

§ 43:10 Accord and satisfaction

§ 43:11 Stipulation

§ 43:12 Judgment

## **CHAPTER 44. SETOFF AND RECOUPMENT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 44:1 Setoff and recoupment—In general
- § 44:2 Setoff and recoupment in California statutes
- § 44:3 Setoff and recoupment in banking
- § 44:4 Parties affected by setoff and recoupment
- § 44:5 Effect of assignment
- § 44:6 Limitations on setoff and recoupment

### **II. OTHER ISSUES**

- § 44:7 Manner of asserting defense
- § 44:8 Burden of proof
- § 44:9 Waiver of defense
- § 44:10 Cross-action as related principle

## **CHAPTER 45. UNCLEAN HANDS**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 45:1 Unclean hands—In general
- § 45:2 Meaning of unclean hands
- § 45:3 Arises from same transaction
- § 45:4 Applies at law and in equity

### **II. ACTIONS IN WHICH CLEAN HANDS ARE REQUIRED**

- § 45:5 Actions requiring clean hands—In general
- § 45:6 Shareholders' derivative actions
- § 45:7 Declaratory and injunctive relief
- § 45:8 Actions involving forfeiture
- § 45:9 Resulting trust actions
- § 45:10 Marriage dissolution and annulment
- § 45:11 Child custody actions
- § 45:12 Extraordinary writs

### **III. OTHER RULES OF APPLICATION**

- § 45:13 Defensive, not offensive
- § 45:14 No defense when wrongful conduct purged

### **IV. MANNER OF ASSERTING DEFENSE**

- § 45:15 Pleadings

## TABLE OF CONTENTS

- § 45:16 Motion or demurrer
- § 45:17 Sua sponte by court
- § 45:18 Trial
- § 45:19 Post-trial

## V. BURDEN OF PROOF; WAIVER

- § 45:20 Burden of proof
- § 45:21 Waiver of defense

## VI. RELATED DEFENSES AND PRINCIPLES

- § 45:22 One who seeks equity must do equity
- § 45:23 In pari delicto
- § 45:24 Estoppel
- § 45:25 Unconscionability

## CHAPTER 46. UNDUE INFLUENCE

### I. NATURE AND ELEMENTS OF DEFENSE

- § 46:1 Undue influence—In general
- § 46:2 Taking advantage of confidence of others
- § 46:3 Confidential and fiduciary relationships—Generally
- § 46:4 —Family relationships generally
- § 46:5 —Husband and wife
- § 46:6 —Parent and child
- § 46:7 —Siblings and other family relationships
- § 46:8 —Effect of independent advice
- § 46:9 —Effect of advantage obtained
- § 46:10 Apparent authority as basis for unfair advantage
- § 46:11 Weakness of mind as basis for unfair advantage
- § 46:12 Distress or need as basis for unfair and grossly oppressive advantage

### II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER

- § 46:13 Manner of asserting defense
- § 46:14 Burden of proof
- § 46:15 Waiver of defense

### III. RELATED DEFENSES AND PRINCIPLES

- § 46:16 Fraud
- § 46:17 Duress
- § 46:18 Unconscionability

## **CHAPTER 47. WAIVER**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 47:1 Waiver—In general
- § 47:2 Persons who may make waiver
- § 47:3 Rights and privileges that may be waived—Generally
- § 47:4 —Constitutional rights
- § 47:5 —Statutory rights
- § 47:6 —Rights arising from court orders
- § 47:7 —Choice of law
- § 47:8 —Notice
- § 47:9 —Objections
- § 47:10 —Contractual rights
- § 47:11 —Privileges
- § 47:12 —Procedural rights
- § 47:13 Rights and privileges that may not be waived

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF**

- § 47:14 Pleading
- § 47:15 Trial and appeal
- § 47:16 Burden of proof

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 47:17 Estoppel
- § 47:18 Abandonment
- § 47:19 Consent
- § 47:20 Forfeiture

## **CHAPTER 48. COMPARATIVE FAULT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 48:1 Comparative fault—In general
- § 48:2 Proximate cause and cause in fact
- § 48:3 Persons who may assert defense
- § 48:4 Persons against whom defense may be asserted
- § 48:5 Joint and several liability
- § 48:6 Imputation of comparative negligence—Generally
- § 48:7 —Partners and joint venturers
- § 48:8 —Owners, drivers, and passengers
- § 48:9 —Family members
- § 48:10 —Spouses

## TABLE OF CONTENTS

- § 48:11 —Decedents
- § 48:12 —Attorneys
- § 48:13 —Agents
- § 48:14 —Independent contractors
- § 48:15 —Trustee's agents
- § 48:16 Causes of action that are subject to defense

## II. MANNER OF ASSERTING DEFENSE

- § 48:17 Pleadings
- § 48:18 Motion or demurrer
- § 48:19 Trial

## III. BURDEN OF PROOF; WAIVER OF DEFENSE

- § 48:20 Burden of proof
- § 48:21 Waiver of defense

## IV. RELATED DEFENSES AND PRINCIPLES

- § 48:22 Willful misconduct
- § 48:23 Gross negligence
- § 48:24 Assumption of risk
- § 48:25 Firefighter's rule
- § 48:26 Last clear chance
- § 48:27 Superseding cause
- § 48:28 Trivial defect defense
- § 48:29 Sophisticated user defense
- § 48:30 Completed and accepted doctrine
- § 48:31 Component parts doctrine

## CHAPTER 49. EMERGENCY

### I. NATURE AND ELEMENTS OF DEFENSE

- § 49:1 Emergency in general

### II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER

- § 49:2 Manner of asserting defense
- § 49:3 Burden of proof
- § 49:4 Waiver of defense

### III. RELATED DEFENSES AND PRINCIPLES

- § 49:5 Last clear chance

- § 49:6 Responsibility of one causing peril
- § 49:7 Rescue doctrine
- § 49:8 Doctrine or privilege of necessity
- § 49:9 Common enemy doctrine

## **CHAPTER 50. SELF-DEFENSE**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 50:1 In general
- § 50:2 Judged by reasonable appearances
- § 50:3 Degree of force permitted
- § 50:4 Persons who may be protected
- § 50:5 Property that may be protected
- § 50:6 Aggressors may not assert self-defense
- § 50:7 Necessity for warning or retreat
- § 50:8 Defense in actions by bystanders

### **II. OTHER ISSUES**

- § 50:9 Manner of asserting defense
- § 50:10 Burden of proof
- § 50:11 Waiver of defense

## **CHAPTER 51. TRUTH**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 51:1 Truth—In general
- § 51:2 Determination of defamation
- § 51:3 Opinions
- § 51:4 Campaign advertising or communication
- § 51:5 Additional consequences of defamation

### **II. MANNER OF ASSERTING DEFENSE**

- § 51:6 Pleadings
- § 51:7 Motion or demurrer
- § 51:8 Trial

### **III. BURDEN OF PROOF; WAIVER; RELATED DEFENSES AND PRINCIPLES**

- § 51:9 Burden of proof
- § 51:10 Waiver of defense
- § 51:11 Privileges and immunities as related principle

TABLE OF CONTENTS

**CHAPTER 52. LACK OF CAPACITY TO CONTRACT**

**I. NATURE AND ELEMENTS OF DEFENSE**

§ 52:1 Lack of capacity to contract—In general

**II. MINORITY**

- § 52:2 Minority—In general
- § 52:3 Void contracts—Generally
- § 52:4 —Delegation of power
- § 52:5 —Real property contracts
- § 52:6 —Personal property contracts
- § 52:7 —Contracts void as contrary to law
- § 52:8 Voidable contracts—Generally
- § 52:9 —How disaffirmance effected
- § 52:10 —Disaffirmance of entire contract
- § 52:11 —Effect of disaffirmance
- § 52:12 Binding contracts—Generally
- § 52:13 —Necessaries for support
- § 52:14 —Medical and dental care
- § 52:15 —Approval by court
- § 52:16 —Other specialized contracts
- § 52:17 —Emancipated minor
- § 52:18 —Married minor
- § 52:19 —Minor on active duty in Armed Forces
- § 52:20 Waiver, estoppel and ratification

**III. UNSOUND MIND**

- § 52:21 Unsound mind—In general
- § 52:22 Determination of incapacity—Generally
- § 52:23 —Voluntary incapacity
- § 52:24 —Totality of evidence
- § 52:25 —Physical condition and age not determinative
- § 52:26 Void contracts—Persons judicially determined of unsound mind
- § 52:27 —Persons entirely without understanding
- § 52:28 Voidable contracts—Persons of unsound mind but not entirely without understanding
- § 52:29 —Persons susceptible to undue influence
- § 52:30 Binding contracts—Contracts for necessities
- § 52:31 —Contracts approved by court
- § 52:32 —Other contracts

- § 52:33 Persons who may invoke defense
- § 52:34 Burden of proof

#### **IV. DEPRIVATION OF CIVIL RIGHTS**

- § 52:35 Deprivation of civil rights—In general

#### **V. MANNER OF ASSERTING DEFENSE; WAIVER; RELATED DEFENSES**

- § 52:36 Manner of asserting lack of capacity defense
- § 52:37 Waiver of defense
- § 52:38 Lack of capacity to sue as related defense

### **CHAPTER 53. STATUTE OF FRAUDS**

#### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 53:1 Statute of frauds—In general
- § 53:2 Meaning of “note or memorandum”
- § 53:3 Meaning of “subscribed by the party to be charged”
- § 53:4 Person who must sign note or memorandum
- § 53:5 Contents of note or memorandum
- § 53:6 Time of preparing or executing note or memorandum
- § 53:7 Loss or destruction of note or memorandum

#### **II. AGREEMENTS WITHIN STATUTE**

- § 53:8 Agreements within statute in general
- § 53:9 Sale or lease of real property or interest therein
- § 53:10 Commissions on real property transfers
- § 53:11 Sale of goods
- § 53:12 Lease of goods
- § 53:13 Sale of securities
- § 53:14 Sale of personal property not otherwise covered
- § 53:15 Agreements creating security interests and letters of credit
- § 53:16 Agreements to loan money
- § 53:17 Promises to answer for debt of another
- § 53:18 Representations as to credit of another
- § 53:19 Purchasers’ agreements to assume mortgages
- § 53:20 Agreements not to be performed within year
- § 53:21 Agreements not to be performed during lifetime of promisor
- § 53:22 Premarital agreements, transmutation agreements, and agreements made on consideration of marriage



## TABLE OF CONTENTS

§ 53:23 Other agreements

### III. CIRCUMSTANCES OUTSIDE STATUTE

§ 53:24 Agreements outside statute

§ 53:25 Part performance that takes contract outside statute

§ 53:26 Estoppel to assert statute

### IV. CAUSES OF ACTION OUTSIDE STATUTE

§ 53:27 Fraud

§ 53:28 Interference with contract

§ 53:29 Accounting

§ 53:30 Reformation

§ 53:31 Actions to quiet title

§ 53:32 Civil conspiracy

### V. OTHER CONSIDERATIONS

§ 53:33 Persons who may rely on statute of frauds defense

§ 53:34 Effect of failure to satisfy statute of frauds

### VI. MANNER OF ASSERTING DEFENSE

§ 53:35 Pleadings

§ 53:36 Motion or demurrer

§ 53:37 Trial

§ 53:38 Post-trial

### VII. BURDEN OF PROOF; WAIVER OF DEFENSE

§ 53:39 Burden of proof

§ 53:40 Waiver of defense

### VIII. RELATED DEFENSES AND PRINCIPLES

§ 53:41 Equal dignities rule

§ 53:42 Parol evidence rule

## CHAPTER 54. EQUAL DIGNITIES RULE

### I. NATURE AND ELEMENTS OF DEFENSE

§ 54:1 Equal dignities rule—In general

§ 54:2 Specialized equal dignities statutes

§ 54:3 Exceptions to rule

§ 54:4 Unconscionability and estoppel

§ 54:5 Ratification

§ 54:6 Persons who may assert defense

## **II. OTHER ISSUES**

- § 54:7 Manner of asserting defense
- § 54:8 Burden of proof
- § 54:9 Waiver of defense
- § 54:10 Statute of frauds as related defense
- § 54:11 Statutory equal dignities

## **CHAPTER 55. UNCONSCIONABILITY**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 55:1 Unconscionability—In general
- § 55:2 Commercial Code provisions
- § 55:3 Other statutory provisions
- § 55:4 Procedural and substantive aspects of defense

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 55:5 Manner of asserting defense
- § 55:6 Burden of proof
- § 55:7 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 55:8 Unclean hands
- § 55:9 Economic duress

## **CHAPTER 56. LACK OR INADEQUACY OF CONSIDERATION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 56:1 Lack or inadequacy of consideration—In general
- § 56:2 Consideration defined
- § 56:3 Mutuality of obligation
- § 56:4 Inadequate consideration
- § 56:5 Lack of consideration—Illegal consideration
- § 56:6 —Illusory promises
- § 56:7 —Existing legal duty
- § 56:8 —Moral obligation
- § 56:9 When consideration is unnecessary
- § 56:10 Suretyship and consideration

## TABLE OF CONTENTS

- § 56:11 Persons who may assert and against whom defense may be asserted
- § 56:12 Timing of determination whether there is consideration

## **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 56:13 Manner of asserting defense
- § 56:14 Burden of proof
- § 56:15 Waiver of defense

## **III. RELATED DEFENSES AND PRINCIPLES**

- § 56:16 Failure of consideration
- § 56:17 Consideration impossible to ascertain
- § 56:18 Promissory estoppel
- § 56:19 Sham transaction

## **CHAPTER 57. FAILURE OF CONSIDERATION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 57:1 Failure of consideration—In general
- § 57:2 Materiality
- § 57:3 Rescission

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 57:4 Manner of asserting defense
- § 57:5 Burden of proof
- § 57:6 Waiver of defense

### **III. RELATED PRINCIPLES AND DEFENSES**

- § 57:7 Lack or inadequacy of consideration
- § 57:8 Commercial frustration

## **CHAPTER 58. FRUSTRATION OF PURPOSE**

- § 58:1 Nature and elements of frustration of purpose defense
- § 58:2 Manner of asserting defense
- § 58:3 Burden of proof
- § 58:4 Waiver of defense
- § 58:5 Impossibility as related defense

§ 58:6 Frustration of purpose preemption

## **CHAPTER 59. PREVENTION OF PERFORMANCE**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 59:1 Prevention of performance—In general
- § 59:2 Prevention by operation of law
- § 59:3 Prevention by act of creditor
- § 59:4 Persons whose conduct will prevent performance

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 59:5 Manner of asserting defense
- § 59:6 Burden of proof
- § 59:7 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 59:8 Frustration of purpose
- § 59:9 Impossibility
- § 59:10 Acts of God
- § 59:11 Estoppel

## **CHAPTER 60. IMPOSSIBILITY**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 60:1 Impossibility—In general
- § 60:2 Destruction of subject matter
- § 60:3 Act of God or public enemies
- § 60:4 Operation of law
- § 60:5 Extraordinary difficulty and expense
- § 60:6 Mere difficulty from foreseeable cause insufficient
- § 60:7 Time of impossibility
- § 60:8 Partial impossibility
- § 60:9 Temporary impossibility
- § 60:10 Construction of contract to avoid impossibility
- § 60:11 Effect of impossibility
- § 60:12 Impossibility caused by defendant insufficient

### **II. MANNER OF ASSERTING DEFENSE**

- § 60:13 Pleadings

## TABLE OF CONTENTS

- § 60:14 Motion or demurrer
- § 60:15 Trial

### **III. BURDEN OF PROOF; WAIVER OF DEFENSE**

- § 60:16 Burden of proof
- § 60:17 Waiver of defense

### **IV. RELATED DEFENSES AND PRINCIPLES**

- § 60:18 Frustration of purpose
- § 60:19 Mistake

## **CHAPTER 61. ABANDONMENT OR MUTUAL RESCISSION OF CONTRACT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 61:1 Contract abandonment or mutual rescission—In general
- § 61:2 Intent requirement
- § 61:3 Voluntary action requirement
- § 61:4 Abandonment by implication
- § 61:5 New contract created by abandonment
- § 61:6 Effect of abandonment

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 61:7 Manner of asserting defense
- § 61:8 Burden of proof
- § 61:9 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 61:10 Alteration and modification
- § 61:11 Rescission
- § 61:12 Laches
- § 61:13 Abandonment of property

## **CHAPTER 62. RESCISSION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 62:1 Rescission in general

### **II. GROUNDS FOR RESCISSION**

- § 62:2 Lack of consent—Generally

- § 62:3 —Mistake
- § 62:4 —Duress and menace
- § 62:5 —Fraud
- § 62:6 —Undue influence
- § 62:7 Contractual waivers of lack of consent grounds
- § 62:8 Failure of consideration—Generally
- § 62:9 —Fault of nonrescinding party
- § 62:10 —Consideration becomes void
- § 62:11 —Failure in material respect
- § 62:12 Frustration
- § 62:13 Illegality
- § 62:14 Prejudice to public interest
- § 62:15 Generally applicable statutory grounds—Generally
- § 62:16 —Civil Code § 39
- § 62:17 —Civil Code § 1533
- § 62:18 —Civil Code § 1566
- § 62:19 —Civil Code § 1930
- § 62:20 —Civil Code § 2314
- § 62:21 —Commercial Code Article 2
- § 62:22 —Insurance Code
- § 62:23 —Other statutes

### **III. PROCEDURE AND EFFECT OF RESCISSION**

- § 62:24 Procedure and effect of rescission—In general
- § 62:25 Notice of rescission
- § 62:26 Time for rescission
- § 62:27 Restoration of status quo
- § 62:28 Relief available on rescission
- § 62:29 Rescission not available to defaulting party
- § 62:30 Partial or total rescission
- § 62:31 Effect of rescission

### **IV. MANNER OF ASSERTING DEFENSE**

- § 62:32 Pleadings
- § 62:33 Trial
- § 62:34 Post-trial

### **V. BURDEN OF PROOF; WAIVER OF DEFENSE**

- § 62:35 Burden of proof
- § 62:36 Waiver of defense

### **VI. RELATED DEFENSES AND PRINCIPLES**

- § 62:37 Termination of contracts

TABLE OF CONTENTS

- § 62:38 Cancellation of contracts
- § 62:39 Reformation of contracts
- § 62:40 Restitution

## **CHAPTER 63. ACCORD AND SATISFACTION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 63:1 Accord and satisfaction—In general
- § 63:2 Honest dispute typically necessary
- § 63:3 Consideration
- § 63:4 Satisfaction
- § 63:5 Use of checks tendered in full payment
- § 63:6 Accord and satisfaction without dispute

### **II. MANNER OF ASSERTING DEFENSE**

- § 63:7 Pleading
- § 63:8 Motion or demurrer
- § 63:9 Trial
- § 63:10 Post-trial

### **III. BURDEN OF PROOF; WAIVER; RELATED DEFENSES AND PRINCIPLES**

- § 63:11 Burden of proof
- § 63:12 Waiver of defense
- § 63:13 Novation as related defense
- § 63:14 Settlement as related defense

## **CHAPTER 64. NOVATION**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 64:1 Novation—In general
- § 64:2 Previous valid obligation
- § 64:3 Intent and agreement of parties
- § 64:4 Extinguishment of prior contract
- § 64:5 Validity of new agreement
- § 64:6 Consideration
- § 64:7 Oral novation of written agreement
- § 64:8 Effect of novation
- § 64:9 Circumstances that do not constitute novation

## **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 64:10 Manner of asserting defense
- § 64:11 Burden of proof
- § 64:12 Waiver of defense

## **III. RELATED DEFENSES AND PRINCIPLES**

- § 64:13 Accord and satisfaction
- § 64:14 Assignment
- § 64:15 Release

## **CHAPTER 65. MODIFICATION OF CONTRACT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 65:1 Modification of contract—In general
- § 65:2 Modification of oral contract
- § 65:3 Modification of written contract—Generally
- § 65:4 —By writing
- § 65:5 —By executed oral agreement
- § 65:6 —By oral agreement supported by new consideration
- § 65:7 Modification of contracts and third party rights

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 65:8 Manner of asserting defense
- § 65:9 Burden of proof
- § 65:10 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 65:11 Related legal theories—In general
- § 65:12 Abandonment of contract
- § 65:13 Novation
- § 65:14 Waiver and estoppel

## **CHAPTER 66. DESTRUCTION OR MATERIAL ALTERATION OF CONTRACT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 66:1 Contract destruction or material alteration—In general



## TABLE OF CONTENTS

- § 66:2 Alteration of documents under Commercial Code
- § 66:3 Material alterations
- § 66:4 Instruments containing blanks
- § 66:5 Immaterial alterations
- § 66:6 Altered documents returned to original condition
- § 66:7 Duplicate originals

## **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 66:8 Manner of asserting defense
- § 66:9 Burden of proof
- § 66:10 Waiver of defense

## **CHAPTER 67. EXONERATION OF SURETY**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 67:1 Suretyship in general
- § 67:2 Suretyship relationship
- § 67:3 Surety's reliance on debtor's defenses
- § 67:4 Exoneration of surety by conduct of creditor

### **II. MANNER OF ASSERTING DEFENSE; BURDEN OF PROOF; WAIVER**

- § 67:5 Manner of asserting exoneration defense
- § 67:6 Burden of proof
- § 67:7 Waiver of defense

### **III. RELATED DEFENSES AND PRINCIPLES**

- § 67:8 Indemnity
- § 67:9 Insurance
- § 67:10 Letters of credit

## **CHAPTER 68. FAILURE TO ARBITRATE OR BREACH OF ARBITRATION CLAUSE**

### **I. NATURE AND ELEMENTS OF DEFENSE**

- § 68:1 Arbitration—In general
- § 68:2 Arbitration and adhesion contracts
- § 68:3 Who courts may compel to arbitrate
- § 68:4 Neutrality or bias of arbitrator
- § 68:5 Generally applicable arbitration statutes

§ 68:6 Specific arbitration statutes

## **II. MANNER OF ASSERTING DEFENSE**

§ 68:7 Pleadings

§ 68:8 Motion or petition

§ 68:9 Appeal or writ

§ 68:10 Proceedings after arbitration

## **III. OTHER ISSUES**

§ 68:11 Burden of proof

§ 68:12 Waiver of defense

§ 68:13 Repudiation of contract

§ 68:14 Failure to mediate

§ 68:15 Appraisal

§ 68:16 Reference

# **Volume 4**

## **CHAPTER 69. PAYMENT**

### **I. NATURE AND ELEMENTS OF DEFENSE**

§ 69:1 Payment—In general

§ 69:2 Checks as payment

§ 69:3 Notes as payment

§ 69:4 Deposit in financial institution and offer of payment

§ 69:5 Payment to joint obligees

§ 69:6 Payment to agents

§ 69:7 Place of making payment

§ 69:8 Manner of making payment

§ 69:9 Application of payments among obligations

### **II. MANNER OF ASSERTING DEFENSE**

§ 69:10 Pleadings

§ 69:11 Trial

### **III. BURDEN OF PROOF; WAIVER**

§ 69:12 Burden of proof

§ 69:13 Waiver of defense

### **IV. RELATED DEFENSES AND PRINCIPLES**

§ 69:14 Performance

TABLE OF CONTENTS

§ 69:15 Full credit bid

**Table of Laws and Rules**

**Table of Cases**

**Index**