

T H E E X P E R T S E R I E S

Schwing

CALIFORNIA
AFFIRMATIVE DEFENSES

Chapters
26 to 53

Ann Taylor Schwing

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CALIFORNIA AFFIRMATIVE DEFENSES

2004 EDITION

By

ANN TAYLOR SCHWING

McDonough, Holland & Allen
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THE EXPERT SERIES

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ABOUT THE AUTHOR

Ann Taylor Schwing is an attorney in Sacramento, California, of counsel to McDonough, Holland & Allen since 1986. She received her B.A. from the University of California at Berkeley in 1968, graduating cum laude, and her J.D. from Boston University School of Law in 1975, graduating cum laude, having served on the editorial board of the Boston University Law Review. She clerked for Chief Judge Thomas J. MacBride of the United States District Court, Eastern District of California from 1977 through 1980. From 1984 through 1987, Schwing was a member of the California State Bar Standing Committee on Rules and Procedures of Court and served as Chair of that Committee in 1986–1987. She is active in the Anthony M. Kennedy Inn of Court and serves on its Executive Committee (1989–present). She has been a member of the Board of Trustees of The Land Trust of Napa County 1995–2001 and a second term 2002–2008 and was its president 1998–2001. She is a member of the Ninth Circuit Task Force on Self-Represented Litigants (2003–2006) and a member of and reporter for the Judicial Advisory Committee of the Eastern District of California, and was a member of the Ninth Circuit Advisory Board (2000–2003). She has served as a lawyer delegate to the Ninth Circuit Judicial Conference and as a member of and reporter for the Civil Justice Reform Act Committee for the Eastern District of California. She is author of *Open Meeting Laws 2d* (2000) and its first edition, and co-author with Tamar Frankel of *The Regulation of Money Managers* (2d ed. 2001). She is also a contributing editor to *Black's Law Dictionary*® (7th ed. B. Garner, ed. 2000).

PREFACE 2004

The supplements and pocket parts of prior years are now behind us, and this preface introduces the first edition of this treatise to be annually updated. Also new with this edition is a significant revision and expansion of Chapter 25, the statute of limitations chapter. This edition fully updates the many treatises and other secondary sources, and its cases and statutes are current as of May 2003. A number of months have elapsed since then, and I regret that the treatise could not be more current on the date of publication. Both West and I will work hard to remedy the delay in future annual editions.

In future years, West and I have agreed to make every effort to make the new edition available by April, three months after its contents are current. Once the 2003 legislative year is concluded, I will prepare an update to bring the treatise current to the end of 2003. In February, West will make this update available on Westlaw, and the update will also be available for free on my website www.openmeetinglaws.com.

In addition to keeping this treatise up to date, I plan to expand and revise the existing chapters as needed. Some chapters require updating much more often than others, due to legislative changes and active appellate decisions. Please communicate your special interests in early revision of particular chapters. My email is aschwing@mhalaw.com, and I'll give careful considerations to any suggestions, corrections or additions you may send.

Best wishes to you, dear reader. I started writing this treatise in 1986 because it filled a need not met by any other books in the library. It has expanded in the intervening years, and I hope you find it fills your needs. I've often thought of writing the companion treatise on California Causes of Action, but publishers have said no one wants it. If you disagree, please speak up.

While working on the revisions for this new annual edition and the revisions to chapter 25, I enjoyed the valuable assistance of Nicole Moscini and Vasilios S. Spyridakis. Vasilios is now in his first year of law school at the University of Cincinnati; he worked the summer of 2002 and the spring of 2003 after graduating summa cum laude from Cal. He checked many quotations and filled in the missing district information for a couple thousand Court of Appeal citations. This is mind-numbing work, but it contributes significantly to the value of the treatise for practicing attorneys. Nicole is now in her third year of law school at University of California Davis, and she could and did handle more varied and complex assignments on this and my other books with expertise and good cheer. I am grateful for their assistance and friendship.

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I continue to work happily at McDonough Holland & Allen PC. The firm has supported and encouraged me in this treatise, my other books and other activities, and I am grateful. My husband Charlie remains the best and brightest part of my life. There are no words to express what he means to me.

ANN TAYLOR SCHWING

November 2003
Sacramento, California

PREFACE TO SECOND EDITION

Many changes have occurred since the initial publication of the first two volumes of this treatise in 1988. The Probate Code has been repealed and reenacted in its entirety and revised in major respects both substantively and in the placement of various provisions. The Family Code has been enacted, drawing its provisions from the Civil, Civil Procedure, Health and Safety, Welfare and Institutions, and other California Codes. The Public Contract Code has been enacted, drawing provisions from the Civil, Government, and other California Codes. Numerous statutes cited in the original treatise have been amended, revised, or repealed, and others that might appropriately have been cited have been enacted. These statutory changes have been reflected in the following pages. New court decisions have altered the governing law or added new dimensions to existing law. These decisions are cited and discussed as appropriate.

This treatise adds significant new materials. Forms for complaint paragraphs, affirmative defenses, and jury instructions have been added throughout when appropriate. Other relevant forms, such as a tolling agreement and a notice of rescission, are provided. The forms refer to “plaintiff” and “defendant,” on the assumption that the names of the specific parties will typically be substituted. Obviously, the forms should be revised to fit the circumstances of the particular cases in which they are used. Forms of jury instructions are not provided when BAJI already includes a form adequately addressing the subject matter.

I welcome suggestions and corrections. Readers are invited to contact me by mail at 555 Capitol Mall, Suite 950, Sacramento, CA 95814; or by telephone at (916) 325-4501; or by e-mail at aschwing@mha-law.com.

The treatise comes home to California with this edition. A new publisher, Bancroft-Whitney, is publishing the second edition in place of West Publishing Company, the publisher of the first edition. I am grateful to both publishers for making the transition as smooth as possible, and I look forward to a long and fruitful relationship with Bancroft-Whitney.

Some things have not changed. McDonough, Holland & Allen continues to provide a warm and comfortable environment for my writing, free of stress and filled with encouragement. I still have not found words to express the professional satisfaction and personal joy that my relationship with McDonough, Holland & Allen provides every day. My continuing thanks go to McDonough, Holland & Allen and its fine attorneys, librarians, paralegals, and staff who have enabled me to work on this treatise.

CALIFORNIA AFFIRMATIVE DEFENSES

Ani Kindall (J.D., 1984) provided steadfast assistance throughout the completion of the first edition. She contributed enormously to the accuracy and breadth of the four original volumes and, through them, to these volumes. She has remained a close friend since going to more traditional legal employment in 1990. Since then, a number of short-term and part-time assistants have checked cites and quotations in pocket parts and in this second edition, including Stacey Bernard Karpi-nen, Alexa Swerdloff Armanino and, finally, Jon Soneff who checked all statutes in the completed manuscript. I am grateful to all of them for their help and friendship.

My husband Charlie has supported my goals and encouraged me at every step. I would surely have faltered without his help, but he has always shared his strength when I had none.

ANN TAYLOR SCHWING

November 1995
Sacramento, California

PREFACE TO FIRST EDITION

California law contains approximately one hundred affirmative defenses that may be raised by a defendant faced with the necessity of responding to a complaint. Although a very few of them, such as lack of subject matter jurisdiction and laches, may bar plaintiff's recovery even if the defendant neglects to assert them, the vast majority are waived if not asserted in a timely and proper manner. No one source has ever gathered the various defenses recognized in California law into a single reference. These volumes contain the jurisdictional and procedural defenses. Companion volumes will contain substantive defenses. The materials set out for each defense follow the same pattern: the nature and elements of the defense, the manner of asserting the defense, the burden of proof for the defense, waiver of the defense, and any related defenses and principles. The content of these sections is determined by the content of California law.

This work is devoted to California law. When pertinent, citation is made to federal cases and other authorities outside California, but no effort has been made to address the law of other jurisdictions. Within California, every effort has been made to provide a comprehensive explanation and analysis of the nature and scope of each affirmative defense. Unavoidably, however, certain defenses have received greater attention than others as a result of extraneous circumstances during the process of research and writing.

This work and its companion volumes on substantive defenses have taken a long time to research and write, much longer than I had contemplated. No matter how long it has taken, however, I have enjoyed the task. In December 1986 I became of counsel at McDonough, Holland & Allen. The firm has provided a warm and comfortable environment, free of stress and filled with encouragement, where I have been able to write without impediment. I have no words to express the professional satisfaction and personal joy that my relationship with McDonough, Holland & Allen provides.

I have been blessed since May 1986 by the steadfast assistance of Ani Kindall (J.D., 1984). Ani has contributed enormously to the accuracy and depth of these books and has made my task far easier and smoother than I could have imagined. No other author has ever enjoyed as helpful and wonderful an assistant.

Finally, I have been blessed beyond description by a husband who has supported my goals and encouraged me at every step. Without his

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help, I would surely have faltered many times over, but he gave me strength when I had none. I dedicate far more than this book to him.

ANN TAYLOR SCHWING

August 1988
Sacramento, California

FOREWORD

Daniel Webster said, “The power of clear statement is the great power at the bar.” Ann Taylor Schwing possesses the power of clear statement. Her most recent work, *California Affirmative Defenses 2d*, is tightly organized, clearly written, and extremely useful for the busy lawyer and the legal scholar.

If you ever wondered whether your client would benefit from the defenses of “retraxit,” “force majeure” or “ripeness,” it is all in here. More important, the more common and frequently occurring affirmative defenses such as lack of jurisdiction, *res judicata*, failure to state a cause of action, uncertainty, collateral estoppel, and many other affirmative defenses are discussed in detail, yet not in too much detail. Ms. Schwing’s work strikes just the right balance between too much and not enough.

Ms. Schwing’s scholarship is superb. For every defense she discusses and cites California case and statutory law and selectively refers the reader to useful secondary authority.

These are the books that you want to consult when you need a concise, yet thorough and useful, discussion of the law relating to virtually every affirmative defense available under California law. Not only does *California Affirmative Defenses 2d* contain a useful and understandable discussion of the law, the author also has included the relevant jury instructions and pleading allegations. This feature will be extremely helpful to the lawyer preparing to answer a complex or unusual complaint. I know of no other source for the kind of clear exposition, analysis, and practical application that relates specifically to affirmative defenses.

For many years, I have known of Ann Schwing’s excellent reputation as a lawyer, writer and scholar. I also have had the pleasure of working with her in the Anthony M. Kennedy American Inn of Court. This experience has given me the opportunity to observe these qualities firsthand. She brings a wealth of experience, technical expertise, and practical judgment to this work.

The civil bar is fortunate to have this outstanding treatise at hand to help ease the many pitfalls of civil pleading and the subsequent litigation.

FRED K. MORRISON
Associate Justice
Third District Court of Appeal

December 1995
Sacramento, California

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