

## CHAPTER 263

## PLEADINGS

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**263.01 Forms.** The forms of pleading in civil actions in courts of record and the rules by which the sufficiency of the pleadings are determined are prescribed by chs. 260 to 296, 421 to 427 and 810 to 818.

History: 1973 c 189

**263.02 Complaint.** The first pleading on the part of the plaintiff is the complaint.

**263.03 Complaint, contents.** The complaint shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial and the names and, in the contents if known, the addresses of the parties to the action, if such addresses are not specified in the body of the complaint.

(2) A plain and concise statement of the ultimate facts constituting each cause of action, without unnecessary repetition.

(3) A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated.

(4) In an action by or against a corporation the complaint must aver its corporate existence and whether it is a domestic or a foreign corporation.

**Cross references:** For effect of demand for judgment or want of such demand in the complaint in case of judgment by default, see 270.57.

As to the effect of not denying an allegation in the complaint of corporate or partnership existence, see 891.29 and 891.31.

Estoppel from asserting 81.15 as a defense was properly applied by the trial court in sustaining the validity of the complaint notwithstanding failure of plaintiff to so specifically plead, for the demurrer interposed by the city precluded the plaintiff from asserting estoppel, and plaintiff could not know whether the city would rely upon the written notice requirement of the statute. *Harte v Eagle River*, 45 W (2d) 513, 173 NW (2d) 683.

A complaint alleging that a person whose name does not appear on a note is liable as a guarantor of it does not state a cause of action. *Jennaro v. Jennaro*, 52 W (2d) 405, 190 NW (2d) 164.

Waiver need not be specifically pleaded, but estoppel, or evidence thereof, must be. *Knapke v. Grain Dealers Mut. Ins. Co.* 54 W (2d) 525, 196 NW (2d) 737.

Where plaintiff's demand is liquidated, he may recover interest without alleging the fact or claiming interest in his prayer for relief. *Bigley v. Brandau*, 57 W (2d) 198, 203 NW (2d) 735.

**263.04 Uniting causes of action.** The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately.

Where the actions are equitable in nature, the requirement that all parties be affected does not apply and the court will retain jurisdiction. *Antigo Superior N. Home, Inc v. First Federal*, 51 W (2d) 196, 186 NW (2d) 265.

Where plaintiff sues for an accident occurring in one county she cannot join as defendant a hospital in another county which is alleged to have aggravated her injuries, even though the original tort-feasor may be responsible for all the damages. *Butzow v. Wausau Memorial Hospital*, 51 W (2d) 281, 187 NW (2d) 349.

**263.05 Pleadings by defendant.** The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within 20 days after the service of the copy of the complaint. If a guardian ad litem is appointed for a defendant pursuant to s. 260.22, the guardian ad litem shall have 20 days after his appointment to serve a response to the complaint.

History: Sup Ct order, 50 W (2d) vii

**Comment of judicial council, 1971:** This amendment gives a guardian ad litem for a defendant 20 days after his appointment to serve a response to the complaint [Re Order effective July 1, 1971]

**263.06 Demurrer to complaint.** There shall be but a single demurrer to the complaint in which the defendant subject to the provisions of ss. 263.11 and 263.12 shall join any or all of the following objections to defects appearing upon the face of the complaint:

(1) That the court lacks jurisdiction over (a) the person of the defendant, or (b) the subject matter; or

(2) That the plaintiff has not legal capacity to sue; or

(3) That there is another action pending between the same parties for the same cause; or

(4) That there is a defect of parties, plaintiff or defendant; or

(5) That several causes of action have been improperly united; or

(6) That the complaint does not state facts sufficient to constitute a cause of action; or

(7) That the action was not commenced within the time limited by law.

**Cross references:** As to improper venue, see 261.03

Lack of jurisdiction over the person, see 262.16

It is permissible for a party to alternatively plead in a single complaint causes of action for subrogation and contribution, allowance of which permits a full determination of all the issues in one suit; hence it is no longer necessary to first attempt to recover on an indemnity theory, failing which, to commence a second action based on contribution. *Heritage Mut Ins. Co. v. Thoma*, 45 W (2d) 580, 173 NW (2d) 717.

A demurrer to a petition in a probate proceeding is not proper when it is necessary to introduce new facts or ask the court to take notice of records. This would constitute a speaking demurrer which is not recognized in this state. *Estate of Rosenstein*, 47 W (2d) 494, 177 NW (2d) 372.

See note to 402.718, citing *Northwestern Motor Car, Inc. v. Pope*, 51 W (2d) 292, 187 NW (2d) 200.

Demurrer to a third-party complaint by an impleaded defendant permits challenge to the original complaint, where liability of the impleaded party is contingent upon the defendant's liability under the original complaint. *Jennaro v. Jennaro*, 52 W (2d) 405, 190 NW (2d) 164.

Where a probate court can give a remedy in the probate proceeding, the circuit court should sustain a demurrer to a complaint against a personal representative. *Thorp Sales Corp. v. Lease*, 53 W (2d) 195, 191 NW (2d) 885.

See note to 402.607, citing *Schnabl v. Ford Motor Co* 54 W (2d) 345, 195 NW (2d) 602, 198 NW (2d) 161.

In an action for accounting of profits from real estate, all parties having an interest must be made parties. *Anderson v. Anderson*, 54 W (2d) 666, 196 NW (2d) 727.

When a complaint states a cause of action for compensatory damages, a demurrer will not lie to a prayer for punitive damages. *Dracger v. John Lubotsky Motor Sales*, 56 W (2d) 419, 202 NW (2d) 20.

**263.07 General demurrer limited.** In case of a general demurrer to a complaint, if upon the facts stated, construing the pleading as provided in section 263.27, plaintiff is entitled to any measure of judicial redress, whether equitable or legal and whether in harmony with the prayer or not, it shall be sufficient for such redress.

**263.08 Demurrer to whole or part.** The demurrer may be taken to the whole complaint or to any of the alleged causes of action therein; and the defendant may demur to one or more of the several causes of action stated in the complaint and answer the residue.

**263.09 Ground of demurrer to complaint to be stated.** The demurrer shall distinctly specify the grounds of objection to the complaint, in the language of s. 263.06 relied upon, adding, if based upon the first, second or fourth subsection, a particular statement of the defect, and if based upon the seventh, a reference to the statute claimed to limit the right to sue. Unless it does so, the demurrer may be stricken.

**263.10 Amended complaint to be served.**

If the complaint be amended a copy thereof must be served and the defendant must demur or answer thereto within twenty days thereafter or the plaintiff, upon filing proof of service thereof and of the defendant's omission, may obtain judgment in the manner provided for a failure to answer in the first instance.

**263.11 Answer may state grounds of demurrer.**

When any of the matters enumerated in section 263.06 do not appear upon the face of the complaint the objection may be taken by answer; and the objection that the action was not commenced within the time limited by law may in any case be taken by answer.

**263.12 Waiver by not demurring or answering.**

Except as provided in s. 262.16, if not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action.

**263.13 Answer, contents.** The answer of the defendant must contain:

(1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

(2) A statement of any new matter constituting a defense, in ordinary and concise language, without repetition.

**(3) The address of the defendant.**

Negative pregnant occur in an answer where denials are stated in the very words employed in the complaint, such denials being condemned because they are pregnant with alternative admissions to the allegations of the complaint. The maker's denial that he received the face amount of the note and that a loan was made did not thereby constitute inferential allegation of gift as a defense, for the note under seal presumptively evidenced sufficient consideration, and additionally the essential elements of a completed gift necessary to set forth a valid defense were absent. *Prestin v Baumgartner*, 47 W (2d) 574, 177 NW (2d) 825.

While under the general rule estoppel must be pleaded when the party relying thereon has an opportunity, and usually estoppel asserted as a matter of defense must be raised by answer, exception to that rule is recognized where the facts showing estoppel are in issue and a part of the case made by the pleadings, in which event the evidence showing estoppel is admissible for any purpose under the pleading and available as a defense without being specially pleaded. *Madsen v Holmes*, 57 W (2d) 148, 203 NW (2d) 865.

**263.14 Counterclaim.** (1) A defendant may counterclaim any claim which he has against a plaintiff, upon which a judgment may be had in the action.

(2) The counterclaim must be pleaded as such and the answer must demand the judgment to which the defendant supposes himself entitled upon his counterclaim.

(3) This section does not extend to or include claims assigned to a defendant after he was served with the summons.

Defendant was not entitled to a jury trial where he asserted a legal defense in his answer to an action to foreclose a mortgage 270 07 (1) has never been construed to require a jury trial as to a legal defense in an equitable action unless he is compelled by law to raise the defense by counterclaim. *Mortgage Associates v. Monona Shores*, 47 W (2d) 171, 177 NW (2d) 340.

**263.15 Cross complaint and third party actions.** (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. Such relief may be demanded by a cross complaint or counterclaim, served upon the party against whom the relief is asked or upon such person not a party, upon his being brought in.

(2) The court or the judge thereof may make such orders for the service of the pleadings, the proceedings in the cause, and the trial of the issues as are just.

(3) The provisions of this chapter with respect to demurrers and answers to complaints apply to and govern pleadings to cross complaints and third-party complaints, except that no answer need be made to a cross or third-party

complaint seeking only contribution, the allegations thereof being deemed controverted.

(4) A cross complaint may be served without leave of court within 40 days after issue is joined in the original action. Thereafter leave of court on notice and hearing or stipulation of the parties must be obtained.

**Cross reference:** See 260.185 for provision as to adding new defendants.

A defendant sued by a corporation in his individual capacity cannot bring in other stockholders by bringing a 3rd-party suit in their representative capacity as stockholders. Furthermore, the cause of action belongs to the company, not to the defendants. *Campfire Land Co v Jolin*, 55 W (2d) 229, 198 NW (2d) 593.

**263.16 Several defenses allowed.** The defendant may set forth, by answer, all defenses and counterclaims he has, whether legal or equitable, or both; they must be separately stated.

**263.17 Demurrer to answer or counterclaim.** There shall be but a single demurrer to the answer. The plaintiff may, within 20 days, demur to the answer or any alleged defense therein when it does not state a defense; and to any counterclaim therein where it appears upon the face thereof either that:

(1) The court lacks jurisdiction of the subject matter; or

(2) The defendant has not legal capacity to maintain the same; or

(3) Another action is pending between the same parties for the same cause; or

(4) There is a defect of parties; or

(5) The counterclaim does not state a cause of action; or

(6) The cause of action stated is not pleadable as a counterclaim; or

(7) The counterclaim is barred by the statutes of limitations.

A demurrer to a counterclaim cannot be sustained on the ground of matter alleged in the complaint. Items of damages in a prayer for relief are not challengeable by demurrer. *Hertz Corp v. Red Rooster Cheese Co*, 55 W (2d) 701, 200 NW (2d) 603.

**263.175 Demurrer to answer; ground to be stated.** The demurrer shall distinctly specify the grounds of objection to the answer, in the language of s. 263.17 relied upon, adding, if to a counterclaim and based upon s. 263.17 (2) or (4), a particular statement of the defect, and if based on s. 263.17 (7), a reference to the statute claimed to limit the right to sue. Unless it does so, the demurrer may be stricken.

**263.18 Demurrer to answer; demurrer and reply to counterclaim.** The plaintiff may demur to one or more of the defenses and may demur to one or more of the counterclaims and reply to the residue of the counterclaims.

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When any of the matters enumerated in s. 263.17 do not appear upon the face of the counterclaim, the objection may be taken by reply; and the objection that the counterclaim is barred by the statute of limitations may in any case be taken by reply.

**263.19 Waiver by not demurring or replying.** If not raised by demurrer or reply, the plaintiff waives all objections to a counterclaim except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action on a counterclaim. If not raised by demurrer, the plaintiff waives the objection that the answer or any alleged defense therein fails to state a defense, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense.

**263.20 Reply; what to contain.** (1) When the answer contains a counterclaim, the plaintiff may, within 20 days, if he does not demur thereto, reply to the counterclaim, except that no reply need be made to a counterclaim seeking only contribution, the allegations thereof being deemed controverted. Such reply must contain:

(a) A specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief.

(b) A statement of any new matter constituting a defense, in ordinary and concise language, without repetition.

(2) The plaintiff may set forth by reply as many defenses to the counterclaims as he may have; they must be separately stated and refer to the counterclaims which they are intended to answer in such manner that they may be intelligibly distinguished.

Plaintiff cannot plead equitable estoppel to an answer setting up the defense of a statute of limitations, since no reply is permitted. *Poeske v. Estreen*, 55 W (2d) 238, 198 NW (2d) 625

**263.21 Judgment by default on counterclaim.** If the answer contain any counterclaim to which the plaintiff fails to reply or demur, within the time prescribed by law, the defendant may move, on a notice of not less than eight days, for such judgment as he is entitled to upon such counterclaim, and if the case require it an assessment of damages may be made or he may at the trial have the counterclaim treated as established without proof.

**263.22 Demurrer to reply; waiver.** The defendant may, within 20 days, demur to the reply or any defense therein, when, upon the face thereof, it does not state facts sufficient to

constitute a defense, stating such grounds. The demurrer shall distinctly specify the grounds of objection to the reply, and unless it does so, the demurrer may be stricken. If not raised by demurrer, the defendant waives objection to the failure of the reply to state a defense, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense to the counterclaim.

**263.225 Demurrer; stipulation.** Where a demurrable objection does not appear on the face of the complaint, cross complaint or counterclaim, the parties to the action by their respective attorneys may stipulate in writing that the issues of fact and law with respect thereto shall be determined by the court in advance of the trial on the merits.

**Cross reference:** Decision on stipulated matter is appealable under 274.33 (3)

**263.227 Judgment on the pleadings.** Judgment on the pleadings may be entered in any civil action or special proceeding. Notice of motion for judgment on the pleadings and the documents in support thereof shall be served within 40 days after issue is joined, subject to enlargement of time as provided in s. 269.45.

To prevail on a motion for judgment on pleadings where issue in the action is joined by answer containing denials and affirmative defenses, a plaintiff to achieve his objective must demonstrate that there are no sufficient legal defenses set forth in either the denials or the matters of affirmative defense alleged in the answer. A negative pregnant is ineffectual to raise an issue in a responsive pleading only when the negative pregnant admits a fact material to the opposing party's cause of action. After denial of the motion there should be a trial of the issues. *All Electric Service, Inc. v. Matousek*, 46 W (2d) 194, 174 NW (2d) 511

**263.23 Pleadings, how subscribed and filed.** Every pleading must be subscribed by the party or his attorney and must be filed not later than ten days after the action is noticed for trial. In case of a failure by either party to file his pleading it may be stricken out, on motion, unless permitted to be filed on such terms as the court shall think proper; or the opposite party may file a copy thereof.

**263.24 Verification of pleading.** Every pleading, except a demurrer, must be verified; but the verification may be omitted when an admission of the allegations might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading. Where service is made either pursuant to ch. 262 or otherwise, no defect or irregularity in a verification shall defeat the jurisdiction of the court but shall be ground for a timely motion to strike the pleading unless

amended. A guardian ad litem may verify pleadings for his ward.

History: Sup Ct order, 50 W (2d) vii.

Comment of judicial council, 1971: This section provides that a guardian ad litem may verify pleadings for his ward. We believe this to be a clarification of present practice. [Re Order effective July 1, 1971]

**263.25 Form of verification.** (1) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief and as to those matters that he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may be made by an agent or attorney if no such party be within the county where the attorney resides, or if the action or defense be founded upon a written instrument in such attorney's possession, or if all the material allegations of the pleading be within his personal knowledge or belief.

(2) When the pleading is verified by any person other than a party he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject and the reason why it is not made by the party, and if made on knowledge shall state that the pleading is true to his knowledge, and if on his belief, that he believes it to be true.

(3) When a corporation is a party the verification may be made by any officer thereof. In actions wherein the state or any officer thereof in his official capacity is a party, verification of pleadings shall not be required by either the state or anyone in its behalf or by any such officer, but all pleadings made by other parties in actions wherein the state or any such officer is a party shall be verified as provided in this section. In all actions wherein the state is the sole party plaintiff and an unverified answer shall be interposed and the demand of the complaint is for money judgment, judgment may be taken by default with the same force and effect and in the same manner as though the complaint were duly verified.

**263.26 Admission by not denying.** Every material allegation of the complaint, and of a counterclaim not controverted as prescribed, shall, for the purposes of the action, be taken as true. But the allegation of new matter in an answer not pleaded as a part of a counterclaim or of new matter in a reply is deemed controverted.

**263.27 Pleadings liberally construed.** In the construction of a pleading for the purpose of

determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties.

**263.28 Variances, materiality.** (1) No variance between the allegation in a pleading and the proof shall be deemed material unless it misleads the adverse party to his prejudice. Whenever it shall be proved to the satisfaction of the court that a party has been so misled, and in what respect he has been misled, the court may order the pleading amended upon such terms as may be just.

(2) When the variance is not material, the fact shall be found in accordance with the evidence and the court may order an amendment without costs.

**263.31 When failure of proof.** When, however, the allegation of the cause of action, counterclaim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within section 263.28, but a failure of proof.

**263.32 Accounts; bill of particulars.** It is not necessary for a party to plead the items of an account but he shall deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account verified by his oath or that of his agent or attorney, that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account and may in all cases on notice order a bill of particulars of the claim of either party to be furnished.

**263.33 Judgments, how pleaded.** In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

**263.34 Conditions precedent in contract, how pleaded.** In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted the party pleading shall be bound to establish on the trial the facts showing such performance.

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**263.35 Pleading by copy; notes, etc.** In an action, defense or counterclaim founded upon an instrument for the payment of money only it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

**263.37 Libel and slander, how pleaded.** In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matters out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff shall be bound to establish on the trial that it was so published or spoken.

**263.38 Answer in libel and slander.** In an action for libel or slander the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances.

**263.39 Answer in action for distrained property.** In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made and that the property distrained was at the time doing damage thereon shall be good without setting forth the title to such real property.

**263.40 Pleadings in special proceedings.** In special proceedings pending on appeal, the court may direct an issue of fact to be made up between the parties by complaint and answer, and such issue shall be tried by the court, or by the jury, as the court shall prescribe.

**263.42 Sham pleadings may be stricken out.** A sham or frivolous answer, reply or defense may be stricken out on motion and upon such terms as the court may impose.

**263.43 Irrelevant, scandalous and indefinite pleadings.** If any pleading contains irrelevant, redundant or scandalous matter it may be struck out, with costs, on motion, and the court may order the attorney who signed the

same to pay costs. When a pleading is so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may on motion order the pleading to be made definite and certain. The time to serve a required responsive pleading is extended 10 days after the service of notice of entry of an order made upon the motion, unless the order fixes a different time.

The last sentence modifies and applies to both preceding sentences. *Production Credit Assn v Goede*, 50 W (2d) 509, 184 NW (2d) 830.

**263.44 Motions to strike out.** A party may move upon one notice to strike out an answer or reply as sham, and frivolous, and irrelevant, and the court or presiding judge, on such motion, may strike out any matter or defense as sham, any other as frivolous, or as irrelevant or otherwise, as the pleading shall be found to be.

**263.45 Amendments of course to pleadings.** Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, within twenty days after service thereof. But if it shall appear to the court that such amendment was made for the purpose of delay or that the same was unnecessary and the opposite party will thereby lose the benefit of a term at which the action may be tried, the amended pleading may be stricken out and such terms imposed as may seem just.

**263.46 Proceedings on decision of demurrer.** After the decision of a demurrer the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over or to withdraw the demurrer on such terms as may be just. If a demurrer to a complaint be sustained upon the ground that several causes of action have been improperly united the court may, in its discretion and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

**263.47 Supplemental pleadings.** The plaintiff and defendant, respectively, may be allowed, on motion and on such terms as may be just, to make a supplemental complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.