

Eight tips to keep your case in the ring

Plaintiffs seldom move for summary judgment but the defense sees it as a knockout round

By Jeffrey Ehrlich

You need not have been practicing law for long to understand the important role that motions for summary judgment and summary adjudication play in the civil-litigation process. They can allow a defendant to terminate the lawsuit in its entirety. Indeed, this is generally recognized as *the* purpose of the summary judgment procedure. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 ["The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute."])

But these motions can play a vital role in litigation even when the defendant fails to achieve a complete victory and terminate the lawsuit. Using a motion for summary adjudication, a defendant can radically limit the scope of its potential liability by eliminating a claim for punitive damages or whole causes of action (such as the bad-faith claim in an insurance-coverage dispute.). These motions can also have great value for plaintiffs. A plaintiff can use a summary adjudication motion to establish that the defendant owed it a duty, or to eliminate a defendant's affirmative defenses. And sometimes simply getting past the defense's summary judgment motion will be a catalyst for settlement because it means that the defendant faces an imminent trial.

In this article I will offer some tips for getting better results in dealing with summary judgment and summary adjudication motions. Some tips will deal with

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how to make a more effective motion; others will deal with how to oppose one. This article is not, however, intended to provide anything close to a comprehensive analysis of how to make or oppose summary judgment motions.

1. The plaintiff's "affirmative" motion: duty does not equal breach

Let's start with getting our terms clear. A "summary judgment" is a dispositive motion; when granted it terminates the action and results in an appealable judgment in favor of the prevailing party. (Rylaarsdam & Edmon, *California Practice Guide – Civil Procedure Before Trial* (Rutter 2014) ("*Civil Procedure*") § 10:26.) Summary adjudication motions allow a court to adjudicate a limited set of issues specified in California's summary judgment statute, section 437c, subdivision of the Code of Civil Procedure. Summary adjudication is authorized to adjudicate one or more causes of action within the action; one or more affirmative defenses within the action; that there is no valid claim for punitive damages; or that the defendant did, or did not, owe the plaintiff a duty. (Code Civ. Proc., § 437c, subd.(f)(1).) That's it.

Moreover, "A motion for summary adjudication shall be granted only if it *completely disposes* of a cause of action, an affirmative defense, a claim for [punitive] damages, or an issue of duty." (Code Civ. Proc. § 437c, subd. (f)(1), emphasis added.) What this means is that a plaintiff cannot generally obtain summary adjudication on the issue of the defendant's liability, while having the amount of damages determined by a jury. (See *Paramount Petroleum Corporation v. Superior Court* (2014) 227 Cal.App.4th 226, 238.)

Federal courts use slightly different nomenclature. Rule 56 of the Federal Rules of Civil Procedure refers to "summary judgment" and "partial summary judgment." The latter appears to give district courts far wider latitude in what they can adjudicate than section 437c, subdivision (f)(1).

In theory, a plaintiff can win a case on summary judgment. Section 437c makes summary judgment available when it is shown that "an action has no merit *or* that there is no defense to the action." So, a plaintiff who could show that the defendant had no defense to the claim would be entitled to summary judgment. But this would mean proving every element of the plaintiff's case – and the amount of damages – and defeating all the defendant's affirmative defenses as a matter of law.

Given the factual issues involved, that would be a daunting enterprise. Remember, even a single triable issue of fact will defeat a summary judgment motion. As the *Civil Procedure* treatise explains, "The requirement that there be "no triable issue of material fact" means that summary judgment can be granted only where the essential facts are either conceded or beyond dispute. If there is one, single material fact in dispute, the motion *must* be denied." (Rylaarsdam & Edmon, *California Practice Guide – Civil Procedure Before Trial* (Rutter 2014) § 10:28, emphasis in text.)

So, plaintiffs seldom move for summary judgment. They do, however, move for summary adjudication, typically either seeking to establish an issue of duty, or to knock out one of the defendant's affirmative defenses. So we'll start by taking a closer look at these kinds of motions.

First, what is an "issue of duty"? Is it limited to the element of "duty" in negligence cases? No. Summary adjudication is available on either a tort or contractual issue of duty. (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 518.) As the *Civil Procedure* treatise notes, "Adjudicating a liability insurer's duty to defend is probably the most common use of CCP § 437c(f)(1)'s "duty" adjudication provision." (*Civil Procedure*, § 10:44.5.) Summary adjudication of an insurer's duty to indemnify, e.g., on coverage, is also available. (See *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945 972 [approving use of the summary-adjudication procedure to determine whether an insurer owed its insured a duty to indemnify].)

But be aware that in the summary adjudication context "an issue of duty" is an inquiry into whether or not the duty exists – not whether or not the defendant actually breached the duty. This distinction was highlighted in *Paramount Petroleum Corporation v. Superior Court*, 227 Cal.App.4th at p. 238. There, the plaintiff had obtained an order granting summary adjudication of the defendant's liability for breach of contract, with the understanding that the amount of damages would be determined at trial. The Court of Appeal reversed, finding that this was an improper summary adjudication order under section 437c, subdivision (f)(1).

A short digression: The *Paramount Petroleum* decision explains that the current version of section 437c is, quite frankly, confusing and poorly drafted. For example, "technically speaking, the first sentence of the statute does not appear to allow a *plaintiff* to move for summary adjudication of a cause of action on the basis that the cause of action is indisputably meritorious." (*Id.*, 227 Cal.App.4th at p. 239.) But the court was able to resolve this technicality by looking at prior versions of the statute and the legislative history of its amendments. (*Ibid.*) (A similar confusing aspect of the statute is its reference to summary adjudication of "an issue of damages" when it means "an issue of *punitive* damages.")

Back to the point: The problem with the summary adjudication order was that it did not adjudicate all elements of the plaintiff's breach-of-contract cause of action. But the summary adjudication statute requires an adjudication of each element of a cause of action. (§ 437c, subd. (f)(1); *Paramount Petroleum*, 227 Cal.App.4th at p. 241.) One of the elements of a breach-of-contract cause of action is "damages." As a result, a court cannot properly adjudicate only *part* of a cause of action, leaving other

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elements (such as damages) to be determined at trial. (*Id*., 227 Cal.App.4th at pp. 241-242.) The trial court in *Paramount Properties* violated this rule.

The plaintiff tried to salvage its summary adjudication ruling by arguing that the trial court had merely resolved an issue of duty. The Court of Appeal was not buying it, for two reasons. First, the court noted that section 437c, subdivision (f)(1) allows summary adjudication of an issue of duty, but not an issue of breach. (*Id*., 227 Cal.App.4th at p. 244.) Second, the plaintiff first brought up the whole "duty" argument in its reply, but did not actually seek to adjudicate an issue of duty in its notice of motion or its separate statement. (*Ibid*.)

2. Check the affirmative defenses

Defendants love their affirmative defenses. Defense lawyers seem to compete to outdo each other in the number of affirmative defenses they plead. Most of these defenses have no connection to the case. In theory, a plaintiff could eliminate these frivolous defenses using a motion for summary adjudication. First, send the defendant form interrogatory 15.1, which requires it to state all facts that support each affirmative defense. Next, insist that the defendant actually provide full responses to this interrogatory. Then, move for summary adjudication of each affirmative defense that has no factual support. (See e.g., *Collin v. Calportland Company* (2014) 228 Cal.App.4th 582, 587 [explaining that defendant can obtain summary adjudication based on factually devoid discovery responses].) This probably sounds like a lot of work, and it is. For this reason, I seldom see plaintiffs going to the trouble to knock out frivolous affirmative defenses. Instead, both sides generally ignore them at trial. I am not suggesting that this is the preferred or safest approach. But that's what I see happen.

But the defense's penchant for pleading affirmative defenses can sometimes be a boon. In an insurance case I worked on recently, I wanted to move for summary adjudication on the issue of coverage. I probably could have, based on the *Lloyds* case cited above. But I did not have that fight because the defense had actually created an affirmative defense it called "no coverage." As a result, I was able to frame the motion as a motion to adjudicate this affirmative defense. As result, the entire issue of coverage was indisputably made subject to summary adjudication.

3. Get the notice and separate statement right

This brings me to the next tip: Make sure that, if you are filing a motion for summary adjudication, you comply with Rule 3.1350(b) of the California Rules of Court. That rule says, in relevant part, "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty *must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement* of undisputed material facts." (Emphasis added.) Few things are more demoralizing than having a viable summary adjudication motion which the court denies for failure to comply with this requirement.

By the same token, when you are opposing a defense motion, make sure that the way the issues have been stated in the notice are identical to the way they are framed in the separate statement. If not, point out the violation to the court. Odds are, the court will deny the motion on that basis alone.

4. Make your undisputed facts indisputable

It should be obvious that every fact you include in a separate statement in support of a motion for summary adjudication must, in fact, be undisputed. Of course, the defense will likely find a way to dispute every fact. That is simply what the defense does. So, your real goal is to make the "dispute" irrelevant by making the fact indisputable. That way, when the defendant says, "Disputed" the trial court will see through it.

When drafting your separate statement the best way to ensure that each fact will be indisputable is to avoid compound factual statements. Each fact should really only make a single factual assertion. The more propositions you include in your "undisputed fact," the more likely the defense will find a legitimate way to dispute it. Similarly, just stick to the facts; don't embellish them with argument or conclusions about them. The facts in your separate statement should be simple and direct: "the document says 'x' in paragraph 2;" "the defendant did 'y' at 2:15 p.m. on July 23, 2010." You can (and must) explain the legal significance of these facts in the memorandum of points and authorities that supports the motion. The separate statement is just the factual predicate. Keep it as simple as possible.

5. Don't include immaterial facts in the separate statement

We tend to refer to "separate statements," but that is shorthand. The document is actually called a "separate statement of undisputed material facts." (Rule 3.1350(c).) So, in drafting a separate statement make sure each fact you include is material to the claim. The ultimate goal is to have the trial court conclude that the sum total of undisputed facts you have included in support of the motion means that you win – you have established that a defense has no merit or that a duty is owed.

I have opposed quite a few summary judgment motions where I felt comfortable saying "undisputed" for each fact that the defendant included in the motion. The facts simply were not material. As a result, at the end of the day, what the defendant put before the court was simply a series of undisputed facts which, when taken together, did not establish that the claim had no merit or that the plaintiff could not

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establish one or more elements of the claim. This kind of motion is fun to argue, because the defense will emphasize that *all* of the facts in its separate statement are undisputed. And I freely admit this, and explain that this is because they fail to include the material disputed facts on which liability turns.

6. Distinguish between the language in a document and its legal effect

I tend to litigate a lot of insurance cases, and both sides in these cases tend to quote parts of the policy in their separate statements. Obviously, neither side can dispute what the policy actually says. But as anyone who has litigated an insurance case knows, there is often a great deal more at issue than simply what the provisions of the policy say. They may be unclear, or there may be reasons that they cannot be enforced. Always be aware of the difference between the factual issue of what a part of given document says and legal effect of that language, which is an entirely different issue. Hence, when responding to a motion where one side has quoted contract language, make sure you explain that you do not dispute that the document contains the quoted language and that it has been quoted correctly. If the defendant is trying to get more mileage out of the quote than that, then you need to add that you do dispute the legal effect of the language, and then explain why and cross-reference the argument in your memorandum of points and authorities.

7. Make sure the order granting or denying the motion complies with the Code

The court's order granting or denying a motion for summary judgment or summary adjudication can be either written or oral, but it must be recorded on the record. Hence, if the court gives oral ruling, a court reporter must be present to take it down. (Code Civ. Proc., § 437c, subd. (g).) A written order prepared by the prevailing party is required unless expressly waived. (Rule 3.1312(a).)

Section 437c, subdivision (g) requires that the order granting the motion must specify the reasons for the court's determination. Similarly, if the court denies the motion, it must "specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists." (*Ibid.*) In practice, courts seldom seem to refer to the actual evidence, but instead refer to the particular material facts in the separate statement that they find to be disputed, and refer to the evidence cited in those facts.

8. Don't confuse the order granting summary judgment with the judgment

Section 437c, subdivision (m)(1) says, somewhat confusingly, "A summary judgment entered under this section is an appealable judgment as in other cases." What this means is that a *judgment* entered after the trial court grants a motion for summary judgment is an appealable judgment, as in other cases. The order granting the summary judgment motion, which is often referred to as an order granting "summary judgment," is *not* a judgment, and is not an appealable order. As the authors of *Civil Procedure* explain, "The order granting the motion is not itself a judgment. The moving party must prepare a proposed judgment, serve it upon opposing counsel and submit it to the judge for signature and filing." (*Id.*, § 10:330; see also *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1032 ["Again, the summary judgment is appealable, whereas the order granting summary judgment is not."])

Hence, don't file a notice of appeal after entry of an order granting summary judgment, but before the actual judgment is entered. In some cases, the court will bail you out and will rely on procedural artifice to save the premature appeal. (See, e.g., *Aguilar v. Universal City Studios, Inc.* (1985) 174 Cal.App.3d 384, 387, fn. 1 [appeal from order treated as appeal from subsequent judgment]; *Lieding v. Commercial Diving Center* (1983) 143 Cal.App.3d 72, 73-74 [nonappealable order granting motion for summary judgment treated as a judgment]; *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1072 [treating notice of appeal as writ petition].) But don't count on this largesse. Other courts have admonished that they will no longer save appeals from non-appealable orders. (See *Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1074 [dismissing appeal from order granting summary judgment].)

Since it now costs about $800 to file a notice of appeal, having an appeal dismissed as premature is still a substantial waste of money. If the dismissal occurs after full briefing and argument, it can also be a considerable waste of everyone's time and can delay the ultimate resolution of the case by years.

With these tips in mind, you should be able to get better results in the summary judgment process, whether you are bringing or opposing the motion.


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