Two can play at that game

Demurrers are not just for defendants: Using the demurrer to neutralize meritless answers and affirmative defenses

By Ted W. Pelletier and Laurel Halbany

Plaintiffs' lawyers know that defense counsel routinely use demurrers, meritorious or otherwise, not just to attack plaintiffs' complaints but as a delay tactic. But demurrers are a two-way street that plaintiffs can use to neutralize meritless denials and affirmative defenses. Demurrers are particularly useful against defense counsel who file paint-by-numbers answers but have no idea how to defend their boilerplate arguments from attack. And a successful demurrer can strike the defendant twice, stripping away 'phantom' and poorly-drafted affirmative defenses and facilitating summary adjudication later.

Determining whether to demur to an answer requires familiarity with the statutory requirements, particularly the very short timeline to do it. More importantly, counsel should consider how a demurrer will affect the timing of the case and thus whether it is better strategy to tolerate a mediocre answer rather than risk any delay.

Planning a demurrer – timing and the meet and confer process

Demurring to an answer is a "commonly recognized practice" in California, challenging whether the answer raises a defense to a stated cause of action. (*Timberidge Enterps., Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 879; see *Hejmadi v. Amfac, Inc.* (1988) 202 Cal.App.3d 525, 535 [proper vehicle to test the sufficiency of an answer].) The same statutes that authorize defendants to demur to your complaint allow you to demur to their answer. Sections 430.10 to 430.90 of the Code of Civil Procedure explain the grounds, timing, and procedure for demurrers. While many of the requirements are similar, there are important differences – particularly in timing – between demurrers to complaints and demurrers to answers.

The most critical difference – and the biggest trap – is the shorter deadline. While a defendant has 30 days to demur to your complaint, you have only *ten calendar days* to demur to an answer. (Code Civ. Proc., § 430.40(b).) (All subsequent section references are to the Code of Civil Procedure.)

Additionally, new requirements require you to meet and confer on the issues "at least five days before" your responsive pleading is due. (§ 430.41(a)(2).) Your demurrer must include a declaration under oath stating that either (1) you met and conferred but could not reach agreement, or (2) the opposing party "failed to meet and confer in good faith." (§ 430.41(a)(3).)

If you are unable to timely meet and confer, you are entitled to an automatic 30-day extension of time. (§ 430.41(a)(2).) But you will need to support that extension with a declaration, and it is unlikely that you will convince the court you were "unable" to meet and confer if you waited until the last minute. To avoid waiving your right to demur, review the defendant's answer as soon as you receive it and contact opposing counsel *immediately* to schedule a meet-and-confer conference.

The statute also requires you to meet and confer in person or by telephone. You can't simply fire off a letter (or e-mail), then demur if the defendant fails to respond. However, it's good practice also to send a letter to opposing counsel explaining the answer's problems, as a summary or "cheat sheet" to guide your meet-and-confer discussions. Besides streamlining your discussion, it will also help memorialize your conversation and forestall any argument that you didn't bring a particular deficiency to counsel's attention.

Grounds for demurrer

The grounds for demurring to an answer are much narrower than for demurring to a complaint. Once a defendant has filed the answer, the plaintiff may demur on at most three grounds: (1) the answer does not state facts sufficient to constitute a defense; (2) the answer is "uncertain," i.e., ambiguous or unintelligible; or (3) when the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral. (§ 430.20(a)-(c).) For our purposes, the most likely grounds will be that the affirmative defenses are either poorly pleaded or are inapplicable to your case.

Section 430.20[a] – insufficient facts to constitute a defense

First, defendants often file poorly drafted "kitchen sink" answers that allege every tangentially possible defense, assuming that any deficiencies will sort themselves out naturally through the litigation process. This approach exemplifies the defense mindset that it is the plaintiff's job to prove everything and their job is simply to poke holes in your case. But it misunderstands the burden of proof and creates an opportunity for you to demur.

A demurrer may be made to an answer that does not state facts sufficient to constitute a defense or is uncertain. (§§ 430.20(a), 430.20(b).) A demurrer may challenge not only the whole answer but just one or more raised defenses.

(§ 430.40(b).) Affirmative defenses cannot simply spout "terse legal conclusions" but must state supporting facts "as carefully and with as much detail" as is required in a complaint. (*FPI Devel., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Allegations stating a legal conclusion (rather than pleading facts) are inadequate. (*Berger v. California Ins. Guar. Assn.* (2005) 128 Cal.App.4th 989, 1006; *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.) Affirmative defenses must be specially pleaded in an answer (notwithstanding the general rule favoring liberal construction of pleadings). (*Houk v. Williams Bros.* (1943) 58 Cal.App.2d 573, 582.) And it is error to overrule a demurrer to a portion of an answer that does not state facts to constitute a defense. (*City of Mountain View v. Superior Ct.* (1975) 54 Cal.App.3d 72, 84.)

In light of these rules, you should carefully review the affirmative defenses you would like to limit or eliminate. Are they generic, broad allegations that do not plead specific facts? If you used similar phrasing in a cause of action in your complaint, would it invite a demurrer? Unless the answer to both questions is "no," a demurrer may lie on grounds that the defense does not allege sufficient facts. Thus, for example, broad statements that the plaintiff was comparatively negligent or "assumed the risk" of unspecified activities gives you no notice of the actual basis of the defense – and is thus subject to demurrer.

Another common basis for a demurrer is that the defendant has not pleaded the defense correctly as a matter of law, or has pleaded a "defense" that is not available under California law. For example, a defendant, using language from boilerplate handed down through the generations, may argue that your plaintiff's claims are barred by "contributory negligence" – a doctrine abolished decades ago in *Li v. Yellow Cab* (1975) 13 Cal.3d 804. While a motion for judgment on the pleadings for summary adjudication may be the more procedurally correct vehicle to attack a fatally defective affirmative defense, judges tend to frown on later-raised attacks as "gotcha" motions which, if they had been raised through demurrer, would have given the defendant a sporting chance to amend their answer. And demurring now does not prevent you from also bringing a dispositive motion on the merits later.

You may also attack "defenses" that are not truly defenses but mere denials of the plaintiff's claims or recitations of the law. A proper affirmative defense is a "new matter" alleging facts showing that "notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought." (*Goddard v. Fulton* (1863) 21 Cal. 430, 436; *accord Walsh v. West Valley Mission Comm. Coll. Dist.* (1998) 66 Cal.App.4th 1532, 1542 n.3.) Thus, an affirmative defense "creates a new issue" on which the defendant bears the burden of proof, rather than a "traverse" that contradicts an existing cause of action. (*Rancho Santa Marg. v. Vail* (1938) 11 Cal.2d 501, 543.) Any non-defenses should be attacked on demurrer not only because they are technically improper, but because defendants may later try to stretch them to include favorable evidence or arguments – for example, claiming a "defense" alleging apportionment of damages under Civil Code section 1431.2 ("Proposition 51") includes an argument that the plaintiff was comparatively negligent.

Additionally, if your case does not seek equitable remedies and is strictly an action at law, a defendant cannot plead equitable defenses like laches. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d. 438, 461-462.) While raising equitable defenses may simply be part of a defendant's throw-everything-at-the-wall approach and have little impact on your case, if you are filing a demurrer anyway, it is relatively straightforward to add on that certain defenses cannot properly be asserted.

A simple way to research whether a defense is correctly pleaded, or valid, is to compare the elements set forth in the defendant's answer to the current CACI instructions. While not the law, CACI provides an excellent summary of the defenses available for each cause of action and the law supporting each defense.

Section 430.20[b] – uncertain [ambiguous or unintelligible]

"Uncertain" is largely reserved for a pleading where the stated defense is ambiguous or unintelligible. Under California's liberal pleading rules, a demurrer based on uncertainty will not be sustained merely because a pleading is poorly signposted. If the answer contains "substantive factual allegations," it sufficiently apprises the opposing party of the issues it is being asked to meet. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139 n.2.) For example, in one of the few published rulings on this issue, the California Supreme Court found error in sustaining a demurrer when two separate defenses were combined – but the demurrer had been properly sustained as to a defense that left uncertain whether the defendant intended to plead the statute of limitations or an equitable defense. (*Hagely v. Hagely* (1886) 68 Cal. 348, 349.)

"Uncertainty" may appropriately attack a claim that unnamed statutes of limitations, or statutes "including, but not limited to" particular sections, bar the plaintiff's claims. Pleading a statute of limitations need not allege specific facts but must state the specific provision: i.e., that "the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." (§ 458.) This requirement is "strictly applied." (*Davenport v. Stratton* (1944) 24 Cal.3d 232, 246.)

Leave to amend?

California's approach to liberal construction of pleadings applies also to answers. Thus, if it is possible to fix an answer, the court will almost certainly

sustain the demurrer with leave to amend. (See § 452; *Angie M. v. Superior Ct.* (1995) 37 Cal.App.4th 1217, 1227.) Indeed, it is an abuse of discretion to refuse to permit amendment unless the pleading "shows on its face that it is incapable of amendment." (*McDonald v. Superior Ct.* (1986) 180 Cal.App.3d 297, 303-304.) And courts will often allow multiple tries to cure the same defect; that previous demurrers have been sustained is not, by itself, a reason to deny leave to amend. (*Stevenson v. San Francisco Housing Auth.* (1994) 24 Cal.4th 269, 284.) However, courts should deny leave to amend where the defect cannot be remedied, such as when no liability can exist under substantive law. (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436; *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 535, [disapproved on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919].)

All this said, it is not your burden to disprove that the answer can be amended. Nor must the trial court figure out how the answer should have been pleaded. On demurrer, the defendant must show how its deficient pleading can be amended to change its legal effect. (*Goodman, supra*, 18 Cal.3d at 349; *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112.) And if the defendant cannot show this, it is well within the court's discretion to deny leave to amend. (*Heritage Pac. Finan., LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.)

As with demurrers to complaints, sometimes an answer may go through multiple iterations before the defendant gives up – or the court loses its patience with the defendant's inability to fix its pleadings. And it is not uncommon for a defendant to simply drop its more ridiculous or unsustainable affirmative defenses and denials.

If the court grants leave to amend, it may order you and defendant to meet and confer before the amended answer may be filed. (§ 430.41(c).) Besides reflecting current legislative policy of meeting and conferring at length before getting near a courtroom, this conference is intended to avoid multiple demurrers by requiring the parties to hash out agreeable wording in the amended complaint. Even if the court does not specifically order such a conference, it is advisable to meet and confer with defendant just as you did before your initial demurrer. Should defendant botch the answer again, you will have a strong foundation to show the court not only that you acted in good faith but that the answer cannot be further amended – and thus the demurrer should be sustained without leave to amend.

Conclusion

Demurrers are not just for defendants. They can and should be used, tactically, to strip away meritless defenses. This will limit your work later, allowing you to focus your resources where they count.


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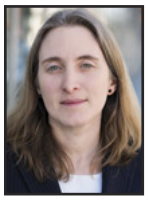
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