Catching rabbits

Attacking affirmative defenses and denials to put the burden of proof on the defense

By Laurel Halbany

"Never run rabbits while chasing the fox" is a rule of the sportsman equally worthy of observance in the trial of causes as on the hunt. (*State v. Davis* (1932) 164 S.E. 737, 748.)

Left unchecked, defendants will happily turn "rabbits" loose all through your case – and especially at trial, when you should be focusing on proving your case in chief. In the view of many defense attorneys, it is always your job to prove everything, and their job is to sit back and poke holes in your case. But when it comes to affirmative defenses and denials, defendants have the burden of proof – and with some advance planning, you can keep those rabbits out of your courtroom, leaving the other side defenseless.

Attack the initial pleadings

Affirmative defenses, with few exceptions, are waived if they are not pleaded in the demurrer or answer. (§430.80.) (All statutory references are to the California Code of Civil Procedure unless otherwise stated.)

This is why defendants' answers are often a grab bag of poorly written repetitive claims that allege everything from laches to the unconstitutionality of punitive damages. Defendants that appear in national litigation may plead defenses that don't exist in California, while defense firms that often handle a particular practice area may have standard answers that have been unchanged for years (or even decades). These answers may not even have been read by the attorney signing them. Remember that in the defense view, there is no downside to meritless arguments.

Review these pleadings *right away* once you receive them; the time to challenge an answer is ten calendar days, and you must try to meet and confer with the defense no later than five calendar days before demurring to, or moving to strike, an answer. (§430.41, subd. (a).) If you wait, you will lose your chance to clear out the nonsense until much later in your case.

Go through the answer with an eye to elimination and consolidation. Are there defenses that are invalid as a matter of law, or that are not applicable to your case? Has the defendant spread what is really a single affirmative defense across several different defenses? Defense counsel may have no idea what is actually in their answer; they may tell you it's their "standard answer" or "we've always done it this way with no problem." But they are often agreeable to filing an amended answer rather than have to oppose a demurrer and possibly lose certain defenses entirely. If a defendant is hesitant to remove an inapplicable defense because they are concerned that new facts may emerge, making that defense appropriate, you can always stipulate to allow them to amend their pleading. (Should a defendant prove stubborn, please see "Two can play at that game," *Plaintiff Magazine*, December 2018, for information on demurring to a defendant's answer.)

Relentless discovery

Once you are satisfied that the defendants' claims are as intelligible as they are likely to get, you must press the defendant on those claims throughout your case. Do not allow defendants to infect you with the mindset that burdens of proof are just for plaintiffs. A defendant has the burden of proof as to the existence or nonexistence of each fact essential to any defense or claim it asserts. (Evid. Code, §500; *Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 24.) Plaintiffs do not have an initial burden of *disproving* affirmative defenses. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

In unlimited civil cases, the simplest and most basic discovery are on the Judicial Council form interrogatories which requires the answering defendant to identify each defense or denial in its pleadings, and for each, to state all facts, witnesses, and documents it claims support that denial or affirmative defense. (This interrogatory may vary depending on the type of case; for unlimited civil cases, it is Interrogatory 15.1.)

Defendants hate this interrogatory, not least because it is difficult for them to persuade judges to uphold the typical boilerplate objections defendants make when they don't want to answer discovery. You are not limited to the form interrogatories, and at a minimum should propound inspection demands for any identified documents. You may also wish to go through the affirmative defenses and prepare additional interrogatories and document demands tailored to the specific claim of each defense.

Be mindful of timing in propounding discovery. If you serve interrogatories too early in the case, you will get back largely useless responses and never learn about later-acquired information; California does not impose an affirmative obligation

to update discovery with later-acquired information. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1325.) You may also serve supplemental discovery periodically throughout the case, but carefully review the statutes to make sure you do not miss your chance; for example, a supplemental interrogatory may be propounded twice before trial setting, but only once after. (§ 2030.070.)

Depositions are also a useful tool to probe whether the defense has any evidence supporting its claims. Many attorneys shy away from this area at deposition, thinking that such questions are improper under *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255. But *Rifkind* only held that 'legal contention questions' or 'law-to-fact' applications are improper: "If the deposing party wants to know facts, it can ask for facts." (*Rifkind* at 1262.)

Eliminating meritless defenses and evidence

Toward the end of your case, you will have a good sense of whether the defendant has any evidence supporting its remaining claims, or whether it plans to raise them at trial in the hopes that the jury will blame you for not disproving them. You can block those affirmative defenses with a timely motion for summary adjudication of affirmative defenses for which the defendant has no evidence, or which fail as a matter of law. (§ 437c, subd. (f)(1); *McCaskey v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975.)

In short, the door of dispositive motions swings both ways. Once adjudicated, the lack of merit of those defenses is "deemed established" and trial will proceed without them. (§ 437c(n)(1).) This will come as a great shock to defendants who have coasted along under the belief that it is your job to prove or disprove everything of consequence, particularly if you rely on their factually devoid responses to discovery to meet your initial burden in your motion. (*Weber v. John Crane Inc.* (2006) 143 Cal.App.4th 1433, 1438; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83.)

Once you have shown that the affirmative defenses in question are defective as a matter of law, or that the defendant has failed to show that there is any evidence supporting the defenses, the burden shifts to the defendant to present that evidence exists. An issue of fact cannot be created by mere possibilities or through broadly phrased and conclusory assertions. (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.) If the defendant responded to your discovery with boilerplate answers that parrot its allegations, without stating specific facts, and which make assumptions without evidentiary support, that will not be sufficient to show that there is sufficient evidentiary support to allow the defense to remain. (*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1230.)

While a dispositive motion should only be brought if you have a good-faith belief that it is meritorious, the unfortunate truth is that these motions may end up functioning as a discovery device. It is not uncommon for defendants to refuse to comply with discovery obligations, even when motions to compel them to do so have been granted, until there are actual consequences from the defendant – such as losing an affirmative defense based on an apparent lack of any evidence for that defense.

Once a defense has been eliminated, bring motions in limine to exclude evidence and arguments related to these no-longer-existing defenses. Evidence that does not tend to prove or disprove any claim at issue is irrelevant, and irrelevant evidence is not admissible. (Evid. Code, §§ 210, 350, 352; *Oakland Raiders v. Nat'l. Football League* (2001) 93 Cal.App.4th 572, 591 [evidence leading to speculative inferences is irrelevant].) Unlike a motion that argues evidence is unduly prejudicial or irrelevant overall, here your motion will point out that specific claims – for which defendant bears the burden of proof – have been adjudicated and removed from the case, such that evidence of those claims is completely irrelevant and a waste of the jury's time.

Using directed verdicts to shut the door to 'rabbits'

A plaintiff may move for a directed verdict as to particular claims, not only at the close of defendant's evidence, but immediately after the defendant's opening statement. (§ 630, subd. (a); *Nuffer v. Insurance Company of North America* (1965) 236 Cal.App.2d 349, 363.) A party's opening statement is meant to "effect a complete statement of the facts" that will support its claims. (*Gibson v. Southern Pac. Co.* (1955) 137 Cal.App.2d 337, 346.) A motion for a directed verdict, prior to the introduction of evidence, is permitted when "counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be." (*Bias v. Reed* (1914) 169 Cal. 33, 37; *Porter v. Fiske* (1946) 74 Cal.App.2d 332, 335.)

Like summary adjudication, a motion for directed verdict after opening statement is a procedural tool that defendants mistakenly think of as "theirs," and have difficulty anticipating – much less opposing. This is particularly true when a defendant believes that arguing in the alternative would weaken their initial presentation to the jury and plans to pivot to a different theory depending on what evidence is admitted at trial. A directed verdict motion immediately after opening, seeking to rule out defenses not raised in (or actively contradicted by) defendant's opening statement, will block this game-playing, and provides a solid basis for you to object to evidence of defendant's "alternative" theories not raised in opening.

For example, a defendant may choose to state in opening that the plaintiff's injuries were "idiopathic" and not the result of defendant's conduct. A directed verdict motion immediately after opening would be proper as to defendant's comparative-fault claims. Defendants are held to their opening

statements just as plaintiffs are, and if a defendant chooses to stall on presenting a potential defense for strategic reasons, it should forfeit the defense.

Conclusion

Defendants count on "letting rabbits loose" throughout your case and all the way up through trial, with the aim of confusing and overburdening you and, eventually, the jury. But from the inception of your case, there are tools available to you – often, the same tools that defendants like to use to attack the plaintiffs' case. By keeping in mind that defendants have the burden of proving their own claims, and holding them to that burden, you can shut down their attacks and get rid of frivolous defenses.

Laurel Halbany is an attorney at Kazan, McClain, Satterley and Greenwood *in Oakland, representing victims of asbestos-related disease, particularly mesothelioma. She is past chair of the AAJ LGBT Caucus, an at-large member of the CAOC Board of Governors, and received the CAOC Presidential Award of Merit in 2017 for advocacy on behalf of asbestos victims.*

Halbany