

## Procedural Analysis of Responses to a Complaint

**WHEN FACED WITH A COMPLAINT** in California, a defendant has a variety of ways to respond. He or she may file a demurrer, a motion to strike, a special motion to strike, a traditional answer, or a combination of these. While these responses are all meant to attack the causes of action pleaded, they differ on which grounds they may dispute the pleading and whether they must seek to strike an entire cause of action or merely a portion of the cause of action. Since each response to a complaint has distinct procedures and deadlines by which it must be filed, knowing these differences is key to avoiding a procedurally defective response, or worse, a waived defense.

The most common response is the answer, which either admits or denies the material allegations set forth in the complaint. It must contain a general denial or specific denials of each of the allegations in the complaint, as well as all affirmative defenses.<sup>1</sup> Additionally, objections to the complaint that are not apparent on its face must be made in the answer.<sup>2</sup> Failure to answer any allegation or to raise a required objection will cause these allegations to be taken as true.<sup>3</sup> Consequently, a defendant must be careful to clearly state which causes of action the defenses are intended to answer or else risk inadvertently admitting important allegations.<sup>4</sup> Otherwise, a defendant is free to answer only specific portions of a cause of action, with that risk in mind.

Demurrers, on the other hand, dispute the legal sufficiency of any or all pleaded causes of action in the complaint. A demurrer does not challenge the veracity of the factual allegations since the reviewing court will deem all of a plaintiff's allegations as true without regard to any evidence. Thus, any deficiencies must appear on the face of the complaint.<sup>5</sup> In a general demurrer, a defendant may argue the pleading fails to allege facts sufficient to state a cause of action or lacks subject matter jurisdiction, which are grounds for general demurrers.<sup>6</sup> However, even if the facts do not support the cause of action alleged by the plaintiffs, it may be sufficient that they support any cause of action. Therefore, when filing a general demurrer, a defendant would be wise to eliminate other causes of action from the realm of possibility in the grounds for demurrer. Note that objections on the grounds of failure to state a cause of action and lack of subject matter jurisdiction are never waived, even if they are not made in a demurrer or answer.<sup>7</sup>

Special demurrers challenge the complaint on the grounds that the claimant lacks legal capacity, there is misjoinder of parties, required certificates are missing, it is duplicative of another pending action, or it is otherwise uncertain, for example whether a contract at issue is written, oral, or implied.<sup>8</sup> In limited civil cases—when the amount in controversy is \$25,000 or less—only general demurrers are allowed, and grounds raised in special demurrers must instead be raised as affirmative defenses in the answer.<sup>9</sup> It is important to note that when special demurrer objections are not made in a demurrer or answer, they are waived, so a complaint should be examined carefully to find all possible objections before responding.

The rules for demurrers are also specific in regard to format and

proper procedures. Each ground for the demurrer must be stated in separate paragraphs, indicating whether it applies to the entire pleading or a single cause of action.<sup>10</sup> If the demurrer alleges the pleading is uncertain, it must specifically state how the pleading is uncertain and where the uncertainty appears with reference to the page and line numbers of the complaint.<sup>11</sup> Uncertainty is a particularly useful ground to assert demurrers to pleadings filed by pro se litigants or largely meritless lawsuits that are often unclear. Furthermore, as a result of recent amendments to the statute, a defendant must meet and confer with the plaintiff at least five days before a response is due to reach an agreement that would obviate the need for filing the demurrer. The statute also requires the demurring party to attach a declaration showing compliance with the meet-and-confer requirement. No other response has a similar meet-and-confer requirement.<sup>12</sup>

### Motion to Strike

A motion to strike targets any “irrelevant, false or improper matter” and matters “not drawn or filed in conformity” with the laws of California or any court rule or court order.<sup>13</sup> While a motion to strike can therefore address the veracity of the allegations in the complaint, the falsity must appear on the face of the pleading or be based on information that the court may employ to take judicial notice.<sup>14</sup> In practice, this means that “it must clearly appear that the allegations of the complaint are false,”<sup>15</sup> without regard to outside information except judicially noticeable legal rules, court documents, and universally known matters.<sup>16</sup> Additionally, a motion to strike may allege the applicable statute of limitations has been violated or claim that punitive damages or other remedies are improper, either of which is not grounds for demurrers.<sup>17</sup> In limited civil cases, however, motions to strike are limited to attacks on remedies.<sup>18</sup>

One of the key distinctions between a motion to strike and a demurrer is that a motion to strike may attack any part of a cause of action—even single words or phrases.<sup>19</sup> While a demurrer can attack all or some of the causes of action, it may only target a cause of action in its entirety and not portions of it.<sup>20</sup> If a defendant does decide to target only some causes of action in a pleading, care must be taken to direct the demurrer specifically to those specific causes of action, because a demurrer that refers to the complaint generally will be sustained only when all causes of action are defective.<sup>21</sup> Since objections that appear on the face of the complaint must be raised by a demurrer or motion to strike—and those that do not must be discussed in the answer—a defendant should examine the complaint for any objections that can be based on the pleading by itself or risk waiving them.<sup>22</sup>

As with the rules for demurrers, California rules are also specific regarding the format and procedure of a motion to strike. Defendants must quote in full the portions desired to be struck unless the motion is to strike an entire paragraph, cause of action, or count or defense,

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and each specified portion must be numbered consecutively.<sup>23</sup> A motion to strike, as well as a demurrer, must be filed within the time to answer, which is typically 30 days after service of the complaint unless the court has extended that period.<sup>24</sup> Most importantly, if a defendant wishes to respond with both a demurrer and a motion to strike, they must be filed and noticed for hearing at the same time.<sup>25</sup> Failure to file a demurrer before a motion to strike will render a later demurrer procedurally defective, and vice-versa. Moreover, a motion to strike based on an alleged defect, which is the proper subject for a demurrer, will be denied outright.<sup>26</sup> Therefore, if a motion to strike is mistakenly filed on grounds that are appropriate for a demurrer, a defendant not only wastes a response but also will have lost the opportunity to respond with a demurrer. Accordingly, it is paramount to understand the differences between a motion to strike and demurrer.

When a motion to strike is filed without a demurrer, however, it will extend the time in which to answer.<sup>27</sup> If a defendant only seeks to strike one cause of action, it is not obligated to answer the remaining causes of action until the motion is ruled upon. This extension allows a defendant an opportunity to attack some of a pleading while also earning more time to develop a coherent and more effective answer

to all the claims than it would have otherwise. On the other hand, if a demurrer is filed without a motion to strike, or vice versa, and is overruled completely or is not sustained as to all the causes of action, a defendant has only 10 days to answer the complaint.<sup>28</sup> In instances of forcible entry, forcible detainer, or unlawful detainer, that period is reduced to five calendar days.<sup>29</sup> Given this short time frame, defendants will want have an answer ready in case of a dispositive ruling even if they are seeking to dismiss a complaint in its entirety.

While these responses may help combat a deficient complaint, California courts grant leave to amend freely, unless there is truly no way for a complaint to be amended to state a viable claim. It has been repeatedly and consistently held that courts should liberally exercise their discretion in allowing amendments so that cases may be decided on the merits.<sup>30</sup> For leave not to be granted, the complaint must be so poorly written that responding would be practically impossible. However, recent amendments to the statute limit the number of times to three that a pleading may be amended in response to demurrers, absent a showing that there is a reasonable possibility that the defect can be cured.<sup>31</sup> Still, in the case when a lawsuit is truly baseless, demurrers and motions to strike are an effective way to avoid the costs

of litigation and dismiss a frivolous lawsuit at the earliest stage—as long as defendants know when and how to use them.

A special motion to strike, otherwise known as an anti-SLAPP motion, attacks causes of action that target activity protected by the freedom of speech. This can include causes of action for defamation, malicious prosecution, abuse of process, and numerous other claims. Under this motion, a defendant must establish that the cause of action arises from its own conduct in furtherance of the right to petition or free speech under the U.S. or California Constitution in connection with a public issue. If the defendant can make this requisite showing, the burden shifts to the plaintiff to show there is a probability that the claim will succeed on the merits through introduction of admissible evidence establishing a prima facie case.<sup>32</sup> Covered conduct includes statements made before a legal proceeding or government body and comments made in public about public issues.<sup>33</sup>

Unlike a demurrer, motion to strike, or answer, a plaintiff is not permitted to file an amended complaint while the special motion to strike is pending or if the motion is granted, overcoming the general policy of California courts to freely grant leave to amend.<sup>34</sup> Also unlike the other responses, a special motion to strike automatically stays discovery pro-

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ceedings upon filing notice of the motion until the order ruling on it is entered.<sup>35</sup> Furthermore, the grant or denial of the motion is subject to an interlocutory appeal, which is not the case with the other responses.<sup>36</sup> Therefore, a special motion to strike is the strongest response a defendant can file, especially if it is successful.

A special motion to strike may be filed up to 60 days after service of the pleading.<sup>37</sup> Accordingly, although it is sometimes a response of last resort, it is also used to give defendants twice as much time to craft an effective pleading. However, if a defendant uses the time to file a special motion to strike towards its natural end, one of the other responses has to be filed within 30 days unless an extension is granted. Otherwise, the plaintiff can obtain a default judgment.<sup>38</sup>

While there was previously a split among appellate courts, the California Supreme Court recently clarified in *Baral v. Schnitt* that just as a typical motion to strike, a special motion to strike can attack all or a portion of a cause of action.<sup>39</sup> This is particularly important in complaints alleging a mixed cause of action, or a count alleging both protected and unprotected activity, when a defendant would be able to strike only protected activity as irrelevant material. Otherwise, a plaintiff could include unprotected conduct on purpose to avoid a special motion to strike because the defendant would not be able to strike the entire cause of action.

Given the relatively short 30-day or 60-day time frame to respond to a complaint, a defendant must carefully consider all possible options to respond. Understanding the differences between these available responses is key to avoiding a defective response or waiving potential objections to a complaint. With a grasp on these differences, however, an attorney can craft an effective response to potentially dismiss any complaint. ■

<sup>1</sup> CIV. PROC. CODE §431.20(a).

<sup>2</sup> CIV. PROC. CODE §§430.30(a)-(b).

<sup>3</sup> CIV. PROC. CODE §431.20(a).

<sup>4</sup> CIV. PROC. CODE §431.30(g).

<sup>5</sup> CIV. PROC. CODE §430.30.

<sup>6</sup> CIV. PROC. CODE §430.10; *see also* Ferraro v. Camarlinghi, 161 Cal. App. 4th 509, 529 (2008).

<sup>7</sup> CIV. PROC. CODE §430.80(a).

<sup>8</sup> CIV. PROC. CODE §430.10.

<sup>9</sup> CIV. PROC. CODE §92(c).

<sup>10</sup> Cal. Rules of Court, Rule 3.1230(a).

<sup>11</sup> Fenton v. Groveland Comty. Servs. Dist., 135 Cal. App. 3d 797, 809 (1982).

<sup>12</sup> CIV. PROC. CODE §430.41.

<sup>13</sup> CIV. PROC. CODE §436.

<sup>14</sup> CIV. PROC. CODE §437.

<sup>15</sup> Duffy v. Campbell, 250 Cal. App. 2d 662, 666 (1967). *See also* Garcia v. Sterling, 176 Cal. App. 3d 17, 21 (1985).

<sup>16</sup> EVID. CODE §§451-52.

<sup>17</sup> Grieves v. Superior Ct., 157 Cal. App. 3d 159, 163-64 (1984).

<sup>18</sup> CIV. PROC. CODE §430.30; Cal. Rules of Court, Rule 3.1322(b).

<sup>19</sup> PH II, Inc. v. Superior Ct. 33 Cal. App. 4th 1680, 1682-83 (1995).

<sup>20</sup> CIV. PROC. CODE §4350.50(a); Kong v. City of Hawaiian Gardens Redev. Agency, 108 Cal. App. 4th 1028, 1047 (2002).

<sup>21</sup> 5 WITKIN, CALIFORNIA PROCEDURE §954 (2008).

<sup>22</sup> CIV. PROC. CODE §§430.30(a)-(b).

<sup>23</sup> Cal. Rules of Court, Rule 3.1322.

<sup>24</sup> CIV. PROC. CODE §430.40(a).

<sup>25</sup> CIV. PROC. CODE §435(b)(3); Cal. Rules of Court, Rule 3.1322(b).

<sup>26</sup> Warren v. Atchison, T. & S. F. Ry. Co., 19 Cal. App. 3d 24, 41 (1971).

<sup>27</sup> CIV. PROC. CODE §435(c).

<sup>28</sup> Cal. Rules of Court, Rule 3.1320(j). In regard to overruling a motion to strike, "no fixed time within which to answer is provided by statute or court rule,

but courts generally permit the same number of days as upon overruling a demurrer." WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL §7:206 (2016).

<sup>29</sup> Cal. Rules of Court, Rule 3.1320(g).

<sup>30</sup> Edwards v. Super. Ct., 93 Cal. App. 4th 172, 180 (2001); Desney v. Wilder, 46 Cal.2d 715, 751 (1959).

<sup>31</sup> CIV. PROC. CODE §430.41.

<sup>32</sup> Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1087 (2001).

<sup>33</sup> CIV. PROC. CODE §425.16(e).

<sup>34</sup> Salma v. Capon, 161 Cal. App. 4th 1275, 1293-94 (citing Simmons v. Allstate Ins. Co., 92 Cal. App. 4th, 1068, 1074 (2001)).

<sup>35</sup> CIV. PROC. CODE §425.16(g).

<sup>36</sup> CIV. PROC. CODE §904.1(a)(13).

<sup>37</sup> CIV. PROC. CODE §425.16(f).

<sup>38</sup> Cal. Rules of Court, Rule 3.110(g)-(h).

<sup>39</sup> Baral v. Schnitt, 1 Cal. 5th 376, 382 (2016).



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