



Offensive use of summary judgments: Knocking out affirmative defenses

Instead of fearing summary judgment, use it to eliminate key issues and improve your position at trial

BY BRIAN J. MALLOY

In representing plaintiffs, a motion for summary judgment¹ is dreaded. Months, if not years of preparing a case for trial could be all for naught at the end of this dispositive motion practice. But what if the tables were turned? What if you, as the attorney for the plaintiff, were able to knock out a critical affirmative defense of the defendant? In such a case, summary judgment could be a boon, eliminating key issues in the case and improving your settlement or trial position. This article addresses defendant's affirmative defense which may be amendable to a plaintiff's motion for summary judgment and will also discuss the "nuts and bolts" procedural requirements for doing so in California state court and the four federal district courts in California.

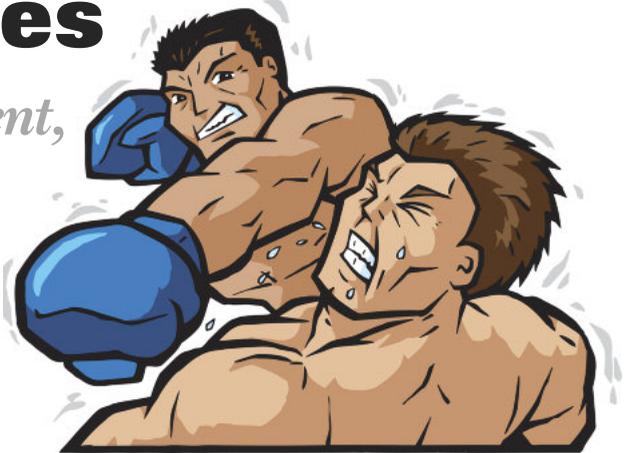
Types of defenses to consider for a plaintiff's motion for summary judgment

An affirmative defense assumes that the allegations in the plaintiff's complaint are true, but that the plaintiff's claims are barred for an independent reason. (See California Code of Civil Procedure ("CCP") § 431.30(b); Federal Rule of Civil Procedure ("FRCP") 8(c).) The defendant bears the burden of proving the affirmative defense. In fact, the federal rules specifically list a number of affirmative defenses that must be pled, including accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel,

failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. (FRCP 8(c)(1).)

The benefits of filing a motion for summary judgment on a defendant's affirmative defenses can be enormous. However, not every case will be appropriate for a plaintiff's motion for summary judgment. You have to examine both the legal issues and what the facts are, or can reasonably be inferred as being, before deciding to put forward the time and effort into preparing such a motion. For example, unless there is a controlling question of law,² a plaintiff filing a motion for summary judgment that the claim is not time-barred is generally inappropriate because the facts will be clear (one way or the other) or the facts will be in substantial dispute presenting a question for the trier of fact. One the other hand, some other defenses may be fertile ground for a plaintiff's motion for summary judgment.

In the employment context, it is an affirmative defense for which the employer must prove that an employee is properly classified as exempt from overtime requirements. (See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197.) For example, my office and I were recently involved in a certified collective action under the Fair Labor Standards Act ("FLSA") alleging wage and hour violations against a well-known chocolate manufacturer. The main issue in that case was whether the



entry-level employees we represented were misclassified as exempt from the overtime pay requirements of federal and California law. We filed a motion for partial summary judgment, arguing that the employer could not meet its burden of establishing that the employees' primary job duties exempted the employees from overtime requirements. The district court agreed and granted the motion, holding that the class of employees was not exempt and was entitled to overtime pay.³ This limited the trial to mainly damages.

In cases against public entities, the government will often raise a number of affirmative defenses involving public entity immunities. For example, in cases alleging a dangerous condition of public property, public entities will oftentimes assert "design immunity" of California Government Code section 830.6. In order to benefit from this immunity, the public entity bears the burden of proving that (1) the injuries were caused by a feature inherent in an approved plan or design; (2) the plan or design was discretionally approved prior to construction or improvement; and (3) there exists substantial evidence supporting the reasonableness of the plan or design. (Gov. Code, § 830.6.) If discovery establishes that one of these critical elements on which defendants bear the



burden of proof exists, a plaintiff's motion for summary judgment may be proper.

Other defenses may also be susceptible to a plaintiff's motion for summary judgment. If there is a particular issue of law in dispute, it may be appropriate to resolve that issue through summary judgment. For instance, a property owner in a personal injury case may assert immunity under California Civil Code section 846, which provides that a "possessor of land owes no duty of care to keep property safe for entry or use by others for recreational purposes nor to give any warning of hazardous conditions, uses, structures or activities on such premises to persons entering for such recreational purpose." This "recreational immunity" applies not only to private landowners in California, but also to the United States government sued under the Federal Tort Claims Act for injuries occurring on its property situated in California. (See 28 U.S.C. § 2674.) The statute defines a non-exhaustive list of "recreational" activities.⁴ If the defendant asserts this in your case, consider whether the activity your client was engaged in actually satisfies this standard as a matter of law.

A defendant in a personal injury case may also assert that the claims are barred by a signed "release." Whether a release was actually contractually agreed to and, if so, whether the claims are covered by the release oftentimes turn on issues of law that may be put to end by a plaintiff's motion for summary judgment.

Discovery tools

Generally, your discovery will have to be tailored to the precise defenses at issue. However, there is one discovery tool that should be used in all cases.

If you are in California state court, do not forget the powerful use of Form Interrogatory No. 15.1, which asks the responding party to "[i]dentify each denial of a material allegation and each special or affirmative defense in your pleadings and for each state: . . . ¶ (a) state all facts upon which you base the denial or special or affirmative defense" and to identify the

names and contact information of persons who have knowledge of such facts and all documents that support such facts. Follow up later in discovery with a supplemental interrogatory under CCP section 2030.070, which requests the responding party to state "any later acquired information bearing on all answers previously made by any party in response to interrogatories." (CCP, § 2030.070(a).⁵)

If you are in federal court, a defendant's factual support of its affirmative defenses should be disclosed pursuant to the initial disclosures of FRCP 26(a). It is also good practice, however, to propound an interrogatory asking the responding party the same terminology as used in Form Interrogatory No. 15.1. Importantly, under FRCP 26(e)(1), the responding party has a duty to supplement both the initial FRCP 26(a) disclosures and responses to interrogatories, requests for production, or requests for admissions "(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court." This supplementation must be done without the need for a supplemental discovery request from the opposing party. A defendant's failure to appropriately supplement FRCP 26(a) disclosures or discovery responses may lead to exclusion of witnesses or information, among other sanctions. (See FRCP 37(c).)

If the defendant provides no or insufficient factual support for any of the affirmative defenses at issue based on the discovery responses discussed above, you should consider using these responses as the basis to knock out potential affirmative defenses.

Procedural requirements in state and federal court

Should you decide that your case is ripe for filing a plaintiff's motion for summary judgment, be mindful of the rules that apply.⁶ The California state courts

have different rules than the federal courts, and even the federal courts in California differ from district to district (and from judge to judge). Below are the highlights of the procedural requirements.

California State Courts

In California, summary judgment is governed by CCP section 437c. Section 437c(a) allows for a summary judgment motion "if it is contended that . . . there is no defense to the action or proceeding." (See also CCP, § 437c(f)(1) ("[a] party may move for summary adjudication as to . . . one or more affirmative defenses . . . if that party contends . . . that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action"). The summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (CCP, § 437c(c).)

The requirements for filing a summary judgment motion on an affirmative defense are the same as to a cause of action. The motion must be served "at least 75 days before the time appointed for the hearing" and "shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (CCP, § 437c(a).) In other words, the motion must be served 105 days before trial.⁷ The motion "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken" and must also "include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed." (CCP, § 437c(b)(1).) An opposition is due 14 days prior to the hearing, and a reply is due 5 days prior to the hearing. (CCP, § 437c(b)(2), (4).)

California Rules of Court ("CRC"), rule 3.1350, provides specific requirements for motions for summary judgment and adjudication. The Rule provides for specific documents required in support of the motion as well as specifics regarding the separate statement of undisputed facts.



(CRC 3.1350(c), (d), (h).) Note that for a motion for summary adjudication, the notice must state the “affirmative defense” or “issues of duty” sought to be adjudicated. (CRC 3.1350(b).)

California’s Four Federal Districts

Summary judgment under federal law is governed by FRCP 56. However, unlike California state courts, in which summary judgments are governed uniformly by CCP section 437c and the California Rules of Court, each district court — and in fact each district judge — may have their own specific rules that apply to summary judgment motions.

Under federal law, “[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought.” (FRCP 56(a).) Summary judgment shall be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” (*Ibid.*) As for timing, “[u]nless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.” (FRCP 56(b).)

FRCP 56(c)(1) requires that “[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Notably, FRCP 56 does not require a separate statement of undisputed facts; however, as will be seen below, the Local Rules of the district courts and the judges within those districts may require this statement.

California is divided into four federal district courts: Northern, Eastern, Central, and Southern.⁸

Northern District

The Northern District of California covers 15 counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, and Sonoma. The Northern District has courthouses in San Francisco, Oakland, San Jose, and Eureka.

In the Northern District, the motion for summary judgment must be filed at least 35 days prior to the hearing date. (N.D. Civ. LR 7-2(a), 56-1.) An opposition is due 14 days after the filing of a motion, and a reply is due 7 days after the opposition is filed. (N.D. Civ. LR 7-3(a), (c).⁹) The Local Rules of the Northern District do *not* require a separate statement of undisputed facts. (N.D. Civ. LR 56-2(a).) However, some district judges’ standing orders do have this requirement, so make sure you check your particular judge’s rules prior to filing. If your judge does require a joint statement of undisputed facts, the Local Rules provide a procedure for conferring. (See N.D. Civ. LR 56 2(b).)

Eastern District

The Eastern District of California consists of 34 counties from Kern County in the South to Siskiyou County in the North: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Tulare, Trinity, Tuolumne, Yolo, and Yuba. The Eastern District has courthouses in Sacramento, Fresno, Tahoe, Yosemite, Bakersfield, and Redding.

In the Eastern District, the motion for summary judgment must be filed at least 28 days prior to the hearing date. (E.D. Civ. LR 230(b).) An opposition is due 14 days prior to the hearing, and a reply is due 7 days prior. (E.D. Civ. LR 230(c), (d).) The Local Rules of the Eastern District do require a “Statement of Undisputed Facts.” (E.D. Civ. LR 260(a).) In addition, check your judge’s standing order to see if there are any additional timing or other substantive requirements.

Central District

The Central District of California covers seven counties: Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Riverside, and Ventura. The Central District has two courthouses in Los Angeles, one in Riverside, and one in Santa Ana.

In the Central District, the motion for summary judgment must be filed 28 days prior to the hearing. (C.D. Civ. LR 6-1.) An opposition is due 21 days before the hearing, and a reply may be filed 14 days prior. (C.D. Civ. LR 7-9, 7-10.) Conceivably, then, a party would only have seven calendar days to oppose the motion, absent a stipulation or court order providing for more time. The Local Rules of the Central District require that the moving party “lodge” a “Statement of Uncontroverted Facts and Conclusions of Law” with the court. (C.D. Civ. LR 56-1.) This statement “shall set forth the material facts as to which the moving party contends there is no genuine dispute.” (*Ibid.*)

For almost every motion, including a motion for summary judgment, filed in the Central District, the party contemplating filing the motion “shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution.” (C.D. Civ. LR 7-3 (emphasis in original).) If a resolution cannot be reached, the moving party must certify in the moving papers that the conference of counsel took place pursuant to L.R. 7-3. (*Ibid.*)

Southern District

The Southern District of California covers the counties of Imperial and San Diego. The Southern District has a courthouse in San Diego and in El Centro.

In the Southern District, the motion for summary judgment must be filed 28 days prior to the hearing. (S.D. Civ. LR 7.1(e)(1).) An opposition is due 14 days before the hearing, and a reply may be filed 7 days prior. (S.D. Civ. LR 7.1(e)(2), (3).) The Local Rules of the Southern District do not specifically state whether a separate statement of undisputed facts is necessary; however, the Rules do state that “[w]here appropriate, a separate



statement of material facts must be supplied.” (S.D. Civ. LR 7.1(f)(1).) Accordingly, you should pay particular attention to the judge’s standing order on this point.

Conclusion

Given the right circumstances, a plaintiff’s motion for summary judgment can be a game changer, eliminating key defenses and issues and strengthening your client’s case. Although not appropriate in every case, it should at least be seriously considered.



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Brian is admitted to the bars of California, Nevada, Arizona, and Washington, D.C., along with numerous federal courts. He has experience in all areas of litigation, including all aspects of discovery, successfully filing and opposing dispositive motions, trials to verdict in California and

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Endnotes

¹ Under both California and federal law, “summary judgment” refers to a motion which disposes of the entire case. Under California law, “summary adjudication” refers to a motion which disposes of a claim or defense; federal law refers to this motion as “partial summary judgment.” For clarity, as used in this article “summary judgment” refers to all three terms.

² See, e.g., *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal.4th 623 (Cal. 2007) (statute of limitations in tobacco-related personal injury action).

³ *Campanelli v. Hershey Co.*, No. C 08-1862 BZ, — F.Supp.2d —, 2011 WL 651939 (N.D.Cal. Feb. 23, 2011).

⁴ These are “fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.” Cal. Civil Code § 846.

⁵ Keep in mind the limitations on the use of supplemental interrogatories: “A party may propound a supplemental interrogatory twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with Section

2024.010), once after the initial setting of a trial date” or “on motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental interrogatories.” CCP § 2030.070(b), (c).

⁶ In California state court, at the pleading stage a plaintiff may challenge an answer by demurrer for failing to state facts sufficient to constitute a defense, uncertainty, or failure to state whether the contract alleged in the answer is written or oral. See CCP § 430.20. In federal court, at the pleading stage a plaintiff may challenge the legal sufficiency of affirmative defenses through a motion to strike under FRPC 12(f).

⁷ There are extended time periods beyond 75 days based on how and where the motion is served. “[I]f the notice is served by mail, the required 75-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days.” CCP § 437c(a).

⁸ The local rules for each district court are posted online. Currently, they are found at:

Northern District: <http://www.cand.uscourts.gov/localrules>
Eastern District: http://www.caed.uscourts.gov/caed/static/Other/page_459.htm

Central District: <http://www.cacd.uscourts.gov/CACD/LocRules.nsf/Local+Rules?OpenView>

Southern District: <http://www.casd.uscourts.gov/index.php?page=local-rules>

⁹ Effective June 3, 2011, the Northern District revised the timing for oppositions and replies to coincide with when the motion is filed as opposed to the hearing date.

