

Excerpt from California Civil Litigation and Discovery

Attacking the Complaint ^{72/}

One of the ways to respond to the complaint is to attack it as legally insufficient on one or more grounds. The paralegal needs to know the substantive grounds upon which to attack the complaint or other pleading as well as the various procedures for doing so. In that regard, some attacks may be made by way of affirmative defense, and others must be made via motion or both; some grounds are waived if not timely brought, and others may be brought at any time.

- When the defect *appears on the face* of the complaint or from matters judicially noticed, it may be attacked by *demurrer*.^{73/}
- When the defect *does not appear on the face* of the complaint, it may only be raised as an *affirmative defense*.

Grounds for Attacking the Complaint

As noted in prior chapters, there are many requirements for bringing a lawsuit against a defendant. To review:

- The court must have a constitutionally sufficient basis for exerting jurisdiction over the defendant.^{74/}
- The defendant must be given notice (met by service of process) in a manner that meets constitutional due process and statutory requirements.^{75/}
- The court must have subject matter jurisdiction.^{76/}

^{72/} Any pleading may be attacked by the methods discussed here. Thus, although we refer to the complaint, the discussion applies to attacks on answers and cross-complaints as well.

^{73/} A defect is on the face of the complaint when it is evident from the construction of the complaint without further investigation.

^{74/} Recall that there is a constitutionally sufficient basis when the defendant is physically in the forum state when he/she is served with the summons and complaint, the defendant lives in or plans to live indefinitely in the state, the defendant has agreed to submit to the jurisdiction of the court by contract or other agreement, or when the defendant has the required minimum contacts with the state.

^{75/} Remember also that there are specific methods for serving process (personal service, substituted service, notice and acknowledgment of receipt, publication), each having very specific procedures which must be followed.

^{76/} As noted above, subject matter jurisdiction is the power and authority of a court to hear a particular type of case and amount in controversy and render a legally binding decision. Lack of subject matter jurisdiction is incurable, fatal, and cannot be waived.

Demurrers do not challenge the truthfulness of the complaint. Instead, they actually assume that everything pled in the complaint is true,^{82/} and argue that there is some defect which bars the plaintiff from any recovery. (For this reason, the demurrer is sometimes referred to as the “so what?” defense.)^{83/}

Example:

Lacy and Vince entered into a contract requiring Vince to deliver two chairs to Lacy’s home on Jan 5, 2000. Lacy files a complaint in March of 2007, alleging that the contract had been entered, the chairs were not delivered, and Lacy suffered damages.

Vince may demur to the complaint on the ground that it is barred by the statute of limitations. He would argue that even if there were a contract as set forth in the complaint, and even if the chairs were never delivered, it happened so long ago that Lacy has no remedy. In other words, “so what” if the facts in the complaint are true?

A demurrer may be “general” or “special.” A general demurrer claims that the court lacks subject matter jurisdiction, while special demurrers attack the complaint on technical grounds.

General Demurrers

General demurrers are most often brought on the ground that the *complaint fails to state a cause of action*. If there is no cause of action, there is nothing to bring before the court, and the court has no subject matter jurisdiction.^{84/}

If the facts pled in the complaint state *any* valid cause of action, the general demurrer must be overruled. If the facts alleged in the complaint do *not* state a valid cause of action, the general demurrer should be sustained. When the defect is curable, leave to amend the pleading is usually granted by the court; when the defect is not curable, the case is dismissed.

^{82/} Assuming the allegations are true for the purpose of the demurrer is *not an admission*. If the demurrer is unsuccessful, the defendant may still deny those allegations in the answer.

^{83/} The grounds for a demurrer do not have to be raised by demurrer only, but may be raised as affirmative defenses or objections in the defendant’s answer.

^{84/} As noted above, subject matter jurisdiction challenges are never waived. Therefore, failure to demur does not waive the defect.