

## Motions

# Using dispositive motions the demurrer, the plea in bar and motion to dismiss

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**R**ule 3:8(A) of the Rules of the Supreme Court of Virginia identifies a short list of the pleadings, other than an answer, that may be filed in response to a complaint: the demurrer, the plea, the motion to dismiss, and the motion for a bill of particulars.<sup>1</sup> Apart from the motion for a bill of particulars, the point of the other three responsive pleadings is to dispose of some or all of the complaint before a trial. This article reviews the function of each of the three “dispositive” motions: the demurrer, the plea in bar, and the motion to dismiss.

### The demurrer

The demurrer says, “Even if we admit all you say to be true, the law affords you no relief....”<sup>2</sup> Stated another way, in a demurrer, the pleader objects to proceeding any further in the case until the court has ruled on whether the plaintiff has stated a claim.<sup>3</sup> The demurrer tests the legal sufficiency of facts alleged in the pleadings, but not the strength of proof.<sup>4</sup> In considering a demurrer, the court should determine only whether the pleading alleges “sufficient facts to constitute a foundation in law for the judgment sought.”<sup>5</sup> In making that determination, the court accepts as true all facts properly pleaded and all reasonable and fair inferences that may be drawn from those facts.<sup>6</sup>

The court is not obligated, however, to accept as true the pleader’s legal conclusions.<sup>7</sup> For that matter, the court is not obligated to consider the pleader’s legal conclusions, even if they are faulty or omitted.<sup>8</sup>

A demurrer stands or falls by the allegations of fact that appear in the complaint<sup>9</sup> or which are added to the record by oyer<sup>10</sup> or which are incorporated in the complaint by reference to another proceeding.<sup>11</sup> A demurrer that relies on allegations of fact outside of these boundaries is a “speaking demurrer” that courts will strike.<sup>12</sup>

The demurrer must be made in writing and filed and “[n]o grounds other than those stated specifically in the demurrer shall be considered by the

court.”<sup>13</sup> It must be filed within the time specified in Rule 3:8 (a).<sup>14</sup> A demurrer and an answer may be filed simultaneously under the Rule, and each shall be “deemed a pleading in response for the count or counts addressed therein.”<sup>15</sup> Several cases, however, hold that a party should not be allowed to demur to a pleading that has been answered unless and until the court grants leave to withdraw the answer.<sup>16</sup> The cases and the language of Rule 3:8 (a) suggests that, while a party may answer some counts and demur to others, answering a count nullifies a demurrer to that count.

### Plea in bar

If the function of the demurrer is to challenge the legal position of the pleader, the function of the plea in bar is to challenge the pleader’s factual position.

More formally stated, “a plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff’s right of recovery.”<sup>17</sup> A plea in bar is unlike a demurrer in that it goes outside of the initial pleading and introduces a new allegation of fact. It is also unlike a motion for summary judgment, which is only available when there is no genuine issue of material fact.<sup>18</sup>

The moving party has the burden of proof on the factual issue raised in the plea. A plea in bar may be presented in any of three ways, which are subject to one of two different standard of review on appeal. First, if the parties go forward only on the pleadings, the trial court must rely solely on the pleadings in considering the plea in bar.<sup>19</sup> In that case, the trial court will take as true the facts as stated in the plaintiff’s pleadings.<sup>20</sup> On appeal, the court will review the trial court’s findings *de novo*.<sup>21</sup>

Second, the issue raised by a plea in bar may be submitted to the circuit court for decision based on the presentation of evidence supporting or opposing the plea.<sup>22</sup> If the parties present evidence on the plea *ore tenus*, the circuit court’s factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly

wrong or without evidentiary support.<sup>23</sup>

Third, if the facts underlying the plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea.<sup>24</sup> The parties may waive the right to a jury by not making the demand.<sup>25</sup> Although the Supreme Court has noted that a party may demand a jury trial of *any issue* in an action at law,<sup>26</sup> trial courts have denied jury demands by finding that the factual issue raised by the plea is not in dispute.<sup>27</sup> The Supreme Court has recently granted an appeal in a case in which one assignment of error was that the trial court had denied a jury demand on a plea in bar and held an evidentiary hearing instead.<sup>28</sup>

### Motion to dismiss

Of the three dispositive motions, the motion to dismiss is the least well-defined. From one perspective, demurrers and pleas are subspecies of motions to dismiss and parties and courts often lump them together when considering them.<sup>29</sup> Motions to dismiss are generally treated like demurrers or pleas in bar depending on the manner in which they seek to dispose of the complaint. This is most often the case with motions to dismiss that challenge the court's jurisdiction, whether subject-matter<sup>30</sup> or personal.<sup>31</sup>

Other motions to dismiss arise under particular statutes and have elements and burdens of proof that derive from the statute. For example, a motion to dismiss for *forum non conveniens* under Virginia Code §8.01-265 permits a court for good cause shown to dismiss an action brought by a person who is not a resident of Virginia if the cause of action arose outside of Virginia, if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than Virginia.<sup>32</sup> Also by way of example, for a motion to dismiss made under Virginia Code §8.01-277 for failure to make service within one year under Rule 3:5(e) or Va. Code §8.01-275.1,<sup>33</sup> the court must find that "plaintiff did not exercise due diligence to have timely service."<sup>34</sup> In each example, the moving party has the burden of persuasion on the statutory basis for dismissal.<sup>35</sup>

### Endnotes

1. Va. Sup. Ct. R. 3:8(a) ("A demurrer, plea, motion to dismiss, and motion for a bill of particulars shall each be deemed a pleading in response for the count or counts addressed therein.")
2. *County School Board v. Snead*, 198 Va. 100, 103 (1956).
3. *Supra*, note 2. A party's refusal to proceed further is tempered somewhat by Rule 4:1(d)(2), which provides that discovery in a case will continue while a demurrer is pending, unless the court orders that discovery be suspended. Va. Sup. Ct. R. 4:1(d)(2).
4. *Glazebrook v. Bd. of Supervisors*, 266 Va. 500, 554

- (2003) (citations omitted).
5. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122 (2006).
6. *Baker v. Poolservice Co.*, 272 Va. 677, 684-85 (2006).
7. *Cline v. Dunlora South, LLC*, 284 Va. 102, 106 (2012); *Dodge v. Randolph-Macon Woman's College*, 276 Va. 1, 5, (2008).
8. *Radford v. Brooks*, 125 Va. 621, 624 (1919) ("It is wholly unnecessary for B to say anything about the law of the case, or what were the respective rights and duties of the parties in the premises. This is a matter of law of which the court takes judicial notice.") (citations omitted).
9. *Anderson v. Patterson*, 189 Va. 793, 798 (1949).
10. *Riverside Healthcare Ass'n v. Forbes*, 281 Va. 522, 534 (2011); *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997) ("[A] court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings."); *Workflow Solutions v. Lewis*, 77 Va. Cir. 334, 336 (Norfolk 2008).
11. *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 305 (2002), citing *Fleming v. Anderson*, 187 Va. 788, 794-95 (1948) ("Where the plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court, in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the former case.")
12. *Patel v. Anjali*, 81 Va. Cir. 264, 265 (City of Chesapeake 2010); *Landes v. Erie Ins. Exch.*, 48 Va. Cir. 298, 298 (Chesterfield County 1999); but see *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 519 n. 1 (1982) (court considers untimely speaking demurrer because it raises question of court's subject matter jurisdiction).
13. Va. Code § 8.01-273.
14. Va. Sup. Ct. R. 3:8(a) ("A defendant shall file pleadings in response within 21 days after service of the summons and complaint upon that defendant, or if service of the summons has been timely waived on request under Code § 8.01-286.1, within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside the Commonwealth.")
15. Va. Sup. Ct. R. 3:8(a) ("A demurrer, plea, motion to dismiss, and motion for a bill of particulars shall each be deemed a pleading in response for the count or counts addressed therein.")
16. *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 519 n. 1(1982) ("A litigant who has answered a pleading may not thereafter demur thereto, unless leave of court, after proper notice, is first given to withdraw the answer.") (citation omitted); *O'Neill v. Cole*, 194 Va. 50, 55 (1952) ("Though a demurrer, an answer and other defensive pleadings may be filed at the same time, yet after an answer has been properly filed in a chancery cause, and so long as it remains filed, a litigant, adult or infant, should not thereafter be allowed to demur to the pleading that has been previously answered. Whether or not the answer may be withdrawn and the litigant then allowed to demur



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- rests in the court's sound discretion."); *Fairfield Williamsburg, Inc. v. Governor's Land Assocs.*, 40 Va. Cir. 312, 314 (City of Williamsburg and James City County 1996) ("When exceptional circumstances surround a case, a demurrer may be accepted at a later stage at the judge's discretion.") (citation omitted).
17. *Station # 2, LLC v. Lynch*, 280 Va. 166, 175 (2010) (quotation marks and citation omitted).
  18. *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88 (2009).
  19. *See Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 112 (2008); *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001) ("Under well settled principles, where no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented.")
  20. *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996).
  21. *Weichert Co. v. First Commercial Bank*, 246 Va. 108, 109 (1993). The Supreme Court has never expressly articulated this standard of review as *de novo*, but has on several occasions cited directly or indirectly to *Weichert Co.*, where it said, "As no evidence was taken, we, like the trial court, rely solely on the pleadings in resolving the issue before us." *Id.*
  22. *Hawthorne v. VanMarter*, 279 Va. 566, 577-578 (2010)
  23. *Hawthorne v. VanMarter*, 279 Va. 566, 577 (Va. 2010); *Jennings v. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 600 (2008); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 595 (2000); *Bottoms v. Bottoms*, 249 Va. 410, 414 (1995).
  24. *See* Va. Code § 8.01-336(B); *Hawthorne v. VanMarter*, 279 Va. 566, 577-578 (2010); *Bethel Inv. Co. v. City of Hampton*, 272 Va. 765, 770 (2006); *Upper Occoquan Sewage Auth. v. Blake Constr. Co., Inc.*, 266 Va. 582, 590-92 (2003) (reversing judgment on a plea in bar that court sustained without evidence to support it).
  25. Va. Code § 8.01-336(B); *see Painter v. Singh*, 73 Va. Cir. 77, 79 (Fairfax County 2007)
  26. *Bethel Investment Co. v. City of Hampton*, 272 Va. 765, 769 (2006).
  27. *Norfolk Cmty. Servs. Bd. v. Berardi*, Civil No.: CL11-2968, 2012 Va. Cir. LEXIS 25 (Norfolk Feb. 15, 2012).
  28. *Kulick v. Allen*, Record No. 120888, 2012 Va. LEXIS 184 (Writ granted Oct. 23, 2012).
  29. *See, e.g. Bowie v. Murphy*, 271 Va. 126, 131 (2006) (defendants challenge court's subject matter jurisdiction by use of demurrer and special plea); *Lucas v. Biller*, 204 Va. 309, 312 (1963) ("Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court....")
  30. *See, e.g. Eberhardt v. Fairfax County Empl. Ret. Sys. Bd. of Trs.*, 283 Va. 190 (2012) (whether subject-matter jurisdiction exists based on statute providing for appeal of retirement board decision to circuit court); *Asplundh Tree Expert Co. v. Pac. Emplrs. Ins. Co.*, 269 Va. 399 (2005) (whether court's jurisdiction to grant declaratory judgment negated by payment of underlying tort claim); *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604 (2001) (court lacks subject matter jurisdiction over matters of internal church discipline, policy, administration, and governance). *See also Lucas v. Biller*, 204 Va. 309, 313 (1963) (because it cannot be waived, motion to dismiss for lack of subject matter jurisdiction may be made at any time).
  31. *See, e.g., Witt v. Reynolds Metals Co.*, 240 Va. 452 (1990) (long-arm jurisdiction); *Stephens v. Stephens*, 229 Va. 610 (1985) (registration of foreign divorce decree insufficient to create personal jurisdiction over resident of foreign state); *Minton v. First Nat'l Exchange Bank*, 206 Va. 589 (1965) (where 1924 divorce decree failed to show process had been served on ex-husband, 1961 suit for unpaid alimony dismissed on ground that 1924 decree was void for want of personal jurisdiction); *Tabet v. Sheban*, 83 Va. Cir. 89 (Fairfax County 2011) (addressing issues of personal, subject matter, and territorial jurisdiction in motions to dismiss two suits arising under the Virginia Declaratory Judgment Act). *Compare Frizzell v. Danieli Corp.*, 81 Va. Cir. 427, 430 (Norfolk 2010) with *Massey Energy Co. v. United Mine Workers*, 69 Va. Cir. 118, 121 (Fairfax County 2005). *Frizzell* and *Massey Energy* were each cases in which the defendants challenged the courts' long-arm jurisdiction. In *Frizzell*, the court received evidence – as in a plea in bar – as to the defendant's minimum contacts with Virginia. *Frizzell v. Danieli Corp.*, 81 Va. Cir. at 430. In *Massey Energy*, the court noted that the defendant had submitted affidavits denying the plaintiff's allegations of minimum contacts but treated the contradictory allegations as if they were a demurrer, holding that "where the parties' allegations are contradictory, those related in Plaintiff's complaint will be accepted as true." *Massey Energy Co. v. UMW*, 69 Va. Cir. at 121.
  32. *See, e.g., Birdsall v. Federated Dep't Stores, Inc.*, 70 Va. Cir. 290 (Fairfax County 2006) (denying motion to dismiss where only argument for good cause was greater degree of practical nexus with foreign forum); *Tanner v. Mobil Oil Corp.*, 54 Va. Cir. 90 (Fairfax County 2000) (granting motion to dismiss and transferring asbestos exposure case to South Africa).
  33. *Lyren v. Ohr*, 271 Va. 155, 157 (2006); *Parsch v. Massey*, 71 Va. Cir. 209 (Charlottesville 2006); *Doulgerakis v. Cooper*, 57 Va. Cir. 326 (Newport News 2002).
  34. Va. Code § 8.01-277(b).
  35. *See Parsch v. Massey*, 71 Va. Cir. 209 (Charlottesville 2006); *Tanner v. Mobil Oil Corp.*, 54 Va. Cir. 90 (Fairfax County 2000).