Finding opportunity in the demurrer

Look upon a demurrer as a chance to strengthen your complaints

By Donna Bader

In law school, we were taught that demurrers were disfavored and you shouldn't file one unless it would eliminate a cause of action or complaint. If it didn't, then you were just educating your opponent, sometimes at a crucial phase of the proceedings, so that your opponent, aware of the omission, could remedy the problem. That advice still holds true today.

And yet we find ourselves facing demurrers, even though we know we can easily amend the complaint. Attorneys often view a demurrer as either a "billable event" or just a battle in an ongoing war. If you win the battle, does that necessarily mean you will at trial? No! As plaintiffs' attorneys we should look upon a demurrer as a chance to strengthen our complaints.

Responding to the different types of demurrers

If you are preparing the complaint and have done your homework as to what must be alleged to constitute a cause of action, then theoretically you will never face a demurrer that attacks pleading defects. While I don't necessarily stick to form books to draft my pleadings, I will use it as a checklist to make sure all necessary allegations are present.

Through the years, I have observed three different types of demurrers:

- A demurrer that attacks pleading defects that can be remedied;
- A demurrer that attacks pleading defects *and* presents a true question of law;
- A demurrer that attacks the pleading based on a question of law that no amendment can remedy.

If you have omitted crucial allegations or your complaint suffers from pleading defects that can be remedied, why fight the demurrer? Use the demurrer as a learning experience, even a checklist, and fix up your complaint. You might just call the other side and tell them that an amended complaint will be filed, making the demurrer moot. Or just file it before the hearing. (Under Code Civ. Proc., § 472, if the complaint has not yet been amended, you can file an amendment complaint as of right, right up until the date set for hearing on the demurrer. But that doesn't mean allowing the court to work up the demurrer papers and then filing the amended pleading at the last minute.) In my opinion, there is no good reason to fight a demurrer on procedural defects or missing elements; it only costs the clients money and gives you more work to do. Your time is better spent on amending the pleading.

If you are facing a demurrer that has both pleading defects and an appealable question of law, then you still might clean up the pleading so that it looks as great as possible. Then you are ready to fight the real issue. You don't want to go to the appellate court with a sloppy pleading, even if the issue can't be cured by amendment.

If your pleading is as good as it gets, then fight it on the legal issue. It could be an issue of standing to bring the action or the application of the statute of limitations, but the issue can't be resolved at the lower trial level. No matter how well written your pleading is, you won't be able to avoid a review of your pleading at the appellate level to see if it can state a cause of action.

Arguing at the hearing on the demurrer

At the hearing on the demurrer, you will likely find the trial court is liberal in granting leave to amend, especially if the defects can be remedied by more comprehensive allegations. Some judges want to avoid several rounds of pleadings and demurrers by inquiring if and how you can amend the pleadings. Always take that opportunity to explain how the pleading can be amended. If the court seems indifferent to the possibility of amendment, ask for it. If the trial court determines that no amendment will overcome the defects in your pleading, then you are going up to the appellate court.

When you argue at the demurrer hearing, don't fall into the trap of arguing the evidence. A demurrer lies from defects on the face of the pleading or from facts that the court may judicially notice. (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) A demurrer is not the place to challenge disputed facts. "[A] hearing on a demurrer cannot be turned into a contested evidentiary hearing." (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 365.) You know the defendant is attempting to do this when he or she explains your allegations or rebuts them with facts that they would present at trial. Another indication that defendant is resorting to extrinsic facts is when the demurrer is supported by a declaration. If the

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demurrer is truly testing the pleading or judicially noticed facts, then the filing of a declaration is unnecessary unless it is required to support the request for judicial notice.

Don't get caught in having to explain how you can prove your allegations at trial. The trial court should not be concerned with this as it must accept the truth of your allegations. The appellate court is also not concerned with how or even if you can prove your allegations at trial. (*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal.App.4th 1219, 1226; *N.V. Heathorn, Inc. v County of San Mateo* (2005) 126 Cal.App.4th 1526, 1531.) The appellate court will ignore erroneous or confusing labels or captions by the pleader; it is focusing on the facts alleged. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 218-219; *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281.) Thus, the defendant cannot set forth arguments in their demurrer that, if proven true, would defeat plaintiff's complaint. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1144.) The appellate court will presume that you can prove the facts you have alleged. (*Hill v. City of Santa Barbara* (1961) 196 Cal.App.2d 580, 585.)

Appellate review of the order sustaining a demurrer

No matter how well you argued, the trial court has sustained the demurrer without leave to amend as to the entire complaint. Your client hasn't even had his or her day in court. What about California public policy that seeks to dispose of cases on their merits? Now what? It's time to appeal, but make sure you file a timely notice of appeal.

If the order sustaining the demurrer without leave to amend eliminates all causes of action and disposes of the matter between the parties, then you will have to appeal to get back into court. Don't rush it and try to appeal from the order sustaining the demurrer. It is not an appealable order. You must appeal from the judgment of dismissal that follows the order. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611; *Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1551, fn. 1.) But beware a combined order sustaining the demurrer *and* dismissing the entire case.

If, however, the order does not dispose of all causes of action, you will have to decide whether to file a writ petition, continue to trial on the remaining causes of action, or dismiss the causes of action that remain alive. Keep in mind that your chances with a writ petition are minimal. "Appeal is presumed to be an adequate remedy, and writ review is rarely granted unless a significant issue of law is raised or resolution of the issue would result in a final disposition as to the petitioner." (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1151.)

Review of the ruling on the demurrer

The appellate court conducts an independent or de novo review of the judgment of dismissal, including the substantive issues. (*TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1363.) The court will determine if you can state facts sufficient to constitute a cause of action under any legal theory. (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 349.)

This standard of review is one that is favored by appellate attorneys and is quite helpful to plaintiffs who might have pled a legal theory that isn't supported by the facts, but later discovers a better legal theory applies. That also means the appellate court is not that concerned with the ruling below; you can ask for review as if you never appeared before the trial court. That doesn't mean that the appellate court has no interest in what the trial court ruled, but its order is not binding on the appellate court and it won't stop them from looking at it anew. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1421.) In addition, the appellate court generally ignores the trial court's reasoning, and fortunately for the appellant, it is not limited by the theories raised in the pleading. (*Community Assisting Recovery, Inc. v. Aegis Security Ins.* (2001) 92 Cal.App.4th 886, 891.)

On review, the appellate court liberally construes the pleading in a reasonable manner. The appellate court is trying to determine if you can state a cause of action. It will liberally construe the pleading so as to achieve substantial justice between the parties, not to summarily dispose of a defective pleading that can be salvaged. Thus, it will read the complaint in a reasonable manner, putting the allegations in context, and consider judicially noticed matter. (*Leonte v. ACS State and Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 525; *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1141.)

If you allege facts in your pleading, and they are not contradicted by your exhibits and judicially noticed documents, then the court will assume the truth of your allegations. (*California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, 178, disapproved of on other grounds in *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963; *Leonte v. ACS State and Local Solutions, Inc., supra,* at pg. 525.) That assumption goes beyond the specific allegations, the appellate court will also assume the truth of facts that may be implied or reasonably inferred from the express allegations. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986.) However, if the allegations are contrary to law, the exhibits, or judicially noticed documents, they will be ignored. (*Consumer Cause, Inc. v. Weider Nutrition Internat., Inc.* (2001) 92 Cal.App.4th 363, 367.) Finally, if you have facts but forget to put them into the complaint, they are not presumed to exist. (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 579.)

The appellate court, however, will not assume the truth of contentions,

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deductions, or conclusions of law or fact. (*Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 705.) Of course, that could prove to be a benefit to you or an obstacle. If you have included contentions and deductions in your pleading, then the court will ignore them, but if the defendant, in preparing the demurrer, is depending on contentions or deductions, then they will also be ignored.

Arguing the trial court's denial of leave to amend the complaint

If you are also arguing that the trial court erred in granting leave to amend, that challenge is reviewed on an abuse of discretion standard. Whether the trial court has abused its discretion in denying leave to amend the complaint is tied to the appellate court's determination whether the plaintiff can state a cause of action under any legal theory. If the plaintiff can, then denying leave to amend is an abuse of discretion. "And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment; if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1423.)

Although the appellant bears the burden of proving the complaint can be amended, a real plus for appellant and somewhat unusual under standard appellate procedure, is that this argument can be raised for the first time on appeal. This is especially helpful since the appellate attorney may uncover new allegations and theories that would have been more appropriate and will overcome a defective complaint after the case is lost below and resides in the appellate courts. As you prepare for appeal, you might discover that another cause of action would have been the appropriate one to pursue. Don't worry, life is not over! For while the appellant bears the burden of proving that the complaint can be amended to state facts constituting a cause of action and generally you cannot raise new issues on appeal, this argument can be made for the first time on appeal. (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1039.) (This is your one free-pass; don't even think of trying this with a summary judgment.)

You can also advance a new legal theory on appeal because the argument involves a pure question of fact that is presented by the undisputed facts. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259.) There is also authority to suggest that the appellate court can raise this issue even if you overlook it, but don't count on the appellate court to always do your work for you. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.)

Pleading problems can usually be cured by amendment; however, there are times when we are faced with legal issues that must be resolved at the appellate stage. These appeals may enjoy more success than appeals after trial because the errors are often legal, enjoy a more favorable standard of review, and involve a strict scrutiny by the appellate court, which is bound by California public policy of disposing of cases on their merits and allowing parties their day in court rather than eliminating cases at the pleading stage.

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