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How to Decide When a Demurrer Makes Sense

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The option to demurrer comes early in a lawsuit, when attorneys are particularly anxious to prove themselves to the client. In this setting it can be tempting to err on the side of recommending the zealous advocacy of a demurrer over the more measured approach of answering the complaint. However, demurrers are often unnecessary and counterproductive, especially in the current, resource-strapped environment of many California courts.

Demurrers, like motions to strike and motions for judgment on the pleadings, are facial challenges to the allegations in a complaint. The grounds for a demurrer are technically considered either "general" or "specific," as defined by the Code of Civil Procedure. In essence, though, demurrers fall into two practical categories: those attacking fundamental legal flaws and those that target more superficial drafting errors or shortfalls in the written complaint.

When challenging a pleading on a more superficial ground, it is important to itemize why the technical issue is substantively significant. The special demurrer on contract issues, for example, is really geared towards whether the contract is written or oral, which has implications for the statute of limitations and the statute of frauds. If applicable, discuss this as the impetus behind the challenge in your moving papers. Demurrers that fail to explain the important implications of the pleading's failures can come across as nit-picky and are less likely to be viewed favorably by the court.

However, sometimes fatal problems with a plaintiff's case simply cannot be challenged by a demurrer. For instance, plaintiffs are generally not required to allege specific dates relevant to their claims as part of the complaint. You may, therefore, have an extrinsic document that clearly indicates that the claim is barred by the applicable statute of limitations, but unless that document is judicially noticeable, you will be unable to challenge the claim at the pleading stage.

In these types of situations a client may be frustrated by the inability to quickly defeat what is perceived as a meritless claim. Where a clear defense is available but not ripe for challenge on demurrer, your biggest asset to the client may be in counselling restraint. If the above-

described statute of limitations defense is indeed valid, then it will be a simple defense to assert on a motion for summary judgment, which may end up being nearly as expeditious as a few rounds of demurrers.

In general, using demurrers for the purposes of gamesmanship should be avoided, particularly with regard to things like special demurrers for uncertainty. Practice guides do not hesitate to clearly brand this ground as "disfavored," and discovery is, of course, the best way to resolve uncertainties about a claim. If asserting uncertainty, however, be very clear to point out why the particular uncertainties prevent you from understanding the claims against you. One good example of this, in multi-party cases, is when the complaint fails to clearly allege which claims are asserted against which defendants. Also, consider discussing in the moving papers how greater clarity will streamline the discovery process, outlining in a declaration the vast amounts of additional discovery that would be obviated by certain clarifications. It is best to avoid the bad impression of presenting a demurrer based on uncertainties that are either not fundamental or could be resolved either through simple discovery or informal discussions.

There are exceptions. For instance, when you are before a single-assignment judge, a demurrer based on uncertainty may provide an opportunity to familiarize the court with the central problems of the case. In one particular case, I was confronted with a complaint whose legal and factual allegations were, I believed, simply copied from a factually related predecessor suit and awkwardly re-purposed for the current case. Since I was already demurring on other grounds, I added an uncertainty challenge, pointing to specific provisions of the complaint that, on their face, seemed confusingly geared towards the prior action. While not a traditional basis for an uncertainty demurrer, it nonetheless allowed me to place the complaint in an advantageous context before the trial judge.

In any event, it is extremely important, in this age of busy and crowded courts, to meet and confer with opposing counsel before filing your demurrer. And if you have met and conferred without success, consider including a brief description of your efforts in a supporting declaration.

In general, take advantage of any such opportunity to put yourself on better footing with the judge. In particular, I distinctly recall one large, multi-party case in which a co-defendant brought a substantive demurrer that struck at the heart of the plaintiff's claim; the issues ended up being appealed all the way to the California Supreme Court.

By comparison, my set of somewhat superficial demurrers, which I nonetheless spent a good deal of time on, seemed like housekeeping. After hours of in-court argument on the other issue, I reminded the court about my remaining demurrers and asked whether the court had a tentative inclination. "Yes," came the response, "all denied. Any argument?" The tone of that not-unjustified response is something I try to keep in mind whenever considering whether or not to demurrer to a complaint.

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