For round three, come out swinging

Demurrers can be a two-way street. A demurrer to the answer is an early option for narrowing the pleadings and setting a tone for all that follows

By Robert P. Travis

As plaintiffs' attorneys, we breathe a sigh of relief every time we receive an answer to one of our complaints because it means we have avoided some initial costly and time-consuming challenges, including demurrers.

Before rushing headlong into the next phase of the case, however, we should always take a moment to see if the defendant's *answer* is subject to a demurrer. Why? Because most answers present a thicket of defective affirmative defenses.

We could just wait and see if the other side does its own pretrial pruning of those affirmative defenses, but chances are the defenses will still be lurking there in the answer, and, therefore, in the case, when the case goes to trial; and we will have to deal with them. Worse, one or more of the defenses might surprise us and devour our case like the pleading equivalent of "Audrey II," the giant carnivorous plant from *Little Shop of Horrors*. In either case, it is better to confront the defenses sooner rather than later.

Towards that end, we could try to slash our way through the defenses with formal discovery, including Interrogatory No. 15.1 from the standard set of Form Interrogatories

(DISC-001) and related special interrogatories, requests for admission, and demands for inspection, but who wants to do all that if we can simply wipe out the defenses at the very beginning of the case?

This is where the demurrer comes in. Thus, if civil litigation rounds one and two are the complaint and answer, we should consider round three as the time to come out swinging with a demurrer to the answer.

Civil Code section 430.20 identifies the three grounds for a demurrer to an answer

The statute that lists the grounds for a demurrer to an answer is short and to the point:

> A party against whom an answer has been filed may object, by demurrer as provided in Section 430.30, to the answer upon any one or more of the following grounds:
>
> (a) The answer does not state facts sufficient to constitute a defense.
>
> (b) The answer is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.
>
> (c) Where the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral.

(Code Civ. Proc., § 430.20.)

Demurrers to answers: "commonly recognized" but "rare"

"Demurring to an answer is a commonly recognized practice" (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1987) 86 Cal.App.3d 873, 879), but, as one practice guide observes, "such demurrers are very rare." (Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group June 2020 Update) ¶ 7:35.1 ("Weil and Brown").)

According to this same practice guide, the reason demurrers to answers are rare is "probably because they are not worth the cost when the same result can be achieved by serving requests for admission or standard form interrogatories seeking the bases for the affirmative defenses." (Weil and Brown, *supra*, ¶ 7:35.1.)

Respectfully, this probably is *not* the reason that demurrers to answers are rare; instead, it is more likely that they are rare because most attorneys simply do not think to use them in response to an answer.

Regardless, it is *not* the case that the "same result" can be achieved by serving written discovery. This is because an attorney who alleges opaque affirmative defenses usually goes on to serve discovery responses that are only marginally more illuminating. Sometimes, the discovery responses are even murkier than the answer, because they are littered with qualifying language or boilerplate objections that must also be cleaned up – and usually with a motion to compel that is more expensive (think "separate statement") than a simple demurrer would have been back at the beginning of the case.

The most common challenge is that an affirmative defense fails to state facts sufficient to constitute a defense

The first prong of section 430.20 provides that an affirmative defense may be challenged where it fails to state facts sufficient to constitute a defense. (Code Civ. Proc., § 430.20, subd. (a).)

"Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining whether a complaint states a cause of action." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732; see 5 Witkin, Cal. Procedure (5th ed., March 2020 Update) Pleading, § 1181 [same].)

"The same pleading of 'ultimate facts' rather than 'evidentiary' matter or 'legal conclusions' is required as in pleading the complaint [internal citation]. [¶] The answer must aver facts 'as carefully and with as much detail as the facts which constitute the cause of action and which are alleged in the complaint.'" (Weil and Brown, *supra*, ¶ 6:459, quoting *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384 ("*FPI Development, Inc.*").)

In determining whether an allegation properly pleads an ultimate fact or improperly pleads a conclusion of fact or law, the inquiry is whether the allegation fairly apprises the opposing party of the factual basis of the claim or defense alleged. (*Jones v. Oxnard School Dist.* (1969) 270 Cal.App.2d 587, 593.)

A demurrer, therefore, is the perfect tool to "eliminate 'boilerplate' affirmative defenses that often appear in answers (e.g., 'waiver,' 'estoppel,' 'unclean hands,' etc.)." (Weil and Brown, *supra*, ¶ 7:35.1.)

For example, in *FPI Development, Inc.*, the plaintiffs sued on a promissory note. In their complaint, the plaintiffs had pleaded the existence of the promissory note and the defendants' failure to pay. The defendants' answer to the complaint contained a general denial and numerous affirmative defenses asserted in a conclusory fashion. (Sound familiar?) Although the plaintiffs never challenged the sufficiency of the affirmative defenses, the court of appeal addressed their sufficiency in its decision affirming the trial court's order granting the plaintiffs' motion for summary judgment:

> Numerous defenses were purportedly raised by defendants' allegations of affirmative defense. Most of these allegations fail to state a defense even when liberally construed in defendants' favor. [Citation.] Some are simply immaterial. For example, defendants allege as a conclusion that plaintiff's claim is barred by laches, an equitable defense that has no application to the plaintiff's legal claim. [Citation.] All of the allegations are proffered in the form of terse legal conclusions, rather than as facts "averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.

(*FPI Development, Inc.*, *supra*, 231

Cal.App.3d at p. 384, quoting § 563, at p. 917; see also *Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1118.) Pomeroy, Code Remedies (5th ed. 1929)

It is also instructive that the Judicial Council's form answer (PLD-050), contains the following lead-in for affirmative defenses: "DEFENDANT states the following *FACTS* as separate affirmative defenses to plaintiff's complaint." (Capitalization in original, italics added.)

Note, too, that while the first prong of section 430.20 is primarily used to challenge *applicable* affirmative defenses that fail to state facts, it can also be used to challenge affirmative defenses that are *inapplicable* – for example, an affirmative defense that the plaintiff "did not reasonably and justifiably rely on the conduct of the defendant" in a case in which reasonable and justifiable reliance is not an element of any one of the plaintiff's causes of action.

The first prong can also be used to attack waffle language stated as an affirmative defense. For example, defendants sometimes purport to "reserve" the right to assert additional affirmative defenses in the future, but that does not mean they actually can. Whatever such attempts might be, they are not affirmative defenses, because they are not "[a] statement of new matter constituting a defense." (Code Civ. Proc., § 431.30, subd. (b)(2).) Moreover, except in limited circumstances that are not relevant in most cases, amendment of a pleading requires a prior court order, and no purported "reservation" of the right to amend can circumvent that requirement.

There are two exceptions to the "facts" requirement

It appears that there are only two exceptions to the foregoing "facts" requirement. The first exception has to do with statute of limitations affirmative defenses. In pleading the statute of limitations, "it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." (Code Civ. Proc., § 458); simply put, "[a] pleading that fails to specify both the applicable statute *and subdivision* 'raise[s] no issue and present[s] no defense'" (Weil and Brown, *supra*, ¶ 6:462.1, italics and brackets by Weil and Brown, citing *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246-247 [plea that action barred by Code of Civil Procedure section 339 not sufficient because statute contains several subdivisions]; see *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691.)

The second exception has to do with affirmative defenses that are obviously only pure legal conclusions and that do not require the assertion of any facts. These are very limited – for example, the standard affirmative defense that a complaint fails to state facts sufficient to constitute a cause of action.

Do not forget section 430.20's second and third prongs

Far and away the most common challenge to an affirmative defense is that it does not state facts sufficient to constitute a defense.

Whether an affirmative defense states facts or not, it might nevertheless be subject to attack under the second prong of section 430.20, i.e., because the defense is ambiguous, unintelligible, or otherwise uncertain. (Code Civ. Proc., § 430.20, subd. (b).)

Affirmative defenses might also fall under this prong for the simple reason that they do not "refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished." (Code Civ. Proc., § 431.30, subd. (b).) Typically, where a complaint states more than one cause of action (and most do), any affirmative defense in response includes a parenthetical or opening statement that indicates the cause or causes of action to which it applies. If it does not, the affirmative defense is likely subject to attack as uncertain.

The third and final ground for a demurrer to an answer is limited to contract allegations ("[w]here the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral"), but, when it appears, a demurrer should be used to flush out the nature of the contract.

Not so fast! Defendant's request for leave to amend

Plaintiffs' attorneys are so used to arguing that "leave to amend is routinely granted" in opposition to defendants' demurrers, they often neglect the corollary when they are the demurring party: that the burden should be on the challenged party to show in what manner the pleading can be amended and how the amendment will change the legal effect of the pleading. (Compare Weil and Brown, *supra*, ¶ 7:130 [discussing the analogous situation as to a defective complaint: "It is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on the plaintiff to show *in what manner* he or she can amend the complaint, and *how* that amendment will change the legal effect of the pleading" (italics by Weil and Brown)); *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105, 112, fn. 8 [quoting Weil and Brown]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) In addition, leave to amend should be denied where an amendment would serve no useful purpose. (Compare *Routh v. Quinn* (1942) 20 Cal.2d 488, 493.)

Accordingly, unless the defendant can show that the challenged affirmative defenses can be cured by amendment, the plaintiff should be firm in arguing that the demurrer be sustained *without leave to amend*.

Help end the lamentable practice of laundry-listing affirmative defenses

Laundry-listing affirmative defenses in an answer is a lamentable practice. In recent years, at least one trial court (San Francisco's) said exactly that in an order sustaining, without leave to amend, a demurrer to 11 affirmative defenses.

Consequently, plaintiffs' attorneys should not be shy about challenging boilerplate and otherwise defective affirmative defenses. The law is on their side; and, contrary to the quoted opinion from Weil and Brown above, the same result cannot be achieved by serving written discovery. In fact, if anything, the demurrer is a discovery tool in its own right, and, if successfully deployed, it will avoid future discovery on the issues.

Calling out a defendant early on in the case also helps establish that plaintiff isn't a soft touch, a dynamic that might discourage the defendant from trying to take advantage of the plaintiff later on (think discovery) and that might also facilitate a more favorable settlement for the plaintiff.

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