

RESOLUTION 11-15-2003

DIGEST

Demurrer to Complaint: Use of Documentary Evidence

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Amends Code of Civil Procedure section 430.10 to allow a cause of action to be conclusively determined by documentary evidence attached as an exhibit to a demurrer.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Related to resolutions 11-14-03, 11-16-03, 11-17-03 and 11-18-03.

Reasons:

This resolution amends Code of Civil Procedure section 430.10 to allow a cause of action to be conclusively determined by documentary evidence attached as an exhibit to a demurrer. This resolution should be disapproved because it would fundamentally change and conflict with the purpose of a demurrer.

The changes proposed in this resolution cause practical problems that are not adequately addressed. The defendant may be able to submit selected documents without being subjected to discovery including depositions and document requests. It provides none of the evidentiary standards a party moving for summary judgment or summary adjudication must meet, including the authentication of documentary exhibits. Moreover, the intent of these resolutions, to provide for a swift resolution to litigation, may not be served by allowing for a demurrer on extrinsic evidence. The trial court must provide a party liberal opportunity to amend a pleading after a demurrer is sustained, denying leave to amend only where the facts alleged could not state a cause of action or defense under any legal theory.

A demurrer is concerned solely with the sufficiency of the allegations of the complaint, not with evidence or other extrinsic matters. It lies only where the defects appear on the face of the pleading or may be judicially noticed. (Code Civ. Proc., §§ 430.30, 430.70.) It is therefore inappropriate for a court to rule on a demurrer by considering matters not disclosed in the pleadings. (See *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) These resolutions would allow for final factual determinations regarding the validity of a defense or action at the demurrer stage before meaningful discovery can take place.

If a party has extrinsic evidence that conclusively determines the merits of a cause of action or defense, that party may move for summary judgment or summary adjudication at the first opportunity. Authorizing the trial court to sustain a demurrer based on extrinsic evidence is not an advisable means of streamlining litigation.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.10 to read as follows:

1 §430.10

2 The party against whom a complaint or cross-complaint has been filed may object, by

3 demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the
4 following grounds:
5 (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
6 (b) The person who filed the pleading does not have the legal capacity to sue.
7 (c) There is another action pending between the same parties on the same cause of action.
8 (d) There is a defect or misjoinder of parties.
9 (e) The pleading does not state facts sufficient to constitute a cause of action.
10 (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous
11 and unintelligible.
12 (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether
13 the contract is written, is oral, or is implied by conduct.
14 (h) No certificate was filed as required by Section 411.35.
15 (i) No certificate was filed as required by Section 411.36.
16 (j) A cause of action is conclusively determined by documentary evidence attached as an
17 exhibit to the demurrer.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: The Lawyer's Club of San Francisco

STATEMENT OF REASONS

Existing Law: Permits a defendant to file a demurrer based on nine specific grounds. However, presently a court may not grant a demurrer in cases where review of a document integral to a cause of action (submitted by the defendant) would enable the court to conclusively resolve the cause of action. Defendants are prohibited from attaching such documentary evidence to a demurrer.

This Resolution: Permits the use of documentary evidence attached to a demurrer when such documents will conclusively determine a cause of action.

The Problem: Matters that could be resolved at the demurrer stage—but for the inability to use documentary evidence—can clog the courts and cause unneeded expense to the parties and the state. For example, a complaint may reference a document as a basis for a cause of action, but in most cases its attachment is not required. In an instance where a document(s) would conclusively resolve the issue, the defendant can attach dispositive documents to the demurrer.

This resolution is similar to a ground for bringing a motion to dismiss in New York. (New York Civil Practice Law and Rules, rule 3211(a)(1).)

IMPACT STATEMENT

This resolution affects Code of Civil Procedure sections 430.30 and 430.70. Reciprocal rights for plaintiffs should also be provided at Code of Civil Procedure section 430.20. See companion resolutions.

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RESPONSIBLE FLOOR DELEGATE: Patrick M. Ryan

COUNTERARGUMENTS

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY:

Amendment of Article 1 of Chapter 3 of Title VI of the Code of Civil Procedure, pertaining to demurrers, is not the proper medium for the attainment of the goal described by the proponent of this resolution. In theory, a demurrer is intended to do nothing more than test the sufficiency of the pleadings, and, on appeal, the facts alleged are deemed to be true. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) If the proponent has the proverbial “smoking gun” that would conclude the case in a way that renders discovery and other due process protections for trial on the merits unnecessary, then a Motion to Strike under Code of Civil Procedure sections 435, *et seq.*, might be available.

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By permitting the use of documentary evidence at the demurrer stage, the demurrer is extended to a “mini summary judgment” motion. Furthermore, the court would be asked to hear the “mini summary judgment” without the parties having the benefit of the full opportunity to conduct discovery. In effect, a party, by introducing such documentary evidence, may effectively “sandbag” the opposition by presenting a seemingly conclusive document at the demurrer stage. It is entirely possible that the opposing party, at such an early stage, would not have the ability to counter that document effectively. Demurrers should remain a test of the sufficiency of the pleadings, not a test of the parties’ overall case. This resolution, and related Resolutions 11-14-2003, 11-16-2003, 11-17-2003 and 11-18-2003, should be disapproved.