LOS ANGELES
Daily Journal

THURSDAY,
JULY 16, 2009
VOL. 122 NO. 134
$ 3.00

Demurrers Drain Time and Resources from Courts, Litigants

By Dan Lawton

I watched from the gallery and waited my turn. The defense lawyer stood at counsel table, arguing his third demurrer. He seemed to be trying hard to muster up some good sincerity for Judge Hayes. "But your Honor," he almost pleaded. "We just want to know what this lawsuit's about." I was having a hard time buying the sincerity. So was Judge Hayes. "I read the second amended complaint," answered the judge. "I think we all know what this case is about." Judge Hayes overruled the demurrer; the plaintiff's lawsuit was going to proceed. I silently estimated the thousands of dollars in attorney fees, hours of judge and staff time, photocopying costs and several months of delay which the three demurrers had eaten. Then it was my turn.

If you're a litigator, you've watched this pattern unfold many times in our superior courts. In 1938, the federal courts did away with the demurrer. Since then, so have most states. California remains in the minority of "fact pleading" states who cling to the demurrer. It shouldn't be that way. It is time to abolish the demurrer.

What is there about the demurrer to pick on? Let us count the ways. Demurrers absorb significant court resources (as the opening vignette illustrates). Even a cursory look on LEXIS reveals hundreds of appellate decisions reversing erroneous trial court orders sustaining demurrers since 1938. We need not be statisticians to guess that these appeals caused years of delay and absorbed tens of thousands of hours (or more) spent by jurists, lawyers and their staffs. Whatever the benefits of the demurrers in these cases, eliminating meritless pleadings was not one of them.

Demurrers unreasonably delay adjudication of the merits. I have lived this on both sides of the aisle. As a defense lawyer, we recently won a case that had been pending in the superior court for over three years. Two demurrers (which I filed myself) directly caused nearly a year of the delay. This was because the court kept postponing a case management conference until the demurrers could be ruled on. The court's calendar was busy, so months went by before each demurrer could be heard. So nearly a year passed without the court setting a trial date. On the other side of the aisle, I once suffered dismissal of a civil rights case on a demurrer. Happily, the Court of Appeal reversed it. But in the meantime, two years had passed and one of my clients had come down with severe heart disease. Each case should have gone to trial far sooner than it did. In each case, demurrer practice ensured that trial would be years, not months, in the future. No benefit to anyone resulted.

Pre-Revolutionary English common law pleading rules supplied means of intercepting supposedly specious claims. These included the demurrer. Aggrieved plaintiffs had to tailor their lawsuits to the "forms of action." If they failed, defendants could demur, challenging the sufficiency of the complaint. This process produced years of delay, gross inefficiency and the sort of injustice satirized in the Dickens novel "Bleak House."

By the mid-19th century, many state courts were following the English pleading model. Fed up with its absurdities, New York enacted a "code pleading" (or "fact pleading") system in 1848. New York's Field Code allowed the pleader to state ultimate facts. Sadly, the Field Code had mixed results. Many judges stubbornly refused to give up career-long habits of scrutinizing pleadings by the old, pre-Field Code standards. In the end, code pleading seemed just to replace one bad system with another. Nonetheless, California adopted the Field Code in 1851.

Reformers argued for relaxed pleading rules. The foremost of these reformers was Judge Charles Clark. He spearheaded adoption of the Federal Rules of Civil Procedure of 1938. Rule 7 abolished the demurrer. Rule 8 required a pleader to state only a "short and plain statement of the claim showing that the pleader is entitled to relief." It required pleadings to be "simple, concise and direct," and said, "No technical form is required." It required courts construing pleadings to "do substantial justice." Rule 9(b) required greater specificity only for allegations of fraud and other narrowly excepted matters.

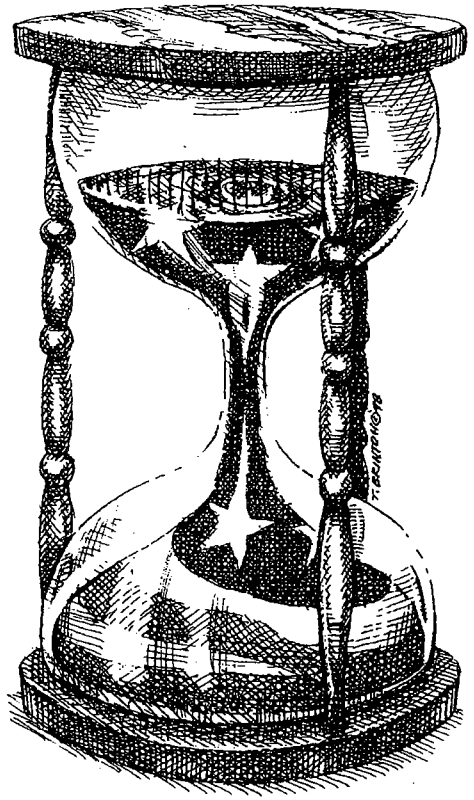
Afterward, states began embracing the Federal Rules' system and philosophy. Today there are at least 29 of these (plus the District of Columbia). The minority of states, however, still cling to "code" or "fact" pleading. These include California. We have Arkansas and South Carolina for company. Is this something to be proud of?

It is long past time for our state to abolish the demurrer and embrace federal notice pleading rules. This means requiring pleadings only to state a "simple, concise, and direct" statement of the pleader's entitlement to relief, as in the federal system. Narrow exceptions could be modeled after Rule 9's narrow exceptions (for fraud, for example). California judges and justices have had no problem applying the federal standard for summary judgment to their cases after our Legislature amended our summary judgment law so as to conform it to the federal standard. By the same token, they should have no problem applying federal pleading standards to pleadings before them in the trial courts and the Court of Appeal.

Parties and lawyers could only benefit from abolishing the demurrer. As needless demurrer litigation disappeared, times to trial (and appeal) would shorten, and expense (on both sides) would decrease. The merits would be gotten to sooner. Untenable claims would be disposed of via motions to dismiss and summary judgment (as in the federal courts).

Judges and justices would benefit too. Sparing court resources now sucked up by demurrers would free more time for other matters and reduce calendars. Writ petitions from orders overruling demurrers would disappear. So would appeals from orders sustaining demurrers.

Lastly, the public image of our profession could only improve. No layperson alive understands the demurrer without hearing a lawyer's tutorial about it. When the layperson hears this tutorial, she turns away, disgusted. We have enough devices which disgust the public. Reducing, not perpetuating, them is what we should be after.



This is California in 2009. Yet no area of our law other than demurrers so closely resembles the pronouncements of bewigged lords holding forth on replevin, assumpsit and trover cases in a time before our great-grandparents were born. In a State where our laws change ever faster, fidelity to an antiquated English pleading system seems quaint at best, fetishistic and ridiculous at worst.

Abolish demurrers. A hundred years from now, our successors will appreciate our having killed it — just as we appreciate today what the long-dead Clark and his committee did for us in 1938. Pleading technicalities should not prevent enforcement of the substantive law. This is what the Federal Rules' pleading standards are all about. It could be what California's pleading standards are all about too.

Dan Lawton is trial and appellate lawyer who represents plaintiffs and defendants in the federal and state courts, and the founder of Lawton Law Firm in San Diego. He is a certified legal specialist in appellate law and an adjunct professor of appellate advocacy at Thomas Jefferson School of Law.