Why Can't We Make This Lawsuit Go Away?

by John Mark Jennings, Partner; and Kiara W. Gebhart, Associate; Shulman Hodges

One of the questions most often asked of a litigation attorney is "why can't we just make this lawsuit go away?" Companies defending lawsuits viewed as frivolous often become frustrated with the prospect of fighting in court for the foreseeable future – and rightfully so. When faced with litigation, there are no magic wands to be waved or back-channel options to dispose of the case. There are, however, various procedural tools to attack defectively pleaded or meritless actions, the utility of which depends on the circumstances of the case. This article will provide a brief summary of the procedural tools available to a state court defendant who hopes to make the plaintiff's case "just go away."

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Upon receipt of a complaint, a defendant usually has three options: (1) cave and pay everything demanded (if that is not your favorite option then keep reading), (2) file an answer to the complaint, or (3) file a demurrer. A demurrer is a motion that attacks the complaint for failing to state facts sufficient to constitute a cause of action. Aside from early settlement, this is generally the defendant's first procedural tool capable of terminating the litigation. Unfortunately, a demurrer rarely results in final resolution of the case. It can, however, be an effective way to obtain more specific information from a plaintiff whose claims are vague or to merely establish an aggressive posture in the litigation. The decision whether to file a demurrer depends not only on tactical and cost considerations but also on whether the complaint itself is subject to a well-founded demurrer.

To successfully demurrer, the defendant must show that, based solely on the "face of the complaint" (including the complaint itself, the attachments thereto and judicially noticeable facts), the plaintiff has failed to state facts sufficient to constitute a cause of action. The court will not consider evidence outside the complaint and is required to assume all well-pleaded allegations to be true. To properly state a cause of action, the complaint (usually) need only include some allegations as to each element of the claim. If the complaint is drafted to meet this relatively low standard and does not otherwise reveal a defect on its face, the demurrer will likely be overruled (denied).

Demurrers are most appropriate when the complaint reveals a fatal defect (for example, the statute of limitations has expired or the defendant was not a party to the contract he purportedly breached) or the allegations are so vague that a demurrer is necessary to clarify plaintiff's claims. Even if the court sustains (grants) the demurrer, the plaintiff is almost always given "leave to amend" provided it is theoretically possible for the plaintiff to fix the defects by amending the complaint. If the plaintiff is able to do so – which they often are – the litigation will continue and the defendant will be forced to answer the amended complaint.

The next procedural tool with the potential to dispose of litigation is a motion for judgment on the pleadings. A motion for judgment on the pleadings is nearly identical to a demurrer in that it is based upon the complaint's failure to state sufficient facts to constitute a cause of action and is determined solely by reference to the face of the complaint. The main difference between the two is that a motion for judgment on the pleadings may be made after the time for demurrer has expired (i.e., after the defendant has answered the complaint). Even where the motion is granted, courts routinely provide the plaintiff leave to amend.

When the deficiencies in the plaintiff's case do not appear on the face of the complaint, the main procedural vehicle by which a defendant can seek to terminate the litigation is a summary judgment motion. Theoretically, summary judgment allows the court to look beyond the pleadings and consider extrinsic evidence (documents, deposition testimony, affidavits) to determine that the complaint lacks evidentiary support. If only portions of the complaint lack evidentiary support, a defendant may move for summary adjudication of certain causes of action, claims for damages or defenses.

Courts will enter summary judgment where the defendant establishes that there is no triable issue as to any material fact and defendant is entitled to judgment as a matter of law. If the plaintiff offers admissible evidence which disputes even one material fact, the court will deny the motion. Setting forth admissible evidence upon which judgment can be entered and which plaintiff cannot dispute requires well-planned, well-executed and timely oral and written discovery.

Summary judgment motions must be served on all parties at least 105 days before trial, but may be served much earlier. However, in deciding when to move for summary judgment, defendants should be mindful that courts are hesitant to grant summary judgment motions too early in the case, especially if the plaintiff has had insufficient opportunity to conduct discovery despite diligent efforts to do so.

Aside from the likelihood of success, there are numerous strategic considerations when deciding whether to move for summary judgment. In addition to the obvious benefits, a successful summary judgment/adjudication motion can increase the likelihood of a favorable settlement. Even an unsuccessful motion can have its benefits: the defendant may have the opportunity to learn the plaintiff's case and be better prepared for trial or to predispose the judge to weaknesses in the plaintiff's case. Of course, an unsuccessful motion can equally harm the defendant, decreasing the potential for a favorable settlement or facilitating the plaintiff's trial preparation.

Although the intent of these various procedural tools is to dispose of meritless cases, in practice, this does not happen as frequently as defendants would like. However, if used properly, taking into account the merits of the respective motions, consideration of the defendant's objectives and cost considerations, they can be effective strategic and, perhaps case dispositive tools. This is especially true as to summary judgment motions where proper preparation via oral and written discovery and skillful drafting of the motion itself can make all the difference.

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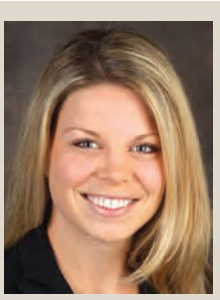

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Electronic Notice to Shareholders, Is It Worth the Risk?

by Keyvan Samini, Managing Principal, Samini & Simmons

Officers and directors of corporations are often alarmed when they learn that agreements authorizing a company to give electronic notices of meetings to individual shareholders are, without more, invalid. There is much more than an agreement that is required before a corporation can give valid electronic notice to its shareholders. It is an expensive lesson to learn when actions taken by a corporation are later found to be unauthorized because the company failed to comply with shareholder electronic notice requirements – just imagine issuing unlawful shares of stock because not all shareholders received valid notice of the meeting authorizing these shares.

Corporations must comply with at least two separate California statutes, as well as the federal Electronic Signatures in Global and National Commerce Act if they wish to give electronic notices to their shareholders. These laws require the company to give seven (7) written disclosures to the shareholder, and the shareholder to give consent electronically. A shareholder must be informed in writing: (1) that he/she has the right to receive notice on paper; (2) of the procedure that must be used to request a paper copy of notices and whether any fee will be charged; (3) that he/she has the right to withdraw consent to electronic notice; (4) of the procedure that the must be used to withdraw consent; (5) whether the consent to electronic notice applies to all future notices; (6) of the procedure required to update electronic information with the company; and (7) the exact type of facsimile, computer, equipment and software that will be needed to receive the notices (ie, internet access, Microsoft Windows 7, Outlook 2010, Abode Reader, 3G fax machine, etc.).

Once these seven disclosures are given, the shareholder must then take the final step. He/she must consent electronically, showing the shareholder can access information in the electronic format being used. That means the company must receive the shareholder consent either by email, facsimile and/or whatever other electronic method being used. This entire consent process must be repeated if there is a change in hardware or software required to receive electronic notice.

Keeping in mind that hardware and software programs are constantly updated, is providing electronic notice to shareholders worth the risk? For smaller corporations electronic notice is the best way to deliver information to shareholders. However, as a company's number of shareholders grows, the risks associated with electronic notice may greatly outweigh the benefits of efficiency due to the burdensome method required to obtain consent, which gives rise to greater opportunities to objections by minority shareholders. Until the law catches up with technology, the best way to give notice is the old-fashioned way – mail it.

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