All About Motions To Dismiss

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Motions to dismiss can be big winners—or big losers.

IT CAN BE one of the most satisfying experiences for a litigator. You pinpointed the fatal flaw in your opponent's case and moved to dismiss. The judge agreed with your legal analysis. The case ended before it really began. Your client is delighted. Not only the right result, your client thinks, but also without the costs of discovery and trial.

Motions to dismiss as well as motions for summary judgment can win the case. But they also can pose risks or increase litigation costs and, in some cases, they can backfire to your client's detriment. The reflex reaction of some litigators to make a motion to dismiss in virtually every case is a bad habit, but probably not as bad as the habit of never making one. This article reviews the tactical considerations that

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should be factored into deciding whether or not to make a motion to dismiss.

APPLICABLE RULES • Rules 12(b), 12(c), and 56 of the Federal Rules of Civil Procedure provide for the making of motions to dismiss, for judgment on the pleadings, and for summary judgment, respectively. Analogous provisions are contained in state procedural rules. Forum-specific motion practice procedures are governed by the various local rules of the trial courts and individual judges. Generally speaking, a motion to dismiss is addressed to a procedural or substantive defect in the plaintiff's case that entitles the defendant to a judgment in its favor. The plaintiff's factual allegations will be taken as true for the purpose of the court's ruling on the motion, because the motion is not to be a substitute for the trial of genuine factual issues and reasonable inferences will be drawn in plaintiff's favor.

If the defendant presents facts outside the complaint's allegations to support the motion, which may then be characterized as a "speaking motion," the court may treat the motion as one for summary judgment. To obtain a summary judgment, the defendant must generally show facts that either are not or cannot be disputed, and which entitle the defendant to win as a matter of law. Again, the court will view the facts most favorably to the plaintiff.

Rule 12 Basics

Under federal Rule 12(b) a defendant may move to dismiss based on any of seven enumerated defenses, including:

- Lack of subject matter or personal jurisdiction;
- Improper venue;
- Insufficient process or service of process;
- Failure to state a claim upon which relief can be granted; and
- Failure to join an indispensable party.

State court rules generally provide analogous provisions, with some specifically providing for motions to dismiss on a variety of additional grounds including:

- Lack of capacity to sue;
- Documentary evidence;
- A prior pending action; and
- Various affirmative defenses including res judicata, collateral estoppel, arbitration and award, release, payment, discharge in bankruptcy, statute of limitations, or the statute of frauds.

In federal court, although not specifically addressed in Rule 12(b), these latter defenses generally may be asserted on a Rule 12(b) motion if the defense appears on the face of the complaint itself, but if matters outside the complaint are presented, the court may treat the motion as one for summary judgment.

Judgment On The Pleadings And Summary Judgment

The essential prerequisite for a successful motion for judgment on the pleadings or for summary judgment by the defendant is that there be no triable issue of any fact material to the motion. This is the first question that the court will consider, and if there is a material fact in dispute, the case will proceed toward trial. Consequently, such motions generally rest on some indisputable fact that is dispositive of the plaintiff's claim or on the more difficult proposition that based on the facts as alleged by the plaintiff, taking into account whatever material facts are not in dispute, the plaintiff has failed to state a claim for relief.

TO MOVE OR NOT TO MOVE? • When your defense on the merits is an open-and-shut winner, you generally will move to dismiss in lieu of answering the complaint. If you have no basis for outright dismissal or

for summary judgment, obviously you will not make the motion; if you do, you may well end up paying the plaintiff's expense of opposing it.

It is in the cases in which you have a respectable motion, but not a clear winner, that you have to make difficult litigation judgments. In determining whether to make the motion, you need to fully understand not only the facts and the applicable law to assess the strength of the motion, but also have in mind your overall pretrial strategy, a good sense of the judge's tendencies, the likely course of discovery, and the dynamics of negotiating any ultimate settlement.

Considerations On Moving To Dismiss On Procedural Grounds

Some motions to dismiss may end the case as well as the controversy. Others, like those challenging personal jurisdiction, service of process, or venue, may result only in the plaintiff bringing suit again in another forum. There are several factors to consider before making a motion on procedural grounds. You may find, after considering all the factors, that the forum chosen by the plaintiff may be the best one for you.

Convenience Of The Venue

Is the forum convenient for the defendant and for you as counsel? If it is, you may well choose to forgo a procedural motion that may land you in a less convenient forum and may cause you to incur significant additional litigation expenses. Conversely, if the plaintiff's chosen forum is not convenient, then a motion on procedural grounds may well be worthwhile absent a compelling reason to stay in that forum.

The Home Court Advantage

Does the plaintiff have a home court advantage? For example, is the plaintiff an entity that is important to the economy of the area or a person well known and well loved in the community? If so, consider whether and to what extent your client would likely be prejudiced by staying in that forum.

Applicable Law

Is the law of the forum favorable to your position? Before making a motion to dismiss on procedural grounds, care must be taken not to leave a forum with more favorable substantive law. If the case raises federal law issues, check and see if the law in the forum's circuit is more favorable to you than it might be elsewhere. Also check on the forum's state law (if state law claims are alleged) to see if that law is more favorable to the defense than might govern elsewhere. Forum law could well end up being the law applied in the case. Choice of law principles may call for the application of the law of that forum; if that law is favorable, it is generally preferable to have a court in that forum apply that law. Moreover, if no one raises a choice of law issue, forum law is generally applied.

The Judge Assigned To The Case

What has the judge on your case previously held on the merits of similar cases? If there is a judge assigned to the case, as there always will be in federal court and often will be in state court, an assessment of the judge's views in similar cases is essential. If you have a judge who has been favorable to the defense in similar cases, you may not want to take a chance on an unknown judge in another forum. On the other hand, if the judge has not been sympathetic to your position in the past, that may be a good reason to make the motion.

The Local Jury Pool

Is there a reason to believe that a jury pool in a different forum would be more advantageous to the defense? Although this question may be

related to the home court advantage, it focuses more on the likely composition of the jury and how local jurors might view the case as opposed to focusing on the stature or reputation of the plaintiff. A careful review with expert jury consultants may be necessary to answer this question properly.

Probability Of Filing Elsewhere

Will the lawsuit just be refiled elsewhere? If you believe that the plaintiff may not take the trouble to refile in another forum, that is a compelling reason for making the motion. If you are quite certain that the plaintiff will refile, you must think carefully about what you will be achieving by making the motion and may choose to just raise the procedural defenses in the answer rather than moving to dismiss.

Considerations On Moving To Dismiss On Substantive Grounds

When you think you have a winning motion to dismiss on substantive grounds, the temptation to make the motion is great. A motion may well be the correct course but only after careful consideration of the possible consequences.

Technical Pleading Defects

Is the basis for your motion a technical defect in the pleading such as failure to plead an essential element of a cause of action? If so, and if it would be easy to fix in an amended complaint, consider how the motion really helps you, even if you win. Chances are good that the court will grant leave to replead, because courts almost always permit an amended complaint if it is the first version of the complaint that is being dismissed. Such a motion would certainly make sense if you believe the plaintiff will not be able to allege in good faith facts to support the necessary additional pleading elements. However, even if you expect a corrective pleading, there may be good reasons to make the motion keeping in mind your overall strategy.

Narrowing The Issues

Even if you cannot get rid of the whole case, will the motion narrow the issues? If so, it is often advisable to make a substantive motion to dismiss, because the narrowing of the issues may serve to dramatically limit discovery and all other aspects of the case. Moreover, if the dismissed claim is the basis for a federal court's subject matter jurisdiction, the plaintiff will lose its basis for being in federal court and will have to refile any remaining state law claims in state court. If you think a state court forum would be preferable, that could be a compelling reason to make the motion.

Educating The Plaintiff

Is it in your interest to educate the plaintiff about the gaps in his or her case so early in the lawsuit? To persuade the court, your motion will lay out the case and identify the weaknesses in the plaintiff's position. Consider whether it may be better to wait until the close of discovery and then move for summary judgment in the hope that plaintiff will not have pursued the development of the facts necessary to sustain some or all of the causes of action pleaded.

The Judge's Attitude On Motions To Dismiss

Is the judge likely to write a blueprint for the plaintiff? You must be wary of judges who, in denying motions to dismiss for failure to state a claim, frequently appear to provide a road map for plaintiffs to prove their claims. If you have such a judge, and do not have a clear winner, a motion may not be advisable. On the other hand, if you have a judge who seems willing to dismiss a claim that appears frivolous even though the plaintiff's allegations could be read to raise factual issues, then a motion may well be desirable.

Considerations On All Motions To Dismiss

Beyond the considerations discussed above specific to the nature of the motion made, there are factors that must be considered on all motions to dismiss.

Special Statutes

Are there any special statutes or rules that govern with respect to the lawsuit? It is important to identify any specific statutes or rules that may be applicable to the case to determine whether moving to dismiss under those statutes or rules provides special benefits. For example, under the Private Securities Litigation Reform Act of 1995 the filing of a dispositive motion to dismiss automatically stays discovery, except in special circumstances.

Waiver

Will you be waiving any aspects of your defense by failing to move? It is important to remember that if you do choose to make a motion to dismiss, any personal jurisdiction or insufficient process defense must be raised in the motion or else it may be waived. In addition, there may be specific required conditions precedent that have not been met, such as a requirement of the exhaustion of administrative remedies, or other defenses to particular claims that must be raised at the start of the lawsuit or risk waiver.

The Judge's Attitude Toward Motions

What is the judge's attitude in general toward motions? If you have had a scheduling or pretrial conference with the court, you may have a sense of the judge's reaction to the issues that will be raised. In federal court you should also consider whether you are required to request a pretrial conference or obtain prior approval before making your motion. Some judges may not even permit a dispositive motion to be made without some notice to or invitation by the court.

Taking The Initiative

Is there any downside to taking the initiative? In some cases, particularly in more complex litigation, you may benefit from gaining the court's attention at an early time. You may expect the plaintiff to seek massive discovery and you foresee court involvement throughout the case. Although you have only a decent shot at getting one or more of the plaintiff's claims dismissed, you expect the court to be sympathetic to your client because the merits appear clearly in your client's favor. In a situation like that, a strong presentation of your case in the context of a motion to dismiss may improve your overall litigation posture.

Delay

Will the motion delay the proceedings and is that to your advantage? Intentionally dilatory frivolous motions are subject to court sanctions. But any reasonably supported motion to dismiss is likely to delay litigation to some extent, even if that is not the purpose for making the motion. Delay is generally thought to work to the defendant's advantage. However, that is not always the case. For example, if you have important witnesses that may not be available later for trial or want an expeditious resolution to lift the specter of a large award from an ongoing business, delay may be damaging to your interests. Moreover, you cannot assume, especially in federal court, that a motion to dismiss or for summary judgment will necessarily result in delay; in some circumstances, it may accelerate the litigation.

Settlement Impact

How will making the motion affect settlement possibilities? A well-drawn set of motion papers may give a tangible demonstration of both the strength of your client's defense and your determination to litigate vigorously. The plaintiff may respond more reasonably to your

settlement proposals. On the other hand, in smaller cases your ability to settle the case may be reduced by the costs incurred by both sides in briefing the motion.

You must also consider how the court's decision will affect your ability to settle the case. For example, if the plaintiff's claim rests on an uncertain legal question, the court's adverse ruling on your motion to dismiss may, in effect, strengthen plaintiff's position in settlement negotiations. Your settlement posture may be stronger the greater the number of uncertainties in the case.

Cost-Benefit Analysis

Is the cost of the motion justifiable given the possible outcomes? If you will not be able to get rid of the whole case for all time, you must consider whether the cost of the motion is justifiable given the likely results. The cost will, of course, depend on how complicated the motion is to make. The cost of making a motion to dismiss for lack of in personam jurisdiction may be quite low, whereas the cost of a full-fledged motion to dismiss on substantive grounds, with supporting affidavits, can be quite expensive. But in analyzing the situation you should consider the likelihood of an early settlement. If no such early resolution is likely, those costs may go toward reducing other costs that would necessarily be incurred in any event in preparing pleadings and developing your case for trial.

It may be meaningful to estimate the costs and to place values on the benefits of the process, to apply probabilities to the various possible outcomes, and to determine whether the projected benefits exceed the costs. This type of cost-benefit analysis will be only as valuable as the intuitive judgment behind it, but it may help structure and focus the decision-making effort in certain situations.

Timing

When should the motion be made? Under the federal rules and generally under state rules, any motion to dismiss must be made before answering the complaint and the motion automatically extends the time to answer. As discussed above, in some cases, there may be a good reason to hold off, answer the complaint, and later move for summary judgment. For example, you may conclude that an important factual issue can be pinned down through depositions and that a motion to dismiss would only alert the plaintiff to the issue and eliminate the element of surprise. You take the depositions and then move for summary judgment.

In other situations, however you may conclude that the motion to dismiss will more likely assist your defense by forcing the opposing counsel to state his or her factual or legal theory, or in getting the court to express its view of an issue. As a result, even if the motion is not successful, you may expect to be in a better position later to move for summary judgment. It is tempting to assume that by making a motion to dismiss, you will get two bites at the apple because, if you lose, you still can move later for summary judgment. This is not necessarily a correct assumption, however, because the court may convert the motion to dismiss into one for summary judgment, may defer any determination until the trial, or may be unwilling later to entertain a summary judgment motion if a motion to dismiss has previously been denied.

CONCLUSION • In short, the question of whether to make a motion to dismiss must be made only after careful consideration of a variety of factors. The answer may determine whether or not you achieve the best result for your client.

PRACTICE CHECKLIST FOR
All About Motions To Dismiss

A motion to dismiss can save your client's money, the court's time, and keep a weak case out of the judicial system. But the success of such motions is by no means guaranteed, and if they don't work, they'll cause quite a few problems.

- If you are moving to dismiss on procedural grounds, consider:

__ The convenience of the forum. If you are in a favorable forum, don't take chances that may land you in a less convenient forum and cost your client money. Conversely, if the forum is not convenient, then a motion on procedural grounds may well be worthwhile;

__ Applicable law. If the law of the forum is favorable to your position, don't risk winding up in a forum where it isn't. If there are federal law issues, check and see if the law in the forum's circuit is more favorable to you;

__ The judge. How has the judge held on the merits of similar cases? If the judge has not been sympathetic to your position in the past, that may be a good reason to make the motion;

__ The jury pool. Is there a reason to believe that a jury pool in a different forum would be advantageous? A careful review with expert jury consultants may be necessary to evaluate this question;

__ Probability of filing elsewhere. If you believe that the plaintiff may not take the trouble to refile in another forum, that is a compelling reason for making the motion.

- If you have a basis to dismiss on substantive grounds, consider:

__ If the basis for your motion is a technical defect in the pleading, chances are good that the court will grant leave to replead. However, the motion would make sense if you believe the plaintiff will not be able to allege the necessary additional pleading elements;

__ Will the motion narrow the issues? If so, it is often advisable to make a substantive motion to dismiss as the narrowing of the issues may serve to dramatically limit discovery and all other aspects of the case;

__ Is it in your interest to educate the plaintiff so early in the lawsuit about the gaps in his or her case? Consider whether it may be better to wait until the close of discovery and then move for summary judgment;

__ In deciding the motion, is the judge likely to write a blueprint for the plaintiff? If you have such a judge, and do not have a clear winner, a motion may not be advisable.