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Risks, obstacles in motions to dismiss

By: Douglas H. Wilkins and Daniel I. Small August 8, 2019

You should think carefully about whether to file a motion to dismiss based on the complaint's actual allegations, the law, resources and strategy. That doesn't always happen. Counsel are often too concerned that by not filing they will miss or waive something important. Those concerns, though sometimes valid, are often overblown.

You preserve your defense or argument by pleading it in your answer. Usually, there is very little chance that you will waive anything substantive by waiting. The rules specifically preserve your right to answer and then raise the most common and determinative grounds for dismissal — failure to state a claim, failure to join a necessary party, and lack of subject matter jurisdiction — by motion for judgment on the pleadings or at trial and even, for subject matter jurisdiction, "whenever." Mass. R. Civ. P. 12(h) (2), (3).

We acknowledge some exceptions, which you should consider. Even if you plead certain technical defenses in your answer, failure to raise them in a motion to dismiss, followed by active litigation that could have been avoided by timely motion, may waive or forfeit some of the technical defenses. That can jeopardize objections to personal jurisdiction, venue, service of process, misnomer of party, or prior pending action. See Mass. R. Civ. P. 12(h)(1) and *American Ins. Co. v. Ziabicki*, 468 Mass. 109 (2016) (delay and activity forfeited objection to personal jurisdiction). But those situations are rare and are discussed in a later column.

It is also true that a somewhat odd rule precludes using summary judgment as a vehicle to challenge the adequacy of the complaint. See *Smith v. Massimiano*, 414 Mass. 81, 85 (1993).

But the rules expressly allow a motion for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial" (Mass. R. Civ. P. 12(c)) and, as noted, allow the most important defenses to be raised at trial.

If your argument is purely a technical objection to an omission in the complaint that can be cured, keep in mind that waiting costs you nothing, because that technicality is exceedingly unlikely to dispose of the case. Not only would the court likely allow an amendment to cure the defect if raised early in the litigation, but the rules authorize the judge to allow amendments even at trial, if necessary to conform to the evidence. Mass. R. Civ. P. 15(b).

Some counsel may also be concerned that the tracking orders under Superior Court Standing Order 1-88 include a deadline for Rule 12 motions. The case law is clear, however, that the standing order yields in the face of the Rules of Civil Procedure. *Sullivan v. Iantosca*, 409 Mass. 796, 800 (1991), *Johnson v. Cooke*, 17 Mass. L. Rptr. 517, (Sup. Ct., 2004).

Keep in mind that the standing order itself is 30 years old, is applied flexibly (as the standing order itself contemplates), and was never intended to force unnecessary or unwise motions.

You may get some pushback if you file a late motion for judgment on the pleadings or raise your argument at trial, but the rules support you, with the exceptions noted above. Practicalities will almost certainly prevail if your motion has clear merit.

We have never heard of a judge seating citizen-jurors for a trial, when the judge was aware of a legal argument that would make the trial unnecessary. So you need not feel pressured by the tracking order or the Rules of Civil Procedure. You can and should think through the pros and cons with your client. What are they? We mentioned some in our last column. Here are some others.

Too often, a motion to dismiss accomplishes nothing more than allowing plaintiffs to do a better job with their complaint. Is that worth the time, effort and expense? Does a better complaint help the defense?

On the other hand, there are cases in which it is helpful to force the plaintiff to state her claim more clearly. For example, when there are multiple defendants all lumped together, when each may have played very different roles. If you limit claims at the beginning of an action with respect to your client, you may have better success in trying to limit discovery with respect to your client as litigation proceeds.

Also, many viable and effective motions to dismiss exist that are not obvious to many litigators. Counsel must ensure she knows the field in which she is practicing. For instance, in certain areas, if the plaintiff does not allege exhaustion of administrative remedies, a defense attorney can quickly dispose of the entire case.

Also, in med-mal cases, defense counsel can file certain motions to dismiss if plaintiffs do not comply with rules concerning the medical tribunal.

Motions to dismiss can be a useful tool, but they are overused. We think many lawyers file such motions simply because they can or are concerned about non-existent risks. Thinking about your goals and options realistically can help you use this tool most effectively.

Judge Douglas H. Wilkins sits on the Superior Court. Prior to taking the bench, he was a trial attorney in private practice and at the Attorney General's Office. Daniel I. Small is a litigation partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.