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Motions to dismiss: Why and why not?

By: Douglas H. Wilkins and Daniel I. Small September 5, 2019

The goal in litigation, as much as possible, is to do everything for a reason. Have a plan. As the great Yogi Berra said, "If you don't know where you are going, you might wind up someplace else." That applies to the decision of whether or not to file a motion to dismiss. Here are a few of the considerations.

First, what do you hope to achieve? Be clear about this, both with yourself and with your client. Is final resolution of the case realistic, or will you obtain, at best, only a temporary procedural victory? Outright dismissal of a complaint with prejudice and no right to amend the complaint is rare.

Often, the plaintiff's opposition to a motion to dismiss will elaborate upon facts that were not in the complaint but could be pleaded. Be realistic; most, if not all, judges will allow at least one amendment to the complaint to allege such facts. If your judge does not, the Appeals Court may well remand for that purpose.

Once your motion exposes pleading weaknesses, the plaintiff may not find it very hard to plead facts that plausibly show that the plaintiff has a claim, if there is any Rule 11 basis for a complaint in the first place.

In this large category of cases, a motion to dismiss will probably result only in an amended complaint that meets the *Iannacchino* test. Is a better complaint really what the defendant wants? If so, the client really needs to know about that potential outcome.

To be sure, a well-advised client may still decide to press forward with a low percentage motion, sometimes for what may appear irrational reasons. Judicial rejection of such a motion may help that client (or insurer) to accept the inconvenient fact that the plaintiff's case actually has some plausibility (or even merit) in the eyes of the court.

If so, then even an unsuccessful motion to dismiss may achieve something important. The key is client communication in advance. Otherwise, the primary effect of the denial may be to undermine the client's confidence in counsel.

Second, are you over-reading *Iannacchino*? The Massachusetts Rules of Civil Procedure did away with strict pleading requirements. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008), was an important case in imposing stricter standards, but it did not repeal Rule 8(f), which directs the court to "construe" all pleadings so "as to do substantial justice."

Heeding that instruction, the judge will likely look past labels and technicalities, as long as a generous reading of the complaint discloses enough factual allegations to support a plausible legal claim that should, in fairness and law, move forward.

Nor should you expect the Appeals Court to uphold an overly technical approach, even if the motion judge agrees with you.

Remember that *Iannacchino* requires pleading sufficient facts. It does not, for instance, require pleading legal theories. Perhaps the plaintiff has used labels that fail to set forth a viable legal theory but states a cause of action with a different label. You may force the plaintiff to think more about its best legal theory, which may not be to your advantage.

You may also find your motion denied, because the judge is aware that, despite incorrect labeling, the facts do plausibly allege a viable claim. You should not rely on drawing a judge who takes a strict view of labels for causes of action.

Third, will a motion to dismiss allow you to place enough facts before the court to make your legal argument effectively? Does the complaint really plead the facts you need? If not, can you establish those facts by attaching the very limited kinds of additional documents that the court may legitimately consider on a Rule 12 motion?

We will discuss this third question in more detail in a later column, but it needs to be part of your assessment whether to move to dismiss in the first place. Perhaps a summary judgment motion would allow a more complete presentation and a better chance of success.

Is it wise to argue a motion without the benefit of your best facts, if (unsurprisingly) the plaintiff has not pleaded them the way you might like? If you prevail, and the plaintiff appeals, do you want the appellate courts to consider your legal theory without the benefit of your best facts?

Fourth, unless you have a slam dunk argument, what are the downsides of bringing a motion to dismiss and losing? The above discussion illustrates how the Rule 12 process may alert the plaintiff to ways to improve its factual presentation, hone its arguments, and develop alternative legal theories if necessary and available.

Moreover, as always, you need to think about your credibility with the court. True, in state court there is a reasonable chance that the judge who rules on your motion may never deal with the case again. But the judge will probably write something to support a denial, even a margin endorsement, that will serve as part of the next judge's introduction to the case.

And, more and more, Superior Court judges are doing longer (six-month) stints in a single session and returning to that session the following year. So for the sake of your own credibility, don't assume that you will be dealing with a clean slate on the bench in the future if your motion is "a stretch."

Fifth, can you quantify or minimize some of the risks by consulting with your opponent? Treat the recent amendments to Superior Court Rules 9A and 9C not just as a burden but also as an opportunity. The moving party no longer appears weak by initiating contact, because Superior Court Rule 9A(a)(1) now requires it: "[T]he moving party shall initiate a conference with the other parties for all dispositive and discovery motions subject to Rule 9C."

Rule 9C describes the goal of the conference: to "confer in advance of serving any motion under Mass. R. Civ. P. 8 (a), 12 (except Rule 12(c) motions in administrative appeals … and make a good faith effort to narrow areas of disagreement to the fullest extent." Give it a try.

Finally, how long will it take to resolve the motion? The answer is unknowable, because the queue lengths for the various civil sessions in Superior Court differ greatly, ranging from a couple of weeks to three or four months. Different judges have different turnaround times.

If you have the improper goal of delay, therefore, you might not achieve much. More to the point, if your goal is appropriate — e.g., prompt resolution of the case — your motion to dismiss still might not achieve much, given that some delay is unavoidable and that your motion may be denied anyway, leaving the matter unresolved.

Worse yet, from the perspective of delay, a trial judge's allowance of your motion is subject to de novo review on appeal, which can take years and may present a substantial prospect of reversal.

The fabulous Dave Clark Five sang: "You got to look before you leap; There's heartaches around every corner."

Avoid heartaches in your litigation. Think it through. Have a plan.

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