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Make sure to raise your Rule 12 defenses early

By: Douglas H. Wilkins and Daniel I. Small October 24, 2019

What defendant wouldn't want the court to dismiss a lawsuit quickly, without even considering the merits? We can think of only a few (those who expect vindication, a difficult result in litigation), but most will want to raise procedural defenses — such as personal jurisdiction, venue, failure to join a party, prior pending action, failed or defective service, and subject matter jurisdiction — promptly.

When we say "quickly," that's no joke. In fact, Rule 12 contains a trap for the unwary. Failure to include most of these defenses in your initial pleading — or Rule 12 motion filed prior to an answer — will waive them.

The exceptions to the waiver rule include failure to state a claim or defense (Rule 12(b)(6)) and failure to join an indispensable party (Rule 12(b)(7)), which can be raised as late as "the trial on the merits," and lack of subject matter jurisdiction (Rule 12(b)(1)), which may be raised "[w]hevever it appears by suggestion of a party or otherwise." See Mass. R. Civ. P. 12(h)(2), (3).

Almost all lawyers know these rules in the abstract. Still, we have seen lawyers unintentionally miss (and waive) some of these defenses. They appear to focus on seemingly more important arguments in the heat of preparing a Rule 12 motion on one or two issues, to the detriment of other available but less "sexy" defenses.

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Your internal checklist for Rule 12 motions should always require you to consider and evaluate all of the waivable Rule 12 defenses. Your client — and malpractice carrier — will insist on it.

In an earlier column, we alluded to another trap for the unwary. This one ensnares those defendants who may want to preserve a defense and then delay raising it for tactical reasons, or worse yet, inadvertence.

Suppose you or your client want to use the forum to engage in discovery and other proceedings, and then claim a lack of personal jurisdiction in the very forum whose authority has been invoked to conduct those proceedings. There is significant unfairness and logical inconsistency in that course of action. There is also unfairness in running out the clock so that a dismissal would occur too late for the plaintiff to refile in the appropriate forum, whose statute of limitations may have expired.

Fortunately, the law mitigates or eliminates the potential for abuse through delay, but that is where the inattentive or dilatory defendant faces a trap. "[R]aising the absence of personal jurisdiction as a defense in a responsive pleading may not alone suffice to preserve that defense. If a party alleges a lack of personal jurisdiction in an answer and then fails timely to pursue the defense, a forfeiture of that defense may result." *American Ins. Co. v. Ziabicki*, 468 Mass. 109, 119 (2016). Note that this is true even though, as we just pointed out, Rule 12(h)(1) allows defendants to include personal jurisdiction in an answer.

This rule can apply to the closely related defenses that challenge service of process and venue. A complete discussion of the rule is beyond this column, but the inquiry "necessarily will be fact sensitive," with all the time, expense and uncertainty that implies — not where a defendant wants to be or something that counsel wants to justify to a client.

Moreover, even if you do succeed in obtaining a dismissal, the plaintiff often will have a year to refile, because G.L.c. 260, §32, extends the statute of limitations for one year after dismissal on "any matter of form."

The answer is simple: be reasonable, which in this case means don't delay. "Parties who opt to raise such a defense in a responsive pleading may ensure its preservation by moving to dismiss pursuant to rule 12 (b) (2) 'within a reasonable time, prior to substantially participating in discovery and litigating *the merits of the case*.'" *AIIC v. Ziabicki*, 468 Mass. 109, 119 (2014), quoting *Raposo v. Evans*, 71 Mass. App. Ct. 379, 385 (2008) (Emphasis added). Astute readers will note the court's near miss on the theme of this entire series: "merits of the cause."

We have written previously about waiting until trial to raise your Rule 12(b)(6) defense, pointing out that, at that point, the presence of a real legal defect in the plaintiff's claim will be significant, but pointing out a curable problem with the pleadings will probably not yield much. Raising the failure to join an indispensable party may get you a continuance, but perhaps not much more.

As for subject matter jurisdiction, what can we say? Yes, you can wait to raise this until trial, post-trial or even appeal. Sometimes, that happens through inadvertence, negligence or honest mistake. The only legal limit on doing so intentionally may be your oath not to delay anyone for lucre or malice.

But losing credibility with the court, in the short and long term, is another very real limit. Get it done.

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