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Motions to dismiss can be sources of confusion

By: Douglas H. Wilkins and Daniel I. Small October 10, 2019

It seems so simple: "Your honor, they've failed to state a claim. Throw the bums out!"

However, the realities of motions to dismiss are often far more complex. With that complexity comes confusion. In this column, let's take a look at some of the most common sources of that confusion.

One area of confusion is documents. It is true that the moving party may rely on documents attached to or specifically referenced in the pleadings for purposes of Mass. R. Civ. P. 12(b)(6). See generally *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). The court may consider matters of public record for the purpose of determining what those records say. See *Jarosz v. Palmer*, 49 Mass. App. Ct. 834, 836 (2000), aff'd, 436 Mass. 526 (2002); *Jackson v. Longcope*, 394 Mass. 577, 580 n. 2 (1985). We have seen moving parties push these principles too far in at least two ways.

First, there must actually be no dispute that the document is authentic. Attaching a document that the moving party claims to be the written contract accomplishes nothing unless the opposing party agrees that the document is indeed the contract.

Second, while the court may take notice that a certain public document exists of record, that does not mean that the court may take notice that the facts stated in a particular document are true, at least in the absence of an additional legal principle, such as issue or claim preclusion. See *Home Depot v. Kardas*, 81 Mass. App. Ct. 75, 91 (2011) ("Although [a court] may take judicial notice of the docket entries and papers filed in separate cases," it "may not take judicial notice of facts or evidence brought in separate actions.").

If you are going to rely on facts in a document not attached to the complaint, you must be prepared to demonstrate preclusion or some other binding principle, without going beyond the bounds of Rule 12(b)(6).

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In addition, moving parties often fail to distinguish between the need to plead sufficient facts and articulation of a particular legal theory. The rules of pleading require the former but not the latter. The rules do not require naming specific statutes and legal theories, as opposed to the facts underlying those theories. *Pontremoli v. Spaulding Rehabilitation Hosp.*, 51 Mass. App. Ct. 622, 626 n.4 (2001), quoting *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89 (1979) ("It is not fatal to the complaint that [the statute in question] was not specifically pleaded … . '[A] complaint is not subject to dismissal if it would support relief on any theory of law.'").

A third problem comes from over-reliance on the provision in Rule 12(b) that: "[i]f, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

We have seen moving parties include material outside the pleading in the hope that, if caught, they can simply point to that provision and leave it to the court whether to treat the motion as one for summary judgment. We question

the tactical wisdom of doing that, as it takes away from any argument that the allegations of the complaint, considered by themselves, fail to state a claim. It is never a good idea to undermine the credibility of your own argument.

Moreover, the quoted language of Rule 12(b) provides that "the motion shall be treated as one for summary judgment … ." In the Superior Court, a summary judgment motion requires compliance with Rule 9A(b)(5), including preparation of, and evidentiary support for, a statement of each fact upon which the moving party relies. Simply adding material to a Rule 12(b)(6) motion is not a valid means to avoid the rule. Most, if not all, judges are going to require compliance with Rule 9A(b)(5), which makes for an orderly process and reliable mechanism to ferret out the truly uncontested facts.

Even if you succeed in slipping one by a judge, keep in mind that the appellate courts take seriously Rule 12(b)'s requirement that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." See *Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555 (2008) ("Where the failure to provide such an opportunity results in prejudice to a party, such a failure can constitute reversible error.").

And a caution for opposing parties: If you attach material to your opposition outside the pleadings, you may be inviting conversion of the motion to one for summary judgment. See *Rawan v. Massad*, 80 Mass. App. Ct. 826, 828 (2011). Far better to agree (or move) to amend the complaint to allege the extra-pleadings material, at least in most instances.

Finally, filing a Rule 12(b)(6) motion based on a defense can be tricky. Ask yourself: Did the plaintiff really plead the facts necessary to prove a defense? On a defense, the defendant will usually have the burden of proof, and the plaintiff need not plead the facts necessary to prove the absence of a defense.

There are, however, issues like the statute of limitations, or certain immunities (official, sovereign, workers' compensation) where the complaint may well contain the necessary facts. For instance, the complaint will likely plead the date of the events. If that date precedes the limitations period, the plaintiff will indeed have the burden of proving the facts necessary to toll the running of the statute.

What seems simple so often is not. Consider each step of the motion to dismiss decision and drafting carefully.

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