

In motions to dismiss, look before you leap

By: Douglas H. Wilkins and Daniel I. Small ◉ July 25, 2019



The late, great Bruce Lee said, "Defense is attack, attack is defense, each being the cause and result of the other." For many defending lawyers, that attack first takes the form of a motion to dismiss. Certainly, it can be a bold move, but is it always the right move?

Particularly at the beginning of the case, the defendant likely is angry about being sued and wants to take immediate action to fight back. So, early in the case, it is hard to avoid overconfidence in the defense position and misappraisal of your prospects.

We also recognize the appeal of an approach that makes you appear aggressive right away. You feel that you may impress your opponent with shock and awe, show your zeal to your client, or simply take strong action for the sake of being aggressive.

A motion to dismiss may satisfy the need to respond to some of these visceral realities in the short run, but don't forget that any satisfaction will vanish if your motion is denied. Starting your defense with a loss isn't a good look. It also has consequences.

Our next three columns address motions to dismiss and encourage you to be realistic in appraising your client's goals, prospects, strategies, alternatives and best way to present the matter to the court.

We start with the decision whether to file a motion to dismiss in the first place. Perhaps, in considering a motion to dismiss, you are encouraged by the requirement (no longer so new) that the complaint must go beyond mere conclusions and must allege facts that plausibly show that the plaintiff is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). In that case, the Supreme Judicial Court agreed with other courts that the prior looser standard of pleading had "earned its retirement," *id.*, p. 636, and it was time for a stricter standard for plaintiffs to meet.

Predictably, *Iannacchino* led to more motions to dismiss, which generated their own delays and costs. Only if a motion is granted will some offsetting savings occur.

Law professors can and do debate whether, on balance, the new standard has led to a net decrease or increase in litigation costs and delay. That is not your problem as defense counsel.

You can, however, judge whether the inevitable costs and delays associated with your own motion to dismiss are likely to save or increase costs. Because, in fact, many motions to dismiss are still denied, notwithstanding *Iannacchino*. Your clients will certainly appreciate discussion of the cost-benefit question, which counsel should be able to accomplish while still appearing suitably aggressive. A realistic discussion of costs, delays and prospects will impress your clients even more in hindsight if your motion is later denied, and you have fully advised them of that prospect.

You may want to think about other, more certain ways of promoting an early resolution, with or without court involvement, perhaps by stipulation or court conference under Mass. R. Civ. P. 16 and Superior Court Rule 20 ("Individual Case Management and Tracking"), which offers a fairly robust menu of options to all parties and the judge.

Among the many alternatives are (1) pleading your defenses, but postponing litigation of them until summary judgment, when you can increase your chances of success by creating a more complete and favorable record; (2)

phased proceedings, with early proceedings (including limited discovery) focusing on issues that may be resolved by motion; or (3) early settlement discussions or alternative dispute resolution.

Keep in mind that, just because the court's standard tracking order sets deadlines for certain motions, you have plenty of flexibility under Mass. R. Civ. P. 16 and Superior Court Rule 20 to tailor the schedule in a way that best suits prompt and efficient resolution of your particular case.

Filing a motion to dismiss should be more than an emotional outburst. The decision whether to file should be part of a planned, considered strategy. We'll discuss the challenges and opportunities in the next several columns.

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