Strategic Considerations For Motions To Dismiss: To File Or Not To File?

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An action has just been brought against your company, and you're not impressed with the opposition's complaint. It fails to satisfy the applicable pleading standard and the allegations are legally and factually unfounded. Your initial reaction is to swiftly seek to end the litigation by filing a motion to dismiss the complaint. But is a motion to dismiss the most efficient or sensible option? Not necessarily.

If At First You Do Not Succeed . . . Amend

A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure where it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). However, even where the plaintiff cannot prove any set of facts that would entitle it to relief, there is an important catch. A party may amend its pleading—once as a matter of course within a certain time frame or with leave of the court, and "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a). Even after the United States Supreme Court seemingly heightened the federal notice pleading standard under Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), it is very difficult to obtain dismissal of a complaint without giving the plaintiff the opportunity to correct the deficiencies. In order to secure a dismissal with prejudice, the moving party must establish that amendment would be futile, that there has been a repeated failure to cure such deficiencies or that the plaintiff has demonstrated undue delay, bad faith or dilatory motive—no simple task. Thus, a motion to dismiss can become very expensive. Many months may pass and litigation expenses may accumulate while the court continues to permit "dismissal without prejudice," allowing any number of amendments.

Consider The Totality of Existing and Potential Claims

If your rationale behind a motion to dismiss is to secure an early and inexpensive dismissal of the entire lawsuit and avoid the expense of discovery, it's important to consider fully the strength of the factual and legal arguments as they pertain to each and every count and the possibility of the court allowing the plaintiff to cure such defects or to bring new and different claims, perhaps against different entities or individuals. Just because there is no valid contract to support a breach of contract claim doesn't mean that a quasi-contractual theory of recovery won't carry the day. Similarly, although there may be a limitation-of-damages clause that precludes consequential or punitive damages against one corporate entity, this limitation might not apply to another defendant that is alleged to have tortiously interfered with the contract at issue. If an early dispositive motion will not dispose of the lawsuit completely or fails to materially lessen your client's overall exposure, a motion to dismiss may increase expense without providing a material benefit.

What Doesn't Kill Him May Make Him Stronger

Moreover, what doesn't kill the plaintiff may only make it stronger. The plaintiff may learn a few things in the course of contesting your motion to dismiss, resulting in a stronger amended complaint and a more educated opposing counsel to contend with throughout discovery and beyond. A motion to dismiss may provide your opponent with a preview of your best arguments or themes early in the litigation or may permit your opponent to address deficiencies or inconsistencies in the complaint that might have otherwise been of strategic use to you later in the litigation. For instance,

if you're aware that your opposing counsel is not well versed on the Racketeer Influenced Corrupt Organizations Act ("RICO"), and the plaintiff's claim for RICO liability confirms that the attorney does not fully comprehend the requirement that the RICO "enterprise" be distinct from the "persons" controlling the enterprise, you may be in a position to establish some advantageous facts and concessions on this issue during the discovery process, enabling you to prepare a powerful motion for summary judgment. It may be in your interest to let your opposing counsel stumble in the dark with an unrefined complaint rather than bestow the benefit of your legal acumen.

But perhaps you want to educate your opponent and reveal your best arguments at an early stage in the hopes of achieving a quick settlement. If the sharpest arrows in your quiver are legal in nature, then an initial dispositive motion may be an effective means to show your hand. Even where the defects can be addressed for purposes of withstanding a motion to dismiss, you may successfully demonstrate to your opponent that he could have serious problems after discovery and during the summary judgment stage. Although obtaining dismissal of a fraud claim is difficult at the pleading stage, you may establish that there are only a few uncontested, and easily-established, facts that stand in the way of a favorable summary judgment ruling. This knowledge, combined with the costs and uncertainties of discovery, may be enough to turn the tables in your favor even where you are not ultimately successful on the motion to dismiss.

The Best Defense May Be A Powerful Offense

Consideration should also be given to the fact that your best defense may be a powerful offense. The factual accuracy of the plaintiff's allegations must be taken as true for purposes of a motion to dismiss. Although an early summary judgment motion or a hybrid motion permitted under state civil procedure rules may be a procedurally correct means to challenge conclusory allegations in the pleading with specific facts outside of the complaint, filing such a motion at the preliminary stages of litigation will undoubtedly be met with the argument that your opponent would be deprived of the opportunity to fairly conduct discovery and investigate the factual predicate for your positions. Both federal and state procedural rules allow for a continuance or stay of the motion to permit discovery for this reason. *See e.g.*, Ill. Sup. Ct. Rule. 191(b); Fed. R. Civ. P. 56(f). Consequently, if your best counter to the complaint is based on facts outside of the pleading, then a well-pled answer that includes affirmative defenses and/or counterclaims—possibly even bringing in new individuals or entities as counter defendants—may be an equally effective and less expensive route to unveil the deficiencies in the plaintiff's claims and showcase your own legal arsenal.

In sum, filing a motion to dismiss may not always be the most effective response even if you've been presented with a weak initial complaint that falls short of the pleading requirements. An early dispositive motion can be a potent weapon, but it can also be expensive and time consuming—and, more importantly, may fail to accomplish the goal of ending the litigation or even significantly limiting the claims or overall exposure. Before making a final decision as to whether filing a motion to dismiss is the best route to achieving that goal, it is critical that clients and counsel consider the strength of their arguments with respect to both existing and potential claims, the plaintiff's ability to cure pleading defects, their overall goals, the aptitude and wherewithal of the opposition, and the best strategies for the litigation as a whole.

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