Comparing The Rules In Three Jurisdictions: Can Extrinsic Evidence Be Considered On A Motion To Dismiss Or To Strike?

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In the movie, *My Cousin Vinny*, the title character is assured by the judge who will try his case that Alabama's procedures are every bit as sophisticated as anywhere else in the country. The judge then thumped the procedure book on the desk and told Vinny he would "get no leeway." Cousin Vinny, thereby, learned that if he is to practice in more than one jurisdiction (New York and Alabama), he will have to learn, understand and live with the nuances of procedure in each jurisdiction. Fans of the movie may quibble that the movie involved criminal procedure (while in this article we deal with civil) and that, in any case, the comedic point was Cousin Vinny's discomfort, at the time, with legal procedure in <u>any</u> jurisdiction.

The fans would be right. But, the scene remains a valid introduction for the underlying point of this article: If an attorney practices in more than one jurisdiction, it will necessitate an understanding of the differing procedures of each jurisdiction.

Here, we will review and compare the procedural rules of three jurisdictions where the authors practice. In order to be brief, we will narrow our focus and discuss well-defined rules that are clearly comparable. Specifically:

> *Rules governing whether and to what extent evidence extrinsic to the pleadings may be considered on motions that test the legal sufficiency of the pleadings.*

We will review and compare Connecticut's motion to strike, Practice Book §10-39, the federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, and New York's CPLR 3211(a)(7) motion for failure to state a cause of action.

The motions reviewed herein are particularly important because they may eliminate claims at an early stage of the litigation with consequent savings in litigation expenses for clients. For example, the authoritative commentator, David E. Siegel,

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has called New York's rule "one of the most important procedural statutes in litigation."[1] Since the federal and Connecticut motions perform essentially the same function as the New York motion, we reasonably conclude that they are of equal importance.[2]

Before continuing, a few notes on terminology and sources of authority will avoid potential confusion later in this article.

1. Terminology: In Connecticut, the "motion to strike," pursuant to P.B. 10-39, is clearly distinguished from the "motion to dismiss," pursuant to P.B. 10-31, which is the designation for a motion that challenges jurisdiction.[3] In New York and in the federal courts, the designation "motion to dismiss" can refer to the two motions discussed herein under that designation but also to other motions or grounds for dismissal.[4] Our review of the particulars will demonstrate that the three motions reviewed here are comparable.

2. Authorities: New York's rule is not applied uniformly by the four judicial departments; for our analysis, we discuss and rely on caselaw in the Second Judicial Department. For our analysis of the federal rule, we rely on caselaw in the Second Circuit. For Connecticut, we rely on statewide authorities.

We will discuss only claims pleaded in a complaint, but our analysis would be largely the same for claims pleaded in counterclaims and cross-claims. We do not attempt to reach a conclusion as to whether any of the three rules is fundamentally more effective than the others. Such a conclusion would require an evaluation of cases far beyond the scope of this article. We do, in a more limited way, exercise the prerogative of all authors to be judgmental. Accordingly, we conclude that Connecticut's rule has the advantage of clarity; the federal rule is the more intellectually rigorous; while New York's, at least in the Second Circuit, is the more practical.

Connecticut's Motion to Strike

In Connecticut, the motion to strike is expressly defined as a motion that tests the sufficiency of the pleadings.[5] In ruling on a motion to strike, it is improper to consider any material extrinsic to the pleadings.[6] No factual findings are required by the court to rule on a motion to strike — well-pleaded allegations and allegations necessarily implied within a complaint are treated as admissions.[7] Summary judgment is available if the Court is to consider facts or evidence extrinsic to the pleadings.[8]

The unequivocal direction to the courts to stay within the pleadings leads to the authors' conclusion that, among the three rules evaluated herein, Connecticut's rule has a distinct advantage in its clarity. There is nothing ambiguous about what is to be considered by the Court in deciding a motion to strike: the sufficiency of the pleadings is determined solely by the content of the pleadings — including any material that becomes part of the pleadings by being attached.[9] In our view, clarity promotes consistency of application. Because the rule is clear, attorneys on either side of the motion are aware of exactly what the court will consider in ruling on a motion to strike.

Federal 12(b)(6) Motion

The evidentiary rule for a federal 12(b)(6) motion is similar in concept to Connecticut's rule, but with an important difference. Along with facts alleged in the complaint (including attached material), the court may consider certain extrinsic material.[10] The limited exception permitting the consideration of extrinsic material is related to the concern that the rule should not be circumvented simply by "clever drafting."[11] On a 12(b)(6) motion, the federal district courts may consider material extrinsic to the pleadings, provided the material meets certain criteria.[12] The extrinsic material must be "integral to the complaint", that is, the plaintiff must have relied on the material in drafting the complaint, or the material must be subject to judicial notice.[13] For example:

1. An item "integral to the complaint" could be a contract or other legal document that is not attached to the complaint.[14] Often, the reason such a document is not attached (and, by being attached, an actual part of the complaint) may be an instance of "clever drafting." The entire document might undermine a claim, but facts selectively and "cleverly" drawn from the document would allow the claim to survive.[15] The "clever drafting" is defeated by allowing the court to consider the entire document, even if the document is not attached.[16]
2. A document subject to judicial notice could be one filed in another court establishing the fact of prior litigation (without necessarily establishing the individual facts stated in the document).[17]

Although the federal rule permits the consideration of extrinsic material, by limiting such material, a sharp distinction is maintained between the 12(b)(6) motion and the summary judgment motion.[18] The criteria that such material be "integral' to the complaint or subject to judicial notice maintains the defined purpose of the 12(b)(6) motion which is to determine whether, on the claim, the plaintiff has a right to continue the litigation and attempt to prove the claim, rather than to adjudicate the claim.[19] Accordingly, the federal rule wins the authors' "prize" for intellectual rigor. The rule addresses potential manipulation through "clever drafting," but does so by establishing a narrow exception that retains a sharp and distinguishable purpose for the 12(b)(6) motion that is easily understood.

New York's 3211(a)(7) Motion

New York's rule, although conceptually similar to the Connecticut and federal rules, has been developed with an important difference that can be crucial in litigation. The language of CPLR §3211(a)(7) would not, at first glance, indicate that it is so different from the motion to strike or the 12(b)(6) motion because the CPLR language refers to the failure to "state" a cause of action.[20] However, the rule also permits the submission of affidavits by the parties that may demonstrate that the pleaded facts are not facts at all.[21] As pointed out by David Siegel in his Practice Commentaries, since the movant, through affidavits, can undermine facts alleged in the complaint, the 3211(a)(7) motion can succeed, resulting in dismissal of the

claim, even when the pleading does actually state a claim.[22] The relevant issue, unlike the Connecticut and federal rules, is whether the plaintiff has a claim.[23]

In essense, New York has addressed the "clever drafting" problem in even stronger terms than the federal courts. The New York Court of Appeals has been explicit and, despite the language of the statute, has emphasized that on a 3211(a)(7) motion the issue is not whether the plaintiff has stated a cause of action but whether the plaintiff has a cause of action.[24] New York's Second Judicial Department, applying and extending that rule, explicitly permits the consideration of evidentiary material outside the pleadings in the form of affidavits and other evidence.[25] Moreover, the Second Department need not accept as true allegations flatly contradicted by evidence in the record.[26] The 3211(a)(7) movant still bears the burden of showing that all factual issues have been resolved as a matter of law and has the option to submit affidavits to meet that burden.[27] The rule is not applied uniformly among New York's four judicial departments but an analysis of the nuances within the New York Courts is beyond the scope of this article.[28]

The New York rule, as applied by the Second Department, does not match the federal rule for intellectual rigor because the distinction between a 3211(a)(7) motion and a summary judgment motion, to some extent, has become a hazy one. New York's rule cannot match Connecticut's for clarity because, as shown above, the language of the rule itself is a little deceptive by referring to whether the claim "states" a cause of action. Also, New York pleadings may or may not be evaluated on their content alone, depending on the tactical choices of the attorneys — whether or not to submit evidence. The mere fact that the other judicial departments have adopted variations would tend to undermine the clarity of New York's rule.

What the New York rule lacks in clarity, consistency and intellectual rigor, is made up for in practical application and in flexibility. One of the authors experienced the advantages of the New York rule first hand in an unpublished New York Surrogate's Court, Second Department matter.[29] A party attempted to repudiate an in-court stipulation of settlement of the contested matter. In New York Surrogate's Court, the procedural mechanism to do so is a petition or cross-petition, in either case, a pleading.[30] The CPLR applies unless particular rules are superseded by the SCPA and 3211(a)(7) is not a superseded rule.[31] In the context of a repudiated settlement, there was already an extensive factual record leading up to the settlement. Thus, the court was permitted to consider facts on the record that "flatly contradicted" the allegations of the pleading in deciding that the party in question had no claims, regardless of whether or not the pleading stated a claim.

While speculation on "what might have been" with the same facts under the Connecticut or federal rules is a futile exercise in clairvoyance, differences in how the issue would have been approached are clear. Under the federal rule, whether the court should consider facts established by the prior record would have been a close call. In asking the court to make that decision, one can reasonably argue either way as to whether the party making the claims necessarily "relied" on the documents comprising the prior record. That decision, in federal court, would have become a primary issue on the motion.

In New York, there would have been no such issue because any evidentiary material could be considered. In Connecticut, there would not have been such an issue because no evidentiary material could be considered.

Since New York's rule is not consistently applied by the four judicial departments, it is reasonable to expect that the Court of Appeals will attempt to establish a more uniform rule. The goals achieved by the Connecticut and federal rules are important ones: clarity, consistency and intellectual rigor. Without abandoning these goals, one hopes that practicality and flexibility will also remain as operative goals in New York.

ENDNOTES

[1] David E. Siegel, Practice Commentaries, N.Y.C.P.L.R. §C3211:23 (Westlaw 2007).

[2] The three motions do not necessarily dispose of claims with the same *res judicata* effect as a dismissal on the merits. For example, under the Connecticut rule, the plaintiff who loses on the motion has the opportunity to simply submit new pleadings (e.g., an amended complaint). Connecticut Practice Book 1998, §10-44. If the statute of limitations has not run, a new claim may be filed in New York, while in federal court, leave to re-plead may be granted. *See, e.g.*, Siegel, Practice Commentaries, N.Y.C.P.L.R. §C3211:67 (Westlaw 2007); *Porat v. Lincoln Towers Community Ass'n.*, 464 F.3d 274, 276 (2d Cir. 2006). Nonetheless, in many circumstances, dismissals under any of these rules is with sufficient finality to end the litigation on the claim in question.

[3] Connecticut Practice Book 1998, §§10-31, 10-39, Conn. R. Supr. Ct. §§10-31, 10-39 (Westlaw 2007); *Pecan v. Madigan*, 97 Conn.App. 617, 905 A.2d 710, 713-714 (Conn.App. 2006).

[4] N.Y.C.P.L.R. §3211 (Westlaw 2007); Fed. R. Civ. P. §11(b)(6).

[5] Connecticut Practice Book 1998, §10-39, Conn. R. Supr. Ct. §10-39 (Westlaw 2007); *Tracy v. New Milford Public Schools*, 101 Conn.App. 560, 922 A.2d 280, 284-285 (Conn.App. 2007); *Housing Authority of the City of New Haven v. Martin*, 95 Conn.App. 802, 898 A.2d 245, 251 (Conn.App. 2006).

[6] *Tracy*, 922 A.2d 280, 284-285.

[7] *Dlugokecki v. Vieira*, 98 Conn.App. 252, 907 A.2d 1269, 1272 (2006); *Housing Authority of the City of New Haven*, 898 A.2d at 245 ("[A]ll well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted.") (quoting *Doe v. Yale University*, 252 Conn. 641, 748 A.2d 834, 851 (Conn. 2000)).

[8] Connecticut Practice Book 1998, §§17-44, 17-49, Conn. R. Supr. Ct. §§17-44, 17-49 (Westlaw 2007); *Gianetti v. United Healthcare*, 99 Conn.App. 136, 912 A.2d 1093, 1096 (Conn.App. 2007).

[9] *Tracy*, 922 A.2d at 284-285.

[10] *Faulkner v. Beer*, 463 F.3d 130, 132 (2d Cir. 2006); *Estate of Axelrod v. Flannery*, 476 F.Supp.2d 188, 198-200 (D. Conn. 2007).

[11] *Estate of Axelrod*, 476 F.Supp. 2d at 198-99 ("The primary purpose of this exception [allowing materials integral to the plaintiff's complaint] is to 'prevent plaintiffs from generating complaints invulnerable to rule 12(b)(6) simply by clever drafting') quoting *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006).

[12] *Id.*

[13] *Id.*

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See, e.g., Global Network Communications v. City of New York*, 458 F.3d., 150, 155 (2d Cir. 2006) ("the conversion of a Rule 12(b)(6) motion into one for summary judgment under Rule 56 when the court considers matters outside the pleadings is 'strictly enforced' and 'mandatory', citations omitted).
[19] *Estate of Axelrod*, 476 F.Supp, at 198.
[20] N.Y.C.P.L.R. §3211(a)(7).
[21] N.Y.C.P.L.R. §3211(c); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).
[22] Siegel, Practice Commentaries, N.Y.C.P.L.R. §C3211:24 (Westlaw 2007).
[23] *Morris v. Morris*, 306 A.D.2d 449, 451 (2d Dep't 2003) [When evidentiary material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. . ., (quoting *Meyer v. Guinta*, 262 A.D.2d 463, 464 (2d Dep't 1999)].
[24] *Guggenheimer*, 43 N.Y.2d at 275.
[25] *See, e.g., Meyer v. Guinta*, 262 A.D.2d 463, 464 (2d Dep't 1999).
[26] *Id.*
[27] *Morris*, 306 A.D.2d at 451.
[28] For a brief discussion of the internal differences within New York State, *see* Siegel, Practice Commentaries, N.Y.C.P.L.R. §C3211:25 (Westlaw 2007).
[29] Decision and Order, March 12, 2007, N.Y. Surr. Ct., Westchester Co. (Scarpino), at p.4.
[30] N.Y. Surr. Ct. Proc. Act §§302, 2101 (Westlaw 2007).
[31] N.Y. Surr. Ct. Proc. Act §102 (Westlaw 2007).

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