Motions to Dismiss in Debt Collection Cases

When you're being sued on a debt by a debt collector, motions to dismiss can come up in one or both of two ways: you could file one against them – or they could file one against you. More specifically, (1) you could file a motion to dismiss their lawsuit, or (2) they could file a motion to dismiss your counterclaim. It is also possible that either or both of you could file a motion to dismiss certain affirmative defenses, although this does not happen very often in debt cases.

What Motions to Dismiss Are

So what is a motion to dismiss? A motion is always the way a litigation party asks the court to take some official action. A motion to dismiss is a motion in which the movant (person filing the motion) asks the court to get rid of some part of the other party's case on the grounds that, even if what the other side says is true, it doesn't give them the right they claim. For this reason, motions to dismiss are sometimes called motions "for judgment on the pleadings" or "demurrers." The crucial fact in all of these motions is that all the facts alleged in the pleadings are taken, for purposes of the motion, as granted just as if they had been proven. If the motion is denied, the facts will still have to be proven later in trial.

In the Litigation Manual I illustrate the concept by supposing that a policeman has issued a ticket for exceeding the posted speed limit, only the ticket says you were going 25 mph in a 30 mph zone. There, even if what the ticket says is true (and in this case, specially if it is), it simply does not state a violation of the law. A similarly basic example in the debt law would be where you sued the other side under the Fair Debt Collection Practices Act without alleging an action that violated the act.

Many motions to dismiss really seem to be calling the court's attention to some obvious mistake, a simple oversight, perhaps. Naturally, however, many motions to dismiss are not so simple. In many cases, although the facts are clear, what the law provides or requires is not, and these would be cases appropriate for motions to dismiss.

> You can move to dismiss any claim or count of the petition. If you do not seek to dismiss the entire petition, you have to answer the part you do not try to get dismissed.

Because the motion assumes that every fact alleged is considered true, motions to dismiss are said to be "testing the sufficiency of the pleadings." Most courts will go ever further than that, and state that, if any set of facts (alleged or not) *consistent with* the pleadings could result in a valid claim, the motion to dismiss is to be denied, but from the point of view of a pro se defendant, this rule has limitations. Depending on unalleged facts can be a dangerous occupation for someone wanting to avoid a motion to dismiss.

Defendant's Motions to Dismiss vs. Plaintiff's Motions to Dismiss

Technically, a defendant's motion to dismiss is treated in the same way as a plaintiff's motion to dismiss, the only differences being who brings them and when. In any event, what is up for grabs is purely a *legal* question: does the law allow or prohibit certain action, and does it give a right to the

person claiming it? Despite the legal equivalence of the motions brought by plaintiff and defendant, it makes sense for us to look first at defendant's motions, which you are likely to file against debt collectors, and secondly at plaintiffs' motions to dismiss counterclaims or affirmative defenses, which debt collectors are likely to file against you.

Motions to Dismiss by Debt Defendants

When Petitions (or counterclaims) are filed, they are supposed to be following one of two types of pleading: "notice" pleading or "fact" pleading. The type of pleading required can make a very large difference, and it is determined by State law. In other words, your state requires either *fact* pleading or *notice* pleading. One of your first actions as a defendant in a debt lawsuit should be to find out which rule your state follows. Most states require fact pleading.

Fact Pleading

If your state requires fact pleading, then filing a motion to dismiss is as "simple" as looking at the elements (parts) of the case the plaintiff is alleging (its "prima facie" case), seeing if every fact necessary to prove that case is alleged, and moving to dismiss if any parts of the prima facie case is missing. You might think that debt collectors, who file millions of these cases per year, would never omit a part of their case in the pleadings. In fact they do so quite often, and this is simply because of the nature of their business: they buy huge numbers of supposed debts with minimal paperwork, file cases by the truckload, and rarely get challenged by defendants or the courts. In reality, lawyers are creating forms that secretaries fill out much of the time. They are not sharp, in other words, nor do they need to worry very much about their petitions. It is easy for them to make mistakes in the pleadings, and they often do. And sometimes they do it on purpose.

For a simple example, consider the filing of a claim of breach of contract in Pennsylvania, where a plaintiff on such a claim must either state the terms of the contract or attach a copy of it. Debt collectors ***almost never*** do this despite the rule – because they can't. They don't have the contracts. The huge majority of the cases are won by default, but those who defend simply file a motion to dismiss (called "Preliminary Objections" in Pennsylvania). Eventually the cases of persistent defendants get dismissed with prejudice, but for each case that gets dismissed, probably thousands of inadequately pleaded cases result in default judgment for the debt collectors. And the debt collectors are never punished for flouting the law. See the attached sample motion and judgment.

Notice Pleading

Where the jurisdiction is "notice" pleading, a motion to dismiss is much more difficult to win. Notice pleading means that a petition must give the party being sued some "general idea" of what he is being sued for, and in some courts this is such a vague standard that it is almost impossible to succeed in your motion to dismiss. Unless the debt collector actually names its theory in a heading (as they often do), if it does not state all the elements of an obvious claim, your motion may well be a "Motion for More Definite Statement." In this motion you point out that the plaintiff has not alleged any specific claim and you ask that the case be dismissed or that the debt collector be required to state the elements of a claim. Your argument there is that the vague petition fails to give you adequate notice of the claims being brought against you. This type of motion (for more definite statement) has many of the advantages of a motion to dismiss and should probably be brought if possible.

If you win that and the plaintiff then files an Amended Petition that is also inadequate in stating a claim, you will either oppose the amendment or file a new motion to dismiss.

Timing – When to File

There are two aspects of time you must consider when filing a Motion to Dismiss (or for More Definite Statement). The first of these is whether you must file your motion to dismiss before filing an Answer. In my opinion it is always a good idea to file a motion to dismiss – on any basis – before filing an Answer.

Motion as to Form of the Petition or the Court's Power over You

Motions that attack the form are treated differently than motions attacking the legal substance of the petition or counterclaim.

Motions as to Form or Power of Court over You

Any motion that goes to the form or understandability of the claim is usually waived (lost) if you file your Answer before the motion, since if you can answer the petition it is assumed you understood it. Any motion that goes to the court's power over you – let's say you are arguing that service on you was legally inadequate – is also waived if you file an Answer before the motion, on the theory that by filing an Answer you are *consenting* to the court's jurisdiction over you. If you file your motion to dismiss before filing an Answer, you wait until the court rules on the motion before filing the answer – and you may never have to.

> I want to be very specific about this: if you are in Pennsylvania, you must file Preliminary Objections before filing your answer. If you file Preliminary Objections on time, you will almost certainly win your case. Fail to do so and you have a good chance of losing. I have a package regarding preliminary objections for Pennsylvania.

Motion as to Legal Substance or Power of the Court over the Issue

A motion that goes to the substance of the claim or the power of the court to hear that sort of claim can be brought at any time. If the court does not have the right to hear cases of the sort brought against you, your consent would not give it that power even if you wanted to. Federal courts essentially never have jurisdiction over collections issues, and if a debt collector sued you in federal court, your challenge to the court's jurisdiction would be good even on appeal.

In Plain English

If your motion to dismiss is to something wrong about the claim – it doesn't have the contract attached or doesn't include certain necessary allegations, or if it attacks the court's right to hear a case about you (bad service, etc.) you must bring this motion before answering. To answer means that you are willing to proceed with the deficiencies, and you have waived (lost) your right to complain about them.

If your motion goes to the court's right to hear any case like the one against you (it's for debt, and they bring it in federal court, or the allegations do not amount to a violation of the law), you can bring the motion to dismiss at any time.

In either case I recommend bringing your motion to dismiss before answering because it's safer to do so and because if you win you might not have to answer at all – so it could save you a lot of time. On the other hand, **you must answer every count of the petition that you don't seek to have dismissed**.

Argument and Timing

In most states, if you want your motion ruled on, you must first have a hearing. Most courts will not do this on their own. Instead, they require one of the parties (either can do it) to set the motion for hearing and move things forward towards argument and decision. Often, delay will suit a debt defendant, and so often it makes sense to wait to see if the debt collector will set the hearing. But you must watch to make sure you do not miss the hearing date.

The party bringing a motion is ordinarily responsible for getting it heard and ruled on by the court. That means that you would want to contact the court's clerk or secretary, find a good date and time for argument, and set your motion for hearing on that date and time. On a motion to vacate, for example, if you fail to set the motion for argument, it will probably sit for months without the court taking action – and then the court might dismiss it without comment. In some states a motion to vacate that is not ruled on specifically by the judge is considered denied after a certain time. So motions to vacate must be set and argued. Motions to dismiss are somewhat different. There, you have not filed an answer and are not required to do so until there is a ruling. Practically this means that the plaintiff must set the motion for argument and hearing. Failure to do so might result in the whole case being dismissed for "lack of prosecution."

Motion to Dismiss by Plaintiff

As mentioned above, the plaintiff (debt collector) could also file a motion to dismiss your counterclaim – possibly your affirmative defenses. This will arise, obviously, after you have filed a counterclaim. Plaintiffs are required to respond to counterclaims just as defendants must answer a petition – or face default judgment. If the plaintiff does not think that the allegations in your counterclaim state a claim against it, it can file a motion to dismiss.

In that case, everything will proceed in just the opposite way as a defendant's motion to dismiss, except that if you do not get the motion to dismiss denied, the underlying, original case, will continue towards trial.

If you are opposing a motion to dismiss, your general strategy should first be to relate your claims to the words of the law under which you are bringing your claim. If the Fair Debt Collection Practices Act says (as it does) that the debt collector must stop calling you at work under certain circumstances, for example, and your claim alleges those circumstances and the fact that the debt collector continued to call, then you will defeat the motion.

Sometimes it is not so clear, obviously. Debt collectors are prohibited from various "unfair" or "deceptive" collection practices, and not all of these are specifically enumerated in the law. In that case you will want to find a case involving similar actions where courts have declared the practice illegal. Failing that, you will make the strongest logical argument possible that the action in dispute is unfair or deceptive.

Questions of Law or Fact

Remember that although every fact will be considered in your favor (every "close" question of fact should go your way), the court will decide close questions of law. That means that even if the judge thinks that calling you seven times in an hour is unreasonable and illegal, he or she might decide that

calling you six times was not unreasonable. That is because the question is not how often you were called (a factual question, any dispute about which should go to the party opposing the motion to dismiss), but whether the number of times called was "reasonable," a decision of law the judge is supposed to make without favoring either side. For this reason, it makes sense to *state the facts strongly and make your best case*.

Discovery

Discovery is not delayed by either a motion to dismiss by defendant or plaintiff. Whether you file the motion to dismiss or the plaintiff does, you will still want to continue to conduct discovery. This is also true of all other motions except, perhaps, motions to vacate, where tech