

The Use of Extrinsic Documents in a Motion to Dismiss

When moving to dismiss under Federal Rule of Civil Procedure (“FRCP”) 12(b)(6), the general rule is that a court may not consider documents that are extrinsic to the complaint. Indeed, under FRCP 12(d), when extrinsic evidence is presented to, and not excluded by the court, the 12(b)(6) motion should normally be converted to a motion for summary judgment. Such a conversion can be dangerous to a defendant, because the court may delay ruling on an early summary judgment motion to give the plaintiff time to conduct discovery. The rationale behind FRCP 12(d) is that a plaintiff may lack notice of extrinsic documents at such an early stage in the litigation.

Despite this, when a plaintiff’s complaint is misleading, a defendant may still be tempted to ask the court to consider extrinsic documents for rebuttal purposes. Fortunately, there are three categories of extrinsic documents that can be considered on a 12(b)(6) motion.

First, a court can consider documents that are either attached to the complaint or incorporated into it by reference. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 46-48 (2d Cir. 1991).

Second, a court can consider extrinsic documents if they are integral to the complaint. *Id.* A document is integral to the complaint if the plaintiff relies on the document’s terms and effect when drafting the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). The rationale underlying these exceptions is that a plaintiff cannot claim to lack notice of a document if it used the document when crafting the complaint. Accordingly, if a plaintiff relies upon an extrinsic document, but presents the document’s facts in a misleading fashion, a defendant is free to rely upon that document in its 12(b)(6) motion.

Third, a court can consider “matters of which judicial notice may be taken” pursuant to Federal Rule of Evidence (“FRE”) 201(b). *Id.* (quoting *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)). This exception allows a court to consider facts that are either generally known, or facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FRE 201(b)(2). Such facts can be considered on a motion to dismiss, just as they can be considered at any stage of the litigation.

This exception routinely applies to facts contained in government

documents, as such documents presumably contain facts whose accuracy cannot reasonably be questioned. This exception can be particularly powerful in the hands of the skilled litigator because it allows a defendant to use government documents to challenge a plaintiff’s misleading complaint at a very early stage in the litigation.

Finally, it is important to remember that these exceptions are useful for reasons other than simply getting a case dismissed. Extrinsic documents can be highly effective at convincing a court that discovery should be

narrowly tailored to focus on certain issues, or to force a plaintiff to re-plead its complaint. And, of course, using extrinsic documents on a 12(b)(6) motion allows a defendant to frame the issues at an early stage in the litigation.

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