FORGET PLAUSIBILITY – THREE TOOLS TO HELP YOUR MOTION TO DISMISS IN MINNESOTA STATE COURT, EVEN AFTER WALSH

By Jeffrey M. Markowitz

"Justice delayed is justice denied." That legal maxim recognizes that securing justice *eventually* is not enough. The injury of delay can deny, or at least diminish, later-secured justice. Often the battle cry of the plaintiff seeking prompt redress, so too may the maxim be the battle cry of the defendant seeking prompt dismissal of a claim destined for a defense judgment. The longer it takes a defendant to march toward justice, the more time, burden, and expense even ordinary litigation will cause. And, particularly if the claim should never have made it past the pleadings stage, every dollar and hour spent in discovery diminishes eventually secured justice.

That is why Rule 12 motions to dismiss (and motions for judgment on the pleadings) based on a plaintiff's "failure to state a claim upon which relief can be granted," *see* Fed. R. Civ. P. 12(b)(6), 12(c), 12(h)(2)(B); Minn. R. Civ. P. 12.02(e), 12.03, 12.08(b), are so critical for securing justice for our defense clients. The Rule 12 motion is, as the United States Supreme Court recognizes, an "important mechanism for weeding out meritless claims," *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014), that is intended to "dispens[e] with needless discovery and factfinding," *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Of course, it is no secret that, after *Walsh v. U.S. Bank, N.A.*, Minnesota state court is a much harder place in which to prevail on a Rule 12 motion, as compared to federal court. Federal defendants benefit from the *Twombly-Iqbal* plausibility standard, under which, to state a claim that satisfies Fed. R. Civ. P. 8(a)(2) and survives a Rule 12 motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). But—in construing Minnesota's own Rule 8, Minn. R. Civ. P. 8.01—*Walsh* rejected "plausibility" as a requirement to state a claim, and recommitted Minnesota to what the court saw as traditional notice pleading. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 600, 604-05 (Minn. 2014).

Nonetheless, I hope to convince you that, even without the plausibility standard, there remain powerful tools to help your Rule 12 motion sing in Minnesota state court. Three are, as follows, and I respectfully suggest that no early-suit Rule 12 assessment is complete without serious consideration of them: (1) the incorporation-by-reference doctrine, (2) the district court's authority to judicially notice, and (3) an enduring similarity in federal and state court: the rule that mere labels and conclusions in a complaint are insufficient to survive a Rule 12 motion.

TOOL 1: INCORPORATION BY REFERENCE

The incorporation-by-reference doctrine, as applied to Rule 12 motions, can be the perfect antidote to cherry-picking gamesmanship. Under it, "a plaintiff 'cannot defeat a motion to dismiss by choosing not to attach [relevant documents] to the complaint.'" *Twin City Sprinkler Fitters v. Total Fire Prot., Inc.*, 2002 WL 31898170, at *1 n.1 (D. Minn. Dec. 26, 2002) (quoting *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997)). It "prevents a plaintiff from evading dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proves his claim has no merit." *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (quotation omitted). And it "guard[s] against the cherry-picking of words in the document out of context." *Reiter on Behalf of Capital One*

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If you enjoyed this article, please comsider attending MDLA's Midwinter Conference at Grandview Lodge January 25-27 where Mr. Markowitz will present on the topic of creative approaches to motions to dismiss.

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Fin. Corp. v. Fairbank, 2016 WL 6081823, at *5 (Del. Ch. Oct. 18, 2016).

Under Minnesota and federal law, the district court must convert a Rule 12 failure-to-state-a-claim motion into a Rule 56 summary judgment motion if "matters outside the pleadings are presented to and not excluded by the court." Minn. R. Civ. P. 12.02; Fed. R. Civ. P. 12(d).

But documents incorporated by reference do not require Rule 56 conversion because they are not really "outside the pleadings." Rather, they are "deemed to be a part of every complaint by implication." 5B C. Wright & A. Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). That is the law in Minnesota: "a court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). And it is the law in federal court: "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

That can be a powerful tool. When documents are part of the complaint, "[t]heir provisions prevail over conflicting allegations in the pleading." *Markwood v. Olson Mfg. Co.*, 289 N.W. 830, 830 (Minn. 1940); see *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 (7th Cir. 2004) ("[T] his court has long held that, when a document contradicts a complaint to which it is attached, the document's facts or allegations trump those in the complaint.").

The classic example of incorporation in the Rule 12 context is the contract case. The plaintiff claims breach of contract. The facts pled, even if accurate, reveal no breach, but only if you review the contract. The plaintiff did not attach the contract to the complaint. But the plaintiff's reliance on the contract was her incorporation by reference to it. Your defendant may attach the contract to a Rule 12 motion without triggering Rule 56 conversion. "In deciding a motion to dismiss, the court 'may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged.'" *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 180 (Minn. App. 2012) (quoting *In re Hennepin Cnty.*, 540 N.W.2d at 497). "This is true even if contract documents not attached to the complaint refute a breach-of-contract claim, or a claim that defendant breached a statutory or common law duty." *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017).

The doctrine may apply in a host of other situations, inviting creativity. For example, courts have granted Rule 12 motions after incorporating the following:

- an email string "selectively quoted" by the plaintiff. *Owens Trophies, Inc. v. Bluestone Designs & Creations, Inc.*, 2014 WL 5858261, at *2 (N.D. Ill. Nov. 12, 2014) (considering "entire email chain that is attached to defendant's motion to dismiss" when plaintiff tried to avoid parts by "selectively quot[ing]").

- news articles. *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 487 & n.7 (S.D.N.Y. 2018) (*Wall Street Journal* article incorporated by complaint cite).

- news broadcasts (one of my cases!). *Wilson v. Northland Coll.*, 2018 WL 341749, at *1 (W.D. Wis. Jan. 9, 2018) (plaintiff in privacy case incorporated "news broadcasts"); *see also Brownmark*, 682 F.3d at 691 (noting that several district courts—but not circuits—had concluded that "television programs and similar works may be incorporated by reference" and, noting in dictum, "we think it makes eminently good sense to extend the doctrine to cover such works").

- even a song. *Woods v. Carter*, 2016 WL 640526, at *3 (N.D. Ill. Feb. 18, 2016) (copyright suit against Lil Wayne) ("Although Woods did not attach this particular song or its lyrics to the complaint, the Court considers his extensive quoting as an incorporation-by-reference of the song, thereby allowing the Court to consider the song itself at the dismissal stage.").

Much of the incorporation case law has been developed by the federal courts. But the core of it is alive and well in Minnesota. And Minnesota courts seem willing to look to and rely on the federal courts in this area. *See, e.g., Hennepin Cnty*, 540 N.W.2d at 497 ("[T]he court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged." (relying on case law from the Sixth and Seventh Circuits)).

Just don't get greedy with what you seek to incorporate. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133–34 (D.C. Cir. 2015) (collecting cases; discussing common-sense "limits" of incorporation) (*citing Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. 2004) (rejecting "fantastic argument" that "*all* facts contained in *any* attachments to a complaint 'are [automatically] deemed facts alleged as part of [the] complaint'") (quotation marks omitted)).

TOOL 2: JUDICIAL NOTICE

Judicial notice can be an equally powerful tool to secure Rule 12 victory.

A court may take judicial notice at "any stage of the proceeding." Minn. R. Evid. 201(f); Fed. R. Evid. 201(d). That includes Rule 12 proceedings. Such is true in Minnesota. *See, e.g., Untiedt v. Schhmidt*, 2001 WL 69482, at *2 (Minn. App. Jan. 30, 2001) ("[w]hen evaluating a rule 12 motion to dismiss, a court may take judicial notice of opinions in

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an underlying action[.]"), *following Rohricht v. O'Hare*, 586 N.W.2d 587, 589 (Minn. App. 1998) (district court did not err in taking judicial notice of decisions in underlying action); *see also Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 653 n.4 (Minn. App. 2016) (noting without critique that, in granting Rule 12 motion, the court "took judicial notice of adjudicated findings and orders from the Petters bankruptcy action"), *review denied* (Minn. Sept. 27, 2017); *Greer v Professional Fiduciary, Inc.*, 2009 WL 3793589 (Minn. Dist. Ct. Nov. 09, 2009) (taking judicial notice and relying on federal case law). And it is true in federal court: "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice." *Tellabs*, 551 U.S. at 322.

As with documents incorporated by reference, judicial notice requires no Rule 56 conversion because matters that are properly judicially noticed are "deemed to be a part of every complaint by implication." 5B C. Wright & A. Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). Judicial notice "allow[s] courts to avoid unnecessary proceedings when an undisputed fact in the public record establishes that the plaintiff cannot satisfy the 12(b)(6) standard." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997).

The standard for what is the proper subject of judicial notice is essentially the same under Minnesota and federal law (subject to what appear to be only stylistic differences in word choice). The court may judicially notice a fact that is "not subject to reasonable dispute" because it is either (1) "generally known within the territorial jurisdiction of the trial court" or (2) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(b); *see* Fed. R. Evid. 201(b) (nearly identical language).

The classic examples of sources that can be judicially noticed are court records. S*ee, e.g.*, *Matter of Welfare of Clausen*, 289 N.W.2d 153, 157 (Minn. 1980) ("The function of judicial notice is to expedite litigation by eliminating the cost or delay of proving readily verifiable facts. Judicial notice of records from the court in which a judge sits would appear to greatly serve this function and satisfy the requirement of Rule 201(b)(2)." (citation omitted)); *Matter of Welfare of D.J.N.*, 568 N.W.2d 170, 174 (Minn. App. 1997) ("Court records and files from prior adjudicative proceedings are an appropriate subject for judicial notice by the court.").

Courts can and do judicially notice such records in granting Rule 12 motions. *See, e.g.*, *Greenpond*, 886 N.W.2d at 653 n.4 (affirming Rule 12 dismissal of Ponzi scheme claims, noting without critique, "In its order granting GECC's motion to dismiss, the district court took judicial notice of adjudicated findings and orders from the Petters bankruptcy action."); *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007) (affirming Rule 12 dismissal of a malicious-prosecution claim based on statute of limitations, relying on "a public record, the state court dismissal").

Judicial notice can be especially helpful when your defense is res judicata or collateral estoppel. Your plaintiff may have conveniently failed to mention the prior adjudication. But "to force the parties to litigate whether a matter has been litigated once already would be especially nonsensical." *Dixon v. Birmingham*, 2017 WL 2378116, at *3 n.11 (N.D. Ala. June 1, 2017). That is why "[t]he rule that judicially-noticed documents can be considered in connection with a Rule 12(b)(6) motion is especially appropriate where . . . the defendant asserts that plaintiff's claims are barred by the doctrine of collateral estoppel." *Id.* "In considering such a challenge, the Court may take judicial notice of and consider documents which are public records, that are attached to the motion to dismiss, without converting [it] into a motion for summary judgment." *Haddad v. Dudek*, 784 F. Supp. 2d 1308, 1324 (M.D. Fla. 2011); *see also M.M. Silta, Inc. v. Cleveland-Cliffs, Inc.*, 2008 WL 11349885, at *2 (D. Minn. Dec. 1, 2008) (court may judicially notice facts from prior proceeding).

District courts are likewise empowered to judicially notice the contents of "'government websites.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (quoting *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011)). That opens the door to a host of possible facts and sources of information, for example:

1) contents of a secretary of state's website, *Klahr*, 830 F.3d at 793 (statement that business was in good standing); *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008) (financial statements) (affirming Rule 12 dismissal);

2) fee information listed on a state's department of transportation website, *Brakebill v. Jaeger*, 905 F.3d 553, 562 & n.5 (8th Cir. 2018); and

3) "a list of approved generic[]" drugs listed on the FDA's website, *Arbor Pharm., LLC v. ANI Pharm., Inc.*, 2018 WL 3677923, at *4 & n.3 (D. Minn. Aug. 2, 2018) (relevant to whether the list included defendant's product).

So too may judicial notice extend to "administrative facts," *Prairie Const. Co. v. Hoich*, 560 F.3d 780, 798 (8th Cir. 2009); "agency documents," *Great Plains Tr. Co. v. Union Pac. R. Co.*, 492 F.3d 986, 995 (8th Cir. 2007) (fraud claim untimely based on judicially noticeable federal agency report); and other areas. *See, e.g., State v. Erickson*, 200 N.W. 813, 814 (Minn. 1924) ("results of a census taken under federal or state authority"); *Kaiser v. Kaiser*, 186 N.W.2d 678, 684 (Minn. 1971) ("the fact of increase and the extent of increase in the cost of living by resort to consumer price indices published by the United States Bureau of Labor Statistics"); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1460 (D. Minn. 1996)

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(judicially noticing "the workshare agreement which exists between the EEOC and the MDHR").

Just remember: courts are rightfully cautious in this area. *E.g.*, *Graphic Comm'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 687 n.2 (Minn. 2014) ("Judicial notice is to be taken with caution and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it.") (quotation omitted); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) (similar). At the end of the day, to be judicially noticeable, Rule 201(b) always requires the fact to be "not subject to reasonable dispute."

TOOL 3: LABELS AND CONCLUSIONS ARE NOT ENOUGH

Walsh, to be sure, killed the plausibility standard in Minnesota.

But, as *Walsh* acknowledged, the Minnesota Supreme Court had already—in *Hebert* and in *Bahr*—quoted with approval the other side of that *Twombly-Iqbal* coin. *See Walsh*, 851 N.W.2d at 603. *Twombly* tells us that "a plaintiff's [Rule 8] obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." 550 U.S. at 555. Our supreme court cited that "more than labels and conclusions" language with approval in *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) and *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). And, after *Walsh*, it made clear (in *Finn*) that that limitation remains, and is a qualifier to what some might describe as the "traditional" pleading standard in Minnesota:

> A district court may only dismiss a complaint under Rule 12.02(e) if "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)). **However, as we recently reiterated, "we are 'not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.'"** *Walsh*, 851 N.W.2d at 603 (quoting *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008)).

Finn v. All. Bank, 860 N.W.2d 638, 653–55 (Minn. 2015) (affirming Rule 12 dismissal of constructive-fraud claim) (emphasis added).

That qualifier has real teeth for Rule 12 motions, no less in Minnesota. That was born out before *Walsh*. *See, e.g.*, *Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 698 (Minn. 2014) (reinstating Rule 12 dismissal of Minnesota Consumer Fraud Act claim because "[t]he Funds' complaint does not allege facts that would trigger a duty to disclose"); *Bahr v. Capella Univ.*, 788 N.W.2d 76, 82, 84 (Minn. 2010) (reinstating Rule 12 dismissal of Minnesota Human Rights Act reprisal claim because plaintiff failed to "plead sufficient facts to show that it was objectively reasonable for her to believe that Capella's actions were forbidden by the MHRA").

And it remains true after *Walsh*. *See, e.g.*, *Robert Allen Taylor Co. v. United Credit Recovery, LLC*, 2016 WL 5640670, at *10 (Minn. App. Oct. 3, 2016) (affirming Rule 12 dismissal of unjust-enrichment claim, rejecting legal conclusions including that "the allegation[] that U.S. Bank 'unjustly refused to return' the purchase price of the three debt portfolios'"), *rev. denied* (Minn. Dec. 27, 2016); *Hansen v. US Bank Nat'l Ass'n*, 2017 WL 10311509, at *6 (Minn. Dist. Ct. Sep. 12, 2017) (granting Rule 12 motion, rejecting legal conclusion that plaintiff "first suffered damage when the Estate stopped receiving Note payments in 2012"); *Lavorato v Schultz*, 2017 WL 3328431, at *8–9 (Minn.Dist.Ct. Mar. 14, 2017) (granting Rule 12 motion, rejecting various legal conclusions, including that various "resignations . . . were ineffective" under governing statute).

In conclusion, before you write off your chances of securing Rule 12 relief, I respectfully suggest that you ask yourself three questions: (1) are there documents that the complaint incorporated by reference; (2) are there facts that the court may judicially notice to come to your aid; and (3) when you parse through the labels and conclusion, what *really* is factually pled?

The answers might be just what you need to make a Rule 12 motion sing in state court, and so secure justice for your defense clients, without discovery and without delay.