

EXERCISE**MOTIONS TO DISMISS: STRATEGIES FOR 12(b)(6) BRIEFING****Background**

You're on a litigation team representing a large tech company, Tech Co., that just acquired a software company, Soft Co. After the deal closed, Tech Co. learned that Soft Co. misrepresented the nature of a litigation that was filed against it. Tech Co. is now suing Soft Co. in federal court for fraud and breach of contract.

A few days after the complaint was filed, Soft Co.'s counsel reached out to say they'd be filing a motion to dismiss the fraud claim and asked for agreement that the breach of contract claim did not need to be answered until the motion had been decided. But your team decided to decline this request.

In their subsequent motion, Soft Co. made two arguments with respect to the fraud claim. First, they argued that the complaint did not allege exactly which negotiation session the allegedly fraudulent misrepresentation occurred in and who exactly was present or involved. Second, Soft Co. argued that the allegation that Tech Co. incurred damages to defend against and settle the lawsuit is incorrect because Tech Co. should have recovered the legal fees as part of the settlement; and regardless, the legal fees incurred were lower than Tech Co. is claiming.

The senior associate asked you to draft the argument section of the opposition brief, and you have a meeting coming up to discuss it.

Instructions

Come prepared to discuss these questions:

- Why might Soft Co.'s counsel have asked your team to agree that the breach of contract claim doesn't need to be answered until after the motion is decided?
- With respect to the Soft Co.'s first argument, why does alleging (or not alleging) specifics about when and with whom the misrepresentation happened matter to the fraud claim?
- What else might your team consider doing procedurally before responding to Soft Co.'s motion?
- How will you respond to the second argument?