SCHALLER, J., concurring in part and dissenting in part. I respectfully disagree with the majority that the trial court improperly denied the motion of the defendants, the former governor, John G. Rowland, and the state of Connecticut, collectively referred to as the state,[1] seeking to dismiss the claim of the plaintiff, Ronald Gold, alleging a taking of his property in violation of article first, § 11, of the constitution of Connecticut. I would affirm the judgment of the trial court with respect to its denial of the motion to dismiss counts one, two, ten, eleven, twelve and thirteen of the second amended complaint.[2] I write separately to emphasize why I believe that the plaintiff is unfairly denied an opportunity to pursue his taking claim.

The majority begins its analysis of this issue by stating its agreement with the state's claim as follows: "We first address the state's claim on appeal that the plaintiff neither alleged nor presented evidence that the state had received the Anthem . . . stock in its capacity as agent for the plaintiff and others similarly situated." Thereafter, the majority discusses the state's claim in terms of the plaintiff's failure to "allege any facts capable of establishing a manifestation of his assent that the state would act on his behalf, any facts capable of establishing that the state agreed to receive the stock on his behalf or any facts capable of establishing that the parties understood that the plaintiff ultimately would be in control of the stock."

At this juncture, it is important to identify the standard of review that applies to the trial court when it decides a motion to dismiss. The majority accurately states the standard as follows: "The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007)." (Internal quotation marks omitted.)

After reciting the trial court's conclusion that, by construing the allegations of the plaintiff's complaint

and the facts necessarily implied in the light most favorable to the plaintiff, the plaintiff had stated a colorable taking claim, the majority diverges from its own standard of review as it rejects the trial court's decision. The pivotal reason, as stated by the majority, is that "[t]he plaintiff neither alleged in his complaint nor presented any evidence to the trial court that Anthem . . . in fact delivered the stock to the state in its capacity as the agent for the group as a whole. Rather, the plaintiff's complaint *more reasonably is read* as alleging that Anthem . . . *failed* to deliver the stock to the state in its capacity as the agent for the group as a whole . . . ." (Emphasis altered.) The majority's basis for rejecting the trial court decision and the plaintiff's taking claim falls short for several reasons.

First, the majority tests the plaintiff's pleading by the wrong standard, that is, as if the motion to dismiss, which properly tests the jurisdiction of the court; see Practice Book § 10-30 et seq.; were a motion to strike, which properly tests the sufficiency of the pleadings. See Practice Book § 10-39 et seq. Although our case law supports the concept of allowing a motion to dismiss to be treated as a motion to strike in situations in which the trial court has done so; see, e.g., *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 501–502, 815 A.2d 1188 (2003); it does not support the concept of *requiring* trial courts to do so, when they have not done so. Nor does it support the concept that this court, sua sponte, should raise that approach—for the first time—in the course of an appeal, which is precisely what the majority does in this instance. In fact, the majority's insistence on raising the issue contravenes the well established notion that "when a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *In re Judicial Inquiry No. 2005-02*, 293 Conn. 247, 254, 977 A.2d 166 (2009).

Second, the plaintiff had no burden whatsoever at the motion to dismiss stage to present evidence and the majority offers no authority for that proposition. The motion was submitted for argument only and nothing in the record suggests that an evidentiary hearing was sought or held. As the majority indicates in reciting the standard of review for a motion to dismiss for lack of jurisdiction, as stated in *Cogswell*, this motion " 'invokes the existing record and must be decided upon that alone.' "

Third, the majority's *reasonable reading* of the complaint unmistakably recognizes the pleading of an agency theory. The majority, by recognizing that the plaintiff's complaint alleges that Anthem failed to deliver the stock to the state in its capacity as agent, necessarily must recognize the implicit allegation that the state should have received the property in its capac-

ity as agent for the plaintiff and, in not doing so, engaged in a taking of the property. Although the majority relies heavily on what it assumes to be Anthem's intention in making delivery, presumably, that Anthem had determined that the state was entitled to the stock, the majority offers no authority as to why that intention, whatever it was, is germane to the ultimate determination, much less the dispositive factor in that determination. It is clear, at this point, that Anthem's position in seeking to remain a party to this action is based on its recognition that, from the outset, the state's retention of the property was highly controversial and disputed, a fact that the state also consistently has acknowledged despite its present argument on the matter.

The state's principal argument is that the plaintiff could not prevail on his claim that any receipt by the state could be for the plaintiff's benefit because he failed to allege explicitly an agency relationship. The trial court determined that the issue of agency was a question of fact to be determined at trial and that the plaintiff was not bound to allege, and certainly was not bound to prove, explicitly an agency relationship at the motion to dismiss stage. I have already noted that the majority's own *reasonable reading* of the complaint supports an implicit agency theory, which is sufficient under the majority's own standard of review. Under no circumstances is there any authority to justify the majority's theory that the absence of an explicit allegation of agency or offer of evidence at the motion to dismiss stage leads inevitably to a conclusion that the plaintiff *could not prove* this fact at trial. Under the circumstances, the state's receipt of the stock necessarily would be as an agent for the plaintiff because the state was not entitled to the stock in its own right.

If, as the majority acknowledges, the trial court correctly determined that the plaintiff had "made a colorable claim that the group as a whole was entitled to the stock, and that the plaintiff had a reasonable expectation under the plan of conversion that Anthem . . . would deliver a single, joint distribution of the stock to the group and that the state was the logical representative of the group for the purpose of receiving the stock," it was not necessary for the plaintiff to allege that Anthem delivered the stock to the state in its capacity as agent for the plaintiff in order to survive a motion to dismiss. Ultimately, the plaintiff would have an opportunity to prove that receipt by the state under those circumstances constituted receipt on behalf of the plaintiff. The plaintiff surely was not bound to produce evidence at the motion to dismiss stage. The majority cannot cite any authority for its conclusion that the plaintiff's case fails on the ground that it was bound to allege that Anthem *in fact* delivered the stock to the state as agent. I believe that the trial court acted consistently with the prevailing standard of review and that its conclusion is unassailable. For the foregoing reasons, I

respectfully disagree with the majority opinion to the extent that it reverses the judgment of the trial court denying the state's motion to dismiss the taking claim.

I also disagree with the majority that Anthem lacks standing to cross appeal from the trial court's dismissal of the plaintiff's claims against the state. The state argues that Anthem lacks standing to cross appeal because the dismissal of the plaintiff's claims against the state did not affect any specific personal or legal interest of Anthem. Although I agree generally with the majority's statement of the law pertaining to standing, I disagree with its application in this case. The majority concedes that, "as a practical matter, permitting the plaintiff to pursue his claims against the state could reduce [Anthem's] risk of exposure to multiple recoveries." The majority also concedes that Anthem's "interest in avoiding multiple recoveries . . . probably would be sufficient to confer standing . . . to bring a claim against the state, which are the claims at issue in [Anthem's] cross appeal."

Despite these adverse practical consequences, the majority concludes that Anthem lacks standing to cross appeal on the basis of two extraneous factors—namely, that Anthem has "no legally protectible interest in the *plaintiff's* claims against the state" and that "the plaintiff could have brought a claim for the stock solely against [Anthem] and he could withdraw his claims against the state at will." (Emphasis in original.)

I submit that the majority, in reaching its conclusion, does not apply the established standing criteria correctly. As the majority recognizes, standing is established by demonstrating a "specific personal and legal interest in the *subject matter of the decision*, as distinguished from a general interest, such as is the concern of all members of the community as a whole. . . . *Briggs* v. *McWeeny*, 260 Conn. 296, 308–309, 796 A.2d 516 (2002)." (Emphasis added; internal quotation marks omitted.) Accordingly, the test in this case is not whether Anthem can demonstrate a specific and personal legal interest in the plaintiff's claims against the state, as the majority maintains, but whether Anthem can demonstrate a specific and personal legal interest, as distinguished from a general interest, in "the subject matter of the decision . . . ." (Internal quotation marks omitted.) *Briggs* v. *McWeeny*, supra, 308.

There is no question that Anthem's interest in the trial court's decision is distinct from—and far exceeds—the general interest of the community. See id. Anthem has a substantial interest at stake in this action—it already has paid a sum exceeding $93 million, representing the proceeds of the stock that Anthem chose to distribute to the state rather than to the plaintiff, and could be compelled to pay that sum yet again. The prospect of making a duplicative payment of nearly $100 million certainly constitutes a specific personal and legal

interest.

Moreover, Anthem has a specific personal and legal interest in the subject matter of this action, which is the determination of the rightful owner of the proceeds. If the court ultimately determines in the course of the present action that Anthem mistakenly distributed the stock to the state rather than to the plaintiff, the plaintiff's only recourse will be against Anthem, because the state will no longer be a party to this action. As the majority points out, "[t]he dismissal of all claims against the state . . . means that the state will no longer be a party to this case . . . [and] neither this court nor the trial court has jurisdiction over persons or entities who are not parties to the action before it." See footnote 31 of the majority opinion. Consequently, even if the court determines that the state had no right to receive the stock in the first place and, therefore, has no right to retain it, the disputed property will not be available to the court for purposes of resolving this interpleader action. Given this context, Anthem should be permitted to maintain its cross appeal challenging the trial court's dismissal of the plaintiff's claims against the state.

Anthem's specific and personal interest in the subject matter of the present action clearly has been adversely affected by the dismissal of claims against the state. This action is an interpleader action by the plaintiff against both the state and Anthem, in which the plaintiff seeks an equitable determination as to the proper owner of the disputed proceeds. As Anthem argues in its brief, the viability of the interpleader action depends on the viability of competing substantive claims. See *Commercial Discount Co.* v. *Plainfield*, 120 Conn. 274, 279, 180 A. 311 (1935). The trial court's dismissal of the claims against the state has adversely affected Anthem's interest in the determination of the rightful owner of the proceeds by allowing the state, as the party in possession of the disputed proceeds, to be removed from this action. Consequently, Anthem should have the opportunity to establish why the plaintiff's claims against the state should be maintained.

Because Anthem ultimately could be ordered to make a duplicative payment to state employees, Anthem has sufficient interest in keeping the disputed proceeds available to the court. If the court determines that the state was not entitled to the proceeds, the proceeds should be readily available to the court for an appropriate order. That appropriate disposition should not depend on whether Anthem can successfully recover from the state in an independent action, especially when there is a possibility that the state will invoke the doctrine of sovereign immunity to preclude such an action.[3] Rather, the present interpleader action is the proper vehicle within which to resolve all of the claims in this multiparty action.

As a practical matter, the present action may well be

Anthem's only opportunity to compel the state to share in liability if the plaintiff is successful. Although the plaintiff's claims against Anthem are distinct from its claims against the state, and Anthem can be found liable regardless of whether the state remains a defendant, the state's continued presence in the present action has a clear effect on the amount of damages to be paid by Anthem, should it be held liable. The possibility that Anthem might be unable to pursue a claim against the state to recoup its losses militates in favor of Anthem's standing in this action. Likewise, the practical consequences of avoiding the risk of multiple recoveries is a serious concern, as the majority acknowledges. This court has recognized that the practical effect of a challenged decision is a relevant consideration in determining the issue of standing. See *Rose* v. *Freedom of Information Commission*, 221 Conn. 217, 231, 602 A.2d 1019 (1992).

Finally, an inflexible interpretation of standing requirements, even if they were accurately applied, is not appropriate. This court has recognized that certain cases "do not fit neatly within the aggrievement rubric." *In re Allison G.*, 276 Conn. 146, 159, 883 A.2d 1226 (2005). The rigid application of the rules in the present case contravenes the well established principles underlying the concept of standing, which "is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Rose* v. *Freedom of Information Commission*, supra, 221 Conn. 223. These objectives of standing are satisfied "when a complainant makes a colorable claim of [a] direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Citations omitted; internal quotation marks omitted.) Id., 223–24. Clearly, Anthem has a significant stake in the outcome of this controversy sufficient to confer standing to cross appeal.

For the foregoing reasons, I respectfully dissent.

[1] The plaintiff also brought this action against Anthem, Inc., Anthem Health Plans, Inc., doing business as Anthem Blue Cross and Blue Shield of Connecticut, Anthem East, Inc., and Anthem Insurance Companies, Inc., collectively referred to as Anthem.

[2] I would also affirm the trial court's dismissal of counts five, six and seven of the second amended complaint, and therefore concur in part III of the majority opinion.

[3] The majority points out that the "practical and logical basis of the doctrine [of sovereign immunity] . . . rest[s] . . . on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and

property," and emphasizes that the exceptions to the doctrine "are few and narrowly construed under our jurisprudence." (Internal quotation marks omitted.) In discussing the exception to the doctrine of sovereign immunity for claims of declaratory and injunctive relief; see *Pamela B.* v. *Ment*, 244 Conn. 296, 328, 709 A.2d 1089 (1998); *Krozser* v. *New Haven*, 212 Conn. 415, 421, 562 A.2d 1080 (1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 757, 107 L. Ed. 2d 774 (1990); *Doe* v. *Heintz*, 204 Conn. 17, 31–32, 526 A.2d 1318 (1987); the majority rejects the suggestion "that the exception may be applied to all claims of injunctive relief, regardless of whether the state has acted in excess of its statutory authority or pursuant to an unconstitutional statute." In addition, the majority rejects the plaintiff's claim that there is an exception for claims to property held by the state in an account that is separate from the general fund on the ground that "it is clear that a judgment against the state would affect the state's treasury . . . ."

If Anthem proceeds against the state, its primary purpose in doing so, regardless of how it labels any such claims, will be to recoup its losses. Given the majority's emphasis on the purpose of the doctrine of sovereign immunity to protect the state's coffers, and the majority's narrow construction of the few exceptions to the doctrine, it is highly likely that the state would raise the defense of sovereign immunity to preclude any attempt by Anthem to seek reimbursement.