

Exercise Five - Motions to Dismiss and Waiver  
Under Federal Rule 12

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## Chapter 1

# Raising, and Waiving, Rule 12 Defenses

Exercise Three explored pleading a complaint. This exercise explores one type of response to a complaint: a preliminary motion to dismiss under Federal Rule of Civil Procedure 12. Consequently, this exercise is narrower than Exercise Three. We do not explore the requirements of, or drafting, an answer, which is the responsive pleading to the complaint. We do not discuss other possible preliminary motions, such as a motion for more definite statement or a motion to strike. We discuss the assertion—and possible waiver—of the seven grounds found in Federal Rule 12(b) for dismissal of a complaint.

### 1.1 The Federal Rule 12(b) Defenses

#### *1. Abandonment of the Special Appearance*

The common law provided a plea in abatement to attack jurisdiction and a demurrer to attack the legal sufficiency of a complaint. The codes provided a demurrer to handle both tasks. In both systems, the defendant could make a *special appearance* to challenge jurisdiction. This can be seen in some older decisions that refer to defendant having “appeared specially.”

Special appearance was a term of art. Defendant appeared in the court for the sole purpose of challenging personal jurisdiction, and no other purpose. That was why the appearance was special. A defendant who attempted to present other defenses or motions before the court made a general appearance,

and a general appearance amounted to a consent to personal jurisdiction. A defendant who challenged jurisdiction and at the same time pleaded to the merits of the complaint obviously called on the power of the court; this was a general appearance. A defendant could also consent, or waive objection, to personal jurisdiction more subtly. For example, a defendant made a general appearance by such actions as opposing plaintiff's motion to amend the complaint, engaging in discovery, challenging the legal sufficiency of the complaint, or possibly even informing the court that it chose not to appear. Consequently, a defendant wishing to challenge personal jurisdiction had to be careful; the challenge must have been to personal jurisdiction and nothing else.

When the special appearance was successful, the case was dismissed and defendant went home happy. When the special appearance was unsuccessful, the case proceeded. At that point, defendant might have a choice to make. Some states allowed defendant to proceed to defend on the merits while preserving the jurisdictional objection. Other states provided that a defendant who proceeded to defend on the merits waived the jurisdictional objection.

All of this has been swept aside in practice in federal courts and in state court systems patterned after the Federal Rules. Federal Rule 12(b) has abolished the special appearance: "No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."

## 2. *Assertion of Rule 12(b) Defenses*

A defendant is required to serve an answer on plaintiff within "20 days after being served with the summons and complaint." Fed. R. Civ. P. 12(a)(1)(A)(i). [A defendant waiving service is allowed a response time of 60 days (90 days if defendant was addressed outside any federal judicial district). Fed. R. Civ. P. 12(a)(1)(A)(ii)]. Instead of answering within that 20-day period, defendant may choose to make a preliminary Rule 12(b) motion to dismiss.<sup>1</sup> Should defendant choose that course of defense, and the motion prove unsuccessful, defendant is allowed 10 days after service of the court's unfavorable decision on the motion to answer. Fed. R. Civ. P. 12(a)(4)(A).

The seven challenges that Federal Rule 12(b) specifically allows to be made by preliminary motion are the following:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;

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<sup>1</sup> Actually, defendant is not the only party who can raise these defenses. The plaintiff, for example, can raise the defenses in response to a counterclaim. The language of FED. R. CIV. P. 12 is carefully drawn to cover any party responding to a claim, whether defendant, plaintiff, or third-party defendant. For convenience, this exercise will use the terms plaintiff and defendant in the usual context of a simple two-party action with no counterclaim.

- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A defendant wishing to raise any one of these seven challenges has two options. Option one is to raise any and all of the defenses in the answer. “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.” Fed. R. Civ. P. 12(b). The answer is the responsive pleading required to the complaint. Fed. R. Civ. P. 7(a). Option two is to raise any and all of these defenses in a preliminary motion, one made before the answer is pleaded. “But a party may assert the following defenses by motion: [listing the seven defenses]. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b). The party may join all motions under Rule 12 into a single motion. Fed. R. Civ. P. 12(g)(1).

Those are the only two options. A defendant who brings a preliminary motion to dismiss that asserts fewer than all of the defenses and later attempts to assert an additional Rule 12(b) defense for the first time in the answer will in most instances waive it, as discussed in I.A.3, *infra*. Similarly, a defendant cannot make successive preliminary motions to dismiss; one is the quota allowed:

Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

Fed. R. Civ. P. 12(g)(2).

The reason the rules limit defendant to one preliminary motion is rather obvious. That is the efficient method to dispose of all the threshold jurisdictional motions. Without that limitation, defendant could delay the proceeding for a long time by doling out the motions. For example, defendant could move to dismiss for insufficient service of process; following denial of that motion, defendant could move to dismiss for improper venue. The string could continue through multiple preliminary motions.

All of the seven grounds for dismissal found in Federal Rule 12(b) are threshold issues that can and should be disposed of before the parties and the court proceed to the work of deciding the merits of the case.<sup>2</sup> With the exception of dismissal for failure to state a claim upon which relief can be granted, all of the grounds for dismissal are separable from the merits. With the exceptions of dismissal for failure to join a Rule 19 party and failure to state a claim, all of

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<sup>2</sup> “If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.” Fed. R. Civ. P. 12(i).

the grounds for dismissal render the court powerless to act in the case because of a defect in jurisdiction, venue, or service of process. By requiring defendant to assert these defenses early—either in preliminary motion or no later than the answer—the rules prevent defendant from laying in the weeds and springing such a ground for dismissal on plaintiff later should progress in the litigation not be favorable to defendant.

### 3. *Waiving Rule 12(b) Defenses*

While Fed. R. Civ. P. 12(g)(2) requires a defendant who makes a preliminary motion under Rule 12 to consolidate all of its Rule 12(b) defenses into that motion, the enforcement provision is found in Fed. R. Civ. P. 12(h):

**(1) When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2);

or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by rule 15(a)(1) as a matter of course.

**(2) When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

**(3) Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

Fed. R. Civ. P. 12(h).

Since this exercise concerns waiver of defenses, we will work from back to front in this rule. First, Fed. R. Civ. P. 12(h)(3) provides that the defense of lack of subject matter jurisdiction [Fed. R. Civ. P. 12(b)(1)] cannot be waived. This of course follows from the fact that jurisdiction over the subject matter is granted by constitution and statutes, not by action of the parties. [See Exercise Two, part I.A]. Second, Fed. R. Civ. P. 12(h)(2) provides that the defenses of failure to state a claim [Fed. R. Civ. P. 12(b)(6)] and failure to join a person required by Rule 19(b) [Fed. R. Civ. P. 12(b)(7)] may be made later: in a pleading, in a motion for judgment on the pleadings, or even at trial. In other words, these two rule 12 defenses are not waived by failure to consolidate them into a preliminary motion.



That leaves four rule 12 defenses that by the express provision of Fed. R. Civ. P. 12(h)(1) are waived if omitted from a preliminary motion to dismiss made “under this rule.” These four waivable defenses are lack of personal jurisdiction [Fed. R. Civ. P. 12(b)(2)],<sup>3</sup> improper venue [Fed. R. Civ. P. 12(b)(3)], insufficient process [Fed. R. Civ. P. 12(b)(4)], and insufficient service of process [Fed. R. Civ. P. 12(b)(5)].<sup>4</sup> These defenses must be consolidated into any preliminary motion brought under rule 12 [Fed. R. Civ. P. 12(g)(2)]; in the absence of a preliminary motion to dismiss, these defenses must be consolidated into the answer; or these defenses must be consolidated into an amendment to the answer that is allowed to be made as a matter of course.<sup>5</sup> Failure of defendant to assert one or more of these defenses in one of the preceding manners results in waiver of the defense(s).

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<sup>3</sup> While the rule refers to lack of jurisdiction over the person, this is understood to include all bases of personal jurisdiction, including *in personam*, *in rem*, and *quasi in rem* jurisdiction. [See Exercise Two, part I.A].

<sup>4</sup> A motion to dismiss for insufficient process is properly brought only when the form of the process is defective. A motion to dismiss for insufficient service of process is properly brought to challenge the method of serving the process.

<sup>5</sup> FED. R. CIV. P. 12(h)(1)(B)(ii) allows a defense omitted from the answer to be saved by amendment of the pleading made as a matter of course. FED. R. CIV. P. 15(a)(1)(A) allows the complaint to be amended once as a matter of course “before being served with a responsive pleading.” While the answer is the responsive pleading to the complaint, no responsive pleading to the answer is usually permitted [unless the court orders a reply pursuant to FED. R. CIV. P. 7(a)(7)], FED. R. CIV. P. 15(a)(1)(B) gives defendant 20 days after serving the answer on the plaintiff to amend the answer as a matter of course. Later amendment of the answer, as by consent of the parties or by leave of court, does not save the omitted defense.



## Chapter 2

# Written Exercise - Questions

The following pages—and the accompanying computer-aided exercise CALI lesson CIV09 – Waiver Under Rule 12, <http://www.cali.org/lesson/385> – contain several questions to probe your understanding of the interrelationships of the federal rules and federal statutes involved in questions of waiver of defenses under Federal Rule 12. You will be required to exercise close scrutiny and interpretation of a complex set of interrelated provisions. The rules are Fed. R. Civ. P. 6(b), 7, 11, 12, and 15(a). The statutes are 28 U.S.C. §§ 1391(a) [venue] and 1404(a) [transfer of venue]. You will need your rulebook with these rules and statutes for both the following written exercise and CALI CIV 09. The questions in the written exercise and the computer-assisted lesson examine these rules and statutes, consider the reasons for special treatment of Rule 12 defenses, and analyze the waiver provisions of the rule.

[Warning: Draw object ignored]

Instructions. This section contains questions for you to answer to test and strengthen your knowledge of waiver of Rule 12 defenses. The answers are in the endnotes.

[Warning: Draw object ignored]

Q-1. Federal Rule of Civil Procedure 12(b) lists seven defenses that may be raised by the defendant prior to answering the complaint. A preliminary motion raising one of the Rule 12(b) defenses postpones the time for filing the answer until after the court has ruled on the motion. Fed. R. Civ. P. 12(a)(4)(A).

The following questions are designed to probe why these defenses receive special treatment.

Q-1(a). Do the seven defenses in Rule 12(b) all involve matters that can be determined by the court on the face of the pleadings, without the necessity for testimony or findings of fact?<sup>1</sup>

Q-1(b). Is there a need to decide the seven defenses before the rest of the lawsuit because they raise especially important issues?<sup>2</sup>

Q-1(c). Are the seven defenses suitable for early disposition because they involve trivial matters of form that should be corrected early in the lawsuit?<sup>3</sup>

Q-1(d). Do the seven defenses involve matters that can be severed for separate determination because they do not go to the merits of the lawsuit?<sup>4</sup>

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<sup>1</sup> *Answer to Q-1(a)*. No. With the exception of the motion to dismiss for failure to state a claim [Rule 12(b)(6)], all of the listed defenses require findings of fact if the factual basis for them is contested. For example, the motion to dismiss for insufficient service of process, if contested, would require the trial court to make a finding about whether process was served upon an appropriate person. In a diversity case, the motion to dismiss for lack of subject-matter jurisdiction can turn on whether a party acquired citizenship by moving to a new state, a matter that requires a finding of fact about the party's actions and intent. Under Fed. R. Civ. P. 43(c), the trial court could base factual findings on affidavits submitted by the parties, but would have the discretion to hear oral testimony or require depositions.

<sup>2</sup> *Answer to Q-1(b)*. No. Not all of the issues are important. For example, the defense of insufficient process can involve the mere assertion that plaintiff omitted the summons or the complaint from otherwise proper process—a matter that cannot have much importance to a defendant who obviously knows of the lawsuit or she would not be making the motion. Similarly, the defense of insufficient service of process can be raised successfully if the plaintiff served an employee of a corporation who was not an officer, managing or general agent, or process agent within the meaning of Rule 4(h)(1)(B). The sole purpose of allowing such motions seems to be to encourage parties to mind their formalities. The motions rarely terminate a lawsuit; instead, absent a statute of limitations problem, they merely result in a re-service of process.

<sup>3</sup> *Answer to Q-1(c)*. No. Some of the defenses are trivial, and some are highly important. The defense of lack of subject-matter jurisdiction is considered near-sacred because it protects the division of powers between federal courts and state courts inherent in federalism. See CHARLES A. WRIGHT & MARY KAY KANE, *THE LAW OF FEDERAL COURTS* § 7 (6th ed. 2002).

<sup>4</sup> *Answer to Q-1(d)*. Yes, with minor qualifications. None of the defenses go to the merits, except the defense of failure to state a claim upon which relief can be granted. A Rule 12(b)(6) defense goes to the merits in the sense that it involves determination of whether the allegations, if true, present a meritorious claim. That defense, however, does not require or allow the court to look beyond the face of the complaint, and hence is a good defense to sever and consider early. Surely the lawsuit should not proceed if the plaintiff's own statement of the claim, considered as true, provides no grounds for relief.

The other Rule 12(b) defenses have nothing to do with the merits of the case, so they are easy to separate and rule on prior to proceeding with the main lawsuit. Early disposition will promote judicial economy. When a defendant has a defense of improper venue or lack of jurisdiction, the court should rule on that defense before the parties develop the merits of the case, which may later be dismissed because it was brought in the wrong court. Finally, the defenses concerning process and service of process might just as well be disposed of earlier as later; the possibility that separate treatment of these defenses will result in delay may not be too high a price to pay in order to encourage plaintiffs to adhere to the proper formalities,

Q-2. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion raising the defenses of lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient service of process, and failure to state a claim upon which relief can be granted. Can George raise all of these defenses at the same time in the same motion? <sup>5</sup>

Q-3. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion under Rule 12(b)(1) to dismiss for lack of subject-matter jurisdiction. The next day, George filed a motion under Rule 12(b)(3) to dismiss for improper venue. Has George waived his venue defense?<sup>6</sup>

Q-4. Sally filed a complaint against George and process was served on Day 1. On Day 4, prior to his answer, George filed a motion under Rule 12(b)(2) to dismiss for lack of personal jurisdiction. The next day, George filed a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. Has George waived his subject matter jurisdiction defense?<sup>7</sup>

Q-5. Sally filed a complaint against George and process was served on Day 1. On Day 19, prior to his answer, George filed a motion under Rule 12(f) to strike impertinent matter from the complaint. The next day, George filed a motion under Rule 12(b)(2) to dismiss for lack of personal jurisdiction. Has George waived his personal jurisdiction defense?<sup>8</sup>

Q-6. Sally filed a complaint against George and process was served on Day 1. Without filing any preliminary motions, George filed an answer on Day 10 in which, in addition to responding to allegations in Sally's complaint, he raised

which after all have the significant purpose of making sure that defendants are given proper notice.

<sup>5</sup> *Answer to Q-2.* Yes. The defenses can be consolidated in the motion. Fed. R. Civ. P. 12(g)(1). Under some prior systems of pleading, the defendant was required to raise defenses in sequence, a time-consuming and inefficient procedure.

<sup>6</sup> *Answer to Q-3.* Yes. Rule 12(h)(1)(A) provides for waiver of the venue defense if it is omitted "from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) provides for consolidation of all Rule 12 motions that were available to the movant. The purpose of these waiver provisions is to require that pre-answer motions be brought together, thereby preventing the delay that might arise from hearing the motions sequentially.

<sup>7</sup> *Answer to Q-4.* No. Rule 12(h)(3) provides that the defense of subject-matter jurisdiction may be raised "at any time." It may also be raised by the court on its own motion. Subject matter jurisdiction is granted by constitution and statutes, not by action of the parties. The federal subject matter jurisdiction defense is considered to be particularly consequential, since erroneous assertion of federal jurisdiction would be usurpation of state power. Hence, the defense is not waivable; the interests of speed and economy must yield to federalism.

<sup>8</sup> *Answer to Q-5.* Yes. Rule 12(h)(1)(A) provides that a defense of lack of personal jurisdiction is waived by "omitting it from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) provides "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Since a personal jurisdiction defense was available, and a Rule 12(f) motion is a motion under this rule [Rule 12], the defense of personal jurisdiction was waived.

the defenses of lack of personal jurisdiction, lack of subject-matter jurisdiction, failure to state a claim upon which relief could be granted, improper venue, and expiration of the statute of limitations. Does George have the right to raise all of these defenses in his answer without making any prior motions?<sup>9</sup>

Q-7. Sally filed a complaint against George and process was served on Day 1. On Day 10, George filed a Rule 12(b)(1) motion raising the defense of lack of subject-matter jurisdiction. On Day 40, the trial court held a hearing on the Rule 12(b)(1) motion and ruled in favor of Sally. On Day 45, George filed his answer, which was timely because the Rule 12(b)(1) motion extended the time for filing the answer until 10 days after notice of the courts action on the motion. [Fed. R. Civ. P. 12(a)(4)(A).] In his answer, George responded to the allegations in Sallys complaint and also raised the defenses of failure to state a claim upon which relief could be granted, lack of personal jurisdiction, expiration of the statute of limitations, res judicata, and improper venue.

Q-7(a). Has George waived the defense of failure to state a claim upon which relief could be granted?<sup>10</sup>

Q-7(b). Has George waived the defense of lack of personal jurisdiction?<sup>11</sup>

Q-7(c). Has George waived the defense of the statute of limitations?<sup>12</sup>

Q-7(d). Has George waived the venue defense?<sup>13</sup>

Q-8. Sally filed and served a summons and complaint, and a set of interrogatories, on George on Day 1. On Day 10, George made a Rule 26(c) motion for a protective order, claiming that the interrogatories were burdensome and vexatious. On Day 15, George filed an answer responding to the allegations in

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<sup>9</sup> *Answer to Q-6.* Yes. Rule 12(b) provides “a party may assert the following defenses by motion. The defendant has two options: 1) raise the defenses in a preliminary motion, or 2) raise the defenses in the answer, provided that they have not been waived by omission from a preliminary motion. Since George made no preliminary motion, he did not waive any defenses by failing to join them with other defenses. They may all be consolidated in the answer, along with admissions, denials, and affirmative defenses.

<sup>10</sup> *Answer to Q-7(a).* No. The defense of failure to state a claim has not been waived. Rule 12(h)(2) preserves the defense and allows it to be asserted in a pleading, on a motion for judgment on the pleadings, or at trial. The defense is considered too important to allow it to be waived by mistake.

<sup>11</sup> *Answer to Q-7(b).* Yes. The defense of personal jurisdiction was waived by failure to join it in the Rule 12 motion. See Rule 12(h)(1)(A).

<sup>12</sup> *Answer to Q-7(c).* No. The statute of limitations defense has not been waived because it is not a Rule 12 defense. This affirmative defense [see Fed. R. Civ. P 8(c)(1)] could not have been raised in the Rule 12 motion, and therefore cannot be waived by omission from the motion.

<sup>13</sup> *Answer to Q-7(d).* Yes. The defense of improper venue has been waived by the provisions of Rule 12(h)(1)(A).

Sallys complaint and raising the defense of improper venue. Has George waived the defense of improper venue?<sup>14</sup>

Q-9. Sally filed and served a complaint against George on Day 1. George did not file any preliminary motions. On Day 10, he served and filed an answer that denied all of the material allegations of Sallys complaint and raised the defenses of lack of subject matter jurisdiction and contributory negligence. Neither the parties nor the court took any further action until Day 25, when George attempted to amend his answer to include the defense of improper venue. Will this amendment save the venue defense?<sup>15</sup>

Q-10. Sally commenced an action alleging that George had defamed her by telling third persons that she is a drug addict. Process was served on Day 1. George did not make any preliminary motions. On Day 10, he filed an answer denying that he had ever said that Sally is a drug addict, and admitting all of the other allegations of Sallys complaint. On Day 35, George attempted to amend his answer to assert the defense of lack of personal jurisdiction. Will this amendment save the personal jurisdiction defense?<sup>16</sup>

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<sup>14</sup> *Answer to Q-8.* No. Rule 12(h)(1)(A) provides for waiver of a venue defense omitted from a Rule 12 motion in circumstances in which Rule 12 requires joinder. The operative language is in Rule 12(g)(2), which requires consolidation when a motion has been made under this rule, *i.e.*, under Rule 12. The Rule 26(c) motion for a protective order was not a Rule 12 motion, so omission of a venue defense did not trigger the waiver provisions of Rule 12(h)(1).

<sup>15</sup> *Answer to Q-9.* Yes. George may amend the answer and save the venue defense. Rule 12(h)(1)(B) provides that the venue defense is waived if it is omitted from a Rule 12 motion, or no motion having been made, if it is omitted from a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course. Here the amendment is permitted as a matter of course because no responsive pleading is normally permitted to an answer [*see* Fed. R. Civ. P. 7(a)], and 20 days have not passed since the answer was served [*see* Rule 15(a)(1)(B)].

<sup>16</sup> *Answer to Q-10.* No. Here, the period during which the answer could be amended as a matter of course has elapsed, since no responsive pleading is normally permitted to an answer [*see* Fed. R. Civ. P. 7(a)] and more than 20 days have passed since service of the answer [*see* Fed. R. Civ. P. 15(a)(a)(B)]. Therefore, under Rule 12(h)(1)(B), the defense of lack of personal jurisdiction has been waived.





## Chapter 3

# Computer Exercise: CALI Lesson CIV09

You are now ready for additional work in applying Rule 12 in CALI lesson CIV09: Waiver Under Rule 12, <http://www.cali.org/lesson/385>. Be sure to take your Federal Rules rulebook with you to the computer. The estimated completion time for this computer-assisted exercise is one hour; it can be done in more than one sitting.