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John A. Bauman
Indiana University School of Law

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THE AMENDMENTS TO RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE*

JOHN A. BAUMAN**

RULE 12 of the Federal Rules of Civil Procedure provides for and regulates the presentation of defenses and objections to pleadings.[1] The rule was amended to discourage attacks on the form of the pleadings, and to facilitate settlement of cases on the merits.[2] The thought is that the formal pleadings can do little more than furnish a general notice of the claim, and that the issue forming and discovering functions should be left to the other more effective devices provided for by the Rules.[3] While the amendments are said to codify the better practice which existed under the rules as originally drafted,[4] they emphasize again that pleadings are relegated to a minor role in the federal system of procedure. A discussion of the amendments to Rule 12 will reveal the correctness of these suggestions.

Rule 12 (b) as originally drafted provided for two methods of raising defenses to a claim. It first provided that every defense, in law or fact, could be raised by a responsive pleading.[5] It then provided that six defenses could be made by a motion.[6] These six defenses were lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper

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** Assistant Professor of Law, University of New Mexico. Member of the law faculty of the University of North Dakota and Faculty Advisor to the student editorial staff of the North Dakota Bar Briefs during the Summer Session of 1949.

1 28 U.S.C.A. following §723 (c) (Supp. 1949).

2 Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 501 (1949); Clark, *The Amended Federal Rules*, 15 Brooklyn L. Rev. 1, 9-11 (1948).

3 Clark, *The Amended Federal Rules*, 15 Brooklyn L. Rev. 1, 9 (1948); Clark, *Simplified Pleading*, 2 F.R.D. 456, 460-62 (1943). For a criticism of this idea, see McCaskill, *Easy Pleading*, 35 Ill. L. Rev. 28 (1940). For reply, see Fisher, *A Vindication of Simplified Pleading*, 35 Ill. L. Rev. 270 (1940).

4 Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 487, 501 (1949).

5 This is the English method. See the Rules of the Supreme Court (England), Order XXV, Rules 1-3 (1883); Clark, *Simplified Pleading*, 2 F.R.D. 456, 464-67 (1943).

6 As to whether these six defenses are to be raised by a motion to dismiss in every case, see Brown, *Some Problems Concerning Motions Under Federal Rule 12(b)*, 27 Minn. L. Rev. 415, 415-19 (1943) (in cases where the defense is (4) insufficieney of process and (5) insufficiency of service of process, such defense should be raised by motion to quash).

venue, insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted.[7]

This subdivision of Rule 12 was amended in two ways: first by adding a seventh defense that may be raised by motion, namely, the failure to join an indispensable party; and, second, by providing that when extraneous evidence is admitted by a court in support of a motion to dismiss for failure to state a claim, such motion is to be treated as one for summary judgment and disposed of as provided by Rule 56 (the summary judgment rule).

The notes of the Advisory Committee state that the addition of the motion to dismiss for failure to join an indispensable party as a seventh defense was made to cure an omission in the rules, which failed to state how this defense was to be raised.[8] Various methods had been adopted in the courts to remedy this deficiency, and, of course, the defense could always be raised by the answer.[9]

The other amendment to Rule 12(b), permitting the introduction of extraneous evidence (affidavits, depositions, or other matter outside the pleading) in support of a motion to dismiss for failure to state a claim, was made to settle a point which was much disputed in the courts and by commentators.[10] The chief argument made against the admission of extraneous evidence, and for restricting the motion to an attack on the face of the pleading, was that the defense provided for by Rule 12 (b) (6) was failure to *state* a claim, and that this meant something different from the failure to *have*

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[7] Subdivision (b) of Rule 12, allowing these defenses to be made by motion, considered in connection with subdivision (g), which permitted the objections to be made in successive attacks, was deplored as indicating a tendency ". . . to return to the common-law hierarchy of defensive pleadings and the junking of a hundred years' effort to eliminate purely technical distinctions between pleas in abatement and pleas in bar." Cleary, Book Review, 57 Yale L. J. 672, 675 (1948). Clark argues against the use of preliminary motions to present these defenses, and contends that real reform calls for the use of the English system. Clark, *Simplified Pleading*, 2 F.R.D. 456, 465-67 (1943). See *Infra*, text at footnote 44.

[8] Notes of Advisory Committee, 28 U.S.C.A. p. 120 (Supp. 1949).

[9] See, for example, United States v. Metropolitan Life Insurance Co., 36 F. Supp. 399 (E.D.Pa. 1941) (motion for judgment on the pleadings); Paper Container Mfg. Co. v. Dixie Cup Co., 74 F.Supp. 389 (D. Del. 1947) (motion to dismiss). Grave doubts may be raised as to the whole concept of the "indispensable party" as a "jurisdictional defect." See *infra*, text at footnote 50.

[10] For citation of authority, see Notes of the Advisory Committee, 28 U.S.C.A. p. 121 (Supp. 1949). See also Brown, *supra* note 6, at 423-28; Clark, *Simplified Pleading*, 2 F.R.D. 456, 466-67 (1943).

a claim in fact.[11] It was further argued that the defense provided for by Rule 12 (b) (6) was simply the old demurrer with a new name, and that extraneous evidence was never admissible in support of demurrer since it would then become a "speaking demurrer," bad at common law.[12] It was contended that the admission of such evidence in support of the motion would eliminate Rule 8 (c) (providing for affirmative defenses) and Rule 56 (b) (motion by defendant for summary judgment).[13]

Judge Clark favored the admission of extraneous evidence in support of this motion. His argument was that the exclusion of such evidence makes the ". . . form and nomenclature of motions of perhaps decisive significance."[14] This is true, since it is clear that if the motion had been labeled one for summary judgment, such evidence would be admissible. Furthermore, Rule 6 (d) (governing motions) and Rule 43 (e) (governing evidence on motions) expressly provide for the use of affidavits in support of motions, and there is no provision made in the rules for the exclusion of such affidavits when a motion is made pursuant to Rule 12 (b) (6).[15]

The Advisory Committee felt that authority should be given to the trial courts to permit the introduction of such evidence, and the amendment therefore expressly grants this authority.[16] However, the Committee felt that if such authority were given, a definite basis should be had for the disposal of the motion.[17] This desire was achieved by specifically providing in the rule that a motion made under 12 (b) (6) is to be treated as one for summary judgment under Rule 56 when extraneous evidence is offered by the movant and received by the court. Since Rule 56 then governs the disposition of such a motion, certain ambiguities in the prior practice have been resolved and the argument that there might be a "battle of affidavits" has been obviated.[18]

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[11] See Brown, supra note 6, at 423-28; Clark, *Simplified Pleading*, 2 F.R.D. 456, 466-67 (1943); Clark, Code Pleading 540 *et seq*; note, 30 Calif. L. Rev. 92 (1941).

[12] *Ibid.*

[13] *Ibid.*

[14] Clark, *Simplified Pleading*, 2 F.R.D. 456, 466 (1943).

[15] See Brown, *supra* note 6, at 425 *et seq.*

[16] Notes of the Advisory Committee, 28 U.S.C.A. p. 121 (Supp. 1949).

[17] *Ibid.*

[18] *Ibid.* The committee emphasized that where a conflict on a material issue was disclosed by the affidavits, there could be no judgment on the merits. Prior to "tying in" the motion under Rule 12 (b) with the summary judgment rule, certain questions could be raised in cases where extraneous evidence was admit-

Rule 12 (c) provides that after the pleadings are closed, a party may move for judgment on the pleadings. It was amended to permit the introduction of extraneous evidence in support of such a motion, and, in such cases, the rule states that the motion is to be treated and disposed of as a motion for summary judgment pursuant to Rule 56. Thus, this amendment serves the same purpose as the corresponding amendment to Rule 12 (b). Since the motion for judgment on the pleadings raises at a later stage a question similar to that raised by the motion to dismiss for failure to state a claim, the same reasoning justifies this amendment as justifies the amendment to Rule 12 (b).[19]

Rule 12 (d) provides for a preliminary hearing on motions raising the defenses enumerated in subdivision (b), except when otherwise ordered by the court. Though Judge Clark argued for a rule similar to that found in the English system,[20] which allows a preliminary hearing prior to trial only in cases where the judge believes that the hearing of the motion would substantially dispose of the case,[21] no such amendment was adopted. The only amendment made was that providing for a preliminary hearing on a motion to dismiss for failure to join an indispensable party. The amendment was made necessary, of course, by the amendment to subdivision (b) which added this seventh defense.[22]

Rule 12 (e) provided for a motion for " . . . a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable . . . (a party) properly to prepare his responsive pleading or to prepare for trial." This rule was amended to strike out all references to a bill of particulars. As the rule now reads, a party may move for a more definite statement only if a pleading is so ambiguous that it is impossible to prepare a pleading responsive to it.

The original Rule 12 (e) was the subject of more judicial

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ted. (1) Will the notice of hearing of the motion be the five day period called for by Rule 6 (d) or the ten day period provided for by Rule 56(c)? (2) The effect to be given to an order denying a motion to dismiss under Rule 12(b)(6). See Brown, *supra* note 6, at 427-28. In General, see 2 Moore, Federal Practice §12.09 (2d ed. Cum. Supp. 1948).

[19] Notes of the Advisory Committee, 28 U.S.C.A. p. 12 (Supp. 1949); Clark, Code Pleading 554-56 (2d ed. 1947).

[20] Clark, *Simplified Pleading*, 2 F.R.D. 456, 465 (1943).

[21] The Rules of the Supreme Court, (England), Order XXV, Rules 2 and 3 (1883).

[22] Notes of the Advisory Committee, 28 U.S.C.A. p. 121 (Supp. 1949).

ruling than any other single rule.[23] Although the rule provided for a more definite statement or a bill of particulars, it was intended that there should be no distinction between the two devices, and that their purpose should be identical.[24] That purpose was to require a clarification of a pleading when necessary to enable the movant to prepare a responsive pleading.[25] Thus the motion for a bill of particulars was not allowed to obtain evidence, since such information was to be obtained by the use of discovery devices.[26] Nor was the motion granted merely to obtain a particularization of the pleading, since particularization was not to be required at the pleading stage, Rule 8 (a) requiring merely general pleading.[27]

Since it was decided that the motion under Rule 12 (e) was to aid in the preparation of a responsive pleading, trouble arose over the use of the words "to prepare for trial" in the rule as originally promulgated, some believing that the use of these words permitted them to demand a detailed statement of the claim that was to be met at trial.[28] However, as the note of the Advisory Committee states, many courts, in denying such a motion, in effect read these words out of a rule.[29] It has been suggested that the meaning of the phrase was restricted to the situation where an affirmative defense was stated ambiguously in the answer.[30] Since no responsive pleading is filed to such defenses in federal practice, the motion could be used only to clarify the issues for trial (hence, "to prepare for trial"). As the rule now stands, no such motion will be allowed, since no responsive pleading is allowed, and any such clarification of issues will have to be made in a pretrial conference.

Judge Clark advocated the complete abolition of the motion

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[23] Notes of the Advisory Committee, 28 U.S.C.A. p. 121 (Supp. 1949); Clark, *Simplified Pleading* 2 F.R.D. 456, 466 (1943).

[24] 2 Moore, Federal Practice §12.17 (2d ed. Cum. Supp. 1948); 1 Moore, Federal Practice §12.07 (1938); Ilsen, Recent Developments in Federal Practice and Procedure, Federal Rules of Civil Procedure 271 (Rev. ed. 1947).

[25] *Ibid.*

[26] 1 Moore, Federal Practice §12.07, pp. 656-57 (1938); Ilsen, *op. cit. supra* note 24, at 278.

[27] Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1943); Notes of the Advisory Committee, 28 U.S.C.A. p. 122 (Supp. 1949).

[28] Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1943); Ilsen, *op. cit. supra* note 24, at 276-77.

[29] Notes of the Advisory Committee, 28 U.S.C.A. p. 122 (Supp. 1949).

[30] Ilsen, *op.cit. supra* note 24, at 276-77.

for a more definite statement or a bill of particulars.[31] However, an argument has been advanced that such a motion serves a useful purpose in complicated cases to enable a party to plead properly.[32] The argument emphasizes the less expensive nature of this motion as compared with the use of depositions and other discovery devices provided by the rules.[33] The Advisory Committee apparently accepted this view. An argument may be made, however, that the demand for a more definite statement is generally an expression of dissatisfaction with the general pleading called for by Rule 8, and that the use of the motion has as its real purpose the limiting of issues at the pleading stage.[34]

Remaining unanswered is the question arising in the situation where the moving party knows the facts, but the pleading is ambiguous. Should the court grant a motion for a more definite statement in such a case? Some federal courts have taken the position that under such circumstances the movant does not need a more definite statement to prepare a responsive pleading, and that therefore the motion should be denied.[35] It has been argued, however, that the defendant is entitled to know what the plaintiff claims the facts to be, and hence defendant's knowledge should not defeat the motion.[36] While this is the position taken by many courts on the question,[37] it is to be remembered that the function performed by the bill of particulars and the motion to make more definite and certain in state procedure is not the same as in federal procedure. In state procedure, one of the chief functions performed by the bill of particulars and the motion to make more definite and certain is to define and limit the issues at the pleading

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[31] Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1943).

[32] Ilsen, *op. cit. supra* note 24, at 272-75.

[33] *Ibid.*

[34] *Cf.* Clark, *Simplified Pleading*, 2 F.R.D. 456, 466-67 (1943); See also Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 Col. L. Rev. 491 (1948). The thought is there expressed that the pleading rules are inconsistent. On the one hand, the rules provide for a very general form of pleadings. On the other hand, there are devices to protect the paper pleadings. The thesis is advanced that a pre-trial conference is necessary to determine the issues of law and fact to be tried in complicated cases under a general pleading system.

[35] See cases pro and con cited by Ilsen, *op. cit. supra* note 24, at 282.

[36] *Ibid.* In support of this position see 2 Moore, Federal Practice §12.18(2) (2d ed. Cum. Supp. 1948).

[37] See, e.g., Matter of Herle, 157 Misc. 352, 283 N.Y. Supp. 588 (1935).

stage.[38] Thus, regardless of defendant's knowledge, the plaintiff's statement of the case is of great importance.

Rule 12 (f) provided for a motion to strike out redundant, immaterial, impertinent, and scandalous matter. The amendment to the rule provided that, in addition, a motion to strike "any insufficient defense" could be made.[39] The Advisory Committee noted that some courts had been troubled by the omission in the rules of any specific method of raising this question, though it had been permitted in one way or another.[40]

Two questions have been raised as to this amendment. First, since it was thought desirable to give the express right to strike an insufficient defense, it is questioned why it was not thought equally desirable to grant the correlative right to strike an insufficient claim.[41] Secondly, it has been suggested that a motion to strike out an insufficient defense supported by matter outside the pleadings should be allowed, and should be treated as a motion for summary judgment, as was done in similar cases in respect to motions pursuant to Rule 12 (b) and (c).[42] Since Rule 56 (d) provides for a partial summary judgment, it would seem that if a motion to strike a defense is made, and extraneous evidence is received by the court in support of it, the motion should be treated as one for summary judgment notwithstanding the mislabel.[43]

Rule 12 (g) provides for the consolidation of motions. As originally drawn, it required a party to join in one motion all defenses *then available* to him. If he did not join all the defenses and objections then available to him, he could not later present such a defense by motions, except for the defenses provided for by Rule 12 (b) (1) to (5).

This rule, considered in conjunction with the provision in Rule 12 (d) for preliminary hearings, allowed defenses to be stated in three stages. The defendant could first make a motion

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[38] Caskey and Young, *The Bill of Particulars — A Brief for the Defendant*, 27 Va. L. Rev. 472 (1941).

[39] There was no method of attacking any pleading after the complaint in the original rules.

[40] Notes of the Advisory Committee, 28 U.S.C.A. p. 122 (Supp. 1949).

[41] Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 344 (1946).

[42] *Id.* at 345.

[43] Authority pro and con on this question is cited in 2 Moore Federal Practice §12.21 (3), n. 36 (2d ed. Cum. Supp. 1948). Moore calls the decision denying the admission of evidence outside the pleading "technical," but states that a court which receives such evidence may not be "technically correct" in view of the explicit provisions allowing for the receipt of such evidence in Rules 12(b) and (c) and the absence of a similar provision in Rule 12 (f).

setting forth one of the defenses enumerated in Rule 12 (b) (1) to (5). If the movant lost on this motion, he was then required to join in one motion all the remaining objections then available to him which may be raised by motion under Rule 12. Thus the defenses of failure to state a claim, the motion for a more definite statement, and the motion to strike could next be raised by motion. Lastly, the answer could be interposed.[44]

The rule, as amended, eliminates one of the first two stages of preliminary hearings. As the rule now reads, a party who resorts to a motion to raise the defenses specified in Rule 12 must include in one motion all defenses *then available* to him. Defendant waives any defense omitted except as provided in Rule 12 (h). The purpose of the amendment was to avoid the delay resulting from two separate motion hearing stages.[45]

Criticism has been made of the consolidation required by this rule.[46] It has been contended that a motion for a more definite statement should be permitted without waiving the right to make subsequent motions.[47] The thought is that the granting of a motion for a more definite statement may furnish the basis for a dismissal of the action on the face of the complaint.[48] However, it seems clear that generally the only result of successive motions is delay.

Rule 12 (h) provides for a waiver of all defenses which a party does not present by motion, or if no motion is made, by

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[44] See Clark, *Simplified Pleading*, 2 F.R.D. 456, 465-66 (1943); Clark, Code Pleading 540-41 (2d ed. 1947).

[45] Notes of the Advisory Committee, 28 U.S.C.A. p. 122 (Supp. 1949); 2 Moore, Federal Practice §12.22 (2d ed. Cum. Supp. 1948). It is to be remembered that only those defenses available but not presented at the time the motion is made are waived.

[46] Armstrong, *supra* note 41 at 343; Armstrong, *Second Draft of Proposed Amendments to Federal Rules of Civil Procedure*, 31 A.B.A.J. 497, 499-500 (1945).

[47] *Ibid.*

[48] Armstrong, *supra* note 41, at 343, n. 24. Armstrong suggests a situation in which defendent moves for a more definite statement though he knows the facts that make venue improper. The motion is sustained and the allegations showing the improper venue are then inserted in the complaint. Could the defendent then move to dismiss for improper venue, or was the defense waived since available and not asserted at the time the motion for a more definite statement was made? Armstrong suggests that the defense must be made in the answer and could not be raised by motion. This seems wrong, for by the provisions of Rule 12(b), the defense would be waived except in cases where no motion was made. See 2 Moore, Federal Practice §§12.22, 12.23 (2d ed. Cum. Supp. 1948). Armstrong feels that practice would be simplified if the motion for a more definite statement were first permitted and then the motion to dismiss. It should be noted that there is a question whether a motion for a more definite statement may be used as preparatory for a motion to dismiss in any case. See 2 Moore, Federal Practice §12.18 (4) (2d ed. Cum. Supp. 1948).

the answer, with certain exceptions. These exceptional defenses which are not waived originally numbered three: failure to state a claim upon which relief can be granted; failure to state a legal defense to a claim; and lack of jurisdiction over the subject matter. The amendments added a fourth defense: the failure to join an indispensable party. Thus if the consolidation of defenses required by Rule 12 (g) is not made, all defenses except the above four are waived.[49]

The note of the Advisory Committee states that the "... addition of the phrase relating to indispensable parties is one of necessity." [50] Moore states that the failure to join an indispensable party "... is a matter of such substance that an appellate court may properly consider the defect although the point was not raised in the trial court." [51] The tendency to treat non-joinder of an indispensable party as a "jurisdictional" error is fallacious, since clearly a person cannot legally be affected by a judgment in an *in personam* suit to which he has not been made a party. Nevertheless, by Rule 12 (b) and 12 (h), this approach seems established in the Federal Rules.

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[49] See 2 Moore, Federal Practice §12.23 (2d ed. Cum. Supp. 1948).
[50] Notes of the Advisory Committee, 28 U.S.C.A. p. 122 (Supp. 1949).
[51] 2 Moore, Federal Practice §12.23, p. 2332 (2d ed. Cum. Supp. 1948).