

## Proposed Amendments to Rule 12

Rule 12 is amended as follows:

**Rule 12.** Defenses and Objections; When and How Presented; ~~[By Pleading or Motion;]~~ Motion for Judgment on the Pleadings; **Consolidating Motions; Waiving Defenses; Pretrial Hearing**

(a) ~~[When Presented]~~ **Time to Serve a Responsive Pleading.**

(1) ***In General.*** Unless ~~[a different time is prescribed in a statute of the United States]~~ **another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:**

(A) the United States, or an officer or agency thereof, ~~[shall]~~ **must** serve an answer to the complaint, or to a ~~[cross-claim]~~ **crossclaim**, or a reply to a counterclaim, within 60 days after the service ~~[upon]~~ **on** the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of the pleading in which the claim is asserted; except that,

(i) in an action described in 28 U.S.C. § 1581(c), no answer ~~[shall]~~ **must** be served or filed, and

(ii) in an action described in 28 U.S.C. § 1581(f), involving an application for an order to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the answer ~~[shall]~~ **must** be served within 10 days after being served with the summons and complaint. For good cause shown, the court in any action may order a different period of time.

(B) Any other defendant ~~[shall]~~ **must** serve an answer

(i) within 20 days after being served with the summons and complaint, or

~~[(C)]~~

(ii) if service of the summons has been timely waived ~~[on request]~~ under Rule 4(d), **the defendant must serve an answer** within 60 days after ~~[the date when]~~ the request for **a** waiver was sent, or within 90 days after ~~[that date if]~~ **it was sent to** the defendant ~~[was addressed]~~ outside any judicial district of the United States.

~~[(2)]~~

**(C)** A party other than the United States or an officer or agency thereof ~~[served with a pleading stating a cross-claim against the party shall serve an answer thereto]~~ **must serve an answer to a counterclaim or crossclaim** within 20 days after being served **with the pleading that states the counterclaim or crossclaim.** ~~[The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.]~~

**(D) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.**

~~[(3) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:]~~

**(2) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:**

(A) if the court denies the motion or postpones its disposition until ~~the~~ trial ~~on the merits~~, the responsive pleading ~~shall~~ **must** be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading ~~shall~~ **must** be served within 10 days after ~~service of~~ the more definite statement **is served**.

(b) ~~How Presented~~ **to Present Defenses**. Every defense~~, in law or fact,~~ to a claim for relief in any pleading~~, whether a claim, counterclaim, cross-claim, or third-party claim, shall~~ **must** be asserted in the responsive pleading ~~thereto~~ if one is required~~, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of the summons and complaint, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19]~~. **But a party may assert the following defenses by motion:**

**(1) lack of subject-matter jurisdiction;**

**(2) lack of personal jurisdiction;**

**(3) insufficient process;**

**(4) insufficient service of process;**

**(5) failure to state a claim upon which relief can be granted; and**

**(6) failure to join a party under Rule 19.**

A motion [making] **asserting** any of these defenses [shall] **must** be made before pleading if a [further] **responsive** pleading is [permitted] **allowed**. **If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim.** No defense or objection is waived by [~~being joined~~] **joining it** with one or more other defenses or objections in a responsive pleading or **in a** motion. [~~If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.]~~]

(c) Motion for Judgment on the Pleadings. After the pleadings are closed – but [~~within such time as~~] **early enough** not to delay [the] trial[, any] – **a** party may move for judgment on the pleadings. [~~If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.]~~]

[~~(d) Preliminary Hearings. The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before~~]

~~trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.]~~

**(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(5) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.**

(e) Motion for a More Definite Statement. ~~[If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.]~~ **A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.** The motion **must be made before filing a responsive pleading and** ~~[shall]~~ **must** point out the defects complained of and the details desired. If ~~[the motion is granted and the order of]~~ the court **orders a more definite statement and the order** is not obeyed within 10 days after notice of the order or within ~~[such]~~ **the** time ~~[as]~~ the court ~~[may fix]~~ **sets**, the court may strike the pleading ~~[to which the motion was directed or make such order as it deems just]~~ **or issue any other appropriate order.**

(f) Motion to Strike. ~~[Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken.]~~ **The court may strike**

from [any] **a** pleading [any] **an** insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. **The court may act:**

**(1) on its own; or**

**(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.**

~~[(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.]~~

**(g) Joining Motions.**

**(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.**

**(2) *Limitation on Further Motions.* 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.**

~~(h) Waiver or Preservation of **Waiving and Preserving** Certain Defenses.~~

~~[(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of the summons and complaint is waived (A) if~~

~~omitted from a motion in the circumstances described in subdivision (g) of this rule, or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.~~

~~(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.~~

~~(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.]~~

**(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(4) 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.**

**(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(6) – 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.**

(As amended Nov. 4, 1981, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Sept. 25, 1992, eff. Jan. 1, 1993; Oct. 5, 1994, eff. Jan. 1, 1995; Dec. 18, 2001, eff. Apr. 1, 2002; \_\_\_\_\_, 2008, eff. \_\_\_\_\_, 2009.)

#### **Advisory Committee Note**

The language of Rule 12 has been amended as part of the general restyling of these rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. It should be noted that the substance of existing Rule 12(d) (“Preliminary Hearings”) has been moved to Rule 12(i) (“Hearing Before Trial”), and proposed Rule 12(d) is now entitled “Result of Presenting Matters Outside the Pleadings,” incorporating the provisions that were formerly included in the second sentence of Rule 12(c) (“Motion for Judgment on the Pleadings”).