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SUBMITTED ELECTRONICALLY

March 6, 2015

Committee on Rules of Practice and Procedure
 Administrative Office of the United States Courts
 One Columbus Circle, NE
 Washington, DC 20544

306 Townsend Street
 Michael Franck Building
 Lansing, MI
 48933-2012

RE: Proposed Amendments to Federal Civil Rule 12(a)(4) and 12(d)

To Whom It May Concern:

The State Bar of Michigan Committee on United States Courts ("Committee") respectfully submits the following proposed amendments to FRCP 12(a)(4) and 12(d) for consideration:

12(a)

(4) Effect of Motion. Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:...

12(d)

Result of Presenting Matters Outside the Pleadings. If, on motion under Rule 12(b)(6) 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. Unless the court orders otherwise, the time for filing a responsive pleading under Rule 12(a)(4) applies to a Rule 12(b)(6) motion treated as one for summary judgment under Rule 56."

Both amendments provide needed clarification to what happens to the deadline to file a responsive pleading in the event a 12(b) motion to dismiss is filed as to some but not all asserted claims or presents matters outside the pleadings. The underlying rationale for both proposed amendments is set forth in the attached memorandum.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges and attorneys who work in and are familiar with the federal court system.

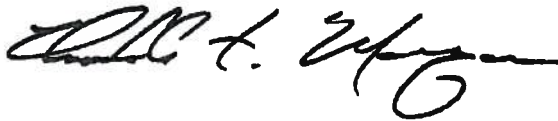
The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. These Federal Civil Rule amendment proposals represent the position of the Committee on the United States Courts and should not be considered a position of the State Bar of Michigan.

Thank you for your consideration.

Sincerely,



Kelley Megan Haladyna
Chair, Committee on United States Courts



Thaddeus E. Morgan
Federal Civil Rule Amendment Sub-Committee

Attachment

MEMORANDUM

To: United States Courts Committee

From: Rule Amendment Subcommittee (Thad Morgan, Mark McInerney, and Matt Heron)

RE: Federal Civil Rule Amendment Proposals

Date: January 19, 2015

Introduction

The Subcommittee requests approval from the Committee to submit the following two rule amendment proposals to the Federal Rules Advisory Committee for consideration, and if accepted by the Advisory Committee, for publication and comment.

Rule Amendment Proposals

Issue: Rule 12(a)(4) provides that serving a Rule 12(b) motion to dismiss alters the time to serve responsive pleadings so that, if the motion is denied, "responsive pleadings must be served within 14 days after notice of the court's action[.]" Rule 12(a)(4), however, is silent on the issue of whether a partial Rule 12(b) motion that attacks some, but not all, of the claims raised in a pleading operates to toll the entire responsive pleading obligation.

Proposed Amendment and Rationale: An amendment to Rule 12(a)(4) is proposed for consideration by the Federal Rules Advisory Committee, and the Subcommittee submits the following two versions for consideration:

(4) ***Effect of Motion.*** Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:...

or

(4) ***Effect of Motion.*** Unless the court sets a different time, serving a any motion under this rule alters ~~these~~ the time periods for filing answer to all or part of the complaint as follows:...

It is fairly settled that a party who files a partial Rule 12(b) motion gets the benefit of having its responsive pleading obligation tolled pending a decision on the motion.¹ There are, however, outlier decisions and some commentary to the contrary.² The rationale behind the majority rule seems to comport with Rule 1's admonition that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." As *Wright & Miller* point out:

Courts following this majority rule have noted that the minority approach would require duplicative sets of pleadings in the event that the Rule 12(b) motion is denied and cause confusion over the proper scope of discovery during the motion's pendency.³

Therefore, request is made for approval from the Committee to forward the proposed amendment to Rule 12(a) to the Federal Rules Advisory Committee for consideration, and, if accepted, for publication and comment by the Advisory Committee.

Issue: When matters outside the pleadings are presented to and not excluded by the court as part of a Rule (12)(b) motion, Rule 12(d) states that a court "must" treat the motion as one for summary judgment brought under Rule 56. When a Rule 12(b) motion is so converted, and no responsive pleading is filed, the open question is whether the Rule 12(a)(4) tolling continues to apply to the Rule 56 motion?

To begin, and ignoring for the moment the question of tolling in the context of a converted Rule 12(b) motion, there is disagreement on the basic question of whether a Rule 56 motion, clearly labeled as such and filed in lieu of an answer, abrogates the requirement that a defendant serve an answer within the prescribed time period. As *Wright & Miller*

¹ See e.g. *Gortat v. Capala Bros.*, 257 F.R.D. 353, 366 (E.D. N.Y. 2009); *Aslani v. Sparow Health Sys.*, 2009 WL 736654, at *4 n. 10 (W.D. Mich. 2009).

² *Gerlach v. Michigan Bell Tel. Co.*, 448 F.Supp 1168 (E.D. Mich. 1978); Scott L. Cagan, A "Partial" Motion to Dismiss under Federal Rule of Civil Procedure 12: You Had Better Answer, 39 Fed. B.J. 202 (1992).

³ Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346, p. 46 (3d ed. 2004) ("*Wright & Miller*").

contend, "[a] defending party is not required by [Rule 56] to file an answer before moving for summary judgment."⁴ There are, however, a number of decisions to the contrary⁵, and in *Rashidi v. Albright*⁶, the district court confronted the question of whether it should entertain the plaintiff's request for entry of default in light of the defendants' motion for summary judgment filed without any accompanying responsive pleading. The district court rejected the request for entry of default reasoning:

The ambiguity of the rules makes disposition of this issue difficult. Generally the best course of action is to complete the pleadings for the record. However, defendants' belief that the law supports the notion that a summary judgment motion falls within the scope of "defend" within the meaning contemplated by Rule 55 and that the summary judgment motion can toll the response time, minimally amounts to a good faith interpretation of the law or alternatively could be considered excusable neglect pursuant to Rule 6(b).⁷

Unlike summary judgment, motions to dismiss are designed to test the adequacy of pleadings, and expanding the inquiry to consider materials outside the pleadings would be inconsistent with the goals of Rule 12.⁸ Further, mislabeled Rule 12 motions that rely upon materials extrinsic to the complaint are disfavored as an attempt to manipulate the Rules and gain an advantage:

[T]he Court has no hesitancy concluding that [defendant] has labeled its Motion for Summary Judgment a 'Motion to Dismiss' simply to *avoid* filing an answer. Such an attempt to manipulate the Federal Rules of Civil Procedure should not be condoned or encouraged by the Court...A litigant should not be permitted to gain an advantage by intentionally mislabeling a filing.⁹

⁴ *Id.* at § 2718, p. 301, citing *First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968) (Supreme Court affirmed grant of summary judgment to a defendant who never answered in more than six years of litigation).

⁵ See *Modrowski v. Pigatto*, 712 F.3d 1166, 1170 (7th Cir. 2013) ("While serving a Rule 12 motion tolls the deadline for a defendant to file an answer, filing a Rule 56 motion has no such effect."); See also *Poe v. Cristina Copper Mines*, 15 F.R.D. 85, 87 (D. Del. 1953) "[an] extension of time to file a responsive pleading until determination of a motion for summary judgment under Rule 56 is not a definite and fixed right but a matter to be granted or denied under Rule 6(b) from a consideration of all the circumstances.")

⁶ 818 F.Supp. 1354 (D. Nev. 1993).

⁷ *Id.* at 1356.

⁸ See *Winget v. JP Morgan Chase Ban, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008).

⁹ *Ricke v. Armco, Inc.*, 158 F.R.D. 149, 150 (D. Minn. 1994) (citations omitted) (italics in original) (denying the defendant's motion to confirm that an answer did not need to be filed).

Returning to the question of whether the Rule 12(a)(4) tolling continues when a Rule 12(b) motion is converted to one for summary judgment, the limited authority suggests that the tolling should continue.¹⁰ This is also the approach taken by *Wright & Miller*: "By analogy, this [Rule 12(a)] language should apply to a Rule 56 motion."¹¹

Proposed Amendment and Rationale: An amendment to Rule 12(d) is proposed for consideration by the Federal Rules Advisory Committee as follows:

(d) Result of Presenting Matters Outside the Pleadings. If, on motion under Rule 12(b)(6) 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. Unless the court orders otherwise—either on its own initiative or at the request of a party—the time for filing a responsive pleading under Rule 12(a)(4) applies.

Given the unsettled question of whether a Rule 56 motion operates to toll the time to answer¹², Rule 12(d) should be amended in the manner set-forth above to *at least* clarify that a converted Rule 12(b) motion continues to be subject to the tolling in Rule 12(a)(4), unless the court orders otherwise. There are several practical reasons in support of the amendment.

First, a party that files a Rule 12 motion should reasonably expect that the tolling provided for in Rule 12(a)(4) will apply even if the Rule 12 motion is converted to a Rule 56 motion. Second, the proposed amendment will eliminate the uncertainty that comes with notice from a court that a Rule 12 motion is converted to a Rule 56 motion, i.e. does the notice require a party to immediately answer or file a motion for an extension of time under Rule 6(b) on the basis of excusable neglect? *Rashidi, supra*. Or, is a plaintiff free to seek an entry of default? Third, the "matters outside the pleadings" may be so innocuous that

¹⁰ See *Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120-1121 (10th Cir. 2006) ("Thus, the motion did toll the time to file an answer until the district court converted it to a motion for summary judgment and resolve the motion.")

¹¹ *Wright & Miller*, § 2718, p. 303.

¹² This could be a matter taken up by the Committee in the future.

responsive pleading is not warranted. For example, the additional material could consist of an undisputed declaration that the party has complied with all conditions precedent to an arbitration demand, such as compliance with a pre-demand settlement procedure.

To be sure, there may be instances where a party manipulates the tolling provided in Rule (a)(4) by filing a mislabeled Rule 12 motion to avoid filing an answer. *Ricke, supra* n. 9. That is why the proposed amendment allows either the court to order, or a party to request, that a responsive pleading be filed in connection with a converted Rule 12 motion. Currently, there is no such authority in the Rules to compel an answer. There are situations, in addition to mislabeled Rule 12 motions, where an answer should be compelled. For instance, again in the arbitration context, the party demanding arbitration in a Rule 12 motion that is converted to a Rule 56 motion could have counter-claims that are outside the ambit of, and unrelated to, the parties' agreement to arbitrate. In that situation, it seems reasonable to permit a party to compel responsive pleadings before the court orders the entire matter to arbitration.

Conclusion

Committee approval is sought to submit the proposed Rule amendments to the Federal Rules Advisory Committee, on State Bar letterhead, for consideration. The Subcommittee acknowledges that any proposal may need further approval from the State Bar Executive Committee prior to submission to the Rules Advisory Committee.