

29-R-99001

FILED

FEB 07 2020

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

IN RE: AMENDMENT OF M.R.C.P. 12

MOTION TO AMEND M.R.C.P. 12

Comes now the Supreme Court Advisory Committee on Rules, pursuant to M.R.A.P. 27(f), and moves the Mississippi Supreme Court to amend M.R.C.P. 12 as follows:

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleading

(a) When Presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply answer to a ~~counter-claim~~ counterclaim ~~in the answer~~ within thirty days after service of the answer counterclaim. ~~or, if~~ If a reply is ordered by the court, the reply shall be served within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:¹

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

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall 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) Improper venue,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted,

¹ These amendments are consistent with the revisions to Rule 7(a) designating the types of pleadings.

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(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside 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 a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any 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; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) Preliminary Hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (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.

(e) Motion for 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, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(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 thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(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 him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense

or objection so omitted, except a motion as provided in subdivision (h)(2) and (3) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a 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 or transfer the action to the court of proper jurisdiction.

Advisory Committee Historical Note

Effective _____, Rule 12(a) was amended so as to be consistent with the pleadings designated by M.R.C.P. 7(a). Both refer to an answer to a counterclaim rather than a reply to a counterclaim. So. 2d _____ (West Miss. Cases 20 _____).

Advisory Committee Notes

The motion for a more definite statement requires merely that—a more definite statement—and not evidentiary details. The motion will lie only when a responsive pleading is required, and is one remedy for a vague or ambiguous pleading. A defendant may also file a Rule 12(b)(6) motion as a means of challenging a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend.

Rule 12(g) provides that a party making a pre-answer motion pursuant to Rule 12 may join with such motion any other available Rule 12 pre-answer motions. If a party makes a Rule 12 pre-answer motion and omits an available Rule 12 defense or objection, the party may only raise such omitted defense or objection as allowed by Rule 12(h)(2) or (3). Rule 12(h)(2) allows a party to raise the defense of failure to state a claim and/or the defense of failure to join a party indispensable under Rule 19 by asserting such defenses in the answer, by raising such defenses in a motion for judgment on the pleadings, or by raising such defenses at the trial on the merits. Rule

12(g) encourages a party to consolidate all available Rule 12 motions so as to avoid successive motions.

Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. The specified defenses include: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficiency of process; and (4) insufficiency of service of process. In addition, Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under Rule 60(b)(4) or may be presented for the first time on appeal. The provision directing a court lacking subject matter jurisdiction to transfer the action to a court having jurisdiction preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. §§157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. §147.

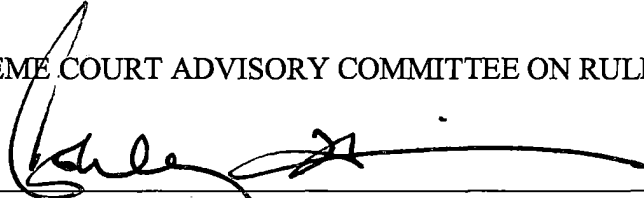
[Advisory Committee Note adopted effective July 1, 2014; amended effective _____.]

The proposed amendment to Rule 12(a) is consistent with the proposed amendments to Rule 7(a). Both refer to an answer to a counterclaim rather than a reply to a counterclaim. This nomenclature is consistent with F.R.C.P. 7(a) and 12(a). The motion to amend M.R.C.P. 12 was unanimously approved by the Committee on September 7, 2018.

The Supreme Court Advisory Committee on Rules therefore moves that the above proposed amendment to M.R.C.P. 12 be considered by the Mississippi Supreme Court.

SO MOVED, this the 7th day of February, 2020.

SUPREME COURT ADVISORY COMMITTEE ON RULES



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