

THE SCRIVENER

Get Out of My Life!

Rule 12 Motions, Part One

By Scott Moïse

The good news was that I got a complex, shiny new case that was going to be fun. The bad news was that my client thought the case was “asinine” and wanted it dismissed immediately. I could practically feel the steam coming through the telephone, listening to him rant about the waste of time and money to defend the case. Oh dear.

Did my client actually believe that our court was going to jump right in and dismiss a well-pleaded complaint on the front end before discovery? Yes, he did. With the facts I was working with in this case, were my chances of winning a motion to dismiss at this stage much better than my chances of winning the Cooper River Bridge Run? No, maybe less.

Sometimes, we must have a hard talk with our clients at the beginning of a lawsuit to decide whether we have good grounds to support a Rule 12 motion, which includes Rule 12(b) motions to dismiss, Rule 12(c) motions for judgment on the pleadings, Rule 12(e) motions for a more definite statement, and Rule 12(f) motions to strike. Even if we have grounds, do we really want to make the motion?

What is gained from making a Rule 12 motion?

Every defendant, of course, wants to get the case dismissed in its entirety, forever, at the outset (preferably with sanctions to be awarded against your adversary and an award of fees and costs). The problem is that most courts are not going to dismiss the case until at least some discovery has taken place, so winning is far from guaranteed even under the best of cases.

Given the difficulty in winning a motion to dismiss at the beginning of a case, why would you con-

sider putting in the time and effort of drafting and arguing the motion? Here are some benefits:

- If the pleadings are deficient to the point that they cannot be corrected by amendment, the court may grant the motion if your argument is clear, compelling, and timely.
- Even if the entire case is not dismissed, the court may dismiss certain claims or defenses, thus narrowing the issues, reducing the risk to your client, limiting expensive discovery and trial time, and potentially promoting early settlement.
- You may waive certain defenses if you do not bring the motion. Lack of personal jurisdiction and service of process are two motions to consider.
- The plaintiff will be required to defend the motion, thereby exposing arguments and evi-

dence that you otherwise may not have gotten as quickly, if ever.

What can you lose by making a motion to dismiss?

- The motion will reveal your facts and legal theories at the outset far more extensively than if you assert them as affirmative defenses.
- Courts allow amendment freely, and technical difficulties are easily curable, but just make the case more expensive on both sides.
- The motion gives a clear picture to the plaintiff of any faults or deficiencies she must correct before trial, but may not help your case in the long run.
- The court may grant your motion and either transfer the case—or allow the plaintiff to bring it in another forum or venue—and the new court may apply law and procedure that is not as favorable to your client’s interests.

RULE	MOTION	WHEN
12(b)	Motion to dismiss	Before answering if a responsive pleading is required and within the time period for answering the complaint. If no responsive pleading is required, the federal rules allow the opposing party to assert at trial any defense to that claim.
12(c)	Motion for judgment on the pleadings	After the pleadings have closed, but early enough not to delay trial
12(e)	Motion for a more definite statement	Before filing a responsive pleading and within the time period for answering the complaint.
12(f)	Motion to strike	Before filing a responsive pleading and within the time period for answering the complaint, OR if no responsive pleading required, within 21 days (federal) or 30 days (state) after service of the objectionable pleading.

When do you need to bring the motions?

If you and your client have discussed the risks and rewards of making a Rule 12 motion and decide to file, know the deadlines in the rules.

Must you always bring Rule 12(b) motions prior to answering the complaint?

Rule 12(b) states that “[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.” A strict reading for Rule 12(h) “leads to the conclusion that the district judge must deny any Rule 12(b) motion made after a responsive pleading is interposed as being too late.” 5C Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 1361 (3d ed. 1998) [hereinafter “Wright & Miller”]. No South Carolina cases address this issue, but the authors of the Wright & Miller treatise believe that courts will allow Rule 12 motions after filing an answer:

[F]ederal courts have allowed untimely motions if the defense has been previously included in the answer. In this context, the motion becomes tantamount to a preliminary hearing under Rule 12(d). Moreover, under Rule 12(h) the defenses of lack of subject matter jurisdiction, Rule 12(b)(1), failure to state a claim upon which relief can be granted, Rule 12(b)(6), and failure to join a party under Rule 19, Rule 12(b)(7), are preserved from the waiver mechanism by the express terms of subdivision (h). Thus, motions raising any of these matters may be considered by the court even when interposed after the responsive pleading has been filed, although technically they no longer are Rule 12(b) motions.

Id.

First things first: Rule 12(b) motions to dismiss

These motions are as follows:

- Lack of subject-matter jurisdiction (not waivable)
- Lack of personal jurisdiction
- Improper venue
- Insufficient process
- Insufficient service of process
- Failure to state a claim upon which relief can be granted
- Failure to join a party under Rule 19 (indispensable parties)
- Another action is pending between the same parties for the same claim (South Carolina state court only)

The only Rule 12(b) motion that goes to the merits is failure to state a claim under Rule 12(b)(6).

WHEN: Motions to dismiss under Rule 12(b)—except lack of subject-matter jurisdiction, failure to join an indispensable party, and failure to state a claim—must be made before answering the complaint. See Fed. R. Civ. P. 12(b)(h). The three exceptions may be raised even as late as trial. *Id.*

Successive Rule 12(b) motions to dismiss are prohibited (with some exceptions).

You may combine Rule 12 motions. However, if you bring a motion under Rule 12, you must assert **all defenses under Rule 12 that are available at the time of filing** because you cannot bring another Rule 12 motion to assert defenses that you did not raise in the initial motion. See Fed. R. Civ. P. 12(h)(2); S.C. R. Civ. P. 12(h)(2); *Patterson v. Whitlock*, 392 F. App’x 185, 189 (4th Cir. 2010) (holding that defendants could not make a second motion to dismiss based on service of an incomplete complaint because they had already made a prior motion to dismiss based on other service grounds); *Glenn v. Sch. Dist. No. Five of Anderson Cty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 49 (Ct. App. 1988) (“Rule 12(g) governs consolidation of defenses in a Rule 12 motion. It provides that a party making a motion under the rule

who omits ‘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 ... as provided in subsection (h)(2).’”).

In one case, the defendant waived personal jurisdiction by failing to bring a 12(b)(2) motion prior to answering, even though he asserted lack of personal jurisdiction as an affirmative defense in the answer. *See Briksza v. Moloney*, No. CIV. 08-CV-01785, 2009 WL 1767594, at *4 (D.N.J. June 19, 2009).

Excluded from this rule are motions for lack of subject-matter jurisdiction, failure to join an indispensable party, and failure to state a claim. Fed. R. Civ. P. 12(h)(2); S.C. R. Civ. P. 12(h)(2).

- **12(b)(1) Lack of subject-matter jurisdiction (not waivable)**

“A Rule 12(b)(1) motion for lack of subject matter jurisdiction raises the fundamental question of whether a court has jurisdiction to

adjudicate the matter before it.” *Affirmative Ins. Co. v. Williams*, No. 5:14-CV-04087-JMC, 2015 WL 3968436, at *6 (D.S.C. June 30, 2015) (granting Rule 12(b)(1) motion on a declaratory judgment issue asking the court to find that the insurer had not acted in bad faith because that claim was not ripe); *see also Zander v. United States*, 494 F. App’x 386, 388 (4th Cir. 2012) (affirming dismissal under Rule 12(b)(1) based on plaintiff’s failure to file complaint within the relevant six-month limitations period); *Edens v. Bellini*, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004) (affirming dismissal under Rule 12(b)(1) because action against employer was barred by the exclusivity provision of the South Carolina Workers’ Compensation Act).

The plaintiff—the party asserting jurisdiction—has the burden to prove subject-matter jurisdiction on a Rule 12(b)(1) motion to dismiss. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Clifton v. Nationstar Mortg., LLC*, No. CIV.A.

3:12-02074-MB, 2013 WL 789958, at *2 (D.S.C. Mar. 4, 2013).

In federal court, Rule 12(b) motions are typically based on the defendant’s belief that the claim does not involve a federal question, the claim does not meet requirements of diversity of citizenship between the parties, or the amount in controversy does not exceed the required jurisdictional amount. 5B Wright & Miller § 1350. Other grounds for a Rule 12(b)(1) motion, which have also been brought as grounds for 12(b)(6) motions, may include failure to exhaust administrative remedies, sovereign and other immunities, lack of standing, Rooker-Feldman doctrine, collateral estoppel, and res judicata. *Id.*

The Fourth Circuit has held that subject-matter jurisdiction can be presented in two ways: (1) an allegation of failure to state facts upon which subject-matter jurisdiction can be based, which is based solely on the allegations in the complaint which are presumed to be true, and (2) an argument

that the allegations of the complaint are not true, and in that case, the court can consider evidence outside the complaint—such as affidavits, depositions, and live testimony—without converting the motion into one for summary judgment. See *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

“Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction.” *Id.*

If subject-matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff bears the burden of persuasion. See *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 407 (D.S.C. 1994). “The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

• **12(b)(2) Lack of personal jurisdiction (can be waived by failing to raise it in an answer or motion to dismiss or by failing to raise it in the first motion to dismiss)**

A Rule 12(b) motion argues that the controversy or the defendant does not have sufficient contacts, ties, or relationships with the forum to give the court jurisdiction over the defendant; that issue typically rests on a jurisdictional statute or rule and the Due Process Clause of the Constitution. See 5B Wright & Miller § 1351.

To avoid any questions of waiver, lack of personal jurisdiction should be raised in a pre-answer motion. See *Briksza v. Moloney*, No. CIV. 08-CV-01785, 2009 WL 1767594, at *4 (D.N.J. June 19, 2009) (holding that the issue was waived even though it had been asserted as an affirmative defense). Also, seeking affirmative action from the court—such as making a Rule 12(b)(6) motion to dismiss—may waive personal jurisdiction. *Id.*

The plaintiff bears the burden of proving the existence of grounds for jurisdiction by the preponderance of the evidence under Rule 12(b)(2). See *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). When the federal district court decides jurisdiction on 12(b)(2) motion papers alone, the plaintiff need only make a “prima facie showing of a sufficient jurisdictional basis” to prevail. See *Perdue Foods LLC v. BRF S.A.*, No. 14-2120, 2016 WL 682951, at *2 (4th Cir. Feb. 19, 2016) (affirming dismissal based on lack of personal jurisdiction in breach of contract case).

When a motion to dismiss attacks the allegations of the complaint on the issue of personal jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. *Coggeshall v. Reprod. Endocrine Assocs.*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (affirming dismissal of out-of-state doctor and fertility clinic for lack of personal jurisdiction and finding that defendants were not doing business in South Carolina based on their unsolicited patient contacts or tangential business dealings with vendors in the state); *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009) (holding that trial court did not err in considering evidence outside the pleadings on motion brought under Rule 12(b)(6) that was actually based on lack of personal jurisdiction).

• **12(b)(3) Improper venue (can be waived by failing to raise it in an answer or motion to dismiss or by failing to raise it in the first motion to dismiss)**

Look to the venue statute to see if the action has been brought in the correct place. The general venue statute for federal courts is 28 U.S.C. §§ 1391 through -1413. Other statutes address venue for specific types of claims, such as ERISA, 29 U.S.C. § 1132(e)(2); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-

5(f)(3); and patent infringement, 28 U.S.C. § 1400(b). South Carolina venue statutes are found in S.C. Code Ann. §§ 15-7-10 through -30.

A court may deny or hold the motion in abeyance if it determines that further information is needed in order to establish clearly whether venue is proper. See 5B Wright & Miller § 1352.

Although state courts have not addressed this issue, federal courts hold that the plaintiff has the burden of proof to show that venue is proper. See *Aggarao v. MOL Ship Mgt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012) (“A plaintiff is obliged, however, to make only a prima facie showing of proper venue in order to survive a motion to dismiss.”). The court may receive evidence outside the pleadings. *Id.* at 365-66; *Motley Rice, LLC v. Baldwin & Baldwin, LLP*, 518 F. Supp. 2d 688, 691 (D.S.C. 2007).

Also consider forum selection clauses in contracts in determining if venue is correct. See *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010) (applying South Carolina state law and enforcing forum selection clause); *Sagittarius Sporting Goods Co., Ltd v. LG Sourcing, Inc.*, No. CV 3:15-00496-MGL, 2016 WL 721302, at *2 (D.S.C. Feb. 23, 2016) (granting motion to transfer venue under forum selection clause); see also S.C. Code Ann. § 15-7-120 (application of contract and arbitration agreements relative to venue of actions).

In federal courts, 28 U.S.C. § 1404(a) allows the district courts to transfer venue to any case to a more convenient forum, instead of outright dismissing the case, if the transfer is in the interest of justice. See *Mitchell v. Hudson*, 626 F. App’x 55, 56 (4th Cir. 2015) (affirming Virginia district court’s order dismissing complaint in part and transferring the remaining claims to the Eastern District of North Carolina).

Next issue, we will resume our Rule 12 journey with Rule 12(b)(4)-(8) motions to dismiss, 12(c) motions for a more definite statement, and 12(f) motions to strike. Stay tuned! 🍷