23-CV-V

To: Rules Advisory Committee
From: Committee on Rule Amendment at Cornell Law School
Date: September 15, 2023
Re: Proposed Rule Amendment to FRCP 12(a)(4)(B)

Dear Members of the Committee:

I. Statement of Purpose

We write to bring the Committee's attention to a deficiency in Rule 12(a)(4)(B) of the Federal Rules of Civil Procedure ("FRCP"). As it stands, the text of Rule 12(a)(4) provides a fourteen-day extension upon which an answer to a complaint is due in three circumstances: (1) when the court denies a motion for a more definite statement under Rule 12(e); (2) when the court denies a motion to strike under Rule 12(f); and (3) when the court grants a motion for a more definite statement under Rule 12(e). The extension of time provision, however, does not apply when the court *grants* a motion to strike under 12(f).[1] We identified this issue in our first-year civil procedure course with Professor Kevin Clermont and have since been determined to bring the inconsistency to the Committee's attention. The purpose of this rule amendment proposal is to increase efficiency for parties and judges alike, avoid unduly dismissed complaints for technical error, to allow otherwise meritorious lawsuits to proceed, and to prevent accrual of costly legal fees to parties who miss the deadline to answer as a result of the inconsistency in Rule 12(a)(4). This proposed amendment will bring the rules closer to their intended purpose: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

II. Statement of the Problem

Because the extension of time provision in Rule 12(a)(4) does not apply to the granting of a 12(f) motion, the movant is faced with a dilemma: either respond before the resolution of her 12(f) motion or wait until the motion is determined by the court.[3] If she responds before the resolution, she runs the risk that she will have been forced to admit or deny potentially scandalous—or at minimum irrelevant—matter. This is because if the motion is granted, she will have responded to the stricken matter. Alternatively, if the motion is denied and she has not responded to the matter that has been unsuccessfully stricken, she runs the risk that her pleading will be partially deficient. Finally, if she waits to respond, she may face default because the twenty-one day response time will typically expire before the court has adjudicated the motion.[4]

This problem is mentioned in an earlier version of *Federal Practice and Procedure* by Charles Alan Wright and Arthur R. Miller, describing the inconsistency in Rule 12(a)(4) as "an unintended omission on the part of the Advisory Committee, an omission that should have been corrected."[5]

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[1] While Rule 12(a)(4)(A) provides the extension when the court denies a motion more generally, including motions under both 12(f) and 12(e), Rule 12(a)(4)(B) only provides the extension when "the court grants a motion for a more definite statement." FED. R. CIV. P. 12(a)(4). An extension for when the court grants a motion to strike is missing from the rule.
[2] *See* FED. R. CIV. P. 1.
[3] 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1346 (3d ed. 2004).
[4] *Id.*
[5] *See id.*

A later update of the treatise ("the Update") changes its tune, arguing the omission should remain.[6] According to the Update, an amendment such as the one proposed here would turn the motion to strike into a "tool for imposing unnecessary delay."[7] However, this argument fails to recognize that a fourteen-day extension is already available to defendants raising a motion for a more definite statement regardless of whether it is granted or denied. Therefore, a defendant aiming to cause unnecessary delay may do so already by raising a frivolous motion for a more definite statement, and we have found no evidence of defendants doing so. If defendants are not using 12(e) motions to cause unnecessary delay—a tool already available to them—why would they suddenly start doing so with an extension under 12(f)? Further, even if defendants did attempt such delay, courts are well equipped to respond with sanctions under Rule 11.[8]

The Update also asserts that the omission "makes sense in light of the fact that in most cases, the motion is being asserted by a defendant who is attacking portions of the complaint as 'redundant, immaterial, impertinent, or scandalous'—rather than seeking to strike defenses as 'insufficient'—because complaints to not raise defenses."[9] However, the movant's dilemma persists regardless of whether or not the movant is attacking portions of the complaint as redundant, immaterial, impertinent, or scandalous as opposed to seeking to strike defenses as insufficient. Defendants still must choose between responding to potentially scandalous or irrelevant matter or filing a partially deficient pleading. Those who wait to respond may risk default if the twenty-one day response time has run up. Of course, defendants may avoid this risk by requesting an extension of time under the court's authority to "specif[y] a different time" under Rule 12(a)(1)(C).[10] However, with the proposed amendment, defendants would not have to spend precious time and money contemplating this dilemma or requesting an extension and judges would not have to spend time ruling on their request—leading to a more efficient and simplified resolution of the complaint.

Finally, the Update argues that the twenty-one day deadline for plaintiffs is irrelevant in most cases, with one exception: if the plaintiff wishes to challenge an answer containing affirmative defenses with a motion to strike and either party has sought an order for the plaintiff to file a reply.[11] In this case, the Update suggests that plaintiffs request an extension of time. Once again, this is not the most efficient system. With the proposed amendment, plaintiffs would not have to spend time and money requesting an extension and judges would not have to spend time deciding on them. Additionally, the rule as written—providing the fourteen-day extension in all circumstances except the granting of a motion to strike—would cause most lawyers to assume that the extension applies to 12(e) and 12(f) motions equally. Meaning, many lawyers may not even realize the risk of default for waiting to respond.

Ultimately, to maximize efficiency, we ask the Committee to resolve the inconsistency in Rule 12(a)(4). We believe the current rule comes with a number of significant costs, in addition to those laid out above, including, but not limited to: (1) legal fees associated with avoiding the dilemma or remedying missed deadline to answer; (2) potential malpractice actions due to assuming the extension applies to 12(e) and 12(f) motions equally; (3) plaintiff's meritorious lawsuits being unduly dismissed; (4) complexity of the current rule and the burden on pro se litigants; and (5) illogical rules lowering the

[6] *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1346 (3d ed. 2023).
[7] *See id.*
[8] *See* FED. R. CIV. P. 11.
[9] *See* WRIGHT & MILLER, *supra* note 6.
[10] *See* FED. R. CIV. P. 12(a)(1)(C).
[11] *See* WRIGHT & MILLER, *supra* note 6.

apparent authoritativeness of the FRCP. All of these costs could be remedied if Rule 12(a)(4) were to apply the extension of time to 12(e) and 12(f) motions equally.

III. Proposed Solution

Should the Committee determine it appropriate to recommend altering Rule 12(a)(4)(B), a solution is relatively straightforward: apply the extension of time provision to a motion to strike under Rule 12(f), so that it would read:

> If the court grants a motion for a more definite statement *or a motion to strike,* the responsive pleading must be served within 14 days after the more definite statement is served *or the insufficient defense or redundant, immaterial, impertinent, or scandalous matter is stricken from the pleading.*

(emphasis added to show changes).

Thank you for considering our thoughts on this topic.

Sincerely,

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