

February 11, 2022

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Rulemaking on Federal Rule of Civil Procedure 12(a)(4)

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice (AAJ) submits this additional comment in response to continued discussion regarding the proposed amendment to FRCP 12(a)(4) that would provide the Department of Justice (DOJ) with 60 days (rather than 14) to serve a responsive pleading after a motion to dismiss has been denied in cases where a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, civil rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules in their practice.

During the formal comment period, AAJ weighed in against the proposed amendment, commenting that its Civil Rights Section opposed the rulemaking and making the point that the request for additional time needs to be balanced against the needs of parties bringing *Bivens*¹ claims. AAJ has closely followed the discussion regarding this amendment as well as the position of the DOJ, which was clearly stated in a letter to the Advisory Committee on Civil Rules dated August 18, 2021,² that it requests a 60-day rule and that a compromise of a shorter time does not warrant moving forward with an amendment.

The amendment should not move forward for the following reasons: 1) the DOJ has not documented the extent of the problem; 2) the amendment gives an appearance of preferential treatment for the government not available to other parties; and 3) a potential compromise is not supported by the DOJ.

¹ *Biven v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

² Advisory Committee on Civil Rules, Agenda Book 143 (Oct. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf.

1. Documentation of the Problem

AAJ is certainly sympathetic to the fact that parties sometimes need extensions of deadlines, but at the time of this writing, this proposed rule change is simply unnecessary. The DOJ has not documented the extent of the problem that they nevertheless insist exists and warrants an amendment to Rule 12(a)(4). It would be helpful to know how often the DOJ has requested an extension; the types of claims involved in these cases, including whether state claims were involved; whether the DOJ was granted an extension by the court; and the length of any extension granted.

2. Appearance of Fairness

The DOJ is probably the largest user of the federal courts. As a large, repeat user of the courts, can the government be routinely granted an amendment to accommodate its own enormity?³ While AAJ cannot answer this question, it does know that if AAJ, or its counterparts at the defense bar, were making a request to amend a rule, the bar would be considerably higher requiring it to: 1) provide documentation, even anecdotal information, for a rules suggestion to be implemented; and 2) be open to compromise. Indeed, state governments, who may defend the same issues, would still abide by the current 14-day rule for filing a responsive pleading.

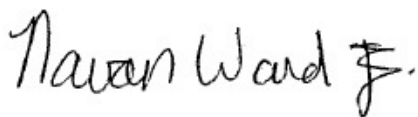
3. Potential for Compromise

This may be an issue where a compromise would be appropriate, but the DOJ's position clearly states that it would prefer for the rule to stay as it is at 14 days rather than for a time period other than 60 days to be chosen. The unwillingness to compromise on the time frame, combined with a lack of documentation of the problem, suggests that a rule change may be unnecessary and should be handled on a case-by-case basis.

If a compromise is a viable option, then AAJ recommends that the compromise focus on setting a time shorter than the proposed 60 days. AAJ and its Civil Rights Section do not support a compromise that provides a longer response period to certain types of cases, believing that such a rule would lead to additional confusion over which time period is applied.

For these reasons, and those stated in its comment dated January 19, 2021, AAJ suggests that the rule remain as it is currently written. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org.

Sincerely,



Navan Ward Jr.
President
American Association for Justice

³ As one member noted during the Advisory Committee on Civil Rules October 5, 2021 meeting, there is an optics issue with granting the Department four times as long to respond as other parties.