

# The Partial Motion to Dismiss: Is Piecemeal Litigation Required in Federal Court Under Rule 12?

WHEN FEDERAL LITIGATORS find themselves defending a case in an unfamiliar jurisdiction, it is critically important that they identify any substantive differences in the prevailing pleading requirements and other pertinent procedural rules. For instance, there continues to exist significant disagreement and confusion among litigators in federal court as to the effect a “partial” motion to

dismiss<sup>1</sup> has on a party’s obligation to answer those counts in the complaint that are not the subject of the motion. Indeed, given the existing split of authority among the district courts and lack of guidance from any federal appellate courts, attorneys have struggled with this issue since the Federal Rules of Civil Procedure took effect in 1938 (and as amended). A litigator who fails to recognize the potential pitfalls associated with Rule 12 in the context of a partial motion to dismiss risks the possibility of serious ramifications, including the entry of default judgment against the client or the waiver of certain counterclaims.<sup>2</sup>

The Federal Rules clearly require a defendant to answer or otherwise respond within 21 days after being served with a summons and complaint.<sup>3</sup> Rule 12(a)(4)(A) provides that the filing of a Rule 12 motion, including a Rule 12(b) motion to dismiss, automatically extends the defendant’s time to answer the complaint until fourteen days after notice of the court’s resolution of the motion (unless the court sets a different date).<sup>4</sup> However, the Federal Rules do not squarely address what is required of a defendant that responds to a complaint with a partial motion to dismiss—a motion directed to only some of the plaintiff’s claims. No federal appellate court has ever addressed this issue, nor have the federal district courts in at least 32 states, or any state court whose procedural rules are patterned after Rule 12.<sup>5</sup>

Courts and commentators alike have noted the disagreement over a party’s obligation to answer remaining counts in a complaint, and the issue remains far from settled.<sup>6</sup> Because this issue continues to present itself to federal litigators, it bears re-examination and re-

evaluation. There is a clear, yet not entirely consistent, trend among the limited authority analyzing Rule 12 that a defendant’s submission of a “partial” motion to dismiss also extends the time a defendant has to respond to those claims not addressed in the motion.<sup>7</sup> What is less clear, however, are the steps a defendant should take to protect itself against the “risk of defaulting on the counts not addressed in its motion.”<sup>8</sup> Although there are several practical approaches available to defense counsel in lieu of answering in those jurisdictions where the issue remains undecided,<sup>9</sup> the optimal method for minimizing a defendant’s risks is to file a motion to extend time to respond to the remainder of the complaint concurrently with the filing of the partial motion to dismiss. Such an approach not only avoids the possibility of default on the remaining claims or the waiver of any counterclaims, but promotes judicial economy by eliminating the need for duplicative pleadings and narrowing the scope of discovery.

### The Minority View

*Gerlach v. Michigan Bell Telephone Co.*<sup>10</sup> is the seminal case expressing the minority view that Rule 12(a) does *not* suspend a defendant’s obligation to respond to the plaintiff’s claims that are not the subject of the defendant’s partial motion to dismiss. The defendant in *Gerlach* moved to dismiss four of the six counts asserted in the plaintiffs’ employment discrimination suit, arguing it was not obligated to answer the remaining counts until the court issued a ruling on its motion. Although the federal court in Michigan agreed that the defendant should be “entitled to narrow the scope of the litigation,” it stated that such an effort did not suspend its obligation to respond to the counts remaining in the complaint.<sup>11</sup> The court held that “[s]eparate counts are, by definition, independent bases for a lawsuit and the parties are responsible to proceed with litigation on those counts which are not challenged by a motion under [Rule] 12(b).”<sup>12</sup>

The *Gerlach* court ultimately denied the plaintiffs’ motion for default judgment because the plaintiffs had not been “severely prejudiced” by the defendant’s failure to answer the remaining counts.<sup>13</sup> The court concluded it was more “appropriate to allow the defendant an opportunity to file its answer within 10 days from the date of [the] opinion.”<sup>14</sup> Nevertheless, the

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defendant dodged a bullet as it was within the court's discretion whether or not to enter a default on the remaining counts given the lack of an answer.

The principal advantage of the minority view is that it discourages defendants from utilizing partial motions to dismiss as an improper litigation tactic aimed solely at delaying the adjudication of their cases.<sup>15</sup> Under certain circumstances, a delay in litigation may severely prejudice the plaintiff, particularly where the alleged injury is ongoing and will cease only with the continuance of litigation.<sup>16</sup> One commentator supportive of the minority view has also suggested that requiring a defendant to answer the unchallenged counts in a complaint is consistent with the underlying policies of the Federal Rules of Civil Procedure, "under which discovery is not automatically stayed by the filing of a Rule 12 motion."<sup>17</sup> By requiring a defendant to answer the unchallenged portions of the complaint within the allowed 21 days, a plaintiff can narrowly tailor its discovery requests, and the filing of a partial motion to dismiss as a dilatory tactic is discouraged.<sup>18</sup>

Though clearly at odds with the predominant view of Rule 12, some courts continue to recognize the minority view. In *Coca-Cola Financial v. Pure Tech Plastics LLC*,<sup>19</sup> one of the most recent decisions to evaluate the effects of a partial motion to dismiss, a district court in Georgia specifically adopted the *Gerlach* rationale, noting the lack of any binding precedent to the contrary. Similarly, a district court in Colorado also appears to have followed the minority view in *Enssle v. IL Tool Works Inc.*,<sup>20</sup> as did a New York district court in *Bull HN Information Systems Inc. v. American Exp. Bank Ltd.*<sup>21</sup>

### The Majority View

*Gerlach*, *Pure Tech Plastics*, *Enssle*, and *Bull HN Information Systems* notwithstanding, the majority of courts that have addressed a partial motion to dismiss within the context of Rule 12 have held that this type of motion *does*, in fact, suspend the time to answer the claims not subject to the motion.<sup>22</sup> In *Brocksopp Engineering Inc. v. Bach-Simpson Ltd.*, the first published opinion to evaluate *Gerlach*, a district court in Wisconsin criticized *Gerlach* and established what is now viewed as the majority rule—that a partial motion to dismiss automatically enlarges the time to submit an answer to those claims not addressed in a Rule 12(b) motion to dismiss.<sup>23</sup>

The primary advantages of the majority view are reducing inefficient, duplicative pleadings and narrowing the scope of discovery to save parties the expense of "exploring the factual predicate for claims that have no legal merit."<sup>24</sup> In adopting the majority view in *Gortat v. Capala Bros. Inc.*, a federal district court in New York recently explained that "[i]f the opposite rule controlled and partial motions to dismiss did not suspend a party's obligation to reply to additional claims, the result would be 'a procedural thicket' of piecemeal

answers that would poorly serve judicial economy."<sup>25</sup> Indeed, if a defendant was forced to answer the unchallenged counts of a plaintiff's complaint, and then file a second answer if the partially dispositive motion to dismiss is denied, the court and litigants would have to evaluate and respond to redundant pleadings.<sup>26</sup> This situation is highly inefficient.

Additionally, requiring a defendant to answer all unchallenged counts in a complaint while a partially dispositive motion is pending would cause confusion "over the proper scope of discovery during the motion's pendency."<sup>27</sup> This, in turn, could very likely lead to needless discovery disputes and result in time-consuming and expensive motion practice.

### The Need for Additional Filings to Prevent Plaintiffs from Seeking Default Judgment

Unless and until there is binding authority conclusively establishing whether or not Rule 12(a)(4)(A) automatically extends the time to answer the complaint's remaining counts (or until Rule 12, itself, is amended), there remains a considerable risk that a plaintiff will seek default judgment on the remaining counts unless the defendant files an answer. Courts, including the *Gerlach* court,<sup>28</sup> have a strong aversion to default judgments, but the option of moving for default is still available to (and commonly used by) aggressive plaintiffs. Defense counsel should therefore consider requesting an extension of time to answer the remaining counts when filing a partial motion to dismiss. While there are several pragmatic options available to a defendant,<sup>29</sup> requesting additional time to answer the remaining counts explicitly preserves the time many believe Rule 12(a)(4)(A) affords, and promotes judicial economy.

The best illustration of this approach can be seen in the recent case *Talbot v. Sentinel Ins. Co.*<sup>30</sup> In *Talbot*, the defendants filed a motion to dismiss that was only partially dispositive of all counts in an insurance coverage action and simultaneously requested that the court extend the deadline to file an answer to the amended complaint until after the motion to dismiss was decided. In support of their argument, the defendants pointed out that there is nothing in Rule 12(a)(4)(A) or controlling case law that requires an answer before a decision is entered on a partial motion to dismiss.<sup>31</sup> The district court in Nevada agreed, explicitly finding that Rule 12 tolls the time to respond to all claims when there is a pending partial motion to dismiss.<sup>32</sup> *Talbot* demonstrates a court's willingness to work within the framework of Rule 12, and illustrates how a defendant can proactively protect itself from default judgment by requesting additional time to answer remaining counts, instead of relying on Rule 12's uncertain grant of an automatic time extension.<sup>33</sup>

Requesting additional time to answer the remaining counts until disposition of the partial motion to dismiss also promotes judicial economy. If the extension of

time is granted, the court would not have to evaluate duplicative pleadings or subject the parties to expensive discovery on claims that may soon be dismissed. Thus, though there is growing authority suggesting that Rule 12(a)(4)(A) automatically extends the time a defendant has to answer the remaining counts, defense counsel would do well to cover its bases and concurrently move the court to exercise its authority to extend the time to answer those counts in order to prevent the plaintiff from seeking default judgment. This is particularly true given the inconsistent application of Rule 12 among the various federal district courts and lack of binding precedent by the appellate courts. **TFL**

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## Endnotes

<sup>1</sup>See *Sherman ex. Rel. Sherman v. Helms*, 80 F. Supp. 2d 1365, 1368 (M.D. Ga. 2000). (“A defendant may move to dismiss a complaint or parts of a complaint before or after filing an answer.”)

<sup>2</sup>See *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir. 1967). (“Under Rule 13(a) a party who fails to plead a compulsory claim against an opposing party is held to have waived such claim and is precluded by res judicata from bringing suit upon it again.”)

<sup>3</sup>See FED. R. CIV. P. 12(a)(1)(A).

<sup>4</sup>See FED. R. CIV. P. 12(a)(4)(A).

<sup>5</sup>No federal courts in the following states appear to have addressed the issue of a partial motion to dismiss in the context of Rule 12: Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming.

<sup>6</sup>Josh Belinfante, *To Answer or Not to Answer: The Partial Motion to Dismiss*, 52 FED. LAW. 20 (2005); Scott Cagan, *A “Partial Motion to Dismiss Under Federal Rule of Civil Procedure 12: You Had Better Answer*, 39 FED. B. NEWS & J. 202 (1992); Andrea G. Lisenbee & Michael D. Moberly, *To Plead or Not to Plead?: Assessing the Effect of a Partial Motion to Dismiss on the Duty to Answer*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 45 (2008).

<sup>7</sup>See 5B FEDERAL PRACTICE & PROCEDURE § 1346 (3d ed.).

<sup>8</sup>See Lisenbee & Moberly, *supra* note 6, at 48.

<sup>9</sup>Despite the well-recognized trends in certain jurisdictions, practitioners should not lose sight of the fact that

there is no appellate authority evaluating Rule 12 in the context of a partial motion to dismiss, thus the district courts are not legally bound to interpret Rule 12 consistent with the prevailing view of any given jurisdiction.

<sup>10</sup>*Gerlach v. Michigan Bell Telephone Co.*, 448 F. Supp. 1168 (E.D. Mich. 1978).

<sup>11</sup>*Id.* at 1174.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>See Lisenbee & Moberly, *supra* note 6, at 62. (“Precisely because Rule 12(b) motions do interrupt discovery in many cases ... a defendant’s submission of a partial motion to dismiss occasionally accomplishes ‘little except to delay the real commencement of litigation.’”)

<sup>16</sup>For example, claims for copyright or patent infringement, enforcement of noncompete provisions, prejudgment seizure of assets and other similar matters might necessitate the continuance of litigation before injunctive relief can be ordered. A purposeful delay in the adjudication of these types of case may be beneficial to defendants and may cause a plaintiff continuing and irreparable harm.

<sup>17</sup>Cagan, *supra* note 6, at 204.

<sup>18</sup>See *id.* (discussing the advantages of requiring the defendant to file answer).

<sup>19</sup>*Coca-Cola Financial Corp. v. Pure Tech Plastics LLC*, 1:12-cv-00949-SJC (N.D. Ga. July 9, 2012). (“Although there may be some instances when a partial motion to dismiss extends the time to answer all counts, this case does not present such an instance. The Court does not see a need to delay [plaintiff’s] claim simply because Defendant moved to dismiss.”)

<sup>20</sup>Minute Order, *Enssle v. IL Tool Works Inc.*, 03-MK-1291 (CBS). Although the specific circumstances surrounding the *Enssle* ruling are unclear, the district court required a defendant that moved for a partial motion to dismiss to answer those claims unaffected by the motion prior to ruling on the motion.

<sup>21</sup>*Bull HN Info. Sys. Inc. v. American Exp. Bank Ltd.*, 1990 WL 48098 (S.D.N.Y. Apr. 6, 1990) (citing *Gerlach* for the proposition that there is “no reason for delaying the progress of litigation with respect to those counts of a complaint which are not addressed by a motion filed under F.R.C.P. 12(b).”)

<sup>22</sup>See, e.g., *In re Vaughan Co., Realtors*, 2012 WL 3166721, at \*11 (Bankr. D. N.M. Aug. 2, 2012) (“The large majority of courts addressing this issue have held that when a defendant timely files a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., Rule 12(a)(4)(A) extends the time to file an answer as to all claims, including those not addressed by the motion to dismiss ... This Court agrees with that holding.”); *ThermoLife Intern. LLC v. Gaspari Nutrition Inc.*, 2011 WL 6296833 (D. Ariz. Dec. 16, 2011) (holding that a partial motion to dismiss tolls the time to respond to all claims under Rule 12(a)(4)); *Gortat v. Capala Bros. Inc.*, 257 F.R.D. 353 (E.D.N.Y. 2009) (filing a partial motion to dismiss suspends the time

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279, 307 (E.D. Pa. 1972)

<sup>8</sup>Education of All Handicapped Children Act, Public Law 94-142 (1975), now codified as Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004).

<sup>9</sup>U.S. Dep't of Education, NCEs 2011-015, DIGEST OF EDUCATION STATISTICS: 2010 (2011).

<sup>10</sup>U.S. Gov't Accountability Office, GAO-12-672, K-12 EDUCATION: SELECTED STATES AND SCHOOL DISTRICTS CITED NUMEROUS FEDERAL REQUIREMENTS AS BURDENSOME, WHILE RECOGNIZING SOME BENEFITS (2012).

<sup>11</sup>*Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) (right to treatment), 334 F. Supp. 1341 (M.D. Ala. 1971) (finding defendants' remedial plans insufficient), 344 F. Supp. 373 (M.D. Ala. 1972), aff'd, 503 F.2d 1305 (5th Cir. 1974).

<sup>12</sup>*Wyatt v. Stickney*, 503 F.2d 1305 (5th Cir. 1974).

<sup>13</sup>Exec. Order No. 11,776, 39 Fed. Reg. 11865 (Mar. 28, 1974).

<sup>14</sup>86 Stat. 1465, 42 U.S.C. § 1381 *et seq.*

<sup>15</sup>S. Rep. No. 92-1230, p. 4 (1972)

<sup>16</sup>29 U.S.C. § 794.

<sup>17</sup>*Halderman v. Pennhurst*, 612 F.2d 84 (3d Cir. 1979) (en banc).

<sup>18</sup>*Halderman v. Pennhurst*, 451 U.S. 1 (1981).

<sup>19</sup>Letter from Centers for Medicare & Medicaid Services (January 14, 2000). Available at [www.acf.hhs.gov/programs/add/otherpublications/olmstead.html#letter](http://www.acf.hhs.gov/programs/add/otherpublications/olmstead.html#letter).

<sup>20</sup>See David Ferleger, *Disabilities and the Law: The Evolution of Independence*, FEDERAL LAWYER, Sept. 2010, at 29.

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<sup>26</sup>*Id.* at 985.

<sup>27</sup>*Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 299-300 (D. Conn. 2008) (describing the success of this judicial oversight in a parallel case involving the same institution).

<sup>28</sup>*Jensen*, 2012 U.S. Dist. LEXIS 98703, at \*14. ("He shall have *ex parte* access to the parties, their counsel and to the Court.

However, in the event there is any information provided to the Court by David Ferleger which is utilized or otherwise relied upon by the Court for any reason relating to compliance with the Settlement Agreement, the Court will provide such information to counsel for the parties.").

<sup>29</sup>*Scheindlin*, *supra* note 3, at 482.

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to answer claims or counterclaims not subject to the motion under Rule 12(a)(4); *Kent v. Green*, 2008 WL 150060 (D. Colo. Jan. 11, 2008) (filing a Rule 12(b) motion alters the deadline to respond to a complaint); *Beaulieu v. Board of Trustees of University of West Florida*, 2007 WL 2020161 (N.D. Fla. Jul. 9, 2007) (holding that a partial motion to dismiss extends the time to file a responsive pleading on unchallenged claims pursuant to Rule 12(a)(4)); *Shah v. KIK Intern. LLC*, 2007 WL 1876449 (N.D. Ind. June 26, 2007) (Rule 12(a)(4) applies to claims not challenged in a partial motion to dismiss); *Ideal Instruments Inc. v. Rivard Instruments Inc.*, 434 F. Supp. 2d 598 (N.D. Iowa 2006) (same); *Bertaut v. Parish of Jefferson*, 2002 WL 31528468 (E.D. La. Nov. 8, 2002) (same); *Finnegan v. Univ. of Rochester Medical Ctr.*, 180 F.R.D. 247 (W.D.N.Y. 1998) (same); *Oil Express Nat'l Inc. v. D'Alessandro*, 173 F.R.D. 219 (N.D. Ill. 1997) (same); *Brocksopp Engineering Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485 (E.D. Wis. 1991) (same).

<sup>23</sup>*Brocksopp*, 136 F.R.D. at 486.

<sup>24</sup>*Lisenbee & Moberly*, *supra* note 6, at 61-62.

<sup>25</sup>*Gortat*, 257 F.R.D. at 366; *see also Ideal Instruments*, 434 F. Supp. 2d at 639 ("[T]his court also rejects the "piecemeal answer" rule proposed in *Gerlach* and holds that a motion pursuant to Rule 12(b), even one that challenges less than all of the claims asserted in the complaint or other pleading, extends the time to answer as to all claims in the pleading.")

<sup>26</sup>*Lisenbee & Moberly*, *supra* note 6, at 58-59.

<sup>27</sup>5A FEDERAL PRACTICE & PROCEDURE § 1346. (2d ed.).

<sup>28</sup>*Lisenbee & Moberly*, *supra* note 6, at 71 ("Indeed, the *Gerlach* court itself concluded that default is too harsh a penalty for a defendant's failure to submit an answer ...")

<sup>29</sup>To avoid default, a defendant can: (1) seek dismissal of only some of the plaintiff's claims by filing a motion for partial judgment on the pleadings under Rule 12(c); (2) file a partial answer simultaneously with its partial motion to dismiss; or (3) move to dismiss the entire complaint. For further explanation of these options. *See Lisenbee & Moberly*, *supra* note 6, at 72-80. *See also Belinfante*, *supra* note 6, at 21 (detailing several practice suggestions when filing a partial motion to dismiss, such as avoiding attaching affidavits and other forms of evidence and "carefully and precisely" informing the court of a party's intentions when filing the motion).

<sup>30</sup>*Talbot v. Sentinel Ins. Co.*, 2012 WL 1068763 (D. Nev. Mar. 29, 2012).

<sup>31</sup>*Id.* at \*2 (requesting that the Court follow the "majority approach" and enlarge the time to respond until 14 days after a decision on the partial motion to dismiss).

<sup>32</sup>*Id.*

<sup>33</sup>*See, e.g., Shkrobut v. City of Chicago*, 2005 WL 2787277, at \*\*2, 4 (N.D. Ill. Oct. 24, 2005) (Defendants moved to continue the time to answer counts of a complaint until the court had ruled on their motion to dismiss); *Fairley v. Andrews*, 300 F. Supp. 2d 660 (N.D. Ill. 2004) (same); *In re Cendant Corp. Sec. Litig.*, 190 F.R.D. 331 (D.N.J. 1999) (same); *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940) (same).