

Alabama Rules of Civil Procedure

III. PLEADINGS AND MOTIONS

Rule 12.

Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on the pleadings.

(a) *When presented.* A defendant shall serve an answer within thirty (30) days after the service of the summons and complaint upon that defendant except when service is made by publication and a different time is prescribed under the applicable procedure. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within thirty (30) days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within thirty (30) days after service of the answer or, if a reply is ordered by the court, within thirty (30) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods to time as follows, unless a different time is fixed by order of the court: (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 (10) 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 (10) days after the service of the more definite statement. Proceedings to modify, cite for contempt, or similar motions in divorce proceedings shall not be considered as original pleadings within the meaning of this rule.

(b) *How presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, 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, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. 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, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) 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.

(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.

(d) *Preliminary hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in 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, the party may move for a more definite statement before interposing a 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 (10) 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 (30) days after the service of the pleading upon the party 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 the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) 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 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.

(dc) *District court rule.* Rule 12 applies in the district courts, except that (1) all time periods of thirty (30) days are reduced to fourteen (14) days for all actions other than an action for unlawful detainer as defined in § 6-6-310(2), Ala. Code 1975, and an action for eviction as defined in §35-9A-141(5), Ala. Code 1975, in which actions a defendant shall serve an answer within seven (7) calendar days after service of the summons and complaint, and (2) the provisions for the assertion of certain defenses by motion at the option of the pleader in Rule 12 are deleted.

[Amended 10-14-76, eff. 1-16-77; Amended 5-16-83, eff. 7-1-83; Amended eff. 10-1-95; Amended 11-28-2012.]

Committee Comments on 1973 Adoption

In this rule, as throughout the rules generally, the parties are allowed 30 days for responsive pleadings, in accord with present Alabama practice, rather than the 20 days permitted by the Federal Rules and similar state rules.

Motions under this rule must be in writing and must state with particularity the grounds of the motion. Rule 7(b)(1). They must be served at least 5 days before the time specified for hearing. Rule 6(d).

The first sentence of Rule 12(a) has been somewhat altered from the corresponding Federal Rule, in order to refer directly to substituted service in general under Rule 4(c), wherein different times may apply.

Alabama has had the traditional “special appearance,” with the required words of limitation in the plea or motion, and the waiver of objections by taking any inconsistent position looking to the merits. This practice is abolished by the third sentence of Rule 12(b). *Carlisle v. Loveland Co.*, 175 F.2d 418 (3rd

Cir.1949). Neither the filing of a general appearance, nor the taking of a position looking to the merits, prevents a party from attacking the jurisdiction of the court or the service of process. E.g., *Alford v. Addressograph-Multigraph Corp.*, 3 F.R.D. 295 (S.D.Cal.1944); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3rd Cir.1944), cert. denied 322 U.S. 740, 64 S.Ct. 1057, 88 L.Ed. 1573. This is a departure from former Alabama practice. See *New York Times v. Sullivan*, 273 Ala. 656, 144 So.2d 25 (1962), cert. granted 371 U.S. 946, 83 S.Ct. 510, 9 L.Ed.2d 496, rev. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, motion denied 376 U.S. 967, 84 S.Ct. 1130, 12 L.Ed.2d 83. Nor need words denoting a special appearance ever be used. *Nagl v. Warren Corp.*, 8 F.R.D. 130 (D.Neb.1948). As under present Alabama practice, a party can claim on appeal error in overruling his jurisdictional objections even though he went ahead and contested on the merits after those objections were overruled. *Vilter Mfg. Co. v. Rolaff*, 110 F.2d 491 (8th Cir.1940).

The ancient objection to the “speaking demurrer” has no place under these rules. Affidavits, depositions, answers to interrogatories and similar evidentiary matter may be presented on a motion under Rule 12. Such matter is freely considered on a motion attacking jurisdiction. *Williams v. Minnesota Mining & Manufacturing Co.*, 14 F.R.D. 1 (S.D.Cal.1953). On a motion to dismiss for failure to state a claim on which relief can be granted, pursuant to Rule 12(b)(6), or a motion for judgment on the pleadings, pursuant to Rule 12(c), if matter outside the pleadings is presented to and not excluded by the court, the motion is to be treated as one for summary judgment pursuant to Rule 56.

Although the defenses listed in Rule 12(b) and the motion for judgment on the pleadings, authorized by Rule 12(c), will usually be heard and determined at a preliminary hearing before trial, the court has discretion, under Rule 12(d), to put hearing and decision of such matters off until the trial. 2A Moore’s *Federal Practice*, ¶ 12.13 (2d ed. 1968). And if the court does so postpone disposition of these objections, it must require the moving party to plead within 10 days, Rule 12(a)(1). Alabama decisions that the court cannot require further pleading until preliminary or dilatory objections are considered and determined—e.g., *Rhode Island Ins. Co. v. Holley*, 226 Ala. 320, 146 So. 817 (1933)—will no longer be authoritative.

Rule 12(e) provides the only remedy for a pleading thought to be vague or ambiguous. The motion it authorizes is proper only where a responsive pleading is permitted. And the motion may be granted only where it is needed to permit the moving party to prepare such a responsive pleading. The motion may not be granted in order to clarify the issues or to give the moving party information needed to prepare for trial. The bill of particulars is abolished. 5 Wright & Miller, *Federal Practice and Procedure*, § 1375 (1969).

Insofar as the motion to strike, sanctioned by Rule 12(f), is used to rid the pleading of redundant, immaterial, impertinent or scandalous matter, it is similar to the motion to strike under present Alabama practice. See Harrison, *Notes on Alabama Pleading—The Motion to Strike*, 2 Ala.L.J. 161 (1927). The rule also makes an innovation in Alabama practice by authorizing the use of the motion to strike to test the legal sufficiency of a defense.

Rule 12(g) requires the pleader who uses the optional motion procedure of Rule 12(b) to join all preliminary objections enumerated in Rule 12 at the penalty of waiver as to any such objections not joined in the motion and then available to him. The sole exceptions to this waiver are the few fundamental matters listed in Rule 12(h). Thus the rule makes a drastic change in present Alabama practice, which requires preliminary objections to be presented, and ruled on, seriatim. *Ex parte Dunlap*, 209 Ala. 453, 96 So. 441 (1923); *Box v. Metropolitan Life Ins. Co.*, 232 Ala. 321, 168 So. 217 (1935), cert. denied 232 Ala. 447, 168 So. 220. Where under former Alabama practice, waiver resulted from consolidation of certain defenses, under this rule, waiver occurs on omission of some defenses at the time of raising other defenses. See, e.g. *New York Times v. Sullivan*, supra, and 2A Moore's *Federal Practice*, ¶ 12.23, at p. 2446 (2d ed. 1968).

Rules 12(g) and 12(h) were drawn so as to prevent piecemeal and successive preliminary attacks on the complaint. The rules establish a waiver of certain omitted defenses in order to encourage consolidation of defenses. On the other hand, due recognition was afforded the need for protection against waiver of fatal defects. Under an earlier version of Rule 12(h), F.R.C.P., there was some ambiguity as to its effect upon a party who filed no Rule 12 motion but simply filed an answer. This confusion led to Rule 12(h) as it presently stands. Changes are for purpose of clarification only.

Present Alabama practice permits want of an indispensable party to be raised for the first time on appeal. *Amann v. Burke*, 237 Ala. 380, 186 So. 769 (1939); *Matthews v. Matthews*, 247 Ala. 472, 25 So.2d 259 (1946). Rule 12(h)(2) deals with the availability of such objection at the pleading stage and "at the trial on the merits," thus giving rise to an inference that the objection is unavailable after the trial. However, in federal practice, absence of a truly indispensable party has been raised by the court on appeal. *Hoe v. Wilson*, 76 U.S. (9 Wall.) 501, 19 L.Ed. 762 (1869); *McShan v. Sherrill*, 283 F.2d 462 (9th Cir.1960); *Flynn v. Brooks*, 105 F.2d 766 (D.C.Cir.1939). 2A Moore's *Federal Practice*, ¶ 12.23, at p. 2462 (2d ed. 1968). However, when raised for the first time on appeal, the considerations in determining indispensability may be more stringent. See e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

The reference to proceedings to modify or cite for contempt in divorce proceedings as the last sentence of Rule 12(a) has been added so as to clearly insulate such proceedings from the ordinary 30-day time limit ordinarily available under Rule 12 for response.

**Committee Comments to October 1, 1995,
Amendment to Rule 12**

The amendment is technical. No substantive change is intended.

**District Court Committee Comments
(Amended Effective July 1, 1983)**

The assertion of defenses by motion to dismiss, allowed in the circuit court by Rule 12(b), is not available in the district court; this is made clear by Rule 12(dc)(2). Of course, the defenses traditionally asserted under a Rule 12(b) motion can, nonetheless, be made by answer. For example, a defendant in an answer can include the ground that the plaintiff's complaint fails to state a claim upon which relief can be granted. However, a party will not be deemed in default if he has served an appearance in the form of a motion to dismiss. See Rule 55(dc)(5).

The time for response in an action for unlawful detainer is 7 days as provided in Rule 12(dc), and this time period applies regardless of whether the action is governed by § 6-6-330, et seq., Code 1975, or § 35-9-80, et seq., Code 1975. Any conflicting provisions of these statutes are to be deemed modified by Rule 12(dc)(1).

**Committee Comments to Amendment to Rule 12(dc)
Effective November 28, 2012**

Issues have been raised regarding the applicability in the district court of certain rules of procedure to possessory actions for eviction under the Alabama Uniform Residential Landlord and Tenant Act, Ala. Code 1975, §35-9A-101 et seq., as amended, and to possessory actions for unlawful detainer under Ala. Code 1975, § 6-6-310(2). This amendment addresses those issues.

First, language has been added to the (dc) provision of Rule 12 to make it clear that the exception therein applies to both eviction and unlawful-detainer actions. cond, with regard to computation of time in eviction and unlawful-detainer actions, the amendment makes it clear that the exclusion in Rule 6(a) of

Saturdays, Sundays, and legal holidays in the computation of periods of less than 11 days has no application to the computation of any time periods in the district court in possessory actions for eviction or unlawful detainer and that "day" means "calendar day" in those computations.

Note from the reporter of decisions: The order amending, effective November 28, 2012, Rule 6(dc), Rule 12(dc), Rule 52(dc), Rule 55(dc), Rule 59(dc), and Rule 62(dc), and adopting the Committee Comments to the Amendment to Rule 6(dc) Effective November 28, 2012, the Committee Comments to the Amendment to Rule 12(dc) Effective November 28, 2012, the Committee Comments to the Amendment to Rule 52(dc) Effective November 28, 2012, the Committee Comments to the Amendment to Rule 55(dc) Effective November 28, 2012, the Committee Comments to the Amendment to Rule 59(dc) Effective November 28, 2012, and the Committee Comments to the Amendment to Rule 62(dc) Effective November 28, 2012, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.