

Filing an Answer to the Complaint or Moving to Dismiss under Rule 12

Michael Stegawski
michael@cla-law.com
800.750.9861 x101

This memorandum is provided for educational and informational purposes only and is not intended and should not be construed as legal advice.

A civil lawsuit begins with the filing of a complaint. This is the document which sets forth the factual allegations of the plaintiff, the jurisdiction of the court to hear the case and over the parties, and the legal theories entitling the plaintiff to some sort of legal relief. The complaint must then be served upon the defendant along with a document known as a summons, a document which provides information pertaining to the lawsuit and directs the named defendant to appear and defend.

This memorandum is prepared to provide an overview of the initial steps to litigation within the federal courts and is written as an introductory guide on the process by which a civil action is commenced and available options for a defendant to appear and defend. This guide is not intended to be and should not be construed as legal advice, but may be helpful to a named defendant in a civil action on the manner in which to respond to a civil lawsuit filed in a U.S. federal court. First, we provide information regarding the service of process of a summons and complaint and the manner and effect of waiving the requirement for service of process. Next, discussion is provided on the applicable time periods for filing a responsive pleading to the complaint or, where applicable, the tolling of that period when a motion to dismiss is filed. This section is followed by an explanation of a Rule 12 motion to dismiss and the procedure by which a lawsuit may be challenged before a court even reaches the merits of a plaintiff's allegations. Discussion is also provided on waiver of certain defenses and how a defendant may move to dismiss a complaint or answer while still preserving all available legal defenses. An overview of the discovery process and motions for summary judgment are included to provide context to a Rule 12 motion. Finally, we conclude with a summary of the court procedures where a party seeks immediate relief from a court and prior to the final judgment in the action, procedures known as motions for temporary restraining orders and preliminary injunctions.

Service of Process of a Summons and Complaint

Pursuant to Federal Rule of Civil Procedure 4(e), an individual within the United States must generally be served by (a) delivering a copy of the summons and complaint to the individual personally, (b) leaving a copy of each at the individual's dwelling or usual place of abode with someone of "suitable age and discretion" who resides there, or (c) delivering a copy of each to an agent authorized by appointment or by law to receive service of process. To the extent that state law provides otherwise, a federal summons may be served by following state law procedure for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made. The purpose of the rule is to assure that a named defendant will be placed on notice of the lawsuit and therefore, the facts and circumstances under which service is attempted need to be evaluated and a court may enter into a factual analysis as to whether service was proper.¹ However, the general procedure for individual service is to serve the defendant personally or with an adult residing in the same home. For registered entities, such as corporations, limited liability companies, or partnerships, a plaintiff will typically research the designated agent for service of process with the applicable secretary or department of state and then serve that registered agent.² Service on an individual located in a foreign country is generally completed by (1) any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service

¹ Where there is uncertainty whether service of process was effected, a defendant is typically best served by filing an appearance in the case and then moving to dismiss for, among other defenses, insufficiency of service of process. See additional discussion below on Rule 12 motions to dismiss and Fed. R. Civ. P. 12(b)(5).

² Federal Rule of Civil Procedure 4(h) also permits service of process on a domestic or foreign corporation or a partnership or other unincorporated association by delivering a copy of the summons and of the complaint to an officer or a managing or general agent.

Abroad of Judicial and Extrajudicial Documents, (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice, such as: (a) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction, (b) as the foreign authority directs in response to a letter rogatory or letter of request, or (c) unless prohibited by the foreign country's law, by delivering a copy of the summons and of the complaint to the individual personally or using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt, or (3) by other means not prohibited by international agreement, as the court orders. See Fed. R. Civ. P. 4(f).

At times, a plaintiff may request that a defendant waive service of process under Fed. R. Civ. P. 4(d). This is commonly done as the parties had continuing discussion on the litigation and the filing of a lawsuit is not a surprise. The rule provides that "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons." The request must follow the procedural formalities under the rule, but once done and if the waiver is not signed, the court must then impose on the defendant the expenses later incurred in making service and the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses. Fed. R. Civ. P. 4(d)(2). The result of executing the waiver saves the plaintiff the time and expense in effecting service, but then also provides a benefit to the defendant in that the time period for filing a responsive pleading is extended to 60 days or, if the defendant is outside the United States, 90 days after the request for waiver was sent. *Id.* 4(d)(3).

Once a complaint is filed, a plaintiff is subject to time limits to effect service of process on a defendant. Under

Federal Rule of Civil Procedure 4(m), “[i]f a defendant is not served within 90 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time.” The court must, however, extend the time period for service of process where a plaintiff can demonstrate good cause.

Time to Serve a Responsive Pleading and the Filing of a Motion to Dismiss

Absent the execution of a waiver, the time period for serving a responsive pleading is 21 days after being served with the summons and complaint. Fed. R. Civ. P. 12(a)(1). However, where a party seeks to file a motion under Rule 12(b), the time periods are altered. The time period for filing a responsive pleading is automatically deferred and, following a court’s ruling denying the Rule 12 motion, is set to a time period of 14 days after notice of the court’s action. Fed. R. Civ. P. 12(a)(4).

A motion to dismiss under Rule 12(b) is a form of challenge to the allegations in a complaint and without disputing the merits of the case. Even accepting as true all reasonable factual averments, a court may be required to dismiss a lawsuit on various grounds. These grounds are set forth under the rule and include: (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, (4) insufficient process, (5) insufficient service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join a party under Rule 19. Hence, for example, a defendant may wish to challenge a court’s ability to exercise jurisdiction over the subject matter of the complaint or that defendant personally, argue that the case was filed in the wrong court, or among others, challenge the manner in which service of process was made; all without arguing whether the case has any legal merit and without even responding to the substantive factual allegations a plaintiff had made.³

³ As it applies to jurisdiction, a defendant may submit evidence,

Waiver and Preserving Certain Defenses

Legal defenses are effective tools to respond to litigation, but some of those may be waived when not timely asserted. A party is deemed to waive the defenses under Fed. R. Civ. P. 12(b)(2)-(5) by failing to make them by motion under Rule 12 or by failing to include the defenses in a responsive pleading. The effect is that where a defendant would seek to challenge the ability of the court to exercise personal jurisdiction, whether the particular court was the proper one for filing, or the validity of the service of process, he or she must raise it by Rule 12 motion or include the affirmative defense in an answer to the complaint. A challenge for a failure to state a claim upon which relief under Rule 12(b)(6) can be raised in any pleading, by a motion under Rule 12(c), or at trial. A challenge to a court’s subject matter jurisdiction under 12(b)(1) can be raised at any time and subject matter jurisdiction cannot be waived.

Temporary Restraining Orders, Preliminary Injunctions, and Related Evidentiary Hearings

A temporary restraining order and preliminary injunction are two similar procedures by which a party can obtain relief before the entry of a final judgment in a civil case. Under Federal Rule of Civil Procedure 65(b), “[t]he court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (a) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition and (b) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” A motion for preliminary injunction may, on the other hand, only be issued on notice to the adverse party. Fed. R. Civ. P. 65(b) by way of an affidavit or sworn declaration, in support of a motion to dismiss on jurisdictional grounds. Other limited circumstances also exist where evidence may be submitted in connection with a Rule 12 motion without conversion into a motion for summary judgment, but such are the exception to the general rule.

65(a)(1). The preliminary injunction has the additional option of being consolidated as a trial on the merits of the case. *Id.* 65(a)(2). A temporary restraining order is followed by a hearing for preliminary injunction and is set at the earliest possible time for hearing, taking precedence over all other matters except matters of the same character, or on 2 days' notice, or shorter as required by the court, by the adverse party. In summary, the temporary restraining order is a protection designed to prevent some form of immediate harm, but the preliminary injunction is a tool to preserve the parties' relative positions until final judgment on the case.

Overview of the Discovery Process and Motions for Summary Judgment

To appreciate the value underlying a Rule 12 motion, an understanding of the civil discovery process and motions for summary judgment is required. This is because a Rule 12 motion, if successful, is a tool designed to prevent the waste of time and both private and judicial resources in the taking of discovery or submitting evidence to the court when the case is due to be dismissed. The discovery process in a civil lawsuit typically consists of a scheduling conference, the taking of discovery, and, upon completion, the filing of summary judgment motions. The period typically begins with a Rule 16(b) scheduling conference. This conference is ordinarily the first opportunity the attorneys will have to discuss the case and is designed to promote order without the necessity of court involvement. While court assistance is available to resolve discovery disputes, the thrust of the rules are designed to alleviate the need for a judge's assistance until summary judgment motions are filed. The conference is followed by a proposed scheduling report by the parties and includes information pertaining to the modification of initial or continuing disclosures, the extent or scope of discovery to be taken, directions for disclosure, discovery, and the preservation of electronically stored information, entering agreements for the preservation of privileged information, setting a schedule for pretrial discovery

and the trial date, and such other matters as each local district court deems appropriate. Commonly, the parties are also ordered to discuss the prospect of an early settlement to the case and report to the court the likelihood of private resolution.

The conference and submission of a proposed scheduling order are followed by mandatory initial disclosures under Rule 26(a). These disclosures include (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment, (ii) a copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment, (iii) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered, and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. The importance of initial disclosures cannot be understated as they form the basis of the party's contemplated case. Hence a party is required to disclose the witnesses it seeks to call at trial, documents it intends to use, and then provide estimates of its damages; a failure of which will lead a court to prevent the party from later relying upon those witnesses, documents, or seeking the undisclosed damages.

An experienced trial lawyer will commonly work in reverse and first determine what the elements of

the parties' claims are, what evidence he or she would need to support or refute those claims or defenses, and then identify what discovery will need to be taken. This discovery will commonly consist of (i) written requests for production of documents (Rule 34), written interrogatories of which the opposing party would be required to serve sworn responses (Rule 33), and then the taking of live depositions of both parties and non-parties to the litigation (Rules 30 & 45). Conversely, the opposing attorney should also be familiar with the elements of the claims and necessary evidence and then prepare his or her witnesses to properly respond to the expected lines of questioning. Then, once both parties have had the opportunity, the pleadings, evidence, and documents on file (if not disputed or an evidentiary foundation has been established) are submitted to the court through summary judgment motions. These motions can be viewed as a trial on the parties' written submissions because, as opposed to motions to dismiss under Rule 12, a party is free to use any evidence in support that could be presented at trial. The judge can then review both sides' arguments and if the facts are uncontested and a legal decision can be entered on those undisputed facts, judgment is proper. If, however, there remains any dispute of material fact, those factual, credibility determinations must be submitted for ruling at trial.

A Practitioner's Perspective

The defense of a civil lawsuit begins with an understanding of the burden of proof. A plaintiff faces an uphill battle as it is the party requesting the court's assistance and therefore, it has the burden of pleading its case, following all procedural formalities in invoking the court's assistance, and then establishing the evidentiary basis of its case and associated damages. A defendant, on the other hand, can succeed by doing no more than defeating a plaintiff on one of the required showings. Hence, if a defendant can raise a challenge to the exercise of the court's jurisdiction or demonstrate that plaintiff's pleadings are defective, the court will never reach the

merits of the case. If, however, a plaintiff survives some of these initial defenses, the case will proceed to pleadings and discovery. A plaintiff will then have all of the burden of obtaining the necessary evidence to support its legal claims and the associated damages on each one of those claims. The hurdle is high as "proof" is measured by evidentiary standards and any evidence must have sufficient foundation for admissibility under the Federal Rules of Evidence. Therefore, an experienced trial lawyer will generally begin his or her discovery analysis with the evidentiary rules and the implementation of a strategy on admissibility. This is because even assuming a case is made on the legal theories plead, the plaintiff's case will be lost if he or she cannot demonstrate damages. A defense attorney can strip a plaintiff of its case by raising evidentiary objections and prohibiting the introduction or reliance of the various documents or statements that could have otherwise demonstrated to the court a right to some relief.

Above and beyond legal procedure, a civil lawsuit is about strategy and an understanding that judges and juries are people subject to persuasion. Some legal procedures are therefore undertaken not for the purpose for succeeding on the substance, but to reach an alternate goal in the case. For example, a Rule 12 motion to dismiss is an excellent tool to educate a judge about the case before the discovery period commences. The motion to dismiss can be filed and hearing noticed and thereby offer a judge an early opportunity to become familiar with the parties and counsel. In this regard, however, an experienced litigator will also advise that credibility is important to build and that may be achieved through consistency. A story is told at the outset of the case, but if new facts come to light and the story changes, the benefit of building a positive first impression may instead lead to a loss of credibility before the trial judge. In another example, restraining order and preliminary injunction hearings can be used to educate a judge at an early stage of the case, but may further be used as strategic tools to expedite a decision

on the merits. As these two types of hearings rely upon the submission of factual evidence and set entitlements to relief, the orders entered may be appealable as either interlocutory or final judgments. Instead of months or years of litigation, including the time necessary for the taking of discovery and the filing of dispositive motions, a party can obtain an immediate response or immediately appealable order for a higher court to review.

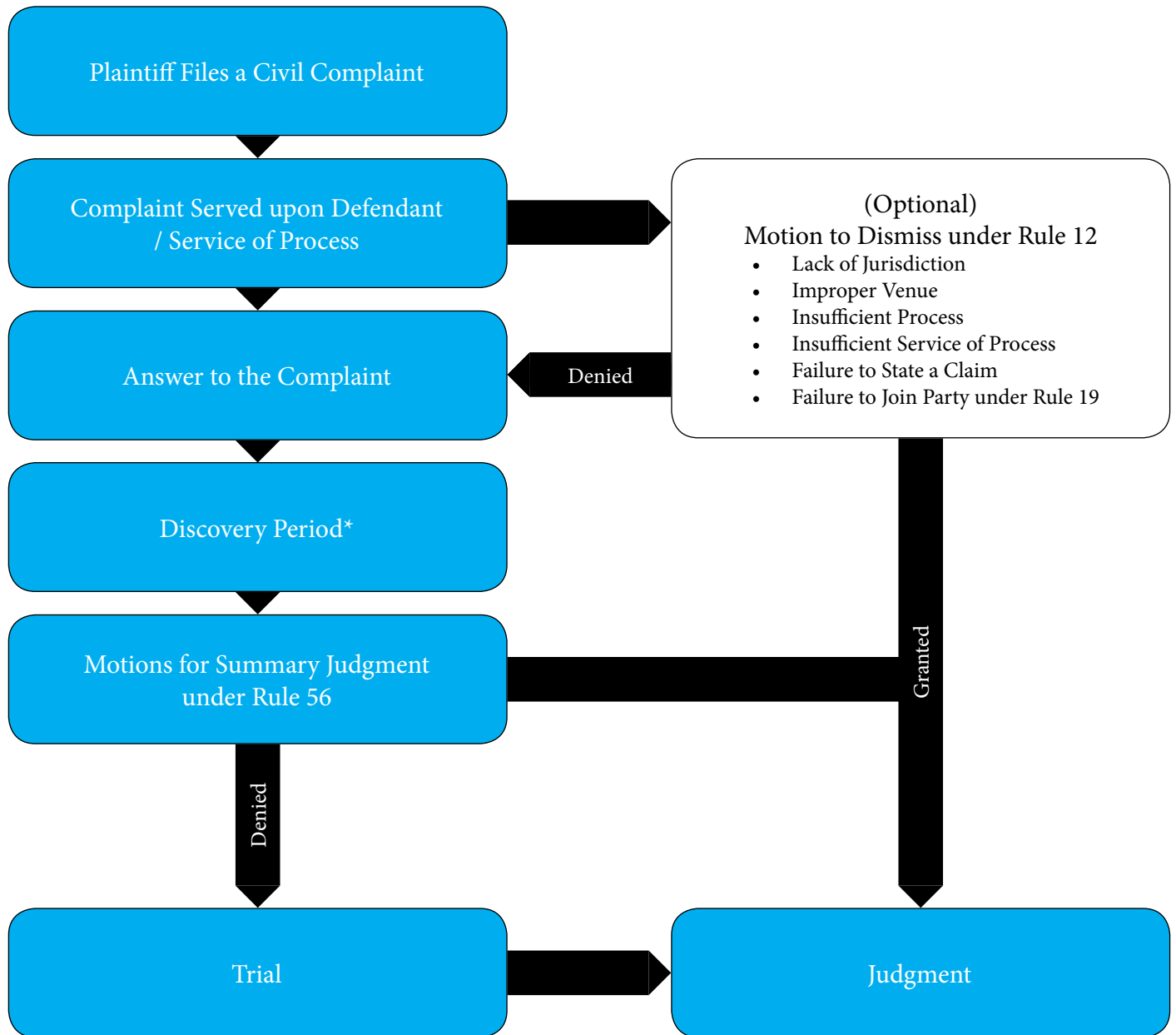
About the Author and Firm

Convergent Litigation Associates was launched in 2010 as the exclusive litigation division of the Convergent Capital Group. Convergent Litigation Associates is a law firm primarily focused on the representation of clients through complex commercial litigation. Recognizing the need for experienced representation through the terrain of the securities industry as well as commercial disputes, and the economic value in small firm representation, the law firm has represented individuals and investment groups, private and publicly-traded companies, and registered market participants through civil litigation and regulatory defense matters. The firm is prepared to provide exclusive representation in a number of U.S. jurisdictions and can also assist through such matters, in conjunction with locally admitted attorneys, on a national basis.

Mr. Stegawski serves our group as a Managing Director. Prior litigation experience has included civil and regulatory securities fraud defense, shareholder common fund and derivative litigation, cross-border securities fraud, and a variety of complex commercial litigation. Michael is admitted to practice law in the states of Florida and Georgia and is admitted to appear before the United States District Courts for the Southern, Middle, and Northern Districts of Florida, Middle and Northern Districts of Georgia, District of Colorado, as well as the United States Courts of Appeal for the Eighth and Eleventh Federal Judicial Circuits. Stegawski has also made special appearances in the United States

District Courts for the District of Utah, District of South Dakota, and the Central District of California. Internationally, Mr. Stegawski is admitted to practice law as a solicitor in England and Wales (currently non-practising). Michael received his bachelor's degree in finance from Wake Forest University and juris doctorate from the Georgia State University College of Law.

Overview of the Civil Litigation Process in Federal Courts



* 4-8 months, but commonly extended

CONVERGENT

ATLANTA

3525 Piedmont Road
7 Piedmont Center, Suite 300
Atlanta, GA 30305

MIAMI

1111 Brickell Avenue
Suite 1100
Miami, FL 33131

TAMPA

100 S Ashley Drive
Suite 600
Tampa, FL 33602