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The Partial Motion To Dismiss and the Defendant's Obligation To Answer

In civil litigation, timing is often everything. In most situations, federal and state rules of procedure set out that timing in detail. But in at least one instance, lawyers are given little guidance. And that is in the case of a "partial motion to dismiss."

Both Rule 12(a) of the Federal Rules of Civil Procedure and its Arizona counterpart ordinarily require the defendant in a civil case to serve an answer upon the plaintiff within 20 days after being served with a summons and complaint.[1] In a state court action, the defendant also must file its answer with the court within that time,[2] while the answer in a federal case must be filed within a reasonable time after being served upon the plaintiff.[3]

However, the time for answering the complaint is automatically extended in both state and federal cases if the defendant instead serves upon the plaintiff a timely motion permitted under Rule 12,[4] including a Rule 12(b) motion to dismiss the claim or claims asserted in the complaint.[5] In that event, the defendant has until 10 days after notice of the court's resolution of the motion within which to serve (and in state court file) its answer[6]—unless, of course, the court effectively dismisses the case in its entirety, in which event the defendant need make no further response to the complaint.[7]

In an effort to narrow the scope of an action,[8] the defendant also may elect to file a "partial motion to dismiss"[9]—that is, one directed to only some of the claims asserted in the complaint.[10] However, Rule 12 does not specifically authorize such motions,[11] and it is therefore unclear whether the defendant's submission of a partial motion to dismiss extends the time within which it must respond to any claims that are not addressed in its motion.[12]

This article explores that issue, on which there is relatively little federal case law,[13] and no existing authority in Arizona.[14] The importance of the issue arises primarily from the risk that a default judgment will be entered against a defendant who fails to respond to some of the plaintiff's claims,[15] and also from the fact that such a defendant might be precluded from asserting certain counterclaims against the plaintiff.[16] These risks are less significant in

Arizona state court cases, where a 10-day grace period protects parties from inadvertent defaults,[17] than they are in federal cases, where no comparable protection exists.[18]

The Minority View

The court in *Gerlach v. Michigan Bell Telephone Co.*[19] perceived itself to be the first court to address the impact of a partial motion to dismiss on the defendant's obligation to answer.[20] The defendant in that case moved to dismiss four of the six counts of the plaintiffs' complaint. The plaintiffs then moved for default judgment on the other two counts,[21] to which the defendant had submitted no response. The court described the issue before it in the following terms:

> This motion raises the issue of whether [a] defendant must answer certain counts contained in a complaint within 20 days after the service of the summons and complaint, pursuant to F.R.C.P. 12(a), even though the remaining counts of the complaint are the subject of a pending motion to dismiss and therefore need not be answered until 10 days after notice of the court's action on the motion, pursuant to F.R.C.P. 12(a)(1).[22]

The defendant argued that it should be permitted to narrow the scope of the litigation to those claims that were truly in dispute. The court agreed with this proposition[23] but concluded that it did not warrant suspending the defendant's obligation to answer or otherwise delaying the litigation with respect to those counts of the complaint that were not the subject of the defendant's motion to dismiss. Articulating the reasoning underlying what is now recognized as the minority view,[24] the *Gerlach* court stated: "Separate 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 F.R.C.P. 12(b)."[25]

The Majority View

Gerlach was not actually the first case to consider this question. The issue had been addressed, albeit briefly, three years earlier in *Business Incentives Co. v. Sony Corp.*[26]

The defendant in *Business Incentives* moved to dismiss seven counts of the plaintiff's nine-count complaint. The plaintiff, in turn, moved for summary judgment on the remaining two counts, arguing that it was entitled to judgment on those counts because the defendant failed to address them in its motion or in a separate answer. The court rejected the plaintiff's argument and denied its motion, stating without elaboration that the defendant's time to answer was automatically extended by the filing of its motion to dismiss.[27]

Despite the brief analysis by the *Business Incentives* court,[28] most courts that have subsequently addressed this issue have agreed with the conclusion reached in that case.[29] Indeed, the contrary view expressed in *Gerlach* is a relatively isolated one[30] that has received pointed criticism,[31] although at least one other court has agreed that the filing of a partial motion to dismiss should not suspend the defendant's obligation to answer the remainder of the complaint.[32]

Critics of the *Gerlach* approach argue that requiring a defendant to respond to any claims not addressed in its motion to dismiss would (1) result in duplicative pleadings in the event the motion is denied[33] and (2) create potential confusion over the proper scope of discovery while the motion is pending.[34]

The first concern may be overstated, because, unlike a defendant filing a motion to dismiss the entire complaint,[35] a defendant filing a partial motion to dismiss ultimately will be required to answer even if its motion is granted,[36] and it should not be difficult for the defendant to file a "partial" answer with its partial motion to dismiss and then simply amend that answer upon the resolution of its motion.[37]

The second concern is more significant.[38] Proceeding with the litigation while a partial motion to dismiss is pending may raise difficult issues regarding the proper scope of discovery.[39] For this reason, one federal appellate court has held that such motions ordinarily should be resolved before discovery is conducted.[40] That court explained that if the court "dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided."[41] By suspending the obligation to answer (and, at least arguably, the commencement of discovery) pending resolution of a partial motion to dismiss, the majority approach may avoid needless discovery involving claims that may be dismissed when the court rules on the motion.[42]

The principal perceived advantage of the *Gerlach* approach, on the other hand, is that it would prevent the defendant from filing a partial motion to dismiss as a tactic to delay the adjudication of the case.[43] Although this is undoubtedly a legitimate concern,[44] the emerging consensus appears to be that any dilatory tactics can be adequately addressed by other means,[45] including the potential imposition of Rule 11 sanctions against the moving defendant.[46]

The majority approach is also more consistent with the language and structure of Rule 12 itself.[47] Specifically, Rule 12(a) suspends the time for answering when the defendant submits any pre-answer motion under Rule 12,[48] including a motion to strike pursuant to Rule 12(f).[49] Almost by definition, a motion to strike addresses fewer than all of the claims in the complaint.[50]

If, as the courts have consistently held, Rule 12(b) similarly permits a defendant to file a motion to dismiss addressing only some of the plaintiff's claims,[51] it makes little sense to require such a defendant to respond to the plaintiff's remaining claims when the defendant could avoid that obligation simply by designating its motion (however improperly)[52] as a motion to strike.[53]

Practical Considerations

The weight of authority holds that the filing of a partial motion to dismiss suspends the time for answering the entire complaint, and not merely the claims that are the subject of the motion.[54] However, the case law addressing this issue is not extensive,[55] and the question technically remains an open one in most jurisdictions,[56] including Arizona.[57]

Despite the uncertainty surrounding the issue, even a court embracing the *Gerlach* view[58] is unlikely to conclude that entering a default judgment against a defendant who has filed a partial motion to dismiss is the appro-

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Prudent litigators should take affirmative steps to minimize the risks, however remote, that a default judgment may be entered on the counts to which the defendant has not responded.

priate remedy for its failure to respond to the claims that are not addressed in its motion.[59] However, this does not prevent an aggressive plaintiff from arguing to the contrary,[60] and no matter how remote the actual risk may be,[61] no prudent lawyer should welcome the opportunity to explain to the court—or a client, for that matter—why the client is not actually in default.[62]

One commentator has suggested that this dilemma can be avoided by filing a motion for partial judgment on the pleadings under Rule 12(c),[63] rather than a partial motion to dismiss under Rule 12(b).[64] Because the defendant cannot file a Rule 12(c) motion until after it has filed an answer,[65] this approach would eliminate any risk the defendant would be found to be in default on the claims that were not addressed in its motion[66] (assuming, of course, that the answer itself was timely filed).[67] However, precisely because a motion for partial judgment on the pleadings cannot be made until after the pleadings are closed,[68] a defendant proceeding in this manner necessarily foregoes the essential benefit of the automatic enlargement of time provided for in Rule 12(a)[69]—delaying (and in some cases even avoiding) the need to prepare and file an answer.[70]

Alternatively, the defendant could file a partial motion to dismiss and, prior to the expiration of the original 20-day period for responding to the complaint, also file a "partial" answer addressing the claims it is not moving to dismiss.[71] While this tactic has occasionally been employed,[72] it offers no apparent advantage over the filing of a motion for partial judgment on the pleadings.[73] Indeed, in the view of at least one court, a partial motion to dismiss submitted pursuant to Rule 12(b) would be "rendered moot by the filing of an answer," making it "procedurally impossible" for the court to rule on the motion without first recharacterizing it as a motion for partial judgment on the pleadings.[74]

In addition, in the one case in which the issue was squarely addressed, *Rawson v. Royal Maccabees Life Insurance Co.*,[75] the court struck a partial answer filed with the defendant's partial motion to dismiss, holding that the defendant was merely required to submit a single, comprehensive answer to the complaint within the extended time provided for under Rule 12(a)(1), regardless of whether its partial motion to dismiss was ultimately granted or denied.[76] The court explained:

> In this case, defendant's solution [to the uncertainty surrounding this issue] was to file a motion to dismiss two counts of the complaint and an answer to the remaining counts of the complaint. The Federal Rules of Civil Procedure, however, do not contain any provision allowing for partial answers of the sort defendant has filed. Indeed, the Federal Rules of Civil Procedure contemplate that there will be but a single answer to a complaint, regardless of the number of claims that complaint may allege[]. Thus, it appears that the procedure followed by the defendant, though clearly well-intended, is not proper under the applicable rules.[77]

A simpler and more practical approach would be for the defendant to move for an explicit enlargement of the time for responding to the remainder of the complaint at the time it submits its partial motion to dismiss.[78] This approach has also been followed in several cases,[79] and it not only minimizes the likelihood the defendant will be found to be in default,[80] but also avoids potentially difficult questions about the defendant's obligation to assert any compulsory counterclaims that would be raised by its filing of a partial answer in conjunction with its partial motion to dismiss.[81]

Although a formal judicial extension of the answer period technically may be unnecessary,[82] a court is likely to be receptive to a request for the clarity such a ruling would provide[83] (particularly if it is apprised of the existing split of authority on the issue).[84] In *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*,[85] for example, the defendants moved to dismiss some of the counts of the plaintiffs' amended complaint,[86] and simultaneously requested an enlargement of the time within which they were required to answer the remaining counts pursuant to Rule 6(b) of the Federal Rules of Civil Procedure.[87] The court held that the requested extension was warranted by the pending motion to dismiss, and in accordance with Rule 12(a), permitted the defendants to submit their answer within 10 days of its ruling on their motion.[88]

Conclusion

The vast majority of courts hold that a defendant's submission of a partial motion to dismiss extends the time within which the defendant must answer the remainder of the complaint. Nevertheless, in view of the limited authority on the subject (and the complete absence of controlling case law in Arizona), prudent litigators should take affirmative steps to minimize the risks, however remote, that a default judgment may be entered on the counts to which the defendant has not responded or that compulsory counterclaims may inadvertently be waived.

Though this may be accomplished in a number of ways, the most sensible approach is for the defendant to file a motion for an enlargement of time to respond to the remainder of the complaint concurrently with the filing of its partial motion to dismiss. This approach protects the defendant's interests in the litigation and promotes judicial economy by eliminating the need for duplicative pleadings and potentially narrowing the scope of discovery.

endnotes on p. 59

The Partial Motion To Dismiss and the Defendant's Obligation To Answer

—continued from p. 36

endnotes

1. *See* FED.R.CIV.P. 12(a)(1)(a); ARIZ.R.CIV.P. 12(a)(1)(a).
2. *See* ARIZ.R.CIV.P. 12(a)(1)(a).
3. *See* FED.R.CIV.P. 5(d); *Katz v. Morgenthau*, 709 F. Supp. 1219, 1226 (S.D.N.Y.), *aff'd in part and rev'd in part*, 892 F.2d 20 (2d Cir. 1989); *Madden v. Cleland*, 105 F.R.D. 520, 525 (N.D. Ga. 1985).
4. *See* FED.R.CIV.P. 12(a)(4); ARIZ.R.CIV.P. 12(a)(3); *Goff v. Superior Courts*, 409 P.2d 60, 64 (Ariz. Ct. App. 1965).
5. *See Ju Shu Cheung v. Dulles*, 16 F.R.D. 550, 552 (D. Mass. 1954); *State v. $5,500.00 in U.S. Currency*, 817 P.2d 960, 962-63 (Ariz. Ct. App. 1991).
6. *See Milk Drivers, Local Union 387 v. Roberts Dairy*, 219 F.R.D. 151, 152 (S.D. Iowa 2003); *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1115 (D. Minn. 2000); *$5,500.00 in U.S. Currency*, 817 P.2d at 962 & n.6.
7. *See Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475, 1480 (N.D. Ga. 1997); *Poe v. Cristina Copper Mines, Inc.*, 15 F.R.D. 85, 86 (D. Del. 1953).
8. *See Texas Taco Cabana, L.P. v. Taco Cabana of N.M., Inc.*, 304 F. Supp. 2d 903, 907 (W.D. Tex. 2003) (observing that "a motion to dismiss provides a valuable tool for narrowing and clarifying the scope of litigation").
9. *See Drewett v. Aetna Cas. & Sur. Co.*, 405 F. Supp. 877, 878 (W.D. La. 1975) ("Authorities indicate that [a Rule 12(b)(6)] motion [directed to the failure to state a claim upon which relief can be granted] may be used to challenge the sufficiency of part of a pleading such as a single count or claim for relief.") (citation omitted); *cf. Elliott v. State Farm Mut. Auto. Ins. Co.*, 786 F. Supp. 487, 489 (E.D. Pa. 1992) ("A Rule 12(b)(6) motion may be granted as to portions of a complaint.").
10. *See, e.g., Capresecco v. Jenkintown Borough*, 261 F. Supp. 2d 319, 321 (E.D. Pa. 2003) ("Defendants filed their Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), although the Court notes that Defendants' Motion is in the nature of a Partial Motion to Dismiss, because they only attack portions of Plaintiff's claims."); *cf. Wade v. United States*, 745 F. Supp. 1573, 1575 (D. Haw. 1990) (observing that a motion to dismiss addressing only some of the plaintiff's claims "is properly characterized as one for partial dismissal").
11. Although the rule itself is silent on the matter, "No reported decision has expressed doubt over the propriety of a partial motion to dismiss." Scott L. Cagan, *A "Partial" Motion to Dismiss Under Federal Rule of Civil Procedure 12: You*

Had Better Answer, 39 FED. B. NEWS & J. 202, 202 (1992).

12. *See Gerlach v. Michigan Bell Tel. Co.*, 448 F. Supp. 1168, 1174 (E.D. Mich. 1978) ("F.R.C.P. 12 does not explicitly address the issue of whether the filing of a motion under F.R.C.P. 12(b) … alters the time within which the moving party must respond to claims in the complaint not addressed in the motion.").
13. *See Oil Express Nat'l, Inc. v. D'Alessandro*, 173 F.R.D. 219, 220 (N.D. Ill. 1997) ("Whether a party is required to answer unchallenged counts after a Rule 12(b) motion has been filed as to certain, but not all, of the counts is an issue that has not received significant judicial attention.").
14. Arizona is not the only state in which this issue is unsettled. *See, e.g.*, Nelson G. Apjohn & Patrick F. Brady, *Dispositive Motions*, MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL § 6.2.1(b) practice note (Supp. 2002) ("The rules do not address whether a defendant who has moved to dismiss only some claims of a multicount complaint must file an answer with respect to the remaining counts within the 20-day period of Mass.R.Civ.P. 12(a). … [N]o Massachusetts decision addresses this issue.").
15. *See* Cagan, *supra* note 11, at 202 (observing that "practitioners … risk a default judgment if they do not answer the unchallenged counts of the complaint in the event they file a partial motion to dismiss").
16. The prevailing view in both the federal and Arizona state courts is that a default judgment precludes the defendant from subsequently asserting against the plaintiff a claim that would have constituted a compulsory counterclaim in the case in which the default judgment was entered. *See Lindquist v. Quinones*, 79 F.R.D. 158, 161 (D.V.I. 1978); *Rich v. Tudor*, 599 P.2d 846, 848 (Ariz. Ct. App. 1979). As the Arizona Supreme Court has explained:

    > A default judgment has the same res judicata effect as a judgment on the merits where the issues were litigated. We would circumvent the purpose of Rule 13(a) if we were to rule that a claim which was the subject of a compulsory counterclaim is not barred in a subsequent suit merely because judgment was taken by default rather than on the merits.

    Technical Air Prods., Inc. v. Sheridan-Gray, Inc., 445 P.2d 426, 428 (Ariz. 1968).
17. Rule 55(a) of the Arizona Rules of Civil Procedure "requires that notice of the application for entry of default shall be given to the party claimed to be in default." *State ex rel. Corbin v. Marshall*, 778 P.2d 1325, 1327 (Ariz. Ct. App. 1989) (discussing ARIZ.R.CIV.P. 55(a)). The rule then permits the party in default to file an answer within a 10-day "grace period," in which event "the clerk's entry of default never takes effect." *Corbet v. Superior Court*, 798 P.2d 383, 385 (Ariz. Ct. App. 1990). The rule thus "essentially extends the time to answer under Rule 12(a)" by enabling a defendant to be relieved of its default "simply by filing an answer within the 10-day grace period." *Gen. Elec. Capital Corp. v. Osterkamp*, 836 P.2d 398, 402 (Ariz. Ct. App. 1992).
18. If the defendant in a federal case "fails to file an answer in response to a complaint, and the plaintiff notifies the Court, then the Clerk must enter default against that defendant." *Kingvision Pay-Per-View Ltd. v. Niles*, 150 F. Supp. 2d 188, 190 (D. Me. 2001) (citing FED.R.CIV.P. 55(a)). Once that occurs, "no responsive pleading may be made … unless the Defendant formally moves to set aside the entry of default." *Maryland Nat'l Bank v. M/V Tanicorp I*, 796 F. Supp. 188, 190 (D. Md. 1992); *see also Kingvision Pay-Per-View*, 150 F. Supp. 2d at 189 ("[O]nce default has been entered, the only appropriate response for a defendant to make is a motion to set aside default."). It is also "hornbook law that once default has been entered by the Clerk, only the Court is empowered to set it aside," *Loperena Hernandez v. Hernandez*, 107 F.R.D. 102, 104 (D.P.R. 1985), and it may do so "only … upon a showing of 'good cause.'" *Kingvision Pay-Per-View*, 150 F. Supp. 2d at 190 (citing FED.R.CIV.P. 55(c)).
19. 448 F. Supp. 1168 (E.D. Mich. 1978).
20. *See id.* at 1174 ("[T]here appears to be no case law which addresses this issue."); *see also Bull HN Info. Sys., Inc. v. American Express Bank Ltd.*, 1990 Copyright L. Dec. (CCH) ¶ 26,555, at 23,280 (S.D.N.Y. 1990) (describing *Gerlach* as "the only case on point").
21. *See Gerlach*, 448 F. Supp. at 1170. In federal cases, obtaining a default judgment is "a two-step process." *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005). First, "[t]he Clerk of Court is authorized to enter default when 'a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend.'" *Ritts*, 989 F. Supp. at 1479 (quoting FED.R.CIV.P. 55(a)). In the second step of the process, "a default judgment may be obtained only by application to the court." *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1152 n.11 (2d Cir. 1995) (quoting 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.03[2], at 55-21 (2d ed. 1994)).
22. *Gerlach*, 448 F. Supp. at 1174.
23. *Id.*; *cf. Riddle v. Egensperger*, 266 F.3d 542, 551 (6th Cir. 2001) (discussing the use of a Rule 12(b) motion "to narrow the claims at the onset of the case, rather than engaging in extensive discovery").
24. *See Finnegan v. University of Rochester Med. Ctr.*, 180 F.R.D. 247, 249-50 (W.D.N.Y. 1998) ("*Gerlach* … appears to be in the minority among the courts that have addressed this issue.").
25. *Gerlach*, 448 F. Supp. at 1174.
26. 397 F. Supp. 63 (S.D.N.Y. 1975).
27. *Id.* at 64.
28. *See* Cagan, *supra* note 11, at 203 (noting that the *Business Incentives* court reached its conclusion "without explanation").
29. *See, e.g., Oil Express Nat'l*, 173 F.R.D. at 221 (relying on *Business Incentives* in holding that "a partial motion to dismiss allows for altering the [time] limits of FED.R.CIV.P. 12(a) with respect to answering those claims not addressed in [the] motion").
30. *See Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 122 (D. Mass. 2001) ("Since the issuance of the *Gerlach* decision, no court has relied on its reasoning or followed its ruling.").
31. *See, e.g., Godlewski v. Affiliated Computer Servs., Inc.*, 210 F.R.D. 571, 572 (E.D. Va. 2002) ("The *Gerlach* court's resolution of the issue under the minority approach is, in this Court's opinion, unnecessarily formalistic at the expense of sound policy and judicial economy.").
32. *See Bull HN Info. Sys.*, 1990 Copyright L. Dec. (CCH) ¶ 26,555, at 23,280 (relying on *Gerlach* in suggesting that Rule 12(a) requires a defendant "to move or answer as to each count" of the complaint).
33. *See Oil Express Nat'l*, 173 F.R.D. at 221; *Brocksopp Eng'g, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486-87 (E.D. Wis. 1991).
34. *See Oil Express Nat'l*, 173 F.R.D. at 221; *Brocksopp Eng'g*, 136 F.R.D. at 487.
35. *See Ritts*, 989 F. Supp. at 1480:

    > [I]f a Rule 12(b) motion is granted, it will lead to dismissal of the action and the party who filed it will never have to file a response. In such an instance, therefore, … it makes sense not to make the party file an answer until the Rule 12 motion is resolved.

36. *See Rawson v. Royal Maccabees Life Ins. Co.*, No. 93 C 6866, 1994 WL 9638, at *1 (N.D. Ill. Jan. 11, 1994) ("The difficulty is that, [even] if the motion is granted, it will still be necessary for the defendant to serve an answer to the remaining claims of the complaint.").
37. *See* Cagan, *supra* note 11, at 204 ("[T]he potential for piecemeal pleadings[] can be alleviated by the simple filing of an amended answer upon the disposition of the motion. With today's computer technology, amending an answer is hardly a cumbersome task.") (emphasis omitted).
38. *See, e.g., Katt v. N.Y.C. Police Dep't*, No. 95 Civ. 8283 (LMM), 1997 WL 394593, at *2 n.2 (S.D.N.Y. July 14, 1997) (noting that the plaintiff's assertion of multiple claims "caused substantial disagreement among the parties about the scope of discovery with respect to the various claims," which resulted in "time-consuming motion practice relating to the proper scope of discovery").
39. *Compare Weiss v. Int'l Bhd. of Elec. Workers*, 729 F. Supp. 144, 148 (D.D.C. 1990) ("[T]he Court stayed discovery pending a ruling on defendants' partial motion to dismiss.") *with Powell v. City of Chicago*, 94 F. Supp. 2d 942, 946 (N.D. Ill. 2000):

    > The court's decision to allow plaintiff to go forward rests in part on the fact that

the instant partial motion to dismiss would not dispose of the entire case. Because the parties will have to conduct discovery regardless of the outcome of the instant motion, it would be premature to bar plaintiff at this early stage from [proceeding].

40. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should … be resolved before discovery begins.") (footnote omitted).
41. *Id.* at 1368.
42. In most jurisdictions, the filing of a motion to dismiss under Rule 12(b) does not automatically stay discovery pending resolution of the motion. *See In re Sulfuric Acid, Antitrust Litig.*, 231 F.R.D. 331, 336 & n.5 (N.D. Ill. 2005). Nevertheless, "such stays are granted with substantial frequency," *id.* at 336, and are clearly appropriate "where the likelihood that such motion may result in a narrowing … of discovery outweighs the likely harm to be produced by the delay." *19th Street Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000) (internal quotation marks and citation omitted).
43. *See Godlewski*, 210 F.R.D. at 572 ("[T]he minority approach has the advantage of preventing a party from using a partial Rule 12(b) motion to delay adjudication of the remaining portion of the action."); Cagan, *supra* note 11, at 204 ("[R]equiring a defendant to answer the unchallenged counts discourages the filing of a partial motion to dismiss solely as a dilatory tactic, and encourages expedient discovery.").
44. *See* Cagan, *supra* note 11, at 204 ("A partial motion to dismiss often has the practical effect of impeding, often paralyzing, the progress of discovery, and the Rules contemplate a steady—if not swift—discovery pace."); *cf. Washington v. City of Evanston*, 535 F. Supp. 638, 639 n.2 (N.D. Ill. 1982) ("Like the large majority of [Rule] 12(b)(6) motions, in principal part this one has accomplished little except to delay the real commencement of litigation.").
45. Indeed, the filing of a motion to dismiss suspends the time for answering only if a specific time for doing so is not otherwise "fixed by court order." FED.R.CIV.P. 12(a)(4). Thus, a court clearly could avoid any prejudicial delay simply by requiring the defendant to file an answer despite its submission of a partial motion to dismiss. *See, e.g., In re Longhorn Secs. Litig.*, 573 F. Supp. 255, 263 (W.D. Okla. 1983) ("To expedite this litigation, … the Court has required the defendants to answer the complaints even though their pre-answer motions were still under consideration.").
46. *See, e.g., Godlewski*, 210 F.R.D. at 572-73 (["[A]ny potential abuses or dilatory tactics which the minority approach seeks to prevent can … be guarded against under the

majority approach through the use of Rule 11 sanctions to deter abuse.").

47. *See generally Finnegan*, 180 F.R.D. at 249 ("[T]he language of Rule 12 itself does not support [the minority] position."); *Bull HN Info. Sys.*, 1990 Copyright L. Dec. (CCH) ¶ 26,555, at 23,280 (observing that requiring the defendant to answer claims not addressed in a partial motion to dismiss "is not required by the plain language" of Rule 12(a)).
48. *See Ricciuti v. N.Y.C. Transit Auth.*, No. 90, Civ. 2823 (CSH), 1991 WL 221110, at *2 (S.D.N.Y. Oct. 3, 1991) ("*Any* motion, particularly when the motion addresses a significant portion of the complaint …, will suspend the time to answer any claim."); *Merchants Nat'l Bank v. Safrabank (California)*, No. 90-4194-R, 1991 WL 173784, at *1 (D. Kan. Aug 28, 1991) ("Ordinarily, a defendant need not file an answer until ten days after the court has ruled on any motions permitted by Rule 12.").
49. *See Sellers v. Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994) ("Rule 12(a)(4) allows a party that files a motion to strike a pleading to delay filing his responsive pleading until ten days after the motion is denied . . . ."); *Fredrick v. Clark*, 587 F. Supp. 789, 791 (W.D. Wis. 1984) (observing that the motions that enlarge the time for answering under Rule 12(a) "are, of course, listed in Rule 12(b) through (f)"). *But see* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1346, at 46-47 (3d ed. 2004) (observing that the "extension of time provision in Rule 12(a) does not apply to the *grant* of a motion to strike under Rule 12(f)," although the rule's "failure to deal with this situation probably is simply an unintended omission") (emphasis added).
50. *See, e.g., Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1332 n.92 (11th Cir. 1998) (discussing the defendants' "Rule 12(f) motion to strike some of the general allegations from the complaint"); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) ("Under Rule 12(f), Defendants seek to strike several items from the Complaint."); *cf. Battle v. Nat'l City Bank of Cleveland*, 364 F. Supp. 416, 419 (N.D. Ohio 1973) ("Ordinarily an entire pleading should not be stricken, but only those portions, if any, which are objectionable.").
51. *See, e.g.*, *Rawson*, 1994 WL 9638, at *1 (noting that the rule "does not require that the motion go to all of the claims in a complaint"); *United States v. Union Corp.*, 194 F.R.D. 223, 233-34 (E.D. Pa. 2000):

    > A party moving under Rule 12(b)(6) may challenge the sufficiency of one, some, or all of the claims for relief contained in a pleading; the overall action is not directly at issue. . . . Nothing in the language of [the] rule suggests that its effect and application should turn on whether only one or some claims … or the entire action is at issue.

52. *See Wray v. Edward Blank Assocs., Inc.*, 924 F. Supp. 498, 501 (S.D.N.Y. 1996) ("Technically, motions to strike are not proper methods of disposing of part or all of a complaint. However, to avoid being restricted by the technical form of common-law practice, which the federal rules have abandoned, courts may treat motions to strike as motions to dismiss.") (citation omitted).
53. Indeed, because "the essential functions of a motion to strike and a motion to dismiss are practically identical," *Ham v. Aetna Life Ins. Co.*, 283 F. Supp. 153, 154 (N.D. Okla. 1968), a court could elect to treat a partial motion to dismiss "as a motion to strike or dismiss certain paragraphs of [the] plaintiff's complaint." *Stoutt v. S. Bell Tel. & Tel. Co.*, 598 F. Supp. 1000, 1001 (S.D. Fla. 1984) (emphasis omitted); *cf. Belton v. Air Atlanta, Inc.*, 647 F. Supp. 28, 28-29 n.2 (N.D. Ga. 1986) (observing that a "motion to strike portions of [a] plaintiff's complaint" is "similar in effect to a motion to dismiss").
54. *See Godlewski*, 210 F.R.D. at 572; *Finnegan*, 180 F.R.D. at 249; *Oil Express Nat'l*, 173 F.R.D. at 220.
55. *See Finnegan*, 180 F.R.D. at 249; *Oil Express Nat'l*, 173 F.R.D. at 220.
56. *See Godlewski*, 210 F.R.D. at 572 ("Case law … fails to conclusively decide the issue.").
57. *See* Josh Belinfante, *To Answer or Not to Answer: The Partial Motion to Dismiss*, 52 FED. LAW. 20, 20-21 (Nov./Dec. 2005) (contrasting the minority view represented by *Gerlach* with the majority view embraced by courts in nine states other than Arizona).
58. The *Gerlach* court itself concluded that default was too "harsh" a penalty for the defendant's failure to submit an answer, and gave the defendant 10 days from the date of its ruling on the defendant's partial motion to dismiss within which to submit an answer. *Gerlach*, 448 F. Supp. at 1174; *see also Bull HN Info. Sys.*, 1990 Copyright L. Dec. (CCH) ¶ 26,555, at 23,280 (observing that the entry of a default judgment would be a "very harsh remedy" for a defendant's failure to answer claims that were not addressed in its motion to dismiss).
59. *See, e.g.*, *Schwartz v. Berry Coll., Inc.*, 74 Fair Empl. Prac. Cas. (BNA) 999, 1000 (N.D. Ga. 1997):

    > Significant case law and one of the most authoritative treatises on Federal Practice and Procedure supports Defendants' position that, when a defendant files a Rule 12(b)(6) motion to dismiss, addressing only some of the claims contained in the plaintiff's complaint, the defendant is not required to file an answer until the court rules on the motion to dismiss. . . . Given this, the court has no trouble concluding that, even if Defendants' view of the Federal Rules is mistaken, Defendants had good cause … for their alleged default. Accordingly, the Court denies Plaintiff's Motion for Entry of Default Judgment and grants Defendants' Motion to Vacate Entry of Default.

60. *See, e.g.*, *Alex. Brown & Sons Inc. v. Marine Midland Banks, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 99,440, at 96,893 (S.D.N.Y. 1997) ("Alex. Brown has moved for a default judgment with respect to the claims Marine has not moved to dismiss, based on Marine's refusal to answer those claims prior to a decision on the instant motion to dismiss.").
61. *See* Cagan, *supra* note 11, at 204 ("Although a court is likely to vacate a clerk's entry of default or a default judgment even if it agrees with the *Gerlach* interpretation of Rule 12(a), it is possible that a court may refuse to vacate them.").
62. *See id.* at 204:

    > [I]t is the clerk, and not the court, which enters a default as a matter of course if less than all of the counts are attacked. Hence, even if the court agrees that Rule 12(a) enlarges a defendant's time to answer all of the counts until resolution of the motion, the attorney will be forced to file a motion to vacate the clerk's entry of default.

    (footnote omitted.)
63. *See Does I Through III v. District of Columbia*, 238 F. Supp. 2d 212, 221 n.9 (D.D.C. 2002) ("[I]t is well established that 'a motion for partial judgment on the pleadings is appropriate[.]'") (quoting *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F. Supp. 2d 1253, 1258 (D. Kan. 1998)); *Moran v. Peralta Cmty. Coll. Dist.*, 825 F. Supp. 891, 893 (N.D. Cal. 1993) ("Although Rule 12(c) does not expressly authorize 'partial' judgments, neither does it bar them, and it is common practice to apply Rule 12(c) to individual causes of action."). *But cf. Picker Int'l, Inc. v. Mayo Found.*, 6 F. Supp. 2d 685, 688 (N.D. Ohio 1998) ("[I]t is not clear whether a Rule 12(c) motion should be granted when it would not dispose of the entire case.").
64. *See* Belinfante, *supra* note 57, at 21 ("[A] defendant could file an answer, then file a motion for judgment on the pleadings pursuant to Rule 12(c), and then move to stay discovery pending the resolution of the Rule 12(c) motion."); *cf. Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993) ("A defendant may use a rule 12(c) motion after the close of the pleadings to raise various rule 12(b) defenses regarding procedural defects, in which case courts apply the same standard applicable to the corresponding 12(b) motion.").
65. *See Straker v. Metro. Transit Auth.*, 333 F. Supp. 2d 91, 94 n.1 (E.D.N.Y. 2004); *N.Y. State United Teachers v. Thompson*, 459 F. Supp. 677, 680 (N.D.N.Y. 1978).
66. *See, e.g.*, *Gordon-Maizel Constr. Co. v. LeRoy Prods., Inc.*, 658 F. Supp. 528, 531 (D.D.C.

1987) (noting that the defendants "answered the complaint, rather than risk a default judgment"); *see also Landman v. Borough of Bristol*, 896 F. Supp. 406, 409 (E.D. Pa. 1995) ("When filing an answer, a party may simply be seeking to avoid the risks of default."); *Prod. Stamping Corp. v. Maryland Cas. Co.*, 829 F. Supp. 1074, 1077 (E.D. Wis. 1993) ("[T]he filing of an answer may be no more than a careful lawyer's decision to avoid the risk of default.").

67. *See, e.g., Jamaica Lodge 2188 of Bhd. of Ry. Employees v. Ry. Express Agency, Inc.*, 200 F. Supp. 253, 254 (E.D.N.Y. 1961) ("[A]fter filing a timely answer, the defendant in this action moved pursuant to Fed.R.Civ.P. 12(c) … for judgment on the pleadings."). *See generally Cetenich v. Alden*, 177 F.R.D. 94, 95 (N.D.N.Y. 1998) ("A defendant avoids default by filing *either an answer or a Rule 12 motion* within twenty days of service of the complaint.") (emphasis added).
68. *See Signature Combs, Inc. v. United States*, 253 F. Supp. 2d 1028, 1030 (W.D. Tenn. 2003); *Little v. FBI*, 793 F. Supp. 652, 653 (D. Md. 1992), *aff'd*, 1 F.3d 255 (4th Cir. 1993).
69. *See Blessing v. Norman*, 646 F. Supp. 82, 83 (N.D. Ga. 1986) (noting that "*pre-answer* motions … toll [the] defendant's time for answering" under Rule 12(a)) (emphasis added); 6 B. E. WITKIN, CALIFORNIA PROCEDURE *Proceedings Without Trial* § 164, at 577 (4th ed. 1997) ("A motion for judgment on the pleadings does not extend the time to plead so as to avoid a default, and thus should not be filed in lieu of a responsive pleading.") (citation omitted).
70. *See Everett v. Trans-World Airlines*, 298 F. Supp. 1099, 1103 (W.D. Mo. 1969) (observing that Rule 12(a) "temporarily relieves [the] defendant of the duty to answer"); *cf. Carter v. Am. Bus Lines, Inc.*, 22 F.R.D. 323, 326 (D. Neb. 1958) ("The reason one would raise [its] defenses by motion [under Rule 12(b)] rather than answer lies in the hope to have the defense sustained without resorting to the trouble of pleading an answer.").
71. *See* Apjohn & Brady, *supra* note 14, at § 6.2.1(b):

> One option for a defendant filing a partial motion to dismiss is to file, simultaneously, a partial answer to the complaint—answering only those claims not addressed in the partial motion to dismiss. Then, following notice of the court's action on the motion to dismiss, the defendant has 10 days to answer the remaining counts of the complaint, to the extent necessary under the court's ruling.

72. *See, e.g.*, *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357, 359 (3d Cir. 1978); *Chisholm v. T.J.X. Cos.*, 286 F. Supp. 2d 736, 738 (E.D. Va. 2003); *U.S. Fid. & Guar. Co. v. Bank of Bentonville*, 29 F. Supp. 2d 553, 555 (W.D. Ark. 1998).
73. Indeed, a court is likely to treat a partial motion to dismiss pending when an answer is filed as if the motion were actually one for partial judgment on the pleadings under Rule 12(c). *See, e.g.*, *Stanley v. St. Croix Basic Serv., Inc.*, 291 F. Supp. 2d 379, 381 n.1 (D.V.I. 2003) ("[B]ecause the Partial Motion to Dismiss in Lieu of an Answer was filed at the same time as the Answer, it should have been framed as a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure."); *see also Colin v. Marconi Commerce Sys. Employees' Ret. Plan*, 335 F. Supp. 2d 590, 607 n.20 (M.D.N.C. 2004).
74. *Brisk v. City of Miami Beach*, 709 F. Supp. 1146, 1147-48 (S.D. Fla. 1989). *But see Beary v. West Publ'g Co.*, 763 F.2d 66, 68 (2d Cir. 1985) ("Although Fed.R.Civ.P. 12(b) encourages the responsive pleader to file a motion to dismiss before pleading, nothing in the rule prohibits the filing of a motion to dismiss with an answer.").
75. No. 93 C 6866, 1994 WL 9638 (N.D. Ill. Jan. 11, 1994).
76. *See id.*, 1994 WL 9638, at *2.
77. *Id.* (citations omitted); *cf. Becker v. Fitzgerald*, No. 94 C 7646, 1995 WL 215143, at * 2 (N.D. Ill. Apr. 10, 1995):

> [T]he Federal Rules of Civil Procedure contemplate that a defendant shall file a single answer. If a motion for a more definite statement has been served and made, the defendant's single answer is to be made after the ruling on the motion within the time limits set by Rule 12(a)(4)(A). The procedure defendant … used—interposing an answer to part of a complaint and making a Rule 12 motion directed to another part of the complaint—is nowhere to be found in the Federal Rules of Civil Procedure.

(citation omitted.)

78. *See* Cagan, *supra*, note 11, at 204 ("[A]n attorney who files a partial motion to dismiss would be prudent to either seek permission from opposing counsel to extend its time to answer the unchallenged counts, or move the court for an extension of time to answer the unchallenged counts.").
79. *See, e.g.*, *In re Cendant Corp. Sec. Litig.*, 190 F.R.D. 331, 333 (D.N.J. 1999); *Gates Energy Prods., Inc. v. Yuasa Battery Co.*, 599 F. Supp. 368, 370 (D. Colo. 1983); *Gines v. Bailey*, Civ. A. No. 92-4170, 1992 WL 394512, at *1 (E.D. Pa. Dec. 29, 1992).
80. *See* Belinfante, *supra* note 57, at 21 ("Many practitioners wisely file a motion to extend the time to answer pending the court's resolution of the motion to dismiss. Such a motion tells the court why no answer will be forthcoming, and it provides strong ammunition if the opposing party moves for a default judgment.").
81. Because "Rule 13(a) only requires a compulsory counterclaim if the party who desires to assert [the] claim has served a pleading," *United States v. Snider*, 779 F.2d 1151, 1157 (6th Cir. 1985), the filing of a Rule 12(b) motion ordinarily extends not only the time within which the defendant is required to answer, but also the time within which it must assert any compulsory counterclaims (although the filing of a motion to dismiss does *not* toll the substantive statutes of limitation applicable to any counterclaims). *See Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp. 2d 1001, 1009 (D. Colo. 2000). However, because a defendant ordinarily waives any compulsory counterclaims "not asserted in [its] first responsive pleading," *id.*, its submission of a "partial answer" with its motion to dismiss might preclude it from pursuing any compulsory counterclaims not also asserted at that time. *Cf. Andrx Pharms., Inc. v. Biovail Corp.*, 175 F. Supp. 2d 1362, 1376 (S.D. Fla. 2001) (suggesting that the defendant's obligation to assert counterclaims arises when it serves "an answer (or partial answer)"), *vacated and remanded*, 276 F.3d 1368 (Fed. Cir. 2002).
82. *See Klein v. Spear, Leeds & Kellogg*, 306 F. Supp. 743, 751 n.5 (S.D.N.Y. 1969):

> [D]efendants move additionally for an order pursuant to Rule 6(b), F.R.Civ.P., extending the time within which they must answer to "ten days after the decision of [their] motions." Having moved pursuant to Rule 12(b), F.R.Civ.P., for dismissal …, the time provisions of Rule 12(a), F.R.Civ.P., automatically alter and extend defendants' time to answer as per defendants' request and without the need of a court order since these motions to dismiss were not fully granted.

83. *See, e.g., Oil Express Nat'l,* 173 F.R.D. at 221 (holding that a "partial motion to dismiss allows for altering the [time] limits of FED.R.CIV.P. 12(a) with respect to answering those claims not addressed in [the] motion").
84. *See* Belinfante, *supra* note 57, at 21 (noting that "[c]itations to the [relevant] cases should be included" in any motion to enlarge the time for answering).
85. 915 F. Supp. 378, *reconsideration denied*, 916 F. Supp. 1557 (N.D. Ga. 1995), *aff'd*, 87 F.3d 1242 (11th Cir. 1996).
86. *See id.* at 379-80, 381 (noting that the defendants moved to dismiss "Counts Three, Four, Seven and, Nine of the [plaintiffs'] amended complaint" and, on separate grounds, "Count Eight of the amended complaint").
87. *See id.* at 384. Rule 6(b) permits the court, upon timely motion, to enlarge the time within which a required act must be done "for cause shown." FED.R.CIV.P. 6(b). The rule thus enables the court to extend the time within which a responsive pleading must be served under Rule 12(a). See *Sony Corp. v. Elm State Elecs., Inc.*, 800 F.2d 317, 319 (2d Cir. 1986).
88. *See Preserve Endangered Species,* 915 F. Supp. at 384.