The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am the trial judge for Division V of the Circuit Court of Shelby County, Tennessee for the Thirtieth Judicial District at Memphis. I am also an adjunct professor at Cecil C. Humphreys School of Law where I teach Federal Courts during the regular term and Legal Methods in the Tennessee Institute for Pre-Law Program.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I have been licensed to practice law in Tennessee since 1991. My BPR number is 014905.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am licensed to practice law only in the State of Tennessee.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

I have never been denied admission to, suspended, or placed on inactive status by the Bar of any state.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Employment Since Completion of Legal Education

Judicial law clerk for Hon. Bailey Brown, Sixth Circuit Court of Appeals (1991-92)

Associate attorney in the business law section at Armstrong, Allen, Prewitt, Johnston & Holmes (1992-93)

Counsel and later Chief Counsel doing transactional work at International Paper Company (1993-2004)

Assistant General Counsel doing transactional work and managing litigation (employment and commercial matters) at Accredo Health, Incorporated (2004)

Contract attorney through Counsel on Call, assigned to work on securities litigation at Tate, Lazarini & Beall (November 2004 – first quarter 2005)

Corporate Counsel/Director of Errors and Omissions Management managing litigation at Sedgwick Claims Management Services, Inc. (2005 – 2009)

Shelby County Circuit Court Judge, Division VIII (March 2010 – September 2010)

Mediator/Arbitrator/Special Master – Ridder Hurd PLLC, later Blair Ridder Hurd PLLC (October 2010 – September 2014)

Shelby County Circuit Judge, Division V (September 2012 – January 1, 2013) (sitting by designation of the Tennessee Supreme Court during absence of Judge Kay S. Robilio)

Shelby County Circuit Judge, Division V (elected to an eight-year term in August 2014)

Additional Employment in Legal Profession

Summer Instructor/Civil Procedure – Tennessee Institute for Pre-Law (1998 – 2010)

Summer Instructor/Legal Methods – Tennessee Institute for Pre-Law (2011 – Present)

Adjunct Professor/Federal Courts – Cecil C. Humphreys School of Law (2004 – 2013, 2019)

Assistant to the Tennessee Board of Law Examiners (1993 – 2012) (responsible for writing and grading bar exam questions)

Employment Prior to Law School

Prior to law school, I was a college English professor. My first position was at Fisk University. After completing the course requirements for my Ph.D., I taught at Middle Tennessee State University. I moved back to Memphis in 1980 and taught English at Memphis State (now University of Memphis). During the summers for several years beginning in 1981, I taught a humanities course in the University of Tennessee Health Careers Opportunity Program for prospective doctors, dentists, nurses, and pharmacists. In 1988, I enrolled in law school. During the summers after my first and second years of law school, I was a summer associate at Hanover, Walsh, Jalenak & Blair.

In the late 1990's, a business partner and I owned and operated a bath and body shop at Memphis International Airport. The shop closed when the construction of a connector between two concourses required use of our space.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Since completion of my legal education, I have never been unemployed in excess of six months.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am a circuit court judge presiding over a variety of civil matters including domestic relations, premises liability, breach of contract, automobile accidents, orders of protection, healthcare liability, and appeals from General Sessions Court. I conduct jury trials and bench trials. I also conduct judicial settlement conferences for cases pending in other divisions of Circuit Court. About forty percent of my time is spent on domestic relations cases, forty percent on personal injury/tort cases, and the balance on other general civil matters.

In addition to my work as a judge, I teach Federal Courts at Cecil C. Humphreys School of Law. The course is a three-hour elective course that considers the role of federal courts in our constitutional system. It examines such concepts as congressional powers related to the federal and legislative courts; the doctrines limiting the jurisdiction of federal courts; the interplay between state and federal courts and state and federal law; federal courts' lawmaking powers; immunity and abstention doctrines; and habeas corpus.

During the summer, I teach Legal Methods in the Tennessee Institute for Pre-Law Program.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I entered the legal profession after having taught composition and literature as a college English professor for seventeen years. As a result, my natural inclination was to work as a transactional lawyer, and that is what I did for most of my legal career. For the nine months I spent at a law firm, I was assigned to the business section. I drafted agreements, prepared financial documents, and worked on various business transactions. I also represented the principals of some of the firm's corporate clients on personal matters.

At International Paper, where I was in-house counsel for 12 years, I drafted, reviewed, and negotiated agreements including procurement, sales, outsourcing, and consulting agreements. I was also legal counsel to the IT department. In addition, as head of the legal department's knowledge management initiative, I designed and implemented tools for sharing information and resources across the department, including various intranet and extranet sites and databases to facilitate workflow. I was a member of the legal department's management team.

At Accredo Health, I drafted, reviewed, and negotiated information technology agreements, including software licenses, maintenance agreements, hardware purchase agreements; real estate leases; service and consulting agreements; distribution agreements; and partnership agreements. In addition, I provided legal support for the marketing, workers' compensation, and benefits departments and managed employment and commercial litigation.

I changed the focus of my practice when I came to Sedgwick CMS. There I began to do primarily litigation management. I managed litigation, errors and omissions (E&O) claims, and EEOC charges; provided legal counsel to the workers' compensation and liability operational units and to the human resources department; and developed and delivered training on E&O prevention and corporate compliance. I managed a broad range of matters, including employment, wage and hour, bad faith, contract, negligence, and RICO cases. Approximately 75% of my time was spent on litigated and E&O matters. The balance of my time was spent on employment matters.

As in-house counsel, I was involved in managing regulatory matters related to manufacturing and the insurance industry. I worked directly with departments of insurance and compliance all over the country. My work included advising and training business units, negotiating with regulatory agencies, drafting company policies, and performing all manner of tasks to assure my employers' compliance with the laws and regulations governing their business activities.

I applied for and was selected as judge for Shelby County Circuit Court, Division VIII in March 2010, and I served in that capacity until the August 2010 election.

For four years, beginning in October 2010, I was a mediator, arbitrator, and special master with Ridder Hurd PLLC, a firm I co-founded with another former judge. I worked as a Rule 31-listed mediator with a practice that included general civil and family cases.

In 2012, I sat by designation as judge for Shelby County Circuit Court, Division V. In 2014, I was elected judge for Shelby County Circuit Court, Division V. I currently serve in that capacity presiding over a variety of civil cases, both jury and non-jury.

My sixteen years of in-house practice and my years as a mediator and trial judge have afforded me the opportunity to develop a wide range of skills in the substantive areas of the law that come before civil court of appeals judges. I am used to working long hours and have excellent time-management skills. I have had to analyze issues quickly but thoughtfully and consider both the legal and practical implications of my decisions and advice, all the time conveying a sense of confidence without being overbearing or arrogant. I have excellent written and oral communication skills, and I am a careful listener. In addition, my work as an assistant to the Board of Law Examiners for twenty years and my work on the bench have required me to remain current in several substantive areas of the law.

The only criminal matter I have worked on as a lawyer involved a crime against my employer and its clients. I worked with authorities to prosecute the perpetrators.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Although not the attorney of record because my cases were pending in other jurisdictions, I

handled several complex cases as in-house counsel, including class actions and multi-district litigation. Many of the cases involved novel legal and procedural issues in various jurisdictions, state and federal. On several occasions, the court's opinion reflected the reasoning and legal analysis of my contributions to memoranda and briefs. Of note are cases involving procedural questions, contract and statutory construction, and application of common-law negligence and bad faith principles.

The decisions in several of the cases I managed as an attorney were appealed. I directed all aspects of the appeals, preparing and/or revising briefs and other court filings and assisting with preparation for oral argument. I worked closely with outside counsel from the initial stages through final resolution.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

In October 2010, I co-founded a mediation firm. My time on the bench in 2010 and my negotiation and ombudsman experience as in-house counsel provided a solid basis for work as a mediator. As Director of E&O for Sedgwick CMS, I worked closely with the operational units not only to resolve disputes with clients and third parties but also to negotiate resolution of internal disputes. While at International Paper, I was appointed legal department ombudsman for a department that at the time was decentralized with attorneys all over the country and overseas. That role also required my serving as intermediary/problem solver.

In addition, being an effective in-house lawyer required examining issues from a variety of perspectives, anticipating problems, and helping to resolve extremely complex issues. It required being smart enough to listen and wise enough to reach the right conclusion based on all the evidence presented. It also meant being tough enough to deliver a message so that clients would listen even when the message was not what they wanted to hear.

As a Rule 31 mediator, I honed my skills. I conducted over 200 court-annexed mediations of cases pending in state and federal courts. I was arbitrator in two uninsured motorist matters and served as Special Master in several cases.

In 2012, when I served as substitute judge for Division V of Shelby County Circuit Court, I presided over a two-week jury trial of a fraudulent inducement to breach of contract claim. I drafted new jury instructions and verdict forms which I later shared with the other civil judges in the 30th Judicial District.

Currently, I am a trial judge who has presided over hundreds of civil proceedings for each of the last four years. Also, I have served on several Special Supreme Court Workers' Compensation Panels with Justice Holly Kirby and authored three opinions related to that work.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

For eight years, I served by appointment of the Governor on the Board of Trustees of the University of Tennessee. The Board is the governing body of the UT system, including all campuses and extension programs. My term on the Board expired in 2008. I am currently a member of the Board of Trustees for Memphis College of Art and my alma mater, Mount Holyoke College. During my career, I have served on numerous other professional and volunteer boards, locally and nationally.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

In 2016 and 2017, I served by special designation on Supreme Court Special Workers' Compensation Panels with Justice Holly Kirby. I authored three opinions as part of my service on those panels.

I served as Assistant to the Board of Law Examiners for twenty years, writing approximately 40 bar exam questions and reading/grading approximately 1000 bar exams per year. I also served as a member of the Board of Law Examiners and on various committees of the National Conference of Bar Examiners, including drafting and policy committees.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

In 2009 I submitted an application to the Judicial Nominating Committee to fill the vacancy in Division VIII, Shelby County Circuit Court. The Commission considered my application at its October 2009 meeting in Memphis. The Commission submitted my name to the Governor who appointed me to fill the vacancy in March 2010.

I also applied in June 2013 and October 2013 to fill vacancies on the Court of Appeals. The Commission did not submit my name to the Governor as a nominee for those positions.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Cecil C. Humphreys School of Law, University of Memphis, Memphis, TN, J.D. – 1991

I was Editor-in-Chief of the Memphis State University Law Review and graduated 16th in a class of 127. In my first year of law school, I received a scholarship for my first-place brief in a writing contest sponsored by the Association of Black Women Attorneys. I was awarded American Jurisprudence Awards in Torts I, Civil Procedure II, Administrative Law, and for my work as editor-in-chief of the law review. My law review Note has been cited by the Tennessee Supreme Court, other courts, and legal scholars both in Tennessee and other states.

George Peabody College of Vanderbilt University, Nashville, TN, Ph.D. - 1985, English Education. My dissertation on the relationship between writing apprehension and audience awareness has been quoted and/or cited by numerous scholars in the field.

Harvard Graduate School of Education, Cambridge, MA, M.A.T. - 1972, African and African-American Literature and Sociology.

Mount Holyoke College, South Hadley, MA, B.A. - 1971, English Composition. I received a writing award for my performance freshman year.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 69 years old. My date of birth is [redacted] 1949.

16. How long have you lived continuously in the State of Tennessee?

I was born in Memphis, Tennessee, and left after graduation from high school in 1967. I returned to Tennessee in 1972.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Shelby County for 39 years.

18. State the county in which you are registered to vote.

I am registered to vote in Shelby County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I have had two complaints filed against me with the Board of Judicial Conduct. Both complaints were dismissed without my having to respond to either one.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court

and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

On September 29, 2009, I filed suit against a former employer. This employment discrimination case was litigated in the United States District Court, Western District of Tennessee (2:2009cv02638). I alleged race discrimination and retaliation in violation of Section 1981 and the Tennessee Human Rights Act. The case settled in 2010.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Memphis College of Art, Board of Trustees (2016 – Present)

Mount Holyoke College, Board of Trustees (2015- Present; Chair of Faculty Conference Committee; Member of Executive Committee)

Mount Holyoke College Alumnae Association (2018- Present)

Memphis Child Advocacy Center, Executive Committee (2011 – 2014)

The Links, Incorporated, Memphis Chapter – (Member since 1976; President 1983-86)

Alpha Kappa Alpha Sorority

Parkway Gardens United Presbyterian Church

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

I am a member of Alpha Kappa Alpha, a sorority with Title IX exemption.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within

the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference (2010 – Present), Tennessee Pattern Jury Instruction, Education, and Bench-Bar Committees

National Bar Association (Ben Jones Chapter) (1990's - Present), former editor of newsletter, former treasurer, former secretary

Tennessee Bar Association (2003 - Present)

Association of Corporate Counsel (2003-2009), frequent speaker and panelist

Association for Women Attorneys, Memphis (2009 – Present), former member of newsletter committee

Tennessee Board of Law Examiners (2013-2014), board member

National Conference of Bar Examiners (various committee appointments, including the committee on character and fitness)

Member of Screening Committee for Selection of Federal Public Defender, Western District of Tennessee (2012) (appointed by Sixth Circuit Court of Appeals)

Tennessee Domestic Violence Coordinating Council, Member (2014-16)

Tennessee Lawyer Assistance Program, Committee member (2015-16)

Leo Bearman, Sr. American Inn of Court (2015-Present)

Memphis ADR American Inn of Court (2017-Present)

Memphis Bar Foundation, Fellow (2016-Present)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

As a practicing attorney, I was an AV Preeminent-rated lawyer for 16 years, since 1997.

In 2000-2001, I received the General Counsel's award at International Paper, an annual award given to the lawyer who best demonstrates the key performance measures of the department. I was the responsible for the department's winning numerous awards given by national organizations for advances in diversity, use of technology, and knowledge management.

In 1999, I received recognition from West Group for my service on the Corporate Counsel Advisory Board.

In 2015, I was selected Judge of the Year by the Memphis Bar Association, Young Lawyers' Division.

I was one of twelve women the Memphis Inter-Denominational Fellowship honored during its 2018 presentation of 12 Most Outstanding Women in the legal profession.

30. List the citations of any legal articles or books you have published.

Civil Procedure--In re Real Estate Title and Settlement Services Antitrust Litigation: Application of the Minimum Contacts Standard to Absent Class-Action Plaintiffs, 20 MEM. ST. U.L. REV. 119 (1989).

The Propriety of Permitting Affirmative Defenses to Be Raised by Motions to Dismiss, 20 MEM. ST. U.L. REV. 411 (1990).

Maine Strives to Cut Health Care Costs Related to Defensive Medicine, MEMPHIS HEALTH CARE NEWS, June 4, 1993 (co-author)

Invention: Hurd, R. and Duvall, M. (International Paper Company) "System for distributing form contracts and monitoring usage thereof." U.S. patent application 20040148285. 29 July 2004

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Federal Courts, Cecil C. Humphreys School of Law

Legal Methods Seminar, Tennessee Institute for Pre-Law at the Cecil C. Humphreys School of Law (credit applied for completion of summer program only)

I frequently present CLE seminars on such topics as courtroom advocacy, preparing for the bar exam, and effective legal writing.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I served on the Board of Trustees for the University of Tennessee from 2000 – 2008 appointed first by Governor Don Sundquist and then by Governor Phil Bredesen.

In 2010, Governor Bredesen appointed me judge for Division VIII, Shelby County Circuit Court. I served in that capacity until September 1, 2010.

In 2012, I served by designation in Division V, Shelby County Circuit Court, during the absence of Judge Kay Robilio.

In August 2014, I was elected judge for Division V, Shelby County Circuit Court.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

I have never been a registered lobbyist.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I am attaching my law review Case Comment, my law review Note, and two rulings in matters heard in Division V. They are all entirely the result of my personal effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I can think of no occupation to which I am better suited and prepared. Although I truly love being a trial judge, serving as an appellate judge would be the perfect job for me. The position would allow me to serve the State engaged in all the professional activities that I love most and do best. As a former English professor and law review editor-in-chief, I am very good at legal research, analysis and writing. I am a very careful listener and thoughtful student of the law. I have an excellent work ethic, always arriving early and staying until I get the job done. During my clerkship with U.S. Court of Appeals Judge Bailey Brown, I wrote opinions on a variety of subjects that are published in the Federal Reporter. I believe I would serve with honor and distinction as an appellate judge for the State of Tennessee.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

At Armstrong, Allen and at International Paper, I represented indigent clients via the MALS pro bono program. I served on the board of MALS and, after retiring from the Board, continued to provide pro bono services as part of programs implemented by the International Paper legal department, principally work in domestic relations and debtor/creditor matters. I founded a summer intern program for minority law students and was instrumental in developing International Paper's Law Day program, which typically focused on the role of the law in protecting civil rights. The ABA and the Commercial Law Section of the National Bar Association formally recognized the department for its efforts. I received a Silver Star Achievement Award for community outreach involving pro bono service to nonprofit organizations. I have done several pro bono mediations and have served pro bono as Special Master in a divorce case for Division V, Shelby County Circuit Court before I was elected to serve as judge in Division V.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking a position as one of four judges on the Tennessee Court of Appeals, Western Grand

Division. The court hears appeals from trial courts, boards and commissions primarily for cases heard in the Western Grand Division of the State. My selection would help to diversify the Court – there are currently no judges with extensive business or in-house experience and, with Judge Gibson's departure, no women. If fortunate enough to be selected, I will do my utmost to serve with distinction.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I intend to continue my volunteer service through bar associations and not-for-profit civic organizations, particularly with institutions of higher education. My volunteer focus has been on abused children, school-age students, and prospective law students. I have spoken at graduations and other school programs for several years and intend to continue because judges are particularly effective role models for this target audience.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am committed to public service and have a deep respect for the law. I believe in the ability of the judicial process to achieve fair resolution of disputes. An impartial judge is essential to that end. A good judge is impartial but not indifferent to litigants' unique circumstances, fair but mindful of pragmatic implications, and decisive but open-minded to alternative points of view. A good judge understands that, although she brings to each case her own world view and values shaped by her experiences, she must at all times be objective to insure respect for and adherence to the rule of law. I am a careful listener; I try not to jump to conclusions before I know enough to form an opinion I can defend. I do not set on a course to do anything because it's the popular thing to do or to advance a personal agenda. Most importantly, I realize I don't know it all – it's important to consider alternative points of view before drawing a conclusion. I believe I have the knowledge, intelligence, and temperament to make an excellent appellate judge. It would be an honor to serve my State in this capacity.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. I will uphold the law even if I disagree with the substance of the law. I exemplified my commitment to follow the law regardless of my personal views during my tenure as substitute judge in Division V, Shelby County Circuit Court. Ironically, my difference of opinion involves a decision by the very Court I am now seeking to join. Case law at the time required dismissal of an appeal from General Sessions Court because the appellant's lawyer failed to inform her she needed to pay not only a filing fee but also an appeal bond. I had to rule against the appellant

although my reading of the relevant statute differed from that of the Court of Appeals, and my reading would have allowed me to hear the appellant's colorable claim and rule on the merits. The case was especially troublesome because, by the time the appellant appeared before me, she was proceeding pro se and had difficulty understanding that her otherwise valid claim could not be heard because of a mistake by her lawyer, and paying that lawyer meant she did not have funds to retain counsel to present her arguments against application of the Court of Appeals' decision to her particular case.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Dr. Sonya Stephens, President, Mount Holyoke College. Office of the President, Mount Holyoke College, 204 Mary Lyon Hall, 50 College Street, South Hadley, MA 01075. [redacted]

B. Catherine S. Mizell, Secretary, Chief of Staff, and Special Counsel, University of Tennessee Board of Trustees. 719 Andy Holt Tower, 1331 Circle Park Drive, Knoxville, Tennessee 37996. [redacted]

C. Beverly Robertson, President & CEO, Greater Memphis Chamber of Commerce. 22 North Front Street, Suite 200, Memphis, Tennessee 38103. [redacted]

D. Carl Q. Carter, Associate General Counsel, International Paper Company. 6400 Poplar Avenue, Memphis, Tennessee 38197. [redacted]

E. Bradford David Box, Partner, Rainey, Kizer, Reviere & Bell, PLC. 209 E Main Street, Jackson, Tennessee 38301. [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals, Western Grand Division of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 5, 2019.

Rhynette N. Hurd

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Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

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CASE COMMENTS

Civil Procedure—*In re Real Estate Title & Settlement Services Antitrust Litigation*: Application of the Minimum Contacts Standard to Absent Class-Action Plaintiffs

Alleging violations of federal antitrust laws, plaintiffs, two Arizona school boards, brought a class action suit against several title insurance companies. The suit was consolidated with twelve other suits against the same defendants and was transferred to the District Court for the Eastern District of Pennsylvania.[1] This multidistrict class action for injunction and treble damages resulted in a settlement premised on the assumption that all of the states involved had supervised the defendants' activities, thereby precluding their residents from receiving damages.[2] Instead of objecting to the adequacy of representation, Arizona, on behalf of the school boards, moved to opt out of the class.[3] After certifying the class under subparts (b)(1)

1. *In re* Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 762-63 (3d Cir. 1989).

2. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 59-60 (1985), held that in a federal antitrust suit, if a state had expressly permitted and supervised the defendant's alleged anti-competitive activities, the state is precluded from recovering damages on behalf of its residents. In the instant case, the district court rejected the plaintiffs' contention that some of the class members resided in states that had not supervised and regulated the activities of the defendants. *Real Estate Title*, 869 F.2d at 763.

3. *Real Estate Title*, 869 F.2d at 763. Arizona's opt-out motion was based on the following contentions:

> (1) due process required that Arizona and its residents be afforded an opportunity to opt out before their damages claims could be extinguished; (2) the district court erred in failing to certify the action as a Fed.R.Civ.P. 23(b)(3) action, which requires that class members be given the opportunity to opt out; and (3) the class received inadequate notice of the settlement and its consequences.

Id. at 764. In light of the substantive difference between the state of Arizona's position and that of the other class members—Arizona contended that it had not "supervised" the activities of the defendants—it seems Arizona might also have justifiably argued that the common issues

and (2) of Federal Rule of Civil Procedure 23,[4] the district court denied Arizona's motion and approved the settlement.[5] The Court of Appeals for the Third Circuit affirmed without opinion.[6] While Arizona's petition for certiorari was pending, the school boards filed a new complaint in Arizona state court seeking damages from the title insurance companies.[7] The defendants then filed a motion in the district court for the Eastern District of Pennsylvania to enjoin the plaintiffs' state action. Holding that the class-action settlement previously approved by the court barred the state suit, the district court granted the defendants' motion.[8] On appeal, the plaintiffs asserted, inter alia, that the Pennsylvania district court lacked in personam

did not "predominate" over the claims of the individual members in a class that included the state of Arizona with the named plaintiffs. *See In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), in which the Ninth Circuit Court of Appeals explained the importance of the trial court's careful consideration of whether the commonality of issues predominates over questions affecting individual class members. 693 F.2d at 856. The court of appeals in *Dalkon Shield* ordered decertification of two classes after finding, among other things, that the trial court had erred in its assessment of the predominance issue. *Id.* at 857.

4. Subparts (b)(1) and (b)(2) of FED. R. CIV. P. 23 read:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

FED. R. CIV. P. 23(b)(1), (2).

5. *Real Estate Title*, 869 F.2d at 763. Though the district court certified the action under FED. R. CIV. P. 23(b)(1) and (2), antitrust actions are typically certified under FED. R. CIV. P. 23(b)(3). *See* C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 480 (4th ed. 1983). The court of appeals in the instant case indicated that the district court may have improperly certified the class. 869 F.2d at 768. *See generally* Kennedy, *Class Actions: The Right To Opt Out*, 25 ARIZ. L. REV. 3, 47-48 (1983) (explaining the link between certification and procedural rights). *See infra* note 58 and accompanying text.

6. *Real Estate Title*, 869 F.2d at 764.

7. *Id.*

8. *Id.* at 764-65.

jurisdiction because the Arizona school boards did not have minimum contacts with the forum.[9] The United States Court of Appeals for the Third Circuit, *held*, reversed and remanded with directions that the district court vacate the injunction.[10] If an absent class member has not had an opportunity to opt out of a class action for injunctive relief and damages, the district court that entertained the class action cannot enjoin a subsequent state action without violating the fifth amendment due process rights of the absent class member unless the class member has minimum contacts with the forum or has consented to the court's jurisdiction. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989).

Class litigation provides an opportunity for a group of similarly situated persons to assert a claim when class members would otherwise forego individual suits because the cost would be disproportionate to the claims or when joinder of parties is impracticable.[11] Traditionally, a class action, properly handled, has been viewed as a fair and efficient means of disposing of numerous claims in one judicial proceeding.[12] Unnamed plaintiffs, through their representatives, can have their day in court, defendants can avoid multiple suits, and the judicial system can avoid inconsistent adjudications of substantially similar claims.[13] With these advantages, however, come numerous procedural complications that must be addressed to ensure that the entry of judgment in a class suit is binding on all parties.[14] Unless all

9. *Id.* at 765. The other contentions, which the court declined to address because it found the first contention dispositive, were:
1. "[T]he district court was without power to determine the res judicata effect of its own judgment." *Id.*
2. "[B]ecause of interests in comity and federalism, the district court should have abstained from deciding the res judicata issue." *Id.*
3. "The district court erred in holding that the settlement of the federal court class action bars the Arizona state court suit." *Id.*

10. *Id.* at 771.

11. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). *See generally* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (1986).

12. Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 589 (1974). *See generally* Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 JUST. SYS. J. 197 (1978).

13. Note, *supra* note 12, at 589.

14. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (referring to the "labyrinthian history" of the case before the court). *See also* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979). Miller's "Frankenstein monsters" refers to the characterization given to the *Eisen* case in a dissent authored by Judge Lumbard, a member of the court of appeals panel that reviewed the case. Eisen v. Carlisle & Jacquelin ("*Eisen II*"), 391 F.2d 555, 572 (2d Cir. 1968)

parties are bound, the underlying rationale for the class action would lose its validity and there would be no justification for the court's relaxation of traditional joinder principles.

As explained in the Advisory Committee's Note to the 1966 Amendment to Rule 23 of the Federal Rules of Civil Procedure, one of the difficulties courts had confronted when applying the original rule was determining which procedural safeguards would ensure the protection of the due process rights of all parties.[15] The rule as amended, therefore, begins with four prerequisites, the last of which mandates adequate representation of absent class members.[16] This prerequisite echoes the holding in a leading state class suit heard by the Supreme Court shortly after the adoption of the original version of Rule 23.

In *Hansberry v. Lee*,[17] the Court held that if the interests of representatives "are not necessarily or even probably the same as those whom they are deemed to represent," binding an absent class member to a judgment violates due process.[18] As early as 1940, therefore, adequate representation was firmly established as one of the essentials to the binding effect of the entry of judgment in a class suit. *Hansberry*, however, only established the standard; it did not indicate what procedures were necessary for meeting the standard.

Ten years later, in *Mullane v. Central Hanover Bank & Trust Co.*,[19] a representative suit involving a common trust fund, the Court

(Lumbard, C.J., dissenting). *See generally* Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 597-98 (1987) (noting the "nightmarish" nature of class-action litigation).

15. *1966 Advisory Committee Note to Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 98-99 (1966). *See generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967).

16. Subdivision (a) of FED. R. CIV. P. 23 sets forth the following prerequisites for the maintenance of a class action suit:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

17. 311 U.S. 32 (1940).

18. *Id.* at 45. *Hansberry* presented the issue of whether the court could regard landowners asserting the benefits of a restrictive agreement that had been held valid in a prior class suit as members of the same class as individuals who were challenging the agreement. The Supreme Court of Illinois had held that the judgment in the original suit was binding on all landowners in the restricted area even though in that suit the plaintiffs did not represent the interests of those individuals who subsequently acquired property in violation of the agreement. *Id.* at 37.

19. 339 U.S. 306 (1950).

set out some helpful guidelines.[20] The Court explained that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[21] Applying *Mullane* to the principle established in *Hansberry* suggests that notice and an opportunity to be heard are required for adequate representation in representative actions.[22] Consequently, in a class suit—an exception to the rule that persons not present as parties to the litigation cannot be bound[23]—the reviewing court must consider whether absent class members received proper notice[24] and were afforded an opportunity to be heard through adequate representation.[25] Only then would the judgment be entitled to full faith and credit.[26]

In 1945, in the landmark case *International Shoe Co. v. Washington*,[27] the Supreme Court provided further guidance regarding procedural protections required to ensure the entry of a binding judgment. Focusing on the due process rights of a defendant, the Court established a minimum contacts standard that recognizes jurisdiction over a defendant only if contacts with the forum state are

20. *Mullane* was not a class action but resembled one in many ways inasmuch as court-appointed guardians represented the interests of all beneficiaries from New York and several other states when the bank sought judicial accounting of funds it held as trustee. The only notice given to out-of-state residents of the pendency of the proceeding was by publication in a New York newspaper. *Id.* at 309-10. The case arose when the appointed guardian for one class of beneficiaries objected on the grounds that out-of-state beneficiaries received inadequate notice and were not subject to the court's in personam jurisdiction. *Id.* at 311.

21. *Id.* at 314.

22. Among other similarities to a judicial accounting of a trust, class actions under FED. R. CIV. P. 23(b)(3), pursuant to section 23(c)(2), require that "the best notice practicable under the circumstances" be sent to all class members. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 481 (4th ed. 1983). Actions properly certified under FED. R. CIV. P. 23(b)(1) and (2) do not require notice. *Id.* at 482. *But cf.* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968) (suggesting that even under FED. R. CIV. P. 23(b)(1) and (2), absent class members are entitled to notice).

23. Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

24. *See supra* note 22.

25. Note, Phillips Petroleum Company v. Shutts, *Procedural Due Process, and Absent Class Plaintiffs: Minimum Contacts is Out—Is Individual Notice In?*, 13 HASTINGS CONST. L.Q. 817, 827 (1986). *See generally* Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 35-37 (1983) (outlining the development of case law regarding procedural requirements in class suits).

26. *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

27. 326 U.S. 310 (1945).

such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[28]

With the Court's unequivocal pronouncement in a later case, *Shaffer v. Heitner*,[29] that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[30] the issue arose as to whether "all" in the foregoing quotation really meant both plaintiffs and defendants such that jurisdiction over absent class-action plaintiffs requires minimum contacts with the forum state.[31] If "all" meant that both plaintiffs and defendants are required to have minimum contacts for the assertion of in personam jurisdiction, then in addition to adequate representation, absent class-action plaintiffs must have sufficient contacts with the forum to be bound by the entry of judgment.[32]

Three years after *Shaffer*, in *World-Wide Volkswagen v. Woodson*,[33] the Supreme Court reaffirmed its holding in *International Shoe* and for the first time enunciated the now familiar factors to consider in the determination of proper assertion of jurisdiction over a defendant.[34] Because the Court limited its analysis to defendants, the case provided no guidance to a consideration of whether the minimum contacts standard is similarly applicable to class-action plaintiffs.[35]

28. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

29. 433 U.S. 186 (1977).

30. *Id.* at 212.

31. *See* Mandler, *Federal Practice and Procedure: Personal Jurisdiction and Class Action*, 1986 ANN. SURV. AM. L. 51, 66-67 (1986) (noting the broad application of the minimum contacts standard in *Shaffer*).

32. Justice Marshall's opinion in *Shaffer* carefully and in detail chronicled the development of the Court's handling of the issue of in personam jurisdiction by explaining how relevant decisions from Pennoyer v. Neff, 95 U.S. 714 (1877), to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), impacted on the case then at bar. *Shaffer*, 433 U.S. at 196-206. The attention to detail suggests that the choice of the phrase "all assertions of state-court jurisdiction" without the qualifying terms "over defendants" was deliberate.

33. 444 U.S. 286 (1980).

34. The Court listed as considerations: the burden on the defendant, the plaintiff's interest in obtaining relief, the interest of the judicial system in efficient resolution of disputes, the forum state's interest in hearing the claim, and interests shared by all states in substantive social policies. *Id.* at 292. Additional considerations are appropriate in class suits because unnamed plaintiffs are likely to be subjected to jurisdiction against their will. Normally, plaintiffs submit themselves to jurisdiction by selecting the forum. In a class action, unnamed plaintiffs do not have that opportunity. The absent plaintiff has even less control in a multidistrict class suit.

35. A class suit reviewed by the United States Court of Appeals for the Fifth Circuit presented the potential for a consideration of whether the minimum contacts standard should be applied to absent class-action plaintiffs as well as to defendants, but the court never addressed the issue. In *In re* Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982), after settlement of a federal antitrust class action in Texas, absent class members filed suit in South Carolina state court against defendants who were parties to the settlement. *Id.* at 1333-34. The federal district court in Texas enjoined the South Carolina action on the ground that the approval of the settlement precluded relitigation of substantially similar claims as those disposed of in the multidistrict litigation. *Id.* at 1334. Although there was no evidence that the absent class members consented to jurisdiction or had additional contacts with Texas, their objections to the injunction on appeal were not based on personal jurisdictional defects. Instead, they relied on the federal Anti-Injunction Act (28 U.S.C. § 2283), their right to fifth and tenth amendment protection of their claim for damages under South Carolina law, and subject matter jurisdictional considerations. *Id.* The court affirmed the injunction order without reference to the matter of personal jurisdiction. *Id.* at 1336. A similar result was obtained in an analogous case, Battle v. Liberty National Life Insurance Co., 877 F.2d 877, 879 (11th Cir. 1989), a federal antitrust class suit alleging violations in the sale and performance of burial insurance policies.

A step towards answering that question was provided in the recent Supreme Court case *Phillips Petroleum Co. v. Shutts*.[36] The class action, brought in Kansas state court by representatives of over 33,000 claimants residing in eleven states, sought recovery of interest payments on accrued royalties from gas leases.[37] After some class members opted out of the class,[38] the remaining class members, numbering over 28,000, received judgment in the trial court.[39] The Supreme Court of Kansas affirmed.[40]

On appeal, the defendant contended that the judgment was not entitled to full faith and credit because the Kansas court lacked personal jurisdiction over absent nonresident class plaintiffs who had not had minimum contacts with the forum state.[41] Therefore, defendant asserted, it would be subject to numerous other suits because not all

36. 472 U.S. 797 (1985).

37. *Id.* at 799-801.

38. *Shutts*, 472 U.S. at 801. *Shutts* was certified under FED. R. CIV. P. 23(b)(3) which provides that an action is maintainable if:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C)the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3). Under this subpart of FED. R. CIV. P. 23, class members have the right to opt out.

39. *Shutts*, 472 U.S. at 802.

40. *Id.* at 803.

41. *Id.* at 805-06.

class members were bound by the judgment.[42] The Supreme Court rejected the defendant's challenge and in doing so clarified the procedural protections to be accorded absent class-action plaintiffs who, though they lack minimum contacts with the state, have been given adequate notice and an opportunity to opt out.[43]

After recognizing the defendant's distinct and personal interest in assuring that the entire class would be bound,[44] the Court explained the principle behind the minimum contacts standard. It compared the procedural posture of a nonresident defendant, who may be substantially burdened by being summoned to an out-of-state court,[45] to that of a class-action plaintiff for whom there is "continuing solicitude."[46] The Court's analysis focused on the concepts presented in *International Shoe*, *Shaffer*, and *Woodson* and the emphasis those cases placed on the need for procedural protections for nonresident defendants, not plaintiffs.[47]

The Court explained that the purpose of the minimum contacts test is to protect defendants or parties in the procedural posture of defendants.[48] Unlike plaintiffs who generally choose the forum, an out-of-state defendant, under pain of a default judgment, is forced to bear the expense of travel, costly discovery and other burdens to face "the full powers of the forum State to render judgment *against* it."[49] On the other hand, an absent class-action plaintiff does not have to "fend for himself."[50] Through careful certification, the court protects absent class plaintiffs, and, as exemplified in *Shutts*, even the defendant has a vested interest in ensuring the proper exercise of jurisdiction over all class members.[51] Having been given an opportunity to opt out of the class and choosing not to, the Court explained, the absent class plaintiff "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[52] This analysis led the Court to conclude that if absent class members have been given adequate notice, as well as an opportunity to opt out, and an opportunity to be heard through adequate

42. *Id.* at 805.
43. *Id.* at 808-12.
44. *Id.* at 805.
45. *Id.* at 808.
46. *Id.* at 808-10.
47. *Id.* at 806-07.
48. *Id.* at 807.
49. *Id.* at 808 (emphasis in original).
50. *Id.* at 809.
51. *Id.*
52. *Id.* at 810.

representation, a distant forum may properly exercise jurisdiction even if the class members do not possess minimum contacts with the forum.[53] Under *Shutts*, it appears, the absent class-action plaintiff is provided sufficient procedural protection without regard to the *International Shoe* requirement for exercise of in personam jurisdiction.

The applicability of *Shutts* was at issue in *In re Real Estate Title & Settlement Services Antitrust Litigation*,[54] a case in which the Court of Appeals for the Third Circuit examined the procedural safeguards to be accorded absent class-action plaintiffs, two Arizona school boards. Having established the premise that the school boards were in a position to assert due process protection under the fifth amendment,[55] the court considered whether enjoining the school boards from pursuing an action in an Arizona state court after settlement of a multidistrict class action in a Pennsylvania district court would deny them due process.[56] The court found that it would.[57]

The court began its analysis of this issue by noting that it had previously upheld the district court's certification of the multidistrict

53. *Id.* at 811-12.

54. 869 F.2d 760 (3d Cir. 1989).

55. *Id.* at 765 n.3. Relying on Mount Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977), the court explained that though the school boards were funded by the state, they represented their school districts and, like private corporations, had standing to sue as persons within the meaning of the due process clause of the fifth amendment. 869 F.2d at 765. Under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), therefore, the school boards' property right to a suit for damages was entitled to due process protection. 869 F.2d at 768. Because the preclusive effect of a federal court settlement was at issue here, the court explained that its decision would be based on the due process protection accorded under the fifth amendment as opposed to the fourteenth amendment. 869 F.2d at 766 n.6. Though the minimum contacts standard established in International Shoe v. Washington, 326 U.S. 310 (1945), arose in state court, the standard has been held to apply as well to federal courts hearing federal claims. 869 F.2d at 766 n.6. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (applying the minimum contacts standard without making a distinction in regard to its application to federal court action).

56. *Real Estate Title*, 869 F.2d at 765-69. In response to the defendants' assertion that the school boards were barred from relitigating the issue of their due process rights after the court of appeals' earlier judgment affirming the district court's denial of an opt out motion, the court concluded in a footnote that the school boards might not be bound by the earlier court of appeals ruling. *Id.* at 764 n.1. The court explained that the matter of issue preclusion could be determined only if the defendants could show that the due process issue had been fully litigated and had served as a basis for the court's denial of the plaintiffs' motion to opt out. Because the first panel, in its affirmance of the district court, issued an order without opinion, the record did not reveal whether the panel's determination had been influenced by an assumption that the school boards would later have an opportunity to assert a due process claim on collateral attack. *Id.* There was no evidence of resolution of the issue of the adequacy of the school boards' representation; therefore, the court could not, under the circumstances, determine that relitigation of the issue was necessarily barred. *Id.*

57. *Id.* at 768.

suit under subparts (b)(1) and (2) of Federal Rule of Civil Procedure 23[58] and that it was bound by its holding that the Arizona school boards did not have the right to opt out of the class.[59] Nevertheless, the court characterized the action as a "hybrid" suit for which it would fashion a rule requiring procedural protections.[60]

The Arizona school boards had two obstacles to overcome to successfully challenge the power of the district court to order an injunction barring the state action. The first obstacle was the Supreme Court ruling in *Shutts*.[61] The second was the defendants' contention that the Arizona school boards had consented to the jurisdiction of the Pennsylvania district court by entering an opt out motion in that forum and by appealing the adverse ruling.[62] Analysis of these apparent obstacles constituted the crux of the court of appeals' opinion.

First, the court addressed the holding of *Shutts* that, in a class action for damages, absent plaintiffs who have had the opportunity to opt out of the class may be bound by the entry of judgment even though they are nonresident class members lacking minimum contacts with the forum state.[63] The court distinguished *Shutts* by noting that it was a class suit certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and, as a consequence, the plaintiffs

58. *See supra* note 4.

59. *Real Estate Title*, 869 F.2d at 768. The court of appeals admitted that because a substantial damage claim was involved, the district court perhaps should have certified that claim separately under FED. R. CIV. P. 23(b)(3), thereby allowing the opportunity for the school boards to opt out and adjudicate their claims in Arizona. *See supra* note 38.

60. *Real Estate Title*, 869 F.2d at 768. The court here, though it borrowed the term formerly applied to a category of class actions under the original Rule 23, was not using the term "hybrid" as it traditionally had been applied. Rather, the court appeared to label the case as hybrid because the original claim was for both injunctive relief and money damages. *See also* Nottingham Partners v. Dana, 564 A.2d 1089 (Del. 1989) (where the Delaware Supreme Court referred to (b)(2) actions with damage claims as "hybrid"). *Compare* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377-80 (1967) (noting difficulties with the terms "joint," "common," and "several" within the meaning of the rule and explaining the use of the term "hybrid" in the original rule). The original version of Rule 23 categorized class suits as either "true," "hybrid," or "spurious." The court determined the category by looking to the claim to be enforced for or against the class. A "hybrid" action was characterized as one in which "the right involved was 'several' but the object of the action was adjudication of claims that did or might affect specific property involved in the action." C. WRIGHT, LAW OF FEDERAL COURTS § 72, at 476 (4th ed. 1983). *See generally* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 40 (1986) (discussing the uncertainty courts have shown in handling the relationships between categories under the original and the amended rule).

61. *Real Estate Title*, 869 F.2d at 765-66.

62. *Id.* at 770.

63. *Id.* at 766 (citing *Shutts*, 472 U.S. at 808).

not only were able to subsequently challenge the adequacy of their representation in a forum of their choice but also had the opportunity to opt out of the class.[64] In the case at bar, neither of these opportunities generally accorded class-action plaintiffs in a suit for damages would be available to the school boards if their state action were enjoined.[65] The court summarized the distinctions between the absent plaintiffs in *Shutts* and the Arizona school boards by stating that the latter had more to lose and were provided fewer procedural safeguards.[66]

The court cited *Hansberry v. Lee*[67] in support of its conclusion that the Arizona school boards had more to lose than the absent plaintiffs in *Shutts*.[68] In *Shutts*, the absent plaintiffs were not foreclosed from challenging the adequacy of their representation in a forum of their choice. In the instant case, however, when the defendants moved the district court to enjoin the Arizona school boards' state action, the absent plaintiffs were forced to litigate the adequacy of their representation as a defense in an injunction action heard in a distant forum.[69] The court noted that *Hansberry* established that the constitutionality of a class action proceeding hinges on whether the unnamed plaintiffs can collaterally attack the judgment by challenging the adequacy of their representation.[70] Affirming the injunction order would have denied the Arizona school boards their choice of forum to challenge the adequacy of their representation and would have resulted in their losing the action for damages. The court, therefore, carefully examined whether the second distinction between *Shutts* and the present litigation—the difference in the certification

64. *Real Estate Title*, 869 F.2d at 762.

65. *Id.* at 767.

66. *Id.* As pointed out in footnote 2 of the case, because Arizona did not supervise and direct the transactions between the school boards and the defendants, the premise of the dismissal of the money damages claim in the multidistrict class action suit did not apply to the Arizona school boards. They contended that they were not adequately represented because their right to money damages was jeopardized by representatives who had not asserted the inapplicability of the "state action [i.e., activity] exception" of the federal antitrust laws to their particular situation. In addition, Arizona state law would not have foreclosed the right to money damage as it does not recognize the foregoing exception. *Id.* at 765 n.2. Having to challenge the adequacy of their representation as a defense in an injunction action in the district court that had already ruled that they had no claim for damages would substantially impair the likelihood that the court would recognize their objection to the representation. *See supra* notes 2-5 and accompanying text.

67. 311 U.S. 32 (1940).

68. *Real Estate Title*, 869 F.2d at 767.

69. *Id.*

70. *Id.* at 769.

of the two actions—substantially jeopardized the procedural safeguards that typically assure protection of the due process rights of absent class-action plaintiffs.[71]

The second distinction the court made between the cases under consideration was that in *Shutts*, a determinative factor in the Supreme Court's decision that the absent plaintiffs were bound by the entry of judgment was that they had been given an opportunity to opt out of the plaintiff class because the action was certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure.[72] In contrast, the Arizona school boards had specifically sought to opt out of the class-action and had been refused the right to do so by the district court whose determination was then affirmed by the court of appeals without opinion.[73] The court explained that the Arizona school boards had to participate in the multidistrict litigation against their will even though they had substantially more to lose than did the absent plaintiffs in *Shutts*.[74] Because the Court in *Shutts* reached its decision only after emphasizing that the absent plaintiffs had been given an opportunity to opt out, the *Real Estate Title* court found that *Shutts* was not binding precedent for the case at bar.[75] The court held that the Arizona school boards could not be enjoined from pursuing their state action unless they had minimum contacts with or had consented to the jurisdiction of the Pennsylvania district court.[76] The court dismissed the suggestion that its holding would deny defendants the benefits of the prior settlement and would therefore produce an unjust result by noting that the defendants would be able to assert the settlement as a defense in the Arizona state court proceeding.[77] It would then be appropriate for the Arizona court to rule on the merits of the school boards' due process claims based upon inadequacy of representation.[78] The court went on to say that in a class suit, if the defendant wants to be assured of maximum preclusive effects, the defendant must make certain that all absent

71. *Id.* at 768.

72. *Id. But see* Nottingham Partners v. Dana, 564 A.2d 1089 (Del. 1989) (a Rule 23(b)(2) action seeking predominately equitable relief). Citing *Shutts*, 472 U.S. at 811, the court in *Nottingham* concluded that even though the absent class members also sought money damages, due process did not require that they have an opportunity to opt out to be bound by the entry of judgment. 564 A.2d at 1098-1101.

73. *Real Estate Title*, 869 F.2d at 764. *See supra* notes 56-59 and accompanying text.

74. *Real Estate Title*, 869 F.2d at 764.

75. *Id.* at 768.

76. *Id.* at 769.

77. *Id.*

78. *Id.*

plaintiffs are adequately represented and that the class is properly certified to allow opt out when appropriate.[79]

The final issue addressed by the court was whether the Arizona school boards had consented to personal jurisdiction by appearing before the district court when they moved to opt out of the class.[80] The court found no justification for holding that such a limited appearance would waive future jurisdictional challenges, especially in light of the fact that the purpose of the appearance was to contest the power of the district court to hear their claims.[81] In the "interests of fairness and efficiency," the court held that the Arizona school boards did not consent to jurisdiction merely by moving to opt out and by appealing the denial of the motion.[82]

A careful reading of both *Shutts* and *Real Estate Title* reveals that the two cases can be satisfactorily reconciled and, taken together, serve to further unravel some of the complexities inherent in class-action litigation involving a claim for damages. As legal commentary indicates, the nature of class action heightens the potential for reversible error. With multidistrict suits, careful consideration at each stage is especially critical. Failure to properly balance the special circumstances of the individual class members against the questions that are common to the class can easily result in inappropriate classification. Because classification determines the procedural protections that will be accorded the parties, a misstep at that stage could jeopardize the binding effect of the judgment. The lower court in *Real Estate Title* failed at this crucial stage when it ignored issues peculiar to the Arizona school boards.

As the court of appeals pointed out, *Shutts* is only applicable to actions properly certified under Rule 23(b)(3), a rule that provides for notice to absent plaintiffs and an opportunity to opt out. The *Shutts* holding should not be taken as an indication of the Court's willingness to allow lower courts to exceed their jurisdictional reach when adjudicating claims of absent class-action plaintiffs who lack minimum contacts with the forum. Rules 23(b)(1) and (2) do not require that absent class members receive notice[83] nor do they give class members an opportunity to opt out. Certification under these

79. *Id.* at 770.

80. *Id.*

81. *Id.* at 770-71.

82. *Id.*

83. *But cf.* Eisen v. Carlisle & Jacquelin. 391 F.2d 555, 564-65 (2d Cir. 1968) (suggesting that even under FED. R. CIV. P. 23(b)(1) and (2), absent class members are entitled to notice).

rules should be restricted to suits requiring uniform results or seeking only injunctive or declaratory relief. The Court has not yet addressed whether nonresident class members who lack minimum contacts with the forum are bound by the entry of judgment when they have been denied the right to opt out of an action for damages. As we are reminded by the *Hansberry* court, however, class litigation was an invention of equity. Fairness and justice are not served by forcing plaintiffs to lose substantial damage claims after being haled into a consolidated proceeding in a forum that they could not have anticipated. A violation of equitable principles is especially apparent when the interests of particular plaintiffs have been obscured by the additional problems of personal jurisdiction and choice of law that are inherent in multidistrict litigation.

Furthermore, in the proceeding for injunctive relief the Arizona school boards, even as defined by *Shutts*, were in the posture of defendants. Therefore, like the defendants in *Woodson*, they were haled into a distant forum against their will. As the *Shutts* holding makes clear, in representative actions for damages, due process requires adequate notice, an opportunity to be heard through adequate representation, and, under the circumstances of *Real Estate Title*, an opportunity to opt out.

As Justice White explained in *Woodson*, the Court has never accepted "the proposition that state lines are irrelevant for jurisdictional purposes, nor could [it], and remain faithful to the principles of interstate federalism embodied in the Constitution."[84] Therefore, in spite of the relaxation of joinder principles that allows absent class-action plaintiffs to receive the benefits of a proceeding without having to participate, if nonresident class-action plaintiffs in a suit for damages have not had an opportunity to opt out or to challenge the adequacy of their representation, a distant forum should not exercise *in personam* jurisdiction unless the plaintiffs have consented to jurisdiction or have minimum contacts with the forum. Otherwise, class-action litigation, under the circumstances presented in *Real Estate Title*, would not remain a viable alternative to a multiplicity of

84. *Woodson*, 444 U.S. at 293.

suits arising from the same activity. The practice would, in the interest of judicial economy, violate the due process rights of the class members, while providing only limited benefits for defendants. Hence, *Real Estate Title* bridges a significant gap in our understanding of the proper exercise of jurisdiction over absent class-action plaintiffs.

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Note
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THE PROPRIETY OF PERMITTING AFFIRMATIVE DEFENSES TO BE RAISED BY MOTIONS TO DISMISS

I. INTRODUCTION

Setting forth their claim in a "short and plain statement," [1] Plaintiffs filed a complaint alleging that they entered into an oral contract with Defendant to purchase cattle for $50,000, and although they gave Defendant a check for one thousand dollars toward the purchase, Defendant refused to deliver the cattle according to the terms of the contract. The complaint sought an order to compel performance of the contract or an award of damages. Instead of answering the complaint and pleading the affirmative defense of statute of frauds, [2] Defendant, without submitting supporting affidavits, filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. [3] Defendant asserted that the Plaintiffs' claim was legally insufficient because the complaint showed on its face that the alleged contract was not in writing and, therefore, was ***412** unenforceable under the statute of frauds. [4] Finding that the complaint failed to state facts that brought the alleged contract within an exception to the statute of frauds, [5] the court, relying solely on the face of the complaint, granted the dismissal. [6]

Contrary to both the spirit of notice pleading [7] and the wording of Rule 8 and 12 of the Federal Rules of Civil Procedure and their ***413** state counterparts, both federal and state courts have permitted affirmative defenses to be raised by motion to dismiss for failure to state a claim instead of requiring that they be set forth affirmatively by responsive pleading. [8] For a court to entertain a 12(b)(6) dismissal on the basis of an affirmative defense, the defense must appear on the face of the complaint; [9] therefore, many of the affirmative defenses provided for in Rule 8(c) are not likely to be successfully raised by motion to dismiss for failure to state a claim. A "short and plain statement" will rarely include, for example, averments to establish such defenses as res judicata, waiver, or estoppel. [10] Other affirmative defenses, such as statute of limitations, immunity, and statute of frauds, frequently serve as the basis for successful motions to dismiss under Rule 12(b)(6) because a complaint commonly avers time, the status of the defendant, or a description of a contract as either oral or written. [11]

Although some courts routinely allow affirmative defenses to be raised by 12(b)(6) motions, [12] others question the validity and the propriety of the practice in light of the plain meaning of the rules ***414** and the liberal standards of modern pleading. [13] Because of the general disfavor of Rule 12(b)(6) motions [14] and the likelihood that exceptions to the affirmative defenses may not be considered before the court forecloses the plaintiff's opportunity to prove the allegations

and show entitlement to relief, [15] some courts insist that affirmative defenses be asserted in the responsive pleading, thereby allowing the suit to run its course so that the validity of the defense is tested on the proof, not on the bare allegations in the complaint. [16] These courts are unwilling to entertain the curious fiction that a complaint may not state a claim because it states a defense and fails to state an avoidance of the defense.

The purpose of this Note is to explore the implications of allowing affirmative defenses to serve as the basis for dismissal for failure to state a claim and to determine whether the practice should be encouraged. With an eye toward the general goals of the pleading rules of the Federal Rules of Civil Procedure and their state counterparts, Section II will discuss the standards for asserting claims and defenses under Rules 7 and 12 and will describe alternative pre-trial procedures for adjudicating the merits of an affirmative defense. Section III will examine three approaches that courts have taken on the issue of allowing affirmative defenses to be raised by motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The conclusion of the Note will weigh the advantages and disadvantages of expanding Rule 12(b)(6) to include dismissal because of the appearance of an affirmative defense on the face of a complaint.

II. STANDARDS OF THE PLEADING RULES: ASSERTING CLAIMS AND DEFENSES

The language of the pleading rules suggests that the purpose of pleading is merely to give the parties notice of the matters to be brought before the court and to facilitate proper adjudication on the ***415** merits. [17] Ideally, the pleading stage is not a forum for carrying out "little trials." [18] Except for certain matters that must be specifically stated pursuant to Rule 9, [19] the plaintiff is not required to plead with particularity [20] nor to anticipate defenses. [21] In the same vein, the forms, which are explicitly declared to be sufficient under Rule 84 and are appended to the rules, demonstrate the very bare bones nature of the complaint as contemplated by the drafters. [22] One of the underlying motivations for adopting the federal rules was to simplify the pleading process without sacrificing the parties' right to "secure the just, speedy, and inexpensive determination of every action." [23] All that is needed in a complaint is sufficient notice of the issues to be addressed at trial so as to prevent surprise and to assist the court in making a determination without sacrificing the merits. [24] For these purposes, a complaint is sufficient even if it formulates only generalized issues. [25]

Requiring the plaintiff to anticipate matters that may be set up as affirmative defenses appears to be inconsistent with the goals of ***416** pleading. Neither a complaint nor an answer need set out every detail or legal theory of a claim or defense. [26] Ordinarily, an affirmative defense is introduced by way of answer to a complaint or it is waived. [27] This method of raising the defense gives the plaintiff fair notice of the defendant's grounds for avoiding the claim. [28] An affirmative defense introduced in the defendant's answer proceeds on the assumption that the plaintiff has stated a claim but, because of an excuse, justification, or other avoidance, the defendant is not liable. [29] Conversely, a pre-trial 12(b)(6) motion, similar to the pre-Rules demurrer, [30] tests whether a claim has been stated and alerts the court to inadequacies of the statement of the claim. [31] For the purposes of the motion, it admits the truth of all material allegations [32] but asserts that the facts alleged do not state a claim as recognized by the law. [33] Instead of attempting to avoid a valid claim, a 12(b)(6) motion attacks the merits of the claim by testing its legal ***417** sufficiency. Thus, while an affirmative defense, by presenting a barrier to a sufficient claim, challenges the plaintiff's ability to ultimately prevail, a motion to dismiss under Rule 12(b)(6) challenges whether the plaintiff's allegations are sufficient to state a claim. [34]

These basic differences between an affirmative defense—a Rule 8(c) defense—and a defense based on the plaintiff's failure to sufficiently state a claim, it would seem, account for the different requirements that the Federal Rules of Civil Procedure impose for their proper assertion. As the term "affirmative" suggests, the rules provide that Rule 8(c) defenses

are to be raised in a pleading responding to the plaintiff's statement of a claim. The rules do not explicitly provide for an alternative method for asserting affirmative defenses. [35] On the other hand, Rule 12(b) provides that the defense of failure to state a claim may be asserted either in the responsive pleading or by motion. [36] Thus, the purpose and the operation of the defenses provided for in Rule 8(c) are distinct from those listed in Rule 12(b). Properly invoked, these rules function within the scheme of the Federal Rules of Civil Procedure to assure that (1) the plaintiff has proper notice and opportunity to address new matters and (2) there is sufficient evidence for the court to determine the validity of a defense. In light of the intended functions of Rules 8(c) and 12(b)(6), legal commentators have questioned the propriety of permitting affirmative defenses to be raised by motion to dismiss for failure to state a claim upon which relief can be granted. [37]

A. The Pleading Standards of Rule 8

Rule 8(a)(2) requires that pleadings contain only "a short and plain statement of the claim showing that the pleader is entitled to ***418** relief," [38] and Rule 8(f), the last section of Rule 8, states that " a ll pleadings shall be so construed as to do substantial justice." [39] Reinforcing the requirement of simplicity, Rule 8(e)(1) provides that " e ach averment of a pleading shall be simple, concise, and direct." [40]

In addition to encouraging "short and plain" pleading, the Federal Rules of Civil Procedure limit the number of pleadings parties may file in order to avoid the use of endless responses and counter-responses that was prevalent before adoption of the rules as the parties sought to reduce and focus the issues to be litigated. [41] To that end, when neither party interposes counterclaims, cross-claims, or third-party complaints, Rule 7(a) [42] authorizes the filing of "a complaint and an answer" and no other pleadings, "except that the court may order a reply to an answer or a third-party answer." The rules, thus, do not contemplate, in most cases, the filing of a reply to an answer. Nor is such a pleading proper. [43] The only exception would be in those rare cases when the court, pursuant to Rule 7(a), orders a reply to an answer. [44]

Given that a plaintiff normally will not have an opportunity to respond to the assertion of new matter, such as an affirmative defense interposed by answer, there must be some provision for determining the status of new matters asserted in the answer to which the ***419** plaintiff is not expected to reply. At this point, Rule 8(d) becomes operative and provides that new matters averred in a pleading as to which no responsive pleading is required or permitted will be taken as denied or avoided. [45] The rules, then, contemplate that if the pleading of a case is permitted to run its course and is not prematurely terminated through a motion to dismiss, an affirmative defense is to be treated at the pleading stage as denied or avoided. If, for example, a complaint properly avers matters of time and the defendant responds with a statute of limitations defense, the most appropriate assumption would be that the plaintiff will seek to "avoid" the defense by showing a factual basis for disallowing it.

Inasmuch as the plaintiffs are not required to set out the details on which they base their claims [46] and Rule 8(c) places the burden of pleading affirmative defenses on defendants, [47] it seems to be contrary to Rule 8(f) to dismiss a complaint because no rebuttal of an affirmative defense appears on the face of the complaint. [48] Allegations that anticipate an affirmative defense are not an integral part of the plaintiff's statement of the claim. [49] In fact, some courts treat such ***420** allegations as mere surplusage. [50] Furthermore, it is possible that the defendant will not wish to raise the defense. In such a situation, the plaintiff's anticipation of the defense would be wasteful and unnecessary.

Although Rule 8 states a general requirement of simplicity and invitation to generality, there are exceptions that bear directly on the sufficiency of a pleading. Rule 9(f), for example, specifically states that "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." [51] This rule provides support for the contention that the affirmative defense of the running of the statute of limitations, for example, is properly asserted by a motion to dismiss for failure to state a claim. If the averment of time is material for testing whether a pleading is sufficient and if, on the face of the complaint, it appears that the time during which the complaint could have been filed has passed, a motion to dismiss under 12(b)(6) seems to be in order. On the other hand, granting the motion forecloses the plaintiff's opportunity to counter the defense by offering proof of factual circumstances that justify the plaintiff's delay in filing the suit. [52] The practice of granting dismissal under such circumstances encourages plaintiffs, in an effort to prevent the averment of time from being fatal to the sufficiency of their complaints, to deviate from Rule 8(a)'s mandate of "short and plain" statements of their claims.

In many cases, mitigating circumstances not evidenced by the pleading bear on the availability of an affirmative defense. For example, for the defense most often raised by motion, the statute of ***421** limitations, [53] such provisions as the discovery rule, [54] equitable tolling, [55] and savings statutes [56] are exceptions that could operate to bar the defense even if the requirements of a statute of limitations defense appear to be obvious on the face of the complaint. [57] Mitigating factors are less likely to be overlooked if the defendant pleads the affirmative defense by answer and the plaintiff has an opportunity to address the issue at trial or, if the court so orders, by reply. Furthermore, if the court does not order a reply, the affirmative defense must, pursuant to Rule 8(d), be considered by the court as "denied or avoided" by the plaintiff. Requiring the plaintiff to anticipate affirmative defenses does not appear to comport with the clear dictates of Rule 8 as it shifts the burden of raising the defense to the plaintiff. In essence, the plaintiff would be forced to plead the defendant's case. [58]

With such defenses as the statute of limitations, laches, [59] release, [60] res judicata, [61] and the statute of frauds, [62] more than the passage of time or the existence or nonexistence of a given document ***422** impacts on the legitimacy of the defendant's assertion of the defense. [63] In light of the fact that with a motion to dismiss under 12(b)(6) all doubts should be resolved in favor of the pleader, [64] there is merit in the argument that an affirmative defense that appears to be present within the four corners of the complaint should not serve as a basis for dismissal for failure to state a claim.

The mandates of Rules 8(a), (e), and (f), placed at the beginning and at the end of the rule that is the heart of the pleading rules, suggest that a complaint should not be vulnerable to dismissal for lack of sufficiency except in unusual cases and certainly not before the court has an opportunity to consider the facts of the case, the underlying substantive law, and the allocation of the burden of pleading. Under the rules, an issue not raised by the pleadings is not in the case. [65] The rules seem not to have contemplated the adjudication of an affirmative defense based entirely upon those averments that are necessary to state a claim upon which relief may be granted.

B. The Concept of Affirmative Defenses and Related Ideas

Instead of being denials, or "negative" defenses, the defenses listed in Rule 8(c) are akin to confessions or avoidances [66] that, if applicable, exonerate the defendant because of circumstances that ***423** occurred either before, [67] during, [68] or after [69] the alleged wrong. By asserting an affirmative defense, therefore, the defendant introduces new matter that will serve as an excuse or justification if the defense is a valid one. [70]

Though Rule 8(c) requires that one responding to a claim set forth matters constituting an "affirmative defense," [71] the rule does not specifically define what is meant by an "affirmative defense." It simply provides an illustrative list of defenses that must be set forth in a response to a pleading, [72] and this list is generally taken to be a nonexhaustive listing of affirmative defenses. [73] The rule, therefore, provides no help in identifying the essential characteristics of an affirmative defense.

The assertion of an affirmative defense may involve three related burdens. First, as indicated in Rule 8(c), there is the burden of pleading. [74] Second, there is the burden of going forward with the evidence, or risk of nonproduction. [75] Third, there is the burden of persuasion, or risk of nonpersuasion. [76] The rule does not tell us which, if any, of these three burdens are essential attributes for delineating an affirmative defense.

The matter is not satisfactorily clarified by the Supreme Court's decision in *Palmer v. Hoffman*. [77] In *Palmer*, the plaintiff brought a personal injury action in federal court based upon diversity of citizenship. The injury had occurred in Massachusetts, but the action was brought in New York, with two "causes of action" based upon the common law and one based upon a Massachusetts statute. Apparently relying upon New York law, the defendants argued that the trial court had incorrectly placed upon them the burden of proving ***424** contributory negligence. In support of the trial court's ruling, the plaintiff cited Federal Rule of Civil Procedure 8(c), which includes contributory negligence as one of the defenses that must be set forth by one responding to a pleading. The Court dismissed that argument of the plaintiff, stating that "Rule 8(c) covers only the manner of pleading." [78]

The Court's statement in *Palmer*, while declaring that the rule concerns only the burden of pleading, thus seems to assume that the concept of affirmative defenses is not entirely controlled by the burden of pleading. Otherwise, the Court simply meant that the rule says that a party who has the burden of pleading on an issue has exactly that, the burden of pleading on the issue.

Courts have often said that the party asserting the affirmative defense has the burden of proving it. [79] Although this statement could be more precise, it seems to suggest that the party relying upon an affirmative defense has the burden of persuasion on the issue. In many, perhaps most, court opinions, the court may not have specifically thought about whether it is referring to the burden of producing evidence or the burden of persuasion. In most cases, the reference might appropriately be taken as applicable to either of these two burdens.

C. Theoretical Difficulties in Raising Affirmative Defenses by 12(b)(6) Motions to Dismiss

When considering a 12(b)(6) motion, the court construes the complaint in the light most favorable to the plaintiff in order to prevent a claim from being dismissed because of a mere technicality. [80] As the Supreme Court set out in *Conley v. Gibson*, [81] for example, the standard for testing the sufficiency of a complaint under Rule 12(b)(6) places a heavy burden on the defendant who seeks dismissal on the face of the complaint. Under *Conley*, a complaint should not be dismissed on a 12(b)(6) motion "unless it appears beyond ***425** doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [82]

The generally accepted view of a motion to dismiss for failure to state a claim leads to understandable doubt about the practice of broadening its application to include challenges based on affirmative defenses. It is well settled that cases should be decided on their merits and that the plaintiff should receive a reasonable opportunity to cure the formal defects

of the complaint. [83] For this reason, some courts hold that upon dismissal under Rule 12(b)(6), the plaintiff, under Rule 15(a), [84] may amend the complaint as a matter of right if there has been no responsive pleading. [85] Others, however, require the plaintiff to obtain leave to amend. [86] In jurisdictions that deny the plaintiff the right to amend as a matter of right, the effect of allowing affirmative defenses to be raised by motion can be especially harsh.

Proponents of the practice of allowing affirmative defenses to be raised by 12(b)(6) motions suggest that, especially with the defense of statute of limitations, the rules contemplate the procedure. [87] Commentators have suggested that because Rule 9(f) provides that averments of time are material for the purpose of testing the sufficiency of a pleading [88] and one means of testing sufficiency is a 12(b)(6) motion, Rule 9(f) would have little meaning if the statute of limitations defense could not be based on the averments of time that appear on the face of the complaint. [89]

***426** There are, however, other purposes for requiring the pleader to specifically aver matters of time. For example, in responding to the complaint, the defendant is required by Rule 8(c) to set forth matters constituting an affirmative defense. By requiring the specific allegation of time, Rule 9(f) helps to insure that the defendant will be alerted to the possibility of a defense based upon the expiration of a time period. In addition, the specific allegation of time puts the defendant on notice of the particular transaction that is the subject of the complaint when the circumstances are such that the transaction might otherwise be difficult to identify.

In further support of the use of 12(b)(6) motions to raise affirmative defenses, some have emphasized the liberal standards for amending pleadings and have cited the holdings, noted above, [90] that allow the plaintiff to amend the complaint as a matter of right when the defendant has responded with a motion to dismiss. This argument, however, requires acceptance of a view regarding the purpose of amendments that is inconsistent with the general policy of discouraging indeterminate pleading and of terminating the process with the responsive pleading. [91] Ultimately, it would lead to pleading practice in which pleaders go back and forth to the court for permission to amend in order to advance or defeat dismissal on the face of the complaint. In addition, it means that the amendment is no longer simply a means of curing a defective statement of a claim or of adding a new theory. The amended complaint, under this approach, becomes a wholly new pleading that will include matters that would ***427** have been inappropriate for the original complaint. It becomes, in reality, a reply to an answer.

D. Alternative Procedures for Pre-trial Determination of Affirmative Defenses

The Federal Rules of Civil Procedure provide for several methods by which a court might adjudicate the merits of an affirmative defense before trial so as to promote judicial economy. On a motion to dismiss, for example, if the court considers matters outside of the pleadings, the motion will be converted to a motion for summary judgment. [92] Alternatively, at the pleadings stage, the defendant may raise the affirmative defense by answer, and, if the court orders a reply to the answer, either party may move for judgment on the pleadings pursuant to Rule 12(c). [93] This rule, like Rule 12(b), [94] provides that if matters outside the pleadings have been introduced and have not been excluded by the court, the motion will be converted to a motion for summary judgment. [95] Finally, if the defendant has raised the defense by answer, the plaintiff may, under Rule 12(f), [96] move to have an insufficient defense stricken from the pleadings. [97] Each of these procedures provides a means by which the court can dispose of insufficient claims or defenses without foreclosing the opportunity for the nonmovant to respond to the opponent's assertions. In addition to providing both parties with fair notice of the issues to ***428** be raised at trial, the procedures allow the court to be more fully apprised of the factual bases for all allegations and defenses so as to reach their substantive merit. Thus, these alternative procedures

are more in line with the general philosophy of modern pleading and call into question the advisability of adjudicating the merits of an affirmative defense by way of motion to dismiss for failure to state a claim.

1. Motion to Strike the Affirmative Defense: Rule 12(f)

With the 1946 amendments to the rules, Rule 12(f) was amended to provide an additional means for a plaintiff to challenge the sufficiency of a defense. [98] When the merits or lack of merits of the defendant's affirmative defense turns upon a legal question, the motion to strike, pursuant to Rule 12(f), [99] will test the legal sufficiency of the defense that appears on the face of the complaint. After the plaintiff has asserted a claim and the defendant has raised an affirmative defense by answer, the plaintiff may move for the defense to be stricken from the pleadings.

Because it is easily used as a dilatory tactic, however, courts generally view a motion under 12(f) with disfavor. [100] Particularly when there has been no opportunity for discovery, courts are not likely to grant the motion because of their reluctance to render a decision based on only "an abstract and hypothetical set of facts." [101]

On the other hand, the procedure can be a useful tool for narrowing the disputed issues and "streamlining the ultimate resolution of the action." [102] If the plaintiff has submitted supporting affidavits and introduced facts that have not been confessed by the defendant's answer, the court, within its discretion, may employ a motion to strike to determine the sufficiency of an affirmative defense. [103] Before the court will order a defense stricken, however, it must "be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances ***429** could the defense succeed." [104]

2. Motion for Judgment on the Pleadings: Rule 12(c)

Through the use of the trial court's power to order a reply to an answer, as contemplated in Rule 7(a), [105] the court may place the pleadings in a posture that will permit the case to be adjudicated on the pleadings by a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). [106] Judgment on the pleadings is proper only after the pleadings are closed; therefore, if the court orders a reply to an answer that raises an affirmative defense, neither party may make a motion pursuant to Rule 12(c) until after the plaintiff has filed a reply. [107] In the reply, the plaintiff may assert matters that show an avoidance of the affirmative defense.

Furthermore, if the court considers matters outside of the pleadings, the motion, as with a 12(b)(6) motion under similar circumstances, will be converted to a motion for summary judgment. [108] Thus, the nonmoving party will be able to introduce evidence in support of a theory to avoid (in the case of the plaintiff) or to sustain (in the case of the defendant) the court's dismissal on the basis of a defense raised by the answer. [109]

Even without the opportunity to submit additional evidence, in the rare instances when the court orders a reply, the plaintiff, having been given notice of the affirmative defense, has a chance for rebuttal before the court tests the merits of the claim. [110] Taking as true all material allegations of the plaintiff's pleadings, [111] the court will consider what the plaintiff has admitted and denied in the complaint and in the reply, and, if a disputed issue remains, the motion for ***430** judgment on the pleadings will be denied. [112]

If, however, the trial court is unwilling to order a reply, [113] the plaintiff will be in the same posture as one against whom the defendant filed a motion to dismiss pursuant to Rule 12(b)(6). Although the court will construe the pleadings in the light most favorable to the nonmovant, the court will consider only the complaint and the answer to determine whether the plaintiff has asserted a claim upon which relief can be granted.

3. Summary Judgment

A pre-trial procedure that is comfortably adapted to testing the validity of an affirmative defense is the motion for summary judgment pursuant to Rule 56. In answer to a complaint, the defendant, "with or without supporting affidavits," [114] may move for summary judgment. In addition, pursuant to Rule 12(b), if the defendant has filed a motion for failure to state a claim and the court has considered matters outside of the pleadings, the motion will be converted to one for summary judgment and will be disposed of under the standards of Rule 56. [115]

***431** If the defendant files a summary judgment motion based on an affirmative defense or if the court treats a 12(b)(6) motion as a motion for summary judgment, the plaintiff will be afforded a reasonable opportunity to show that the defense is insufficient because of mitigating circumstances. [116] The evidence will be considered in the light most favorable to the plaintiff, [117] and the motion will be granted only if the plaintiff is unable to show that there is a genuine factual issue for trial. [118]

In *Celotex Corp. v. Catrett*, [119] a wrongful death case in which the plaintiff failed to sufficiently establish an essential element of her case after the defendant moved for summary judgment, the Supreme Court explained how summary judgment works. Under the *Celotex* decision, after the moving party has met its responsibility of informing the court of the basis for the motion and of identifying the aspects of the case that point to the lack of a genuine factual issue, the burden is on the nonmoving party to respond. [120] If, after adequate opportunity to use the full machinery of discovery, [121] the nonmoving party fails to establish that there is a genuine issue that must be determined by a finder of fact, the summary judgment must be granted. [122] As the Court explained, " o ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually ***432** unsupported claims or defenses . . . ." [123] To this end, the rule allows the nonmoving party to take advantage of depositions, requests for admissions, interrogatories, and supporting affidavits.

As applied in a case in which a defendant bases a motion for summary judgment on the assertion of an affirmative defense, adjudication of the validity of the defense could completely bar the plaintiff's claim. Such would be the case, for example, if the court grants a summary judgment motion based on the affirmative defense of the running of the statute of limitations or any other affirmative defense that completely bars the claim. The plaintiff would, however, have an opportunity to present evidence in support of a theory avoiding the defense. If, on the other hand, the plaintiff sustains the burden of showing that there is a genuine factual issue as to the applicability of the defense, the motion for summary judgment will be denied and the case will go to trial if no other matters bar the claim. Thus, with the summary judgment procedure, a plaintiff who has abided by Rule 8(a) can bring to the court's attention extenuating circumstances that neither party presented at the pleadings stage. The plaintiff will have received fair notice of the defendant's defenses, and the court will have before it more than the bare pleadings on which to base its determination of whether the plaintiff is entitled to relief.

The majority opinion in *Celotex* closes with an explanation of why, under the Federal Rules of Civil Procedure, summary judgment motions are preferable to motions to dismiss. The Court reasoned:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based ***433** in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. [124]

The implication of the Court's statement is that, because modern pleading serves only to give the parties and the court notice of the issues to be adjudicated, the merits of a claim can rarely be determined solely on the basis of the averments in a complaint. Under the federal rules, then, it is preferable to allow proof outside of the pleadings before the court determines the sufficiency of a claim or defense. [125]

III. JUDICIAL EXPERIENCE WITH 12(B)(6) AND AFFIRMATIVE DEFENSES

Decisions that have dealt with the issue of basing Rule 12(b)(6) motions on affirmative defenses that appear on the face of the complaint can be placed into three general categories: (1) those that, in the interest of judicial economy, [126] follow the so-called Third Circuit Rule and allow the practice liberally for all affirmative defenses; (2) those that, in the interest of justice, [127] allow it only under limited circumstances and not before the court considers mitigating circumstances or alternative procedures for determining the validity of the affirmative defense; and (3) those that, in an effort to avoid the risk of unjustifiably foreclosing the plaintiff's right to prove the allegations of the complaint, expressly prohibit the assertion of affirmative defenses by motion to dismiss for failure to state a claim.

Apparently, the courts that allow 12(b)(6) motions to be grounded on affirmative defenses interpret Rule 8(c) as instructing defendants who wish to introduce new matter constituting an avoidance or affirmative defense to set forth the matter affirmatively by ***434** answer only if they "[plead] to a preceding pleading." [128] Under this construction, if the defendant chooses not to file a responsive pleading, the new matter may be introduced by motion to dismiss based on the assertion that, in light of the defense, the plaintiff has failed to state a legally sufficient claim and is not entitled to proceed with discovery and trial where the parties can present evidence in support of their allegations. The affirmative defenses listed in Rule 8(c) are subsumed under the 12(b)(6) defense, one of only seven defenses that, at the defendant's option, may be pleaded or made by motion. [129]

A. Liberal Use—The Third Circuit Rule

The notion that Rule 12(b)(6) may be invoked on the ground that an affirmative defense appears on the face of the complaint has come to be called the Third Circuit Rule, [130] although courts in several other circuits follow the same approach. [131] This method of asserting 8(c) defenses is especially prevalent in cases involving statutes of limitations;

however, courts applying the Third Circuit Rule apply it to permit 12(b)(6) motions based upon a variety of affirmative defenses, so long as the defense is apparent on the face of the complaint. [132]

Shortly after the adoption of the Federal Rules of Civil Procedure, district courts in several circuits looked to Rule 9(f), [133] which states that averments of time are material in the determination of the sufficiency of a complaint, to support rulings that 12(b)(6) dismissal is appropriate if the time alleged in the complaint indicates that the action is time barred. One such case is a Sixth Circuit case, *A.G. Reeves Steel Construction Co. v. Weiss*, [134] in which the court, citing no authority, stated that:

> ***435** [s]ince time is material in an action to recover taxes, a motion to dismiss because the statute of limitation has run, may be utilized without an affirmative defensive plea or supporting affidavits, whenever the time alleged in the petition shows that the cause of action has not been brought within the statutory period. [135]

Finding that the plaintiff failed to allege that it brought the suit within the statutory time limits, the court affirmed the lower court dismissal.

Because the claim in *Reeves* was brought under a provision of the Revenue Act of 1924 that prescribed time limitations and, therefore, the prescribed time period was a substantive jurisdictional requirement, [136] the holding could be construed narrowly to apply only to cases in which the time limit goes not just to the remedy but also to the right of action. Furthermore, the trial court's ruling was not really on the basis of a pure 12(b)(6) motion. Instead, before ruling on the validity of the affirmative defense before it, the court took judicial notice of significant facts outside the record. [137] Nevertheless, courts have continually cited *Reeves* as standing for the proposition that affirmative defenses are properly raised under Rule 12(b)(6). [138]

***436** In *Wright v. Bankers Service Corp.*, [139] the court cited *Reeves* in response to the plaintiff's assertion that a statute of limitations defense must be raised by answer. [140] Ruling that raising the defense by motion is proper, the court reasoned that when the defense is apparent on the face of the complaint, requiring it to be raised by answer "would be an inexcusable loss of time and money to the litigants." [141] As in the case of several opinions that have followed *Reeves*, [142] the court based its decision on Rule 9(f)'s reference to the averment of time as material in testing the sufficiency of a complaint. [143]

In another early case, *Kahn v. Cecelia Co.*, [144] the United States District Court for the Southern District of New York held that the trial court had properly dismissed an action for wrongful discharge when the defense of statute of frauds appeared on the face of the complaint. [145] Even though the complaint included allegations sufficient to establish the plaintiff's reliance on the defendant's oral promise, [146] the district court granted a 12(b)(6) dismissal after concluding that New York law recognized only a limited application of the doctrine of promissory estoppel. [147] In support of its conclusion that a Rule 12(b)(6) motion is a proper vehicle for raising the statute of frauds defense, the court cited only *Moore's Federal Practice*. [148]

Hartmann v. Time, Inc., [149] an early Third Circuit case, stated that res judicata may be raised by motion to dismiss. [150] Although ***437** the court mentioned the matter only briefly in a footnote and in its discussion of a conflict of laws issue, it unequivocally stated that pleading res judicata under Rule 8(c) is "a mere matter of form," [151] thereby suggesting that pleading the defense in the answer is merely one way of raising the issue. The *Hartmann* opinion, however, is unclear about whether the res judicata defense in the case at bar was raised by motion for summary judgment or by motion to dismiss. In addition, when ruling on the res judicata issue, the court had before it an extensive record of previously filed suits and motions. Despite these qualifications of the holding, *Hartmann* is cited as authority that the rules contemplate raising res judicata and other affirmative defenses by pre-answer motions to dismiss. [152]

In *Williams v. Murdoch*, [153] for example, the court, relying on footnote 3 in *Hartmann*, stated that res judicata is properly raised by a 12(b)(6) motion. [154] Although later decisions cite *Murdoch* as a principal case in the development of the Third Circuit Rule, [155] *Murdoch's* unusual history distinguishes it from other cases in which a defendant seeks to raise an affirmative defense by motion to dismiss. First, the case reached the Third Circuit on appeal from denial of the plaintiff's motion for reconsideration of dismissal on the ground of res judicata. [156] Therefore, the court of appeals had before it an ***438** extensive record consisting of additional material filed in connection with the motion for reconsideration. In addition, as the court pointed out in a lengthy footnote, the trial court had allowed the defendants to attach a "Document Appendix" to their 12(b)(6) motion. [157] As a result, even though the case is generally cited in support of the notion that a court can properly dismiss when the inquiry is limited to matters pleaded in the complaint, both the lower court and the court of appeals considered matters outside of the complaint in ruling on the motion. The reviewing court, though it admonished the lower court for the form in which it allowed the defendants to present the additional material, [158] did not indicate whether the plaintiff had an adequate opportunity to rebut the issues raised in the appendix attached to the defendants' motion. [159]

In a 1975 opinion by a district court within the Third Circuit, [160] the court, citing *Murdoch* and a number of other decisions, said:

> it is well settled that while a claim may be adequately stated, if in addition to that claim there appears on its face that it includes a matter which would vitiate the complainant's cause of action, the complaint is self-defeating and a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) . . . is well grounded. [161]

Thus, courts have expanded the holdings of cases that could easily have been narrowly construed and have created a general rule permitting affirmative defenses to be adjudicated on the basis of a 12(b)(6) motion. Under this approach, Rule 8(c) represents only an optional procedure for raising an affirmative defense, and the plaintiff is encouraged to anticipate affirmative defenses by pleading facts that would avoid those defenses.

On their facts, the leading cases that establish the Third Circuit Rule may not have worked an identifiable injustice. Because those principal cases—*Reeves, Hartmann*, and *Murdoch*—were decided ***439** under special circumstances, however, application of their holdings to all 8(c) defenses is questionable. By generalizing from particular cases, courts have fashioned a shortcut and have avoided addressing the potential for injustice that is posed by a general rule that a complaint is subject to dismissal if an affirmative defense appears on the face of the complaint.

B. Restrictive View—The Middle Ground

Despite their desire to permit prompt disposal of frivolous claims, some courts are reluctant to resort to the Third Circuit Rule. In an effort to assure not only a speedy but also a just resolution of disputes, these courts favor providing an opportunity for the plaintiff to offer proof unless "it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim." [162] Before ruling on whether an affirmative defense should serve as the basis for 12(b)(6) dismissal in a particular case, the courts that follow this middle-ground approach first determine that the defense would *conclusively* bar recovery. [163]

Leimer v. State Mutual Life Assurance Co. [164] is representative of early cases that acknowledge occasions when allowing affirmative defenses to be raised by motion may be appropriate but that restrict the practice to very limited circumstances. In *Leimer*, the lower court granted a 12(b)(6) dismissal of an action for recovery of insurance proceeds after it determined that the complaint contained allegations that disclosed the defenses of estoppel and laches. [165] Though recognizing the usefulness of Rule 12(b)(6) as a vehicle for presenting affirmative defenses in appropriate circumstances, [166] the Eighth Circuit Court of Appeals quoted with approval an earlier opinion that reasoned:

> ***440** "[t]hat rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill." [167]

In support of its holding that the defendant, on the particular facts of the case, should not have been permitted to obtain dismissal by a 12(b)(6) motion asserting the defenses of estoppel and laches, the *Leimer* court noted the preference for simplicity in pleading under the federal rules. [168] It also pointed to the post-answer procedures of motions for summary judgment and judgment on the pleadings for pre-trial dismissal of claims on the basis of affirmative defenses. [169]

In dictum, however, the court did open the door to possible use of a 12(b)(6) motion to present affirmative defenses in rare cases. It noted that under the appropriate circumstances, for example when "averments of the complaint show *conclusively*" that limitations bar the claim, asserting the defense by motion could "[serve] a useful purpose." [170] The court indicated, however, that for the most part, a 12(b)(6) motion is in order only when the plaintiff seeks relief for an injury for which the law provides no redress or if the plaintiff has no right to assert the claim, rather than when the defendant's challenge is an affirmative defense. [171] Even though the complaint in *Leimer* included allegations that tended to support the availability of an affirmative defense, the plaintiffs were entitled to make an attempt at proving their claim. [172]

The court in *Continental Collieries v. Shober* [173] relied on *Leimer* to determine that a statute of frauds defense could not, under the circumstances, be raised by motion to dismiss for failure to state a claim. [174] Interestingly, the court framed the issue as being "whether ***441** the plaintiff's complaint plead ed an *enforceable* cause of action," [175] not whether it pleaded a cause of action. [176] Even when measuring the sufficiency of the complaint under this stricter standard, the court held that pre-answer dismissal was not proper. [177]

The effect of the statute of frauds defense in *Shober*, a diversity suit to enforce an oral assignment of rights in five agency contracts, [178] depended on whether an agent of the defendant, who was also a plaintiff in the case, had an interest in the amounts sought to be recovered. [179] Acknowledging that in some cases the statute of frauds could be raised under Rule 12(b)(6), [180] the court determined that, in the case at bar, the defense should have been pleaded by answer. [181] Recognizing that " n o matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it," the court reversed the lower court dismissal. [182]

Similarly, the court in *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* [183] declined to dismiss a complaint when the defendant raised the statute of limitations by motion to dismiss for failure to state a claim. After addressing a number of substantial questions of law, including a choice of law issue regarding the appropriate statute of limitations to apply in a securities action, the court considered the propriety of dismissing the action in light of the possibility that the plaintiff could establish fraudulent concealment as an avoidance to the defense. [184] Having cited *Conley v. Gibson*, [185] the court looked to ***442** "whether the complaint include d allegations of fact that effectively vitiate d the ability to recover" [186] and declined to dismiss the complaint. [187] Though there was an apparent affirmative defense on the face of the complaint, the court was not willing to determine at that point that the defense was dispositive.

Comparable results were attained in *Emrich v. Touche Ross & Co.* [188] and in *Richards v. Mileski*. [189] In *Emrich*, after discussing the possibility of equitable tolling and the complexities of borrowing state statutes of limitation in this multi-count suit, [190] the court determined that, in light of the *Conley* standard, the plaintiff was entitled to a trial on the merits. [191] In *Richards*, a case filed more than twenty years after the claim arose, the court reasoned that:

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs . . . . The filing of an answer . . . allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal. [192]

To avoid foreclosing the plaintiff's opportunity to establish grounds for overcoming the affirmative defense, the court reversed the lower court's dismissal. [193]

The philosophy of the courts in this second category of cases is that, even though there are instances when an affirmative defense can serve as the basis for a 12(b)(6) motion, the better practice is to allow the plaintiff an opportunity to establish proof of a ground for avoiding the defense. These courts are less willing than those that follow the Third Circuit Rule to hold that an affirmative defense that is dispositive of the case appears on the face of the complaint. Disfavoring the use of 12(b)(6) motions, the courts in this line of ***443** cases look to other provisions of the rules for prompt disposal of insufficient claims and take into consideration mitigating factors that test the validity of the defense under the circumstances. Before allowing pre-answer dismissal of claims, these courts, preferring to allow the case to go to trial if it appears that the plaintiff can possibly establish grounds for avoiding the affirmative defense, [194] tend to require that the complaint allege sufficient facts upon which to conclusively determine that the claim is barred. Although these courts do not delineate what set of facts would establish the conclusive effect of an affirmative defense, it is clear that only rarely would dismissal be proper because of the appearance of an affirmative defense on the face of the complaint.

C. Prohibitive View—The Common-Law Rule

Reading Rules 8(c) and 12(b)(6) literally, some courts hold that a motion to dismiss for failure to state a claim is an inappropriate vehicle for raising an affirmative defense. [195] For these courts, a literal reading of the rules mandates that an affirmative defense is to be raised by "pleading to a preceding pleading," and it presents matter "constituting an avoidance" to a sufficiently stated claim. [196] It is not, therefore, among those defenses that under Rule 12(b) "may at the option of the pleader be made by motion." [197] In addition to pointing to the semantic differences between Rules 8(c) and 12(b)(6), the courts that prohibit asserting affirmative defenses by motion look to the substantive difference between attacking the sufficiency of a pleading under Rule 12(b)(6) and avoiding a sufficiently ***444** stated claim under Rule 8(c). [198] In the first instance, the plaintiff has no right of action, and in the second, the plaintiff merely has obstacles to overcome before the court can determine whether the plaintiff can recover under a properly asserted claim. Furthermore, the courts that prohibit the use of Rule 12(b)(6) to raise affirmative defenses note that one of the purposes of responsive pleading is to give the plaintiff fair notice and an opportunity to rebut the defense, and when the defendant is allowed to present an affirmative defense by a 12(b)(6) motion, the plaintiff is denied a meaningful opportunity to address the new matter that is asserted in the motion. [199]

For the most part, cases holding that affirmative defenses cannot be raised under 12(b)(6) do not provide extensive analysis of the issue. The courts quote or cite the applicable rules [200] and, without much discussion, draw their conclusions. There are, however, a few early cases that more fully address the issue.

Zeligson v. Hartman-Blair, Inc. [201] typifies cases that read the rules literally to preclude a defendant from raising affirmative defenses under Rule 12(b)(6). Although the court took judicial notice of an earlier proceeding and, therefore, was aware of matters outside of the pleadings, [202] it explained that a motion to dismiss was an inappropriate procedure for raising the defense of res judicata. The court stated that the earlier judgment could become "a barrier at some stage of the case, but whether plaintiff can hurdle it cannot ***445** be determined on a motion directed to the sufficiency of the complaint." [203] The court went on to say that "any . . . matter constituting an avoidance or affirmative defense must be affirmatively pleaded." [204]

The court in *Baker v. Sisk* [205] reached a similar conclusion regarding a statute of limitations defense. The complex procedural history of the case [206] required the court to address the difference between Rules 8(c) and 12(b)(6). The principal issue in *Baker*, a state tort claim removed to district court shortly after the rules took effect, [207] was whether the plaintiff lost her right to voluntary dismissal without prejudice under Rule 41(a) [208] after the defendant asserted a statute of limitations defense by way of a motion to dismiss for failure to state a claim. [209] Noting that the defendant could not raise the affirmative defense under Rule 12(b)(6), the court, based on the content of the motion, characterized it as an answer. [210] It then determined that because the defendant had filed an "answer," the plaintiff's right to voluntary dismissal without prejudice was foreclosed. [211]

***446** According to the court, the statute of limitations was a matter of avoidance, not a means of attacking the sufficiency of the complaint. [212] Although the action commenced after the running of the statute of limitations, [213] the court found that the complaint stated a claim within the meaning of Rule 12(b)(6) inasmuch as " t he motion to dismiss . . . is not designed to reach a case in which the plaintiff would not be entitled to any relief after the matters of defense have been presented. In other words it may not be substituted for an answer." [214]

Quoting this language from *Baker*, the court in *Eberle v. Sinclair Prairie Oil Co.* [215] concluded that, in light of Rules 8(c) and 56(b), [216] Rule 12(b)(6) should not be construed to permit affirmative defenses to be raised by motion to dismiss. [217] Although the court resolved the case on other grounds, it addressed the issue of the function of Rules 8(c) and 12(b)(6) in an effort to "clarify future procedure." [218] The defendant had filed two motions, one for summary judgment under Rule 56 and one for dismissal for failure to state a claim. [219] For each motion, accompanying affidavits revealed that a previous lawsuit arising out of the same wrongful death claim resulted in a compromise and settlement with other defendants. [220] The court indicated that had it taken judicial notice of the earlier judgment, the motion to dismiss would have to be sustained. Because, however, in ruling on a 12(b)(6) motion the court could consider only the allegations of the complaint, which should be taken as true, dismissal for failure to state a claim would be improper. [221] Furthermore, reasoned the court, the content of the affidavits filed with defendant's 12(b)(6) motion constituted an affirmative defense and such matters could be raised only in a responsive pleading. [222] The court overruled the motion to dismiss but then sustained the motion for summary judgment. [223]

***447** It is apparent from the reasoning in *Eberle* that the court viewed Rules 8(c) and 12(b)(6) as distinct challenges to the plaintiff's ability to recover. [224] Rule 8(c) provides a means of presenting to the court factual issues that serve as obstacles to the plaintiff's recovery, and Rule 12(b)(6) alerts the court to the possibility that there is no legal basis on which to establish the plaintiff's right to recover. Though the results in the case would have been the same had the court granted the 12(b)(6) motion, the court apparently considered motions to dismiss to be entirely inappropriate for raising challenges based on affirmative defenses.

Courts that reject the motion to dismiss as a vehicle for raising affirmative defenses view the rules as facilitating the court's disposal of claims on their merits. [225] Their theory is in line with the United States Supreme Court pronouncement in *Scheurer v. Rhodes* [226] that when considering a motion to dismiss, " t he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." [227] For these courts, the apparent availability of an affirmative defense may make it more difficult for the plaintiff ultimately to prevail, but it does not mean that the plaintiff has failed to state a claim. Concerned, as were the drafters of the rules, [228] that the merits of a valid claim may be sacrificed because of a seemingly insurmountable obstacle, the courts in this line of cases prefer to prohibit a practice that may defeat meritorious claims by obscuring the underlying issues.

***448 IV. CONCLUSION**

To determine whether affirmative defenses should be subsumed under Rule 12(b)(6), courts must look to the Federal Rules of Civil Procedure as a whole. The starting point is Rule 1's mandate that the rules be interpreted in a manner that promotes justice, avoids undue delay, and, finally, adds no unnecessary expense. These goals must serve as the guiding principles to a court that is considering the propriety of employing procedures not explicitly provided for in the rules. Furthermore, it is important for courts to note that the promotion of justice was first among the goals of the drafters of the federal rules. Thus, only after justice has been assured should the court proceed to accomplish the other goals.

Traditionally, courts have granted 12(b)(6) motions only when they are certain that the plaintiff will be unable to establish a basis for a valid claim. Reading Rule 8(c) into Rule 12(b)(6) to allow affirmative defenses to be asserted by motion, then, greatly expands the use of a procedure that courts view with disfavor. While dismissing complaints because of an affirmative defense that appears to be obvious on the face of the complaint may promote judicial economy, it

substantially diminishes the likelihood that the claim will be tried on the merits. Furthermore, it promotes inefficient use of the pleadings by encouraging excessive allegations and dilatory motions.

Although prompt disposal of insufficient claims is an important goal of the federal rules, there are other provisions in addition to Rule 12(b)(6) for testing the validity of claims and defenses. Rules 12(c) and 12(f) and the summary judgment provisions of Rule 12 are better suited to promoting prompt determination of claims without jeopardizing the plaintiff's opportunity to overcome an obstacle that may be apparent on the face of the complaint. After all, the drafters designed the rules to open, not to close, the courtroom doors. Taking the judicial shortcut of dismissing complaints because of an apparently dispositive defense revealed in the complaint is not in line with either the language or the philosophy of the rules. In light of the benefits of alternative methods for determining whether a claim can be avoided because of an affirmative defense, courts should discourage the raising of affirmative defenses by motion to dismiss under Rule 12(b)(6).

The only reasonable exception would be cases in which bringing a suit within a given time is a so-called "jurisdictional prerequisite" for a cause of action. Only if the court insists on construing a statute as incorporating a built-in and absolute requirement regarding time ***449** limitations is there a possibility that the plaintiff could fail to state a claim by averring matters of time. In such cases, the determination of whether the plaintiff's claim is sufficient would more likely be based on a matter of law, not on factual issues that are properly determined by a jury.

As with other affirmative defenses, a Rule 8(c) statute of limitations defense is a matter of avoidance, not an element of the claim. Thus, a plaintiff does not fail to state a claim merely because the defendant raises the affirmative defense of the statute of limitations. Because of the possibility that exceptions would be applicable in a given case, the validity of 8(c) defenses and their effect on the plaintiff's ability to recover should be determined only after the court considers matters outside of the pleading. Dismissing complaints for failure to state a claim because an affirmative defense appears to be on the face of the complaint fails to give proper consideration to the first goal stated in Rule 1. The result is particularly unjust when the plaintiff is not given an opportunity to amend the complaint to cure the apparent defect. Because the practice is contrary to the language and spirit of the Federal Rules of Civil Procedure and because the interests of judicial economy and fairness are better served by alternative methods of determining the validity of claims and defenses, courts should reconsider the practice of allowing 12(b)(6) motions to be based on affirmative defenses.

Footnotes

1 FED. R. CIV. P. 8(a)(2).

2 Statute of frauds is one of 19 defenses as to which Rule 8(c) of the Federal Rules of Civil Procedure expressly provides that the burden of pleading is upon the party responding to an opponent's pleading. Rule 8(c) reads in pertinent part:
In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.
FED. R. CIV. P. 8(c).

3 Pursuant to Rule 12(b), failure to state a claim upon which relief can be granted is one of seven defenses that may be asserted either by motion or in the responsive pleading. The rule reads in pertinent part:
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.
FED. R. CIV. P. 12(b).

4 Section 2-201 of the Uniform Commercial Code is representative of statute of frauds provisions. This version of the statute provides in pertinent part:
Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.
U.C.C. § 2-201(1) (1987).

5 Subsection 3 of section 2-201 of the Uniform Commercial Code version of the statute of frauds provides for exceptions to the general requirement of a writing. Subparts (b) and (c) provide that an oral agreement is enforceable under the following conditions:
(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.
U.C.C. § 2-201(3)(b), (c) (1987). *See also infra* note 62.

6 The fact pattern is based on Anthony v. Tidwell, 560 S.W.2d 908 (Tenn. 1977). The court of appeals reversed the judgment of the lower court on the ground that an affirmative defense may not be raised by a 12(b)(6) motion but must be raised in the defendant's answer. *Id.* at 909. The Tennessee Supreme Court held, however, that insofar as the complaint sought the enforcement of the entire contract, the lower court properly dismissed the complaint. *Id.* at 910. The court explained that a complaint is subject to dismissal for failure to state a claim "if an affirmative defense clearly and unequivocally appears on the face of the complaint" and "the facts on which [the defendant] relies to defeat [the] claim are admitted . . . in [the] complaint." *Id.* at 909. Fatal to the plaintiffs' claim, then, was the use of the word "oral" in their complaint. After examining the complaint for allegations that would have brought the alleged contract within an exception to the statute of frauds and finding none, the court, without requiring the defendant to submit supporting affidavits, granted the motion to dismiss. The court's approach required that the plaintiffs anticipate the defense in order to avoid dismissal.
Although the court in *Anthony* relied on Tennessee law, the Tennessee Rules of Civil Procedure are substantially the same as the federal rules, and to interpret them, Tennessee courts, like courts in other states, have relied on cases interpreting the federal rules. Hixson v. Stickley, 493 S.W.2d 471, 472 (Tenn. 1973).
For a discussion of *Anthony*, see Comment, *Civil Procedure—The Availability of Affirmative Defenses in 12.02(6) Motions to Dismiss*, 9 MEM. ST. U.L. REV. 151 (1978) (authored by Daniel Loyd Taylor).

7 *See* Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (explaining that under the federal rules, all the plaintiff is required to do is "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"); *see also* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); *see generally* Clark; *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958); Moscowitz, *Trends in Federal Law and Procedure*, 5 F.R.D. 361 (1946).

8 *See* Bethel v. Jendoco Constr. Corp., 570 F.2d 1168 (3d Cir. 1978) (stating that limitations defenses may be brought under Rule 12(b)(6) motion); McMillen v. Douglas Aircraft Co., 90 F. Supp. 670 (S.D. Cal. 1950) (finding statute of limitations properly raised by motion to dismiss); Cooper v. Rutherford County, 531 S.W.2d 783 (Tenn. 1975) (finding governmental immunity properly raised by motion to dismiss).

9 *See* Hanna v. United States Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975); Cook v. Board of Educ. of the Memphis City Schools, No. 139417 (Tenn. Ct. App. Sept. 27, 1990) (WESTLAW, 1990 WL 139417).

10 McNally v. American States Ins. Co., 382 F.2d 748, 752 (6th Cir. 1967) (issues of prior litigation not apparent for defense of res judicata); Jones v. Miller, 2 F.R.D. 479, 479 (W.D. Pa. 1942) (res judicata defense not apparent on face of complaint); Manecke v. School Bd. of Pinellas County, Fla., 553 F. Supp. 787, 788 (M.D. Fla. 1982) (factual considerations not apparent for defense of waiver), *aff'd in part and rev'd in part*, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986); Collins

v. PBW Stock Exch., Inc., 408 F. Supp. 1344, 1348-49 (E.D. Pa. 1976) (evidentiary hearing needed to establish defense of estoppel).

11 Some cases hold, however, that even with these affirmative defenses, the court should be wary of dismissing the claim without considering underlying facts. *See* Gomez v. Toledo, 446 U.S. 635 (1980) (finding that qualified immunity defense cannot be determined by looking at complaint); Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982) (noting that statute of limitations defenses may be subject to exceptions not apparent on the face of the complaint); Ray Peppelman, Inc. v. Mobil Oil Corp., No. 87-5513 (E.D. Pa. Nov. 25, 1987) (WESTLAW, 1987 WL 25245) (explaining that course of dealing may avoid a statute of frauds defense); *see generally* Atkinson, *Pleading the Statute of Limitations*, 36 YALE L.J. 914 (1927).

12 *See, e.g.*, Simmons Oil Corp. v. Bulk Sales Corp., 498 F. Supp. 457, 460 (D.N.J. 1980).

13 *See Gordon*, 675 F.2d at 360 (noting the safeguards provided by the rules for fair adjudication of the issues).

14 Orlando v. Alamo, 646 F.2d 1288, 1289 (8th Cir. 1981).

15 Richards v. Mileski, 662 F.2d 65, 73 (D.C. Cir. 1981) ("[t]he filing of an answer, raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal").

16 *See* Arthur H. Richland Co. v. Harper, 302 F.2d 324, 325 (5th Cir. 1962) (disposing of case on "bare bones pleadings is a tortuous thing"); Zeligson v. Hartman-Blair, Inc., 135 F.2d 874, 876 (10th Cir. 1943) (at trial plaintiff may hurdle barrier of res judicata defense).

17 Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 350 (1971). *See also Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 254 (1952) [hereinafter *Claim or Cause of Action*] (Ninth Circuit Committee on Federal Practice stating that "pleadings serve no purpose save to give notice").

18 Williams v. Nash, 428 So. 2d 96, 100 (Ala. Civ. App. 1983); *see generally* Collins v. PBW Stock Exch., Inc., 408 F. Supp. 1344, 1348-49 (E.D. Pa. 1976) (preference for evidentiary hearing before foreclosing right of action).

19 For example, Rule 9(b) reads in pertinent part, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).

20 Jenkins v. General Motors Corp., 354 F. Supp. 1040, 1048 (D. Del. 1973).

21 *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 40, at 251 (2d ed. 1947); *see infra* notes 49-50 and accompanying text.

22 See, for example, Form 5 which reads:

COMPLAINT FOR GOODS SOLD AND DELIVERED
1. Allegation of jurisdiction.
2. Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936, and December 1, 1936.
Wherefore (etc. as in Form 3).
FED. R. CIV. P. Appendix of Forms; *see also* Conley v. Gibson, 355 U.S. 41, 49 (1957); Piest v. Tide Water Oil Co., 27 F. Supp. 1020, 1022 (S.D.N.Y. 1939); *see generally* Clark, *supra* note 7, at 181.

23 FED. R. CIV. P. 1.

24 Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (*pro se* complaint sufficient though inartfully drawn); United States v. Hougham, 364 U.S. 310, 317 (1960) (noting that pleading should not be construed as a game of skill).

25 Owens Generator Co. v. H.J. Heinz Co., 23 F.R.D. 121, 124 (N.D. Cal. 1958), *cert. denied*, 375 U.S. 815 (1963).

26 Curacao Trading Co. v. William Stake & Co., 2 F.R.D. 308, 309 (S.D.N.Y. 1941).

27 Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Travelers Ins. Co. v. Austin, 521 S.W.2d 783, 785 (Tenn. 1975). *See* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952). Millar asserts that "[d]efenses in avoidance must in *all* cases be affirmatively pleaded." *Id.* at 181 (emphasis added). See also the definition of "affirmative defense" in BLACK'S LAW DICTIONARY 55 (5th ed. 1979) that reads, "[i]n pleading, matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it. Under the Fed. Rules of Civil Procedure, and also under most state Rules, all affirmative defenses must be raised in the responsive pleading . . . ."
There are exceptions to the general principle of waiver for failure to assert an affirmative defense when the defendant first files an answer. If, for example, the plaintiff otherwise has notice of the defendant's intention to raise the defense, Allied Chemical Corp. v. MacKay, 695 F.2d 854, 855 (5th Cir. 1983), or has expressly or impliedly consented to its being raised at trial, the defense is deemed not to be waived. O'Shea v. Amoco Oil Co., 886 F.2d 584, 591 n.6 (3d Cir. 1989) (relying on FED. R. CIV. P. 15(b)). Furthermore, under Rule 15(a), the defendant may seek to amend its original answer to include an affirmative defense. *In re* Mayo, 112 Bankr. 607, 658 (Bankr. D. Vt. 1990). In such cases, the defense is not waived for failure to plead it in the first instance. American Air Filter Co. v. Industrial Decking & Roofing Corp., 82 F.R.D. 681, 682 (E.D. Tenn. 1979).

28 Taylor v. Reo Motors, Inc., 275 F.2d 699, 704 (10th Cir. 1960).

29 Williams Enters., Inc. v. Strait Mfg. & Welding, Inc., 728 F. Supp. 12, 23 (D.D.C. 1990); Husbands v. Commonwealth, 359 F. Supp. 925, 939 (E.D. Pa. 1973).

30 *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 442 (1946) [hereinafter *Proposed Amendments*].

31 *See* Sides, *The Pre-Trial Conference and Order—Ready on the Firing Line§*, 9 MEM. ST. U.L. REV. 387, 394 (1979) (explaining that, like the pre-Rules demurrer, Rule 12(b) "remains the tool by which wheat (a pleading stating a 'cause of action') is separated from chaff (one failing in that mission)").

32 Holloway v. Putman County, 534 S.W.2d 292, 296 (Tenn. 1976).

33 Leimer v. State Mut. Life Assurance Co., 108 F.2d 302, 305 (8th Cir. 1940); Cornpropst v. Sloan, 528 S.W.2d 188, 190 (Tenn. 1975).

34 *Leimer*, 108 F.2d at 304.

35 *See supra* notes 2, 27; *see generally* Holzoff, though arguing against a proposed amendment to Rule 12(b) that would require defendants to raise all defenses by answer and would disallow pre-trial motions to dismiss, describes affirmative defenses as those that "[u]nder the new Rules . . . are pleaded in the answer . . . ." *Id.* at 496. He places affirmative defenses in a different category from those defenses that are properly considered under Rule 12(b). His treatment suggests that affirmative defenses are more appropriately raised by answer and that 12(b) defenses, on the other hand, should be permitted to be raised either by motion or in the answer.

36 *See supra* note 3.

37 *See generally* Sides, *supra* note 31, at 404-07; Brown, *Some Problems Concerning Motions Under Federal Rule 12(b)*, 3 F.R.D. 146 (1944); *see also In re* Rawson Food Serv., Inc., 846 F.2d 1343, 1349 (11th Cir. 1988) (ruling that an affirmative defense is not one that "points out a defect in the plaintiff's prima facie case" as would a 12(b)(6) motion).

38 FED. R. CIV. P. 8(a)(2).

39 FED. R. CIV. P. 8(f).

40 Federal Rule of Civil Procedure 8(e)(1) states, "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1). *See* Harrell v. Directors of Bureau of Narcotics & Dangerous Drugs, 70 F.R.D. 444, 446 (E.D. Tenn. 1975) (only a "short and plain statement" is permissible).

41 Komer v. Shipley, 154 F.2d 861, 862-63 (5th Cir. 1946). *See generally Claim or Cause of Action*, *supra* note 17, at 259; Clark, *Summary Judgments: A Proposed Rule of Court*, 2 F.R.D. 364, 366 (1942); Pike & Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297 (1940).

42 Rule 7(a) of the Federal Rules of Civil Procedure reads:
There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.
FED. R. CIV. P. 7(a).

43 Coley v. Pierce, 1 F.R.D. 77 (D.D.C. 1939).

44 Moviecolor Ltd. v. Eastman Kodak Co., 24 F.R.D. 325, 326 (S.D.N.Y. 1959) (indicating that only when "there is a clear and convincing factual showing of necessity or other extraordinary circumstances of a compelling nature" should a court order a reply to an affirmative defense). *See also* C. WRIGHT, THE LAW OF FEDERAL COURTS § 66 (4th ed. 1983) [hereinafter WRIGHT].

45 Rule 8(d) of the Federal Rules of Civil Procedure reads:
Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.
FED. R. CIV. P. 8(d).
See Beckstrom v. Coastwise Line, 13 F.R.D. 480 (D. Alaska 1953); *see generally* Ford, *More Expeditious Determination of Actions Under the New Federal Rules of Civil Procedure*, 1 F.R.D. 223, 225 (1941) (with Rule 8(d), reply is not necessary to establish plaintiff's denial or intention to avoid affirmative defense).

46 Conley v. Gibson, 355 U.S. 41, 47 (1957); Moscowitz, *supra* note 7, at 366.

47 Richard Nathan Corp. v. Mitsubishi Shoji Kaisha, Ltd., 41 F. Supp. 299, 301 (S.D.N.Y. 1941) (ruling that the statute of frauds, for example, is an 8(c) defense and "plaintiff need not . . . rebut it in the first instance"); *see supra* notes 2, 27.

48 *Richard Nathan*, 41 F. Supp. at 301. *See supra* text accompanying note 39.

49 In Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908), the United States Supreme Court held that, for the purpose of determining federal question jurisdiction, the Court will not consider allegations in anticipation of a defense. *Id.* at 152. The well-pleaded complaint rule set out in *Mottley* suggests a general disfavor of the practice of anticipating defenses in a complaint.
According to Clark, the reporter for the drafters of the 1938 Federal Rules of Civil Procedure, although "[i]t is axiomatic that the plaintiff need not set forth matters of defense, that is, matters which legally should come from the other side," it is not improper to do so. C. CLARK, *supra* note 21, at 251. He suggests that the goals of notice pleading may be better served if the plaintiff states matters of defense in the complaint. *Id.* at 251-52. If an affirmative defense appears on the face of the complaint, to avoid dismissal, the plaintiff should also allege matters of avoidance of the defense. *Id.*

50 *See* Alcoa S.S. Co. v. Ryan, 211 F.2d 576 (2d. Cir. 1954) (refusing to recognize allegations that anticipated the affirmative defense of release); Hower v. Roberts, 153 F.2d 726 (8th Cir. 1946) (treating as surplusage the allegation of due care in anticipation of the affirmative defense of concurrent negligence); Brown, *supra* note 37, at 148. *Contra* C. CLARK, *supra* note 21, at 251-52.

51 FED. R. CIV. P. 9(f).

52 Most federal and state courts recognize exceptions to the running of the applicable statute of limitations. Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). Under common-law and statutory provisions, the running of the statute of limitations may be tolled, for example, if the plaintiff is defrauded, disabled, or imprisoned. Note, *The Tolling of Statutes of Limitations in Tennessee*, 14 MEM. ST. U.L. REV. 375, 377 (1984) (authored by Tony Arvin).

53 *See generally* 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 352 (2d ed. 1990) [hereinafter WRIGHT & MILLER] and cases cited therein. Averments of time, which are material to the determination of sufficiency under Federal Rule of Civil Procedure 9(f), clearly appear on the face of the complaint and often serve as a basis for the defendant's challenge under the applicable statute of limitations. *Id.* at 352-54.

54 *See* Jones v. Rogers Memorial Hosp., 442 F.2d 773, 775 (D.C. Cir. 1971) (motion to dismiss denied in light of the discovery rule).

55 Emrich v. Touche Ross & Co., 846 F.2d 1190, 1200 (9th Cir. 1988) (possibility that pendency of earlier actions tolled the statute of limitations).

56 Williams v. Dayton Police Dept., 680 F. Supp. 1075, 1080 (S.D. Ohio 1987) (statute of limitations for § 1983 action tolled while plaintiff was imprisoned).

57 *See* Owens Generator Co. v. H.J. Heinz Co., 23 F.R.D. 121, 123 (N.D. Cal. 1958) (discussing a number of mitigating factors that affect the validity of a statute of limitations defense), *cert. denied*, 375 U.S. 815 (1963).

58 *See* Gomez v. Toledo, 446 U.S. 635, 640-41 (1980) (holding that plaintiff is not required to allege defendant's bad faith to avoid the defense of qualified immunity); *see also supra* note 49.

59 *See* Sidebotham v. Robison, 216 F.2d 816, 827 (9th Cir. 1954) (holding that bar by reason of laches arises only when, in addition to lapse of time, there is prejudice to a party resulting from the delay); Organizations United for Ecology y. Bell, 446 F. Supp. 535, 546 (M.D. Pa. 1978) (stating that defendant “must meet three independent criteria” to establish defense of laches).

60 Griswold v. E.F. Hutton & Co., 622 F. Supp. 1397, 1407 (N.D. Ill. 1985) (jury question as to the effect of a release even when release is attached to the complaint).

61 Miller v. Shell Oil Co., 345 F.2d 891, 893 (10th Cir. 1965) (facts supporting defense of res judicata not evident from the complaint).

62 *See supra* note 5. See also Anthony v. Tidwell, 560 S.W.2d 908 (Tenn. 1977), in which the court of appeals found that by raising the defense of statute of frauds by a 12(b)(6) motion to dismiss, the defendant brought the contract within one of the exceptions to the statute. The court indicated that the 12(b)(6) motion admitted the existence of the material facts of the complaint, including the existence of the alleged oral contract. *Id.* at 910. Refusing to allow the defendant's defense to be defeated because of a technical admission, the Tennessee Supreme Court granted the defendant's motion despite the apparent anomaly. *Id.* Though it has been suggested that the court of appeals' contention would destroy the effectiveness of the statute, Comment, *supra* note 6, at 155-56, requiring the defense to be raised by answer instead of allowing it to serve as a basis for motion under Rule 12(b)(6) would not force the defendant into a technical admission of the existence of a contract but would, instead, allow the defendant to deny having signed one.

63 Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 233-34 (1959) (good faith belief in defendant's assurances accounting for delay in filing suit); Howell v. Gray, 10 F.R.D. 268, 269 (D. Neb. 1950) (mere “calendar intervals” not an insurmountable bar).

64 Branko Int'l, Inc. v. Saudi Arabian Airlines, 704 F. Supp. 386, 389 (S.D.N.Y.), *aff'd*, 880 F.2d 1318 (2d Cir. 1989).

65 *See, e.g.*, Trinity Carton Co., Inc. v. Falstaff Brewing Corp., 767 F.2d 184, 193-94 (5th Cir. 1985) (holding that an affirmative defense is excluded from the case if it is not pleaded), *cert. denied*, 475 U.S. 1017 (1986).

66 *See generally* B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 348-50 (3d ed. 1923); J. KOFFLER & A. REPPY, HANDBOOK OF COMMON LAW PLEADING (1969); *see also* Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988) (stating that 8(c) defenses are akin to common law "confessions and avoidance" (quoting *In re* Rawson Food Serv., Inc., 846 F.2d 1343, 1349 (11th Cir. 1988))).

67 Consider, for example, estoppel, license, res judicata, and waiver.

68 For example, assumption of risk, contributory negligence, illegality, and statute of frauds.

69 For example, arbitration and award, discharge in bankruptcy, payment, or statute of limitations.

70 Williams Enters. v. Strait Mfg. & Welding, Inc., 728 F. Supp. 12, 23 (D.D.C. 1990); Husbands v. Commonwealth, 359 F. Supp. 925, 938 (E.D. Pa. 1973).

71 Palmer v. Hoffman, 318 U.S. 109, 117 (1943).

72 *See supra* note 2.

73 *See, e.g.*, Sayre v. Musicland Group, Inc., 850 F.2d 350, 353 (8th Cir. 1988).

74 C. CLARK, *supra* note 21, at 610-11.

75 McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 255-58 (1944). *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2485-88 (Chadbourn rev. 1981 & Supp. 1990) [hereinafter WIGMORE].

76 James, *Burdens of Proof*, 47 VA. L. REV. 51-55 (1961). *See also* WIGMORE, *supra* note 75.

77 318 U.S. 109 (1943).

78 *Id.* at 117.

79 *See, e.g., In re* Rawson Food Serv., Inc., 846 F.2d 1343, 1349 (11th Cir. 1988); Drexel Burnham Lambert Group, Inc. v. Galadari, 777 F.2d 877, 889 (2d Cir. 1985); Howard v. Green, 555 F.2d 178, 181 (8th Cir. 1977); Tendler v. Jaffe, 203 F.2d 14, 17 (D.C. Cir.), *cert. denied*, 346 U.S. 817 (1953); Williams Enters. v. Strait Mfg. & Welding, Inc., 728 F. Supp. 12, 23 (D.D.C. 1990); Organizations United for Ecology v. Bell, 446 F. Supp. 535, 546 (M.D. Pa. 1978); *see also* WIGMORE, *supra* note 75, § 2486, at 288.

80 Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982); Arfons v. E.I. Du Pont De Nemours & Co., 261 F.2d 434, 435 (2d Cir. 1958).

81 355 U.S. 41 (1957).

82 *Id.* at 45-46.

83 Foman v. Davis, 371 U.S. 178, 182 (1962).

84 Federal Rule of Civil Procedure 15(a) provides in pertinent part:
A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.
FED. R. CIV. P. 15(a). *See* Brown, *supra* note 37, at 149 (indicating that amending the complaint provides an opportunity for the plaintiff to show an exception to an affirmative defense raised by motion).

85 Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964); Fuhrer v. Fuhrer, 292 F.2d 140 (7th Cir. 1961); Kasu Corp. v. Blake, Hall & Sprague, Inc., 540 A.2d 1112 (Me. 1988).

86 Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 450 (2d Cir. 1978); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

87 American States Ins. Co. v. Williams, 151 Ind. App. 99, 103, 278 N.E.2d 295, 298 (1972) (citation omitted). *See generally* Brown, *supra* note 37, at 148.

88 *See supra* text accompanying note 51.

89 Suckow Borax Mines Consol., Inc. v. Borax Consol. Ltd., 185 F.2d 196, 204 (9th Cir. 1950) (holding that because averments of time are material, statute of limitations may be introduced by 12(b)(6) motion), *cert. denied*, 340 U.S. 943 (1951); A.G. Reeves Steel Constr. Co. v. Weiss, 119 F.2d 472, 476 (6th Cir.) (finding that in light of 9(f), failure to plead the statute of limitations by answer is not a waiver), *cert. denied*, 314 U.S. 677 (1941); Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969, 975 (S.D. Cal. 1942) (relying on 9(f) as support for allowing 12(b)(6) motion grounded on statute of limitations).
Averments of time may disclose the defendant's right to dismissal of the claim on the face of the complaint for reasons other than the running of the statute of limitations. For example, a cause of action may arise because of the time within which the defendant acted. Such would be the case in actions under section 10(b) and Rule 10(b)-5 of the Securities Exchange Act for trading within a prohibited window of time. In addition, when the court construes a statute as creating a right of action, not just a right to a remedy, and the plaintiff has no means of avoiding the strict time limitations set out in the statute, the passage of time may be dispositive. In such cases, time limitations are deemed to be strict jurisdictional absolutes, and Rule 9(f), by making averments of time material, insures that the lack of jurisdiction will be disclosed on the face of the complaint. *See*, *e.g.*, Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1319 (D.D.C. 1977); *see generally* Comment, *Equitable Modification of Time Limitations Under Title VII*, 48 U. CHI. L. REV. 1016 (1981) (authored by Leo Katz).

90 *See supra* notes 83-85 and accompanying text.

91 *See supra* notes 41-42 and accompanying text.

92 *See infra* note 94.

93 Federal Rule of Civil Procedure 12(c) states that:
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.
FED. R. CIV. P. 12(c).

94 Rule 12(b) provides in pertinent part:
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.
FED. R. CIV. P. 12(b).

95 McMillen v. Douglas Aircraft Co., 90 F. Supp. 670, 672 (S.D. Cal. 1950).

96 Rule 12(f) provides in pertinent part, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
FED. R. CIV. P. 12(f).

97 United States v. Union Gas Co., 743 F. Supp. 1144, 1150 (E.D. Pa. 1990).

98 Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 343-44 (1946); *Proposed Amendments*, *supra* note 30, at 441.

99 *See supra* note 96.

100 *Union Gas*, 743 F. Supp. at 1150; United States v. Marisol, Inc., 725 F. Supp. 833, 836 (M.D. Pa. 1989).

101 William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp., 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015 (1986).

102 California v. United States, 512 F. Supp. 36, 38 (N.D. Cal. 1981).

103 *See supra* note 96.

104 Lirtzman v. Spiegel, Inc., 493 F. Supp. 1029, 1031 (N.D. Ill. 1980) (quoting Systems Corp. v. American Tel. & Tel., 60 F.R.D. 692, 694 (S.D.N.Y. 1973)).

105 *See* Columbia Pictures Corp. v. Rogers, 81 F. Supp. 580, 584 (S.D. W. Va. 1949); *see supra* note 42 and accompanying text.

106 *See supra* note 93.

107 *See generally* 2A MOORE'S FEDERAL PRACTICE ¶ 12.15 (2d ed. 1990 & Supp.).

108 *See* McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982); WRIGHT & MILLER, *supra* note 53, § 1366, at 493; *see also* Republic Steel Corp. v. Pennsylvania Eng'g Corp., 785 F.2d 174 (7th Cir. 1986) (motion to dismiss after answer is filed is properly converted to summary judgment motion if court considers matters outside of the pleadings).

109 Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

110 Bankers Bond & Mortgage Co. v. Witherow, 1 F.R.D. 197, 198 (E.D. Pa. 1940). *See* WRIGHT, *supra* note 44, § 66, at 426 (court rarely orders a reply).

111 Barbar Lines v. M/V Donau Maru, 615 F. Supp. 109, 110 n.2 (D. Mass. 1984), *aff'd*, 764 F.2d 50 (1st Cir. 1985).

112 National Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987). On the advantages of disposal of claims and defenses under Rule 12(c), one commentator has suggested:
A motion for judgment on the pleadings under 12(c) would serve the purpose of a 12(b)(6) motion in almost every instance, and since 12(b)(6) motions so frequently merge in any case with Rule 56 motions for summary judgment, the whole procedure might be both shortened and rendered more economical if the 12(6)(6) motion were eliminated.
Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1887 (1989).

113 *See* Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 10 F.R.D. 39, 41-42 (S.D.N.Y. 1950) (denying defendant's request for court to order a reply to an answer setting up a number of affirmative defenses).

114 Federal Rule of Civil Procedure 56(a) provides:
A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
Furthermore, Federal Rule of Civil Procedure 56(b) provides that "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." FED. R. CIV. P. 56(a) & (b).

115 *See supra* note 94. The summary judgment provision of Rule 12(b), according to the court in Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982), "gave the District Courts authority to consider factual material at the motion to

dismiss stage [and] also sought 'to avoid taking a party by surprise . . . .' *Id.* at 360 (citing *Notes of Advisory Committee on 1946 Amendment to Rules*, 28 U.S.C. App. at 409-10 (1976)). The rules, however, do not require the court to exercise its authority to consider matters outside of the pleadings. The court in Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24 (2d Cir. 1988), for example, explained that the court may ignore additional materials and base its ruling on the 12(b)(6) motion solely on the face of the complaint. *Id.* at 25. *See also* Ware v. Associated Milk Producers, Inc., 614 F.2d 413, 414-15 (5th Cir. 1980) (finding that it is within the court's discretion whether to consider matters outside of the pleadings).

116 *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990); Herron v. Herron, 255 F.2d 589, 594 (5th Cir. 1958); *Proposed Amendments, supra* note 30, at 443-44. *But see* North Star Int'l v. Arizona Corp. Comm'n., 720 F.2d 578, 580-82 (9th Cir. 1983) (12(b)(6) motion not automatically converted to summary judgment motion under all circumstances).
On the notice requirement under the summary judgment provision of Rule 12(b), see Comment, *Civil Procedure—Isquith v. Middle South Utilities, Inc.: Notice Required When a Rule 12(b)(6) Motion Is Converted into Summary Judgment*, 19 MEM. ST. U.L. REV. 99 (1988) (authored by Sussan P. Harshbarger).

117 Pritchard v. State, 163 Ariz. 427, 433, 788 P.2d 1178, 1184 (1990).

118 Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250-52 (1986).

119 477 U.S. 317 (1986).

120 *Id.* at 324.

121 *See* FED. R. CIV. P. 26.

122 *Anderson*, 477 U.S. at 243.

123 *Celotex*, 477 U.S. at 323-24.

124 *Id.* at 327 (citations omitted). *See also Proposed Amendments, supra* note 30, at 433-44 (explaining that the inclusion of the summary judgment provision of Rule 12(b)(6) insures that if extraneous matter is introduced outside of the pleadings, both parties will have an opportunity to submit additional proofs).

125 *See generally* Butcher v. United Elec. Coal Co., 174 F.2d 1003 (7th Cir. 1949). In *Butcher*, what appears to convince the court that the rules provide for the raising of an affirmative defense by motion to dismiss is that Rule 12(b) includes a provision for converting the motion to one for summary judgment. *Id.* at 1006. The analysis in *Butcher* suggests that without the benefit of supporting affidavits, the court would not have enough information to determine whether a case should be summarily dismissed. *Id.*

126 Federal Rule of Civil Procedure 1 provides that "[the rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

127 *See id.*

128 *See* FED. R. CIV. P. 8(c), *supra* note 2.

129 *See* FED. R. CIV. P. 12(b), *supra* note 3.

130 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277, at 463 (2d ed. 1990).

131 *See, e.g.*, Herron v. Herron, 255 F.2d 589 (5th Cir. 1958); However v. Roberts, 153 F.2d 726 (8th Cir. 1946); Berry v. Chrysler Corp., 150 F.2d 1002 (6th Cir. 1945); Gossard v. Gossard, 149 F.2d 111 (10th Cir. 1945).

132 *See* Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978).

133 *See supra* note 53; *see also* Commentary, *Raising Statute of Limitations by Motion to Dismiss*, 3 Fed. R. Serv. § 12b.325, at 671, 672-673 (Callaghan 1940).

134 119 F.2d 472 (6th Cir.), *cert. denied*, 314 U.S. 677 (1941).

135 *Id.* at 476.

136 *Id. See supra* note 89.

137 *Reeves*, 119 F.2d at 474-75.

138 *See* Pierce v. Oakland County, 652 F.2d 671, 672 (6th Cir. 1981) (statute of limitations in an equal employment opportunity action); Berry v. Chrysler Corp., 150 F.2d 1002, 1003 (6th Cir. 1945) (statute of limitations in an action for fraud); Frabutt v. New York, C. & St. L. R.R., 84 F. Supp. 460, 463 (W.D. Pa. 1949) (statute of limitations in wrongful death action); Munson Line, Inc. v. Green, 6 F.R.D. 470, 474 (S.D.N.Y. 1947) (privilege); Hartford-Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711, 714 (W.D. Pa. 1942) (statute of limitations and laches).
Chambliss v. Coca-Cola Bottling Corp., 274 F. Supp. 401 (E.D. Tenn. 1967), *aff'd*, 414 F.2d 256 (6th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970), is a leading federal case in Tennessee on raising statute of limitations by motion to dismiss. In *Chambliss*, a class action under federal and state securities acts, holders of Class "A" stock sought declaratory relief to have declared void the conversion of plaintiff's stock to debentures under the company's recapitalization plan. Among the defenses that served as a basis for the defendants' motion to dismiss was the named plaintiff's failure to state a claim because the action was not brought within the limitations requirements of the securities acts. In response to the class representative's contention that a motion to dismiss was not a proper method of asserting the statute of limitations defense, the court, in a footnote citing *Reeves*, declared that "[i]t now seems to be well-settled that, if the failure to comply with a limitations period appears on the face of the complaint, that defect may be raised by a motion to dismiss." *Id.* at 408 n.14. The court further noted that even at common law, when a motion to dismiss was considered inappropriate for asserting statute of limitations, there was an exception for claims that arose under statutes that created a new cause of action and limited the time in which an action could be filed. *Id.* at 408. Noting that (1) the cause of action was created by statutes that specified limitation periods, and (2) the complaint made no allegations regarding the time during which the purported stock conversion was to have taken place, the court, over objections based on the applicable tolling statutes, held that the complaint failed to state a claim. *Id.*
On the common-law practice, see Patsavouras v. Garfield, 34 F. Supp. 406 (D.N.J. 1940).

139 39 F. Supp. 980 (S.D. Cal. 1941).

140 *Id.* at 984.

141 *Id. See also* Pearson v. O'Connor, 2 F.R.D. 521 (D.D.C. 1942).

142 *See, e.g.*, Hanna v. United States Veterans Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975); Gossard v. Gossard, 149 F.2d 111, 113 n.11 (10th Cir. 1945); Statler v. Babcock, 7 F.R.D. 57, 59 (W.D. Pa. 1946); Hartford-Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711, 714 (W.D. Pa. 1942); American States Ins. Co. v. Williams, 151 Ind. App. 99, 103, 278 N.E.2d 295, 298 (1972).

143 *Wright*, 39 F. Supp. at 984.

144 40 F. Supp. 878 (S.D.N.Y. 1941).

145 *Id.* at 879.

146 *Id.*

147 *Id.* at 879-80. Under New York law, the application of promissory estoppel was limited to cases concerning charitable subscriptions. *Id.* at 879.

148 1 MOORE'S FEDERAL PRACTICE § 12.04, at 644-47 (1938), *cited in Kahn*, 40 F. Supp. at 879.

149 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948).

150 *Id.* at 131 n.3.

151 *Id.* at 138.

152 *See, e.g.*, Thomas v. Consolidation Coal Co., 380 F.2d 69, 75 (4th Cir.), *cert. denied*, 389 U.S. 1004 (1967); Four Corners Enter., Inc. v. Manfoni, 17 Bankr. 156, 158 (Bankr. M.D. Tenn. 1982); Commonwealth v. Brown, 260 F. Supp. 323, 340 (E.D. Pa. 1966); United States v. Alaska, 197 F. Supp. 834, 836 (D. Alaska 1961); Mountjoy v. Twentieth Century-Fox Film Corp., 13 F.R.D. 122, 122-23 (W.D. Mo. 1952); Love v. United States, 104 F. Supp. 102, 105 (Ct. Cl. 1952).

153 330 F.2d 745 (3d Cir. 1964).

154 *Id.*

155 United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1307 n.9 (5th Cir. 1987) (citing *Murdoch* in a discussion of the conflict among the circuits as to whether affirmative defenses must be raised by answer); Adams v. Gould, Inc., 739 F.2d 858, 870 n.14 (3d Cir. 1984) (res judicata), *cert. denied*, 469 U.S. 1122 (1985); American Furniture Co. v. International Accommodations Supply, 721 F.2d 478, 482 (5th Cir. 1981) (res judicata); Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 n.10 (3d Cir. 1978) (statute of limitations); American Original Corp. v. Legend, Inc., 652 F. Supp. 962, 968 (D. Del. 1986) (condition precedent and statute of frauds defense to counterclaim); Hauptmann v. Wilentz, 570 F. Supp. 351, 363 n.4 (D.N.J. 1983) (statute of limitations and immunity), *aff'd*, 770 F.2d 1070 (2d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986); Mack v. Municipality of Penn Hills, 547 F. Supp. 863, 867 n.9 (W.D. Pa. 1982) (res judicata); Burkhardt v. Liberty, 394 F. Supp. 1296, 1298 (W.D. Pa. 1975) (statute of limitations), *aff'd*, 530 F.2d 963 (3d Cir. 1976); Katz v. State, 307 F. Supp. 480, 483 (D. Conn. 1969) (res judicata), *aff'd*, 443 F.2d 878 (2d Cir. 1970); Williams v. Atlantic Coast Line R.R., 274 F. Supp. 216, 217 (D.S.C. 1967) (res judicata).

156 *Murdoch*, 330 F.2d at 749.

157 *Id.* at 749 n.3.

158 *Id.*

159 The court did exclude from its consideration one exhibit to which the plaintiff had explicitly taken exception. *Id.*

160 Burkhardt v. Liberty, 394 F. Supp. 1296 (W.D. Pa. 1975), *aff'd*, 530 F.2d 963 (3d Cir. 1976).

161 *Id.* at 1298. The court's language suggests an even more liberal use of 12(b)(6) dismissal than is generally practiced under the Third Circuit Rule. The *Burkhardt* court suggests that merely the appearance that an affirmative defense is available will warrant dismissal. Most courts following the Third Circuit Rule frame the issue as whether an affirmative defense appears on the face of the complaint. *See supra* note 6.

162 Continental Collieries v. Shober, 130 F.2d 631, 635 (3d Cir. 1942). The United States Supreme Court adopted this language in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), a case decided 15 years after *Shober*. The Court determined that a complaint is sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); *Shober*, 130 F.2d 631 (3d Cir. 1942); and Leimer v. State Mut. Life Assurance Co., 108 F.2d 302 (8th Cir. 1940)).

163 *See, e.g.*, Leimer v. State Mut. Life Assurance Co., 108 F.2d 302, 306 (8th Cir. 1940); Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 551 F. Supp. 580, 591 (S.D. Ohio 1982).

164 108 F.2d 302 (8th Cir. 1940).

165 *Id.* at 304.

166 *Id.* at 305-06.

167 *Id.* at 305 (quoting Winget v. Rockwood, 69 F.2d 326, 329 (8th Cir. 1934)).

168 *Id.*

169 *Id.* at 306.

170 *Id.* (emphasis added).

171 *Id.*

172 *Id.*

173 130 F.2d 631 (3d Cir. 1942).

174 *Id.* at 635.

175 *Id.* at 632 (emphasis added).

176 *See* C. CLARK, *supra* note 21, at 127-48, 463-64 (discussion of definitions of "cause of action"). The Federal Rules of Civil Procedure dispensed with the terminology "cause of action" and substituted for it the term "claim." *See id.; see also* 5 C. THOMPSON & D. JAKALA, CYCLOPEDIA OF FEDERAL PROCEDURE § 15.160, at 151 (3d ed. 1985) (indicating that a 12(b)(6) motion addresses two concerns—"whether a claim is stated and . . . whether relief can be granted on it"); *see generally Claim or Cause of Action, supra* note 17.

177 *Shober*, 130 F.2d at 636.

178 *Id.* at 633.

179 *Id.* at 633, 635.

180 *Id.* at 635-36.

181 *Id.* at 636.

182 *Id.* at 635. Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982), addresses the issue of raising res judicata by 12(b)(6) motion. The court determined that a trial court must have additional material, such as a copy of the records of the earlier suit, to rule on a motion to dismiss based on the affirmative defense of res judicata, and, therefore, 12(b)(6) was not an appropriate device for raising the defense of res judicata. *Id.* at 1076. A similar result was obtained in McNally v. American States Ins. Co., 382 F.2d 748 (6th Cir. 1967).

183 551 F. Supp. 580 (S.D. Ohio 1982).

184 *Id.* at 592-93.

185 355 U.S. 41 (1957); *see supra* text accompanying notes 81-82.

186 *Basile*, 551 F. Supp. at 591.

187 For a similar case, see Williams v. Dayton Police Dep't, 680 F. Supp. 1075, 1080 (S.D. Ohio 1987) (holding that because imprisoned plaintiff could possibly establish fraudulent concealment that would toll the running of the statute of limitation, claim not dismissed under 12(b)(6)). *See also* Watts v. Graves, 720 F.2d 1416 (5th Cir. 1983); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1319 (D.D.C. 1977).

188 846 F.2d 1190 (9th Cir. 1988).

189 662 F.2d 65 (D.C. Cir. 1981).

190 *Emrich*, 846 F.2d at 1193, 1198-99.

191 *Id.* at 1198, 1199.

192 *Richards*, 662 F.2d at 73.

193 *Id.*

194 *See* Jones v. Rogers Memorial Hosp., 442 F.2d 773 (D.C. Cir. 1971) (statute of limitations and the discovery rule); Griswold v. E.F. Hutton & Co., 622 F. Supp. 1397 (N.D. Ill. 1985) (release and misrepresentation); Simmons Oil Co. v. Bulk Sales Corp., 498 F. Supp. 457 (D.N.J. 1980) (statute of frauds and confirmatory writing).

195 Harrison v. Thompson, 447 F.2d 459, 460 (5th Cir. 1971) (statute of limitations); Currier v. Knapp, 442 F.2d 422, 423 (3d Cir. 1971) (per curiam) (statute of frauds); Cohen v. United States, 129 F.2d 733, 737 (8th Cir. 1942) (payment); *In re* Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 886 (E.D. Mich. 1983) (statute of limitations), *aff'd in part and rev'd in part sub nom.,* Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985); Husbands v. Commonwealth, 359 F. Supp. 925, 938 (E.D. Pa. 1973) (res judicata); Drummond v. Spero, 350 F. Supp. 844, 845 (D. Vt. 1972) (privilege); Howell v. Gray, 10 F.R.D. 268, 269 (D. Neb. 1950) (statute of limitations); Patsavouras v. Garfield, 34 F.Supp. 406, 407 (D.N.J. 1940) (statute of limitations that is not an element of the claim); Hixson v. Stickley, 493 S.W.2d 471, 473 (Tenn. 1973) (release); Usrey v. Lewis, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977) (res judicata).

196 *See supra* note 2.

197 *See supra* note 3.

198 In *Husbands*, for example, the court explained that "[i]t is apparent under the rules that the plea of res judicata does not test the sufficiency of the pleadings but seeks to avoid a cause of action once stated. This conforms to common usage and practice." 359 F. Supp. at 938. The court went on to say that it "believe[d] it sufficient to say that the affirmative defense of res judicata should more properly be pled in a Rule 8 setting than in a Rule 12 setting." *Id.* at 939.
See also Perkins v. United States, 76 F.R.D. 590, 592 (W.D. Okla. 1976) ("limitations is a matter of defense rather than an element of a claim"); Syracuse Broadcasting Corp. v. Newhouse, 14 F.R.D. 168, 170 (N.D.N.Y.1953) ("Rule 12(b) enumerates the defenses which may be made by motion").

199 *Harrison*, 447 F.2d at 460 (granting opportunity to support allegations in complaint); Taylor v. Reo Motors, Inc., 275 F.2d 699, 704 (10th Cir. 1960) (providing fair notice of defensive matters); Builders Corp. of Am. v. United States, 259 F.2d 766, 772-73 (9th Cir. 1958) (providing opportunity to show underlying facts); Rambur v. Diehl Lumber Co., 144 Mont. 84, 89, 394 P.2d 745, 748 (1964) (avoiding surpise).

200 *See Husbands*, 359 F. Supp. at 938; Hixson v. Stickley, 493 S.W.2d 471, 472-73 (Tenn. 1973).

201 135 F.2d 874 (10th Cir. 1943).

202 *Id.* at 876.

203 *Id.*

204 *Id.*

205 1 F.R.D. 232 (E.D. Okla. 1938).

206 *Id.* at 236.

207 *Id.*

208 Under Federal Rule of Civil Procedure 41(a), the plaintiff has a right to move for dismissal if the defendant has not filed an answer. Rule 41(a) provides in pertinent part that, subject to other provisions:
an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
FED. R. CIV. P. 41(a).
For a discussion of the provision for voluntary dismissal in cases in which the defendant has presented a meritorious statute of limitations defense, see Note, *Rule* 41(a)(2) *Dismissals: Forum Shopping for a Statute of Limitations*, to be published in 20 MEM. ST. U.L. REV.— (1990) (authored by Susan Clark Taylor).

209 *Baker*, 1 F.R.D. at 235-37.

210 *Id.* at 236. *See also* Cook v. Board of Educ. of Memphis City Schools, No. 139417 (Tenn. Ct. app. Sept. 27, 1990) (WESTLAW, 1990 WL 139417) (agreeing with contention that collateral estoppel was not properly raised by 12(b)(6) motion and considering the motion as if it were an answer).

211 *Baker*, 1 F.R.D. at 237.

212 *Id.* at 236.

213 *Id.* at 235-36.

214 *Id.* at 236.

215 35 F. Supp. 296 (E.D. Okla. 1940), *aff'd*, 120 F.2d 746 (10th Cir. 1941).

216 *Id.* at 300. *See supra* note 114.

217 *Eberle*, 35 F. Supp. at 299-300.

218 *Id.* at 299.

219 *Id.* at 298.

220 *Id.*

221 *Id.* at 299.

222 *Id.*

223 *Id.* at 300. This case was decided prior to the 1946 amendment to Rule 12(b)(6) that requires the court to convert a motion to dismiss to a summary judgment motion if the court considers matters outside of the pleadings. *See supra* notes 94, 115-16 and accompanying text. This change, however, would not affect the court's characterization of the distinct functions of Rules 8(c) and 12(b)(6).

224 *Eberle*, 35 F. Supp. at 299 (citing Leimer v. State Mut. Life Assurance Co., 108 F.2d 302, 305 (8th Cir. 1940)).

225 Rambur v. Diehl Lumber Co., 144 Mont. 84, 90, 394 P.2d 745, 749-51 (1964).

226 416 U.S. 232 (1974).

227 *Id.* at 236. In *Scheurer*, the question of what constitutes sufficient grounds for pre-answer dismissal arose on appeal from an order of dismissal for lack of subject matter jurisdiction on the ground of governmental immunity under the eleventh amendment.

228 According to Clark, reporter for the Advisory Committee on the Rules:
The new Federal Rules represent a compromise between the view . . . that attack on the face of a pleading by demurrer or its modern substitute has substantial utility in advancing adjudication of cases and the view that contest limited to the parties' allegations is formal, ineffective, and often unjust in its consequences and that decision should always be directed to the merits, regardless of the pleadings. Thus we have epitomized the whole controversy aroused by modern simplified pleading and precipitated here by the Advisory Committee's proposals for amendment in line with the trend of the authorities towards the second view.
C. CLARK, *supra* note 21, § 86, at 540.

20 MPSSULR 411

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

ACCREDO HEALTH GROUP, INC.,

Plaintiff/Counter-Defendant,

v

No. CT-004487-12
Division V

GLAXOSMITHKLINE LLC f/k/a
SMITHKLINE BEECHAM CORPORATION
d/b/a GLAXOSMITHKLINE,

Defendant/Counter-Plaintiff.

ORDER GRANTING GLAXOSMITHKLINE LLC'S MOTION FOR SUMMARY JUDGMENT AS TO ACCREDO'S COMPLAINT AND PARTIAL SUMMARY JUDGMENT AS TO GLAXOSMITHKLINE LLC'S COUNTER-CLAIM FOR BREACH OF CONTRACT

This matter came before the court on March 2, 2017, upon Defendant/Counter-Plaintiff GlaxoSmithKline LLC's Motion for Summary Judgment as to Accredo's Complaint and Partial Summary Judgment as to GlaxoSmithKline LLC's Counter-Claim for Breach of Contract (the "Motion"). The case involves discounted sales of Arixtra by GlaxoSmithKline LLC ("GSK") to Accredo Health Group, Inc. ("Accredo"). GSK based its determination that Accredo was eligible to buy the drug at a discount on Accredo's certification that its purchases were for its own use in its home health care business

All of Accredo's claims against GSK are premised on Accredo's contention GSK wrongly denied discounts on purchases of Arixtra from January 1, 2007 to May 16, 2010 and from June 28, 2012 forward GSK alleges Accredo breached the contract by failing to meet the requirements that would entitle Accredo to a discount. Accredo seeks a refund for alleged

overcharges, and GSK seeks to disgorge Accredo of the discounts GSK alleges Accredo improperly received.

The issues now before the court are (1) whether Accredo breached the parties' contract or, on the other hand, dispensed Arixtra as part of and to promote its function as a home health care facility as required by the parties' contract; (2) if Accredo breached the contract, whether GSK waived the "home health care" requirement; and (3) if Accredo breached the contract and its waiver defense fails, the amount of damages payable to GSK for discounts Accredo received to which it was not entitled.

Upon consideration of the Motion, memoranda, exhibits and other papers submitted by the parties and the oral argument of counsel, this court finds that GSK's Motion is well-taken For the reasons set forth below, GSK's Motion for Summary Judgment as to Accredo's Complaint and Partial Summary Judgment as to GSK's Counter-Claim is GRANTED

Accredo's Arixtra Purchases

The first issue may be determined as a matter of law in light of the Tennessee Court of Appeals opinion affirming this court's interpretation of the parties' contract. No genuine issue of material fact exists as to whether Accredo purchased Arixtra for use as part of and to promote its function as a home health care facility as required by the parties' contract. Accredo did not According to the Court of Appeals, "Accredo's intended institutional operation for purposes of [the] agreement was a 'home health care' entity, and its 'own use' of Arixtra was limited by this." Accredo Health Group Inc. v. GlaxoSmithKline LLC, No W2015-01970-COA-R9-CV, 2016 WL 4137953, at *9 (Tenn. Ct. App Aug. 3, 2016). The record contains an abundance of evidence that Accredo sold the drug as a specialty pharmacy and did not use it in its home health care business Its failure to do so constitutes a breach rendering Accredo ineligible for discounts

under the contract

The court finds unavailing Accredo's argument that because Accredo's Arixtra customers have access to services that are "more than what a patient would typically receive from a brick-and-mortar retail pharmacy or mail-order pharmacy," Id at 10, Accredo's purchases were for use under the home health care class of trade As the Court of Appeals made clear, "Accredo must provide some sort of service **in the home** to make the dispensation . . . for its 'own use.'" Id. (emphasis added).

Accredo argues that the fact it has medical professionals available for consultation to Arixtra patients and in several instances the patients availed themselves of those services while the patients were in their homes means Accredo sold the drug as part of its home health care business, not its specialty pharmacy business The parties' contract, however, requires that Accredo perform the services "in the home," not just that the patients are at home when communicating with Accredo professionals. As the Court of Appeals stated, Accredo "is entitled to discounted pricing on Arixtra that is dispensed as part of and promoting its provision of health services to prevent or treat illness or injury provided in the place where the patient lives or dwells." Id at 9 Accredo has made clear, however, that instead of dispensing Arixtra as part of and promoting its home health care services, it, on occasion, provided services as part of and promoting its sale of Arixtra in its specialty pharmacy business. In other words, the dispensing of Arixtra was not incidental to the provision of health care services; rather the services were incidental to Accredo's sale of Arixtra. Such a scenario does not comport with the requirements of the parties' contract. Contrary to Accredo's statement on the Group Purchasing Organization Designation and Business Type Eligibility Form where Accredo agreed to be subject to the "penalty of perjury," Accredo's purchases were not "exclusively for use by [Accredo's] patients

under the designated class of trade [Home Health Care/Home Infusion]."

Accredo did not purchase Arixtra® for its own use in its home health care business but instead purchased the drug as a specialty pharmacy Accredo, therefore, was not entitled to the discounts it received, and it breached the parties' contract by failing to use the drug in compliance with the representation it made on the Declaration Form that GSK reasonably relied on when giving the discount

Accredo's Waiver Argument

Under Texas law, which by contract applies in this case, waiver requires "(1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence, and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right." See Ulico Cas Co. v. Allied Pilots Ass'n, 262 S W 3d 773, 778 (Tex. 2008). "For implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." Motor Vehicle Bd. v El Paso Indep. Auto. Dealers Ass'n, Inc., 1 S.W.3d. 108, 111 (Tex 1999).

Accredo contends GSK waived the right to deny discounts and terminate the contract because GSK continued to sell Arixtra at a discount after GSK should have known Accredo was not using it for its own use in its home health care business Accredo asserts that both the manner in which Arixtra is administered and the amount Accredo purchased should have alerted GSK that Accredo was not using the drug in compliance with the Declaration Form GSK relied on when determining Accredo's discount eligibility.

As regards the method of administering Arixtra, Accredo asserts that, because GSK knew Arixtra is self-injectable and administering the drug does not require in-home health care services, GSK waived the requirement that Accredo use the drug in its home health care

business. The manner in which Arixtra is designed to be administered, however, does not preclude a nurse or other healthcare professional from administering it Even drugs in the form of capsules, which clearly can be self administered, could be purchased by a healthcare facility for its own use as contemplated in the instant case. It would not be unreasonable for a drug manufacturer to assume a facility that certifies it will use a drug in its home health care business will, in fact, use it that way regardless of how the drug is designed to be administered

In the instant case, the determinative issue is not how the drug is designed to be administered but rather whether Accredo was "in the patient's home" when the drug was administered and whether the drug was administered as part of and promoting Accredo's services as a home health care facility The mere selling of a drug that is self-injectable is not inconsistent with GSK's belief that Accredo was going to dispense it for its own use in its home health care business when Accredo, under penalty of perjury, certified it would do so.

As regards Accredo's second theory on waiver, Accredo asserts GSK waived its right to terminate because it continued to sell Arixtra to Accredo after a GSK representative noted the sales volume was inconsistent with use by a home health care facility. The record reveals, however, that shortly after GSK noted the unusual volume of purchases, GSK sought to exercise its right to audit Accredo. In a letter to Accredo in October 2011, for example, GSK responded to conditions Accredo sought to put on GSK's audit In addition to objecting to the conditions, GSK notified Accredo it questioned whether Accredo was eligible for the discounts it had received The October 2011 letter from GSK's compliance director states·

> the large volume of Arixtra purchases by your facility seems inconsistent with the representations that were made on your declaration form. This audit will allow GSK to verify whether that information is correct, and whether all purchases of Arixtra by your

facility were used incidental to your facility's provision of home care and that you continue to meet the minimum eligibility requirements set forth in the Novation agreement

Clearly, GSK was not sitting on its rights to audit Accredo and discontinue the discounts if GSK determined Accredo failed to meet the eligibility requirements Of note also, GSK was under an obligation not to unreasonably withhold approval of Accredo for discounts. GSK, therefore, understandably did not terminate the contract immediately upon suspecting Accredo was not in compliance.

The surrounding facts and circumstances suggest GSK did not waive the requirement that Accredo dispense Arixtra for its own use in its home health care business Accredo's waiver defense, therefore, fails.

Damages

GSK seeks an award of $7,047,743.76 as reimbursement of the discounts Accredo wrongfully received from May 17, 2010 through June 28, 2012 The amount is supported by credible evidence in the form of Exhibits 14 and 15 to GSK's Statement of Undisputed Material Facts in Support of Partial Summary Judgment and the affidavit of Clayton Whitehead, GSK's Manager of Channel Sales Validation. Accredo challenges GSK's damages methodology on grounds there is no certainty Accredo would have purchased the same volume of Arixtra had it not received the discount. Accredo, however, fails to acknowledge it has enjoyed a benefit for which it was not eligible. To properly compensate GSK, restitution damages in the amount of discounts wrongfully received are appropriate Restitution damages are damages that restore to a plaintiff the benefit it conferred on the defendant. Quigley v Bennett, 227 S W 3d 51, 56 (Tex 2007), citing Restatement (Second) Of Contracts § 344 (1981) The damages GSK seeks were

necessarily the result of Accredo's breach; therefore, restitution damages are appropriate in this case. See Arthur Andersen & Co v Perry Equip. Corp., 945 S W 2d 812, 816 (Tex.1997). As damages for Accredo's breach of contract, GSK is entitled to an amount equal to the difference between the discount price and the price Accredo would have paid for Arixtra without the discount for purchases from May 17, 2010 through June 28, 2012. That amount is $7,047,743.76.

Conclusion

When determining Accredo's discount eligibility, GSK reasonably relied on Accredo's certification that purchases of GSK product would be for use in Accredo's designated class of trade, home health care. Contrary to its certification, Accredo's Arixtra purchases were not for use in Accredo's home health care business. GSK timely sought to audit Accredo for compliance and did not otherwise waive its rights to terminate discounts after June 2012.

There is no genuine issue of material fact that Accredo was not eligible for the discounts it seeks to recover in its breach of contract claim against GSK. Furthermore, GSK is entitled to recover on its counterclaim for breach of contract to recover the discounts Accredo received on Arixtra purchases from May 17, 2010 through June 28, 2012.

IT IS THEREFORE ORDERED AND ADJUDGED, that GSK's Motion for Summary Judgment as to Accredo's Complaint and Partial Summary Judgment as to GlaxoSmithKline LLC's Counter-Claim for Breach of Contract is GRANTED and GSK is awarded damages in the amount of $7,047,743.76

IT IS SO ORDERED this 9 day of March 2017.

Rhynette N. Hurd

JUDGE RHYNETTE N. HURD

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was emailed or mailed postage prepaid to the parties' attorneys at the addresses below this the _____ day of March 2017.

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