FJC Staff Paper

Use of Rule 12(b)(6) in Two Federal District Courts

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USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS

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I. Background: The Committee Proposal and Call for Data

At its November 1988 meeting, the Advisory Committee on Civil Rules received and discussed briefly a proposal from Professor Paul Carrington, the reporter to the committee, to abrogate Rule 12(b)(6) of the Federal Rules of Civil Procedure. The current rule permits a defendant to raise certain defenses by a motion that "shall be made" before filing an answer. The specific defense provided by Rule 12(b)(6) is the "failure [of the complaint] to state a claim upon which relief can be granted." As drafted by Professor Carrington, the language in subsection (6) would be deleted and replaced with the term "[abrogated]."[1]

The principal procedural effect of the proposed change would be to eliminate pre-answer motions to dismiss for failure to state a claim upon which relief can be granted. To challenge the legal sufficiency of a complaint, a defendant would have to file an answer and seek either judgment on the pleadings under Rule 12(c) or summary judgment under Rule 56. The proposed revision also makes it clear that an opportunity for "any necessary discovery" should be provided before the court renders judgment on the pleadings or summary judgment.[2]

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1. The abrogation of Rule 12(b)(6) also entails deletion of the references to the circumstances under which a Rule 12(b)(6) motion is converted into a motion for summary judgment. The full text of the rule, with the proposed addition in boldface and the proposed deletions struck through, is as follows:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) ~~failure to state a claim upon which relief can be granted,~~ [abrogated] (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. ~~If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.~~

Advisory Committee on Civil Rules, Oct. 1, 1988, Reporter's Discussion Draft, Rule 12 (hereinafter Rule 12 Draft). For a recent decision restating the standards for application of Rule 12(b)(6), see Neitzke v. Williams, 57 U.S.L.W. 4493 (U.S. May 1, 1989).

2. Rule 12 Draft, Proposed Advisory Committee Notes, subdivision (c).

As expressed by Professor Carrington, the purpose of the change is to reduce the volume of motions practice that does not lead to termination of the case. Such practice "is said to have experienced a 'revival'" that is associated with an increase in "fact pleading."[3] The reasons for the committee to reject this type of pleading are that it frequently addresses "matters of form, not substance," that it is "not consistent with Rule 1 or with the notice theory of pleading," and that it "may be motivated by a desire to delay."[4]

Recognizing that the above purposes involve empirical questions and assumptions, Professor Carrington suggested that the committee "consider whether additional data might be gathered that would illuminate the question raised by the proposal" to abolish Rule 12(b)(6).[5] Specifically, he called for information that would test Professor Richard Marcus's "observation that there has been a substantial increase in . . . [Rule 12(b)(6)] motion practice in the last decade."[6] Professor Carrington also noted that "Rule 11 has some bearing" on the proposed revision of Rule 12(b)(6)[7] and asked that the Federal Judicial Center gather data on Rule 11 in the course of studying Rule 12(b)(6).

In response to that request, I sought answers to the following questions:

(1) Has there been an increase in Rule 12(b)(6) practice in recent years?

(2) Do Rule 12(b)(6) motions fail to lead to the disposition of cases?

(3) Has Rule 11 had any demonstrable effect in cases involving Rule 12(b)(6)?

I found the following answers:

(1) The amount of Rule 12(b)(6) activity has diminished between 1975 and 1988, based on a sample of 640 cases terminated in 1988 in two federal district courts that was compared with a 1975 sample of terminated cases in those same courts and four other district courts.

(2) In the sample of case terminations in two districts in 1988, the ruling on the Rule 12(b)(6) motion led to final termination of the entire case in 3% of the sample. Rule 12(b)(6) motions were filed in 13% of the sample and the motions were granted in 6%. Granting the motion led either to termination of the case as a whole or as to one or more defendants in 5% of the sample.

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3. *Id.* at subdivision (b), citing Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 Colum. L. Rev. 433 (1986). Whether the increase in fact pleading is a cause or an effect (or both, or neither) of the increase in formal motions practice is itself a challenging empirical issue.

4. Rule 12 Draft, Proposed Advisory Committee Notes, subdivision (b).

5. *Id.*, Reporter's Note.

6. *Id.*

7. *Id.*

(3) There was little evidence of Rule 11 activity in the cases in which Rule 12(b)(6) motions had been filed. No Rule 11 sanctions were imposed in any of the cases in the sample of 1988 terminations.

The following sections address these issues in more detail and include some speculations about explanations for the findings. I also suggest a more precise methodology for a deeper examination of the Marcus thesis regarding the revival of fact pleading.

The Advisory Committee on Civil Rules considered the data in this report at its April 1989 meeting and decided not to change Rule 12(b)(6).[8]

8. Letter from Paul D. Carrington to Thomas E. Willging (May 21, 1989).

II. Empirical Evidence on the Use of Rule 12(b)(6) Motions

A. Baseline Data

Despite tongue-in-cheek assertions that Rule 12(b)(6) "was last effectively used during the McKinley administration,"[9] empirical data show a modern, consistent use of such motions to dispose of cases and claims. Comparing these data with data from a Federal Judicial Center study in the 1970s provides at least a preliminary assessment of Professor Marcus's claim of a substantial increase in Rule 12(b)(6) practice.

Studying data from 500 randomly selected cases that had been terminated in fiscal year 1975 in each of six metropolitan federal district courts, Paul Connolly and Patricia Lombard found that approximately 15% of the cases involved a Rule 12(b)(6) motion.[10] Among the six districts, the percentage of cases involving a Rule 12(b)(6) motion ranged from 6% in the Eastern District of Louisiana to 20% in the Southern District of Florida and the District of Maryland.[11]

The filing of motions does not tell the full story, however. In some situations, motions may be filed on a pro forma basis and either ignored or routinely denied. In other contexts, motions may be granted in whole or in part without leading to a final disposition of the case. Indeed, Connolly and Lombard found that only 40% of the cases that included a Rule 12(b)(6) motion were disposed of by that motion. The range was from approximately 16% in Eastern Louisiana to about 62% in Central California.[12] Twenty-three percent of the motions did

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9. A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure (Federal Judicial Center 1984). Professor Miller asserts that Rule 12(b)(6) "is not an effective screen. It is in a sense a revolving door device, rarely dispositive. Indeed it is by most sorts of cost-efficiency tests an artifact at this point." *Id.* at 8.

10. P. Connolly & P. Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980). Their research was part of the Federal Judicial Center's District Court Studies Project. The districts in their study were Southern Florida, Central California, Maryland, Eastern Louisiana, Massachusetts, and Eastern Pennsylvania. Motions to dismiss for failure to state a claim were filed in 582 (19%) of the 3,114 cases studied (Tables 20, 23).

11. The percentages for the other three courts are Central California, 19%; Massachusetts, 15%; and Eastern Pennsylvania, 8%. These figures are derived from the data base that Connolly and Lombard used to create a part of Table 20 in their report. The authors excluded certain cases from the study: multi-district litigation cases, uncontested Federal Home Loan Act (FHA) and Veterans Home Loan Act (VA) collection cases, and cases enforcing foreign subpoenas. *Id.* at 60 n.64.

12. The exact percentages for the other courts are Maryland, 51%; Massachusetts, 37%; Eastern Pennsylvania, 32%; and Southern Florida, 24%. These figures are derived from Table 23 and from the data base Connolly and Lombard used to create a part of Table 20 in their report.

not elicit any ruling before disposition. Of those motions that did lead to rulings, 65% were granted in whole or in part, and 72% of those grants led directly to final disposition of the entire case.[13] Rule 12(b)(6) motions produced final dispositions in about 6% of all cases studied. Nor were these dispositions of the "revolving door" variety.[14] Of the dispositions from Eastern Pennsylvania and Maryland, only one was reopened and that was closed promptly after reconsideration and affirmance of the dismissal.[15] The Connolly and Lombard findings are summarized in the following table, which traces the treatment of Rule 12(b)(6) motions between the filing stage and the final disposition stage.

TABLE 1
Effect of Rule 12(b)(6) Motions on Dispositions in Six Federal District Courts, Random Sample of 1975 Terminations
(*N* = 3,114)

	Rule 12(b)(6) Motions	Cases with Rule 12(b)(6) Motions (% of Sample)
Total in Sample	582	462 (15%)
Total Rulings (77% of Motions)	449	368 (12%)
Total Granted (65% of Rulings)	292	259 (8%)
Total Dispositions (72% of Granted Cases)		186 (6%)

Source: P. Connolly & P. Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980).

Further data on Rule 12(b)(6) practice emerge from the Civil Litigation Research Project (CLRP). The CLRP study examined selected cases terminated in calendar year 1978 in five federal district courts.[16] Approximately one in ten of those cases included Rule 12(b)(6) motions. Fifty-six percent of the motions in those cases were ruled on. Fifty-eight percent of those rulings produced total or

13. The number of rulings granting Rule 12(b)(6) motions in whole or in part was 292 of 449 (65%). The percentages for the six courts are Central California, 77%; Maryland, 74%; Eastern Pennsylvania, 70%; Massachusetts, 67%; Eastern Louisiana, 67%; and Southern Florida, 48%. These figures are derived from a worksheet that Connolly and Lombard used to create a part of Table 20 in their report.

14. See *supra* note 9.

15. Personal communication with Patricia Lombard, who reanalyzed the data to test for reopenings.

16. For a general description of the data collection strategy of this major research effort, see Kritzer, *Studying Disputes: Learning from the CLRP Experience,* 15 Law & Soc'y Rev. 503, 512–15 (1981). The five districts were Eastern Pennsylvania, South Carolina, Eastern Wisconsin, New Mexico, and Central California. Uncontested collections cases, bankruptcy cases, government versus government, judicial review of administrative decisions, and quasi-criminal matters such as prisoner petitions were all excluded from the study.

partial dismissals for failure to state a claim. Less than one-third of the dismissal rulings led to a termination of the litigation. Using the same format as in Table 1, the CLRP data are summarized in Table 2.

TABLE 2
Effect of Rule 12(b)(6) Motions in Dispositions in Selected Cases in Five Federal District Courts, Random Sample of 1978 Terminations
(*N* = 809)

	Rule 12(b)(6) Motions	Cases with Rule 12(b)(6) Motions (% of Sample)
Total in Sample	98	79 (10%)
Total Rulings (56% of Motions)	55	49 (6%)
Total Granted (58% of Rulings)	32	29 (4%)
Total Dispositions (31% of Granted Cases)		9 (1%)

Source: Civil Litigation Research Project.

The percentage of cases that include a Rule 12(b)(6) motion is lower than the Connolly and Lombard figure (10% versus 19%). The difference may arise from the types of cases excluded from the CLRP data set and included in Connolly and Lombard's set: prisoner petitions, bankruptcy appeals, and appeals of administrative agency decisions. Prisoner petitions are especially likely to involve a challenge for failure to state a viable legal claim.[17]

The number of Rule 12(b)(6) motions that led to a final disposition in the CLRP study is dramatically lower than the comparable figure in the Connolly and Lombard data (1% versus 6%). Again, a partial explanation may lie in the differences in the types of cases included in both studies. Dismissal of a prisoner petition may more often amount to a final disposition of the case.

B. Current Data

To test the current use of Rule 12(b)(6) motions and to develop additional data, a team of research assistants under my supervision examined docket sheets and files in approximately 300 terminated cases each in two federal district courts, Maryland and Eastern Pennsylvania.[18] Social Security cases and cases in-

17. *See generally* Prisoners Civil Rights Committee, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Federal Judicial Center 1980)

18. I selected these two courts to provide two different court settings. The District of Maryland has a statewide jurisdiction. Slightly more than 10% of its caseload consists of prisoner civil rights cases, 10% consists of private civil rights cases, and 2% consists of civil rights cases involving the

volving the collection of unpaid student loans were excluded. The overall results follow.

TABLE 3
Effect of Rule 12(b)(6) Motions on Dispositions in Two Federal District Courts, Sample of 1988 Terminations
(*N* = 640)

	Rule 12(b)(6) Motions	Cases with Rule 12(b)(6) Motions (% of Sample)
Total in Sample	103	81 (13%)
Total Rulings (83% of Motions)	86	67 (10%)
Total Granted (52% of Rulings)	45	37 (6%)
Total Dispositions (Defendants and Cases)	36	33 (5%)
Total Dispositions (51% of Granted Cases)		19 (3%)

NOTE: For separate data on the two courts, see Tables 5 and 6 in the Appendix.

1. Filing rate

Comparing tables 1, 2, and 3 reveals some noteworthy similarities and differences.[19] The data fail to support the Marcus claim that Rule 12(b)(6) activity has recently increased. The percentage of cases in which a Rule 12(b)(6) motion was filed decreased from 15% in the 1975 Connolly and Lombard data to 13% in the 1988 data. Looking behind the tables to the separate data from each district reveals that the overall difference in the rate of filing results from the combination of a modest decrease in Maryland (from 20% to 14%) and a slight increase

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United States. Contract and tort actions constitute the bulk of the remaining cases. Administrative Office of the U.S. Courts, 1987 Annual Report of the Director at Table C 3A.

The Eastern District of Pennsylvania is a large metropolitan court. The docket appears to represent every major category of litigation, including public and private civil rights cases and prisoner petitions. However, the proportion of civil rights litigation and prisoner litigation (about 15% of the docket) is less than in the District of Maryland. The bulk of the docket appears to consist of private contract cases (about 15%) and tort cases (about 37%).

19. The inclusion of prisoner cases in both Federal Judicial Center data sets makes their conclusions comparable; the exclusion of such cases from the CLRP data set creates problems with comparisons. As shown below (Table 4 and following discussion), a substantial number of prisoner cases are in the 1988 data set. The exclusion of Social Security and student loan cases from the 1988 data should not affect the rate of filing, because those cases are commonly dealt with either on cross motions for summary judgment (Social Security) or as defaults or settlements (student loans). Because the complaints for both groups of cases are generally on standard forms, dismissal for failure to state a legal claim would be surprising. Similarly, the exclusion of home loan collection cases from the Connolly and Lombard study should not affect the rate of filing of Rule 12(b)(6) motions.

in Eastern Pennsylvania (from 8% to 11%). (See Tables 5 and 6 in the Appendix.)

2. Disposition rate

Differences in the rate of final disposition of cases as a result of the granting of Rule 12(b)(6) motions are notable, having declined from 6% in 1975 to 3% in 1988. The decline represents a steep reduction in dispositions in Maryland (from 10% to 2%) coupled with a substantial increase in Eastern Pennsylvania (from 2% to 4%). The dispositions did not display any "revolving door" characteristics.[20] In the 1988 data I did not find any terminated cases that were reopened.

In the current study, I was able to track the disposition rate as to individual defendants. Rule 12(b)(6) motions led to the disposition of fifteen individual defendants in fourteen cases (2% of the sample) without producing the disposition of the entire case. Data on this point were not available in the Connolly and Lombard study or the CLRP study.

The decline in final dispositions in Maryland does not appear to be attributable to changes in the patterns of rulings on Rule 12(b)(6) motions. While there was a decline in the percentage of rulings granting dismissal between 1975 and 1988, the magnitude of the change is not sufficient to account for the decrease in dispositions.[21]

One can only speculate as to other reasons for the change. Two theories come to mind. One is that the change may be related to changes in the structure of litigation. For example, if there are increases in the number of plaintiffs, defendants, or third parties involved in the litigation, Rule 12(b)(6) motions would have to be successful as to all claims for relief among all the parties to achieve a disposition. Testing this theory would require re-analysis of both the 1975 and 1988 data.[22]

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20. To test the "revolving door" hypothesis, *supra* note 9, I defined *final disposition* to exclude any cases that were terminated yet reopened on an amended complaint or on reconsideration of the original dismissal. This definition is consistent with that used by Connolly and Lombard in their examination of the 1975 data. Both studies treated a terminated case as a final disposition at the trial level even if it was appealed and later remanded.

21. In 1975, 74% of the Rule 12(b)(6) rulings in the District of Maryland granted the motion; in 1988, 54%. These variations appear to be within normal range, however: 65% of the rulings granted dismissal in the 1975 study, 58% in the CLRP study, and 52% in the current study. In 1988 in Eastern Pennsylvania, 55% of the 12(b)(6) rulings granted dismissal. If Maryland's 1975 grant rate of 74% had prevailed in 1988, the dispositions reported in Table 3 would have increased from 3% to 4%.

22. A simple comparison of the average number of motions per case in which a Rule 12(b)(6) motion was filed does not reveal much variation among the three data sets. In Connolly and Lombard there were 1.26 motions per case; in CLRP, 1.24; and in the current study, 1.27. Of course, these figures do not reveal whether the underlying structure of the litigation changed in complexity. The

Another theory, not entirely independent of the first, is that changes in the law, procedural and substantive, have restricted the authority of a court to dismiss claims in certain contexts. This may be especially true in the area of prisoners' rights. A review of cases decided by the Fourth Circuit between 1976 and the present suggests that dismissal of prisoner pro se cases under Rule 12(b)(6) should be given careful scrutiny.[23]

Comparison of the 1988 data with the 1975 data supports this theory. In 1975, prisoner cases constituted 11% of the cases in which a Rule 12(b)(6) motion was filed in Maryland. In 1988, prisoner cases constituted only 3% of the Rule 12(b)(6) filings in Maryland. Moreover, the rate at which motions in prisoner cases led to final dispositions in Maryland changed dramatically between 1975 and 1988. In the 1975 sample, fifty-one prisoner cases (11%) involved Rule 12(b)(6) motions. Forty-five motions were granted, terminating forty-one cases for an 80% disposition rate. In the 1988 sample, motions were filed in ten prisoner cases and seven were granted, terminating three cases for a 30% disposition rate.

Looking at the data on prisoner cases, however, leads to a more general theory: that there has been a general change in the procedural standards for reviewing Rule 12(b)(6) motions in the circuit and district. The disposition rate for prisoner cases is double the rate for non-prisoner cases. This suggests that a major factor operating to reduce the disposition rate is a general reduction in the de-

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best test of that would be a count of the number of plaintiffs, defendants, and third parties in the litigation in each of the data sets. Such a test is beyond the scope of the current project.

23. There were four published opinions in prisoner conditions-of-confinement cases from this period that involved Rule 12(b)(6) motions. Of these, three were reversed and remanded in whole, and one was affirmed in part and reversed in part. The language of the court emphasized a strong preference for deciding prisoner petitions on their merits: on factual grounds, not on technical rules of pleading. Hudspeth v. Figgins, 584 F.2d 1345, 1347 (4th Cir. 1978) ("Thus the power summarily to dismiss a prisoner's *pro se* complaint is limited."); Loe v. Armistead, 582 F.2d 1291, 1295 (4th Cir. 1978) ("The standard of proof for dismissal under Rule 12(b)(6) is demanding because the Federal Rules of Civil Procedure are premised on the notion that disputes should be decided on their facts, as developed through discovery and at trial, rather than on the skill or ineptitude with which the pleadings are drawn. . . . And liberal construction of pleadings is particularly appropriate where, as here, there is a *pro se* complaint raising civil rights issues."); Bolding v. Holshouser, 575 F.2d 461, 466 (4th Cir. 1978) ("Thus, we remind counsel for defendants and the district court that the proper path for them to pursue is not a motion under Rule 12(b)(6) but the various procedures authorized and described in Rules 16, 26–37, and 56."); and Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978) ("the district court must examine the *pro se* complaint to see whether the facts alleged, or the set of facts which the plaintiff might be able to prove, could very well provide the basis for recovery under any of the civil rights acts or heads of jurisdiction in the federal arsenal for redress of constitutional deprivations"). For an article by a district judge in the Fourth Circuit that confirms the strictness of the standard for dismissal of pro se prisoner cases, see Doumar, *Prisoner Civil Rights Suits: A Pompous Delusion,* 11 Geo. Mason U.L. Rev. 1, 4 (1988) ("The author now hesitates to dismiss a pro se complaint without a defensive pleading, since to do so invariably results in a reversal.").

gree to which motions that are granted lead to final dispositions. In Maryland in 1975, 91% of all granted motions led to final dispositions of a case; in 1988, the comparable figure was 35%. This is evidence that in the District of Maryland the percentage of formal pleading under Rule 12(b)(6) has increased. At the same time, the diminishing prospects of accomplishing a final disposition of a case may account for the decrease in use of Rule 12(b)(6) motions in the district.

Regardless of the explanation, the data show a substantial reduction in the disposition rate in the District of Maryland. These data support an inference that the Rule 12(b)(6) motion has a diminished utility in that district as compared with its utility in 1975. Whether the 1988 disposition rate, which is not insignificant, represents a valuable contribution to case management or a waste of resources for the parties and the courts is the ultimate issue. Resolution of that issue calls for a value judgment by the appropriate policymakers.

3. Sanctions

There was little evidence of any sanctions activity in the sample of cases that involved motions to dismiss for failure to state a claim. A review of the docket sheets in all cases with Rule 12(b)(6) motions showed few references to sanctions and even fewer relating to Rule 11 sanctions. In the District of Maryland's forty-three cases, two had references to non-discovery sanctions motions. Neither of these cases led to a ruling or sanctions. Similarly, in the Eastern District of Pennsylvania, two motions for sanctions under Rule 11 were filed. Both were denied. Given the mandatory nature of Rule 11 sanctions, it is surprising that Rule 12(b)(6) activity is not accompanied more frequently by Rule 11 sanctions activity. However, as the appellate cases discussed in note 35 of this report illustrate, proper use of Rule 12(b)(6) frequently involves the resolution of arguable legal theories.

Another hypothesis regarding sanctions would be that the general deterrent effects resulting from increased use of amended Rule 11 might affect Rule 12(b)(6) practice in one of two ways. First, the threat of sanctions to a plaintiff might deter the filing of an unfounded complaint. Second, the threat of sanctions might deter the filing of a Rule 12(b)(6) motion. Without a precise yardstick of the deterrent effects of Rule 11 in these districts, I did not undertake to pursue this issue.[24]

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24. Coincidentally, a task force appointed by Chief Judge John J. Gibbons of the Third Circuit and chaired by Judge John P. Fullam of the Eastern District of Pennsylvania studied Rule 11 activity in the Third Circuit from July 1, 1987, to June 30, 1988. *See* Third Circuit Task Force (S. Burbank, Reporter), Rule 11 in Transition (1989). The level of activity under Rule 11 was not high in the Eastern District of Pennsylvania. There were forty-two requests for sanctions and three sua sponte actions in forty-one cases. *Id.* at 108. Sanctions were imposed in four cases. *Id.* at 112.

C. Case Characteristics

1. Nature of suit

The 103 Rule 12(b)(6) motions included in the study were filed in eighty-one cases. Table 4 identifies the nature of those cases, using the Administrative Office's "nature of suit" codes.

TABLE 4
Nature of Suit of Cases with Rule 12(b)(6) Motions Filed in Two Federal District Courts, Sample of 1988 Terminations

AO Code	Description	No. in D. Md	No. in E.D. Pa.	Total Such Cases (% of Sample)
110	Contract: Insurance	0	3	3 (4%)
140	Contract: Negotiable Instruments	1	0	1 (1%)
160	Contract: Stockholder Suits	1	0	1 (1%)
190	Other Contract	5	3	8 (10%)
220	Foreclosure	0	1	1 (1%)
240	Torts to Land	1	0	1 (1%)
350	Motor Vehicle	1	1	2 (2%)
360	Other Personal Injury	1	6	7 (9%)
362	Personal Injury: Medical Malpractice	1	0	1 (1%)
365	Personal Injury: Product Liability	2	3	5 (6%)
368	Personal Injury: Asbestos Product Liability	5	1	6 (7%)
410	Antitrust	0	1	1 (1%)
440	Civil Rights: Other	4	6	10 (12%)
442	Civil Rights: Jobs	5	2	7 (9%)
540	Civil Rights: Mandamus and Other	2	0	2 (2%)
550	Prisoner Civil Rights	10	1	11 (14%)
690	Other Forfeiture & Penalty	1	0	1 (1%)
710	Fair Labor Standards Act	1	0	1 (1%)
720	Labor/Management Relations Act	0	1	1 (1%)
791	Employee Retirement Income Security Act of 1974	0	1	1 (1%)
820	Copyright	0	1	1 (1%)
850	Securities, Commodities Exchange	1	4	5 (6%)
890	Other Statutory Actions	1	3	4 (5%)
TOTAL		43	38	81

To categorize the cases further, thirty cases (37% of the total) were classified as civil rights cases. Twenty-one cases (25%) were personal injury actions, and thirteen (16%) involved some form of contract action. The balance were sprinkled among statutory actions, labor laws, and property rights. From the group of complex statutory actions, there was one antitrust case, five securities-commodities cases, and no Racketeer Influenced and Corrupt Organization (RICO) cases.

How did motions in the civil rights cases fare in comparison with motions in all other cases in the data set?[25] Rule 12(b)(6) motions in civil rights cases were somewhat more likely than such motions in non-civil rights cases to be granted totally or partially (58% versus 48%) and they were somewhat more likely to lead to termination of the entire case (36% versus 27%).

The above differences, however, are largely attributable to the presence of twenty-one personal injury cases among the fifty-one non-civil rights cases. The twenty-five motions in those personal injury cases were far less likely to be ruled on than civil rights case motions were (64% versus 97%). The rulings were unlikely to grant the motion in whole or part (38%) and were very unlikely to lead to a disposition of the entire case (13%). Given the relative simplicity of the form complaint for negligence actions appended to the Federal Rules of Civil Procedure,[26] the fact that such cases are infrequently dismissed is not surprising. Indeed, it is more of a surprise that Rule 12(b)(6) motions are filed in such cases. The high rate of denial of such motions (63%) and the low rate of case terminations resulting from them are both evidence of formal pleading.

2. Mode of disposition

Using data developed by Joe Cecil of the Federal Judicial Center's Research Division,[27] I was able to track the number of motions for summary judgment granted in the sixty-two cases involving Rule 12(b)(6) motions that did not terminate the case. Summary judgment motions were filed in almost two-thirds of the cases (63%) and granted in one-third of those cases, with all but two of the judgments favoring the defendant in whole or in part.

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25. This is not to suggest that civil rights cases should generate the same pattern of Rule 12(b)(6) activity as other cases. There is no normative or empirical baseline from which to measure the degree to which any type of case warrants or does not warrant disposition under Rule 12(b)(6). To test the proposition, obtaining expert qualitative reviews of decisions would probably be necessary. For discussion of this issue in another context, see T. Willging, The Rule 11 Sanctioning Process 161–63 (Federal Judicial Center 1988).

26. Fed. R. Civ. P., Form 9.

27. *See generally* J. S. Cecil & C. R. Douglas, Summary Judgment Practice in Three District Courts (Federal Judicial Center 1987); *see also* J. S. Cecil, Change of Summary Judgment Use Following Supreme Court Clarification of Standards (forthcoming from the Federal Judicial Center).

Overall, based on the Administrative Office data for the sixty-two cases, forty-three (69%) were disposed of during the pretrial process. Ten percent were disposed of during a trial by court or jury and another 5% after a court trial. The balance were recorded in other categories.

3. Outcomes

As might be expected, the overwhelming majority of the sixty-two cases were dismissed or settled at some stage of the litigation. Only four (6%) are recorded as involving jury verdicts or judgments after bench trials. For those cases for which data were available (19 of 63), only one judgment for the plaintiff was reported and one judgment for both plaintiff and defendant. Data on the nature of judgment were consistent with the above report. Only one monetary award was involved. Two judgments, both for defendants, involved an award of costs.

4. Counsel

Twenty-two of the 103 motions were filed in twenty cases in which the plaintiff was not represented by counsel. Eighteen of those cases were civil rights cases, nine of which were filed by prisoners. Another five involved job discrimination claims.

In cases in which the plaintiff proceeded without counsel, a motion to dismiss was more likely to be ruled on, the motion was more likely to be granted, and the case was more likely to be terminated than where the plaintiff was represented. In pro se cases, all Rule 12(b)(6) motions were ruled on; in represented cases, 79% of such motions were ruled on. Motions to dismiss were granted in whole or in part in 59% of the pro se cases as compared with 40% of the others. The motion would terminate 32% of the pro se cases compared with 20% of the cases in which plaintiff had counsel. In absolute numbers, the number of terminations of pro se cases was seven out of 640 in the sample.

In summary, cases involving Rule 12(b)(6) motions involve all major categories of federal litigation. Civil rights, personal injury, and contract categories account for 78% of the total. Such motions in civil rights cases are more likely to be ruled on, granted, and result in case terminations than are motions in other cases, especially personal injury cases, but the small number of cases dictates caution in generalizing from these limited data.

III. The Marcus Thesis

The general empirical proposition underlying the Advisory Committee's proposal is that "[a]lthough they rarely acknowledge the shift, federal courts are insisting on detailed factual allegations more and more often, particularly in securities fraud and civil rights cases."[28] This proposition is empirically testable, but not without a major use of resources to identify and code the presence of detailed factual allegations in a series of cases over time.

Professor Marcus's main thesis, however, is more subtle. He traces some of the forces leading to the development and erosion of the concept of notice pleading. He concludes that "notice pleading is a chimera," a fanciful goal that cannot be precisely identified.[29] Rather than testing the pleading system by whether it affords adequate notice of claims with sufficient factual details, the true test of pleading practice is whether it helps judges "make genuine and reliable merits decisions."[30]

Viewed from the perspective of aiding merits decisions, fact pleading is not always harmful. Indeed, requiring factual allegations in pleadings can sharpen the issue of whether there is any evidence to support an element of a claim.[31] Marcus divides fact pleading into three general contexts:

(1) Cases in which there is no fact or inference to support an essential element of a claim. Requiring the plaintiff to plead the details of the claim should bring that gap to the surface and advance a timely decision on the merits.[32]

(2) Cases in which there is no viable legal theory to support the claim. Viewed from the factual side, plaintiff's factual allegations show that defendant did not violate any recognizable legal right of plaintiff.[33]

(3) Cases in which plaintiff's factual conclusions ("conclusory allegations") are not supported by sufficient evidence to persuade the judge of their merits. These cases are problematic because there is no opportunity for discovery of facts in defendant's possession. In addition, there is no standard for measuring the amount of evidence necessary. Finally, the

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28. Marcus, *supra* note 3, at 436.

29. *Id.* at 451.

30. *Id.* at 454.

31. *Id.* at 460–62.

32. *Id.* For some recent cases illustrating this point, see *infra* note 35.

33. *Id.* at 462–65. For some recent cases illustrating this point, see *infra* note 35.

> "insistence on detailed evidence regarding state of mind violates the second sentence of Rule 9(b), which specifies that '[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.'"[34]

Motions under Rule 12(b)(6) may be categorized in any of these three groups. The first two classes serve beneficial purposes in most instances, advancing decisions on the merits of cases while retaining confidence that decisions are in the legal domain and not resting on disputed factual premises. In the third category, requiring fact pleading undermines the goal of improving the quality and timing of the decisions on the merits. These cases could better be decided under the standards applicable to summary judgment, after affording an opportunity for discovery.

The empirical question becomes this: How many Rule 12(b)(6) motions involve the third type of claims? A field study could be designed to examine these issues. I have toyed with a scale that would separate motions by type. On a scale of zero to five, independent raters could review complaints and motions to dismiss and code the degree to which the case represents Rule 12(b)(6) activity that aids the court in reaching a decision on the merits. The scale follows:

0 No legal theory whatsoever (a frivolous case)

1 A pure issue of law, with two or more competing, plausible theories

2 Absence of any factual allegation relating to an essential element of an established legal theory

3 Conclusory or general allegations on an essential element of an established legal theory

4 Highly improbable factual allegations on an essential element of an established legal theory

5 Conceivable set of facts alleged in support of each essential element of an established legal theory

While the categories are not mutually exclusive, within the fact and law sides they can be applied exclusively. Each claim will have either an established legal theory, two or more competing theories, or no theory at all. If an established legal theory is found, the factual allegations can be characterized as absent, conclusory, highly improbable, or conceivable. The last three categories are the troublesome ones, the ones that involve issues of deleterious "fact pleading" in Marcus's schema.

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34. *Id.* at 469. For some recent cases illustrating this point, see *infra* note 36.

I tested this scale by applying it to forty-two claims for relief in thirty-eight circuit decisions involving Rule 12(b)(6) and published during 1986 through 1988. I read each decision of the circuit court of appeals and ranked it according to my assessment of the dominant characterization of the case given by the court of appeals. The breakdown of cases by category was this:

0	None
1	21 (50%)
2	10 (24%)
3	3 (7%)
4	None
5	8 (19%)
TOTAL	42

At the outset, I should note that these cases are certifiably atypical. Because this was a limited test of a tentative methodology, I reviewed only a limited number of cases. Looking only at appellate decisions skews the process, largely because the only source of information is the circuit court's decision. The decision is crafted to persuade the reader that the case fits the appropriate legal categories. Despite this limitation, the exercise does serve to illustrate the scale. It also systematically identifies those cases that, in my evaluation, represent beneficial and harmful uses of the rule. The circuit rulings provides authority that supports my reading of the cases.

Categories one and two represent Rule 12(b)(6) motions that addressed the merits of the case in an uncontested factual context. Factual allegations of the complaint were sufficient to generate a ruling on the legal issues, presumably in an economical fashion for the parties.[35]

Category three primarily represents applications of a requirement of "fact pleading." In some contexts, this is appropriate. For example, Rule 9 provides

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35. For examples of category one decisions, see Shaw v. Valdez, 819 F.2d 965 (10th Cir. 1987) (complaint established claim for relief based on alleged violations of due process in the administration of unemployment compensation benefits); Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987) (Education for All Handicapped Children Act did not provide for a free written transcript of administrative hearing and did not support parent's claim for relief in the form of a free transcript); Rauch v. RCA Corp., 861 F.2d 29 (2d Cir. 1988) (plaintiff's shareholder's action was precluded by Delaware's doctrine of "independent legal significance").

For examples of category two, see Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987) (RICO complaint fails to allege "pattern of racketeering activity" conducted in affairs of an "enterprise"); S.E.C. v. ESM Group, Inc., 835 F.2d 270 (11th Cir. 1988) (allegations did not amount to "fraud on the court" as required to set aside a judgment more than a year old).

that "the circumstances constituting fraud or mistake shall be stated with particularity." In other contexts, the requirement may illustrate Marcus's thesis.[36]

Category five uncovered problems in the administration of Rule 12(b)(6). The landmark case of *Conley v. Gibson*[37] articulated the standard that a court should deny a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."[38] In eight of the cases reviewed, it was clear from the appellate decision that there were conceivable sets of facts that would support plaintiff's claim. In all eight of these cases the district court had granted a Rule 12(b)(6) motion and the court of appeals reversed or vacated that grant.[39] If such actions are typical, they would represent a tendency on the part of district courts to require fact pleadings and a tendency on the part of circuit courts to resist that trend.

This exploratory survey suggests that the "fact pleading" issue is a serious one. Further exploration of the issue by reviewing pleadings and decisions on Rule 12(b)(6) issues would add empirical light to a critical debate about a serious issue. The objectivity of the scale would have to be tested in terms of its capacity to produce similar judgments from different observers.

The outcome of further research on the issue would be useful in diagnosing whether courts have used Rule 12(b)(6) to impose unwarranted fact pleading on the parties. In turn, the diagnosis might be useful in deciding whether any further action should be taken.[40]

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36. For examples of category three, see Gooley v. Mobil Oil Corp., 851 F.2d 513 (1st Cir. 1988) (conclusory allegations of violations of marketing practices and consumer protection acts held insufficient under Rule 12(b)(6)); McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988) (plaintiffs failed to allege specific facts to show that NCAA eligibility rules are unreasonable and in violation of antitrust laws).

37. 355 U.S. 41 (1957).

38. *Id.* at 45–46.

39. *See, e.g.*, Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988) (plaintiffs might be able to prove facts that would toll the running of the statute of limitations); Hayes v. Western Weighing & Inspection Bureau, 838 F.2d 1434 (5th Cir. 1988) (plaintiff might be able to prove that National Railway Adjustment Board decision was based on fraud or corruption); Marmon Group, Inc. v. Rexnord Group, Inc., 822 F.2d 31, 34 (7th Cir. 1987) (interpretation of indemnity clause in contract requires proceedings beyond the initial pleading).

As of June 30, 1989, four of these eight cases had been terminated after a remand from the court of appeals. One had settled and the other three were terminated by an order granting summary judgment for the defendant.

40. In light of the removal of the proposal to abrogate Rule 12(b)(6) from the Advisory Committee's agenda, see *supra* note 8, it is unlikely that any action would be taken regarding that rule in the immediate future. Other rules, especially Rule 8 (General Rules of Pleading) and Rule 9 (Pleading Special Matters), might be affected by empirical evidence that courts have or have not adopted fact pleading.

APPENDIX

TABLE 5
Effect of Rule 12(b)(6) Motions on Dispositions in the District of Maryland, Sample of 1988 Terminations
(*N* = 304)

	Rule 12(b)(6) Motions	Cases with Rule 12(b)(6) Motions (% of Sample)
Total in Sample	56	43 (14%)
Total Rulings (86 % of Motions)	48	36 (12%)
Total Granted (54% of Rulings)	26	20 (7%)
Total Dispositions (Defendants and Cases)	19	17 (6%)
Total Dispositions (27% of Granted Cases)		7 (3%)

TABLE 6
Effect of Rule 12(b)(6) Motions on Dispositions in the Eastern District of Pennsylvania, Sample of 1988 Terminations
(*N* = 336)

	Rule 12(b)(6) Motions	Cases with Rule 12(b)(6) Motions (% of Sample)
Total in Sample	47	38 (11%)
Total Rulings (81% of Motions)	38	31 (9%)
Total Granted (50% of Rulings)	19	17 (5%)
Total Dispositions (Defendants and Cases)	17	16 (5%)
Total Dispositions (63% of Granted Cases)		12 (4%)

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