Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our "Listen and Learn" series, we're discussing the Federal Rules of Civil Procedure, and particularly FRCP 12(b). Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today, we're discussing the Federal Rules of Civil Procedure, and specifically Rule 12(b). This is a very important rule that governs defenses and motions to dismiss, and it is frequently tested both in Civil Procedure classes and on the bar exam. Rule 12, in general, is about defenses and objections, and 12(a) sets out the procedure for filing a responsive pleading, including the timing of when the answer must be served. We're going to focus primarily on Rule 12(b), which lays out certain specific defenses and provides guidance on when they must be asserted.

Lee Burgess: 12(b) starts by saying: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." What this means is that, if you are the defendant, you need to assert all of your defenses in your answer. But the specific defenses enumerated in Rule 12(b) may also be asserted in a separate motion – that is, a motion to dismiss. These defenses are, (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19 – that is, failure to join a required party.

Lee Burgess: A motion to dismiss based on any of these defenses enumerated in Rule 12(b) must be made before filing your answer. Some of the 12(b) defenses can only be raised in an answer or a motion to dismiss, while others can be raised at later stages of litigation. These distinctions are set forth in Rule 12(h).

Lee Burgess: Under Rule 12(h), lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process are all defenses that must be raised either through a motion to dismiss or in the first responsive pleading, a.k.a. the answer. Otherwise, they are considered waived.

Lee Burgess: So, let's say that a defendant files a motion to dismiss for lack of personal jurisdiction, and that motion is denied. Can she then raise improper venue in her answer? No, she cannot. Because she already filed a 12(b) motion to dismiss and did not raise improper venue at that stage, she has waived her right to assert that defense at a later point.

Lee Burgess: By contrast, a defendant has more opportunities to raise a defense for failure to state a claim upon which relief can be granted, or for failure to join a required party under Rule 19. These two defenses can be raised in the motion to dismiss, or in the answer, but they can be also be raised at trial, even if they have not been raised previously. These two defenses are not waived until trial is over.

Lee Burgess: The final defense referenced in Rule 12(b) is lack of subject matter jurisdiction. While this defense can be raised in a motion to dismiss, or in an answer, or at trial, it is never waived. It can be asserted all the way through the appeals process, even if it wasn't brought up earlier. If a court determines at any time during the proceeding that it lacks subject matter jurisdiction, the court must dismiss the action. So, always remember that it is never too late to raise the issue of lack of subject matter jurisdiction, because that goes to the very heart of the court's ability to rule on the case.

Lee Burgess: A lot of these defenses – like improper venue or insufficient service of process – are fairly self-explanatory. And others, like subject matter jurisdiction and personal jurisdiction, have been covered in other episodes. So, for the next few minutes we're going to focus now on what is arguably the most complicated of these defenses, which is 12(b)(6) – failure to state a claim upon which relief can be granted. What does that actually mean? "Failure to state a claim upon which relief can be granted" means that the plaintiff's pleading has not sufficiently presented her claims. So, what is required in a pleading in order to satisfy to survive a 12(b)(6) challenge?

Lee Burgess: The requirements for a pleading can be found in Rule 8(a), which provides that a pleading is adequate if it contains a "short and plain statement of the claim showing that the pleader is entitled to relief." The basic idea of a 12(b)(6) motion is that the moving party is claiming that the plaintiff's complaint has failed to show that they are entitled to that relief.

Lee Burgess: At the pleading stage, the parties have not yet gone through the discovery process, so there's a lot the parties still don't know. Even so, even at this stage there must be enough information in the complaint to persuade the court that the party is potentially entitled to the relief that they're seeking.

Lee Burgess: The 8(a) standard of a "short plain statement of the claim" might seem pretty easy to satisfy. But in reality, the court's evaluation of the pleadings for the purposes of a 12(b)(6) motion can be a pretty difficult standard for plaintiffs.

Lee Burgess: Today, a court's analysis of a 12(b)(6) motion is guided by two important cases: *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* - I hope I'm saying that right. Together, these cases tell us that a complaint must paint a plausible portrait of the alleged activity. It's not enough that the allegations made in the complaint are consistent with illegality, because the court can consider alternative explanations in making its assessment. In evaluating whether the complaint has successfully stated a claim upon which relief can be granted, the court will only consider the factual allegations – not any conclusions that are drawn. So, before evaluating the complaint to determine whether it states a claim upon which relief can be granted, the court will first strike any "conclusory" allegations, instead looking only at the facts. The facts provided at this pre-discovery stage must be compelling enough on their own for the court to believe in the plausibility of the claims.

Lee Burgess: So, to break that down into how a court will actually evaluate a 12(b)(6) motion: First, the court is going to strike all conclusory allegations from the complaint, leaving only the facts alleged by the plaintiff. Then, taking all factual allegations as true, the court will determine whether the complaint makes a plausible case that the plaintiff is entitled to the relief sought. In undertaking this second step of the analysis, the court has a good deal of discretion in asserting whether the plaintiff's story is a plausible one.

Lee Burgess: Now that we've covered the basics of Rule 12(b), let's look at our first example:

Lee Burgess: "Jane had worked at a Fortune 500 company in State A for more than a decade. She was well-liked by her peers and supervisors, and was considered a likely candidate for an executive position that had recently become vacant.

Lee Burgess: Her coworker, Marcus, was also interested in the executive position. Shortly after the position became available, Marcus began telling other employees at the company, including several who sat on the hiring committee, that Jane had been embezzling money from the company. Marcus received the promotion, and shortly thereafter Jane was let go from the company.

Lee Burgess: Jane filed an action against Marcus in the U.S. District Court for the District of State A. The complaint alleged that Marcus made defamatory comments about her to other employees at the company, thereby committing a tort under State A law.

Lee Burgess: In particular, Jane's complaint alleged that, between August and September of that year, Marcus had repeatedly made remarks to coworkers and supervisors that Jane had engaged in dishonest, even criminal behavior. The complaint further stated that such comments were false and defamatory.

Lee Burgess: Marcus has moved to dismiss the defamation claim, arguing that Jane failed to state a claim upon which relief can be granted."

Lee Burgess: Let's focus on the 12(b)(6) analysis. Under Rule 8(a), the pleading of claims in federal court tells us that a pleading is adequate if it contains a "short and plain statement of the claim showing that the pleader is entitled to relief." In *Twombly* and *Iqbal*, the Supreme Court interpreted Rule 8(a) to mean that the plaintiff must allege, at a minimum, facts that state a plausible claim for relief, not mere conclusory allegations. Jane's complaint appears to satisfy this pleading standard. She alleges that Marcus made comments to the effect that she had engaged in dishonest or criminal behavior. She alleges that such comments were false. Her complaint provides the approximate dates when the comments were made. Such comments, if made, would likely be defamatory under state law and would state a plausible claim for relief.

Lee Burgess: Now, let's look at another hypo:

Lee Burgess: "John, a citizen of California, was driving through Arizona when he was hit by a drunk driver, Eric, a local business owner and a citizen of Arizona. John sustained serious injuries from the accident. John sued Eric in the United States District Court for the District of Arizona. John's complaint invoked the court's diversity jurisdiction.

Lee Burgess: The process server attempted personal service on Eric, but Eric was out of town and couldn't be located. Instead, the process server left the summons and complaint tucked under the doormat at Eric's business. 72 hours later, when Eric returned to work, he found the papers.

Lee Burgess: Eric filed a motion to dismiss John's complaint for failure to state a claim, and the district court judge denied his motion. Eric subsequently filed a second motion to dismiss for insufficiency of service of process. The judge also denied that motion.

Lee Burgess: Did the court property deny Eric's motion to dismiss for insufficient service of process? Explain."

Lee Burgess: Although it is likely that service of process was improper in this case, the district court nonetheless was correct to deny Eric's motion to dismiss on that basis. Eric initially responded to Plaintiff's complaint by making a motion to dismiss for failure to state a cause of action. When that motion was denied, Eric moved to dismiss for insufficient service of process.

Lee Burgess: As we discussed earlier, if a party makes a Rule 12(b) motion and fails to join other available defenses, the party waives those other defenses and is not allowed to raise them later. So, if a party makes a 12(b) motion but fails to include the defense of insufficient service of process in that motion, that defense is deemed waived. Because Eric has made a Rule 12(b) motion to dismiss for failure to state a claim, but did not join his available defense of insufficiency of service of process in that motion, Eric waived that defense. So, the district court was correct to deny Eric's motion to dismiss on that ground, regardless of whether service was in fact improper.

Lee Burgess: That's all we have for you today! Hopefully you found these hypos to be helpful examples of how to work through a motion to dismiss question on an exam. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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