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The Leave to Plead as a Waiver of the Jurisdictional Defenses

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THE LEAVE TO PLEAD AS A WAIVER OF THE JURISDICTIONAL DEFENSES

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I. INTRODUCTION

Civil Rule 12(B)¹ includes three defenses which challenge in personam jurisdiction. They are the 12(B)(2) defense of lack of jurisdiction over

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¹ OHIO R. CIV. P. 12(B). Specific Ohio Civil Rules are hereinafter generally referred to

the person,³ the 12(B)(4) defense of insufficiency of process,³ and the 12(B)(5) defense of insufficiency of service of process.⁴ Not infrequently, the assertion of any one or more of these defenses is haunted by the ghost of the old "special appearance," and that which makes the ghost rattle its chains is often the defendant's taking a leave to move or plead before presenting these defenses to the court. In such case it is usually said that the taking of leave is the entry of a general appearance which waives the three jurisdictional defenses. However, for reasons which shall be given below, there is no more substance to this argument than there is to any ectoplasmic apparition. Under the Ohio Rules of Civil Procedure, the taking of leave to move or plead is an appearance by the defendant in the action, but in and of itself, it is not an appearance that waives the jurisdictional defenses.

II. THE LEAVE TO PLEAD UNDER CODE PROCEDURE

In the old days of Code pleading, of course, things were different. The former Code procedure is fairly well summarized in *Scott v. Davis*:⁵

There are several ways in which a court obtains jurisdiction of the person of a defendant. Jurisdiction is acquired by service of

as "Civil Rule" or "Rule."

³ OHIO R. CIV. P. 12(B)(2). As a general rule, this defense may be used in any one of the following three situations: 1) when the exercise of jurisdiction by an Ohio trial court would violate the due process and equal protection requirements of the fourteenth amendment to the United States Constitution; 2) when the defendant has not been served with a summons, and he has not otherwise submitted himself to the court's jurisdiction; or 3) when the summons or the service of the summons on the defendant has been quashed under the provisions of OHIO R. CIV. P. 12(B)(4) AND/OR 12(B)(5) AND THE PLAINTIFF FAILS TO OBTAIN THE VALID SERVICE OF A VALID SUMMONS ON THE DEFENDANT WITHIN A YEAR FOLLOWING THE FILING OF THE COMPLAINT WITH THE COURT. IN THIS LATTER EVENT, THE ALTERNATIVE DEFENSE OF FAILURE OF COMMENCEMENT IS ALSO AVAILABLE TO THE DEFENDANT AND WILL BE MORE EFFICACIOUS THAN THE DEFENSE OF LACK OF JURISDICTION OVER THE PERSON IF THE STATUTE OF LIMITATIONS HAS ALSO EXPIRED. See OHIO R. CIV. P. 3(A); Scigliano, *Failure of Commencement, the Forgotten Defense—A Comment on Ohio Civil Rule 3(A)*, 16 AKRON L. REV. 265 (1982).

⁴ OHIO R. CIV. P. 12(B)(4). As a general rule, this defense may be used whenever the content of the summons served on the defendant does not include those items of information required by OHIO R. CIV. P. 4(B) and 15(D).

⁴ OHIO R. CIV. P. 12(B)(5). As a general rule, this defense may be used in any of the following circumstances: 1) when a valid summons was not served in the manner provided by OHIO R. CIV. P. 4.1, 4.2, 4.3(B), 4.5, 4.6(A), 4.6(C), 4.6(D), 15(D), and the provisions of the Ohio Revised Code which supplement these Rules; 2) when service by publication is not made in accordance with the provisions of OHIO R. CIV. P. 4.4 and/or there is no statutory provision authorizing service by publication; or 3) when a valid summons has been validly served, but the exercise of jurisdiction by an Ohio trial court would violate the due process and equal protection requirements of the fourteenth amendment to the United States Constitution. For an example of this latter situation, see *Wainscott v. St. Louis-S.F. Ry.*, 47 Ohio St. 2d 133, 351 N.E.2d 466 (1976).

⁵ 173 Ohio St. 252, 181 N.E.2d 470 (1962).

process, by the defendant's consent, or by the defendant's general appearance in the cause. 14 Ohio Jurisprudence (2d), 539, Courts, Section 124.

Likewise, there are several ways to challenge a court's jurisdiction of the person. First, there is a special appearance to move to quash service of summons or for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant. *Smith v. Hoover*, 39 Ohio St., 249; *Canton Provision Co. v. Gauder, A Minor*, 130 Ohio St., 43, 196 N.E., 634. Second, if the defect appears upon the face of the petition, the objection can be taken by demurrer under subdivision (A) of Section 2309.08, Revised Code. Third, the objection can be taken by answer, if the defect does not appear upon the face of the petition. *Drea v. Carrington*, 32 Ohio St., 595; *Bucurenciu v. Ramba*, 117 Ohio St., 546, 159 N.E., 565; *Maloney v. Callahan*, 127 Ohio St., 387, 188 N.E., 656; *Glass v. McCullough Transfer Co.*, 159 Ohio St., 505, 112 N.E. (2d), 823; Section 2309.10, Revised Code.

It is basic that an attack upon jurisdiction should be made at the first opportunity. *Glass v. McCullough Transfer Co.*, *supra*. If there is a defect in service of summons, a special appearance by motion to quash can question jurisdiction at the outset. If the defect appears upon the face of the petition, a demurrer solely under subdivision (A) of Section 2309.08, Revised Code, is proper. If the defect does not appear on the face of the petition, then the issue can be raised properly by answer.

It has been held that the filing of a motion attacking jurisdiction, which motion includes matters relating to the merits of the cause, waives the issue of jurisdiction. *Handy v. Insurance Co.*, 37 Ohio St., 366, *Elliott v. Lawhead*, 43 Ohio St., 171, 1 N.E. 577; *Long v. Neuhouse*, 57 Ohio St., 348, 49 N.E., 79; *State v. Fremont Lodge of Loyal Order of Moose*, 151 Ohio St., 19, 84 N.E. (2d), 498.⁶

Under Code pleading, there were relatively few opportunities to properly raise the jurisdictional defenses by demurrer or answer. Therefore, as a practical matter, the jurisdictional defenses had to be presented by a "special appearance." For the most part, this "special appearance" was made by a motion to quash service or a motion for other relief that would be wholly consistent with the lack of in personam jurisdiction.⁷

⁶ *Id.* at 254-55, 181 N.E.2d at 472-73.

⁷ See *Virginia Joint Stock Land Bank v. Kepner*, 54 Ohio App. 352, 7 N.E.2d 562 (9th Dist. 1936) (Summit County):

Where a defendant objects to the jurisdiction of the court over his person by means of a motion to quash the sheriff's return of summons as it applies to such

In order to remain a "special appearance" as opposed to a "general appearance," the motion proceeding had to meet two very stringent limitations. First, it had to be limited to a challenge to the court's jurisdiction over the person of the defendant, and it had to request a form of relief that was wholly consistent with the lack of such jurisdiction; if it advertently or inadvertently sought a form of relief that was inconsistent with the court's lack of in personam jurisdiction, it became a "general appearance" which conferred jurisdiction on the court.⁸ Second, the motion proceeding had to be initiated at the defendant's first opportunity. This generally meant that the defendant had to move to quash the service before he took any other step in the action, and he could not take any other step in the action until after the court ruled on the motion to quash.⁹

Long v. Newhouse,¹⁰ a case that has been much-cited recently,¹¹ illus-

defendant, the test in determining whether a general appearance has been made is governed by the nature of the relief asked; if such relief is inconsistent with want of jurisdiction, a general appearance is thereby effected, but if consistent with want of jurisdiction, no such appearance results.

Id. at 352, 7 N.E.2d at 562 (syllabus I). Thus, it was held that the following motion was a special appearance because it did not ask for relief inconsistent with the want of jurisdiction:

Now comes Vera E. Kepner, one of the defendants in the above entitled action, and, entering her appearance solely for the purposes of this motion and not otherwise, moves the court for an order correcting the sheriff's return on the summons issued in this case for her; quashing said apparent summons upon her herein; and vacating and holding null and void the judgment in this case against her.

Id. at 354, 7 N.E.2d at 562. One federal court described this "special appearance" procedure as "[standing] at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within." See *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944).

⁸ See *supra* note 7. The rationale for this position is stated in *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E. 79 (1897), as follows:

[I]f [the defense of no jurisdiction of the person is] made, it must be at the very threshold of the defendant's appearance to the action. The reason is a plain one. If a party may at the same time invoke the jurisdiction of a court on the merits of an action, and deny its jurisdiction over his person it would work great injustice. He could, under such practice, if the judgment on the merits is in his favor, avail himself of it as a bar to another action, but if it should be against him, he could set it aside for want of jurisdiction of his person. Hence it is said, that, "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

Id. at 368-69, 49 N.E. at 80-81.

⁹ It was also frequently said that if the motion to quash was overruled, the defendant had to take care to preserve his objection to jurisdiction in all subsequent steps taken or he would waive the objection. For a discussion of this latter point see Browne, *Preserving Objections to In Personam Jurisdiction—Ohio's Persistent Shibolet*, 21 CLEV. ST. L. REV. 141 (1972).

¹⁰ 57 Ohio St. 348, 49 N.E. 79 (1897).

¹¹ See *Watson v. Watson*, No. 44126 (Ohio 8th Dist. Ct. App. May 27, 1982) (Cuyahoga County); *Pinkus v. Pinkus*, No. 43776 (Ohio 8th Dist. Ct. App. Apr. 15, 1982) (Cuyahoga

trates this second point. In paragraph two of the syllabus, the Ohio Supreme Court said:

In order to enable a defendant to object to the jurisdiction of the court over his person, the objection must be made at the earliest opportunity of the party. If before making such objection, the party appears and makes a motion that the plaintiff be required to attach on account of the items of his claim to his petition, or, that he be required to separately state and number his causes of action, or, that he be required to strike certain matters from his petition, in either of these cases, the party voluntarily submits himself to the jurisdiction of the court, and he cannot afterwards be heard to object thereto.¹³

County); *Franklin v. Franklin*, 5 Ohio App. 3d 74, 449 N.E.2d 457 (7th Dist. 1981) (Mahoning County). In *Watson v. Watson*, the Court of Appeals for Cuyahoga County stated:

Assuming defendant is in a position to raise the question of personal jurisdiction, it is nonetheless apparent in this case that the judgment is not infirm for lack of such jurisdiction. For by entering appearance as they did and by failing at the first opportunity to challenge the court's exercise of jurisdiction over the person, the parties waived and [sic] objection, see *Long v. Newhouse*, (1897), 57 Ohio St. 348, 370.

No. 44126, slip op. at 3. In *Pinkus v. Pinkus*, the same court stated:

While a court may acquire jurisdiction over the person of a defendant by service of process in a manner consistent with the Due Process Clause of the United States Constitution, a court may also acquire jurisdiction over the defendant's person by the defendant's consent, or by the defendant's voluntary appearance in the action. *Cf. Scott v. Davis*, (1962), 173 Ohio St. 252, 254. A defendant who voluntarily appears in an action, and who fails at his first opportunity to challenge the court's exercise of jurisdiction over his person, will not later be heard to complain that the court lacked jurisdiction. *Long v. Newhouse* (1897), 57 Ohio St. 348; *Limbaugh v. Western Ohio R.R. Co.* (1916), 94 Ohio St. 12; *Russell v. Drake* (1956), 164 Ohio St. 520.

No. 43776, slip op. at 6. The *Pinkus* court went on to quote the second paragraph of the *Long v. Newhouse* syllabus.

¹³ The Ohio Supreme Court gave the following examples of proceedings which will waive the special appearance, or convert it into a general appearance, if they are taken before, with, or in lieu of the motion to quash:

The decisions of this court on the subject, are all to the effect, that any step taken in a case by a defendant, other than to object to the court's jurisdiction over his person, enters his general appearance to the action, and he cannot afterwards claim that the court's jurisdiction of his person has not been properly obtained. Thus a motion for leave to answer, *Brundage v. Biggs*, 25 Ohio St., 652; a motion to strike papers from the files, *Maholm v. Marshall*, 29 Ohio St., 611; a demurrer to a petition, 1 Ohio St., 286; and, though subsequently withdrawn, *Evans v. Iles*, 7 Ohio St., 238; a motion to dismiss for want of security for costs, *Schaeffer v. Waldo*, 7 Ohio St., 309; a motion to dismiss for want of jurisdiction of the subject-matter of the action, *Handy v. Ins. Co.*, 37 Ohio St., 366; *Smith v. Hoover*, 39 Ohio St., 249; and a motion to strike from the petition certain averments, *Railroad Co. v. Morey*, 47 Ohio St., 207, 210, have all been held to enter the party's appearance to the action, as completely as if he had been properly served with process.

Id. at 370, 49 N.E. at 81.

The pre-Rule decision most pertinent to the present inquiry is *Brundage v. Biggs*,¹³ which was decided in 1874. In this case, the trial court ordered that one Rachel Long be made a new party defendant in the action. She was served with a summons, but did not answer to the petition. After the time for answer had expired, her attorney moved for leave to answer by a day certain. The motion was granted, but Rachel Long never answered or otherwise took part in the proceeding. On appeal to the supreme court, one of the questions presented was whether Ms. Long was a party to the action. The supreme court held that she was, saying that her motion for leave to plead was the entry of a general appearance which gave the trial court jurisdiction over her person.¹⁴ For the ninety-six years remaining under the old Code, it was taken as well-settled that a motion for leave to move or plead, made before the motion to quash service, amounted to the entry of a general appearance which waived the jurisdictional defenses.¹⁵ There was some question, however, whether a motion for leave to enter a special appearance solely for the purpose of asserting the jurisdictional defenses amounted to the entry of a general appearance.¹⁶ In any event, under Code pleading, it was a rule of thumb that

For other examples of proceedings that amounted to a general appearance when taken before, with, or in lieu of a special appearance, see 2 O. Jur.2d, *Appearance* §§ 13-28 (1953).

¹³ 25 Ohio St. 652 (1874).

¹⁴ The supreme court stated:

On [the defendant's] application, the court ordered [Rachel Long] to be made a party defendant, and that a summons issue for the purpose. A summons was accordingly issued in the usual form, which was duly served. The record shows that she subsequently applied by her attorney to the court and obtained leave to answer. Without, therefore, deciding that the service of the summons would not have been sufficient to effect her appearance for all the purposes of the suit, it seems plain to us, that by applying for and obtaining leave to answer, her voluntary appearance was effected.

Id. at 656.

¹⁵ *Baldine v. Klee*, 10 Ohio Misc. 203, 224 N.E.2d 544 (C.P. Trumbull County 1965), *rev'd on other grounds*, 14 Ohio App. 2d 181, 237 N.E.2d 905 (11th Dist. 1968) (Trumbull County), was one of the last pre-Rule cases which discussed the subject, and it fairly well stated the prevailing Rule. In paragraph one of the syllabus, the court stated: "Where a defendant obtains leave to move or plead, he makes a general appearance and waives any claimed defects in either the process which was served or in the manner in which it was served." *Id.* at 203, 224 N.E.2d at 544. The court further noted:

In case No. 75741 defendant Dio D. Reynolds first sought and obtained leave to move or plead and thereafter filed his motion to quash service of summons. Regardless of the contention made in that motion, it is the opinion of the court that the obtaining the leave to move or plead constituted a general appearance in the action and waived any claimed defects in either the process which was served or in the manner in which it was served. See *Brundage v. Biggs*, 25 Ohio St. 652, and annotations in 81 A.L.R. 166.

Id. at 204, 224 N.E.2d at 546.

¹⁶ See *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927). *Ramba* was one of those rare cases in which the jurisdictional defense could be presented by answer. Defendant

moving for leave to move or plead was the entry of a general appearance which nullified any later attempt at a special appearance and which gave the court jurisdiction over the person of the defendant.

III. THE LEAVE TO PLEAD UNDER RULE PROCEDURE

A. *The Leave to Plead as an Appearance*

But, such is not the case under the Ohio Rules of Civil Procedure. To begin with, Civil Rule 12(B) clearly does away with the first limitation on the motion proceeding which challenges in personam jurisdiction. In pertinent part, the Rule states: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Thus, there is no longer any requirement that the defendant's challenge be limited to an attack on the court's jurisdiction over his person; indeed, under the provisions of Civil Rule 12(G)¹⁷ the defendant may be required to assert other defenses and objections with his challenge to in personam jurisdiction if he elects to make that challenge by a pre-answer motion. Under the Rule, then, the defendant may defend the action on the merits while still asserting lack of jurisdiction

Cohen did not file his answer within Rule and had to move for leave to file it instant. Leave was given, and the answer, which consisted of a general denial, was filed. The effect of this sequence of events was described by the supreme court:

The sole question here presented, as we view it, is whether the general denial of Cohen challenged the jurisdiction of the court over his person, and therefore whether he may be held to have challenged such jurisdiction at this first opportunity. We do not believe the fact that he did not file his answer within Rule and therefore was required to obtain leave to file the general denial answer is of itself sufficient to in any way change the status of the defendant with reference to having entered his appearance, since the leave was not to plead generally, but was to file the particular answer which was filed, and therefore if the answer be construed to challenge the jurisdiction the leave to file the particular answer must be construed as a leave to challenge the jurisdiction.

Id. at 548, 159 N.E. at 566. There is no reason in principle why this same rationale could not be applied to a motion for leave to move to quash instant.

¹⁷ OHIO R. CIV. P. 12(G) reads as follows:

A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this Rule.

See OHIO R. CIV. P. 12(G) advisory committee note (1970):

Rule 12(G) follows up the abolition of the special appearance in Rule 12(B) by actually compelling the defendant who makes a motion to include therein all defenses and objections then available to him which this rule permits to be raised by motion. This compulsion is accomplished by the provision that no waivable defense or objection which is omitted from a motion may thereafter be asserted in an answer.

over his person without waiving the jurisdictional defense.¹⁸

¹⁸ As it is said in *Ross v. Speigel, Inc.*, 53 Ohio App. 2d 297, 305-06, 373 N.E.2d 1288, 1294 (10th Dist. 1977) (Franklin County), albeit in a somewhat different context: "The third-party defendants could have defended the wrongful death action on the merits while still asserting lack of jurisdiction over their person without waiving that defense." See *Browne*, *supra* note 9, at 160.

But see *Keyer v. Wysong*, No. 6114 (Ohio 2d Dist. Ct. App. July 10, 1979) (Montgomery County). In this case defendant filed an answer containing six defenses. The third numbered defense alleged lack of jurisdiction of the person, insufficiency of process and insufficiency of service of process; the remaining defenses were all addressed to the merits of the plaintiff's case. Thereafter, the defendant served interrogatories and a request for the production of documents on the plaintiff; deposed the plaintiff; caused the plaintiff to be examined by the defendant's physician; participated in settlement negotiations; and participated in a pretrial conference. After the case was set for trial, defendant moved for a determination of the jurisdictional defenses under the provisions of OHIO R. CIV. P. 12(D). The trial court found the jurisdictional defenses valid and dismissed the case. On appeal, the plaintiff made two arguments. First, citing *Scott v. Davis*, 173 Ohio St. 252, 181 N.E.2d 470 (1962), the plaintiff argued that defendant entered his general appearance by combining the jurisdictional defenses with defenses to the merits. Second, plaintiff argued that defendant waived the jurisdictional defenses by participating in the action and by not making his Rule 12(D) motion until after the case had been set for trial.

In responding to the first argument, the court of appeals cited the third sentence of OHIO R. CIV. P. 12(B) and stated:

It is this last quoted sentence which sets aside the rule of law set forth in *Scott*. Under *Scott*, when [defendant] joined in his Answer the defense of lack of jurisdiction over his person with allegations of defensive material countering allegations of the complaint, since he was thus dealing with the merits of the controversy, he was considered to have entered a general appearance and to have waived his jurisdictional defense. Clearly now the joining of defenses, however consistent or inconsistent, does not constitute a waiver of any of them. Cf. Civ. R. 8(E).

Keyer, No. 6114, slip op. at 4.

The appellate court's response to the second argument was divided into two parts. The first part dealt with the Rule 12(D) motion, with the court saying:

[Plaintiff] suggests that [defendant's] failure to file a 12(D) motion until after the trial date was set, while at the same time doing all of the acts listed in the front part of this decision, constituted a conduct waiver of the jurisdictional question. . . . [Defendant] was under no more obligation to have the jurisdictional question determined at an earlier date than was [plaintiff]. It is to be noted that the last part of Civ. R. 12(D) provides that the enumerated defenses may be heard before trial "on application of any party."

Id. at 5 (emphasis in original). So far, so good. However, in the second part of its response, the court noted:

While there is some question in some of the Federal cases as to whether under Federal Rule 12 there is any longer a distinction between a general and special appearance, there is authority in Ohio that in this state the distinction does still exist. *Southgate Shopping Center Corp. v. Jones*, 49 Ohio App. 2d 358, 361 N.E.2d 460 (1975), decided after Civ. R. 12 became effective:

As a general rule, when the defendant becomes an actor in the case without objecting to jurisdiction, he enters his appearance and may not thereafter object to the jurisdiction over his person. The general test of a general appearance is whether some act has been done, or step taken, by a person not legally notified, before a tribunal or board, which calls

However, the above-quoted sentence from Civil Rule 12(B) not only eliminates the first limitation on the motion proceeding challenging jurisdiction, it also effectively does away with the concept of "special" and "general" appearances. What made an appearance "special" was the fact that it had to be limited to a challenge to in personam jurisdiction or to a request for a form of relief that was wholly consistent with a lack of in personam jurisdiction. But if, under Civil Rule 12(B), the jurisdictional defense need not be presented in isolation and if it can be coupled with a request for relief on the merits (*e.g.*, a request for dismissal of the action because the complaint does not state a claim upon which relief can be granted),¹⁹ then the appearance made by the motion or answer asserting the jurisdictional defenses cannot be a "special" appearance.²⁰ If there is

upon it to examine, however slightly, into the merits of the controversy before it. The act or step referred to may be the filing of certain papers in the cause, the invoking of some action by the court, or the submission of some right for adjudication

As we view it, the key language of the preceding quotation is whether the court is called upon "to examine, however slightly, into the merits of the controversy before it." As to the facts in the case at bar, at no time did [defendant] do anything which involved the court in making any decision with regard to any part of the merits of the case. Everything that was done was in connection with trial preparation, not in connection with decision making. See *W.F.H. Schultz, Inc. v. Glidden Company*, 275 F. Supp. 955.

Id. at 5-6.

This writer was unable to find the quoted material in *Southgate Shopping Center Corp. v. Jones*, 49 Ohio App. 2d 358, 361 N.E.2d 460 (5th Dist. 1975) (Licking County), and is at loss to know where the court of appeals for Montgomery County found it. But in any event, the quoted material does not reflect the present state of the law under OHIO R. Civ. P. 12. Thus, it is submitted that to the extent this decision suggests that there is still a distinction between general and special appearances and to the extent that it suggests that a defendant cannot defend fully on the merits after having timely raised the jurisdictional defenses, it is wrong.

¹⁹ OHIO R. Civ. P. 12(G) clearly allows the joinder of, say, a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person with a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, even though Rule 12(H)(2) makes the 12(B)(6) defense of failure to state a claim upon which relief can be granted an exception to the mandatory joinder requirement of Rule 12(G). If the two motions are made together and the court grants the 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the subsequent dismissal of the action will be on the merits unless the court otherwise specifies in its journal entry. See OHIO R. Civ. P. 41(B)(3): "A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." See *Columbus Prod. Credit Ass'n v. Saker*, No. 81AP-6 (Ohio 10th Dist. Ct. App. June 11, 1981) (Franklin County).

²⁰ See OHIO R. Civ. P. 12(B) advisory committee note (1970). In pertinent part, it states:

The present Ohio law as to the method of asserting defenses and objections is uncertain and unsatisfactory. In the first place, the 1853 code of civil procedure did not explicitly provide a method of asserting lack of jurisdiction of the person,

no "special" appearance, however, neither can there be a "general" appearance, since the term "general" has meaning only when contrasted with "special."²¹ Thus, the assertion of the jurisdictional defenses by mo-

lack of jurisdiction of the subject matter, or improper venue. Consequently, lawyers and courts in Ohio and other code states improvised the motion to quash or set aside summons, service or return as the normal method of asserting these defenses. The use of the motion to quash resulted in the development of the distinction between a special and a general appearance, a distinction which appears nowhere in the code of civil procedure and hence constitutes a trap for inexperienced defense counsel. The use of the motion to quash has also made it possible and sometimes necessary for a defendant to utilize at least four separate and successive steps to assert his defenses and objections: (1) motion to quash, (2) motions to the petition, such as to strike, make definite and certain, etc., (3) demurrer, and (4) answer.

Rule 12(B) lays down the clear, simple and comprehensive rule that every defense shall be asserted in the responsive pleading thereto if one is required, except that the seven enumerated defenses (and *only* those defenses) may at the option of the pleader be made by motion. Observance and enforcement of this rule should correct the loose and irregular practice in Ohio discussed above.

The second sentence of Rule 12(B) provides for the assertion of defenses in one step (an answer alone) or at most two steps (a motion followed by an answer).

The third sentence of Rule 12(B) makes a special appearance unnecessary, and as will be pointed out later, waivable defenses are waived by failure to include them. This is a striking change from previous Ohio practice.

See OHIO R. Civ. P. 12(G) advisory committee note (1970). As that Staff Note begins: "Rule 12(G) follows up *the abolition of the special appearance . . .*" (emphasis added).

As Judge McCormac stated:

The basic philosophy that a party must contest jurisdiction over his person at the earliest opportunity is not changed. The change is that there is now no requirement of a special appearance, for the purpose of contesting jurisdiction over the person only, which is separate from any other procedure. The defense of jurisdiction over the person, whether asserted by motion or answer, can be combined with one or more other defenses or objections in the same motion or answer without being waived. The trap that formerly existed under Ohio practice has now been eliminated by eliminating the requirement of a special appearance for contesting jurisdiction over the person only. Formerly, that defense was presented by a motion to quash but it could also be presented by a specific demurrer if the defect appeared on the face of the petition. Thereby a separate step has been eliminated from the pleading process.

J. McCORMAC, OHIO CIVIL RULES PRACTICE WITH FORMS § 6.17, at 137 (1970).

²¹ See 4 ANDERSON'S OHIO CIVIL PRACTICE § 152.09, at 360 (1975):

Under former code practice the party objecting to jurisdiction over his person did so by "special appearance"; that is, the party filed his motion to quash and alleged that he was appearing in the action only for the purpose of contesting jurisdiction over his person. If his motion was overruled, the party would then file other motions or an answer, at the same time alleging that he reserved his rights to appeal the motion overruling his objection to jurisdiction over his person. The special appearance necessarily led to the possible stringing of motions. The third sentence of Civ. R. 12(B) abolishes the distinction between the special appearance (to contest jurisdiction over one's person) and the general appearance (an appearance to contest the merits of the action). . . . In other words, if a party raises the defense

tion or answer is simply an "appearance."²² This "appearance," however, cannot result in the waiver of the jurisdictional defenses; it would be patently ridiculous to hold that the very assertion of these defenses results in their waiver, and whatever the Civil Rules may be, they are not ridiculous. Therefore, the appearance made by the assertion of these defenses, in and of itself, cannot be a waiver of these defenses.²³

In sum, the above-quoted third sentence from Civil Rule 12(B) has not only abolished the old "special" and "general" appearance, it has also made the entire concept of "appearance" largely irrelevant to the ques-

of lack of jurisdiction over his person, he has not submitted himself to the jurisdiction or waived that defense by combining it with other defenses. The rule obviously prevents the stringing of motions and obviates the necessity for a special appearance.

Id. (footnote omitted).

In the 1981 supplement to the above section, Professor Harper cites *McGarr v. Hayford*, 52 F.R.D. 219 (S.D. Cal. 1971), for the following proposition:

Initially, it must be noted that Rule 12 has eliminated the necessity of appearing specially. The technical distinctions between general and special appearances have been abolished. *Bjorgo v. Weerden*, 342 F.2d 558 (7th Cir. 1965). "However, there is no penalty if the pleader, mindful of the old ways, undertakes a 'special appearance,' although the label has no legal significance." 5 Wright and Miller, *Federal Practice and Procedure* [Sec.] 1344 at 522. See also *Bjorgo v. Weerden*, *supra*, and *Melekov v. Collins*, 30 F.Supp. 159 (D.C. Cal. 1939), which indicate that use of the words "special appearance" does emphasize a party's intent to object to jurisdiction.

Id. at 221.

²² Even under Rules practice, however, a defendant may limit his initial appearance in the action to what would have been a "special appearance" under the Code if he chooses to do so. See, e.g., *Rasmussen v. Vance*, 34 Ohio Misc. 87, 293 N.E.2d 114 (C.P. Cuyahoga County 1973):

On January 8, 1973, an instrument captioned "Motion to Quash" was filed by counsel for defendant, Marshall L. Vance. This is treated by the court as a special appearance motion to dismiss because of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. See Civ. R. 12(B), defenses (2), (4), and (5).

Id. at 90, 293 N.E.2d at 117.

The significance of this remark does not lie in the fact that the appearance in this case was limited to an attack on in personam jurisdiction, but in the court's characterization of the appearance as a "special appearance." Although special appearances have been abolished, many trial judges still think in terms of "special appearance" versus "general appearance," and many of them still consider a motion for leave to move or plead the entry of a "general appearance" which waives the jurisdictional defenses. Hence, the reason for this Article.

²³ See 3 W. MILLIGAN, *OHIO FORMS OF PLEADING AND PRACTICE* 12-18 (1971):

Nonwaiver of defenses; special appearances. The theory of the rule is that a quick presentation of defenses is to be encouraged and that successive motions are to be discouraged. Thus, no defense is waived by joining it with another, the effect of which is to destroy the reason for special appearances. See Ohio Civil Rule 12(B). A responding party waives a defense only by failing to include it in a Rule 12 motion or in the answer. A voluntary appearance does not waive the objection of lack of jurisdiction over the person.

tion of in personam jurisdiction. The concept of "appearance" now has relevance only to the "notice" requirements of Civil Rules 5(A)²⁴ and 55(A).²⁵

B. *The Irrelevance of the Appearance as Such*

It cannot be doubted that a request or motion for an extension of time

²⁴ OHIO R. CIV. P. 5(A) states:

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4 through Rule 4.6.

The purpose of service, of course, is to give notice, and as the Rule indicates, service must be made on those parties who have appeared in the action. Thus, it is the "appearance" in the action that triggers the need for notice through service.

²⁵ In pertinent part, OHIO R. CIV. P. 55(A) provides:

If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for [default] judgment at least seven days prior to the hearing on such application.

Again, under this Rule, it is the "appearance" in the action that requires notice through service. *See supra* note 24.

Under this Rule, an appearance has been found in the filing of a letter with the court, *Spratt v. Frederickson*, No. 38579 (Ohio 8th Dist. Ct. App. Apr. 26, 1972) (Cuyahoga County). *Contra*, *Tzangas v. Krstic*, No. CA-5974 (Ohio 5th Dist. Ct. App. Dec. 21, 1982) (Stark County); in the filing of a motion for leave to move or plead, *Standard Oil Co. v. Noble*, 4 Ohio App. 3d 76, 446 N.E.2d 816 (11th Dist. 1982) (Trumbull County); *Commercial Savings Bank v. Aetna Freight Lines, Inc.*, No. 16-82-1 (Ohio 3d Dist. Ct. App. Nov. 19, 1982) (Wyandot County); *Suki v. Blume*, No. 44645 (Ohio 8th Dist. Ct. App. Dec. 30, 1982) (Cuyahoga County); *Lindner v. Community Dev. Assoc.*, 67 Ohio Op. 2d 314, 322 N.E.2d 337 (1st Dist. Ct. App. 1974) (Hamilton County); in the filing of a motion to dismiss, *Carter v. Johnson*, 55 Ohio App. 2d 157, 380 N.E.2d 758 (8th Dist. 1978) (Cuyahoga County); and in the filing of an answer out of rule without leave of court, *Suki v. Blume*, No. 44645 (Ohio 8th Dist. Ct. App. Dec. 30, 1982) (Cuyahoga County); *Central Trust Co. v. Shepherd*, No. CA 7149 (Ohio 2d Dist. Ct. App. Aug. 26, 1981) (Montgomery County); *Fuller v. Walt Peabody Agency*, No. 78AP-246 (Ohio 10th Dist. Ct. App. Sept. 26, 1978) (Franklin County). Needless to say, a timely filed answer is also an appearance. *Ries Flooring Co. v. Dileo Constr. Co.*, 53 Ohio App. 2d 255, 373 N.E.2d 1266 (8th Dist. 1977) (Cuyahoga County).

Conversely, if the defendant has made no appearance in the action, he is not entitled to notice of the default proceedings. *See Sexton v. Sugar Creek Packing Co.*, 37 Ohio St. 2d 58, 307 N.E.2d 541 (1974); *Antonopoulos v. Eisner*, 30 Ohio App. 2d 187, 284 N.E.2d 194 (8th Dist. 1972) (Cuyahoga County); *Farmers & Merchants State & Savings Bank v. Raymond G. Barr Enter.*, 6 Ohio App. 3d 43, 452 N.E.2d 521 (4th Dist. 1982) (Galia County). However, it is not error for the court to give such a defendant notice on its own initiative. *Jenkins v. Clark*, No. CA 7181 (Ohio 2d Dist. Ct. App. March 2, 1982) (Montgomery County).

in which to move or plead is an appearance.²⁶ However, as shown above, the fact that it is an appearance is irrelevant to the question of jurisdiction because in and of itself an appearance does not waive the jurisdictional defenses. Therefore, it follows that the request or motion for leave to move or plead does not waive the jurisdictional defenses²⁷ unless some

²⁶ See *Standard Oil Co. v. Noble*, 4 Ohio App. 3d 76, 446 N.E.2d 816 (11th Dist. 1982) (Trumbull County) (appellant appeared in the action by his attorney filing a motion for leave to move or plead on June 5, 1981). In *Linder v. Community Dev. Assoc.*, 67 Ohio Op. 2d 314, 322 N.E.2d 337 (1st Dist. Ct. App. 1974) (Hamilton County), the court stated:

Since, by filing and serving on appellee's counsel on June 4, 1973, their motion for an order permitting the filing of an answer, appellants formally "appeared in the action" 2 O.Jur. 2d, Appearances, Sec 23, Rule 55(A) clearly required that appellants be timely served with written notice of the application for default judgment.

Id. at 316, 322 N.E.2d at 339. To the same effect see *Suki v. Blume*, No. 44645 (Ohio 8th Dist. Ct. App. Dec. 30, 1982) (Cuyahoga County); *Commercial Savings Bank v. Aetna Freight Lines, Inc.*, No. 16-82-1 (Ohio 3d Dist. Ct. App. Nov. 19, 1982) (Wyandot County).

²⁷ *Accord Pacific Lanes, Inc. v. Bowling Proprietors Ass'n of America*, 248 F. Supp. 347 (D. Ore. 1965); *Capital City Theatre Corp. v. Warner Bros. Pictures, Inc.*, 19 F.R.D. 210 (N.D.N.Y. 1956); *Bowles v. Underwood Corp.*, 5 F.R.D. 25 (E.D. Wis. 1945). See Annot., 30 A.L.R. Fed. 584 (1976), for those federal cases which hold that a stipulation for an extension of time in which to move or plead does not waive the jurisdictional defenses. Included with these cases is the much-cited *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3d Cir.), cert. denied, 322 U.S. 740 (1944). After acknowledging that "[t]he filing by the individual defendants of the stipulation for the extension of the time for answering or otherwise moving with respect to the complaint amounted to a voluntary appearance in the action which gave the court power to adjudicate the controversy to which they were parties," the court held that such a voluntary appearance did not, in and of itself, waive the jurisdictional defenses. *Id.* at 873-74. The court stated:

It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within. He may enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly. If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules. We conclude that within the time allowed for serving the answer the defendant may assert this defense unless he has waived it by some action other than his voluntary appearance.

Id. at 874.

However, in *Easterling v. Volkswagen of America*, 308 F. Supp. 966 (S.D. Miss. 1969), the court stated:

The next question which this Court must decide is whether the defendant International, by filing its "Motion for Time to Plead and/or to Specially Appear" in the Circuit Court of Forrest County, Mississippi on April 3, 1969, thereby waived service of process and made a general appearance herein. The general rule is that

specific provision of the Civil Rules so states.

1. The Leave to Challenge the Jurisdiction

To determine whether there is such a provision, it must be recognized that there are two separate ways in which the leave may be sought. First, in the request or motion for an extension of time in which to move or plead, the defendant indicates to the court that he intends to present the appropriate jurisdictional defense by motion or answer. Second, the request or motion for an extension of time in which to move or plead is general in nature and does not in any way indicate that the jurisdictional defenses are to be included in the subsequently filed motion or answer. In neither case should it make any difference whether leave is sought under the provisions of Civil Rule 6(B)(1) or 6(B)(2),²⁸ although as a practical matter, if the defendant is compelled to invoke Rule 6(B)(2), the motion for an extension of time is more likely to be specific rather than general,

one who makes an appearance in a cause to move for an extension of time in which to plead is deemed to have made a "general appearance" and therefore waived his right to question the jurisdiction of the Court. 5 Am.Jur.2d, Appearances, [§] 25, p. 499. However, where the Motion for Extension of Time is made by special appearance and is solely for the purpose of enabling the defendant to have sufficient time in which to decide whether to plead or file a Motion to Quash Service of Process, the Courts have held that the defendant does not waive his right to question jurisdiction.

Id. at 971. Upon analysis, however, it is clear that the court is not here stating the federal law upon the subject, but is reiterating the Mississippi law which it believed was applicable to the case before its removal to the federal court.

There remains *Puett Electrical Starting Gate Corp. v. Thistle Down Co.*, 2 F.R.D. 550 (N.D. Ohio 1942), and *Preferred Risk Mut. Ins. Co. v. House*, 14 F.R.D. 39 (W.D. Mo. 1953). Both of these cases imply that an unrestricted stipulation for an extension of time in which to move or plead will enter a "general appearance" and waive the jurisdictional defenses, but a stipulation for an extension of time in which to present the jurisdictional defenses by motion or answer is not such an appearance and will not waive the jurisdictional defenses. Neither court makes any reference to the Federal Rules of Civil Procedure, and both decisions are inconsistent with the majority of federal decisions. To some extent, the *Puett* case can be explained away by its age. It was decided at a time when the Federal Rules of Civil Procedure were little more than five years old, and it is apparent that the court was thinking in terms of pre-Rule practice. No such explanation, however, applies to *Preferred Risk*. The best that can be said for it is that it is either the product of poor briefing by counsel or poor research by the court, since the cases cited in support of the court's conclusion are either pre-Rule cases or cases which deal with the concept of "general appearance" in an entirely different context. In short, *Preferred Risk* is simply an aberration.

²⁸ OHIO R. CIV. P. 6(B) states, in pertinent part:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;

since the defendant will be required to demonstrate excusable neglect.²⁹

The problem raised by the first way in which leave is sought can be resolved by reference to the pre-Rule decision in *Bucurenciu v. Ramba*,³⁰ with the understanding, of course, that the decision has been modified somewhat by the third sentence of Rule 12(B). With this modification in mind, the supreme court's holding can be paraphrased as follows:

We do not believe the fact that the defendant did not serve his motion or answer within rule and therefore was required to obtain leave to serve and file the motion or answer is of itself sufficient to in any way change the status of the defendant with reference to having entered his appearance, since the leave was not to move or plead generally, but was to serve and file the particular motion or answer which was served and filed, and therefore since the proffered motion or answer contained a challenge to the jurisdiction the leave to serve and file the particular motion or answer must be construed as a leave to challenge the jurisdiction.³¹

In other words, where the leave sought is leave to serve and file a specific motion or answer in which the jurisdictional defenses are included,³² then the leave must be construed as a leave to challenge the jurisdiction, and

²⁹ In deciding whether or not to grant leave under OHIO R. Civ. P. 6(B)(2), the court must determine whether the defendant was guilty of dilatory tactics, *Rich Equip. Co. v. Reasonover*, No. L-78-147 (Ohio 6th Dist. Ct. App. Apr. 27, 1979) (Lucas County); *State ex rel. Board of Education v. Johnston*, No. 77AP-910 (Ohio 10th Dist. Ct. App. Apr. 18, 1978) (Franklin County); and whether the plaintiff will be substantially prejudiced by the granting of leave, *Manes v. Magenheim*, No. C-810651 (Ohio 1st Dist. Ct. App. Aug. 4, 1982) (Hamilton County); *Muntz v. Muntz*, No. 38811 (Ohio 8th Dist. Ct. App. May 24, 1979) (Cuyahoga County). The defenses to be included in the motion or answer for which leave is sought will be pertinent to both determinations. Therefore, the court should require a defendant seeking leave under OHIO R. Civ. P. 6(B)(2) to submit with the motion for leave a copy of the proposed motion or answer to be served and filed. If that is done and the motion or answer contains the jurisdictional defenses, then we have a first situation rather than a second situation.

³⁰ 117 Ohio St. 546, 159 N.E. 565 (1927).

³¹ *Id.* at 549, 159 N.E. at 566. The precise language used by the Ohio Supreme Court can be found at *supra* note 16.

In *Bucurenciu* one of the defendants was out of rule and had to move for leave to file his answer instanter. Accordingly, the supreme court's language was directed to what would now be an OHIO R. Civ. P. 6(B)(2) situation. But there is nothing in principle that would prevent the supreme court's rationale from applying to a request or motion for leave made within rule under the provisions of OHIO R. Civ. P. 6(B)(1). Therefore, the court's reference to the defendant's being out of rule should be construed as illustrative of the precise problem before it, not as a limitation on the doctrine which the court announced.

For the text of OHIO R. Civ. P. 6(B)(1), (2), see *supra* note 28.

³² As shown above in the text, the motion or answer for which leave is sought need no longer be limited to the jurisdictional defenses alone. Therefore, when the *Bucurenciu* doctrine is applied to post-Rule practice, it must be applied as modified by the third sentence in OHIO R. Civ. P. 12(B), and the inclusion of non-jurisdictional objections or defenses in the motion or answer will not waive the jurisdictional defenses.

the act of obtaining such a leave does not waive the presentation of the jurisdictional defenses.³³

It must be confessed, however, that to rely on *Bucurenciu* is to beg the question. In effect, the *Bucurenciu* doctrine holds that a motion for leave to present the jurisdictional defenses is a "special appearance to make a special appearance," and it clearly implies that a motion for leave to move or plead generally would be a "general appearance" which waives the jurisdictional defenses. In other words, the doctrine is an exception to the rule, and the question which it begs is whether there is any validity to the rule itself.³⁴ That question is squarely presented by the problem raised by the second way in which leave is sought—a request or motion for leave to move or plead generally.

2. The Leave to Move or Plead Generally

The answer to this question and the solution to the problem presented by a request or motion to move or plead generally is to be found in the following texts:

Civil Rule 12(B). How [defenses are] 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: . . . (2) lack of jurisdiction over the person, . . . (4) insufficiency of process, (5) insufficiency of service of process . . . A motion making any of these defenses shall be made before pleading if 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.

Civil Rule 12(G). Consolidation of defenses and objections:

³³ See cases cited *supra* note 27. Although these cases are aberrations in the federal system, they do contain dicta which supports the application of the *Bucurenciu* doctrine in the circumstances described in the text.

³⁴ As the balance of this article will demonstrate, there is no validity to the rule itself, and therefore, as an exception to the rule, the *Bucurenciu* doctrine is theoretically unsound because it is premised on concepts that no longer have any validity in themselves. However, the theoretical concepts that invalidate the old rule would also mandate the same solution as that produced by the application of the *Bucurenciu* doctrine. Therefore, there is no practical harm by begging the question and applying the *Bucurenciu* doctrine, especially since experience teaches that the judges presently sitting are more comfortable with the *Bucurenciu* approach than they are with the new approach mandated by OHIO R. Civ. P. 12. As demonstrated by *Rasmussen v. Vance*, 34 Ohio Misc. 87, 293 N.E.2d 114 (C.P. Cuyahoga County 1973), judges brought up in the old school of Code pleading have difficulty in throwing off the old concept of a "special appearance," but they do not experience the same difficulty in accepting the *Bucurenciu* concept of a "special appearance to make a special appearance."

A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

Civil Rule 12(H). Waiver of defenses and objections:

(1) A defense of lack of jurisdiction over the person, . . . insufficiency of process or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (G), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Civil Rule 15(A). Amendments:

[I]f the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, . . . [a party may amend his pleading once as a matter of course] at any time within twenty-eight days after it is served.

The basic "statutory" scheme underlying these Rules is apparent: the defendant will no longer be permitted to "string out" his defenses and objections by successive motions followed by an answer; he is now limited to a single pre-answer motion, if he chooses to make one, and his jurisdictional defenses must be included in that pre-answer motion. Only if he opts not to make a pre-answer motion may his jurisdictional defenses be raised in the answer.³⁶ If the defendant does not comply with this proce-

³⁶ See authorities cited *supra* notes 17, 20, 21. In addition, Professor Harper has noted: The Field Code of Civil Procedure, adopted by Ohio in 1853, did not contain provisions governing motion practice. Apparently it was assumed in the code that all defenses to a pleading would be raised by the responsive pleading. But the expectation did not come to pass. At common law, practitioners had developed the practice of raising certain objections to a pleading by motion. After the code was adopted, the practice of raising objections to pleadings by preliminary motion continued. But the practice was defective in that it was possible to "string" motions consecutively as a result of prevailing custom. A trial on the merits might be long delayed by the "stringing" of dilatory preliminary motions. Thus, preliminary to filing his answer, the defendant might file a motion to dismiss the action for want of jurisdiction over the defendant's person. If that motion were overruled, defendant might then file a motion for a definite statement. And if that motion were overruled, defendant might then file a motion to dismiss because of improper venue. Many months might go by before defendant was forced to respond to the merits of the action by answer.

Civil Rule 12 continues the common law-code pleading practice of permitting certain defenses to a pleading to be raised by motion at the option of the respond-

ture he will have waived his jurisdictional defenses.³⁶

a. The Three Invalid Arguments for Waiver

With this "statutory" scheme as a starting point, three arguments may be made to support the proposition that obtaining a leave to move or plead generally waives the jurisdictional defenses, even though it be conceded that the leave to move or plead does not result in such a waiver when treated simply as an "appearance." Although all three arguments are essentially variations on the same theme, it is best to discuss them separately.

(1) Jurisdictional Defenses Must be Consolidated in a Pre-Answer Motion

The first argument proceeds as follows. Under the provisions of Civil

ing pleader. But Civ. R. 12 does not permit the dilatory practice of "stringing" motions. Subdivision (G) of the rule requires consolidation of motions.

4 ANDERSON'S OHIO CIVIL PRACTICE § 152.06, at 347-48 (1975).

³⁶ As the court in *Franklin v. Franklin*, 5 Ohio App. 3d 74, 449 N.E.2d 457 (7th Dist. 1981) (Mahoning County), stated: "1. Pursuant to Civ. R. 12(B), the defense of lack of jurisdiction over the person must be presented either in defendant's answer or by a motion prior to filing an answer. 2. Pursuant to Civ. R. 12(H), a party waives the defense of lack of jurisdiction over the person by failure to comply with Civil Rules in presenting such defense." *Id.* at 74, 449 N.E.2d at 458 (syllabus I, II). In this case, the defendant orally moved to dismiss for lack of jurisdiction at the beginning of the trial on the merits, and the trial court sustained the motion. In reversing, the Court of Appeals for Mahoning County stated:

The basis of the trial court's dismissal of this case is lack of jurisdiction over the person of plaintiff. Under the facts of this case, Civ. R. 12(B) provides that this defense must be presented to the trial court either in defendant's answer or by a motion prior to filing such answer. In this case defendant did neither.

Pursuant to Civ. R. 12(H) this defense was waived by defendant for failure to comply with Civ. R. 12. 43 Ohio Jurisprudence 2d 208, Pleading, Section 134. This has been the law of Ohio for a long time. *Glass v. McCullough Transfer Co.* (1953), 159 Ohio St. 505 [50 O.O. 425]; *Long v. Newhouse* (1897), 57 Ohio St. 348; *Thompson v. Steamboat Julius D. Morton* (1853), 2 Ohio St. 26; 22 Ohio Jurisprudence 3d, Courts and Judges, Section 311, at page 479 and Section 312, at pages 481-482.

Id. at 75-76, 449 N.E.2d at 459.

Unfortunately, this is technically dictum, albeit a correct statement of the law, because the issue was not whether the trial court had jurisdiction over the person of the *plaintiff* (it clearly did have such jurisdiction because the plaintiff brought the suit and thereby conferred in personam jurisdiction on the court), but whether the trial court had subject matter jurisdiction over the action because of the plaintiff's residence.

In any event, the point made by the *Franklin* syllabus is well-taken. See *Akron-Canton Reg. Airport Auth. v. Swinehart*, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980); *Security Ins. Co. v. Transit Auth.*, 4 Ohio App. 3d 24, 446 N.E.2d 220 (8th Dist. 1980) (Cuyahoga County); *Hamilton v. East Ohio Gas Co.*, 47 Ohio App. 2d 55, 351 N.E.2d 775 (9th Dist. 1973) (Summit County); *GMS Mgmt. Co. v. Axe*, 5 Ohio Misc. 2d 1, 449 N.E.2d 43 (Clev. Hts. Mun. Ct. 1982). See unreported cases cited *supra* note 11.

Rule 12(G), the jurisdictional defenses must be presented in the defendant's pre-answer motion or they are waived. But, a motion for leave to move or plead is a pre-answer motion. Therefore, if the jurisdictional defenses are not included with the motion for leave to move or plead, they are waived on the ground that they have been omitted from the defendant's pre-answer motion. If the defendant obtains leave to move or plead generally, however, without indicating that he intends to include the jurisdictional defenses in the motion or answer for which leave is sought, it cannot be said that the jurisdictional defenses are included in the pre-answer motion which seeks leave to move or plead. Therefore, by obtaining leave to move or plead generally, the defendant waives the jurisdictional defenses.

This argument is invalid for several reasons. First, a motion is not the only vehicle by which a defendant may obtain leave to move or plead generally. If the defendant is within rule, an informal request to the court, whether made orally or in writing, will suffice as a vehicle for obtaining leave. Civil Rule 6(B)(1) states:

[T]he court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order

Since leave can be obtained "with or without motion," a simple request will suffice,³⁷ and since leave can also be obtained "with or without notice," it may be obtained orally.³⁸ Likewise, if a rule of court permits, a

³⁷ ОНЮ R. Civ. P. 7(B)(1) provides in pertinent part: "An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing." Whatever else it may be, the vehicle used to obtain leave to move or plead under ОНЮ R. Civ. P. 6(B)(1) is "an application to the court for an order," since that Rule clearly states that the court may "order" an enlargement of the specified time period. Accordingly, under ordinary circumstances, the vehicle seeking such an enlargement of time must be characterized as a motion, and it would have to comply with all of the requirements of ОНЮ R. Civ. P. 7(B)(1). But if every "application to the court for an order" must be a motion and if the request for leave under Civil Rule 6(B)(1) is an "application to the court for an order," then the provision in Rule 6(B)(1) providing that leave can be obtained "with or without motion" is rendered meaningless. Since a meaningless result is an unacceptable result, it must be concluded that Rule 6(B)(1) carves out an exception to the general rules stated in Rule 7(B)(1)—that is, the specific takes precedence over the general—and the request for leave to move or plead need not be characterized as a motion subject to all of the requirements of Rule 7(B)(1). That being so, the Rule 6(B)(1) application for leave to move or plead can be characterized by some name other than "motion" and need not be limited to the extent that true "motions" are limited. Accordingly, when such an application is made informally and not in strict accord with Rule 7(B)(1), it can be characterized as a "request" rather than a "motion," and it should not be treated as a "motion."

³⁸ See *supra* note 37. The due process concept of "notice" underlies the limitations on oral motion practice. A party against whom a motion is made is entitled to notice of the motion and an opportunity to be heard with respect thereto. If the motion is made during a hearing or trial, the party against whom it is made will have "notice" because he will be

defendant can obtain leave by way of a stipulation filed with the clerk,³⁹ if the stipulation is filed within rule.⁴⁰ A motion for leave to move or

present during the hearing or trial. However, if it is not made during a hearing or trial, it must be in writing, and the party against whom it is made will receive "notice" when a copy of the written motion is served upon him as required by OHIO R. CIV. P. 5. But OHIO R. CIV. P. 6(B)(1) does not require "notice" of an application for an extension of time in which to move or plead. Therefore, the application need not be in writing and need not be served on an opposing party; it may be made orally even though not made during a hearing or trial. In other words, a request for an extension of time in which to move or plead, as opposed to a motion for such an extension, may be made both orally and *ex parte* because normally the request will not meaningfully impinge on any other party's substantive rights.

Indeed, the reasoning concerning the *ex parte* nature of the application for an extension of time is equally true with respect to a motion for an extension of time made under the provisions of Rule 6(B)(1). Although that motion would normally have to be in writing because Rule 7(B)(1) demands a writing, it need not be served on other parties to the action because a motion that can "be heard *ex parte*"—that is, one that does not require "notice" to other parties—is specifically exempted from the service requirements of OHIO R. CIV. P. 5(A). See *supra* note 24, for the precise language of OHIO R. CIV. P. 5(A).

³⁹ Typical of the local rules to be found on this subject are C.P. CT. R. 17.01 (Franklin County); C.P. CT. R. 12 (Hamilton County). The Franklin County Rule states:

By agreement of counsel any party may be permitted three leaves to move or plead provided the total extension of time does not exceed fifty-six days. Such consent shall be evidenced by a consent to plead signed by all counsel and filed with the Clerk. Neither these forms nor entries shall be submitted to the court for approval where consent to plead is proper and is obtained.

C.P. CT. R. 17.01 (Franklin County).

The Hamilton County rule reads:

Parties may obtain an extension of time, not to exceed 28 days, in which to move, answer or otherwise plead, when no such prior extension has been granted, by filing with the Clerk of Courts a written stipulation providing for such extension. The stipulation shall affirmatively state that no prior extension has been granted, and must be filed before the expiration of the period originally prescribed, as set forth in Civil Rule 6(B)(1).

C.P. CT. R. 12 (Hamilton County).

⁴⁰ See *id.* It is questionable whether a local rule of court could authorize leave by way of stipulation filed with the clerk once the defendant is out of rule, since such a stipulation would preclude a finding by the court that the defendant's tardiness was due to excusable neglect, as required by OHIO R. CIV. P. 6(B)(2). As the Ohio Supreme Court noted in *Miller v. Lint*, 62 Ohio St. 2d 209, 404 N.E.2d 752 (1980):

The issue before the court for determination in case No. 79-1097 (plaintiff's appeal) is whether the trial court abused its discretion in allowing the defendant to file her answer beyond rule date without regard to the requirements of the Ohio Rules of Civil Procedure.

Civ. R. 12(A)(1) expressly provides that "[t]he defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him." Hence, the defendant in this case was required to file her answer or to request an extension of time on or before March 9, 1977, but the record discloses that she did neither.

Instead, the defendant, upon receiving notice of the motion for a default judgment, proceeded to file her answer, but this filing did not comport with the requirements of Civ. R. 6(B)(2), which provides that such a late filing can only be

plead is required only if the defendant is out of rule at the time such leave is sought. As stated in Civil Rule 6(B)(2):

[U]pon motion made after the expiration of the specified period [originally prescribed or as extended by a previous order, the court for cause shown may at any time in its discretion] permit the act to be done where the failure to act was the result of excusable neglect⁴¹

In this context, there are no essential differences among motions, requests, and stipulations. A motion must be in writing⁴² and may have to

accomplished "upon motion" and "where the failure to act was the result of excusable neglect."

Moreover, Civ. R. 7(B)(1) requires that any motion other than those made during a hearing or at a trial "shall be made in writing," and Civ. R. 6(D) provides for the *service* of any such written motions. Here, however, the record fails to portray compliance with either of these requirements. . . .

While this court is in general agreement with the universal practice of allowing trial courts broad discretion in settling procedural matters, such discretion as evidenced by Civ. R. 6(B), is not unlimited, and under the circumstances existing on April 14, 1977, some showing of "excusable neglect" was a necessary prelude to the filing of the answer. . . .

However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment. Hence, the judgment of the Court of Appeals in case No. 79-1097 is reversed, and the cause remanded to the trial court for further proceedings according to law.

Id. at 213-15, 404 N.E.2d at 754-55.

Any local rule that would permit an automatic leave by an out-of-rule stipulation would also permit the defendant to side-step the "motion" and "excusable neglect" requirements of OHIO R. Civ. P. 6(B)(2). An "open ended" rule such as C.P. Ct. R. 17.01 (Franklin County) could be construed as such a rule. See *supra* note 39. However, given the emphasis placed on those requirements by the Ohio Supreme Court in *Miller v. Lint*, such a local rule arguably is in conflict with Civil Rule 6(B)(2). If that is the case, the local rule would be invalid, and the defendant would rely upon it at his peril. See *Browne, Local Rules of Court*, 13 AKRON L. REV. 277, 293-94 (1979).

On the other hand, since such a stipulation requires the consent of at least the plaintiff and since Civil Rule 6(B)(2) is primarily for the plaintiff's benefit, the local rule could be sustained on the theory that the plaintiff has waived the requirements of Civil Rule 6(B)(2) by signing the stipulation. If the "motion" and "excusable neglect" requirements can be waived by inaction or delay, as held in *Manes v. Magenheimer*, No. C-810651 (Ohio 1st Dist. Ct. App. Aug. 4, 1982) (Hamilton County), then it should follow that they can also be waived by consent. In the opinion of this writer, the "waiver by consent" theory is the better approach to an "open ended" rule providing for automatic leave by stipulation.

In any event, because of the prevalence of "open ended" local rules the question is not entirely academic. Whatever the correct answer to this problem may be, it is clear from *Miller v. Lint*, that in the absence of a local rule allowing an out-of-rule stipulation, the defendant must comply with the requirements of Civil Rule 6(B)(2). Otherwise the court abuses its discretion in granting leave to move or plead.

⁴¹ See *supra* note 28. A motion for leave to move or plead is required when the defendant is out of rule, see *Miller v. Lint*, 62 Ohio St. 2d 209, 400 N.E.2d 752 (1980).

⁴² See *supra* note 37.

be served⁴³ on other parties to the suit. A request can be in writing (but need not be)⁴⁴ and can be served on other parties to the suit (but need not be).⁴⁵ A stipulation must be in writing and is in effect served on the plaintiff, since it requires the plaintiff's consent. However, if there are no *essential* differences among motions, requests or stipulations, and if Civil Rule 12(G) does not apply to a request or stipulation (and by its terms, it clearly does not), then there is no logical reason why it should apply to a motion for leave to move or plead.

Second, according to its express terms, Rule 12(G) applies only to "a motion under this rule." The words "this rule" can only apply to Civil Rule 12. Therefore, the consolidation provisions of Civil Rule 12(G) apply only to motions made under Civil Rule 12.⁴⁶ But a motion for an extension of time in which to move or plead (if the application for leave is sought by motion) is made under the rubric of Civil Rule 6(B). Therefore, the consolidation provisions of Civil Rule 12(G) do *not* apply to a motion for an extension of time in which to move or plead, and the failure to include the jurisdictional defenses in such a motion does not result in their waiver under the waiver provisions of Civil Rule 12(G).

Further, all of the Rule 12 motions,⁴⁷ except the 12(D) motion for a preliminary hearing, are motions which assert defenses or objections.⁴⁸ Note that the Rule 12(D) motion for a preliminary hearing is used to obtain a pre-trial adjudication of a defense or objection previously asserted by motion or answer. Therefore, it is obvious that Rule 12(G)'s reference to a motion made "under this rule" is a reference to a motion asserting a defense or objection. However, a Rule 6(B) motion seeking an extension of time in which to move or plead does not assert a defense or objection. Consequently, the consolidation and waiver provisions of Rule 12(G) do not apply to a Rule 6(B) motion.

Again, by its own terms, Rule 12(G) requires the consolidation of only

⁴³ See *supra* note 38.

⁴⁴ See *supra* notes 37, 38.

⁴⁵ *Id.*

⁴⁶ The OHIO R. CIV. P. 12 motions to which the consolidation provisions of Rule 12(G) apply are the following: dismissal for lack of jurisdiction over the subject matter, under 12(B)(1); dismissal for lack of jurisdiction over the person, under 12(B)(2); transfer for improper venue, under 12(B)(3); quash for insufficiency of process, under 12(B)(4); quash for insufficiency of service of process, under 12(B)(5); dismissal for failure to state a claim upon which relief can be granted, under 12(B)(6); compel the joinder of an absent necessary or indispensable party, under 12(B)(7); summary judgment, under the last three sentences of 12(B); judgment on the pleadings, under 12(C); a preliminary hearing, under 12(D); a more definite statement, under 12(E); strike an insufficient claim from a pleading, under 12(F); strike an insufficient defense from a pleading, under 12(F); and strike any redundant, immaterial, impertinent or scandalous matter from a pleading, under 12(F).

⁴⁷ See *supra* note 46.

⁴⁸ For the characteristics of defenses and objections and the differences between them, see Browne, *Ohio Civil Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses*, 27 CLEV. ST. L. REV. 329, 335-401 (1978).

those defenses and objections that are "then available" to the pleader when he makes his pre-answer motion. In any given case, it is possible that none of the jurisdictional defenses will be "available" at the time a defendant moves for an extension of time in which to move or plead. In order to be "available" to a defendant, a defense must meet two requirements: 1) it must be applicable to the situation presented by the record, *i.e.*, it must be a "valid" defense; and 2) it must be ripe for adjudication at the time the court would normally determine its validity. When a defense is presented by motion, the court must normally determine its validity⁴⁹ within thirty to ninety days after the motion is made.⁵⁰ Therefore,

⁴⁹ See, *e.g.*, *State ex rel. Keating v. Pressman*, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974):

The Court of Appeals held that the trial court erred when it failed upon appellee's motion to dismiss before the trial. That motion was based upon the ground that appellant's petition failed to state a claim against appellee upon which relief could be granted. Civ. R. 12(B)(6) specifically provides that a defense based upon that ground may be made by motion. Civ. R. 12(D), which prescribes the time for hearing and determination of a Civ. R. 12(B)(6) motion to dismiss provides:

"The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by a motion . . . shall be heard and determined before trial on application of any party."

Thus, Civ. R. 12(D) withholds from the trial court the power to defer hearing and determination of a Civ. R. 12(B)(6) motion to dismiss until after commencement of trial. "On the application of any party," the trial court must hear and determine a motion to dismiss for failure to state a claim upon which relief can be granted, before proceeding to the trial of the cause.

Additionally, the motion to dismiss, *of itself*, represents a request for a ruling of the court and *it need not be reiterated by subsequent motions*. In the case at bar, appellee made an "application" within the meaning of Civ. R. 12(D), *when she filed her motion* and orally requested the court to rule upon the merits thereof.

Id. at 163-64, 311 N.E.2d at 526 (emphasis added). See also *Carter v. Johnson*, 55 Ohio App. 2d 157, 380 N.E.2d 758 (8th Dist. 1978) (Cuyahoga County) (pursuant to OHIO R. Civ. P. 12(A)(2) the service of any Rule 12 motion stays the running of the 28-day answer period until the court rules on the motion).

When *State ex rel. Keating v. Pressman* and OHIO R. Civ. P. 12(A)(2) are read together, the following rule emerges: every Rule 12 motion asserting an objection or defenses contains within it, and as an essential part of it (albeit, *sub silentio*), a Rule 12(D) motion for a pretrial determination of the validity of the objection or defense. See *infra* note 50 (discussing the time-frame for that determination).

⁵⁰ The Ohio Rules of Civil Procedure do not expressly state the time-frame in which a court must rule on a motion. However, the following provisions suggest the appropriate time frame. First, OHIO REV. CODE ANN. § 2701.02 (Page 1981), provides as follows:

When submitted to a court on motion, demurrer, or motion for new trial, or when submitted to a court on appeal on questions of law or on final trial on the issues joined, a cause begun in a court of record shall be determined and adjudicated within thirty days after such submission.

This section applies to causes sent to referee or special master, and to motions affecting the confirmation, modification, or vacation of a report thereof. This section does not affect, alter, or change the rules of the supreme court.

Second, SUP. CT. R. SUPERINT. CT. C.P. provides in pertinent part:

in order to be "available" for presentation by motion, the defense must lie in the circumstances presented by the record at the time the motion is made, and it must be ripe for adjudication either at the time the motion is made or within thirty to ninety days following the making of the motion.

The following hypothetical situation will illustrate this proposition. Suppose that the defendant personally receives and signs for certified mail service and, upon opening the envelope, finds only a copy of the complaint and no summons. Through an oversight in the clerk's office, no summons was ever issued for the defendant; as a consequence none was served.⁵¹ Under these circumstances, the defendant is under no obligation to respond.⁵² However, the record will not reflect the absence of a sum-

Each judge of a court of common pleas shall review, or cause to be reviewed, quarterly, all pending motions The number of pending motions . . . which have been pending more than 90 days shall be separately reported the month next following the end of the quarter on forms provided by the Administrative Director. With respect to motions, the 90 day period shall begin to run on the day the motion is filed or made. . . . The Chief Justice of the Supreme Court may require specific information from the administrative judge or judge reporting, or both, as to the reasons of delay in such rulings.

See also SUP. CT. R. SUPERINT. MUN. CT. & COUNTY CT. 6(B) (essentially similar language).

These two provisions indicate that the time-frame in which a motion must normally be decided by the trial court is within 30 to 90 days after it is filed or made.

Therefore, when the authorities discussed *supra* note 49 are read together with the authorities discussed above, they present the following rule for the determination of motions: unless unusual circumstances require otherwise, a Rule 12 motion asserting a defense or objection must be heard and determined before trial and within 30 to 90 days after it is filed or made.

⁵¹ These things happen. See, e.g., *Lippe v. Fortner*, No. 39464-CV (C.P. Cuyahoga County 1982). The defendants were listed as follows: "Second (Full Name Unknown) Worthen, as father and natural guardian of Melvin S. Worthen," and "Third (First Full Name Unknown) Worthen, as mother and natural guardian of Melvin S. Worthen." With respect to these two defendants, the clerk's office issued two summons. One was directed to "Worthen, (1st Full Name Unknown) Mother & Natural Gdn. of Melvin S. Worthen," and the second was directed to "Worthen (2nd Full Name Unknown) Mother and Natural Guardian of Melvin S. Worthen." Thus, two summons were issued for the mother and the father was never served with a summons directed to him.

⁵² As OHIO R. CIV. P. 12(A)(2) states, in pertinent part: "The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him;"

See *Akron-Canton Airport Auth. v. Swinehart*, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980):

The trial court in this case effectively dismissed appellant's appropriation complaint because of the problems surrounding its service. This dismissal, however, was improper since a joint answer had been filed by appellees. By filing this answer, an appearance was made and appellees consented to the personal jurisdiction of the court. . . . *Because of the invalid service the time for the answer had not begun to run until that appearance.* The answer filed upon that date was therefore timely and the cause should proceed from that point.

Id. at 407-08, 406 N.E.2d at 815 (citation omitted) (emphasis added). In this case, the only "appearance" made by the defendants was by the filing of the joint answer, and that answer

mons; on the face of the record it will appear that the defendant was properly served.⁵³ Therefore, if the defendant does nothing he will run the risk of a default judgment being taken against him without any notice to him.⁵⁴ Accordingly, to prevent this the defendant waits until near the end of the twenty-eight day response period⁵⁵ and then moves for an extension of time in which to move or plead.⁵⁶ At the time he makes this

did not contain the jurisdictional defenses. Thus, it was an "appearance" which conferred jurisdiction on the court by consent.

⁵³ The certified mail return receipt (the "green card") simply reflects that certified mail was delivered to the person signing for it; it does not reflect the content of the envelope. The court, of course, will presume regularity and will thus presume that a summons was within the envelope delivered. Accordingly, the record, coupled with this presumption of regularity, will reflect good service on the defendant.

⁵⁴ See cases cited *supra* note 25.

⁵⁵ See *supra* note 52.

⁵⁶ In this situation, it is to the defendant's advantage to "run out the clock." As OHIO R. Civ. P. 3(A) states: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." Thus, if the plaintiff does not obtain valid service within one year from the filing of the complaint, the action will fail of commencement. *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977); Scigliano, *supra* note 2. Accordingly, the defendant will want to postpone informing the plaintiff of the failure of service as long as possible in the hope that both the year in which to obtain service and the statute of limitations will expire.

However, the use of leaves to plead for this purpose may very well raise problems under the provisions of OHIO R. Civ. P. 11. There can be no doubt that it is legitimate to take a leave to plead in order to avoid a default judgment being taken against the defendant without notice. Furthermore, it is probably proper to take leaves to plead if the parties are involved in serious settlement negotiations; but is it proper to take two or more leaves to plead solely for the purpose of "running out the clock"?

If the leaves to plead are obtained by a writing (e.g., a written request, a stipulation, or a motion for leave), the writing will probably be signed by counsel for the defendant. However, OHIO R. Civ. P. 11 states:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading . . . is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate action.

Id. (emphasis added). Further, OHIO R. Civ. P. 7(B)(3) provides: "The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules." *Id.* (emphasis added). Thus, the signature requirement applies to a motion for leave to move or plead because it is a motion, and it applies to a written request or a stipulation for leave to move or plead because the written request or stipulation would qualify as an "other paper." See *Browne, Civil Rule 11: The Signature and Signature Block*, 9 CAP. U.L. REV. 291 (1979).

Under the provisions of Rule 11, an attorney is barred from interposing a pleading, motion, or other paper solely for the purpose of delay. *Browne, The Significance of the Signature: A Comment on the Obligations Imposed by Civil Rule 11*, 30 CLEV. ST. L. REV. 385, 459-66 (1981). If the second and subsequent leaves to plead are obtained for the purpose of "running out the clock," are they not interposed solely for the purpose of delay? If the trial

motion, however, none of the jurisdictional defenses are "available" to him for assertion by motion. The defenses of insufficiency of process and insufficiency of service of process are not available because no summons was ever issued or served, and the defense of lack of jurisdiction over the person is not available until the end of the year following the filing of the complaint.⁵⁷ Thus, even if Rule 12(G) were applicable to Rule 6(B) mo-

court is convinced that they are, it may, on its own initiative, strike the written request, stipulation or motion seeking the leave to move or plead, and proceed with the case as if they had not been filed. This result would make the subsequent Rule 12 motion or answer out of rule, and would result in the waiver of the jurisdictional defenses. *See infra* note 143 and accompanying text.

How, then, may the defendant ethically "run out the clock" so as to take advantage of failure of commencement under OHIO R. Civ. P. 3(A)? One way is to make no appearance in the action at all until after the year following the filing of the complaint expires. The defendant could guard against a default judgment in this situation by carefully monitoring the court's docket and journal. A second way is to serve and file an answer in which he asserts the jurisdictional defenses. *See infra* note 58. Neither method guarantees success in "running out the clock," but both are more consonant with OHIO R. Civ. P. 11 than taking successive leaves to plead.

⁵⁷ See OHIO R. Civ. P. 3(A). This Rule allows the plaintiff one year to obtain valid service on the defendant. As long as some reasonable possibility exists that the plaintiff can effectuate such service, the trial court will not know if it has jurisdiction until the year expires. If the plaintiff obtains valid service within the year, the trial court has jurisdiction of the person of the defendant; if the year expires without valid service, the trial court does not have jurisdiction of the person of the defendant. Thus, as long as the plaintiff is trying to obtain valid service and as long as there is time left within the year following the filing of the complaint, the court cannot dismiss the action for lack of jurisdiction over the person of the defendant. Accordingly, as a rule of thumb, the defense of lack of jurisdiction over the person is not "available" until the end of the year following the filing of the complaint. As the court in *Hayden v. Ours*, 44 Ohio Misc. 62, 337 N.E.2d 183 (C.P. Paulding County 1975), stated:

Plaintiffs have begun the commencement of their causes of action but they have not yet caused them to be commenced because they have not caused summons to be served upon defendant administrator within one year. *Consequently, defendant's motion to dismiss is premature* as plaintiffs have until April 8, 1975, in which to accomplish this.

Id. at 66, 337 N.E.2d at 186 (emphasis added). In *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975) (Hamilton County), the court stated:

It follows, therefore, and we accordingly hold, that the action in the instant cause commenced on March 1, 1974, with the filing of the Complaint with the Court of Common Pleas, probate division, in conformity with Civil Rule 3(A); . . . and that the action of the trial court in granting defendant's Motion to Dismiss prior to the expiration of the period provided by Civil Rule 3(A) for the perfection of service, insofar as it was founded upon a procedural requirement for a praecipe which had been eliminated by Civil Rule 4(A), was error.

Id. at 418, 339 N.E.2d at 840 (emphasis added). *See also* *Twardowski v. Cooper*, No. 8105 (Ohio 2d Dist. Ct. App. May 2, 1983) (Montgomery County) (error to dismiss an action for want of prosecution within the year following the filing of the complaint because such dismissal denies the plaintiff an opportunity to perfect service pursuant to Civil Rule 3(A)).

Where, however, it becomes clear that the plaintiff will never be able to perfect service within the year, the defense of lack of jurisdiction becomes available at an earlier date, and

tions generally, it would not be applicable in this instance because none of the jurisdictional defenses were available to the defendant at the time he made this Rule 6(B) motion.⁵⁸

In addition to all of the reasons stated above, Rule 12(G) is not applicable to Rule 6(B) motions for an extension of time in which to move or plead because the application of Rule 12(G) to a Rule 6(B) motion would frustrate the purpose of the latter Rule. In the context of this discussion, Rule 6(B) is designed to give the defense attorney additional time in which to investigate, evaluate, prepare, and present his client's defenses. In many cases this additional time is needed because the defense attorney may not receive the suit papers until late in the twenty-eight day response period. This fact is especially pertinent when the suit papers must first pass through the hands of the defendant's insurance carrier.⁵⁹ Thus, it would be ludicrous to hold that the defense attorney must present the jurisdictional defenses with the very same motion used to obtain an extension of time in which to determine whether those defenses are available to him. The Civil Rules are not ludicrous; therefore, for this reason, and for all of the reasons stated above, this first argument, which bases the need for inclusion of the jurisdictional defenses in the motion for leave to move or plead on the characterization of these motions as pre-answer motions has no validity.

the court may entertain a motion asserting that defense before the year expires. *Lozier v. Thorne*, No. 5-78-34 (Ohio 3d Dist. Ct. App. May 25, 1979) (Hancock County).

⁵⁸ The defense of lack of jurisdiction over the person would, however, be available for presentation by answer even in the circumstances described in the text. The key to "availability" is whether the defense is ripe for adjudication at the time the court would normally hear and determine the validity of the defense. But defenses raised by answer are normally heard and determined at the time of trial, and given the present state of the docket in most courts, trials are normally held more than a year after the complaint is filed. Therefore, even if this defense could not be heard and determined before the end of the year following the filing of the complaint, it could be presented by answer, because the action would not normally be tried within the year following the filing of the complaint.

Presenting this defense by answer is probably more ethical than seeking extensions of time in which to move or plead, if the extensions are sought *solely* for the purpose of "running out the clock." See *supra* note 56. And it would probably accomplish as much, since plaintiffs are reluctant to employ OHIO R. Crv. P. 12(D) for the purpose of testing defenses asserted in the answer. See, e.g., *Keyer v. Wysong*, No. 6114 (Ohio 2d Dist. Ct. App. July 10, 1979) (Montgomery County), as discussed in note 18, *supra*.

⁵⁹ See, e.g., *Colley v. Bazell*, 64 Ohio St. 2d 243, 416 N.E.2d 605 (1980); *Marlin v. West American Ins. Co.*, No. 81AP-86 (Ohio 10th Dist. Ct. App. May 14, 1981) (Franklin County); *Antonopoulos v. Eisner*, 30 Ohio App. 2d 187, 284 N.E.2d 194 (8th Dist. 1972) (Cuyahoga County); *Kish v. Leppert*, No. 78AP-638 (Ohio 10th Dist. Ct. App. Mar. 1, 1979) (Franklin County). See also *Machies v. Anesthesia Assoc., Inc.*, No. 43493 (Ohio 8th Dist. Ct. App. Dec. 10, 1981) (Cuyahoga County) (insurance situation was applied by analogy to the acts of a dishonest employee who withheld the suit papers from his employer, delaying the retention of a defense attorney until after a default judgment had been taken against the employer).

(2) The Rules Prohibit the "Stringing" of Pre-Answer Motions

The second argument in favor of waiver proceeds as follows. The spirit of Rule 12 is to prevent the "stringing out" of motions before answer. If the defendant is allowed to move for an extension of time in which to move or plead and then move to dismiss or quash pursuant to the Rule 12(B)(2), 12(B)(4) or 12(B)(5) defenses, he is "stringing out" his motions. Therefore, the argument goes, in order to avoid this tactic, the motion to dismiss or quash must be joined with the motion for leave to move or plead. Otherwise, the jurisdictional defenses which could have been raised by the motion to dismiss or quash are waived.

There is a grain of substance to this argument, because there can be no doubt that Rule 12 was designed to prevent the "stringing out" of motions.⁶⁰ This argument, however, is really nothing more than a variation of the Rule 12(G) consolidation argument made above, and it is invalid for all of the same reasons. But, two additional reasons require emphasis. First, to the extent that Rule 12 prevents the "stringing out" of motions, it does so only with respect to motions which present defenses or objections.⁶¹ The Rule 6(B) motion for leave to move or plead does not present a defense or an objection. Therefore, the spirit of Rule 12 does not prevent that "stringing" which results from the use of a motion for an extension of time in which to move or plead, followed by the use of a motion which presents a defense or objection. Indeed, it may be said that this form of "stringing" is one of the purposes for which Rule 6(B) was designed. Second, Rule 12 does not impose an absolute ban on the "stringing" of motions. In fact, it actually permits the "stringing" of motions, subject to the limitations in Rule 12(G). As Professor Harper so clearly states:

Civil Rule 12 continues the common law-code pleading practice of permitting certain defenses to a pleading to be raised by motion at the option of the responding pleader. But Civil Rule 12 does not permit the dilatory practice of "stringing" motions. Subdivision (G) of the rule requires consolidation of motions. Although subdivision (G) accomplishes a simple purpose—avoidance of delay—the subdivision requires explanation.

The first sentence of Civ. R. 12(G) provides; "A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him."

The sentence must be read carefully for full understanding.

Only those motions "under this rule" must be consolidated. "This rule" means Civ. R. 12 and all of the motions permitted under the subdivisions of Civ. R. 12. A motion provided for by a

⁶⁰ See authorities cited *supra* notes 17, 20, 21, 35.

⁶¹ *Id.*

rule other than Civ. R. 12 need not be consolidated with a Civ. R. 12 motion. Two-step motion practice is possible. Thus, defendant is served with a complaint which he must answer within twenty-eight days after service. Within the twenty-eight day period, and for some valid reason, defendant moves for an extension of time pursuant to Civ. R. 6(B). The motion is granted. Defendant then serves a motion authorized by Civ. R. 12. He may do so because the first motion was not a Civ. R. 12 motion.

A motion for summary judgment pursuant to Civ. R. 56 is obviously not a Civ. R. 12 motion and therefore, when made in good faith, need not be consolidated with a Civ. R. 12 motion.⁶²

Thus, a defendant acting in good faith and for valid reasons may "string" his motions as follows. First, he may move for an extension of time in which to move or plead under the provisions of Rule 6(B). If that is granted, he may then present his jurisdictional defenses, and any other Rule 12 defenses and objections then available to him under the provisions of Rules 12(B), 12(E) and/or 12(F). If these motions fail, he may then present, for example, a Rule 8(C) affirmative defense by a motion for summary judgment under the provisions of Rule 56.⁶³ If the defen-

⁶² 4 ANDERSON'S OHIO CIVIL PRACTICE § 152.06, at 348-49 (1975). Harper cites *Blanton v. Pacific Mut. Life Ins. Co.*, 4 F.R.D. 200 (W.D.N.C. 1944), for the proposition that the Rule 12 motions need not be consolidated with the Rule 6(B) motion for an extension of time. In *Blanton*, the court stated:

It appears to be argued by the plaintiff that when the defendant made its motion for an extension of time within which to answer it was required to include therein any [Rule 12(f)] motion for a bill of particulars or to strike, or forfeit the right to do so. That having omitted to do so, the latter motions were no longer available. This interpretation fails to consider the nature of the motions provided for in Rule 12. The motions permitted under Rule 12 are motions made by way of defense or objection to the complaint. And the [Rule 12(g)] requirement relates to the including in one motion of all defenses or objections permitted under "this rule" (i.e., Rule 12). A motion for enlargement of time is in no way a defense or objection to the complaint. Neither is it permitted, or even referred to, in this rule (Rule 12). On the contrary, motions for enlargement of time are provided for by Rule 6(b) and have no relation or connection with motions by way of defense or objection which are regulated by Rule 12. It is only the latter which must be embraced in one inclusive motion. When the defendant came to offer motions under Rule 12, it complied with the rule by including in one motion both of the objections which it desired to offer; namely to strike and for a bill of particulars.

Id. at 205 (emphasis in original).

⁶³ Under certain circumstances, OHIO R. Civ. P. 12(G) may prevent the use of a motion for summary judgment as the vehicle for presenting the affirmative defense. In *Mills v. Whitehouse Trucking Co.*, 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974), the supreme court held that if an affirmative defense is both discernible and determinable from the face of the complaint, it may be presented by an OHIO R. Civ. P. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Such an affirmative defense thus becomes an available defense which OHIO R. Civ. P. 12 permits to be raised by motion. However,

dant does not wholly prevail on his motion for summary judgment, he may then serve his answer.⁸⁴

OHIO R. CIV. P. 12(G) states:

If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert *by motion* or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

Id. (emphasis added). Further, OHIO R. CIV. P. 12(H)(2) provides: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits."

Now, suppose that an affirmative defense such as the statute of limitations is both discernible and determinable from the face of the complaint, and the defendant elects to present his jurisdictional defenses by a Rule 12 motion to dismiss or quash. When these two subdivisions of Rule 12 are read together in this context, they produce the following rule: if the defendant does not present his statute of limitations defense by a 12(B)(6) motion joined with his 12(B)(2) motion to dismiss or his 12(B)(4) or 12(B)(5) motion to quash, he will be precluded from raising the statute of limitations defense by a *second pre-answer motion*, such as a Rule 56 motion for summary judgment. Thus, the defendant will be limited to presenting the statute of limitations defense in his answer. If the defendant is limited to asserting the defense by answer, he must be careful to assert it in Rule 8(C) terms rather than in Rule 12(B)(6) terms. That is, the defendant does not properly assert the statute of limitations defense in his answer if he merely states that "the complaint fails to state a claim upon which relief can be granted" (the Rule 12(B)(6) formulation). The proper assertion of this claim may be made as follows: "The right of action set forth in the complaint did not accrue within two years next before the commencement of this action" (the Rule 8(C) formulation). If the defendant did not employ the Rule 8(C) formulation, he would waive the affirmative defense on the theory that he did not give the court or the plaintiff adequate notice of the nature of the defense being asserted. This was the principal thrust of *Mills v. Whitehouse Trucking Co.*, wherein the court stated:

Civ. R. 8(C) provides, in part:

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense. . . ."

Appellee's first defense [in the answer], "the complaint fails to state a claim against the defendant, City of Hillsboro, upon which relief can be granted," clearly fails to allege affirmatively the bar of the statute of limitations to the present action nor does it formulate in a simple, concise, and direct manner the issue to be resolved by the trial court.

Id. at 58, 320 N.E.2d at 670. This complexity created by the *Mills* decision is unfortunate, but the bench and bar will have to learn to live with it.

⁸⁴ If the defendant employs an OHIO R. CIV. P. 56 motion for summary judgment in the circumstances described in the text, he may need an extension of time in which to answer. After stating that the basic response time to a pleading asserting a claim for affirmative relief is 28 days, OHIO R. CIV. P. 12(A)(2) provides:

The service of a motion *permitted under this rule* alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which

In sum, then, the spirit and letter of Rule 12 prohibits the stringing of Rule 12 motions which present defenses or objections. A motion for leave to move or plead, followed by a Rule 12 motion presenting the jurisdictional defenses, does not fall within the prohibited "stringing" pattern. Accordingly, the waiver argument based on prohibited "stringing" is invalid. Oddly enough, however, an argument based on prohibited "stringing" will have some application to the defeat of the third argument in favor of waiver.

(3) Jurisdictional Defenses Must be Presented at the First Opportunity

The third argument in favor of waiver is premised on the concept of "first opportunity" and proceeds as follows. It is the well-settled law in Ohio that the jurisdictional defenses are waived if they are not asserted at the defendant's first opportunity. However, the jurisdictional defenses may be raised by motion. Therefore, the first opportunity to raise the jurisdictional defenses is the first motion made by the defendant. Generally, the first motion made by the defendant will be a motion for an extension of time in which to move or plead. Thus, the jurisdictional defenses must be included with that motion, or they will not have been raised at the defendant's first opportunity.

complies with the court's order.

Id. (emphasis added). In other words, the service of a motion "permitted under this rule" stays the running of the 28-day response time until after the court rules on the motion. See *Carter v. Johnson*, 55 Ohio App. 2d 157, 380 N.E.2d 758 (8th Dist. 1978) (Cuyahoga County). But the phrase "permitted under this rule" obviously refers to motions made pursuant to Rule 12. A motion for summary judgment, however, is made under the provisions of Rule 56. Therefore, if Rule 12(A)(2) is read literally, the service of a motion for summary judgment does not automatically stay the response time for the answer, and if the answer is not served within 28 days after the service of the summons or complaint (or by the end of the extended period of time obtained under the first motion for leave to move or plead), the answer will be out of rule.

Arguably the last three sentences of Rule 12(B) infer that a motion for summary judgment is permitted. Thus, such a motion is a "motion permitted under this rule." If, however, the last three sentences are read literally, a motion for summary judgment is permitted only under the following limited circumstances: 1) the motion for summary judgment is improperly presented under the guise of a supported Rule 12(B)(6) motion to dismiss for failure to state a claim for which relief can be granted; 2) the evidence offered in support of the 12(B)(6) motion is proper under the provisions of Rule 56(C); and 3) such evidence is not excluded by the court. Accordingly, if the defendant serves a proper motion for a Rule 56 summary judgment, the last three sentences of Rule 12(B) do not come into play.

Most judges tend to apply Rule 12(A)(2) to pre-answer motions for summary judgment on a theory of application by analogy. But the language of the Rule does not apply to pre-answer motions for summary judgment even though Rule 56(B) would allow the defendant to make such a motion prior to answer. Therefore, the safest course would be to serve the pre-answer motion for summary judgment and simultaneously move for leave to serve the answer within 14 days after the court rules on the motion for summary judgment. If the court's ruling does not dispose of the entire case, an answer is still required.

Again, most of the reasons stated which refute the first and second arguments in favor of waiver apply here and demonstrate the invalidity of this argument. However there is a grain of substance to this argument that requires separate discussion. This substance is found in two unreported decisions of the Court of Appeals for Cuyahoga County which state unequivocally that the defendant must seize his first opportunity to present his jurisdictional defenses, or they are waived.⁶⁵ Accordingly, it is necessary to determine what is meant by the phrase "first opportunity."

The phrase cannot be given a purely temporal interpretation; that is, it cannot be read to mean that the defendant must assert the jurisdictional defenses immediately upon discovering them. This interpretation would require the defendant to assert the defenses not later than the day following his determination as to their availability.⁶⁶ Such a requirement would completely nullify the provisions of Rule 12(A)(1) which grants the defense not less than twenty-eight days in which to assert defenses. An interpretation of one part of a Rule that results in the nullification of some other pertinent part of the same Rule is not an acceptable interpretation and cannot be considered a valid interpretation. Further, if speed in the determination of the validity of the jurisdictional defenses is not of great importance (and it is not),⁶⁷ then speed in their assertion likewise cannot be of any great importance per se. Accordingly, the phrase must have some meaning other than immediacy.

The word "opportunity" is the key to the meaning of the phrase. Once the jurisdictional defenses become available, they must be asserted at the first opportunity employed by the defendant for the presentation of defenses.

⁶⁵ See *Watson v. Watson*, No. 44126 (Ohio 8th Dist. Ct. App. May 27, 1982) (Cuyahoga County); *Pinkus v. Pinkus*, No. 43776 (Ohio 8th Dist. Ct. App. Apr. 15, 1982) (Cuyahoga County). See also, *Franklin v. Franklin*, 5 Ohio App. 3d 74, 449 N.E.2d 457 (7th Dist. 1981) (Mahoning County) (citing *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E.79 (1897)) (infers a waiver).

⁶⁶ In pertinent part, OHIO R. Civ. P. 6(A) provides:

In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

In simple terms, this means that the period of time in which to do something begins with the day following the day on which the triggering event occurred. Thus, if the triggering event is the determination that the jurisdictional defenses are available to the defendant, and that event occurred on a Tuesday, the first day of the period for asserting those defenses would be Wednesday, the next day. But if the phrase "first opportunity" is interpreted to mean "immediately," then Wednesday would have to be the day on which the defenses were asserted, or they would be lost.

⁶⁷ For the proposition that the validity of the jurisdictional defenses need not be determined immediately, see *Keyer v. Wysong*, No. 6114 (Ohio 2d Dist. Ct. App. July 10, 1979) (Montgomery County), as discussed and quoted *supra* note 18. But see authorities cited *supra* notes 49, 50.

Why, then, is the motion for an extension of time in which to move or plead not the "first opportunity" for presenting available jurisdictional defenses? The simple answer is that a motion for leave to move or plead is not an "opportunity" for presenting defenses and objections; it is a device for gaining further time in which to exercise the defendant's "opportunity" to present defenses and objections.

If the answer is that simple, why do modern post-Rule cases still cite *Long v. Newhouse*⁶⁸ for the proposition that the jurisdictional defenses must be asserted at the first opportunity, or they are waived? It is well known that under the *Long v. Newhouse* doctrine a motion for an extension of time in which to move or plead, made prior to the assertion of the jurisdictional defenses or made with such an assertion, will result in the waiver of the jurisdictional defenses. Here, the answer is not quite as simple. The "first opportunity" formulation of *Long v. Newhouse* is still sound doctrine, but the historical baggage that accompanies that formulation is not. In citing *Long v. Newhouse*, the post-Rule decisions accept the basic soundness of the formulation, but reject the historical context in which that formulation was developed.

That historical context was stated at some length at the beginning of this Article and need only be summarized here. In the usual case under Code procedure, the defendant had three opportunities to present defenses: a motion, a demurrer, and an answer.⁶⁹ In the context of this discussion, the motion used to present the jurisdictional defenses would be a motion to quash service. These opportunities had to be exercised in the order listed, or the omitted opportunity would be lost. For example, if a party first demurred, a defense by motion was no longer possible since omitting the motion meant losing it as an opportunity to raise defenses.⁷⁰ Therefore, since motion—demurrer—answer was the prescribed order of opportunity, the motion became the "first opportunity" for presenting defenses and objections. At this point, the concept of the "special" and "general" appearance came into play. In order to preserve his jurisdictional defenses, the defendant had to take great care in two respects. He had to present jurisdictional defenses by a "special appearance" made at his first opportunity, and he had to avoid making a "general appearance." As noted, in the usual case, the "first opportunity" for making a "special

⁶⁸ 57 Ohio St. 348, 49 N.E. 79 (1897). For the post-Rule cases which cite *Long v. Newhouse*, see *supra* note 11.

⁶⁹ See *Scott v. Davis*, 173 Ohio St. 252, 181 N.E.2d 470 (1962) (quoted extensively in the text at note 5, *supra*). It must be emphasized that we are dealing here with the usual case. Thus, in some cases the demurrer would be the first opportunity for presenting the jurisdictional defenses, and in other cases the answer would be the first opportunity. But these were unusual cases.

⁷⁰ The defendant was also *quite* likely to waive the defenses or objections that could have been presented by the omitted motion, since the defenses presented by demurrer or answer were somewhat limited.

appearance" was the motion to quash service. Because of the prevailing rationale underlying the concept of "special appearance,"⁷¹ a "general appearance" would waive any jurisdictional defense that had not been previously presented and preserved.⁷² In other words, to be effective, it was necessary to make the "special appearance" before a "general appearance," and to make it in isolation; any attempt to combine a "special appearance" with a "general appearance" resulted in the waiver of the "special appearance" and a concomitant waiver of the jurisdictional defenses.⁷³ A "general appearance," however, was any application to the court for a form of relief that was inconsistent with the court's lack of jurisdiction over the defendant's person.⁷⁴ An application to the court for an extension of time in which to move or plead generally⁷⁵ was an application for a form of relief inconsistent with the court's lack of jurisdiction because, in substance, it implied that the defendant would respond to the merits of the action,⁷⁶ and any response to the merits was inconsistent with lack of jurisdiction.⁷⁷ Therefore, under Code procedure, if the defendant moved for an extension of time in which to move or plead generally, either before making his motion to quash or with his motion to quash, he entered a general appearance, waived his special appearance, and waived the jurisdictional defenses. In other words, in the Code context, "first opportunity" literally meant "first in time" as well as "through the first available vehicle."

In the context of the Civil Rules, however, "first opportunity" no longer means "first in time." To begin with, the third sentence of Rule 12 has abolished the distinction between "special" and "general" appearances; under the Rules there is only an "appearance." As was demonstrated above, an appearance, in and of itself, does not waive the jurisdictional defenses. Therefore, even though a motion for leave to move or plead is an appearance, it will not as such waive the jurisdictional defenses, and it

⁷¹ For the prevailing rationale, see *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E. 79 (1897). See *supra* note 8.

⁷² The concept of "previous presentation and preservation" is fully discussed in *Browne*, *supra* note 9.

⁷³ See examples *supra* note 12.

⁷⁴ See *Virginia Joint Stock Land Bank v. Kepner*, 54 Ohio App. 352, 7 N.E.2d 562 (9th Dist. 1936) (Summit County).

⁷⁵ Code procedure did recognize what was in effect a special appearance to make a special appearance; that is, a motion for an extension of time in which to assert the jurisdictional defenses by a special appearance. See *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927); see also *supra* notes 16, 31 (discussing *Ramba*). However, a motion for leave to move or plead generally was not construed as a motion for the limited purpose of obtaining an extension of time in which to present the jurisdictional defenses only. See *Brundage v. Biggs*, 25 Ohio St. 652 (1874); *Baldine v. Klee*, 10 Ohio Misc. 203, 224 N.E.2d 544 (C.P. Trumbull County 1965), *rev'd on other grounds*, 14 Ohio App. 2d 181, 237 N.E.2d 905 (11th Dist. 1968) (Trumbull County).

⁷⁶ See *id.*

⁷⁷ *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E. 79 (1897).

is no longer necessary that the challenge to jurisdiction be first in time. Further, holding that the challenge to jurisdiction need be first in time might well yield the following result: a Rule 12 motion asserting the jurisdictional defenses, followed by a Rule 6(B) motion for an extension of time in which to move or plead, followed by another Rule 12 motion presenting the remaining Rule 12 defenses and objections, followed by an answer. Not only would such a result fly in the face of the express language of Rule 12(G), but it would also foster that "stringing" of Rule 12 defenses and objections which Rule 12(G) was designed to prohibit. For all of the above reasons, therefore, "first opportunity" no longer means first in time; its meaning is now limited to the first available vehicle or method for asserting defenses. As a consequence, the jurisdictional defenses are preserved if they are included in the first available vehicle employed for the presentation of defenses, and it makes no difference whether that vehicle is employed before or after a motion for an extension of time in which to move or plead. In a word, priority in time has no significance under the Civil Rules, and the jurisdictional defenses are not waived if they are not asserted with a motion for an extension of time in which to move or plead even if that motion is the first act of the defendant in the action. "First act" and "first opportunity" are no longer synonymous.

Accordingly, when post-Rule decisions state that the jurisdictional defenses must be raised at the defendant's "first opportunity," they mean that the defenses must be included in the first timely vehicle employed by the defendant for the purpose of asserting defenses. This presents two questions: 1) what vehicles are available to the defendant for the purpose of asserting jurisdictional defenses; and 2) when will such vehicles be timely employed?

b. "First Opportunity" Under the Civil Rules

In answer to the first question, it may be said that there are at least three possible vehicles which may be used to assert the jurisdictional defenses: 1) a motion for summary judgment under the provisions of Rule 56; 2) a motion to dismiss or quash under the provisions of Rule 12(B)(2), (4) and/or (5); and 3) a responsive pleading. For the sake of convenience, the responsive pleading will hereinafter be referred to as an "answer," although it must be understood that what is said with respect to the "answer" also applies to other responsive pleadings such as the reply to a counterclaim, an answer to a cross-claim and a third-party answer.

(1) The Motion for Summary Judgment

Some authority exists which infers support for employing the motion for summary judgment as the vehicle for asserting the defense of lack of

jurisdiction over the person.⁷⁸ There is much to be said for the use of this motion in presenting the defenses of insufficiency of process and insufficiency of service of process as well. In *Jurko v. Jobs Europe Agency*,⁷⁹ it was noted that matters of jurisdiction are very often not apparent on the face of the summons or complaint, and in *Krabill v. Gibbs*,⁸⁰ it was pointed out that a defendant may employ evidence aliunde the record in order to demonstrate lack of jurisdiction in the face of a record that indicates regularity in the service of process. Thus, in any given case, the defendant may have to support his challenge to the jurisdiction with documentary evidence in testimonial form.⁸¹ If such evidence is required, one

⁷⁸ Thus, the court in *Fleming v. American Capital Corp.*, 1 Ohio Op. 3d 265 (10th Dist. Ct. App. 1976) (Franklin County), stated:

Civ. R. 41(B)(4) provides that dismissals for lack of jurisdiction over the person or the subject matter, or for failure to join a party under Civ. R. 19 or 19.1 is a failure otherwise than on the merits. Hence, it is clear that a summary judgment based other than on lack of jurisdiction or failure to join a party under Rule 19 or 19.1 constitutes a judgment on the merits, unless the court, in its order for dismissal, otherwise specifies.

Id. at 266. The clear implication here is that one can obtain a dismissal for lack of jurisdiction over the person by way of a motion for summary judgment, but the resulting "judgment" will be otherwise than on the merits.

⁷⁹ 43 Ohio App. 2d 79, 334 N.E.2d 478 (8th Dist. 1975) (Cuyahoga County). In the words of the court:

When a court considers a challenge to its jurisdiction over a defendant—a defense which may require the taking of extensive evidence—the court may hear the matter on affidavits, depositions, interrogatories, or receive oral testimony, as matters of jurisdiction are very often not apparent on the face of the summons or complaint.

Id. at 85, 334 N.E.2d at 482.

⁸⁰ 14 Ohio St. 2d 1, 235 N.E.2d 514 (1968) (syllabus II): "Where process against a defendant appears on the face of the record to be regular he may, nevertheless, by evidence *aliunde* the record show that a defect, irregularity, or deviation from statutory particulars has, in fact, occurred. (*Connor v. Miller*, 154 Ohio St. 313, approved and followed)."

⁸¹ The documentary evidence in testimonial form may be used to support or oppose a challenge to the jurisdiction. See *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971); *Krabill v. Gibbs*, 14 Ohio St. 2d 1, 235 N.E.2d 514 (1968); *Barile v. University of Virginia*, 2 Ohio App. 3d 233, 441 N.E.2d 608 (8th Dist. 1981) (Cuyahoga County); *Grossi v. Presbyterian Univ. Hosp.*, 4 Ohio App. 3d 51, 446 N.E.2d 473 (7th Dist. 1980) (Jefferson County); *Jurko v. Jobs Europe Agency*, 43 Ohio App. 2d 79, 334 N.E.2d 478 (8th Dist. 1975) (Cuyahoga County).

As for the types of documentary evidence that may be used to support or oppose a challenge to the jurisdiction, see *Melamed v. Catalano*, 20 Ohio Op. 3d 428 (Clev. Hts. Mun. Ct. 1981), where the court stated:

But if an oral hearing is not to be had as a matter of right, or if an oral hearing is a matter of grace, and it has not been scheduled at the time the motion is made, then the movant's admissible external evidence must be served and filed with the motion, and must be presented either by transcripts of deposition testimony (if the transcript has also been filed with the court under the provisions of Civ. R. 32[A]), answers to interrogatories (if the answers have been filed with the court under the provisions of Civ. R. 5[D]), written admissions (including, but not lim-

might well echo the court in *Adomeit v. Baltimore*,⁸² which stated that “[t]he rigid procedural requirements of Civil Rule 56 regarding the documents and other material the parties should submit in support of and in opposition to a motion for summary judgment are excellent guides and a commendable procedure to be followed”⁸³ in supporting or opposing a challenge to the jurisdiction. But if Rule 56 is an excellent guide, and if it contains commendable procedures to be followed, why scruple at using the motion for summary judgment provided by the Rule?

Apart from the fact that at least one justice of the Ohio Supreme Court has criticized the use of summary judgment for this purpose,⁸⁴ the

ited to, Civ. R. 36 admissions if they have been filed with the court under the provisions of Civ. R. 5[D]), affidavits, transcripts of evidence previously taken in the pending action, or written stipulations of fact. . . . For convenience, these six vehicles for the presentation of external admissible evidence may be referred to collectively as “documentary evidence in testimonial form.” And it is proper to note here that when oral hearings are to be had as a matter of grace a prima facie showing of merit by the documentary evidence in testimonial form may be a prerequisite to the grant of such a hearing. . . . Of course, if the prerequisite is met, and an oral hearing is then scheduled on a motion other than a motion for summary judgment, additional testimony may be presented at the hearing. . . . As a general rule, the party opposing the motion is limited to the same types of documentary evidence in testimonial form as the movant, but the timing of its presentation may vary.

Id. at 432-33 (citations omitted).

⁸² 39 Ohio App. 2d 97, 316 N.E.2d 469 (8th Dist. 1974) (Cuyahoga County).

⁸³ *Id.* at 104, 316 N.E.2d at 475.

⁸⁴ See *Sizemore v. Smith*, 6 Ohio St. 3d 330, 453 N.E.2d 632 (1983). Justice Brown stated:

The arguable insufficiency of service of process on defendant was not subject to a motion for summary judgment. This is apparent upon analyzing Civ. R. 56(B) upon which defendant posited his motion

Defendant’s attack was on the sufficiency of process upon himself. This challenge is properly covered by a motion to dismiss the complaint under Civ. R. 12(B)(2) and (5)

The fifth sentence of Civ. R. 12(B) authorizes a motion to dismiss for failure to state a claim upon which relief can be granted (Civ. R. 12[B][6]) to be converted into a motion for summary judgment, but it does not authorize a motion to dismiss grounded on insufficiency of service of process (Civ. R. 12[B][5]) or lack of jurisdiction of the person (Civ. R. 12[B][2]) to be converted into a motion for summary judgment. . . .

Since the granting of summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of jurisdiction. . . . If a party files a motion for summary judgment for lack of jurisdiction over his person, the motion should be considered as a Civ. R. 12(B)(2) motion, a motion which is determined otherwise than on the merits. *Kemper v. Rohrich* (D. Kan. 1980), 508 F. Supp. 444.

Id. at 335-36, 453 N.E.2d at 638 (Brown, J., dissenting) (citations omitted).

Whatever the merits of this view, it appears inapplicable to the facts of *Sizemore*. According to the majority opinion: “In some way appellant learned of the suit. After receiving an

Rule 56 motion presents problems which can very well turn into self-inflicted wounds for the defense. To begin with, the terminology can lead to confusion and the entry of an order that cannot stand on appeal. The motion asks for a "judgment," but given the present state of the law, none of the jurisdictional defenses result in a judgment. If valid, the defenses of insufficiency of process and insufficiency of service of process result in the quashing of the service. However, despite what is said in *Howard v. Allen*,⁸⁵ neither defense directly results in a dismissal of the action,⁸⁶ and in the absence of a dismissal there can be no judgment. The defense of lack of jurisdiction, if available at the time the motion is made, does result in a dismissal, but since the dismissal is otherwise than on the merits,⁸⁷ it is not a final order.⁸⁸ If the dismissal is not a final order, it

extension of time within which to answer the complaint, appellant filed his answer on November 1, 1978. Among his defenses was insufficiency of service of process." *Id.* at 330.

Therefore, in the context of *Sizemore*, the defense was raised in the answer, and not by summary judgment; the motion for summary judgment was simply used as a device for obtaining a pretrial adjudication of the defense. If summary judgment is inappropriate for this purpose, then the motion for summary judgment should have been considered a Rule 12(D) motion for a preliminary hearing rather than a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person.

Since the appellant did move for an extension of time before answering, one is tempted to cite this case for the proposition that a motion for leave to move or plead does not result in the waiver of the jurisdictional defenses. But since that point does not seem to have been argued in the supreme court, the court did not pass on it, and it would not be legitimate to cite the case as proof of the thesis presented in this Article.

⁸⁵ 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971) (Franklin County), *aff'd on other grounds*, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972).

As the appellate court stated: "Dismissal of an action for insufficiency of process or insufficiency of service of process is not a failure otherwise than upon the merits within the meaning of R.C. 2305.19." *Id.* (syllabus III).

⁸⁶ Browne, *supra* note 48, at 380-83, 384-85.

⁸⁷ Thus, it is said in OHIO R. Civ. P. 41(B)(4): "Failure other than on the merits. A dismissal (a) for lack of jurisdiction over the person . . . shall operate as a failure otherwise than on the merits."

⁸⁸ See *Hensley v. Henry*, 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980):

Assuming, *arguendo*, that an effective filing of a Civ. R. 41(A)(1)(a) notice of dismissal does not divest the trial court of jurisdiction, . . . the trial court was nevertheless incompetent to grant plaintiff relief. Civ. R. 60(B) is restrictive in that it permits the court to grant relief only from certain "*final* judgment[s], order[s], or proceeding[s]." (Emphasis is added.) Under Civ. R. 41(A)(1), plaintiff's notice of dismissal does not operate "as an adjudication upon the merits" because plaintiff had not previously "dismissed in any court, an action based on . . . the same claim," and because the notice of dismissal did not "otherwise" state that it should so operate. As such, it is not a final judicial determination from which Civ. R. 60(B) can afford relief.

Id. at 279, 400 N.E.2d at 1353-54. Thus, if a voluntary dismissal "otherwise than upon the merits" is not a final order for Rule 60(B) purposes, neither should an involuntary dismissal "otherwise than upon the merits" be a final order. If the orders are not final for Rule 60(B) purposes because they are "otherwise than upon the merits," then they should not be final for purposes of appeal either. Therefore, Rule 41(B)(4) dismissal for lack of jurisdiction of

cannot be a judgment.⁸⁹ Therefore, a court cannot enter a summary "judgment" pursuant to a Rule 56 motion used for the purpose of asserting the jurisdictional defenses; if it attempted to do so, it would hand the plaintiff an appeal on a silver platter.

Of course, the Rule 56 motion can be used to obtain a partial summary adjudication—that is, an interlocutory order that disposes of some distinct aspect of the case without disposing of the entire case.⁹⁰ If the motion is used for this purpose, great care must be taken in its drafting. If the defendant merely asserts as grounds for the motion that there is no genuine issue with respect to any material fact and that he is entitled to judgment as a matter of law—the traditional formulation—he may very well find himself in the *Mills v. Whitehouse Trucking Co.*⁹¹ trap. A waiver of the jurisdictional defenses may result because the motion does not formulate the issue to be resolved by the trial court⁹² in a simple, concise, and direct manner.

The timing of the motion also presents a pitfall for the unwary defendant. The motion for summary judgment or for partial summary adjudication cannot be used *before* a Rule 12 motion because such a use would produce that "stringing" of motions asserting defenses that is prohibited by the spirit of Rule 12(G). It cannot be used *after* a Rule 12 motion because that would violate the letter of Rule 12(G) governing the consolidation of defenses and objections.⁹³ Thus, either use would result in the

the person is not a final order because it is a dismissal that operates "otherwise than on the merits."

⁸⁹ See OHIO R. CIV. P. 54(A): "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

⁹⁰ See, e.g., the last sentence of OHIO R. CIV. P. 56(C): "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." See also OHIO R. CIV. P. 56(B): "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 his favor as to all or any part thereof. . . ." (emphasis added).

⁹¹ 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974).

⁹² See *supra* note 63.

⁹³ If the jurisdictional defenses are not available at the time the Rule 12 motion is made, can they be raised by a subsequent motion for summary judgment? This question raises a problem of construction created by the failure to properly integrate Rule 56 with Rule 12. OHIO R. CIV. P. 56(B) states that a motion for summary judgment may be made by the defendant at "any time." See *supra* note 90. Thus, if the jurisdictional defenses may be raised by a motion for summary judgment, this fact seems to authorize the summary judgment after the Rule 12 motion (in which the defenses could not be included because they were not available) and before the answer. On the other hand, when OHIO R. CIV. P. 12(G) and (H) are read together, they clearly imply that defenses that are not available for assertion by motion will be asserted in the answer. This construction is in accord with the opening clause of OHIO R. CIV. P. 12(B) which states that all defenses *shall* be asserted in the responsive pleading. The implication here, then, is that a motion for summary judgment cannot intervene between a Rule 12 motion and the service of the answer. It is perhaps best to avoid this problem by concluding, as is done in the text, that a motion for summary

waiver of the jurisdictional defenses. Therefore, if the Rule 56 motion is to be used at all, it must be used in lieu of a Rule 12 motion. However, if it is to be used in lieu of a Rule 12 motion, it will be treated as the Rule 12 motion which it should have been.⁹⁴

All of the above reasons illustrate that it is pointless to use a Rule 56 motion when the Civil Rules provide more specific motions which are designed to accomplish the same end without all the potential missteps inherent in the motion for summary judgment. As a practical matter, then, the motion for summary judgment is not a suitable vehicle for presenting the jurisdictional defenses.

(2) The Rule 12 Motion or the Answer

The elimination of the motion for summary judgment leaves the Rule 12 motion or the answer as the vehicles for raising the jurisdictional defenses. As a preliminary matter it should be noted that these vehicles are mutually exclusive; that is, the jurisdictional defenses can be raised *either* by motion *or* by answer, but not by both.

The very ability of the defendant to choose between a motion or an answer, however, sometimes leads to another fallacious interpretation of the concept of "first opportunity." The argument proceeds as follows. The defendant may raise his jurisdictional defenses by a Rule 12 motion made before the answer. Therefore, the Rule 12 motion is the first opportunity for asserting the jurisdictional defenses. The jurisdictional defenses must be raised at the defendant's first opportunity or they are waived. Therefore, if they are not raised by a Rule 12 motion, they are waived.

Were it not for the language of Rule 12(B), there would be some merit in this argument. As it is, however, it contravenes Rule 12(B), which clearly states that the defendant has the *option* of asserting the jurisdictional defenses by motion *or* by answer. Therefore, the concept of "first opportunity," even when interpreted to mean priority in time, does not mandate that the jurisdictional defenses be raised by a Rule 12 motion. In theory, the defendant has free choice between the Rule 12 motion or an answer. As will be shown below, however, that choice is not always completely untrammelled.

(a) The Problem of Availability

To some extent, "availability" of the defenses dictates the choice between a Rule 12 motion and the answer as the vehicle for raising the defenses. If the jurisdictional defenses are ripe for adjudication at the time the defendant elects to respond, or if they will be ripe for adjudica-

judgment is simply not a suitable vehicle for presenting the jurisdictional defenses.

⁹⁴ See *supra* note 84.

tion within thirty to ninety days thereafter,⁹⁵ the defendant *may* raise them by a Rule 12 motion. It must be emphasized that he need not use a Rule 12 motion. When the jurisdictional defenses are ripe for adjudication at the time of response, the defendant may forego the Rule 12 motion and assert the defenses in his answer. Thus, availability at the time of response allows the defendant a free choice between a motion or an answer as the vehicle for asserting the defenses.

This choice is completely free only in theory. If the defendant has some Rule 12 *objection* which he wishes to assert, such as vagueness and ambiguity in the complaint, then he *must* use a Rule 12 motion (in this case, the Rule 12(E) motion for a definite statement) to assert the objection, or the objection will be waived.⁹⁶ Note that Rule 12(G) now comes into play. If the defendant uses *any* Rule 12 motion to assert an objection or defense, then he must join with that motion any of the Rule 12 motions which he could employ to assert the jurisdictional defenses or he will lose both the right to make a second Rule 12 motion *and* the jurisdictional defenses themselves. Thus, when Rule 12 objections are available to the defendant, he will either have to waive those objections, since objections may not be raised other than by a Rule 12 motion, or he will have to assert his jurisdictional defenses by motion and join his objections with the jurisdictional defenses.

On the other hand, if the jurisdictional defenses are not ripe for adjudication at the time the defendant elects to respond, or within thirty to ninety days thereafter, they are not "available" for assertion by a Rule 12 motion. Rule 12(G) would not require their inclusion in a Rule 12 motion asserting an objection or some other Rule 12 defense. However, these defenses would be "available" for inclusion in the answer. Therefore, in this circumstance, the defendant could not raise them by a Rule 12 motion and is limited to raising them by answer; indeed, in this circumstance the defendant *must* raise such defenses by answer or waiver will result.

Since availability of the defenses is the key to the choice of motion or

⁹⁵ See *supra* notes 49, 50 and accompanying text.

⁹⁶ See ОНЮ R. Civ. P. 12(E): "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may *move* for a definite statement *before interposing his responsive pleading.*" (emphasis added). ОНЮ R. Civ. P. 12(F) states:

Upon *motion made* by a party *before responding to a pleading* or, if no responsive pleading is permitted by these rules, *upon motion made* by a party *within twenty-eight days after the service of the pleading upon him* or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

Id. (emphasis added). Thus, it is clear that objections have to be raised either by a Rule 12(E) motion for a definite statement or a Rule 12(F) motion to strike from a pleading.

For a more detailed discussion of this point, see Browne, *supra* note 48.

answer as the vehicle for asserting the defenses, it might be useful to examine each of the jurisdictional defenses from the point of view of availability.

i. The Insufficiency Defenses

Without attempting an exhaustive analysis, it may be said that the defense of insufficiency of process arises out of: 1) a summons that does not contain all of the information required by Rule 4(B); 2) a published notice that does not contain all of the information required by Rule 4.4(A); 3) a summons served by ordinary mail that does not have endorsed upon it the answer date, as required by Rules 4.6(C) and 4.6(D); and 4) a summons served upon a "John Doe" defendant which does not contain the phrase "name unknown," as required by Rule 15(D).

Again, without attempting an exhaustive analysis, it may be said that the defense of insufficiency of service of process arises out of: 1) a failure to make service in the manner prescribed by Rules 4.1, 4.2, 4.3(B), 4.5, and 4.6(C) and (D); 2) the absence of minimum contacts with the State of Ohio, as required by Rule 4.3(A); 3) the failure to plead jurisdictional facts in a "long arm" rule case, as required by *Jurko v. Jobs Europe Agency*⁹⁷; or 4) a failure to comply with the various requirements for service by publication under Rule 4.4(A), such as a proper affidavit for service by publication, publication in a newspaper of general circulation, publication of the notice for the requisite number of times, and the like.

From the above recitation, it is apparent that both of these defenses arise out of the actual service of a summons; the insufficiency of process defense arises out of the invalidity of the summons actually served, and the insufficiency of service of process defense arises out of the invalid method of service of summons. Conversely, neither defense ever arises if a summons is not served. However, if these defenses arise out of the actual service of a summons, which triggers the running of the twenty-eight day response time, then it follows that these defenses will be available to the defendant when he elects to respond. Therefore, the defendant has the choice of asserting these defenses either by answer or by motion: if by motion, a Rule 12(B)(4) motion to quash the summons in the case of insufficiency of process, or a Rule 12(B)(5) motion to quash the service of summons in the case of insufficiency of service of process.

⁹⁷ 43 Ohio App. 2d 79, 334 N.E.2d 478 (8th Dist. 1975) (Cuyahoga County): "Plaintiff's complaint must sufficiently plead facts alleging a non-resident defendant's minimal contacts with Ohio thereby alleging the court's jurisdiction over his person in order to withstand such defendant's motion to quash service of summons and to dismiss based on the Civil Rule 12(B)(2) defense of lack of personal jurisdiction." *Id.* (syllabus I).

ii. The Lack-of-Jurisdiction Defense

The defense of lack of jurisdiction over the person is more troublesome. One of the ways in which this defense can arise is through the complete failure to serve the defendant with a summons.⁹⁸ Theoretically, a defendant in this situation need not respond at all, since the response time does not begin to run until the defendant is served with a summons. That fact in itself raises the following problem—is any defense or objection “available” until and unless the defendant is required to respond? The answer is probably in the affirmative; there is nothing in the Civil Rules that prevents a defendant from making an appearance in an action before he is required to do so. The better approach to “availability” is to limit it to the factors discussed above—whether the defense lies, given the state of the record, and whether it is ripe for adjudication. In any event, it is quite likely that the defendant will make some form of response in this situation just to avoid the entry of a default judgment. It must be emphasized, however, that the defendant is not required to respond, and if particularly daring, he may try to remain out of court until both the year in which to obtain valid service and the statute of limitations applicable to the action expire.

In this situation, of course, neither insufficiency of process nor insufficiency of service of process are available to the defendant because no summons has ever been served on the defendant, and these defenses arise only out of the service of a summons. Therefore, the only defense which the defendant may employ is the defense of lack of jurisdiction over his person.⁹⁹

⁹⁸ See *supra* notes 51-58 and accompanying text.

⁹⁹ If the defendant manages to wait out the year following the filing of the complaint, he will also have available to him the defense of failure of commencement. If the statute of limitations has also run, this defense will be more advantageous to the defendant than lack of jurisdiction over the person. For the proper use of this defense in these circumstances, see *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983) (Cuyahoga County); Scigliano, *supra* note 2. In *Saunders* the court noted:

In an opinion and order February 8, 1982, the trial court dismissed the case without prejudice at appellant's cost. The court based this decision entirely on Civil Rule 3(A) and failure of commencement. The court declined to apply the savings provision of R.C. 2305.15 stating that such was a non-issue since Civil Rule 3(A) explicitly requires service within one year of the filing of a complaint. The court stated:

Assuming that the statutory period has by reason of the aforesaid Saving Clause, not run, this case at this time does not legitimately stand on the Court's docket for it has never been commenced.”

When an action fails of commencement it is as if no complaint was ever filed. If service is obtained anytime within one year of the filing of the complaint, the action is considered commenced as of the date of the complaint from the record.

No. 45101, slip op. at 4, 7, 9 (emphasis in original).

The distinction between dismissing the action for lack of jurisdiction over the person and

Whether this defense is available depends upon the likelihood of the plaintiff obtaining good service on the defendant within one year following the filing of the complaint. If there is no reasonable likelihood that the plaintiff can obtain such service, then the defense of lack of jurisdiction over the person is immediately available, and can be asserted either by a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person or by answer. It must be emphasized that in this situation, the "timeliness" of the assertion of the defense is not a factor; since the defendant is under no duty to respond (not having been served with a summons), the response period never begins to run, and the defense is "timely" asserted whenever the defendant chooses to assert it.¹⁰⁰

On the other hand, if there is any reasonable possibility that the plaintiff can obtain valid service within the year following the filing of the complaint, the defense of lack of jurisdiction over the person does not

striking the complaint from the files for failure of commencement is important. If the action is dismissed for lack of jurisdiction, the dismissal is otherwise than on the merits. See OHIO R. CIV. P. 41(B)(4). But such a dismissal is also a failure "otherwise than on the merits" within the meaning of OHIO REV. CODE ANN. § 2305.19 (Page 1981), the "savings statute" (but not the "savings provision" referred to in *Saunders v. Choi*). Therefore, if the action is dismissed for lack of jurisdiction over the person after the statute of limitations has run, the plaintiff has a year from the date of dismissal in which to commence a new action: On the other hand, if the complaint is stricken from the files for failure of commencement, that is a declaration by the court that no action ever came into existence. If no action ever came into existence, it follows that it cannot "fail." Therefore, in a failure-of-commencement situation, there is no "failure otherwise than on the merits," and § 2305.19 does not apply; the plaintiff does not have a year in which to commence a new action.

Of course, if the statute of limitations has not run at the time the complaint is stricken from the files for failure of commencement (which appears to be the case in *Saunders v. Choi*), then the plaintiff may commence a new action at any time before the statute of limitations expires. Since failure of commencement is simply a declaration that no action ever existed, it is neither a dismissal nor a failure "on the merits," and the doctrine of res judicata would not prevent the commencement of a new action at any time within the applicable statute of limitations.

¹⁰⁰ See *Akron-Canton Reg. Airport Auth. v. Swinehart*, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980).

But see text accompanying notes 51-58. Even though the defendant is under no duty to respond because of a lack of service of summons, he may impose upon himself a time-frame in which he must respond or waive his jurisdictional defenses. Thus, in the example stated in the text accompanying notes 51-58, the defendant was under no duty to respond because he had not been served with a summons. But it was postulated that at the end of the normal 28-day response period, the defendant moved for an extension of time in which to move or plead. By doing so, he imposed upon himself the duty to move or plead within that period of time granted him by the court's OHIO R. CIV. P. 6(B) order. Therefore, in this circumstance, the defendant would have to assert the defenses of lack of jurisdiction over his person by motion or answer within the response time established by the court order; a court order which he voluntarily sought and obtained. If he did not so move or plead within the extended time and if he did not get a further extension of time under either OHIO R. CIV. P. 6(B)(1) or 6(B)(2), the defense would be waived because it would be out of rule. See *infra* note 143 and accompanying text. Thus, "timeliness" can become a factor in this situation if the defendant makes it so by obtaining a leave to move or plead.

become available until the end of that year.¹⁰¹ Thus, the defense would not be immediately available for assertion by motion until the year expires, but it would be immediately available for assertion by answer, since a defense in an answer is not normally determined until the time of trial. Moreover, given the state of most court dockets, trial is not likely to occur within the year following the filing of the complaint.

However, if the "end of the year" rule applies in this "no service of summons" situation, two problems may very well arise. First, suppose that the defendant does assert the defense by a Rule 12(B)(2) motion to dismiss before the end of the year. In this case, the trial court should do one of two things. Either 1) it should withhold a ruling on the motion to dismiss until (a) the plaintiff obtains valid service on the defendant or (b) the post-filing year expires, whichever first occurs; or 2) it should strike the Rule 12(B)(2) motion to dismiss from the files as being premature.¹⁰² Second, suppose that the defense of lack of jurisdiction over the person is raised in the answer and the case is scheduled for trial before the end of the year following the filing of the complaint. Or alternatively suppose the plaintiff tests the validity of the defense by a Rule 12(D) motion for a preliminary hearing at some time during the year following the filing of the complaint. In these situations, the trial court must either reschedule the trial to a date more than one year following the filing of the complaint or withhold a ruling on the 12(D) motion until (a) the plaintiff obtains valid service on the defendant or (b) the year expires, whichever first occurs. The court cannot legitimately dismiss the action for lack of jurisdiction over the person before the post-filing year expires in either this first or second situation. The court's dismissal of the action before the year expired would deprive the plaintiff of his due process right to attempt service throughout the year following the filing of the complaint.¹⁰³

¹⁰¹ See authorities cited *supra* note 57.

¹⁰² For the proposition that the OHIO R. Civ. P. 12(B)(2) motion to dismiss for lack of jurisdiction over the person is premature if made during the year, see *Hayden v. Ours*, 44 Ohio Misc. 62, 337 N.E.2d 183 (C.P. Paulding County 1975). See *supra* note 57.

¹⁰³ See *Sizemore v. Smith*, 6 Ohio St. 3d 330, 453 N.E.2d 632 (1983). Justice Brown, in dissent, stated:

In view of the unanimous sound judicial analysis by our sister, the federal judiciary, of the consequences of dismissal of an action for lack of jurisdiction over the person or for insufficiency of service of process, we must conclude that under Civ. R. 41(B)(4) such dismissal "shall operate as a failure otherwise than on the merits." In that event the plaintiff has the right to take advantage of R.C. 2305.19, savings in case of reversal, and may file a new action within one year after the date of reversal by this court of the decision of the court of appeals. . . . Denial to plaintiff of his right to file a new action under R.C. 2305.19 would and should invite a collateral attack by him of the dismissal in the federal court on the grounds of denial of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 337, 453 N.E.2d at 639 (Brown, J., dissenting) (citations omitted). This due process

A second way in which the defense of lack of jurisdiction over the person may arise is through the absence of a constitutional basis for the exercise of jurisdiction. Suppose, for example, that the plaintiff premises jurisdiction on a defendant's "implied presence" within Ohio, but the defendant's activities within the state are not substantial enough to warrant the exercise of jurisdiction over it;¹⁰⁴ or suppose that the plaintiff attempts "long arm" service on the defendant, but the claim does not arise out of any of the minimum contacts listed in Rule 4.3(A)(1)-(8);¹⁰⁵ or, finally, suppose that the plaintiff attempts "long arm" service on the defendant, but the defendant's minimum contact with the state is not substantial enough to make it fair and reasonable to require the defendant to come into the state to defend.¹⁰⁶ In all of these cases, there is no constitu-

argument is equally applicable by analogy to the dismissal of an action for lack of jurisdiction over the person before the post-filing year expires whenever there is a reasonable possibility that the plaintiff can obtain valid service on the defendant before that year expires.

Indeed, if the Ohio Supreme Court adheres to the position taken in *Hensely v. Henry*, 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980), a collateral attack on due process grounds, whether in federal court or otherwise, may be the only form of relief available to the plaintiff. As noted above, a dismissal for lack of jurisdiction over the person is otherwise than on the merits. However, in *Hensely*, the supreme court held that a dismissal otherwise than on the merits was not a final order for Ohio R. Civ. P. 60(B) purposes. *Id.* at 279, 400 N.E.2d at 1353-54. But if it is not final for Rule 60(B) purposes, neither should it be final for the purpose of an appeal. Therefore, since an appeal can only be taken from a final order, the plaintiff would not be able to appeal the trial court's dismissal of his action for lack of jurisdiction over the person.

¹⁰⁴ See, e.g., *Wainscott v. St. Louis-S.F. Ry.*, 47 Ohio St. 2d 133, 351 N.E.2d 466 (1976):

1. The due-process clause of the Fourteenth Amendment to the United States Constitution requires a determination that a foreign corporation has certain minimum contacts with Ohio such that it is fair that a defendant defend a suit brought in Ohio and that substantial justice is done.

...

3. A foreign railroad corporation having no tracks in Ohio and maintaining two offices in this state for the purpose of soliciting freight traffic to be carried over the corporation's out-of-state lines does not have the necessary minimum contacts with Ohio such as to make it fair for the corporation to defend a suit in this jurisdiction based on a cause of action arising from the corporation's business in Missouri and to satisfy the requirement of substantial justice under the due-process clause of the Fourteenth Amendment to the United States Constitution.

Id. (syllabus I, III).

¹⁰⁵ See, e.g., *Grossi v. Presbyterian Univ. Hosp.*, 4 Ohio App. 3d 51, 446 N.E.2d 473 (7th Dist. 1980) (Jefferson County):

1. The provisions of R.C. 2307.382(A)(4) and (5) require that the injury which is the basis of the complaint must occur in the state of Ohio.

2. The fact that the person causing injury regularly does business in Ohio does not confer jurisdiction over such person for an injury that occurred outside the state.

Id. at 51-52, 446 N.E.2d at 474 (syllabus I, II).

¹⁰⁶ See, e.g., *Leemar Steel Co. v. Primary Steel, Inc.*, No. 43818 (Ohio 8th Dist. Ct. App. Aug. 12, 1982) (Cuyahoga County):

In order to exercise jurisdiction over Primary [an out-of-state corporation],

tional basis for the exercise of jurisdiction over the person of the defendant, and the defendant may assert the defense of lack of jurisdiction over his person. But when does that defense become available?

As a rule of thumb, in cases such as these, the defense of lack of jurisdiction becomes immediately available on the filing of the complaint. Therefore, in the usual case, the defense can be asserted either by answer or by a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person. In the exceptional case, however, there may be more than one theory that would sustain the exercise of jurisdiction. If that is so, the defense does not become available until all theories have been tested and found wanting, or until the end of the year following the filing of the complaint. If this latter situation prevails, all that has been said above concerning the "end of the year" rule will also apply here.

One of the more interesting aspects of this type of case has not frequently been discussed in the decisions. These cases are almost always commenced by the filing of a complaint and the valid service of a valid summons. Even the valid service of a valid summons, however, does not permit the trial court to exercise jurisdiction in the absence of a proper

under Ohio's Long Arm Statute [§ 2307.382], it is necessary that Primary has such minimum contacts in Ohio that would constitute the "transacting of any business." Certain minimal contacts, . . . ["such that the maintenance of the suit [in Ohio] does not offend 'traditional notions of fair play and substantial justice'"], are also necessary to comply with the requirements of due process. *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316.

The instant case was decided by the trial court on the pleadings, motions, and affidavits. Since there were contradictory factual allegations set out in the foregoing pleadings, motions, and affidavits, for purposes of this appeal, we must assume the facts alleged in Leemar's complaint and affidavit are true. See *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App. 2d 79.

A review of the jurisdictional facts alleged by Leemar in its affidavit and complaint reveals:

1) On or about December 11, 1979, Leemar received a telephone call from Primary. Primary wanted to know if Leemar could supply it a certain quantity and quality of steel. Leemar assured Primary that it could.

2) On or about December 14, 1979, Leemar received a purchase order from Primary.

3) On receiving the purchase order, Leemar shipped the steel to Primary in Georgia.

4) Leemar did not solicit this order from Primary, instead, Primary contacted Leemar in Cleveland.

5) Leemar never left the State of Ohio to negotiate this contract.

6) Primary has failed and refused to pay for the goods ordered from Leemar.

The alleged facts as set out by Leemar are not sufficient to permit the exercise of personal jurisdiction over a nonresident buyer, such as Primary.

Id. slip op. at 2-3 (footnote omitted).

Since Leemar has the burden of establishing jurisdiction, once challenged, it was incumbent upon Leemar to get information into the record so that personal jurisdiction could be exercised by the Ohio courts without violating the fundamental fairness principle of the due process clause. See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

constitutional basis;¹⁰⁷ the question remains whether the absence of this proper basis has any effect on the service.

Theoretically, the absence of a proper basis for the exercise of in personam jurisdiction renders the service of the process insufficient. If the defendant does not then assert the defense of insufficiency of service of process, does he not waive it? Moreover if he waives it, does he not consent to the court's exercise of jurisdiction over him, thereby making consent the proper basis for the exercise of jurisdiction? The answer to these questions is far from clear because they have not been directly discussed. It would appear, however, that the courts treat the service of summons as immaterial in this type of case since the valid service of summons cannot, in and of itself, confer jurisdiction on the court. Therefore, if the service is immaterial, it makes no difference whether it is theoretically sufficient or insufficient; it simply serves no particular function other than to alert the defendant to the fact that he has been sued. Nevertheless, in this type of case a prudent defendant will join the defense of insufficiency of service of process with his defense of lack of jurisdiction over the person, even though his failure to do so will not result in the waiver of his lack-of-jurisdiction defense.

A third way in which the defense of lack of jurisdiction can arise is through the proper service of an invalid summons, the invalid service of a proper summons, or the combination of both. But the invalidity of the summons, or the invalidity of the service of the summons, does not, in and of itself, give rise to the defense of lack of jurisdiction over the person. That defense does not arise *until after the summons has been quashed or until after the service of the summons has been quashed*. Therefore, the appropriate defense—either insufficiency of process or insufficiency of service of process, or both—must be asserted either prior to, or with, the defense of lack of jurisdiction over the person. If these insufficiency defenses are not asserted prior to, or with, the lack-of-jurisdiction defense, they are waived; if they are waived, the summons, or the service of summons, will be deemed good, and the defense of lack of jurisdiction over the person does not arise. The failure to realize that these are independent defenses and that the assertion of one is not an assertion of the other—that insufficiency does not import lack of jurisdiction, and vice versa—is the deepest pitfall into which an unwary defendant can fall.

The question, then, is the order in which the defenses must be presented if lack of jurisdiction is not to be waived. As noted above, the

¹⁰⁷ See *Wainscott v. St. Louis-S.F. Ry.*, 47 Ohio St. 2d 133, 351 N.E.2d 466 (1976): Compliance with Civ.R. 4.2(6), providing for service of process upon both domestic and foreign corporations and not limiting service of process to causes of action arising within this state, does not eliminate or abolish the due-process requirement that the necessary minimum contacts exist in order for Ohio courts to acquire *in personam* jurisdiction.

Id. (syllabus II).

insufficiency defenses become available upon the service of the summons. Therefore, they are available for assertion either by answer or by the appropriate Rule 12(B)(4) or 12(B)(5) motion to quash at any time within twenty-eight days after the service of the summons. However, it does not follow that the lack-of-jurisdiction defense is equally available. Once again, the availability of this defense depends on the likelihood of the plaintiff obtaining valid service within the year following the filing of the complaint.

If there is no likelihood that the plaintiff can obtain valid service within the year, then all three defenses are immediately available. Accordingly, they can be raised either by answer or motion, giving rise to the following possible scenarios with their concomitant results:

1. The defendant makes a timely 12(B)(4) or 12(B)(5) motion to quash and joins with it a 12(B)(2) motion to dismiss for lack of jurisdiction. All three defenses are properly asserted and none are waived.

2. The defendant makes a timely 12(B)(4) or 12(B)(5) motion to quash but does not join with it his 12(B)(2) motion to dismiss. All three defenses are waived. The 12(B)(2) defense of lack of jurisdiction over the person is waived under the provisions of Rule 12(G) because it was not included with the motion to quash, and the insufficiency defenses are waived because the waiver of the lack-of-jurisdiction defense renders the insufficiency of the summons or the insufficiency of the service of summons moot.

3. The defendant makes a timely 12(B)(2) motion to dismiss but does not join with it his 12(B)(4) or 12(B)(5) motion to quash. All three defenses are waived. Under the provisions of Rule 12(G), the insufficiency defenses are waived because they were not included with the 12(B)(2) motion to dismiss, and the lack-of-jurisdiction defense does not arise because the waiver of the insufficiency defenses validates the summons or the service of the summons, preventing the court from quashing either. In the absence of the summons or the service of summons being quashed, the lack-of-jurisdiction defense never comes into existence.

4. The defendant timely serves his answer and includes in that answer both the insufficiency defenses and the lack-of-jurisdiction defense:

a. if the answer was not preceded by any Rule 12 motion, all three defenses are properly asserted, and none are waived;

b. if the answer was preceded by a Rule 12 motion which asserted an objection or some Rule 12 defense other than the jurisdictional defenses, all three defenses are waived. Under the provisions of Rule 12(G), the defenses had to be included in the Rule 12 motion, or they were waived; if they were omitted from the Rule 12 motion, they cannot be raised for the first time in the answer.

5. Without making any Rule 12 motion, the defendant timely serves his answer and includes therein the insufficiency defenses only. Under the provisions of Rule 12(H)(1), the lack-of-jurisdiction defense is waived because it was not raised either by motion or answer, and the waiver of

the lack-of-jurisdiction defense renders the insufficiency defenses moot.

6. Without making any Rule 12 motion, the defendant timely serves his answer and includes therein only the lack-of-jurisdiction defense. All three defenses are waived. The insufficiency defenses are waived under the provisions of Rule 12(H)(1) because they were not raised either by motion or answer, and their waiver undermines the lack-of-jurisdiction defense because it cannot be granted unless the summons or the service of summons is quashed.

The possibility of amendment may affect what is said in the second, third, fifth, and sixth scenarios above. The second and third scenarios present the most difficult problem, because they will require the amendment of whichever Rule 12 motion the defendant made prior to answering. Can the motion be amended?

The Civil Rules are silent upon this point, but some local rules of court speak to the issue. For example, Rule 8(E) of the Rules of the Court of Common Pleas, Cuyahoga County, states in pertinent part:

Pleadings and motions may be amended as provided in Civil Rule 15, but no pleading or motion shall be amended by interlineation or obliteration except upon leave of court first obtained; upon the filing of an amended pleading or motion the original or any prior amendment thereof shall not be withdrawn from the files except upon leave of court.

Of course, Rule 15 does not provide for the amendment of motions. Therefore, this local rule must mean that the provisions of Rule 15 should be applied by analogy. Even in the absence of a local rule of court, it would seem that a motion could be amended provided the amendment would not circumvent some express provision of the Civil Rules. Thus, Professor Harper states:

It should be noted that it is possible to amend a motion, as distinguished from a pleading. The amendment of a motion is governed by the discretion of the court and does not fit within the ambit of Civ. R. 15, governing amendment of pleadings. . . . But the amendment of a motion must be made in good faith and made sufficiently before the hearing on the motion so as not to cause delay.¹⁰⁸

From all of this it may be concluded that the defense omitted from the original motion can be added by an amended motion or an amendment to the original motion. But from what is said in Rules 12(H)(1) and 15(A), which surely apply by analogy, it is doubtful if an amendment would be effective for this purpose if the amended motion or the amendment to the original motion was served more than twenty-eight days after the service

¹⁰⁸ 4 ANDERSON'S OHIO CIVIL PRACTICE § 152.06, at 352 n.18 (1975).

of the original motion.

The fifth and sixth scenarios are clearly covered by Rules 12(H)(1) and 15(A). The defense omitted from the answer can be added thereto by an amended answer or an amendment to the answer served within twenty-eight days after the service of the original answer, provided that (a) the defendant has not previously amended the original answer as a matter of course, and (b) the action has not been placed upon the trial calendar.

So much for the situation when there is no likelihood of the plaintiff ever obtaining valid service. Suppose, now, that there *is* a reasonable possibility that the plaintiff can obtain valid service within the year. From what has been said above with respect to availability, it is now clear that the lack-of-jurisdiction defense in this circumstance is not available for assertion by motion, but is available for assertion by answer. Some (but by no means all) of the possible scenarios that can arise follow:

1. The defendant makes a Rule 12 motion but does not include the insufficiency defenses. He thereafter files an answer which includes the lack-of-jurisdiction defense. All three defenses are waived. By not including the insufficiency defenses in the Rule 12 motion, he waived them under Rule 12(G), and their waiver undermines and renders moot the lack-of-jurisdiction defense.

2. The defendant makes a Rule 12 motion but does not include the insufficiency defenses. He thereafter files an answer which includes both the insufficiency defenses and the lack-of-jurisdiction defense. All three defenses are waived for the same reason as that given in the first scenario.

3. The defendant makes a timely Rule 12 motion which includes a 12(B)(4) or 12(B)(5) motion to quash (as appropriate). He thereafter files an answer which includes the lack-of-jurisdiction defenses. All three defenses are properly asserted and no waiver results.

4. The defendant makes a timely Rule 12 motion which includes a 12(B)(4) or 12(B)(5) motion to quash (as appropriate). He thereafter files an answer which does not include the lack-of-jurisdiction defense. All three defenses are waived. The failure to plead the lack-of-jurisdiction defense in the answer waives that defense and renders the insufficiency of process or insufficiency of service of process moot.

5. The defendant makes no Rule 12 motion but files an answer which includes both the insufficiency defenses and the lack-of-jurisdiction defense. All three defenses are properly asserted; none are waived.

6. The defendant makes no Rule 12 motion but files an answer which

- a. includes only the insufficiency defenses, in which case all three defenses are waived for the reason given in the fourth scenario above; or
- b. includes only the lack-of-jurisdiction defense, in which case all three defenses are waived. Failure to plead the insufficiency defenses waives them and that undermines the lack-of-jurisdiction defense. Under the circumstances here discussed, that defense cannot stand alone.

The third and fourth scenarios present an interesting problem. If the

insufficiency defenses are asserted in a Rule 12 motion, the defendant need not answer until the court rules on that motion. Suppose the court overrules the insufficiency defenses. Must the defendant now plead the lack-of-jurisdiction defense in his answer if the only basis for that defense is the validity of the insufficiency defenses? The answer is in the affirmative. Even though the trial court has found the insufficiency defenses invalid, that finding may be erroneous and may be reversed on appeal. Therefore, to protect his lack-of-jurisdiction defense and to avoid its waiver, the defendant must plead it in the answer. The defendant should plead lack of jurisdiction even if it is quite likely that the trial court will also overrule the defense when presented for determination either at the trial or on the service of a Rule 12(D) motion for a preliminary hearing.

The interplay between the defense of lack of jurisdiction over the person and the defense of failure of commencement presents another interesting trap for the unwary defendant. As a general rule, it may be said that whenever the defense of lack of jurisdiction over the person is ripe for adjudication (either immediately upon the service of the summons or at the end of the year following the filing of the complaint) so too is the defense of failure of commencement.¹⁰⁹ Does it make any difference, then, which defense is asserted?

If the statute of limitations has not run on the plaintiff's claim, the choice of defense does not make any difference. It is immaterial whether the action is dismissed for lack of jurisdiction over the person or whether the complaint is stricken from the files because of failure of commencement; in neither case does the bar of *res judicata* attach to the decision, and the plaintiff may commence a new action against the defendant at any time prior to the expiration of the statute of limitations.

However, if the statute of limitations has run at the time these defenses become ripe for adjudication the choice of defense is crucial. Between the filing of the complaint and the time either defense becomes ripe for adjudication, the action is not really an action at all; technically, it is an "action attempted to be commenced." In pertinent part, section 2309.19 of the Ohio Revised Code provides:

In an action . . . attempted to be commenced, . . . if the plaintiff fails otherwise than on the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff, or if he dies and the cause of action survives, his representatives may commence a new action within one

¹⁰⁹ To be properly understood, OHIO R. Civ. P. 3(A) should be read as follows: a civil action is commenced by filing a complaint with the court, *if jurisdiction over the person of the defendant is obtained within one year from such filing*. Here, the words "if jurisdiction over the person of the defendant" are substituted for the actual words "if service," because the Rule actually speaks to jurisdiction over the person and not just service of summons. See Scigliano, *supra* note 2, at 275.

year after such date. . . .¹¹⁰

Now, suppose that after the statute of limitations has run, the defendant moves to dismiss for lack of jurisdiction over the person, and the motion is granted. What is dismissed? An "action" is not dismissed, because no action has yet come into existence. What is being dismissed is "an action attempted to be commenced." But an involuntary dismissal such as this is clearly a "failure" of the action, and under the provisions of Rule 41(B)(4), it is also clearly a "failure otherwise than on the merits." Therefore, if the defendant moves to dismiss for lack of jurisdiction over the person, and the motion is granted, the plaintiff's "action attempted to be commenced . . . fails otherwise than on the merits," and the plaintiff "may commence a new action within one year after such date." In other words, if the court finds for the defendant on the defense of lack of jurisdiction over the person after the statute of limitations has run on the plaintiff's claim, that finding invokes the "savings" provision of section 2305.19 and allows the plaintiff a year in which to commence a new action against the defendant.

On the other hand, suppose the defendant moves to strike the complaint from the files for failure of commencement and the court grants the motion. Here, the court has not dismissed either an "action" or "an action attempted to be commenced"; it has simply made a judicial declaration that no action exists—that none is pending before it.¹¹¹ If no action exists, then no action can "fail," because only that which exists can fail. However, if the action has not "failed," then the "savings" provision of section 2305.19 does not apply, and the plaintiff does not have a year in which to commence a new action against the defendant. Judicial support exists for this proposition.¹¹² Therefore, if the defendant wishes to avoid the application of section 2305.19, he must choose his defense carefully and present it in the proper manner. The proper manner requires that the defendant eschew the word "dismiss." Only that which exists can be

¹¹⁰ OHIO REV. CODE ANN. § 2305 (Page 1981).

¹¹¹ See authorities cited *supra* note 99.

¹¹² See *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954):

Where a petition to recover damages for personal injuries received in an automobile accident is filed within two years from the date when the alleged injuries were received and summons is issued for the defendant but service of the summons is never obtained, and, after the expiration of two years from the date of the accrual of the cause of action, the court orders the petition to be "dismissed" for the reason that there had been no service of summons, the plaintiff can not be considered as having failed "otherwise than upon the merits" in an action commenced or attempted to be commenced so as to authorize the plaintiff to commence an action within one year after the date of such "dismissal," under Section 11233, General Code (§ 2305.19).

Id. at 378, 119 N.E.2d at 286 (syllabus I). To the same effect, see *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

dismissed.¹¹³ Therefore, if the defendant asks that the action or the complaint be dismissed, he impliedly concedes existence. If the defendant concedes existence, he waives the defense of failure of commencement which depends upon nonexistence.

In sum, then, the vehicle to be used for asserting the jurisdictional defenses depends upon the availability of those defenses. If the jurisdictional defenses are immediately available—that is, if they are ripe for adjudication at the time the defendant elects to respond or within thirty to ninety days thereafter—they may be asserted either by a Rule 12 motion or by answer, but not by both. On the other hand, if the defenses are not immediately available, they cannot be asserted by a Rule 12 motion since their assertion would be premature. The defenses must be asserted in the answer or waiver will result. Obviously, if the defenses can be asserted either by answer or by motion but are not asserted in either way they are waived, subject to the possibility of amendment within twenty-eight days after the service of the original answer or motion.

(b) *The Problem of Timeliness*

The second major problem raised by the modern concept of “first opportunity” is the timeliness of the vehicle by which the jurisdictional defenses are asserted. Here again, the discussion must be divided between the answer and the Rule 12 motion.

i. Timely Service

The timeliness of an answer is more readily determined than the timeliness of a motion because the Civil Rules speak directly to the point.

¹¹³ For the proposition that the metaphysical concept of “existence” is the key to understanding commencement under OHIO R. Civ. P. 3(A), see *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954):

[T]here was no service of summons. Therefore, it cannot be said that an action was ever deemed to be commenced in Lorain county. In other words, notwithstanding the filing of the petition and the issuance of summons, no case ever matured in Lorain county to the point where the court had any jurisdiction over the defendant or had any power to make any order based upon the allegations or the petition so filed. There was no pending case to be “dismissed.” Although on the Lorain county court docket there appears the words, “dismissed without prejudice,” what that court did was merely to strike the petition from the files. It is common knowledge that after service of summons and even after the filing of an answer a case may be “dismissed” for want of prosecution. Such would be a genuine dismissal because such case would be pending and the court would have jurisdiction over it. *It seems axiomatic that a nonexistent case cannot be dismissed.* In the present instance, for lack of service, no case came into existence in Lorain county. Therefore, as to the petition filed in Lorain county we hold that the plaintiff did not fail “otherwise than upon the merits.” The plaintiff simply never had a pending case in Lorain county.

Id. at 383-84, 119 N.E.2d at 288 (emphasis added).

There are, however, several variant fact patterns that affect the calculation. In discussing these variant factual situations, it will be assumed that no extension of time in which to answer has been obtained under Rule 6(B).

Under the first variant, the defendant has made no pre-answer motion asserting a defense or an objection; the answer will be the defendant's first defensive move in the action. Here, the answer will be timely if it is served¹¹⁴ at any time within twenty-eight days after the service of the

¹¹⁴ See OHIO R. Civ. P. 12(A)(1): "Generally. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication."

"Service" is the key to timeliness. The answer will be timely if it is served in accordance with OHIO R. Civ. P. 5(B) at any time prior to midnight on the 28th day following the service of the summons on the defendant. See *Prince v. Ridenour*, 65 Ohio Misc. 1, 413 N.E.2d 867 (Akron Mun. Ct. 1980):

An answer is timely filed when the requirements of both Civil Rules 5 and 12(A)(1) are met. The primary obligation imposed on the defendant is to serve opposing counsel with a copy of the answer within 28 days of the service of the complaint. Secondly, the answer must be filed with the court within 3 days of service on the plaintiff.

It is undisputed that the complaint was served upon the defendant Sears on February 1, 1980. Calculating from that date, the answer by rule was required to be served up to February 29, 1980. [1980 was a leap year.] Sears' answer and counterclaim was deposited in the mail to plaintiff's counsel on February 27, 1980, and filed with the court on March 3, 1980.

The language "within 28 days after service" means that the day of service, February 1, 1980, is not to be counted. The answer then is required by rule to be served within twenty-eight days after February 1, 1980, or between February 2, 1980 and February 29, 1980.

The primary requirement of the Rules is that service on the opposing party be completed within twenty-eight days and that filing with the court occur within three days after that.

Should the defendant serve plaintiff and not file with the court, the motion to strike would then be meritorious. The defendant must do two things: first, serve opposing counsel within twenty-eight days, and second, file the answer with the court within three days of service on the plaintiff.

The defendant deposited in the mail its answer and counterclaim on February 27, 1980. That date falls within the twenty-eight day time period required by Civ. R. 12(A)(1). Further, the defendant filed its answer and counterclaim with the Court on March 3, 1980. While Rule 5(D) requires that filing occur within three days after service upon the plaintiff, the third day here was a Saturday. The first regular court day thereafter was Monday, March 3, 1980, and filing, therefore, was within rule. Rule 6(A).

The service required under Civ. R. 12(A)(1) is satisfied by depositing the answer

summons¹¹⁵ on the defendant or within twenty-eight days after the completion of service by publication, if service of notice has been made by publication.¹¹⁶

Under the second variant, the defendant has made a pre-answer Rule 12 motion. If the court denies the Rule 12 motion, the answer will be timely if it is served at any time within fourteen days after notice of the court's action.¹¹⁷ If the court grants the Rule 12 motion, it will generally either dismiss the plaintiff's action, or it will order the service of an amended complaint. If the court dismisses the plaintiff's action, no further response will be required of the defendant. If the court orders the service of an amended complaint, the answer to the amended complaint

in the mail within the twenty-eight days after receipt of the summons.

Id. at 1, 2-3, 413 N.E.2d at 867, 868-69.

¹¹⁵ See OHIO R. Civ. P. 12(A)(1). This Rule speaks in terms of "service of the summons and complaint," the implication being that unless and until both a summons and a complaint are served on the defendant, the defendant has no duty to respond. *But see* Akron-Canton Reg. Airport Auth. v. Swinehart, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980) (Ohio Supreme Court made clear that service of summons is the triggering act).

¹¹⁶ OHIO R. Civ. P. 12(A)(2) makes the same 28-day response time applicable to other responsive pleadings:

Other responses and motions. A party served with a pleading stating a cross-claim against him shall serve his answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer, or if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs.

¹¹⁷ OHIO R. Civ. P. 12(A)(2):

The service of a motion permitted under this rule alters [the 28-day response time] as follows, unless a different time is fixed by order of court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action . . .

It is not clear whether the word "notice" as used in this Rule means actual notice of the court's action to the defendant, or whether it means constructive notice which the defendant should have through the journalization of the order denying the motion. In the absence of a local rule of court providing for notice to counsel, the court is under no duty to give the parties to the action actual notice of any decision entered in its journal. *See, e.g.,* Society Nat. Bank v. Joyce, No. 44431 (Ohio 8th Dist. Ct. App. Oct. 28, 1982) (Cuyahoga County); Lomax v. Phillips, No. 39161 (Ohio 8th Dist. Ct. App. June 28, 1979) (Cuyahoga County); Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (2d Dist. 1975) (Franklin County). Further, it is frequently said that the parties to the action are conclusively presumed to know what the court enters in its journal or on its docket. *See, e.g.,* Maynard v. Maynard, No. 43642 (Ohio 8th Dist. Ct. App. Feb. 11, 1982) (Cuyahoga County); Metcalf v. Ohio State Univ. Hosp., 2 Ohio App. 3d 166, 441 N.E.2d 299 (2d Dist. 1981) (Franklin County); Markovich v. Markovich, No. 42888 (Ohio 8th Dist. Ct. App. July 2, 1981) (Cuyahoga County); State v. Willis, 69 Ohio App. 2d 128, 432 N.E.2d 219 (8th Dist. 1980) (Cuyahoga County); Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d 255, 373 N.E.2d 1266 (8th Dist. 1977) (Cuyahoga County); Kent, *Checking the Docket*, 53 CLEV. B. J. 146 (1982). Therefore, in all probability, the word "notice" means that constructive notice which a party is presumed to have through the journalization of the entry denying the motion.

will be timely if it is served at any time within fourteen days after the service of the amended complaint.¹¹⁸

Under the third variant, the defendant has made a pre-answer motion, other than a Rule 12 motion, in which he asserts a defense to the plaintiff's action (*e.g.*, a Rule 56 motion for summary judgment). If the court denies the motion, or if it grants it in such a way that an answer is required, the defendant may very well be out of rule by the time the court acts on the motion. Since the motion was not made pursuant to Rule 12, it does not stay the running of the twenty-eight day answer period.¹¹⁹ Therefore, unless the defendant has obtained an extension of time, the answer will be timely only if it is served at some time within twenty-eight days after the service of the summons or within twenty-eight days after the completion of service by publication, if service of notice has been made by publication.¹²⁰

Under the fourth variant, the defendant is served with an amended complaint. If the defendant has not already answered the original complaint no answer to the original complaint is required, since the amended complaint supersedes the original for all purposes.¹²¹ The answer to the amended complaint will be timely if it is served at any time within the time remaining for response to the original complaint or within fourteen days after service of the amended complaint, whichever period may be the longer.¹²² In this situation, the defendant always has at least fourteen days after the service of the amended complaint in which to serve his

¹¹⁸ OHIO R. CIV. P. 12(A)(2):

The service of a motion permitted under this rule alters [the 28-day response time] as follows, unless a different time is fixed by order of the court: . . . (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

¹¹⁹ See *supra* note 64.

¹²⁰ OHIO R. CIV. P. 12(A)(1).

¹²¹ See, *e.g.*, *Bell v. Coen*, 48 Ohio App. 2d 325, 357 N.E.2d 392 (9th Dist. 1975) (Summit County); *Montgomery County Bd. of Commrs. v. McQuarry*, 26 Ohio Misc. 239, 265 N.E.2d 812 (C.P. Montgomery County 1971). Both cases state the general rule that the election to amend a pleading constitutes an abandonment of the original and the amended pleading replaces the original for all purposes.

It should be noted, however, that if the original pleading contains admissions, those admissions can be used against the pleader by introducing the original pleading into evidence. See *Hersch v. E.W. Scripps Co.*, 3 Ohio App. 3d 367, 445 N.E.2d 670 (8th Dist. 1981) (Cuyahoga County); see also OHIO R. CIV. P. 8(G) "Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence" (emphasis added). But see *Jones & Laughlin Steel v. Board of Revision*, 40 Ohio St. 2d 61, 320 N.E.2d 658 (1974); *Hess v. Sommers*, 4 Ohio App. 3d 281, 448 N.E.2d 494 (3d Dist. 1982) (Mercer County).

¹²² See OHIO R. CIV. P. 15(A): "A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

answer to the amended complaint.

Despite all of these possibilities, the first variant noted above is the one that will most generally apply. Therefore, for convenience's sake, it may be said that the answer will be timely if it is served at any time within twenty-eight days after the service of the summons.

The second sentence of Rule 12(B) is the key to the timeliness of Rule 12 motion practice. It states: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted."¹²³ Thus, if the Rule 12 motion must be "made" before the answer, it follows that it must be made within the same time-frame as the answer. Of the four variants applicable to the answer, only the first, third and fourth are realistically applicable to the Rule 12 motion. Therefore, given the proper variant, it may be said that the Rule 12 motion will be timely if it is "made" within the same time-frame as the time-frame for the answer in variants one, three and four. But when is a motion "made"? Oral motions, of course are made when they are uttered, but written motions are made when they are served.¹²⁴

Again, since the first variant noted above is the one that will most generally apply, it may be said, for convenience's sake, that the Rule 12(B)(2), 12(B)(4) or 12(B)(5) motion will be timely if it is served at any time within twenty-eight days after the service of the summons.

When read as a whole in this context, it is clear that Rule 12 contemplates the following sequence of events: 1) service of the motion; 2) ruling on the motion by the court; and 3) service of the answer (if an answer is still required). Now suppose that the defendant serves his answer with his Rule 12 motion, or before the court has ruled on his Rule 12 motion. Does this premature service of the answer have any effect on the jurisdictional defenses asserted in the motion?

It can be argued that the premature service of the answer waives the jurisdictional defenses. The theory is that the answer contains defenses going to the merits of the case. However, these defenses do not have to be asserted if the court does not have in personam jurisdiction of the defendant. Therefore, by asserting these defenses, the defendant is seeking a form of relief that is inconsistent with the position he has taken in his

¹²³ Other subdivisions of OHIO R. Civ. P. 12 contain similar language. Thus, OHIO R. Civ. P. 12(E) states that a party "may move for a definite statement before interposing his responsive pleading;" and OHIO R. Civ. P. 12(F) states: "Upon motion made by a party before responding to a pleading . . ." Accordingly, the basic scheme for Rule 12 motion practice is motion before pleading and within the same time-frame as the pleading. There are, of course, two major exceptions: the OHIO R. Civ. P. 12(C) motion for judgment on the pleadings, and the OHIO R. Civ. P. 12(F) motion to strike from a pleading, to the extent that the latter is directed to a responsive pleading rather than an assertive pleading. By their very nature these motions are not subject to the general rule because they are made after the service of the responsive pleading.

¹²⁴ Browne, *The Metaphysics of Motion Practice: When is a Motion "Made" for Purposes of the Rules of Civil Procedure*, 50 OHIO BAR 925 (1977).

motion and inconsistent with the premise that the court lacks jurisdiction of his person. The letter of the third sentence of Rule 12(B) does not save the defendant in this situation because it contemplates the joinder of defenses in the *same* pleading or motion, and not the simultaneous assertion of inconsistent defenses in a separate motion and pleading. Therefore, by prematurely answering, the defendant has waived the jurisdictional defenses.

While there is a certain amount of logic to this approach, the conclusion is less than satisfying (and one need not here echo the old bromide about logic not being the life of the law). Such a result would be clearly inconsistent with the spirit of the third sentence of Rule 12(B). Further, Rule 8(E)(2) states, in pertinent part: "A party may also state as many separate . . . defenses as he has regardless of consistency and whether based on legal or equitable grounds." Therefore, consistency is no longer the bugaboo that it was under the Code.¹²⁵ In all probability the premature service of the answer in this context will not result in the waiver of the jurisdictional defenses. Nevertheless it is bad practice and a source of confusion to serve the answer before the court has ruled on the defenses and objections asserted in the Rule 12 motion.¹²⁶

The "service" aspect of timeliness requires one last word. Using the twenty-eight day time-frame solely for convenience of discussion, it can be said that the Rule 12 motion or the answer is timely if it is served by midnight on the twenty-eighth day. But what if the twenty-eighth day is a Saturday, Sunday or legal holiday? Although the weekend or a holiday would not necessarily have any effect on the defendant's ability to make service,¹²⁷ Rule 6(A) comes into play, and allows the defendant an auto-

¹²⁵ See, e.g., *Keyer v. Wysong*, No. 6114 (Ohio 2d Dist. Ct. App. July 10, 1979) (Montgomery County) (the joining of defenses, however consistent or inconsistent, does not constitute a waiver of any of them). For a more detailed discussion of this decision, see *supra* note 18.

¹²⁶ While the premature service of the answer probably does not waive any defenses asserted by a timely Rule 12 motion, it does waive the OHIO R. Civ. P. 12(E) objection of vagueness or ambiguity. As that subdivision of Rule 12 provides: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading." Thus, the underlying thrust of this objection is that the defendant cannot answer the complaint because it is so vague or ambiguous. Obviously, if the defendant does answer the complaint, he makes himself out a liar, and the objection is mooted by the service of the answer.

¹²⁷ As a general rule, service of the motion or answer is made either by mailing a copy of the document to counsel for all other parties, or by delivering a copy of the document to counsel for all other parties. OHIO R. Civ. P. 5(B). But a copy of the document could be deposited in the mail on a Saturday, Sunday or legal holiday, and it could be delivered through residence service on Saturday, Sunday or legal holiday. As for service by mail, OHIO R. Civ. P. 5(B) states: "Service by mail is complete upon mailing." With respect to delivery, OHIO R. Civ. P. 5(B) states:

Delivery of a copy within this rule means: handing it to the attorney or to the

matic extension. As Rule 6(A) states in pertinent part: "The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." Thus, if the last day of the twenty-eight day period for service is a Saturday, Sunday or legal holiday, the Rule 12 motion or the answer will be timely served if it is served by midnight on the regular business day next following the Saturday, Sunday or legal holiday.

ii. Timely Filing

However, timely service is only one dimension of timeliness; the second dimension is filing. In order to be timely, the motion or answer must not only be served within the appropriate time-frame for response, but it must also be filed with the court within three days after it has been served.¹²⁸ If it is not filed with the court within three days after service, the motion or answer will be untimely and out of rule, even though it was timely served on all parties to the action.¹²⁹

Once again, the weekend/holiday problem affects the application of this three-day rule. The solutions to the problem may be stated as follows:

1. If the first day of the three-day period falls on a Saturday, Sunday or legal holiday, this day is not counted, and the three-day count does not begin until the first business day next following the Saturday, Sunday or legal holiday.¹³⁰

2. If the last day of the three-day period falls on a Saturday, Sunday or legal holiday, the three-day period continues to run until the business day next following the Saturday, Sunday or legal holiday.¹³¹

party; or . . . if the office [of the attorney] is closed or the person to be served has no office, [by] leaving [the copy] at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

¹²⁸ OHIO R. CIV. P. 5(B): "All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service."

¹²⁹ See *Prince v. Ridenour*, 65 Ohio Misc. 1, 413 N.E.2d 867 (Akron Mun. Ct. 1980).

¹³⁰ OHIO R. CIV. P. 6(A) states in pertinent part: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

¹³¹ OHIO R. CIV. P. 6(A) states in pertinent part: "The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday."

For an example of the application of this Rule, see *Prince v. Ridenour*, 65 Ohio Misc. 1, 413 N.E.2d 867 (Akron Mun. Ct. 1980). Service is an extra-judicial act. Therefore, when read in the context of service, the phrase "end of the next day" means midnight on the day next following the Saturday, Sunday or legal holiday. Filing, however, generally takes place in the clerk's office. See *infra* note 131. Therefore, when read in the context of filing, the phrase "end of the next day" will normally mean by closing time of the clerk's office on the day next following the Saturday, Sunday or legal holiday.

Filing, however, normally takes place at the courthouse.¹³² Therefore, a third variant is possible, and the rule may be stated as follows:

3. If the last day of the three-day period falls (a) on a day when the clerk of court's office is closed to the public for the entire day, or (b) on a day when the clerk of court's office closes before its usual closing time, filing may be performed on the next succeeding day which is not a Saturday, a Sunday, or a legal holiday.¹³³

There are at least two other factors that can affect the timeliness of a Rule 12 motion or an answer, but they occur so rarely that they will be given only cursory treatment here.

iii. The Signature Requirement

First, suppose a Rule 12 motion or an answer is timely served and filed, but is not signed as required by Rule 11.¹³⁴ The three likely variants, with concomitant results, may be summarized as follows.

Under the first variant, the court allows the attorney to supply the missing signature. Technically, this might be construed as an amendment by interlineation, and as such, it relates back to the original service and filing. The documents remain timely served and filed.¹³⁵

Under the second variant, the unsigned motion or answer is stricken

¹³² OHIO R. CIV. P. 5(E):

The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Of course, it is not strictly true to say, as was said in the text, that filing takes place at the courthouse. Since the papers can be filed with the judge if he or she consents to accept them, they can be filed wherever the judge can be located. However, the judge's consent to such filing is not likely to be forthcoming if he or she is pursued outside the courthouse.

¹³³ OHIO R. CIV. P. 6(A):

When a public office in which an act, required by law, rule, or order of court, is to be performed is closed to the public for the entire day which constitutes the last day for doing such act, or before its usual closing time on such day, then such act may be performed on the next succeeding day which is not a Saturday, a Sunday, or a legal holiday.

¹³⁴ OHIO R. CIV. P. 11: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated." OHIO R. CIV. P. 7(B)(3) makes this provision equally applicable to motions: "The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules."

¹³⁵ For the relation-back theory, see OHIO R. CIV. P. 15(C), which states in pertinent part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Clearly, this applies by analogy to the addition of the missing signature through an amendment by interlineation, the provisions of OHIO R. CIV. P. 7(B)(3) make it equally applicable to the amendment of a motion. See *supra* note 133.

from the files.¹³⁶ Here, the document is presumed to be nonexistent,¹³⁷ and therefore it is not timely served.

Under the third variant, the unsigned motion or answer is stricken from the files with leave to reserve and refile it. Here, if the motion or answer is reserved and refiled within the time permitted by the court, it is timely under the provisions of Rule 6(B)(2).

iv. The Proof-of-Service Requirement

Second, suppose a Rule 12 motion or answer is timely served and filed, but it is not covered by a proof of service as required by Rule 5(D).¹³⁸ Again, there are a number of likely variants.

Under the first variant, before the court takes any action with respect to the motion or answer, the defendant separately files¹³⁹ a proper¹⁴⁰ proof of service covering the motion or answer. The motion or answer is timely. Although Rule 5(D) contemplates the filing of the proof of service contemporaneously with the document to which it refers, it does not require contemporaneous filing, and the proof of service may be separately filed at any time prior to the court taking official cognizance of the document. Thus, the proof of service affects timeliness only if it is not filed prior to the court taking some official action with respect to the document.

Under the second variant, before the defendant can separately file a proof of service, the court strikes the motion or answer from the files. The motion or answer is not timely. In the absence of a proof of service, the document is presumed nonexistent.¹⁴¹ Striking the document from the files makes that presumption conclusive. As far as the Civil Rules are concerned, no such motion or answer was ever served and filed.

Under the the third variant, the motion or answer is stricken from the files with leave to re-serve and refile it. Here, if it is re-served and refiled within the time permitted by the court, it is timely under the provisions of Rule 6(B)(2).

¹³⁶ See OHIO R. CIV. P. 11: "If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served."

¹³⁷ See *supra* note 135. If the action may proceed as though the pleading or motion had not been served, the pleading or motion is deemed nonexistent.

¹³⁸ In pertinent part, OHIO R. CIV. P. 5(D) states: "Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed."

¹³⁹ For the proposition that the proof of service may be separately filed, see *supra* note 138.

¹⁴⁰ OHIO R. CIV. P. 5(D) contemplates a proper proof of service: "The proof of service shall state the date and manner of service and shall be signed in accordance with Rule 11."

¹⁴¹ See *supra* note 137. That the document is presumed nonexistent is established by the fact that OHIO R. CIV. P. 5(D) unequivocally states that the court "shall not" consider it until proof of service is endorsed on it or separately filed.

Under the fourth variant, before the court takes any action with respect to the motion or answer, the plaintiff makes some official response to it (e.g., a brief in opposition to the motion or a Rule 12(D) motion for a preliminary hearing with respect to a defense in the answer) without challenging the absence of a proof of service. The motion or answer is timely. By officially responding to the document without challenging the absence of the proof of service, the plaintiff has waived the proof of service and has, in effect, supplied it by tacitly acknowledging that he has been served with the document.¹⁴³

Placing these latter two factors aside and noting sub silentio that a fourteen-day response time may be the appropriate time-frame in certain circumstances, it may be concluded that the jurisdictional defenses are timely asserted if they are raised either by an appropriate Rule 12 motion or by answer served within twenty-eight days after the service of summons, and filed with the court within three days after service. Conversely, if the jurisdictional defenses are not raised in a timely Rule 12 motion or answer, they are waived. The reason for this result is clear. If they are not timely, they are out of rule. But a motion or pleading out of rule can only be served and filed with leave of court.¹⁴³ If they are served and/or filed without leave of court, they are illegally on file and not part of the record in the case.¹⁴⁴ However, if the motion or pleading is not part of the record in the case, it is a nullity and can have no effect. Therefore,

¹⁴³ See *Miller v. Thorndyke*, 30 Ohio App. 2d 71, 283 N.E.2d 184 (1st Dist. 1971) (Hamilton County):

Where a party in a legal proceeding is entitled to receive notice of the filing of a responsive pleading but does not, and such party appears and participates in the hearing on the pleading, he may not later interpose his lack of notification.

...

In assignment of error 1 (C), the city contends that the answer of Doench was not properly before the court because that answer was not served on the city, nor was there proof of service attached to the answer, and that in the absence of proof of service the answer of Doench could not be considered by the court.

...

We find from the record that although the city did not receive notice of the answer and request for an injunction filed by Doench on September 4, 1970, after it had been made a party, the city entered its appearance on the Doench answer when it appeared by counsel and participated in the hearing on September 24, 1970. Having participated in the hearing of the issue presented by Doench, the city cannot later be heard to claim it was without notice of the answer filed by Doench. It follows that assignment of error 1 (C) is not well taken.

Id. at 71, 73-74, 283 N.E.2d at 184, 186.

See also *New York Higher Educ. Assistance Corp. v. Acosta*, No. 81AP-583 (Ohio 10th Dist. Ct. App. Nov. 24, 1981) (Franklin County) (the answer contained no proof of service and was not signed by defendant, but no issue regarding either of these matters was apparently raised in the trial court).

¹⁴³ See OHIO R. CIV. P. 6(B)(2).

¹⁴⁴ See *Miller v. Lint*, 62 Ohio St. 2d 209, 404 N.E.2d 752 (1980); *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975).

if the vehicle asserting the jurisdictional defenses is not timely, the jurisdictional defenses are waived.

IV. CONCLUSION

It is with respect to the question of the timeliness of the motion or answer, and only with respect to the timeliness, that a motion for an extension of time in which to move or plead becomes relevant to the concept of "first opportunity."

Very simply stated, the motion for leave to move or plead is not in itself the "first opportunity" for asserting the jurisdictional defenses. Assuming the full availability of those defenses, the "first opportunity" for asserting them is either the Rule 12 motion or the answer, whichever the defendant elects. Rather, the motion for leave to move or plead is either a device for expanding the time-frame in which the first opportunity is to be exercised or a device for making timely a first exercise of opportunity that would otherwise be out of rule. If, for example, twenty-eight days is not sufficient time for evaluation and presentation of the jurisdictional defenses, the defendant can expand that time-frame by obtaining an extension of time under the provisions of Rule 6(B)(1). Or if, through some misfortune, the defendant is out of rule, he can legitimate or make timely his Rule 12 motion or answer by obtaining leave to serve and file it in-stanter, under the provisions of Rule 6(B)(2). Thus, the motion for an extension of time in which to move or plead serves no other function than to insure the timeliness of the defendant's "first opportunity" for presenting the jurisdictional defenses. Given the fact that the "special appearance" no longer prevails in Ohio, it would be incongruous to hold that the defendant exercises his "first opportunity" to assert the jurisdictional defenses simply by making use of the device that is specifically designed to expand the time-frame in which that first opportunity is to be exercised. To hold otherwise would be to confuse "priority in time" with "timeliness." The two are not synonymous; "first opportunity" no longer means "first act." Therefore, the mere fact that the defendant's first act in a case is a motion for an extension of time in which to move or plead does not mean that the defendant has forfeited his first opportunity to present the jurisdictional defenses. If anything, the defendant has taken the necessary step to insure the timeliness of the exercise of his first opportunity to present the jurisdictional defenses.

In sum, the correct rule of waiver is this. Subject to:

- (a) the possibility that a fourteen-day period may be the appropriate time-frame for response in certain cases;
 - (b) the filing provisions of Rules 5(D) and 5(E);
 - (c) the automatic extension of time provided by the provisions of Rule 6(A); and
 - (d) the possibility of cure by amendment made as a matter of course;
- the jurisdictional defenses available to the defendant are waived if they

are not asserted *either*:

(1) by a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person, a Rule 12(B)(4) motion to quash the summons, and/or a Rule 12(B)(5) motion to quash the service of the summons (as appropriate), served either:

(a) within twenty-eight days after the service of the summons on the defendant, or

(b) within the time for service as extended by a journalized order of the court made under the provisions of Rule 6(B); *or*

(2) by a responsive pleading served either:

(a) within twenty-eight days after the service of the summons on the defendant, or

(b) within the time for service as extended by a journalized order of court made under the provisions of Rule 6(B).

The motion for an extension of time in which to move or plead, then, is not a waiver of the jurisdictional defenses; rather, it is a device for preventing their waiver through the untimely exercise of the defendant's first opportunity for asserting them.

