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# SEVENTH CIRCUIT WEIGHS IN ON CIRCUIT SPLIT AND CONCLUDES THAT COURTS CANNOT GRANT RULE 12(B)(6) MOTIONS TO DISMISS SOLELY BECAUSE THEY ARE UNOPPOSED

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## SUMMARY

In *Marcure v. Lynn*, --- F.3d ---, 2021 WL 1138110 (Mar. 25, 2021), the Seventh Circuit joined six of its sister circuits (and split from two others) in concluding that Federal Rule of Civil Procedure 12(b)(6) prevents courts from granting unopposed motions to dismiss solely because no response has been filed.

The case involved a dispute between a pro se plaintiff and several defendants, including police officers, prosecutors, defense attorneys, and relatives. The police officers filed a motion to dismiss, and the plaintiff filed a response. The plaintiff's response, however, was nearly a month late and lacked the plaintiff's signature as required by Federal Rule of Civil Procedure 11(a). The district court excused the plaintiff's late filing but entered an order warning the plaintiff that it would strike the response if he did not correct the signature deficiency within six days. A week later, when the plaintiff failed to correct the deficiency, the court struck the plaintiff's response and dismissed his claims against the officers with prejudice solely because the court deemed the motion to be unopposed.

The Seventh Circuit reversed. After concluding that the district court did not err in striking the plaintiff's unsigned response, *Marcure*, 2021 WL 1138110, at *4 ("The text of the rule is clear: Rule 11(a) does not give courts discretion to overlook a party's failure to correct promptly an unsigned filing . . . ."), the Seventh Circuit held that "Rule 12(b)(6) prevents courts from granting unopposed motions solely because there is no response." *Id.* at *6. To the contrary, the court concluded that because Rule 12(b)(6) requires movants to prove entitlement to relief, district courts must consider the merits of a motion to dismiss filed pursuant to that rule even if no opposition is filed. In reaching this conclusion, the court cited decisions from six other circuits in which this rule has been applied. *See Giummo v. Olsen*, 701 Fed. App'x 922, 924-25 (11th Cir. 2017) (per curiam); *Issa v.*

*Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003); *McCall v. Pataki*, 232 F.3d 321, 322-23 (2d Cir. 2000); *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991); *Carver v. Bunch*, 946 F.2d 451, 453-55 (6th Cir. 1991); *Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d 1210, 1214 (5th Cir. 1980). The court also noted that the First Circuit applies the opposite rule, *Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143, 145 (1st Cir. 2004), and that the D.C. Circuit takes a "middle approach" and "reluctantly" permits courts to grant Rule 12(b)(6) motions without prejudice if they are unopposed, *Cohen v. Bd. of Trustees of the Univ. of the Dist. of Col.*, 819 F.3d 476, 480 (D.C. Cir. 2016).

## RELATED PRACTICE AREAS

- Appellate

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