


Pretrial Problems: Don't Forfeit Your Personal-Jurisdiction Defense

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 The Seventh Circuit's decision in *German American Financial Advisors & Trust Co. v. Rigsby*, No. 15-1612, 2015 WL 5579751 (7th Cir. Sept. 23, 2015), highlights the preservation pitfall of forfeiting a personal-jurisdiction defense through litigation on the merits. There, rather than press a defense of lack of personal jurisdiction due to improper service, the relevant defendant instead moved for additional time to respond to the plaintiff's summary judgment motion. Further, in that motion for additional time, the defendant proposed substantive defenses for the district court to evaluate if more time was not allotted to challenge plaintiff's summary judgment motion. In affirming the conclusion that this defendant waived her personal-jurisdiction defense, the Seventh Circuit relied on the rule that "a defendant will waive objection to the absence of personal jurisdiction by giving the plaintiff a 'reasonable expectation' that she 'will defend the suit on the merits.'" 2015 WL 5579751, at *2. **Preservation Issues:** A personal-jurisdiction defense is generally presented and preserved through one of two mechanisms: (1) a 12(b)(2) motion to dismiss; or (2) the defendant's answer as one of the pled defenses (for later presentation through a motion). However, even when presented in one of these ways, the defendant may waive or forfeit a personal-jurisdiction defense through litigation on the merits in situations in which it is not clear that the defendant maintains its personal-jurisdiction defense. *See, e.g., Blockowicz v. Williams*, 630 F.3d 563, 566 (7th Cir. 2010) (where defendant responded to plaintiff's injunction motion and included statement that the district court lacked personal jurisdiction over it and further stated that it did "not waive any arguments it has pursuant to Fed. R. Civ. P. 12(b)(2)," defendant nevertheless waived its personal-jurisdiction defense by failing to press it and, instead, substantially litigating on the merits); *Gerber v. Riordan*, 649 F.3d 514, 518 (6th Cir. 2011) (where defendants filed an initial motion to dismiss for lack of personal jurisdiction – which was rejected for reasons other than the merits – and then participated in litigating on the merits before renewing their motion, which included their counsel making a general appearance, the defendants waived their personal-jurisdiction defense). The following general rule is central in this context: A "delay in challenging personal jurisdiction by motion to

dismiss may result in waiver, even where ... the defense was asserted in a timely answer.” *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir. 1999) (internal quotation marks omitted). **Tips:** To maximize the potential for proper preservation of a personal-jurisdiction defense, it should be presented as early as possible in the action and, if denied, reasserted with a clear explanation that further participation by the defendant in litigating the action remains subject to its rejected personal-jurisdiction defense.

- Generally, this would first involve a motion to dismiss under Rule 12(b)(2).
- If that motion is denied and the defendant must then answer, the defense should also be pled in the defendant’s responsive pleading.
- If possible, before a defendant proceeds to litigate on the merits, it should seek an indication from the district court, on the record, that the court recognizes the defendant is only proceeding with the merits subject to its rejected personal-jurisdiction defense. *See, e.g., IDS Life Ins. Co. v. SunAm. Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998) (“There is no merit to the plaintiffs’ argument that [the defendant] waived its defense to personal jurisdiction by participating in the litigation on the merits, since it did so at the direction of the district judge after having raised the defense in a timely fashion.” (internal citation omitted)).

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