

Waiving the Personal Jurisdiction Defense

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In 2016, we authored an article titled “[Pretrial Problems: Don’t Forfeit Your Personal-Jurisdiction Defense](#).” In that article, we discussed the Seventh Circuit’s decision in *German American Financial Advisors & Trust Co. v. Rigsby*, which highlighted the preservation pitfall of forfeiting a personal jurisdiction defense through litigation on the merits. As we noted, the Seventh Circuit relied on the rule that a defendant will waive an objection to the lack of personal jurisdiction by “giving the plaintiff a ‘reasonable expectation’ that she ‘will defend the suit on the merits.’” Generally, the question whether the personal jurisdiction defense has been waived through litigation on the merits is a fact-specific inquiry. Nonetheless, several federal courts of appeals have been making those inquiries for themselves, and in some cases, getting closer to formulating bright-line rules in doing so. For example, in *Blessing v. Chandrasekhar*, the Sixth Circuit held that simply filing a notice of appearance will not, on its own, cause a defendant to waive a personal jurisdiction defense. Of course, the waiver inquiry becomes more complicated when the defendant actually litigates the case on the merits. Recent decisions make clear that various opportunities and pitfalls exist, for the wary and the unwary, respectively.

- The [D.C. Circuit](#) recently held that if a defendant moves to dismiss at the outset of the case for lack of personal jurisdiction, litigates that issue fully before the district court, and the district court rejects the personal jurisdiction defense, then the defendant is thereafter safe to defend the merits of the case. In this scenario, for a court to properly find that a defendant had forfeited a personal jurisdiction defense, the defendant would have to take specific actions inconsistent with good faith preservation, such as intentional sandbagging or an express and unambiguous renunciation. Indeed, the D.C. Circuit held as it did even though the defendant failed to re-raise its personal jurisdiction defense in a motion for summary judgment.

- The [Ninth Circuit](#) has held that once the issue of personal jurisdiction has been adjudicated on the merits against a party, that party may fully participate and defend the litigation up to and including filing its own counterclaims. The Ninth Circuit explained that while waiver can arise from failing to properly request a ruling on a personal jurisdiction defense, it does not arise from vigorous litigation of the remaining claims or defenses following an adverse ruling on personal jurisdiction by the district court.
- The [Fifth Circuit](#) recently held that, under the circumstances presented in that case, a defendant could raise a personal jurisdiction defense in opposition to class certification, while simultaneously litigating the merits in a summary judgment motion, without waiving the personal jurisdiction defense.
- On the other hand, the [Third Circuit](#) held that despite filing a Rule 12 motion asserting their personal jurisdiction defense, certain defendants nonetheless waived the defense by objecting to transfer to a court with personal jurisdiction, and by expressly consenting to further proceedings before the district court that lacked personal jurisdiction by filing an answer in that court, in line with the procedure set forth by the district judge. The Third Circuit explained that behavior consistent with waiver, and which indicates an intent to litigate the case on the merits, is sufficient to constitute waiver, regardless of whether the parties also express a contrary intent in writing. As the Third Circuit succinctly explained, “[t]he law is clear that words alone are insufficient to preserve a personal jurisdiction defense where conduct indicates waiver.”

Tips

To maximize the potential for proper preservation of a personal jurisdiction defense:

- Present the personal jurisdiction defense as early as possible in the action, typically in a motion to dismiss under Rule 12(b)(2), and avoid seeking any affirmative relief (if possible) until the personal jurisdiction defense has been ruled upon.
- If the motion to dismiss for lack of personal jurisdiction is denied and the defendant must answer, then reassert the personal jurisdiction defense in the answer with clear non-waiver language explaining that further participation by the defendant in litigating the action remains subject to the personal jurisdiction defense rejected by the district court, and does not constitute acquiescence to that ruling.
- Be sure to obtain a ruling on the personal jurisdiction defense before proceeding to litigate on the merits. If possible, seek an indication from the district court, on the record, that the district court recognizes the defendant is only proceeding with the merits subject to its rejected personal jurisdiction defense.

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