CARLTON FIELDS

When Is a Defense "Available"? Avoiding Waiver by Being Bold When Asserting Defenses

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It is well known that, at least in the federal system and Florida, a defendant who fails to raise lack of personal jurisdiction in a pre-answer motion to dismiss waives that defense. But there is an exception to this rule: If a personal jurisdiction defense was not available to the party when it moved to dismiss, but later became available due to a new authoritative decision, then it is held not to have been waived. But what makes a defense "available" to a party when it is moving to dismiss?

A recent decision from the Northern District of Illinois provides an answer to that question which suggests that it is wise to be bold in asserting defenses. In *Quinn v. Specialized Loan Servicing, LLC* , No. 1:16-cv-02021, 2019 WL 5260774 (N.D. Ill. Oct. 17, 2019), the defendant was facing a class action lawsuit from two classes of Illinois, Indiana, and Wisconsin plaintiffs. The defendant did not raise a personal jurisdiction defense in its pre-answer motion to dismiss, but did include that defense in its answer.

After the court certified both classes, the U.S. Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court* , 137 S. Ct. 1773 (2017). *Bristol-Myers* concerned claims in California state court made by non-California residents, claims that were not sufficiently connected to California to qualify for specific personal jurisdiction on their own. The Supreme Court held that California state courts could not exercise specific jurisdiction over those claims even if they were packaged with claims by California residents in a mass tort action.

Courts have split on whether *Bristol-Myers'* jurisdictional limit on state court mass actions also applies to federal court class actions. The defendant in *Quinn* argued that *Bristol-Myers'* jurisdictional limit does apply to federal court class actions, and thus the Northern District of Illinois did not have jurisdiction over the claims of class members residing in Indiana or Wisconsin. And the defendant argued that it had not waived this specific personal jurisdiction defense because that defense was not available to it until the Supreme Court decided *Bristol-Myers*.

The *Quinn* court disagreed. It explained that courts had divided on this issue of when a defense is available. For some, a defense is not available to a party when there is no legal authority recognizing a defense in a case like the party's. For other courts, a defense is not available to a party only when there is legal authority foreclosing that defense in a case like the party's. The *Quinn* court accepted the latter view, ruling that a litigant should raise a defense it wishes to preserve unless there is a controlling case squarely rejecting the defense in that context.

Tip:

Preservation may require asserting any colorable defense, even one you have not seen prevail under current law, unless there is authoritative law specifically rejecting it. Or, stated simply, be bold! If there is a novel, creative, colorable, good faith, non-frivolous argument for a certain defense, then caution counsels asserting it. Otherwise, even when the law moves in a direction favorable to your client, you may not be able to capitalize on that development.