

A woman domiciled in State A was driving in State B when the brakes on her car malfunctioned. As a result, she lost control of her car and hit a concrete traffic barrier. The woman later brought a strict products liability action against the brake manufacturer in a federal court in State A to recover \$100,000 in damages. The manufacturer is incorporated and headquartered in State B. The manufacturer conducts no business and has no employees in State A.

The manufacturer filed a motion to dismiss for insufficient service of process, which was denied. The manufacturer has now filed an answer to the woman's complaint and asserted therein a motion to dismiss for improper venue. The woman failed to respond to the motion.

Is the court likely to dismiss the action for improper venue?

- A. No, because the manufacturer waived its right to challenge venue.
- B. No, unless the court determines that a federal court in State B is a more convenient forum under the doctrine of *forum non conveniens*.
- C. Yes, because the manufacturer resides in State B and the accident occurred there.
- D. Yes, because the woman failed to respond to the manufacturer's motion to dismiss.

Explanation:

Waiver of defenses

Defenses	Waiver
<ul style="list-style-type: none">• Lack of subject-matter jurisdiction	Never waived
<ul style="list-style-type: none">• Lack of personal jurisdiction• Improper venue• Insufficient process or service of process	Waived if not asserted in pre-answer motion or answer (whichever occurs first)
<ul style="list-style-type: none">• Failure to state claim• Failure to join required party	Waived if not asserted before end of trial
<ul style="list-style-type: none">• All other legal defenses	Waived if not asserted in answer or amended answer

The following **defenses are waived** if they are **not asserted** in a **pre-answer motion or answer**, whichever occurs first: (1) lack of personal jurisdiction, (2) improper venue, and (3) insufficient process or service of process. Here, the manufacturer filed a pre-answer motion to dismiss for insufficient service of process, but that motion failed to assert the defense of improper venue. The manufacturer therefore waived its right to challenge this issue, and the court is unlikely to dismiss the action for improper venue.

Had the manufacturer preserved its right to challenge venue, the court would have applied the general venue statute to determine if venue is proper in State A. Under this statute, venue is proper in any judicial district where:

- any *defendant* **resides**, so long as all defendants reside in the same state (here, the manufacturer resides in State B)*
- a substantial part of the events giving rise to the claim occurred or a substantial portion of the property at issue is located (here, the accident occurred in State B) *or*
- any defendant is subject to **personal jurisdiction**, but only if venue cannot be established under either of the above provisions (not applicable here).

Therefore, venue is proper in State B but improper in State A. However, the manufacturer waived its right to challenge venue by failing to do so in its pre-answer motion (**Choice C**).

*An entity resides in any judicial district where it is subject to personal jurisdiction. As a result, the manufacturer resides in State B because it is incorporated and headquartered

there. But it does not reside in State A because it conducts no business and has no employees there.

(Choice B) The doctrine of forum non conveniens allows a federal court to dismiss or stay a case if a state or foreign judicial system, not another federal court, is better suited to hear the dispute.

(Choice D) The woman had no duty to respond to the manufacturer's answer containing the motion to dismiss for improper venue. That is because a plaintiff need only respond to a defendant's answer if the defendant asserted a counterclaim or the court orders a reply (neither seen here).

Educational objective:

The defenses of (1) lack of personal jurisdiction, (2) improper venue, and (3) insufficient process or service of process are waived if they are not asserted in a pre-answer motion or answer, whichever occurs first.

References

- Fed. R. Civ. P. 12(h) (waiver of defenses).