

Corporate & Financial Weekly Digest

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Ninth Circuit Holds Assertion of Counterclaim Does Not Waive Improper Venue Defense

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Investors filed a complaint in the U.S. District Court for the District of Arizona against the former president and CEO of a corporation that no longer had any assets, his wife, and the company's former securities counsel. Defendants filed answers that included an affirmative defense of improper venue premised on the forum selection clauses in the agreements between the parties. Defendants also filed counterclaims, as well as a third-party complaint against the individual who sold the shares in the corporation to plaintiffs. The district court dismissed the complaint for improper venue based on the forum selection clauses.

On appeal, plaintiffs argued that by filing an answer with affirmative defenses and counterclaims, and a third-party complaint, defendants waived any improper venue defense. Affirming the district court's decision, the U.S. Court of Appeals for the Ninth Circuit held that the mere assertion of a counterclaim will not waive a defense of improper venue that was explicitly asserted in an answer. The court also found that parties may argue alternative positions without waiver. (*Hillis v. Heineman*, No. 09-17040, 2010 WL 4673675 (9th Cir. Nov. 19, 2010))

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