

8. FRCP 8 provides that a defendant “must” include all affirmative defenses in his answer, but it does not state what the consequences are of failing to do so. The U.S. Supreme Court has interpreted FRCP 8 by ruling that “must” necessarily means that omitting an affirmative defense in an answer waives it. The Supreme Court has since carved out an exception to the waiver rule, ruling that there is no waiver when fully adjudicating the omitted defense at trial could be done without undue prejudice to the plaintiff. The Supreme Court’s latter ruling can properly be characterized as federal common law, as opposed to a mere interpretation of the text of FRCP 8. By contrast, a state statute in Oregon provides that failure to plead an affirmative defense in the answer always waives it, and that no exceptions are allowed whatsoever. A plaintiff files an action under Oregon state law for negligence in federal court in Oregon; the defendant fails to plead contributory negligence in the answer. One year later, and with it being too late to amend the answer, the defendant informs the plaintiff that he nevertheless intends to raise contributory negligence at trial. The plaintiff objects. The district court concludes that allowing the defendant to raise the affirmative defense at trial would not unduly prejudice the plaintiff—assume this conclusion is correct under the circumstances. But the district court must next decide whether to apply the no-exceptions-waiver rule under Oregon law or the waiver-exception rule of the Supreme Court. The correct answer is:
- a. FRCP 8 will govern the waiver issue if the district court also concludes that the rule is valid under the Rules Enabling Act and that it is constitutional.
 - b. The Oregon state statute will govern because its no-exceptions-waiver rule comes from a statute instead of Oregon common law.
 - c. The Oregon state statute will govern because, if the state statute were deemed to not apply in federal court, that would likely affect a plaintiff’s decision *ex ante* whether to sue in state court versus federal court.
 - d. The Supreme Court’s waiver-exception rule will govern because, if the state statute were deemed to not apply in federal court, that would likely not affect a plaintiff’s decision *ex ante* whether to sue in state court versus federal court.
 - e. None of the above.