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**LEGALTECHNOLOGY/Featuring Law Technology News****Should Foreign Plaintiffs' Personal Injury Suits Be Litigated in U.S. Courts?**

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U.S. product manufacturers -- and courts -- are seeing more and more lawsuits filed by foreign plaintiffs seeking redress for personal injuries they claim to have sustained from the use of products in their home countries.

U.S. product manufacturers have challenged the propriety of litigating these lawsuits in the United States, asserting a lack of jurisdiction over such lawsuits as well as asserting that it would be more convenient and appropriate for courts located in the foreign plaintiffs' home countries to handle the disputes.

The foreign plaintiffs have strenuously resisted, arguing that the conduct at issue is "American misconduct," that the events that gave rise to the litigation occurred in the United States and that U.S. courts have the greatest interest in protecting consumers of defective products manufactured by U.S. businesses. U.S. courts have been left to resolve the jurisdictional questions.

Manufacturers have advanced various jurisdictional arguments against these claims by foreign plaintiffs. One is based on the doctrine of *forum non conveniens*, a doctrine that grants a court discretion to decline to exercise jurisdiction in favor of an alternate, more convenient forum, even though the court in which the case was filed does have jurisdiction over the case.

The legal principles regarding *forum non conveniens* are well settled, incorporating a two-step analysis: determining whether there exists an alternative adequate forum for the plaintiffs to pursue their claims; and balancing the relevant public and private interest factors in order to determine whether such factors weigh in favor of dismissal.<sup>1</sup>

Pursuant to the doctrine, courts also consider the plaintiff's choice of forum, and while, generally, there is deference in favor of that choice, the U.S. Supreme Court has made clear that "[w]hen the plaintiff is foreign, however, this assumption is much less reasonable."<sup>ii</sup>

Motions to dismiss based on the doctrine of *forum non conveniens* will often involve detailed, complex, competing submissions from foreign law experts, advising the U.S. court of the principles and nuances of the plaintiff's home country's legal system. Such motions may be filed after discovery relevant to the *forum non conveniens* issue has been taken. As a result, U.S. courts engage in time-consuming, fact-intensive, complex inquiries in order to determine whether to exercise jurisdiction over a case involving a plaintiff from a foreign country.



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**EXAMPLES OF FEDERAL CASES**

***In re: Factor VIII or IX Concentrate Blood Products Litigation:*** The U.S. Court of Appeals for the Seventh Circuit is scheduled to hear oral argument in September on whether negligence claims brought against four American manufacturers of blood-clotting products by hemophiliacs and their spouses who are citizens and residents of the United Kingdom were properly dismissed on the grounds of *forum non conveniens*.<sup>iii</sup> The U.K. plaintiffs have asked the Seventh Circuit to find, *inter alia*, that the lower court abused its discretion in holding that the U.K. legal system is an adequate forum for U.K. citizens to adjudicate product liability claims for personal injuries sustained in the United Kingdom.

The U.K. plaintiffs have gone so far as to declare that their concerns "center on the inextinguishable structure and procedural inability to have their case heard in the U.K.," insisting that the United Kingdom "is an inadequate forum ... because it offers, as a matter of reality, no forum at all."<sup>iv</sup> They argue that they are "foreclosed from any remedy" in the United Kingdom, owing to, *inter alia*, the strict adherence in the United Kingdom to the "but for" principle of causation, which, plaintiffs claim, fails to acknowledge market share liability or its variants that are available in the United States, as well as the rule of U.K. civil procedure that allows for the "strike-out" of group litigation where the costs of litigation may exceed the potential damages.<sup>v</sup> The U.K. plaintiffs also criticized the lower court for ignoring what they call "extreme impediments to funding" the litigation in the United Kingdom, citing "obstacles" such as the lack of contingent fee arrangements and the "loser pays rule."<sup>vi</sup>

Of course, the blood-clotting product manufacturers take issue with plaintiffs' arguments. They note the absence of a single U.S. court decision holding that courts in the United Kingdom do not provide an adequate forum for U.K. citizens to litigate personal injury claims.<sup>vii</sup> They also maintain that the plaintiffs are improperly attempting to turn the "adequacy" inquiry into a determination of whether plaintiffs will win in the United Kingdom, and they call on the Seventh Circuit to "refuse Plaintiffs' invitation to open up the United States as the world's product liability forum."<sup>viii</sup>

***In re: Vioxx Products Liability Litigation:*** The pharmaceutical manufacturer in the Vioxx litigations, Merck & Co. Inc., is no stranger to this issue either.

More than 175 putative class actions have been transferred into or filed directly in the multidistrict litigation proceeding that has been consolidated in the U.S. District Court for the Eastern District of Louisiana. Thirteen of the putative class actions have been filed on behalf of classes of citizens from various foreign countries, including Australia, Canada, England, France, Germany, Israel, Italy, the Netherlands, New Zealand, Poland and South Africa.<sup>ix</sup>

Plaintiffs seek to certify classes consisting of all citizens who were prescribed Vioxx in each of the plaintiffs' resident countries and further seek to certify three subclasses of patients -- those who suffered personal injury, those who seek treatment and reimbursement under a medical monitoring program and those who seek reimbursement for the purchase price of Vioxx.<sup>x</sup>

In each instance the foreign plaintiffs were prescribed Vioxx by local physicians in their home countries, ingested Vioxx in their home countries and allegedly suffered injury there as well. Also, in each instance, each relevant country's governmental regulatory body approved Vioxx for sale and was involved in the determination of the warnings and information that were included in that particular country's Vioxx label.<sup>xi</sup>

Merck has moved to dismiss the foreign class actions on the grounds of *forum non conveniens*. It argued that the alternative fora, Italy and France,<sup>xii</sup> are adequate and that balancing the relevant private and public factors weighs heavily in favor of dismissing the U.S. actions in favor of them being brought in the alternate fora.

Of note, Merck has advocated dismissal on the grounds that international comity would be upset if U.S. juries were permitted to "second-guess foreign regulatory judgments approving" pharmaceutical medications for sale in the relevant foreign countries and that U.S. juries, "unfamiliar with foreign languages, customs, and medical practice, would be ill-suited to adjudicating" the claims concerning the appropriateness of pharmaceutical warnings brought by foreign plaintiffs.<sup>xiii</sup> Boldly, Merck has also taken the position that if foreign plaintiffs are allowed to sustain their claims in the U.S. MDL proceeding, resources will be diverted from resolving Vioxx claims brought by U.S. plaintiffs.<sup>xiv</sup>

In addition to the *forum non conveniens* challenge, Merck has also advanced two additional arguments. Merck has argued that the court should strike the foreign plaintiffs' class allegations for the following reasons: a number of the putative class actions "involve citizens from countries that would not afford preclusive effect to a U.S. judgment against the putative members of an opt-out class" and class allegations concerning citizens who reside in a country where class action proceedings are already underway should be stricken on grounds of international comity.<sup>xv</sup>

Plaintiffs have vigorously opposed Merck's motion. They insist that jurisdiction is more convenient in the United States since the development, design, testing and decision to recall Vioxx all occurred in the United States. They claim that all important decisions concerning Vioxx were directed from Merck's headquarters in New Jersey and declare that the documents and witnesses supporting liability are housed in the United States.

They also argue that France and Italy are inadequate fora to pursue Vioxx claims, advancing arguments similar to those advanced by the U.K. blood-clotting plaintiffs. They also make the rather remarkable assertion that their "home forums do not have a strong interest in adjudicating these claims as evidenced by the forums' failure to recognize class actions, contingency fees, and refusal to remove fee shifting rules."<sup>xvi</sup>

As to Italy, plaintiffs have asserted that there is no economically feasible medical monitoring remedy available to them there because of the Italian national health care system. Merck, they argue, "should not benefit from Italy's decision to provide a national healthcare system for its citizens."<sup>xvii</sup>

The briefing on Merck's motion was completed this summer. One can expect the losing party will likely seek review by the Fifth Circuit.

**Tuazon v. R.J. Reynolds Tobacco Company:** Contrary to the result achieved by the blood-clotting product manufacturers, earlier this year a U.S. tobacco manufacturer was unable to secure dismissal from a U.S. court of personal injury claims brought by a Philippine citizen

concerning a smoking-related illness he contracted in the Philippines after smoking there for 40 years. In a fact-intensive, detailed opinion, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's order rejecting the tobacco manufacturer's arguments that the case should be dismissed for lack of personal jurisdiction or, alternatively, on the grounds of *forum non conveniens*.<sup>xviii</sup>

In *Tuazon*, the plaintiff began smoking in the Philippines in 1955 at the age of 17 and had smoked continually for more than 40 years. In 2003, he was diagnosed with a lung disorder. After his diagnosis the plaintiff, who was a Philippine attorney, began researching cases brought against tobacco companies in the United States.<sup>xix</sup> In April 2003, he immigrated to Washington state, where his daughter lived, and "filed [his] case within eight days of arrival in the United States."<sup>xx</sup> His lawsuit against R.J. Reynolds Tobacco Company is rooted in his claim "that Reynolds participated in a global conspiracy to suppress information regarding the addictive and health-related effects of cigarettes" and that the conspiracy "originated in the United States, and by the 1970s, had moved abroad."<sup>xxi</sup>

Reynolds moved to dismiss the case for lack of personal jurisdiction on the basis that the claim arose from conduct by Reynolds outside the state of Washington. Alternatively, Reynolds moved to dismiss on the grounds of *forum non conveniens*.

The lower court denied Reynolds' motion. The Ninth Circuit affirmed after conducting a detailed inquiry into whether Reynolds' contacts in Washington were sufficient to support the exercise of general jurisdiction under the Due Process Clause of the 14th Amendment.

The Ninth Circuit also upheld the lower court's ruling denying Reynolds' *forum non conveniens* challenge, noting that the district court had the "broadest possible discretion" and had not abused it.<sup>xxii</sup>

At the end of its opinion, the Ninth Circuit offered some words of caution for U.S. product manufacturers as well as U.S. courts: "In this global and mobile age, we should expect to face controversies arising from activities originating in the United States but played out in distant lands. We should also expect to face more frequently difficult jurisdictional issues based on complicated cross-border factual scenarios."<sup>xxiii</sup>

Reynolds has petitioned for writ of certiorari to the U.S. Supreme Court on the question of whether "product sales and sales-related activities in the forum state can constitute sufficient minimum contacts to support the exercise of general jurisdiction over a company incorporated and headquartered elsewhere, and thus allow suit on claims having no connection to the forum."<sup>xxiv</sup>

Reynolds has argued that the Ninth Circuit decision is at odds with Supreme Court authority and "amounts to a holding that any large corporation that engages in substantial sales and sales-related activities across the nation satisfies the due process minimum contacts test for general jurisdiction in any State of the union," and, in doing so, has expressed concern that more and more suits concerning claims arising outside the United States will be filed in this country if litigation is not foreclosed in jurisdictions that lack connection to the lawsuit's subject matter.<sup>xxv</sup>

Reynolds' petition is scheduled to be considered by the U.S. Supreme Court at its Sept. 25 conference.

## CONDITIONAL DISMISSALS

While the *Blood Products* court dismissed the action involving the U.K. plaintiffs on the grounds of *forum non conveniens*, it did so subject to certain conditions being met -- the manufacturers had to agree to accept service in the United Kingdom, satisfy a final judgment rendered by a court of the United Kingdom, exclude from the calculation of statutes of limitations time periods the period of time plaintiffs' claims had been pending in the Illinois action (including the appeals process), and advise the U.K. court that they did not object to the use of discovery obtained in the United States in a later-filed U.K. action.<sup>xxvi</sup>

Such conditions to *forum non conveniens* dismissals are not uncommon.<sup>xvii</sup> Indeed, the foreign Vioxx plaintiffs have asked that any *forum non conveniens* dismissal be conditioned on Merck doing the following: consenting to jurisdiction in the relevant foreign country; accepting service of any complaint filed; agreeing to pay any final judgments adjudicated by any foreign country; not raising the statute of limitations defense for any period of time in which the action was being litigated in the United States; providing any necessary documents and witnesses in the foreign countries; not objecting to any evidence offered in the foreign country that would have been admissible in a U.S. court; and allowing plaintiffs to re-file their lawsuits in the United States if the foreign courts do not accept jurisdiction of their claims.

It remains to be seen whether the Vioxx court will grant the motion to dismiss and/or order any dismissal to be subject to any such conditions.

\* \* \*

The *Tuazon* holding will likely be troubling to U.S. product manufacturers insofar as it raises the spectre of a possible flood of foreign citizens litigating claims in U.S. courts for personal injuries sustained in foreign countries. Whether the U.S. Supreme Court accepts Reynolds' cert petition may foretell the possibility of interesting times to come for product manufacturers.

With respect to the *forum non conveniens* analysis, the Ninth Circuit decision highlights the difficulty manufacturers face if they are not initially successful at the trial court level of having the claims of a foreign plaintiff dismissed. The standard of review on appeal -- clear abuse of discretion -- underscores the importance of securing victory in the lower court. And, even when U.S. product manufacturers are successful in having litigation dismissed in favor of foreign jurisdictions, they can expect victory to come at a price, insofar as such dismissals are frequently conditioned on manufacturers' concessions in favor of the foreign plaintiffs. In addition to submitting to the jurisdiction of foreign tribunals, U.S. manufacturers may have to agree to provide foreign plaintiffs with access to discovery and potential trial evidence that the foreign plaintiffs might not have been able to secure through their own country's civil procedure mechanisms.

Whatever the final outcome of the various jurisdictional motions in the cases discussed above -- and others -- U.S. product manufacturers and U.S. courts should take notice of the admonition voiced by the Ninth Circuit. For the foreseeable future it would appear that they can expect to see foreign plaintiffs continue to try and pursue their personal injury product liability claims in this country, which will necessitate highly fact-specific, resource-intensive and costly inquiries into complex areas of law.

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i Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252 (1981).  
 ii Id. at 256, 102 S. Ct. at 266.  
 iii In re Factor VIII or IX Concentrate Blood Prods. Litig., Gullone et al. v. Bayer Corp. et al., No. 06-1427 (7th Cir.). Beginning in 2004, non-U.S. hemophiliacs

(from Argentina, Austria, Brazil, Chile, Colombia, Denmark, Germany, Honduras, Hong Kong, Israel, Italy, Luxembourg, New Zealand, Norway, Panama, Paraguay, Peru, South Africa, Taiwan, Venezuela and the United Kingdom) sued four U.S. corporations who manufacture blood clotting products. They claim the manufacturers were negligent in collecting and processing plasma used to derive "factor concentrates" and as a result sold virally contaminated products for use by hemophiliacs. Plaintiffs further claim that, after the U.S. manufacturers became aware of the contamination, they concealed the risks associated with the contaminated products and "dumped" the contaminated products on unsuspecting foreign markets. In re Factor VIII or IX Blood Prods. Liab. Litig., 408 F. Supp.2d 569, 570-573 (N.D. Ill. 2006). The manufacturers asserted that the claims of all the foreign plaintiffs, from the thirteen different countries, "should be dismissed because of *forum non conveniens*." The lower court gave the defendant-manufacturers the option of choosing which forum to address first. They selected the United Kingdom. Id. at 573.

iv Brief of Plaintiffs-Appellants at 26, In re Factor VIII or IX Concentrate Blood Prods. Litig., Gullone et al. v. Bayer Corp. et al., No. 06-1427 (7th Cir. Mar. 20, 2006).  
 v Id. at 19.  
 vi Id. at 28-29.  
 vii Brief of Defendants-Appellees at 41, In re Factor VIII or IX Concentrate Blood Prods. Litig., Gullone et al. v. Bayer Corp. et al., No. 06-1427 (7th Cir. Apr. 21, 2006).  
 viii Id. at 14.  
 ix Mem. In Supp. Def. Mot. Dismiss the Foreign Class Actions Or, In the Alternative, Strike the Foreign Class Allegations at 1-2, n.2, In re: Vioxx Prods. Liab. Litig. MDL No. 1657 (E.D. La. Jan 13, 2006).  
 x Id. at 3.  
 xi Id. at 3-4.  
 xii By agreement, counsel for the parties determined that Merck's motion should first be decided as it applies to the French and Italian putative class action complaints.  
 xiii Id. at 12.  
 xiv Id. at 21.  
 xv Id. at 25.  
 xvi Mem. In Supp. Opp. To Def. Mot. To Dismiss the Foreign Class Actions, or in the Alternative, Strike the Foreign Class Allegations, In re: Vioxx Prods. Liab. Litig. MDL No. 1657 (E.D. La. June 6, 2006).  
 xvii Id.  
 xviii *Tuazon v. R. J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006).  
 xix Id. at 1167.  
 xx Petition for Writ of Certiorari, *R.J. Reynolds Tobacco Co. v. Tuazon*, No. 05-1525, at 2.  
 xxi *Tuazon*, 433 F.3d at 1168.  
 xxii The Court disagreed with Reynolds' assertion that *Tuazon's* choice of forum was not entitled to deference because he was a "foreign" plaintiff. The Court stated that a resident alien -- which *Tuazon* was by virtue of immigrating to the U.S. eight days before filing suit -- was entitled to the same deference in the context of a *forum non conveniens* analysis as a U.S. citizen and was not a "foreign" plaintiff. Id. at 1177, n.6, citing *Piper*, 454 U.S. at 256 n.23, 102 S. Ct. 252. The Court also found that the private and public interest factors weighed against dismissal, relying heavily on *Tuazon's* status as a current U.S. resident. *Tuazon*, 433 F.3d at 1180-1182.  
 xxiii Id. at 1182.  
 xxiv Petition for Writ of Certiorari, supra footnote 20, at i.  
 xxv Id. at 6, 20-21.  
 xxvi In re Blood Prods., 408 F. Supp. 2d at 591.  
 xxvii See, e.g., *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), 2005 WL 1870811, at \*18 (S.D.N.Y. Aug. 9, 2005) (dismissing complaint seeking damages as a result of injuries allegedly sustained after ingestion of an experimental antibiotic administered in Nigeria, allegedly without informed consent, for failure to state a claim under the Alien Tort Statute, but holding that if it had subject matter jurisdiction, the court would have dismissed the action on *forum non conveniens* grounds provided Pfizer (i) accepted service in Nigeria, (ii) waived any statute of limitations defenses available in Nigeria, (iii) made available for discovery and for trial, at its own expense, documents and witnesses (including retired employees) within its control, and (iv) did not act to prevent plaintiffs from returning to the U.S. court in the event the Nigerian court did not accept jurisdiction). The case is presently on appeal to the Second Circuit. *Abdullahi et al. v. Pfizer, Inc.*, No. 05-4863 (2nd Cir.)

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