

PRODUCT LIABILITY

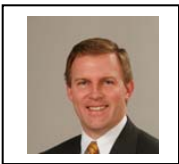
June 2009

IN THIS ISSUE

David Wix reports on a recent decision by the Seventh Circuit Court of Appeals that affirmed the dismissal on forum non conveniens grounds of a case filed by Argentine plaintiffs against American manufacturers in the United States.

The Doctrine of Forum Non Conveniens: Are Foreign Plaintiffs Suing American Manufacturers in the United States Entitled to a Presumption in Favor of Their Choice of Forum?

ABOUT THE AUTHORS



David Wix, formerly a Partner at Baker & McKenzie, is the Managing Partner of The Wix Law Group, LLC in Deerfield, Illinois, which he started in April 2009. Mr. Wix focuses his practice on product liability and commercial litigation as well as providing advice to manufacturers on product recall and product safety matters.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one broadcast e-mail, members can obtain information on experts from the entire Committee membership.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Amy Sherry Fischer
Vice Chair of Newsletters
Foliart, Huff, Ottaway & Bottom
(405) 232-4633
amyfischer@oaklahomacounsel.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

w: www.iadclaw.org p: 312.368.1494 f: 312.368.1854 e: mdannevik@iadclaw.org

With the continued expansion of the global economy, American manufacturers routinely market and sell their products outside the United States. When those products are alleged to have injured consumers in foreign countries, the plaintiffs often choose to pursue product liability lawsuits here in the United States. Depending on the circumstances, including consideration of the foreign jurisdiction's legal system and applicable product liability laws, an American manufacture may decide that defending the case in the United States on its own turf is the preferred course of action. But what if for strategic or other reasons the American manufacture would rather defend the case abroad in the plaintiff's home country where the injury actually occurred? What factors will a court consider when faced with a motion to dismiss on *forum non conveniens* grounds in such a situation? The Seventh Circuit Court of Appeals recently addressed this issue in *Abad v. Bayer Corp.*, 2009 U.S. App. LEXIS 9435 (7th Cir. May 1, 2009).

The *Abad* decision actually involved the consolidation of two appeals presenting similar issues of *foreign non conveniens*. In both cases (*Abad* and *Pastor*) the plaintiffs were Argentine citizens, resident in Argentina, who filed product liability suits in federal district courts against American manufacturers for injuries sustained in Argentina. In each case the district judge, on the defendants' motion, after considerable pretrial discovery, invoked *forum non conveniens* and dismissed the case in favor of the courts of Argentina.

Abad was a class action on behalf of some 600 Argentines where hemophiliacs claimed that they (or their decedents) were infected with the AIDS virus because the defendant manufacturers of the clotting factor that hemophiliacs take to minimize bleeding failed to eliminate the virus from donors' blood from which the clotting factor was made. The class members had acquired and used and

become infected by the defendants' blood solids in Argentina.

Pastor was a wrongful-death suit stemming from a fatal auto accident in Argentina when a Ford Explorer, an SUV equipped with tires manufactured by Bridgestone/Firestone rolled over. The suit, originally filed in a state court in Florida and removed to Federal court, charged the defendants with defects in the design, manufacture, and testing of the vehicle and its tires.¹

On appeal, the plaintiffs, relying on *Colorado River Conservation District v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), argued that federal courts have the "virtually unflagging obligation" to exercise the jurisdiction given them and a motion to dismiss on *forum non conveniens* grounds must be denied unless the balance of relevant factors inclines very steeply in favor of dismissal, because of the presumption in favor of giving the plaintiff his choice of courts.² Defendants argued that a ruling granting a motion to dismiss on *foreign non conveniens* grounds can only be reversed if the district court was guilty of an abuse of discretion.

After discussing the applicable standard of review, Judge Posner, who authored the opinion on behalf of the Court, acknowledged that foreign plaintiffs are entitled to sue American manufacturers in the United States and many judicial opinions recognize "a presumption in favor of allowing a plaintiff his choice of courts rather than insisting that he choose the optimal forum." However, those cases usually refer to an American plaintiff wanting to litigate in the United States rather than a foreign court. Where,

¹ The suit, one of a number of similar suits, was sent by the Multidistrict Litigation Panel to the federal district court in Indianapolis for pretrial discovery.

² Subject matter and personal jurisdiction were not an issue in this case.

as was the case here, the plaintiffs could have sued in their own nation's courts, the presumption in favor of the plaintiffs' choice of forum is weakened and when application of the doctrine would send the plaintiffs to their home court, the presumption in favor of giving plaintiffs their choice of court is little more than a tie breaker in the *foreign non conveniens* analysis. See *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749, 752-53 (7th Cir. 2008). Judge Posner stated:

When the plaintiff wants to sue on the defendant's home turf, and the defendant wants to be sued on the plaintiff's home turf, all really that the court is left to weigh is the relative advantages and disadvantages of the alternative forums. In such a case there is no reason to place a thumb on the scale, since there is no prima facie reason to think a plaintiff discriminated against by being sent to his home court or a defendant discriminated against by being forced to stay and defend in *his* home court.

After determining that the foreign plaintiffs suing in the United States were not entitled to a presumption in favor of their choice of forum, Judge Posner turned to the particularized circumstances that leaned in favor of U.S. courts or Argentine courts. Not surprisingly, plaintiffs argued that the United States had a greater interest in the litigation than Argentina because the defendants are American companies, while the defendants argued that Argentina had a greater interest than the United States because the plaintiffs are Argentines. But according to Judge Posner, "[t]he reality is that neither country appears to have any interest in having the litigation tried in its courts rather than in the courts of the other country; certainly no one in the government of either country has expressed to us a desire to have these lawsuits litigated in its courts. For this is ordinary private tort litigation

that "implicates," as some judges like to say, no national interest." Instead, the only consideration was "whether the district judge in either case was unreasonable in deciding that, given the circumstances of each case, the remaining litigation should be conducted in Argentina rather than in Illinois or Florida."

In affirming the district court's ruling, Judge Posner addressed the specifics of each case. Addressing the *Abad* case, Judge Posner focused first on the remaining discovery to be completed in the case. By virtue of a ruling by the district court, plaintiffs' pretrial discovery had already been completed; however, the defendants still wanted to obtain depositions and medical records of the class members which would have to be done in Argentina. Plaintiffs argued that the discovery taken to date would have to be translated to Spanish if the case were to be litigated in Argentina. Defendants, in turn, argued that the depositions and documents obtained from class members in Argentina would have to be translated into English if the case were to be litigated in the United States. Although plaintiff claimed that it had 12 million documents in its database, Judge Posner chastised them for not presenting a realistic estimate of the quantity of discovery materials that would actually be used at trial and for not providing any estimates of the costs of translating those documents to Spanish. Had they done so, Judge Posner would have given those estimates substantial weight. Instead, in the absence of any actual evidence of relative burdens, he considered the costs of translation to be "a wash."

Judge Posner then turned to an analysis of the substantive law that would be applied to the case. Plaintiffs claimed that under Argentine choice of law rules the substantive law that would be applied if this case were litigated in an Argentine court would be American rather than Argentine law. Had this been true, it would have been a

“powerful argument” for leaving the case in the United States. However, Judge Posner determined that this was not true and pointed out there was a lack of cases or materials addressing the issue.

Instead, Judge Posner determined that the place of the injury would determine the substantive law to be applied:

“[I]n the absence of unusual circumstances, the highest scorer on the 'most significant relationship' test is--the place where the tort occurred. For that is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law.” (*Citations omitted*). That is particularly true when the place of the accident is also the place in which the victims were injured and were resident, for that offsets the argument that the jurisdiction of the defendant has an interest in regulating the conduct of its people and firms. Victim location and injurer location are valid considerations. But when they point to two different jurisdictions they cancel out, leaving the place where the injury (and hence the tort) occurred as the presumptive source of the law governing the accident. So if these cases were to be tried in American courts, in all likelihood the law of Argentina would govern the substantive issues.³

In addition to determining that Argentine law would apply, Judge Posner noted that Argentine courts would be in a much better position to decide issues of causation and whether

“alternative causation theories” or the “market share” approach would apply since the plaintiffs did not know which blood-solids manufacturer or manufacturers made the blood solids they took:

[T]he uncertainty of Argentine law is a compelling reason why this case should be litigated in Argentina rather than in the United States. When the decision of a case is uncertain because the orthodox sources of law do not provide adequate guidance (apparently no code provision or judicial decision in Argentina accepts or rejects market-share liability), the court asked to decide must make law, in this case Argentine law; and an Argentine court is the more competent maker of Argentine law--more competent in the sense of more legitimate, but also more competent in the sense of being better able to decide the case correctly because more at home in the relevant legal tradition than an American court would be.

Turning to the *Pastor* case, Judge Posner again focused on the burdens of discovery and the substantive law to be applied. He agreed with the district court’s decision that Argentine law would apply because the accident occurred in Argentina and that an Argentine court would be better suited to interpret Argentine law:

There is no issue of "alternative causation theories" in this rather routine products-liability case, although some uncertainty remains about Argentine tort law because, so far as we can determine, the civil code and judicial decisions in Argentina do not address many of the issues that can arise in an accident case. The district judge correctly ruled that the law applicable to the suit is Argentine law, and, other things being

³ It is interesting to note that the district court actually determined that U.S. law would apply. However, Judge Posner, as noted, disagreed.

equal, an Argentine court is, as we said, more competent than an American court to apply Argentine law, and, *a fortiori*, to create it, which may be necessary, though this is less likely in *Pastor* than in *Abad*.

And while he acknowledged that the translation burden may be greater for the plaintiffs if the case were tried in Argentina, he again chastised the plaintiffs for failing to present any evidence substantiating the claimed costs.

So what does this mean for American manufacturers sued in the United States by foreign plaintiffs when they would prefer to litigate in a foreign jurisdiction? Obviously, the Seventh Circuit's decision in *Abad* does not stand for the proposition that a motion to dismiss on *foreign non conveniens* grounds in this situation will always be successful – had the plaintiffs in *Abad* substantiated their claims of undue burden and costs or had U.S. law been determined to apply, the result likely would have been different. However, American manufacturers can take solace in the fact that a foreign plaintiff will not necessarily be entitled to a presumption in favor of the chosen forum in the United States just because the manufacturer is located here. As a result, defendants facing this situation can base their decisions on how to proceed in this case on the “particularized circumstances” of whether the appropriate forum should be in the United States or a foreign jurisdiction.



PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY (2) 2009

Up in Smoke: The Changing Atmosphere of Mattress and Upholstered Furniture Flammability Standards

David Rheney and Laura Figueroa

MAY (1) 2009

Nanotechnology Litigation: Factors to Consider When Advising Your Clients

John R. Mitchell, Clifford S. Mendelsohn, and Michelle D. Bogle

APRIL 2009

The Consumer Product Safety Improvement Act and its Liability Implications

Frank Leone and Bruce J. Berger

MARCH 2009

Defending the Punitive Damages Claim: How to Use *Philip Morris v. Williams* and *Exxon Shipping Co. v. Baker*

Kristen E. Dennison and William J. Conroy

FEBRUARY 2009

Made in China: Consumer Product Lawsuits Imported to the United States

Gregory Shelton

JANUARY 2009

The Potentially Dangerous Intersection of New York Labor Laws and Product Liability and Toxic Tort Cases

Roy Allen Cohen and Allen I. Young

DECEMBER 2008

Witness Manipulation in Product Liability Litigation

Creighton (Chip) Magid and Joseph Perkovich

DECEMBER 2008

The "Sophisticated User" Defense in Product Liability Actions

Brian P. Heermance and Kevin A. Hickman

DECEMBER 2008

The Fifth Circuit Shuts the Door to Economic Loss Doctrine Exceptions

Daryl G. Dursum