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The Latest Trends and Tactics in Prosecuting and Defending Foreign Mass Accident Litigation*

The Latest Trends and Tactics in Prosecuting and Defending Foreign Mass Accident Litigation

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I. Introduction

The litigation of foreign aviation accidents in the United States is fundamentally focused on whether the litigation should remain in the United States or should be dismissed in favor of re-filing in a foreign forum. While the *forum non conveniens* doctrine continues to dominate this analysis, the outcome of *forum non conveniens* motions in United States litigation from foreign aviation accidents is strongly correlated to whether the action is pending in federal or state court. This reality has spawned a series of strategies and counter-strategies and pleading and motion tactics through which plaintiffs typically commence litigation in state court (often in Cook County, Illinois) and seek to maintain that state forum, while defendants seek to remove the litigation to a federal forum. This paper addresses significant *forum non conveniens* decisions, as well as the latest trends, strategies and tactics in the seemingly never-ending battle over forum.¹

II. Summary of Significant Federal Court *Forum Non Conveniens* Decisions

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TAM Airlines Flight 3054 Disaster

In *Tazoe v. Airbus S.A.S.*,² the Eleventh Circuit affirmed the *forum non conveniens* dismissal of claims arising from the worst aviation disaster in Brazilian history.

On July 17, 2007, TAM Airlines Flight 3054 overran a rain-soaked runway as it attempted to land in Sao Paulo, Brazil and crashed into a warehouse and fueling station killing 187 people on board the airplane and twelve people on the ground. Roberto Tazoe, a U.S. citizen living in Florida, was among the victims. The airplane had an inoperative thrust reverser on its number two (right) engine. The thrust reversers help slow the airplane down upon landing along with the airplane's brakes. TAM knew that the number two engine's thrust reverser was not working, but decided that the airplane was still safe to fly as long as its pilots followed proper procedures. When they attempted to land in Sao Paulo, however, the pilots made a mistake: they left the throttle of the number two engine in "climb" mode instead of pulling it back to idle. This meant the number two engine produced more thrust and created an asymmetrical thrust condition when the pilots deployed the number one engine's thrust reverser. The mistake also caused the airplane's

¹ The authors wish to acknowledge the assistance of Michael G. Koueiter of Condon & Forsyth LLP in the preparation of this paper.

² 631 F.3d 1321 (11th Cir. 2011)

spoilers not to deploy and its auto brakes not to engage. As a result, the pilots could not stop the airplane and it ran off the runway.

After the Flight 3054 disaster, many lawsuits were filed in the Southern District of Florida. The plaintiffs settled all of their claims against TAM, and the *forum non conveniens* issue before the court related to the claims against the manufacturer defendants. The manufacturers agreed to submit themselves to the jurisdiction of Brazil and to toll the statute of limitations there, and the district court accordingly concluded that Brazil was an available and adequate alternative forum. The court then concluded that the balance of private and public interest factors favored Brazil, even for Mr. Tazoe's estate's claims.

On appeal, the Eleventh Circuit first noted that it would only disturb the district court's dismissal if it determined that the district court had abused its discretion and that the district court was entitled to substantial deference. The court then considered whether the district court was entitled to dismiss the complaints filed by the families of the Brazilian victims. The court found that Brazil was an adequate alternative forum, based largely on the manufacturer's agreement to submit to jurisdiction and to waive the statute of limitations.

The court also agreed with the district court that the "vast majority [of evidence] appears to be in Brazil or France." The wreckage was in Brazil, the "results of five governmental investigations of the accident" were in Brazil, damages information was in Brazil, the court lacked authority to compel certain witnesses to attend proceedings, the manufacturers could not implead certain potential responsible parties in the U.S. litigation, the accident site was in Brazil, and a trial in the Southern District of Florida would incur significant document translation costs.

The court separately considered the Tazoe claim because the family was entitled to "somewhat more deference" in the choice of a U.S. forum than the choices of the foreign plaintiffs. Nevertheless, the court affirmed the dismissal, finding that the district court did not abuse its discretion when it concluded that "material injustice is manifest" in the claims of the Tazoe family against the manufacturers since those defendants could not compel certain witnesses and evidence and implead potentially liable third-parties.

Air France Flight 447 Disaster

In a widely-followed decision, Judge Stephen Breyer of the Northern District of California recently dismissed the claims of a U.S. citizen based on the *forum non conveniens* doctrine – even claims brought under the Montreal Convention, which provides that the plaintiff's principal and permanent residence has the jurisdiction to hear the case if the carrier is subject to jurisdiction there.

*In re Air Crash Over the Mid-Atlantic on June 1, 2009*³, arose from the crash of Air France Flight AF447, which took off from Rio de Janeiro bound for Charles de Gaulle Airport in France. The aircraft used for Flight 447 was an Airbus A330-200. The last contact from the crew was a routine message to Brazilian air traffic controllers over the Atlantic Ocean. Forty minutes later, the airplane emitted a four-minute-long series of automatic radio messages, identifying numerous difficulties. The aircraft then disappeared off radar. The disaster took the lives of 216 passengers and twelve crew members.

Among the Flight 447 passengers were Mr. and Mrs. Harris, U.S. citizens residing in Brazil. Their estates' representatives sued Air France in the United States based on the Montreal Convention, which provides for jurisdiction, *inter alia*, in the jurisdiction where the plaintiff maintained his or her "principal and permanent residence." Air France moved to dismiss the Harris claims, arguing that because Mr. and Mrs. Harris were living in Brazil and Mr. Harris worked in Brazil they had established Brazil as their residence and they could not sue in the United States. The court rejected Air France's argument, finding that the Montreal Convention's use of the word "permanent" required more than just determining where the victim was living at the time of the accident. The court examined the Montreal Convention's drafting history and concluded that "principal and permanent residence" was akin to domicile and while Mr. and Mrs. Harris were residing in Brazil, they had not abandoned the U.S. domicile. This element of the decision may have significant influence on the law since there have been few reported decisions on the issue.

After finding that the Montreal Convention provided jurisdiction, the court found that it could still dismiss claims based on the *forum non conveniens* doctrine. The court reached this conclusion despite a prior ruling in which the Ninth Circuit had held that the *forum non conveniens* doctrine conflicted with jurisdictional provisions of the Warsaw Convention, the predecessor of the Montreal Convention. The Ninth Circuit had found that permitting *forum non conveniens* dismissals would conflict with the Warsaw Convention's purpose of allowing plaintiffs flexibility in choice of forum and "would undermine the [Warsaw convention's] goal[s] of uniformity [and balance]."⁴

The court found, however, that *forum non conveniens* dismissals were appropriate under the Montreal Convention. It noted that while the Warsaw Convention was drafted at a time when the doctrine of *forum non conveniens* was fairly new and, therefore, the Convention's silence on the doctrine meant that it was

³ 2010 WL 3910354 (N.D. Cal. October 4, 2010).

⁴ *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 2010 WL 3910354 (N.D. Cal. Oct. 4, 2010) (quoting *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002)).

not available, the doctrine was well established at the time the Montreal Convention was drafted. Secondly, the court noted the positions taken by the United States, including those taken during the Montreal Convention's drafting.⁵

The court then recognized the trend toward dismissing the claims of foreign plaintiffs: “[c]ourts inside and outside the Ninth Circuit have dismissed on *forum non conveniens* grounds air crash cases brought by primarily foreign plaintiffs.”⁶ On private interest factors, the court relied heavily upon defendants’ agreement to “provide all of their evidence in France.” In contrast, the court found it would be very difficult to get the evidence, including all the physical evidence, located in Europe, into the U.S. litigation.

The court held that the public interest factors heavily favored dismissal, finding that France was more interested than the U.S. in the litigation since the flight was destined for France and had many more French citizens than U.S. citizens on board. The court found that the U.S. interests were not sufficient to justify the investment of “judicial time and resources” in the case. The court also noted that the foreign plaintiffs could name Air France as a defendant in France, but were not able to do so in the U.S.

In an aside, the court stated that if the defendants were to bring Air France into the U.S. litigation brought by the foreign plaintiffs, it would create tension with the Montreal Convention, which does not provide jurisdiction over Air France for the foreign plaintiffs’ claims. The court concluded that this tension, and the possibility that the defendants would be unable to successfully implead Air France into the suits brought by the foreign plaintiffs, weighed in favor of dismissal.

Following the dismissal, the U.S. plaintiffs filed a motion to reconsider, arguing that there was no basis to dismiss the “damages only” cases against Air France brought under the Montreal Convention. Under the Convention, Air France is strictly liable for the accident up to 100,000 Special Drawing Rights (approximately \$158,000) and would have to show that it was not negligent to avoid liability beyond that amount for provable compensatory damages. The plaintiffs argued that dismissing the claims would create tension with the Montreal Convention, which provided for U.S. jurisdiction and that there was no justification under the *forum non conveniens* doctrine to dismiss what are essentially the damages claims of U.S. citizens. The court denied the motion, and the U.S. plaintiffs have appealed. The district court has not yet ruled on a motion to reconsider filed by the foreign plaintiffs.

⁵ *Id.* at § 5 (citing *In re West Caribbean Airways, S.A.*, 619 F.Supp. 2d at 13426) (The U.S. filed statement of interest in the West Caribbean Airways case favoring the availability of *forum non conveniens* in Montreal Convention cases).

⁶ *Id.* at * 6

The Gol Flight 1907 Disaster

In *In re Air Crash Near Peixoto De Azeveda, Brazil on September 29, 2006*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008), wrongful death claims were brought in the Eastern District of New York by Brazilian plaintiffs representing decedents who were Brazilian citizens at the time of their deaths. The claims arose from the Gol Flight 1907 disaster on September 29, 2006.

A Gol Flight 1907 aircraft had collided with a new Embraer EMB-135BJ Legacy 600 jet (the “Legacy jet”) operated by defendant ExcelAire, a New York company. The pilots of the Legacy Jet had picked it up at Embraer in Brazil and were ferrying it to the U.S. The pilots were U.S. citizens residing in New York. The plaintiffs sued ExcelAire and the pilots of the Legacy. The plaintiffs also sued Honeywell, another U.S. company, alleging that defects in avionics equipment in the Legacy were the cause of the collision. Other named defendants included Raytheon, Lockheed Martin and Amazon Tech., all U.S. companies, which had worked on the radar system for the Amazon region of Brazil. It is noteworthy that Brazil considers the radar system part of its national security infrastructure. Another U.S. defendant, ACSS, manufactured the Traffic Alert and Collision Avoidance System (“TCAS”).

The court noted “other [involved] entities” including Gol and Embraer, both headquartered in Brazil, A-Tech, a Brazilian technology company, Brazil’s air traffic control agency and Brazil’s government agency were charged with investigating accidents.

Like all cases involving foreign accidents, the Gol disaster spawned a massive investigation outside the U.S. It was principally investigated by the Brazilian authorities, but the U.S. National Transportation Safety Board and the Federal Aviation Administration also participated in the investigation. Following the disaster a criminal proceeding was commenced in Brazilian federal court and civil actions against Gol also were commenced (Gol is 100% liable to the passengers under Brazilian law). Many of the cases in Brazil had already been resolved when the U.S. court addressed the *forum non conveniens* question.

As in almost every case, the defendants, with the exception of the Legacy pilots and ExcelAire, agreed to Brazilian jurisdiction, to waive any statute of limitation defense and to make available witnesses and evidence in Brazil. ExcelAire agreed to everything except tolling the statutes of limitation. The pilots would not agree to return to Brazil for fear of criminal prosecution, but did agree to appear for a videotaped deposition in the U.S.

The court provided a detailed discussion regarding the deference it would accord to the foreign plaintiffs’ choice of forum and, while rejecting the defendants’ argument that the plaintiffs were entitled to no deference, the court decided that the deference had to be limited. The court rejected the plaintiffs’

reliance on a U.S.–Brazil Treaty that provided equality of access to the courts for citizens of each nation who are “transient or dwelling” in the territory of the other nation to argue that the court must give full deference because the plaintiffs were not present in the U.S. The court reduced the level of deference further because it found that none of the plaintiffs had convenient residence in relation to the forum. After weighing the factors set forth in the Second Circuit’s *Iragorri v. United Tech., Corp.*⁷ decision, the court found that they did not “move plaintiffs to any higher level of deference than they started with based on their foreign-citizen status.” In other words, the court set the bar the defendants had to hurdle to obtain a dismissal relatively low.

The court rejected plaintiffs’ arguments that Brazil was not an available alternate forum. It then found that the private and public interest factors fell “on both sides of the aisle, and down the middle” In the end, it decided to dismiss the case because of its concern that the court lacked jurisdiction over potentially liable parties and also lacked the power to compel the production of documents from Brazil, or the testimony of witnesses in Brazil. The Second Circuit affirmed the court’s ruling in a summary order, stressing the deference owed to the trial court in making *forum non conveniens* determinations.⁸

Other Recent Decisions

In *Francois v. Hartford Holding Co.*, 2010 WL 1816758 (D.V.I. May 5, 2010), wrongful death actions were brought in the U.S. Virgin Islands on behalf of four Dominican nationals and a citizen of the Netherlands for their damages relating from a crash on Dominica. The flight originated in St. Maarten and its destination was Dominica. Cardinal Airlines, Ltd. (“Cardinal”), a Dominican airline, sold the tickets to the plaintiffs. Defendant Hartford Holding Company leased the airplane to defendant Air Anguilla, a St. Thomas corporation, which maintained it and operated it for Cardinal pursuant to a lease agreement entered into in Dominica. The Organization of Eastern Caribbean States Civil Aviation Authority, the United States National Transportation Safety Board and the Federal Aviation Administration investigated the accident.

The court found Dominica was an available forum based on defendants’ consent to jurisdiction and that Dominica was an adequate alternative forum, noting that Dominica recognizes a cause of action for personal injury arising from negligence. The court also relied on the defendants’ waiver of the statute of

⁷ 274 F.3d 65 (2d Cir. 2001). The *Iragorri* factors for determining whether the plaintiff’s choice of forum was genuinely motivated by convenience include the following: 1. The convenience of plaintiff’s residence to the forum, 2. The availability of witnesses and evidence in the forum, 3. The defendants amenability to suit in the forum, 4. The “availability of appropriate legal assistance,” and 5. “other reasons related to convenience or expense.”

⁸ *Lleras, et al. v. Excelsaire Services, Inc. et al.*, 354 Fed.Appx. 585, 2009 WL 4282112 (2d Cir. Dec. 2, 2009).

limitation, and rejected the affidavit of plaintiffs' expert that the Dominican courts would not recognize a waiver of the statute of limitations.

The plaintiffs, none of whom were United States citizens at the time the action was filed, and only one of whom, Mary Anthony, purportedly became a citizen since then, have given no reason why they chose the District of the Virgin Islands as the forum. None of them resides here. Their attorney has no office here and is appearing *pro hac vice*. None of the acts regarding liability or damages occurred here. The only connection to the Virgin Islands is that one defendant, Air Anguilla, had an office in St. Thomas. Thus, the plaintiffs' choice of the District of the Virgin Islands is not entitled to a strong presumption of convenience, but will be given some deference.⁹

The court concluded that the Dominican courts are better than the U.S. courts at applying Dominican laws and dismissing the case avoids the U.S. court with its "already back-logged civil case inventory" from having to address any conflicts of laws issues. *Id.* Dismissing the case avoids U.S. citizens from having to serve on the jury and would eliminate one action from the congested docket. The private interest factors were significantly impacted by the defendants conceding liability, leaving damages the only issue to be determined.

Can v. Goodrich Pump & Engine Control Systems, Inc., 711 F. Supp. 2d 241 (D. Conn. 2010), arose from a helicopter crash in Turkey. The helicopter was manufactured in the United States by MD Helicopters, Inc., an Arizona company, which plaintiffs did not sue. Plaintiffs, who were all citizens and residents of Turkey, sued component parts manufacturers, including Rolls-Royce Corporation and Goodrich Control Systems, Inc. The *forum non conveniens* issue came before the court with an unusual procedural history because a state court in Indiana had already dismissed an almost identical claim on *forum non conveniens* grounds and the main issue before the court was whether the prior decision was entitled to collateral estoppel. Furthermore, plaintiffs brought a spoliation claim, which they argued was not subject to the prior order. The court found that it had addressed the issue and rejected the plaintiffs' argument that the prior decision was not preclusive. The court found that Turkey was an adequate alternative forum for the litigation, that plaintiffs' choice of the U.S. as a forum was entitled to little deference and the public and private interest analysis strongly favored dismissal.

In re Air Crash Disaster over Makassar Strait, Sulawesi,¹⁰ arose from the crash of Adam SkyConnection Airlines Flight DHI 571, a Boeing 737 airplane, off the coast of Sulawesi. The crash killed all 102 persons on board. The investigators found that the crash was caused because the pilots became engrossed

⁹ *Id.* at *5

¹⁰ 2011 WL 91037 (N.D. Ill. Jan. 11, 2011).

with troubleshooting a system malfunction of the airplane's inertial reference system and did not pay attention to their other flight responsibilities. While they were troubleshooting, the airplane's autopilot disengaged and the airplane went out of control. When the pilots finally attempted to correct the problem, they over-stressed the airplane and caused a structural failure.

Plaintiffs, none of whom were U.S. citizens or residents, brought suit in the Northern District of Illinois against a number of U.S. entities, including Boeing. Defendants moved to dismiss on *forum non conveniens* grounds, arguing that the litigation belonged in Indonesia.

The court rejected plaintiffs' argument that corruption in Indonesia rendered it an unavailable forum. The court decided that the case should be dismissed in favor of Indonesia, finding that it would be easier there to obtain necessary evidence and because defendants could implead the airline in Indonesia.

III. Summary of Significant State Court *Forum Non Conveniens* Decisions

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In a series of cases, the Circuit Court of Cook County, Illinois has denied motions to dismiss based upon *forum non conveniens* in products liability and negligence actions brought against Illinois and other U.S. defendants arising from international aviation cases. The Illinois Appellate Court has affirmed such denials in every appeal brought before it and the Illinois Supreme Court has denied defendants' petitions for leave to appeal.

Ellis v. AAR Parts Trading, Inc.

In *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 828 N.E.2d 726 (1st Dist. 2005), plaintiffs, residents of the Philippines, brought a wrongful death action arising from an air crash in the Philippines. Defendants moved to dismiss based upon *forum non conveniens*, proposing an alternative forum in the Philippines. The Circuit Court denied defendant's motion and the Appellate Court affirmed. Even though the defendants in *Ellis* claimed there were at least 31 witnesses with knowledge of such facts as pilot training, aircraft maintenance and crash investigation residing in the Philippines, the Appellate Court found that such facts did not strongly favor a transfer where plaintiffs' action was based upon defects in the aircraft; all the evidence regarding plaintiffs' cause of action was in the U.S., and not in the Philippines; and the other evidence was scattered among several forums in the U.S., such that no one forum predominated.

The Appellate Court in *Ellis* stated that "it is incredulous to observe that the defendants *thoroughly ignore the fact that the theories plead against them concern the defective condition of the aircraft,*" quoting the

Circuit Court (emphasis in the original), *Ellis*, 357 Ill. App. 3d at 743, 828 N.E.2d at 743. Significantly, the Appellate Court in *Ellis* held that it would be an abuse of discretion for a trial court to grant a *forum non conveniens* motion under these facts.

Vivas v. Boeing, et al.

In *Vivas v. Boeing, et al.*, 392 Ill. App. 3d 644, 911 N.E.2d 1057 (1st Dist. 2009), plaintiffs, primarily citizens of Peru, brought wrongful death and personal injury claims for product liability and negligence against Illinois resident defendant Boeing and the U.S. engine manufacturer arising from the crash of a Peruvian airline during a flight between two cities in Peru. Defendants moved for a *forum non conveniens* dismissal, proposing Peru as the alternative forum. The Circuit Court denied defendants' motion and the Appellate Court again affirmed.

The Appellate Court first held that the burden is on the party seeking dismissal to show that the relevant factors “strongly favor” transfer, citing, *inter alia*, *Ellis, supra*. The Court acknowledged that a significant portion of the crash evidence was in Peru, but, like the Circuit Court, it found it important that all the evidence in the products liability case relevant to the design, manufacture and assembly of the aircraft was in the United States (if not in Illinois). The Appellate Court, like the Court below in that case, further acknowledged that if the case remained in Illinois, witnesses in Peru could not be compelled to come to the United States, but found that if the forum was changed to Peru, American witnesses could not be compelled to appear in Peru. The Appellate Court held that the Circuit Court was correct in finding that where evidence is scattered among various forums, the private interest factors do not strongly weigh in favor of a *forum non conveniens* dismissal. *Vivas*, 392 Ill. App. 3d at 159.

As for the public interest factors, the Appellate Court held that “product liability actions are not ‘localized’ cases; they are cases ‘with international implications’” and “Americans, no less than Peruvians, have a specific interest in the safety of [the] Boeing . . . aircraft which fly in our skies,” “particularly when one of those corporations has its world headquarters here.” *Id.* at 661. The Court in *Vivas* also found that choice of law factors are not usually dispositive and that an Illinois court is competent to determine which law applies to the controversy and to apply the law of Peru if necessary. *Id.* at 662.

Thornton, et al. v. Hamilton Sundstrand Corp., et al.

In *Thornton, et al. v. Hamilton Sundstrand Corp., et al.*, No. 07 L 4642 (Cir. Ct., Cook County, Illinois, Sept. 5, 2008), plaintiffs, residents of Australia, brought wrongful death actions for products liability and negligence against Illinois defendant Boeing and others, arising from the crash of an Australian commuter

plane in Australia. The Circuit Court denied defendants' *forum non conveniens* motion to dismiss, argued on the same day before the same judge as in *Vivas*, and the Appellate Court affirmed. *Thornton, et al v Hamilton Sundstrand Corp. et al*, No. 1-08-274 (Illinois Appellate Court, First District, Aug. 31, 2009).

The Circuit Court again noted that all of the defendants were U.S. corporations and defendant Boeing has its headquarters in Illinois. The Court found that potential trial witnesses and sources of proof were scattered among various forums, including Texas, Washington, Colorado, and Australia, with all the evidence as to the products' design located in the U.S. The Court again found that one party would be inconvenienced no matter where the action was litigated, but that when potential witnesses are scattered among various states and countries, no single forum can be more convenient. Again, defendants in *Thornton*, like defendants in *Vivas*, did not submit any affidavits asserting that a trial in Illinois would be inconvenient for any of their witnesses. On the public interest factors, the Circuit Court, while recognizing Australia's interest in the case, held that Illinois residents have an interest in resolving a matter when an Illinois corporation takes advantage of Illinois law.

The Illinois Appellate Court, in its own detailed opinion, affirmed the Circuit Court on every essential point and, once again, the Supreme Court denied leave to appeal.

Arik v. Boeing, et al.

The Circuit Court denied yet another *forum non conveniens* motion to dismiss brought by Illinois resident defendants Boeing and McDonnell Douglas and another U.S. defendant in *Arik v. The Boeing Company, et al.*, No. 08 L 12539 (Cir. Ct., Cook County, Ill., Feb. 18, 2010), an action arising from the crash of a Turkish airline in Turkey. This time, defendants, relying upon certain language in the *Vivas* Appellate Court opinion, moved for *forum non conveniens* dismissal proposing, first, an alternative forum in Turkey or, as a second choice, an alternative forum in Washington. As it had in *Vivas* and *Thornton*, the Court in *Arik* found that two of the defendants were headquartered in Cook County, Illinois; potential trial witnesses and evidence were scattered among different countries and states, with no one forum predominating; all the evidence concerning the aircraft and components' design and manufacture was in the U.S.; and defendants had not submitted any affidavits attesting to any inconvenience of the Illinois forum.

Again, as it did in *Vivas* and *Thornton*, the Court in *Arik* acknowledged that Turkey had an interest in the accident because of its conduct of the investigation, but held that Illinois residents have an interest in resolving a matter when Illinois corporations, which take advantage of Illinois law, are involved in the litigation.

Turning to defendants' proposed second alternative forum of Washington, the Court held that the relevant private and public interest factors also did not weigh strongly in favor of dismissal to a Washington court, despite defendants' contention that the majority of documents and witnesses relating to the design and manufacture of the aircraft and components were in Washington. The Court found that trial witnesses and evidence were scattered among different states other than Washington, as well as the U.S. and other countries, and repeated that no single forum was more convenient than another.

Since it had only recently affirmed the Circuit Court's denial of *forum non conveniens* motions to dismiss in *Vivas* and *Thornton*, the Illinois Appellate Court took the unusual step of denying defendants' leave to appeal. However, on defendants' petition to the Illinois Supreme Court, that Court directed the Appellate Court to hear defendants' appeal. That appeal to the Appellate Court is pending.

Sabatino, et al. v. Boeing, et al.

The Circuit Court of Cook County also denied defendants' *forum non conveniens* motion to dismiss, in favor of an alternative forum in the United Kingdom or, as a second choice, Florida, in *Sabatino, et al. v. Boeing, et al.*, No. 09 L 1056 (Cir. Ct., Cook County, Illinois, March 3, 2010). In *Sabatino*, the plaintiffs were United Kingdom residents who brought suit for personal injuries against Boeing and others resulting from their exposure to fumes onboard a Boeing aircraft during a flight operated by a British airline from London to Orlando. The Circuit Court held that plaintiffs' right to select a forum is substantial and unless the relevant factors weigh strongly in favor of transfer, plaintiffs' choice of forum should rarely be disturbed, even where the chosen forum is neither plaintiffs' home nor the site of the event. The Court held the defendant must prove that its alternative forum is inconvenient to defendant *and* its proposed alternative forum is more convenient to *both* plaintiffs and defendants.

Considering the private interest factors, the Court held that because the parties reside in various forums, including Illinois, other states in the United States, and the United Kingdom, one forum cannot be said to more convenient to all the parties. It then held that potential testamentary and documentary evidence existed in multiple forums, including Illinois, other states in the United States, and the United Kingdom, but that in this age of technology, access to documentary and real evidence is a less significant factor. The Court further found that, regardless of the forum in which the case would be litigated, there would be problems with securing the attendance of unwilling witnesses through compulsory process and it would be costly to obtain the testimony of willing witnesses. The Court also held that it would be premature to dismiss the case on the basis that a third-party complaint may be filed against the British airline.

The Court in *Sabatino* then considered the public interest factors, finding that a product liability action like this has international implications and the site of the accident is less important. The Court recognized that the United Kingdom had an interest, but also found that residents of Illinois have just as much an interest in the safety of aircraft that fly in Illinois skies and that Illinois residents are concerned with the operations of companies that conduct business within Illinois and take advantage of Illinois law. *Id.* at p. 7.

Finally, the Court in *Sabatino* held that neither the congestion of the court system nor the possible application of foreign law dictated that either the United Kingdom or Florida was substantially a more appropriate forum. Finding that no forum enjoyed a predominant connection to the litigation, the Court found that defendants failed to meet their burden of proof and denied defendants' motion. Defendants elected not to seek leave to appeal the Circuit Court's decision in *Sabatino* to the Illinois Appellate Court.

Bjorkstam, et al. v. Learjet, Inc.

The Circuit Court in *Bjorkstam, et al. v. Learjet, Inc., et al*, No. 09 L 13025, (Cir. Ct., Cook County, Illinois, Dec. 10, 2010), denied defendants' *forum non conveniens* motion to dismiss to their first proposed alternative forum of Mexico, but granted dismissal to defendants' second alternative forum of Texas. The *Bjorkstam* action arose from the crash of a Learjet aircraft into a busy commercial area of Mexico City. Plaintiffs brought suit in Illinois against an Illinois component manufacturer, the aircraft manufacturer, and others. Plaintiffs then brought another suit in state court in Texas against certain of the same defendants in the Illinois action, as well as the Mexican operator of the aircraft.

The Circuit Court quickly disposed of defendants' argument that the action should be dismissed in favor of a forum in Mexico. However, the Court found that the case had unique facts which distinguished it from caselaw which the Court otherwise would find directly on point and which would have compelled the Court to deny defendants' motion completely. Specifically, plaintiffs already had another action pending in Texas arising from the same crash and therefore plaintiffs could not claim Texas was an inconvenient forum. The Court also found that Texas would have jurisdiction over the Mexican operator, whereas Illinois would not. The Court therefore granted defendants' motion, in part, subject to the condition that defendants accept plaintiffs' re-filing of the action in Texas. Neither party appealed the Circuit Court's decision.

Stafford, et al. v. Boeing

The most recent decision by the Illinois court on a *forum non conveniens* motion in an international aviation case is *Stafford, et al. v. Boeing*, No. 09 L 13343 (Cir. Ct., Cook County, Illinois, Feb. 17, 2011). *Stafford* was an action for products liability and negligence against Boeing, the aircraft manufacturer, arising from injuries plaintiffs sustained in a crash landing of a Boeing 777 aircraft at London's Heathrow Airport. Defendant Boeing moved for a dismissal proposing, first, an alternative forum in the United Kingdom or, alternatively, Washington, where the aircraft was designed and manufactured. Although the Circuit Court found that the United Kingdom was an available and adequate alternative forum and that the choice of Illinois as the forum was entitled to a lesser deference because most of the plaintiffs were residents of the United Kingdom and none were residents of Illinois, the Court nevertheless found that the private and public interest factors did not strongly favor dismissal and it denied defendant's motion.

The Court first found that Boeing has its corporate headquarters in Cook County and had not provided any affidavits stating that Illinois was an inconvenient forum. Further, since there are some plaintiffs who are residents of countries other than the United Kingdom, the United Kingdom could not be said to be more convenient to *all* parties. The Court also found that, although the accident occurred in the United Kingdom and was investigated by the United Kingdom's AAIB, a significant amount of evidence was located in the United States, particularly given the participation of the NTSB and Boeing in the accident investigation. The Court held that since witnesses and documents are scattered through various states and countries, the location of evidence factor did not weigh in favor of any particular forum. Similarly, since parties and potential witnesses are residents of several countries, there would be problems with compelling unwilling witnesses to attend trial in either the United Kingdom or the United States and it would be costly to bring willing witnesses to either forum. The Court also held that it would be premature to dismiss the case based upon a possible third-party complaint against the U.K. engine manufacturer. Finally, while recognizing that the United Kingdom has an interest in the litigation, the Court held that Illinois residents also have an interest in the safety of aircraft that fly over their skies, particularly when the manufacturer has its headquarters in Cook County and takes advantage of Illinois law.

The Court in *Stafford* held that, for the same reasons, Washington is not a more convenient forum for all the parties and the private and public interest factors do not weigh strongly in favor of Washington. Defendant did not appeal the Circuit Court's denial of its motion.

These decisions indicate that where an action is brought for product liability; at least one defendant is an Illinois resident; the product design evidence is in the U.S., even if not necessarily in Illinois; and the

evidence and witnesses are scattered among various jurisdictions, a *forum non conveniens* motion to dismiss likely will be denied by the Illinois court.

However, Illinois does not stand alone in its denial of *forum non conveniens* motions in international aviation cases. In *Thornton, et al. v. Lambert Leasing, Inc., et al.*, Circuit Court of Greene County, Missouri, No. 0831-CV05866, the plaintiff Australian residents brought suit against the U.S. seller of the allegedly defective accident aircraft, the Australian partnership which purchased that aircraft and then sold or leased it to the Australian operator, and the individual Australian resident principal of the operator. The action arose from a crash of an Australian commuter aircraft in Australia. The Circuit Court in Missouri denied the Australian defendants' motion to dismiss for lack of personal jurisdiction and also denied the *forum non conveniens* motion to dismiss brought by all defendants. The Missouri Court of Appeals and Missouri Supreme Court both denied leave to appeal.

IV. The Battle Over a Federal v. State Forum in Foreign Mass Accident Litigation

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As the federal and state court cases described above make clear, the jurisdiction in which the defendant's *forum non conveniens* motion is resolved plays a critical role in the outcome of the motion. For this reason, parties frequently fight a vigorous threshold forum battle—defendants attempt to establish federal jurisdiction, normally through removal, while plaintiffs push for remand back to state court. In recent years, these battles have focused largely on certain procedural issues centering on three removal statutes: (1) the Multiparty, Multiforum Trial Jurisdiction Act; (2) the Class Action Fairness Act; and (3) 28 U.S.C. § 1441.

Discussed below are some of the key issues that have arisen in the aviation context with respect to each statute.

A. Multiparty, Multiforum Trial Jurisdiction Act

Enacted in 2002, the Multiparty, Multiforum Trial Jurisdiction Act (“MMTJA”) created a broad grant of federal jurisdiction—including a right of removal—in multistate cases arising from “a single accident, where at least 75 natural persons have died in the accident at a discrete location.” 28 U.S.C. § 1369(a). However, the MMTJA only applies in cases that involve “minimal diversity,” which exists when “any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section.” *Id.* § 1369(c)(1). But with its focus on accidents

involving the death of at least 75 persons, and given that Congress's primary purpose in enacting the MMTJA was to provide a consolidated federal forum for "multiple cases arising out of a single disaster," *Pettitt v. The Boeing Co.*, 606 F.3d 340, 342 (7th Cir. 2010) (citing H.R. Rep. No. 106-276, at 200 (2002) (Conf. Rep.)), there is little doubt that the MMTJA is well-tailored for cases involving large commercial aviation accidents.

Indeed, defendants already have used the MMTJA to remove several aviation cases, including cases relating to the crash of Air France Flight 447 and Kenya Airways Flight 507. These cases reflect provisions in the MMTJA that are beneficial to defendants. First, the MMTJA's minimal diversity requirement means that a defendant can remove a case without regard to the forum defendant rule. *See* 28 U.S.C. § 1441(e)(1). This means that defendants can remove a case while avoiding potentially difficult battles about fraudulent joinder. *E.g.*, *Katonah v. USAir, Inc.*, 876 F. Supp. 984 (N.D. Ill. 1995) (rejecting fraudulent joinder argument where an Illinois state court might deny a motion to dismiss claims that supervisory employee of airline was negligent in failing to report passenger report about unusual aircraft noise).

Also notable is that the MMTJA has been interpreted to permit removal without the consent of all defendants. In *Pettitt*, the Seventh Circuit explained that the language in the general removal statute, 28 U.S.C. § 1441(a), states that an action "may be removed by the defendant or the defendants," which courts have interpreted to mean that all defendants must consent to removal. *Pettitt*, 606 F.3d at 342. In contrast, the Seventh Circuit noted, section 1441(e)(1), states that "'a defendant . . . may remove . . . if the action could have been brought . . . under section 1369.'" *Id.* (quoting 28 U.S.C. § 1441(e)(1) (emphasis in *Pettitt*)). As *Pettitt* makes clear, the MMTJA permits a single defendant to quickly remove a case to federal court without the consent of other defendants.

Apart from these generally pro-defense provisions, the MMTJA still affords plaintiffs who file in state court an important benefit: the district court to which an MMTJA case has been removed and that makes a decision on liability must remand to state court for a decision on damages unless the district court finds that it should retain the case "for the convenience of the parties and witnesses and in the interest of justice." *Id.* § 1441(e)(2). While there are no reported cases on this provision, Congress apparently intended to preserve some role for state courts in cases removed under the MMTJA. In aviation accident cases, where damages values can be quite high, this provision could prove significant.

Along with the remand requirement for damages trials, the MMTJA has also been interpreted by at least one court as allowing plaintiffs to conduct certain proceedings in state court before the defendant's right

to removal is triggered. In *Alemayehu v. Boeing*, No. 10-3147, 2010 WL 3328278 (N.D. Ill. Aug. 18, 2010), the survivors of persons who died on Ethiopian Airlines Flight 409 off the coast of Lebanon filed a Verified Petition for Discovery in Illinois state court pursuant to Illinois Supreme Court Rule 224. Citing the general rule that removal statutes should be construed narrowly, and Seventh Circuit precedent that the filing of a Rule 224 petition does not mean that a claim is being brought against the defendant, the district court remanded the action. The district court specifically held that Rule 224 provides a mechanism for obtaining information before filing suit and does not constitute a complaint against the defendant. It remains to be seen whether future Ethiopian Airlines plaintiffs can keep their claims in state court or if Boeing will be able to successfully remove to federal court.

B. Class Action Fairness Act

The Class Action Fairness Act of 2005 (“CAFA”) is another important new basis for federal jurisdiction in aviation accident cases, but it presents more of a mixed bag than the MMTJA. Specifically, CAFA creates federal jurisdiction, and permits removal, in cases filed in state court as class actions. 28 U.S.C. §§ 1332, 1453. While aviation accident cases are rarely filed as “class actions,” CAFA is nonetheless significant because the statutory term “class action” includes a “mass action,” which CAFA defines as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground the plaintiffs’ claims involve common questions of law or fact.” *Id.* § 1332(d)(11)(B)(i). But there is an important catch: The mass action provision does not apply where plaintiffs’ “claims are joined upon motion of a defendant.” *Id.* § 1332(d)(11)(B)(ii)(II). Thus, the key question in CAFA mass action cases is whether plaintiffs actually have proposed a joint trial of 100 claims or more.

The Seventh Circuit addressed this question at some depth in *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008). The Court of Appeals explained that “[a] proposal to hold multiple trials in a single suit (say, 72 plaintiffs at a time, or just one trial with ten plaintiffs and the use of preclusion to cover everyone else) does not take the suit outside of [CAFA’s mass action provision].” *Id.* at 762. Judge Easterbrook further explained, “The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the ‘claims’ advanced by 100 or more persons are proposed to be tried jointly. A trial of ten exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly.” *Id.*

Bullard suggests a clear division in mass action cases. Complaints that name more than 100 plaintiffs are clearly subject to removal as mass actions, even if not all 100 plaintiffs’ claims go to trial at the same

time. On the other hand, plaintiffs can structure their lawsuits to propose trials of fewer than 100 claims and thereby avoid triggering removal. This fault line is evident in several recent aviation cases. For example, in *Altoum v. Airbus S.A.S.*, No. 10-467, 2010 WL 3700819 (N.D. Ill. Sept. 9, 2010), 102 Sudanese plaintiffs originally filed claims in Illinois state court in connection with the crash of a Sudan Airways aircraft in Khartoum, Sudan. Citing CAFA's mass action provision, the defendants removed the lawsuit to the Northern District of Illinois. However, after removal, twenty plaintiffs moved to voluntarily dismiss their claims because they were parties to a separate lawsuit also pending in Illinois state court, arguing that the dismissal of their claims would leave fewer than 100 plaintiffs in the case. But the district court rejected this argument on the ground that "jurisdiction under CAFA is determined at the time a complaint is filed." *Id.* at *3. "Thus," the court reasoned, "even if the Court granted Plaintiffs' motion to voluntarily dismiss, the resultant reduction in plaintiffs would have no impact on the Court's jurisdiction." *Id.* (citing *Bullard*, 535 F.3d at 761).

But where plaintiffs do not propose to try more than 100 claims in a single proceeding, federal courts have refused to permit removal under CAFA's mass action provision. Noting that CAFA expressly bars removal where defendants join plaintiffs' claims to reach the mass action threshold, federal courts have rejected attempts by defendants to aggregate multiple state court complaints to reach the 100 claimant threshold. See *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009). This is what doomed the attempted removal of a separate Sudan Airways complaints—the complaint named fewer than 100 plaintiffs and could not be joined by defendants with the *Altoum* action to reach the "mass action" threshold. Going further still, the Seventh Circuit has even held that plaintiffs can deliberately structure their filings into multiple complaints, each with fewer than 100 claimants, to prevent jurisdiction under CAFA. See *Anderson v. Bayer Corporation*, 610 F.3d 390 (7th Cir. 2010). One question left open in these cases though is whether removal is permissible when the court joins separate lawsuits *sua sponte* to thereby reach the 100-claimant threshold. See *Anderson*, 610 F.3d at 394 n.2; *Tanoh*, 561 F.3d at 956.

It also is clear that plaintiffs have at least some room to maneuver in state court before they will be deemed to have proposed a mass action. In *Koral v. Boeing Company*, 628 F.3d 945 (7th Cir. 2011), a total of 117 plaintiffs filed 29 separate actions in state court in connection with the crash of a Turkish Airlines 737 in the Netherlands. Boeing moved to dismiss the claims in state court based on the *forum non conveniens* doctrine citing, among other things, the need for witnesses to travel repeatedly to Illinois to testify in 29 different trials. Plaintiffs argued in response that "practically speaking," the witnesses would only need to travel to Illinois once because in aviation accident cases "several exemplar cases are routinely tried on one occasion at which time the issue of liability is determine for the remainder of the

cases.” *Id.* at 946. Boeing then filed a notice of removal, citing plaintiffs’ one-trial argument from their opposition to the *forum non conveniens* motion as proposing a mass action involving all 117 plaintiffs.

The district court disagreed and the Seventh Circuit affirmed the remand order. The Seventh Circuit explained that a plaintiff’s proposal to hold a joint trial can be “implicit”, but that the plaintiffs’ statement to the state court in this case “falls just short of a proposal, as it is rather a prediction of what might happen if the judge decided to hold a mass trial.” *Id.* at 947. “It would be odd to think that plaintiffs could not make a telling response to a motion for dismissal of a suit on the ground of *forum non conveniens* without thereby having forfeited their chosen forum; by arguing against dismissal, they would be arguing for it,” the Seventh Circuit concluded. *Id.*; see also *Kaya v. The Boeing Company*, No. 10-6617, 2011 WL 52425 (N.D. Ill. Jan. 3, 2011) (remanding on same ground).

As the foregoing cases show, CAFA’s mass action provision already has played a significant role in aviation accident cases. Unlike in the MMTJA context where plaintiffs have relatively little ability to control when removal jurisdiction exists, plaintiffs have significant leeway to preclude removal under CAFA. This suggests that in cases that do not involve the deaths of 75 or more persons in a single accident, and thus are not subject to MMTJA jurisdiction, plaintiffs in aviation accident cases that want to stay in state court are likely to split their complaints to ensure that each one names fewer than 100 plaintiffs.

C. Non-forum Defendant Removal

An additional tactic that non-forum defendants have been using to remove state court actions to federal court deals with the specific language of 28 U.S.C. §1441(b), also known as the “Forum Defendant Rule.”

Pursuant to §1441(b), an action can be removed on the basis of diversity jurisdiction “only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” A tactic utilized by defendants seeking removal to federal court focuses on the “properly joined and served” language of the statute; an out-of-state defendant (“non-forum defendant”) simply removes the action to federal court before any in-state defendant (“forum defendant”) has been served. This tactic has yielded mixed results across the country and limited appellate authority addresses the issue.¹¹

¹¹ Pursuant to 28 U.S.C. §1447(d), an order remanding a case to state court generally is not reviewable on appeal. However, some appellate courts have addressed the §1441(b) issue with varying results. See, e.g., *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001)(“inclusion of an *unserved* resident defendant does not defeat removal”); *Pecherski v. General Motors Corp.*, 636 F.2d 1156 (8th Cir. 1981)(remanded); *Morris v. Vitek*, 412 F.2d 1174 (9th Cir. 1969)(remanded).

However, when successful, the §1441(b) tactic has turned out to be an effective way for non-forum defendants to get cases into federal court.

The split in decisions on this issue results from whether the particular court favors enforcing the plain language of §1441(b)¹² versus a desire to correct what some have deemed to be a “bizarre” or “absurd” result that Congress did not intend.¹³ The two sides of this issue are illustrated, in turn, by the cases of *Hutchins v. Bayer Corp.*, 2009 WL 192468 (D. Del. Jan. 23, 2009), and *Miller v. Piper Aircraft, Inc.*, 2009 WL 1033585 (E.D. Pa. Apr. 14, 2009).

***Hutchins v. Bayer Corp.*: The Defendant Succeeds**

Hutchins is a product liability action involving the drug Trasyolol, which was filed in the Superior Court of the state of Delaware. *Hutchins*, 2009 WL 192468, at *2. Defendant Bayer Corporation, a Pennsylvania corporation with its principal place of business in Pennsylvania, removed the action to the Delaware district court before any in-state defendant had been served with the complaint. *Id.* at *2. Plaintiff alleged that removal had occurred “before Plaintiff had any practical opportunity to serve [the defendants] with process,” and filed a motion to remand the action to Superior Court. *Id.* at *2.

¹² District courts in W. Virginia, Delaware, California, New York, New Jersey, Illinois, Indiana, Florida, Missouri, Maryland, Mississippi, Alabama, South Carolina and Nebraska have all denied motions to remand and permitted removal by defendants provided that no in-state defendant had yet been served at the time the action was removed. These courts generally rely on the unambiguous language of § 1441(b) and hold that the statutory language trumps any other considerations. *See, e.g., Vitatoe v. Mylan Pharms., Inc.*, 2008 WL 3540462 (N.D. W.Va. Aug. 13, 2008); *Hutchins v. Bayer Corp.*, 2009 WL 192468 (D.Del. Jan. 23, 2009); *Waldon v. Novartis Pharms. Corp.*, 2007 WL 1747128, at *1 (N.D.Cal. June 18, 2007); *City of Ann Arbor Employees' Retirement Sys. v. Gecht*, 2007 WL 760568 (N.D.Cal. Mar. 9, 2007); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F.Supp.2d 177, 180-81 (S.D.N.Y. 2003); *Thomson v. Novartis Pharms. Corp.*, 2007 WL 1521138, at *4 (D.N.J. May 22, 2007); *Frick v. Novartis Pharms. Corp.*, 2006 WL 454360 (D.N.J. Feb.23, 2006); *Massey v. Cassens & Sons, Inc.*, 2006 WL 381943 (S.D.Ill. Feb. 16, 2006); *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826 (S.D. Ind. 2002); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M.D.Fla. 2009); *Valerio v. SmithKline Beecham Corp.*, 2008 WL 3286976 (S.D.Fla. Aug. 7, 2008); *Masterson v. Apotex Corp.*, 2008 WL 2047979 (S.D.Fla. May 13, 2008); *Johnson v. Precision Airmotive, LLC*, 2007 WL 4289656 (E.D.Mo. Dec. 4, 2007); *Clawson v. FedEx Ground Package Sys., Inc.*, 451 F.Supp. 2d 731 (D.Md. 2006); *Ott v. Consol. Freightways Corp. of Del.*, 213 F.Supp.2d 662 (S.D.Miss. 2002); *Mask v. Chrysler Corp.*, 825 F.Supp. 285 (N.D.Ala.1993); *Wensil v. E.I. DuPont De Nemours and Co.*, 792 F.Supp. 447 (D.S.C. 1992); *Windac Corp. v. Clarke*, 530 F.Supp. 812 (D.Neb. 1982).

¹³ District courts in New Jersey, Ohio, Pennsylvania, Illinois, Maryland and Texas have granted plaintiffs’ motions to remand by concluding generally enforcing the forum defendant rule in circumstances that yield results they deem Congress could not have intended. *See, e.g., Sullivan v. Novartis Pharms. Corp.*, 575 F.Supp. 2d 640 (D.N.J. 2008); *Brown v. Organon Int’l Inc.*, 2008 WL 2833294 (D.N.J. July 21, 2008); *Fields v. Organon USA Inc.*, 2007 WL 4365312 (D.N.J. Dec. 12, 2007); *DeAngelo-Shuayto v. Organon USA Inc.*, 2007 WL 4365311 (D.N.J. Dec. 12, 2007); *Ethington v. General Elec. Co.*, 2008 WL 4183900 (N.D. Ohio Aug. 13, 2008); *Miller v. Piper Aircraft, Inc.*, 2009 WL 1033585 (E.D. Pa. Apr. 14, 2009); *Allen v. GlaxoSmithKline PLC*, 2008 WL 2247067 (E.D. Pa. May 30, 2008); *Holmstrom v. Harad*, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005); *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726 (N.D. Ill. 2007); *Oxendine v. Merck & Co., Inc.*, 236 F.Supp. 2d 517 (D. Md. 2002); *Recognition Comm., Inc. v. American Auto. Ass’n*, 1998 WL 119528 (N.D. Tex. Mar. 5, 1998).

In support of its motion to remand, Plaintiff argued that doubts about removability should be resolved in favor of remand, that a statute should not be construed to lead to a “bizarre or absurd result” and statute should not be construed to lead to a result Congress did not intend. *Id.* at *5-*7. Bayer argued that a court must enforce the plain language of an unambiguous statute, that every word in the statute must be given effect and that defendants are entitled to make litigation decisions based on existing conditions. *Id.* at *8-*9.

The court acknowledged that conflicting case law existed on the §1441(b) issue and that no binding precedent existed. *Id.* at *10-*11. After a thorough analysis of the arguments the court agreed with Bayer that “[t]he language of §1441(b) is plain and unambiguous” and accordingly, it should be enforced according to its terms. *Id.* at *11. The court found that the purpose of the statute’s “joined and served” requirement was “to protect non-forum defendants in diversity cases from being deprived of their right of removal by plaintiffs fraudulently joining a forum defendant whom plaintiffs had no intention of serving.” *Id.* at *7. Accordingly, the court held that permitting removal under the circumstances presented did not either conflict with Congressional intent or rise to the level of a “bizarre or absurd result.” *Id.* at *6-*7. The court concluded that while plaintiff’s argument that the statute should be amended to allow for a “reasonable opportunity” for a plaintiff to serve the forum defendant, alteration of §1441(b) could only be accomplished by Congress. *Id.* at *12.

Miller v. Piper Aircraft, Inc.: The Plaintiff Succeeds

The *Miller* case, which arose from fatal injuries sustained by passengers as a result of a 2007 Piper aircraft accident, was filed in the Philadelphia Court of Common Pleas. *Miller*, 2009 WL 1033585, at *1. The day after filing and pursuant to local service rules, Plaintiff submitted his Complaint to the Lycoming County Sheriff for execution of service upon two forum defendants. *Id.* However, the Sheriff was allowed thirty days to execute service under the local rules of civil procedure. *Id.* In the meantime, Defendant Textron, Inc., a Delaware corporation with headquarters in Rhode Island, removed the action to the district court for the Eastern District of Pennsylvania. *Id.* at *1, *3. Plaintiff thereafter filed a motion to remand the action back to the Philadelphia Court of Common Pleas. *Id.* at *1.

In support of its motion to remand, Plaintiff argued that Defendant improperly engaged in a “race to the courthouse” by removing before service could be effectuated on the forum defendants. *Id.* at *3. In opposing plaintiff’s motion, Defendant compiled various cases from outside of the jurisdiction in which arguments substantially similar to plaintiff’s were rejected with respect to the “joined and served” provision of §1441(b). *Id.*

In analyzing the arguments and authorities cited by both parties, the court noted that factual distinctions rendered most inapplicable to its current situation. *Id.* Rather, the court found persuasive the reasoning of the court in *Allen v. GlaxoSmithKline PLC*, 2008 WL 2247067 (E.D. Pa. May 30, 2008), despite the fact that in that case it was a forum defendant seeking removal. In *Allen*, the court held that:

Despite the ‘joined and served’ provision of Section 1441(b), the prevailing view is that the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal. Logic does not permit considering the citizenship of unserved defendants for purposes of assessing diversity, but then ignoring it for purposes of the forum defendant rule. The Court is mindful that when ruling on a motion to remand, a district court must resolve all contested issues of substantive fact in favor of the plaintiff and must resolve uncertainties as to the current state of controlling substantive law in favor of the plaintiff.

Allen, 2008 WL 2247067, at *6 (citations omitted).

Further, the *Miller* court also applied the reasoning of the U.S. Supreme Court from the case of *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939) - a case decided before the “properly joined and served” language was added to §1441. *Miller*, 2009 WL 1033585, at *5; see also *Sullivan v. Novartis Pharm. Corp.*, 575 F.Supp. 2d 640, 644-45 (D.N.J. 2008)(noting that the “properly joined and served” provision of §1441(b) was added in 1948). In *Pullman*, the Court held that “[where] there is no diversity of citizenship, and the controversy being a non-separable one, the non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected.” *Pullman*, 305 U.S. 534, 541.

The *Miller* court noted that the Plaintiff acted diligently to effectuate prompt service but had no control over the time it would take the Sheriff to effectuate it. *Miller*, 2009 WL 1033585, at *4. Accordingly, the Court determined that Defendant had failed to meet its burden of establishing that removal was proper and granted Plaintiff’s motion to remand. *Id.* at *6.

Future Considerations

The split in authority regarding the Forum Defendant Rule has created an opportunity for defendants, as well as a potential pitfall for plaintiffs. Modern technologies allowing electronic monitoring of state court dockets play a key role in this removal tactic for defendants, since they must act promptly to remove cases using §1441(b). Further, plaintiffs aware of the potential ramifications will pay extra attention to avoid delay of service, and should have a plan for countering defendants’ tactics in this area before filing

suit. It is left to be seen as to whether Congress will take action to close this loophole, and if so, how long that will take. Until then, this will continue to be a fascinating area of legal battles.

V. Litigating the Case After *Forum Non Conveniens* Dismissal

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For all the bluster and maneuverings made by the plaintiffs bar to avoid application of *forum non conveniens* in mass tort actions, one would think plaintiff lawyers were reluctant to have their cases litigated abroad. While historically foreign jurisdictions, particularly in Latin America, have been viewed as primarily favorable to the defense and highly unfavorable to plaintiffs, this paradigm has changed in recent years. Venues in Latin America, formerly unfriendly to large groups of plaintiffs, have evolved over time through changes in structure and attitudes making them more receptive to and more capable of handling large numbers of plaintiffs in cases involving complex issues of causation, particularly where the defendants and evidence are based in foreign countries.

To achieve these objectives, many jurisdictions in Latin America have enacted or considered repeatedly legislation designed to make it easier for large groups of their own citizens to bring tort claims for injuries, particularly where complex issues of causation are involved. Moreover, the political views in many Latin American countries, once decidedly more favorable to capitalist interests, have since shifted the majority view toward more socialist values and parochial interests. This section focuses on the aforementioned change in legislation.

Changes in legislation in Latin America began as a knee-jerk response to dismissals based on *forum non conveniens* in the United States of claims brought by citizens of various Latin American countries for injuries they sustained in their home countries, allegedly at the hands of U.S. based multi-nationals. “Blocking Statutes” – laws established to discourage the pursuit of FNC dismissal by enacting barriers to litigation in the home country of the claimant – originally considered and, in some cases, passed in the mid 1990s led to development, refinement and passage of legislation containing procedural mechanisms and safeguards intended to make the courts of the home country more accessible to plaintiffs and the courts more capable of handling complex issues of causation.

Blocking Statutes were initially enacted in Latin America as a response to the purported “illegalities” of a series of *forum non conveniens* dismissals that occurred in the mid-1990s related to a series of claims brought by individuals claiming to be foreign banana workers from a number of foreign countries, including several in Latin America, for injuries allegedly caused by the pesticide known as

dibromochloropropane (“DBCP”). See Henry St. Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, The University of Miami Inter-American Law Review, Symposium Edition: Forum Non Conveniens Development and Issues Over the Past Seven Years, 35 U. Miami Inter-Am. L. Rev. 21. They were promoted by academics and lawyers throughout Latin America in the mid 1990s as a means of addressing *forum non conveniens* dismissals resulting in refiling in Latin American countries. They were justified on three grounds: (1) *forum non conveniens* have illegal effects in the home countries of the claimants, including the concept of pre-emptive jurisdiction;¹⁴ (2) evidence will be lost or inaccessible upon transfer; and (3) certain procedural requirements, such as a service and subpoena will be impractical if the case is litigated in the home country. *Id.* at 22-30. Such statutes were ultimately adopted in at least Ecuador, Guatemala, Dominica and Nicaragua, although most were later overturned on Constitutional grounds. They were overturned because of the way in which they sought to “block” *forum non conveniens* dismissals: through application of onerous provisions tilting the scales of justice largely in the home country plaintiff’s favor.

The Nicaraguan statute, for example, Special Law 364 -- originally introduced in 1997, subsequently revised, passed in 2000, effective January 17, 2001 – incorporated a series of onerous provisions making litigation of these claims in Nicaragua extremely unpleasant to defendants. The statute incorporated a number of onerous provisions, including: two required separate mandatory deposits of \$100,000 and roughly \$20,000,000 simply for the right to defend; an irrefutable presumption of causation based on minimal scientific proof; minimum statutory damages which were many times greater than any personal injury award ever given in Nicaragua; and an abbreviated proof period allowing only seven days for the defense to respond to mountains of evidence submitted by large groups of plaintiffs. But these onerous provisions were not designed to have the defendant submit to a deprivation of due process rights. Indeed, the statute incorporated an out: should the defendant agree to submit unconditionally to the jurisdiction of the U.S. courts by refusing to make the required deposits and denouncing the defense of FNC. Thus, the concept was to “block” litigation in Nicaragua by forcing the defendant into a Hobson’s choice, where the only acceptable solution was to litigate in the U.S.

While these statutes might have been effective in theory at deterring the filing of *forum non conveniens* motions, their practical application was muted by the fact that their primary mechanism of disincentivizing *forum non conveniens* motions through lopsided provisions were unconstitutional in many of the countries where they were enacted. For example, the June 12, 1997 anti-*forum non conveniens* law passed in Guatemala – the “Law in Defense of Procedural Rights of Nationals and

¹⁴ The concept of pre-emptive jurisdiction emanates from Roman law and essentially holds that once a matter is initiated in one jurisdiction, it deprives all other courts of jurisdiction. *Id.* at 28-29.

Residents” – was found unconstitutional by the Constitutional Chamber of that country’s Supreme Court on October 29, 1999. The basis for that Court’s determination was a deposit requirement similar to that of Nicaragua’s Special Law 364. Unlike Guatemala’s Supreme Court, however, Nicaragua’s Supreme Court found Special Law 364 to be constitutional, primarily because it did provide the defendant an out from having to submit to litigation under the statute.

As the anti-*forum non conveniens* laws began to fall of their own weight, so too did the thinking of their proponents change. The evolution of the statutory framework is not easy to discern. However, what is clear, is that several efforts to pass anti-*forum non conveniens* statutes have evolved over time into efforts to pass legislation making the courts more accessible to citizens of their countries seeking redress for injuries under theories that historically were difficult if not impossible to prove. These efforts appear to have begun with the Blocking Statutes, later driven by model legislation first introduced at the Latin American Parliament, an international organization formed by representatives of Latin American countries in 1998, which later evolved into The Latin American Model Act for International Litigation (“Model Act”), which was first introduced publicly by Henry St. Dahl at the Inter-American Bar Association Conference held in Madrid, Spain in 2004.

Honduras, for example, recently considered a proposed statute—the Law for the Solution of International Lawsuits in the Areas of Private Rights: Object, Term, Protection of Environment, Forum Non Conveniens, Indemnifications—which while adopting the principle of pre-emptive jurisdiction, states that its primary objective is to modernize and make more agile the handling of international disputes. This objective would be carried out through a number of provisions that make it easier for large groups of plaintiffs to bring complex claims in the courts there. Such provisions include: allowing the aggregation of a multitude of claims; international service of process; creation of the discovery rule and tolling rules for statutes of limitations; admissibility of proof introduced and findings made in foreign processes; accelerated proof and appellate processes; and application of damages awards that have been made in similar cases on foreign (*i.e.* U.S.) soil. The combination of these provisions would appear to have the effect of not only making Honduras more amenable to the handling of mass tort claims brought by its citizens, but seem to take the process a bit further, tilting the scales of justice ever so slightly in the claimant’s favor. Although the Supreme Court of Honduras found certain aspects of the law ill advised and, as a result, the draft law was rejected by the legislature there, this author is aware of further efforts to modify the legislation to address the Supreme Court’s concerns and to reintroduce it in the near future.

In 2006, a statute was passed in Panama which is also based on the Model Act. Law 32, like the Model Act, allows aggregation of claims, adoption of findings from foreign cases, expedited proceedings,

limited rights of appeal and incorporation of procedures used in other countries. Efforts to pass similar legislation are active in Costa Rica as well as these two countries. There may be other efforts this author is unaware of.

These legislative activities have had some other, interesting results. For example, in Ecuador, legislation was passed in 1994 giving indigenous Amazonian tribes rights to pursue redress for contamination. That legislation adopted some of the principles articulated in the Model Act relating to environmental rights and has led to the now infamous litigation against Chevron in that country, which recently resulted in a judgment against Chevron exceeding \$9 billion.

What does all this mean? At a minimum, the legal and political systems have changed and are actively changing in Latin America, causing the litigation environment to evolve into a more open, plaintiff favorable one, particularly in the context of claims by citizens of the home country against foreign multinationals. Given the lengthy process involved in a *forum non conveniens* dismissal, it means that defendants cannot count on the environment being the same as it was when their *forum non conveniens* decision was first made. And companies doing business in Latin America who get sued in the U.S. must now consider that their case may not be any better for them once it is refiled in the claimants' home country. While cases continue to be filed in the U.S. by foreign claimants, no doubt the plaintiff bar now has some viable options available to them to litigate cases in their home country. Indeed, U.S. plaintiff lawyers have in recent years set up offices in the foreign countries, such as in the Chevron case, and have participated in the litigation there. In short, U.S.-based multinational corporations should be careful of what they wish for, because they might find themselves fighting the same battle, or even a more difficult one, once they land the case on foreign soil.