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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2013 Issue

An inconvenient forum for whom?

In mass-tort litigation, defense motions to dismiss for forum non conveniens require careful analysis

The doctrine of forum non conveniens originated in the United States with *Willendson v. Forsoket* (DC Pa 1801) 29 Fed Cas 1283, in which a federal district court in Pennsylvania declined to exercise jurisdiction over a Danish sea captain who was being sued for back wages by a Danish seaman. The court stated that the matter "must be settled by a Danish tribunal." The court's analysis was elegantly simple: U.S. courts had not been established to settle disagreements between parties from other countries, even if the controversy had some connection with the forum sufficient to give the court jurisdiction. After all, the parties were not Americans, their bargain had not been struck or broken in the U.S., and in any event, what interest would American taxpayers have in financing the judicial resolution of a controversy that ultimately would not affect them at all?

On these facts, the doctrine of forum non conveniens seems perfectly logical. But, of course, logic's place in the U.S.'s legal system is never permanently secure. The adversarial system, though perhaps not intended to reward torturous applications of doctrine, certainly has contributed to this practice. One notable recent example is the use of the forum non conveniens doctrine, by mass-tort defendants, to dispose of cases which might otherwise move relatively quickly to trial. The typical claim – anodyne enough on its face – is that another forum is more "convenient" than the one chosen by the plaintiff. But a closer look at the facts – as we will see in one notable example – demonstrates that convenience of the parties is at best an ancillary concern, and that the moving party's chief motivation is to delay the plaintiff's day in court.

The doctrine of forum non conveniens

The common law doctrine of forum non conveniens allows a court to dismiss a case over which it would normally have jurisdiction if doing so "best serves the convenience of the parties and the ends of justice." (*Kamel v. Hill-Rom Co., Inc.* (7th Cir.1997) 108 F.3d 799, 802 (citing *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 507.)

"Dismissal for forum non conveniens reflects a court's assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." (*Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.* (2007) 549 U.S. 422, 429.) Under the doctrine of forum non conveniens, a case may be dismissed only when two conditions are met: (1) there is an available and adequate alternative forum that has jurisdiction over the case; and (2) the balance of private and public interest factors weighs in favor of dismissal. (*Clerides v. Boeing Co.* (7th Cir. 2008); 534 F.3d 623, 628; *In re Bridgestone/Firestone, Inc* (7th Cir. 2005) 420 F.3d 702, 703-04.)

Balancing private interests requires determining the convenience of the parties, affording domestic plaintiffs "a strong presumption" that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs. (*Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 256.) Relevant public interests, on the other hand, include administrative difficulties with deciding litigation in congested centers rather than at their origin, the imposition of jury duty on a community unrelated to the litigation, the relative interests of the possible fora, and the interest in a court avoiding the necessity of "untangl[ing] problems in conflict of laws, and [applying] law foreign to itself." (*Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-09.)

The example of the ASR hip litigation

While these factors seem reasonable enough, the application of the doctrine to mass-tort cases has the potential to yield results that seem unlikely to have been intended by any of the decisions interpreting the rule. The chief reason for this is that the doctrine assumes that all cases have a center of gravity, which points to the most "convenient" forum. But mass-tort cases as a rule involve parties from numerous locations, far-flung sources of evidence and multiple appropriate fora. A defendant's argument that any one of these potential jurisdictions is "most convenient" is usually pretext for some tacit design. The stated concern may be to compel refiling of the plaintiff's case in a more appropriate forum, but these motions usually have the practical effect of prolonging litigation.

Consider the case of the recalled ASR hip implant, a medical device which was designed and manufactured by a company headquartered in the United Kingdom, and marketed throughout the U.S. by a company based in Indiana. The ASR hip was developed in collaboration with surgeons in California and across the globe. The data which ultimately damned the device came from Australia, the United Kingdom, the United States and elsewhere. The ASR's recall resulted in the filing of thousands of lawsuits, against most of the aforementioned parties, in nearly every state in the Union. The defendants are being called to task in courtrooms from West Palm Beach to San Francisco.

More than 7,000 cases involving the ASR hip have been filed in federal and state courts. More than two-thirds of these are consolidated before a single federal judge; the so-called multidistrict litigation ("MDL") court. But more than 2,000 cases are pending in state court in California, as well. Jurisdiction lies in this state because one of the defendants, Dr. Thomas Schmalzried, is a California resident. Dr. Schmalzried played a critical role in the development and marketing of the ASR hip implant device. Indeed, because of his involvement, as well as another surgeon/designer in this state, a substantial amount of evidence relevant

See Kaufman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2013 Issue

to all cases involving the ASR is located in California.

Of course, these facts are well known to the defendants. Still, this has not stopped them from urging courts to dismiss cases on the basis that "the evidence" – a curiously monolithic phrase – is all located in the plaintiff's home state. Indeed, to hear the defendants describe it, foreign plaintiffs' (residents of states other than California) cases have no connection to California other than, possibly, the location of their attorneys' office.

Of course, this is not so. The evidence in this case is located across the country and, in fact, across the globe. Defendant DePuy Orthopaedics, Inc., is headquartered in Warsaw, Indiana; its parent company, Johnson & Johnson, Inc., in New Brunswick, New Jersey (collectively "DePuy"). The ASR hip was manufactured in the UK. The surgeon design team was comprised of physicians from California (including Dr. Schmalzried), the United Kingdom, South Africa, Australia and Germany.

Admittedly, mass-tort litigation, in which critical evidence is located across disparate locations, is cumbersome, expensive and inconvenient for all parties. But the suggestion that the location of the evidence weighs "heavily" in favor of trial in the plaintiff's home state, as opposed to California, is absurd. For example, defendants have argued that they will: have to obtain medical records from the plaintiff's home state; will have to take depositions of multitudinous physicians, co-workers and family members there; and will be especially prejudiced because they will not be able to compel witnesses from the home state to appear at trial in California.

But none of these reasons is particularly supportive of defendants' argument. The plaintiff's medical records will have to be obtained from her home state no matter where the case is tried. The same holds true with respect to the depositions of third-party witnesses, including the plaintiff's family members, none of whom are party to the suit. And while it is true that defendants would not be able to compel residents of the plaintiff's home state to appear at trial in California, this difficulty is hardly unprecedented in mass-tort litigation, and unfairly disadvantages neither side. The plaintiff will not be able to compel critical witnesses from Indiana or the UK to appear at trial, either in her home state or California. And while live testimony is preferable to testimony by video, mass tort proceedings invariably require some amount of videoed deposition testimony.

The evidence in this case emanates from multiple fora, most of it from outside nearly every plaintiff's home state. To date, DePuy has produced in excess of 35 million pages of material. Witnesses have been deposed in multiple states and countries. Much of the evidence relevant to this case is located in California. One of the defendants is a resident of California. Indeed, this is the basis of the court's jurisdiction. The defendants are not being dragged to some random forum to try this case. They are party to more than 2,000 similar cases pending in California courts, and here they will remain until the litigation is concluded. Considering the grounds raised in the standard motion to dismiss for forum non conveniens, it would appear that the defendants are not interested in finding a more convenient forum in which to try this case, but rather in finding a way to avoid trying this case altogether.

Forum non conveniens: The California perspective

Forum non conveniens is an equitable doctrine. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) "Grounded in equity, its purpose is to see that equity is done." *Martinez v. Ford Motor Co.* (2010) 185 Cal.App.4th 9, 18, *as modified on denial of reh'g* (June 25, 2010), *citing Elbert, Limited v. Federated Income Properties* (1953) 120 Cal.App.2d 194, 206 ["It is a measure of the virility and flexibility of equitable principles that they may be applied to the end that neither party is permitted to secure an advantage to the prejudice of another..."].) The doctrine permits a court to invoke its discretionary power to decline to exercise its jurisdiction over a case "when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik*, 54 Cal.3d at 751.)

But this power is not to be exercised lightly. In California the plaintiff's choice of forum is entitled to great weight even if she is a nonresident. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (*Ford Motor Co. v. Ins. Co. of N. Am.* (1995) 35 Cal.App.4th 604, 610-11; *Stangvik*, 54 Cal.3d at p. 753.)

The forum non conveniens' analysis requires a three-step process. As applied in this matter, the court must first determine whether the proposed alternative forum is a "suitable" place for trial. If the court makes this finding, it must then consider: 1) the private interests of the litigants; and 2) the public interests in retaining the action in California.

As the moving party, defendants bear the burden on each issue. (*Stangvik* , 54 Cal.3d at 751.) The defendants' motion must be supported by evidence – not merely bald assertions. (*Bechtel Corp. v. Industrial Indem. Co.* (1978) 86 Cal.App.3d 45, 48.) Thus, the court's analysis in considering a forum non conveniens motion "must start from the premise that defendants [bear] the burden of producing sufficient evidence to overcome the strong presumption of appropriateness attending plaintiff's choice of forum." (*Ford Motor Co.*, 35 Cal.App.4th at 611.) Moreover, "[t]he inquiry is not whether [the alternate forum] provides a better forum than does California, but whether California is a seriously inconvenient forum." (*Ibid.*) Therefore, "[u]nless the balance [of the private and public interests] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (*Id.* at 610-611.)

The plaintiff's home state may not be a suitable alternate forum

Under many circumstances, the plaintiff's home state would be a suitable, alternate forum. However, given the practical context of coordinated mass-tort case, it can be far less suitable to other fora. In most mass-tort cases, the plaintiff is the only party residing in her home state. If she refiles there, jurisdiction will lie in

See Kaufman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2013 Issue

federal court under 28 U.S.C. § 1332. Of course, any ASR case filed in federal district court would be transferred by the Judicial Panel on Multidistrict Litigation to MDL 2197, in the Northern District of Ohio. Transfer to any MDL usually means the plaintiff's case will languish in that court until it is remanded to the transferor court. There is no indication when this would happen, if ever; though if history is any guide, the chances are slim. Since the inception of the MDL panel, in 1968, only four percent of all cases subjected to MDL proceedings have been remanded to the transferor court. As one court has observed, "compared to the processing time of an average case, MDL practice is slow, very slow." (*Delaventura v. Columbia Acorn Trust* (D. Mass 2006) 417 F. Supp. 2d 147, 150.)

Neither private nor public interest factors support forum non conveniens motions in mass-tort actions

The private-interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. (*Stangvik*, 54 Cal.3d at 751.) Defendants bear the burden of showing that these factors weigh heavily in support of trial in the plaintiff's home state.

Typically, mass-tort defendants urge that "all" the evidence in a litigation is located in the plaintiff's home state. As discussed above, this is not the case. Admittedly, *some* evidence related to any mass-tort case will be located in the plaintiff's home state, though the situation is not as extreme as most defendants would have us believe. For example, defendants protest that numerous witnesses (such as the plaintiff's physicians, co-workers and family members) are located in her home state. But defendants will routinely omit that scores of witnesses are located elsewhere.

Defendants also argue that they will have to obtain medical records from a "multitude of out-of-state health-care providers and depose them." The same argument is raised with respect to third-party witnesses such as the plaintiff's co-workers and family members. Defendants also protest that they will have to rely on the use of videotaped deposition testimony, because they will be unable to compel unwilling witnesses to appear at trial.

As an initial matter, plaintiff should remind courts that, ordinarily, no allegations of wrongdoing are made against any of her physicians or other health-care providers. The mere fact that a plaintiff's surgery is performed someplace other than the trial court's jurisdiction should not overcome the fact that plaintiff's claims are almost always based on defendants' misconduct in designing, manufacturing, and marketing of a product – most of which took place someplace other than her home state.

As a practical matter, regardless of where any ASR case is ultimately tried, defendants and plaintiff will need to gather evidence and take depositions in the plaintiff's home state (where her physicians and medical records are located), in California (where at least one defendant is located), and in Indiana, New Jersey and – as has already been in the case – in the United Kingdom, and perhaps elsewhere. In short, costs to obtain evidence and attendance of witnesses will occur whether this matter is litigated in California or in any other forum. There will be "out-of-state" depositions either way. Accordingly, this factor is, if anything, neutral.

Similarly, the availability of compulsory process for attendance of unwilling witnesses is also a neutral factor, as plaintiff will not be able to compel defendant's officers, directors or employees to appear in her home state, and defendant will not be able to compel plaintiff's physicians to appear in California.

The public-interest factors "include (1) avoidance of overburdening local courts with congested calendars, (2) protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and (3) weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik*, at 751.) As discussed above, the balance of public interests between California and the plaintiff's home state is, at best, neutral.

Any argument about the congestion in California courts is usually a neutral consideration because defendants persistently fail to produce evidence that the plaintiff's home state's courts are less congested than California's. (See *Ford Motor Co.*, at 615 [finding that congestion of the courts was a neutral public interest factor where "there is no evidence that [an alternative jurisdiction's] courts have any less of a problem in this regard [than California], and the instant action is less likely to clog the courts"].)

Further, where a JCCP court is the chosen forum, the plaintiff can argue forcefully that it is clearly the most prepared to efficiently hear her case. Coordinated proceedings have proven very capable of presiding over thousands of similar cases; one more will not add any additional burden. Retaining cases within any particular JCCP will conserve judicial resources by avoiding the duplication of effort that would result if the matter was litigated in a separate forum. Thus, considerations of judicial economy weigh in favor of California as a convenient forum.

When facing a motion to dismiss for forum non conveniens, it is critical for a mass-tort plaintiff to educate the court on the facts applicable to the doctrine. The plaintiff is entitled to choose the forum in which she wishes to proceed with her action, and this choice is entitled to deference. Claims that an alternate forum is more convenient should be scrutinized closely. It can be easy for courts to take the path of least resistance (dismissal moves the matter off their plate), without appreciating that an established legal doctrine may not be applicable to certain types of cases. Attempts to delay a plaintiff's day in court which are masquerading as forum non conveniens motions should be countenanced.

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