

Foreign Plaintiffs Battle to Keep Class Claims in U.S. Courts

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actions with an early motion to dismiss based on *forum non conveniens*, arguing that the plaintiff's native country is the proper place for product litigation. The forum motion, decided by a judge, involves a fact-specific inquiry on issues such as the location of documents, witnesses, and other sources of proof, and also requires an analysis of the law of the suggested alternative country. Unlike litigation where only U.S. law needs to be considered and judges are the acknowledged experts on the law, a motion involving foreign litigants will likely require expert affidavits or even testimony on the rights and effect of the foreign law. Because *forum non conveniens* motions give separate consideration to the law of each country at issue, the defendant will likely need separate legal counsel and experts for each foreign country as well as potential discovery to support the motion. It is no exaggeration to say that defendants faced with cases filed by foreign plaintiffs need to anticipate a hard-fought, expensive and time-consuming battle.

In the past year, several cases have been decided that should impact how future filings will be addressed by the courts.² These decisions show that whether a *forum non conveniens* motion succeeds will depend on how well the parties frame their arguments to two key questions:

- ◆ Is there an adequate alternative forum available to the plaintiff?
- ◆ Do the balance of relevant private and public interest factors favor dismissal?

Adequate Alternative Forum

Whether a forum is "available" depends on if the

“There’s so much that we share, that it’s time we’re aware, it’s a small world after all.” Some plaintiff’s counsel seem to have taken to heart these lyrics from the Disney theme park song, by pursuing a share of the U.S. litigation system on behalf of foreign plaintiffs. Claimants who neither reside in the U.S. nor were injured by a product while visiting the U.S. have filed tort litigation against such Food and Drug Administration (FDA)-regulated products as Vioxx (rofecoxib), Blood Concentrate (anti-hemophilic factors) and Trovan (trovaflazacin mesylate). The reason is fairly obvious: There is probably no more plaintiff-friendly forum in the world than the U.S. federal and state courts.

While many claims by foreigners have been dismissed, the perceived benefits of filing in the U.S. continue to motivate an increasingly sophisticated and coordinated plaintiff’s bar, seeking such mechanisms and remedies as class actions, punitive damages and medical monitoring.

Product lawsuits brought by foreign plaintiffs have a typical posture. Most cases end up in federal court, even if not filed there originally, on the ground of diversity jurisdiction.¹ Plaintiffs focus on purported “American misconduct,” which they argue make the U.S. the most appropriate forum. Defendants almost always fight these



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defendant can be served with process (i.e., that a suit can be filed and served against the company in the alternative country). That was a telling factor in the Vioxx Litigation, where the court found that Merck's foreign subsidiaries were already subject to service of process in both France and Italy. To cap off the dismissal, Merck agreed to submit voluntarily to the foreign jurisdictions for any individual civil suits filed in those countries. Some U.S. courts will require more than just the company's promise. In the Blood Products litigation, defendants provided not only a stipulation that they would submit to United Kingdom jurisdiction but also an affidavit from an English law expert stating that such a stipulation would, in fact, be accepted by UK courts.³

A foreign forum is deemed "adequate" when the parties will not be deprived of all the remedies or treated unfairly, even though parties may not receive the same benefits as they might enjoy in an American court. In the Vioxx litigation, plaintiffs argued that neither Italy nor France was an adequate forum because neither jurisdiction allowed for class action proceedings; and that fee shifting rules and prohibitions on contingency-fee arrangements in both countries made filing suit prohibitively risky and expensive for individual plaintiffs. These arguments did not save the claims for a U.S. court because both jurisdictions had "effective collective action mechanisms that allow groups of plaintiffs who allege similar injuries to file suit together."⁴ In any event, "the lack of a class action device is not a basis for

concluding that a foreign forum is inadequate for *forum non conveniens* purposes."⁵

An alternative forum is inadequate only if it deprives the plaintiff of *all* remedies or treats the plaintiff unfairly.⁶ To insure access to foreign process, courts on occasion have conditioned the grant of a motion to dismiss on the defendants' entering into stipulations or even waivers on issues such as statute of limitations or admissibility of evidence.

In contrast, the *Tuazon* decision affirmed that the Philippines was not an adequate alternative forum because the defendant failed to show it would submit to process there and failed to counter extensive evidence of corruption in the Philippine court system.⁷

Balance of Interest Factors

The analysis of relevant private and public interest factors should be more familiar to U.S. litigants, as it parallels the same balance of factors that come into play in a motion to transfer a case from one U.S. jurisdiction to another. Long-recognized private interest factors include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses ... and all other practical problems that make trial of a case easy, expeditious, and inexpensive."⁸

Convenient access to necessary proof was a key factor in

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granting the dismissal of Italian and French litigants in the Vioxx litigation, where defendants highlighted that the drug was sold overseas only after obtaining regulatory approval in those countries, the foreign plaintiffs bought and used Vioxx and sustained their alleged injuries and received treatment there, and relevant evidence such as plaintiffs' Italian and French medical records would not be readily accessible to parties seeking discovery in a U.S. court.⁹ If a foreign plaintiff becomes resident in the U.S., which was the situation in the *Tuazon* case, the defendant's *forum non conveniens* arguments could lose much of their force, even for a claim resulting entirely from conduct and harm outside the U.S.¹⁰

Well-established public interest factors include the administrative difficulties flowing from court congestion, the fairness of imposing jury duty upon the people of a community, which has no relation to the litigation, and the interest in having foreign controversies decided in the foreign location.¹¹ Practical arguments favoring defendant manufacturers are that the worldwide nature of pharmaceutical sales argues against allowing foreign cases to proceed in U.S. courts. Easy access to U.S. courts would open a floodgate of similar claims from plaintiffs around the world and hopelessly congest the U.S. dockets, especially since the complicated nature of these claims, often involves long trials with complex medical and scientific issues.

The court in the Blood Products litigation noted that an earlier single-plaintiff trial involving the same product, alleged injury, and manufacturers took seven weeks to try.¹² The Vioxx litigation decision emphasized the rights of foreign courts to hear disputes involving their citizens and their regulatory agencies. Trying claims brought by Italian and French plaintiffs in the U.S. would risk disrupting the judgments of Italian and French regulators by improperly imposing an American jury's view of the appropriate standards of safety and labeling on companies marketing and selling drugs in Italy and France.¹³

Conclusion

In an era where pharmaceutical, biotech, and other FDA-regulated products are routinely developed and marketed abroad, "we should expect to face controversies arising from activities originating in the United States but played out in distant lands."¹⁴ Strategic factors should guide the company's responses and management of such litigation.

Should you contest a U.S. forum when litigation is brought by foreign plaintiffs? This depends on the company's analysis of the prospects and risks for litigation pursued here or abroad. As examples, the company's chance of success may be better in the U.S. on account of fewer procedural or substantive protections in foreign jurisdictions, foreign political factors, or foreign business issues. Less access to proof in a foreign jurisdiction can cut both ways for the plaintiff and the defendant.

The costs of defending in multiple foreign jurisdictions is another consideration. Settlement in the U.S. may or may not achieve finality of foreign claims. Overall, these and other factors that come into play are sufficiently complex and varied to preclude cookbook conclusions. It is not quite a "small world, after all" and litigation brought by foreign plaintiffs deserves a strategic, results-centered analysis for how best to proceed. **▲**

1 An exception is where the defendant is a citizen of the forum state. *See, e.g., In re Vioxx Litigation*, 2006 WL 2950622 (N.J. Super. Oct. 2, 2006)(filed in the defendant's home state of New Jersey).

2 *See In re Vioxx Products Liability Litigation*, 448 F. Supp. 2d 741 (E.D. La. 2006) (Vioxx Litigation); *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 408 F. Supp. 2d 569, 591 (N.D. Ill. 2006) (Blood Products Litigation), and *In re Vioxx Litigation*, 2006 WL 2950622, N.J. Super. (Oct. 2, 2006) (Vioxx State Court Litigation). *See also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F. 3d 1163 (9th Cir. 2006), *cert. denied*, 549 U.S. __ (2006).

3 408 F. Supp. 2d at 576.

4 448 F. Supp. 2d at 746.

5 *Id.* Citing *Pavlov v. Bank of New York Co., Inc.*, 135 F.Supp.2d 426, 434, S.D.N.Y. (2001).

6 *Id.*

7 433 F. 3d 1178.

8 *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947).

9 448 F. Supp. 2d at 747.

10 *See, e.g.*, 433 F. 3d at 1180.

11 330 U.S. at 508.

12 408 F. Supp. 2d 569, 591, N.D. Ill. (2006). The court also noted that a trial in the alternative foreign forum, the UK, would be decided by a judge rather than a jury. Whether access to a jury trial is considered a relevant "public interest" factor may be an issue considered by the Seventh Circuit in review of this case.

13 448 F. Supp. 2d at 748.

14 433 F. 3d at 1182.