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Huddled Masses Yearning to Strike It Rich: Foreign Plaintiffs Shopping for Gold in American Courts

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"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" – Emma Lazarus, "The New Colossus" (engraved on pedestal of Statue of Liberty)

Foreign litigants suing American companies for torts committed abroad hope the golden door swings open into American courtrooms, even when the conduct and events underlying their claims occurred in far-off lands and have no effect on U.S. citizens. With increased frequency, American companies conducting operations abroad face lawsuits in American courts by foreign plaintiffs seeking the benefits of the American system of justice.

Foreign plaintiff forum shopping affects not only the parties to the case, but impacts broader societal, economic and governmental interests as well. The Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, contends that global forum shopping creates uncertainty for corporations operating in U.S. markets, discourages foreign investors in U.S. companies and compromises U.S. foreign relations by encouraging expansion of foreign court jurisdiction to counter American judicial expansion. (Global Forum Shopping Fact Sheet; last visited June 15, 2009).

Even the U.S. State Department has weighed in, arguing that lawsuits in American courts can have deleterious effects on foreign relations. See John B. Bellinger III, "The U.S. Can't Be the World's Court, *Wall Street Journal*, May 27, 2009, at A19, which discusses State Department opposition to a New York federal lawsuit against GM, Ford and IBM for allegedly "aiding and abetting crimes against humanity committed by the apartheid government in South Africa."

Relying upon the common law doctrine of forum non conveniens, however, defendants often secure dismissal of cases filed by foreign plaintiffs. Proponents of forum non conveniens dismissal argue that disputes ought to be resolved where they arise, while opponents counter that justice often eludes foreign plaintiffs in their homelands, where judicial systems are corrupt and litigation is laden with risk. The battle lines divide American companies operating in foreign countries on one side and, on the other, plaintiffs supported by their own government's legislation and even treaties with the U.S. designed to pry open the golden door to American courtrooms frequently slammed shut by forum non conveniens.

THE SHIMMER OF AMERICAN JUSTICE

What motivates foreign plaintiffs to file suit in American courts? The same things that motivate American plaintiffs. Commentators have identified a number of benefits that foreign plaintiffs see in the American civil litigation system compared to the systems of their own countries: the availability of strict liability for defective products, liberal and extensive pretrial discovery, jury trials, class actions, contingency fee arrangements and the "American rule" that the loser does not pay the winner's legal fees and expenses. See Todd Gattoni & Brian Oh, "The Recent Trend of 'Backdooring' Foreign Mass-Tort Claims Into U.S. Courts," 13 MED. DEVICES 1 (Jan. 8, 2007); Hal S. Scott, "What to Do About Foreign Discriminatory Forum Non Conveniens Legislation," 49 HARV. INT'L L.J. 95, 96 (Jan. 20, 2009).

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Compensatory damage awards tend to be higher in the United States than in some foreign jurisdictions. See Eric A. Posner & Cass R. Sunstein, "Dollars and Death", 72 U. CHI. L. REV. 537, 580, 2005: ("Because tort law in other countries, like in the U.S., is mainly limited to compensating dependents, foreign tort awards usually undervalue the victim's loss. Because American courts generally defer to foreign law in cases of torts committed on foreign soil, the low tort awards in other countries are implicitly incorporated into American foreign policy.") It is no wonder foreign plaintiffs, with encouragement from American plaintiffs lawyers, prefer American justice.

KATY, BAR THE DOOR: DISMISSAL BY FORUM NON CONVENIENS

"Under the federal doctrine of forum non conveniens, when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish ... oppressiveness and vexation

to a defendant ... out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established." *Am. Dredging Co. v. Miller,* 510 U.S. 443, 447-48 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)). As a result of the enactment of the federal transfer statute, 28 U.S.C. § 1404, "the federal doctrine of forum non conveniens has continuing application only in cases where the alternative forum is abroad." Id. at 449 n.2.

U.S. Supreme Court Justice Robert Jackson described the underpinnings of forum non conveniens more than 60 years ago in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947):

The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

In deciding whether to dismiss a case on forum non conveniens grounds, courts must first determine whether an adequate alternative forum exists and, then, whether public and private interests weigh in favor of dismissal. *See Reyno*, 454 U.S. at 254 n.22. Private interest considerations 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 unwilling, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. Public interest considerations include "administrative difficulties ... when litigation is piled up in congested centers instead of being handled at its origin[;]" burdening "jury duty ... upon the people of a community which has no relation to the litigation[;]" "local interest in having localized controversies decided at home[;]" and "an appropriateness ... in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." Id. at 508-09.

As in most venue controversies, a plaintiff's choice of forum deserves deference, but less so when the plaintiff is foreign:

[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. (*Reyno*, 454 U.S. at 255-56; e.g., *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430, 2007, quoting *Reyno*).

At least one court (*Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72, 2nd Circuit, 2001) has held that the more forum shopping drives the choice of forum, the less deference the choice deserves:

[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens. Thus, factors that argue against forum non conveniens dismissal include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense. On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that convenience would be better served by litigating in another country's courts.

American courts, both state and federal, are not afraid to dismiss cases brought by apparently sympathetic foreign plaintiffs, on the appropriate facts. In I*n re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987), for instance, the 2nd Circuit affirmed the Southern District of New York's forum non conveniens dismissal of multiple lawsuits against Union Carbide arising out of the Bhopal disaster. Similarly, in In re Vioxx Litig., 928 A.2d 935 (N.J. Super. App. Div. 2007), 98 plaintiffs residing in England and Wales sued Merck & Co. in New Jersey state court over personal injuries allegedly caused by the arthritis drug Vioxx. The trial court dismissed the claims on forum non conveniens grounds, and the appellate court affirmed. Resolution of motions to dismiss on forum non conveniens grounds depends heavily upon particularized facts of each case, allowing foreign plaintiffs commonly to defeat seemingly well-founded motions. E.g., In *re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 190 F. Supp. 2d 1125 (S.D. Ind. 2002) (denying motions to dismiss product liability cases involving accidents occurring in Venezuela and Colombia); *Bridgestone/Firestone North American Tire, LLC v. Garcia*, 991 So. 2d 912 (Fla. 4th DCA 2008) (affirming denial of motions to dismiss product liability cases involving accidents in Argentina).

LEGISLATIVE CROWBAR: ALIEN TORT CLAIMS ACT, TREATIES OF FRIENDSHIP AND DISCRIMINATORY LEGISLATION

Foreign plaintiffs facing eviction from American courtrooms have tried with some success to gain entry using various pieces of legislation enacted by the U.S. government or their own governments. Of particular note is the Alien Tort Claims Act, 28 U.S.C. §1350, which was passed by the first Congress as part of the Judiciary Act of 1789 and which gives federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), the Supreme Court held that "the statute is in terms only jurisdictional" but "at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." Id. at 712. Thanks to *Sosa*, and likely to Justice Antonin Scalia's dismay, the ATCA has become a weapon in the arsenal assembled by foreign plaintiffs to breach the doorway to American courts.

Compare id. at 739 ("American law – the law made by the people's democratically elected representatives – does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.") (Scalia, J., concurring) with James Goodwin & Armin Rosencranz, "Holding Oil Companies Liable for Human Rights Violations in Post-Sosa World," 42 NEW ENG. L. REV. 701 (Summer 2008) (analyzing cases involving foreign plaintiffs' reliance on ATCA to sue American companies in federal court for claims arising from alleged torts abroad).

Foreign plaintiffs have likewise claimed jurisdiction under treaties between the U.S. and many European countries. Numerous treaties purport to accord citizens of other countries "no less favorable access to U.S. courts to redress injuries caused by American actors." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1383 (11th Cir. 2009) (footnotes and quotations omitted); id. at 1383 n.2 (describing "Treaty of Friendship, Commerce and Navigation" and others). Foreign plaintiffs have argued that these treaties mean their choice of forum deserves equal deference, not "less deference" under *Reyno*. Those arguments have generally failed to carry the day, however. Id. at 1383 ("In this case, then, the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience.").

Some foreign plaintiffs find allies in their own governments, which have enacted highly discriminatory legislation aimed at discouraging or outright punishing American defendants who pursue or obtain forum non conveniens dismissal in American courts. The legislatures in both Nicaragua and Guatemala have enacted two of the most egregious forms of this type of legislation. See *Scott*, supra, at 99-102.

Guatemalan legislation renders Guatemalan courts unavailable merely by the filing of a lawsuit in a foreign court, regardless of whether that foreign lawsuit is ultimately dismissed. Id. at 100. Because no Guatemalan court would be available, the foreign (U.S.) court would need to retain jurisdiction under common law forum non conveniens doctrine. Id.

Nicaraguan legislation imposes draconian measures on foreign defendants sued in Nicaraguan courts. For example, foreign defendants must make substantial deposits in special bank accounts (millions of dollars) as security, and all cases are resolved through summary proceedings. Id. Significantly, the legislation only applies to defendants who have secured forum non conveniens dismissal from a U.S. court. Id. The legislation clearly intends to retaliate against foreign defendants who successfully move to dismiss on forum non conveniens grounds. The idea is that U.S. defendants will forgo forum non conveniens dismissal out of fear that they will be sued in Nicaragua. Id. at 101-02. "Defendants thus face a no-win scenario: either litigate in the wrong place or litigate in the right place with unfair procedures." Id. at 102.

LOOKING AHEAD: THE POTENTIAL EFFECT OF HIGH COURT NOMINEE SOTOMAYOR

Second U.S. Circuit Court of Appeals Judge Sonia Sotomayor, President Obama's nominee for the Supreme Court, has written relatively little on issues affecting foreign plaintiff forum shopping, making it difficult to divine what effect, if any, her confirmation would have on Supreme Court jurisprudence. While serving on the District Court for the Southern District of New York, she denied a motion to dismiss on forum non conveniens grounds in *Revlon, Inc. v. United Overseas Ltd.*, No. 93 Civ. 0863 (SS), 1994 WL 9657 (S.D.N.Y. Jan. 12, 1994), a case brought by an American company against a British company. She also participated in the 2nd Circuit's consideration en banc of I*ragorri v. United Techs. Corp.*, in which the court outlined its sliding scale analysis of the deference owed to foreign plaintiffs' choice of forum but nonetheless vacated the district court's dismissal on forum non conveniens grounds. On the other hand, Sotomayor sat on the panel deciding *Fed'n of Yagua People of Lower Amazon and Lower Napo v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), in which the court affirmed dismissal on forum non conveniens grounds of various claims, including claims under the ATCA.

CONCLUSION

Foreign plaintiffs pursue entrance through the golden doors of American courtrooms because the American form of civil litigation offers potentially lucrative benefits their homeland's judicial system does not. Although many foreign plaintiffs deserve to have their claims adjudicated by American courts, too often foreign plaintiffs seek access to American courts on tenuous legal and factual grounds. When public and private interests favor dismissal, the doctrine of forum non conveniens can help to reinforce the floodgates.

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