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The *Forum Non Conveniens* Decision

Part Two of a Two-Part Article

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In Part One of this article, Section 1 discussed the considerations both pro and con for *forum non conveniens* motions, and explained why the traditional calculus favoring such motions is changing. Section 2 presented two recent case studies in which successful *forum non conveniens* motions backfired against the defendants and placed them in a far more dangerous litigation posture. Section 3 herein explains how defendants who have elected to stay in U.S. courts have used the strengths of the U.S. judicial system to expose the factual gaps, and in some cases outright fraud, that formed the basis of many of the foreign claims that have been imported to U.S. shores.

There's No Place Like Home

In addition to demonstrating the dangers of the *forum non conveniens* strategy in subjecting defendants to the jurisdiction of foreign courts, the Chevron/Texaco and DBCP cases also provide potent illustrations of the strengths of the U.S. judicial system. In both case studies, the defendants abandoned the *forum non conveniens* strategy in subsequent lawsuits brought in the U.S. by other foreign plaintiffs arising from the same facts, and the defendants succeeded in U.S. courts in both defeating plaintiffs' claims and uncovering clear evidence of plaintiff misconduct.

In 2006, one of the U.S. attorneys who had filed the *Aguinda* action (*Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2nd Cir. 2002)) brought a separate personal injury lawsuit against Chevron/Texaco on behalf of a number of Ecuadorian residents, alleging that exposure to oil from historic Texaco operations had caused them to contract cancer. The plaintiffs had purportedly obtained certifications from medical doctors stating that there was at least a 51% chance that their cancers had been caused by oil contamination, but when the defendants deposed the plaintiffs, they discovered that the claims were entirely fraudulent: each plaintiff admitted that he/she did not have cancer. The court granted the defendants' motion to dismiss and in a subsequent ruling on the defendants' motion for sanctions, strongly admonished the plaintiffs' counsel for failing to conduct the required due diligence before filing the complaint: Plaintiffs' counsel "knew or should have known how weak was the evidentiary support and that inquiry [into plaintiffs' alleged personal injury claims] was neither competent nor reasonable." *See Gonzales v. Texaco, Inc.*, No. C 06-02820, 2007 WL 3036093 (N.D. Cal. Oct. 16, 2007), *vacated on other grounds*, *Collingsworth v. Texaco, Inc.*, 344 Fed. Appx. 304 (9th Cir. 2009) (holding that trial court had used incorrect legal standard in imposing sanctions against two of three sanctioned plaintiffs' attorneys). Similarly, U.S. courts in the third-party discovery actions brought by Chevron-Ecuador in response to the apparent misconduct of the Ecuadorian court expert Richard Cabrera have been far more receptive to the evidence of plaintiff fraud in Ecuador than has been the Ecuadorian Court. *See, e.g.*, Order Granting Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings, *In re Application of Chevron Corp.*, No. 2:10-cv-02675 (D.N.J. June 15, 2010) (rejecting privilege claim based, *inter alia*, on crime-fraud exception).

DBCP Litigation Brought In the United States

The record established from DBCP litigation brought in the U.S. is even more dramatic. In 2004, plaintiffs filed three separate lawsuits on behalf of allegedly injured Nicaraguan banana workers in Los Angeles County Superior Court. California has not adopted the *Daubert* standard for admissibility of expert testimony. While the trial judge subsequently stated that she had concerns about the plaintiffs' evidence, she nonetheless let the first case, *Tellez*, proceed to trial in July 2007 on the sterility claims of 12 individual plaintiffs. In November 2007, the jury issued a split verdict, finding for six of the plaintiffs and finding for the defendants on the claims brought by

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the other six plaintiffs. The jury awarded damages for the six successful plaintiffs in the amount of $5 million, including $2.5 million in punitive damages. While this judgment was on appeal, however, the defendants uncovered evidence of the massive fraud in Nicaragua discussed above. The California state court put a stay on the remaining DBCP litigation and ordered the plaintiffs to provide discovery in response to the defendants' showing of fraud. In 2009, following a three-day evidentiary hearing, the judge issued a powerful opinion dismissing all of the claims still pending before her and harshly condemning the attorneys involved for their fraudulent misconduct, finding that the plaintiffs and their counsel were engaged in "not just a fraud on this court, but … a blatant extortion of defendants." Transcript of Sanctions hearing at 794:11-13, *Mejia v. Dole Food Co., Inc.*, No. BC-340049 (L.A. Super. Ct. Apr. 21 & 23, 2009) (on file with author). In her subsequent written opinion, the court found that the evidence of fraud in the *Mejia* lawsuit was illustrative of a "broader conspiracy that permeates all DBCP litigation arising from Nicaragua." *Id.*, Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court, at 2 (June 17, 2009). In July 2009, the Second Appellate Division of the Court of Appeals of California remanded the previously tried plaintiffs' verdict in *Tellez* back to the Superior Court, with an order to show cause why that case should not be dismissed as well.

In a separate legal proceeding, two prominent plaintiffs' attorneys, Tom Girardi and Walter Lack, succeeded with Nicaraguan counsel in securing a $489 million judgment on behalf of 465 plaintiffs against Dole Food Corporation. There is no such corporation. However, when the actual company, Dole Food Company, moved to intervene in the proceeding, the Nicaraguan court denied intervention because Dole Food Company was not a named party in the action. Armed with this improperly secured judgment, attorneys Girardi and Lack brought an enforcement action against Dole Food Company in the U.S., repeatedly misrepresenting to both a U.S. District Court for the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit that the Nicaraguan judgment had been issued against the properly-named defendant. Plaintiffs finally dismissed the enforcement action on the eve of the oral argument before the Ninth Circuit, and the court appointed a Special Master to investigate plaintiff counsel's misrepresentations to the court. In his subsequent report, the Special Master concluded that attorneys Girardi and Lack had "recklessly and intentionally misled this Court" and recommended fines totaling nearly $400,000. *In re Girardi*, No. 08-80090, Report and Recommendation of the Special Master (9th Cir. March 21, 2008) (on file with author). The Ninth Circuit subsequently appointed an independent prosecutor to investigate the matter, *In re Girardi*, 529 F.3d 1199 (9th Cir. 2008), and his investigation is ongoing.

While the Chevron/Texaco and DBCP case studies provide the most dramatic evidence of defendants' success in U.S. courts in defeating baseless claims and exposing fraudulent misconduct by foreign plaintiffs, there are numerous other examples. In an ATS case against Bridgestone in the Southern District of Indiana, a court recently ordered a paternity test for a minor plaintiff who allegedly was subjected to unlawful child labor in Liberia after evidence was uncovered that the individual who had submitted the claim was not the plaintiff's true father. In a separate ATS claim in U.S. court in which the author is involved, a court recently dismissed with prejudice the claims of three plaintiffs when it was discovered that the plaintiffs — who had each submitted sworn questionnaire responses in support of their personal injury claims — in fact lived 275 miles from the farm where they had alleged exposure to herbicide. Had these defendants secured *forum non conveniens* dismissals and tried their luck in the courts of the plaintiffs' home country, it is quite possible that these frauds would not have been uncovered.

Conclusion

When a U.S. defendant finds itself sued in U.S. courts by foreign plaintiffs alleging misconduct in a foreign country, there is a strong temptation to file a quick *forum non conveniens* motion in the hope that the litigation will go away. Defendants need to consider carefully, however, exactly where the lawsuit will go away to. In many cases, the alternative foreign forum is far worse for defendants than proceeding in the U.S., and a defendant that files a forum non conveniens motion may end up regretting its litigation "success."