

The Foreign Plaintiff

Applying the doctrine of forum non conveniens to dismiss cases brought by out-of-state claimants

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In a recent decision, *In re: Vioxx® Litigation*, 395 N.J. Super. 358 (App. Div. 2007), the Appellate Division upheld the trial court's decision to dismiss 98 cases. For mass tort defense practitioners, an en masse dismissal of almost 100 cases is no small feat. The plaintiffs in these cases, however, were no ordinary plaintiffs, but residents of England and Wales, and the result was due to the application of the doctrine of forum non conveniens.

As discussed more fully below, the court granted the forum non conveniens dismissals due in large part to public interest factors that weighed in favor of dismissal. Specially, the court did not want to burden jury members and a community having no relationship to the litigation and did not want to inflict an additional administrative burden on the court system. Although the court applied its analysis only to the foreign plaintiffs, the same rationale applies to nonresident domestic plaintiffs. As such, perhaps this opinion signals an overdue shift in the treatment of this issue by New Jersey courts. Given the rationale of this decision, coupled with a mass tort court system that is burdened by over 90 percent of cases being brought by non-New Jersey residents, broader application of this doctrine to out-of-state plaintiffs is both appropriate and necessary.

Vioxx® is currently one of 10 pending mass torts in New Jersey. Vioxx® was manufactured and sold by Merck and Company for the treatment of acute pain and osteoarthritis. See <http://www.judiciary.state.nj.us/mass-tort/index.htm>. Merck is an international pharmaceutical company headquartered in New Jersey. As a designated mass tort, all Vioxx® cases filed in New Jersey are case managed and coordinated in Atlantic County.

Based on the doctrine of forum non conveniens, Merck brought a motion before the trial court to dismiss the claims of all plaintiffs who resided in the United Kingdom. On October 5, 2006, the trial court filed a memorandum opinion, which resulted in the dismissal of all actions filed by citizens of the United Kingdom.

In a companion order, the court set certain additional conditions of dismissal. See http://www.judiciary.state.nj.us/masstort/vioxx/vioxx_forum_non_UK_order.pdf. Specifically, the court required that defendants: (1) consent to service of process and jurisdiction in the United Kingdom; (2) agree to satisfy any final judgment; (3) be precluded from including the time period that the case was pending in the United States in arguing statute of limitations defenses; and (4) not object to any cases filed within 120 days of the date of the order coming back to Atlantic County if the United Kingdom refuses to exercise jurisdiction.

The Appellate Division began its analysis by noting that traditionally, deference is given to plaintiffs' choice of forum with defendants bearing the burden of establishing that New Jersey is an inconvenient forum. In this instance, however, the court determined that because foreign plaintiffs were involved, less deference should be afforded to plaintiffs' choice of forum. The court then evaluated the facts, considering the following factors: (1) existence of adequate alternative forum in which litigation can be brought; and (2) an evaluation of the private and public interest factors "bearing upon the suitability of the plaintiffs' choice of forum."

In addressing the first factor, the court acknowledged that the requirement of the existence of a suitable alternative forum is typically satisfied if the "defendant is 'amenable to process' in another jurisdiction." The court noted, however, that in some "rare circumstances," where the remedy available in the alternative forum is clearly inadequate, this requirement may not be met. In this case, the plaintiffs argued the existence of such "rare circumstances." Specifically, plaintiffs contended that the United Kingdom was an inadequate alternative forum because, inter alia: (1) the law in this venue did not provide for all of the causes of actions available to plaintiffs in New Jersey; and (2) the cost of litigation and financial challenges attendant to litigating in the

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United Kingdom. The court rejected the first argument and found that if some cause of action is still available in the alternative forum, the alternative forum is adequate. Further, the court also determined that the financial obstacles involved in litigating the cases in the United Kingdom “are not so insurmountable as to render that forum either inadequate or unavailable.”

The court next addressed the private interest factors relative to the “suitability” of plaintiffs’ choice of venue, focusing primarily on the following: (1) “the relative ease of access to the Courts”; and (2) the “availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses.” The court found that each party’s relative position with respect to these factors to be more or less equal, perhaps with a heavier burden on Merck. However, the court opined that the private interest factors did not significantly assist Merck in satisfying its burden of proving that New Jersey is a demonstrably inappropriate forum.

Finally and most importantly, the court addressed the public interest factors, which it conceded are the decisive criteria in this analysis. These factors include: (1) the administrative difficulties inherent in having litigation pile up in a central location, rather than being handled in the forum of origin; (2) the burden of jury duty on a “community having no relation to the litigation”; (3) local interest in the subject matter; and (4) “local interest ‘in having localized controversies decided at home.’”

Finding that the drug approval process differed between the United States and the United Kingdom, the court determined that New Jersey juries would not have any interest and/or relationship to plaintiffs’ claims to the extent such claims were based on the law of the United Kingdom. While finding that a New Jersey jury would be able to apply foreign law, the Court questioned “why ... should [New Jersey juries] be called upon to do so in these cases.”

Additionally, the court agreed with the trial court’s observation that handling an enormous number of cases in one venue is difficult, but manageable where all parties are residents of the same country and that would not be the case if the parties are from different countries. In fact, the court deferred entirely to the trial court’s conclusion that the foreign plaintiffs would place a “substantial burden on the court and exacerbate the administrative process ... the burden on the State of New Jersey is an unnecessary one since a foreign country’s courts can do a better job of interpreting their laws and protective their citizens.”

Thus, based primarily on the public interest factor weighing in favor of dismissal, the court affirmed the trial court’s ruling dismissing the suits filed by plaintiffs from the United Kingdom based on the doctrine of *forum non conveniens*. The court did not comment on the conditions of dismissal placed by the trial court.

Although the Court dismissed almost 100 foreign plaintiffs in *In re: Vioxx*®, the trend for New Jersey courts, particularly in the mass tort setting, is rarely to dismiss cases involving domestic out-of-state plaintiffs. Indeed, the Appellate Division suggests that managing litigations involving foreign out-of-state plaintiffs is less burdensome. There is no rational basis, however, for that result and practice. Assuming that, as in the *Vioxx*® case, an alternative available forum is available and the private interest factors are equally burdensome to both plaintiffs and defendants, the decisive public interest factors favoring dismissal of foreign defendants also should result in the dismissal of domestic, non-New Jersey plaintiffs.

First, as a practical matter and without engaging in a choice of law analysis (which can only be conducted on a case by case, issue by issue basis), the law of the state of plaintiff’s resident is often the law applied in an individual mass tort case, including under New Jersey’s government interest test. If as the court in *Vioxx*® reasoned, the citizens of New Jersey would not have any interest and/or relationship to plaintiffs’ claims to the extent such claims were based on the law of the United Kingdom, similarly the citizens of New Jersey would not have any interest and/or relationship to plaintiffs’ claims to the extent such claims were based on the law of other states. There simply is no distinction in the application of the court’s rationale to domestic, out-of-state plaintiffs. In both instances, the plaintiffs are not from New Jersey and the citizens of New Jersey have no interest in such plaintiffs’ claims.

Additionally, domestic, non-New Jersey plaintiffs, like foreign non-New Jersey plaintiffs, do place a substantial burden on the court and tax the administrative process. Given that as of December 2006, 93 percent of pending mass tort cases in New Jersey were filed by out-of-state plaintiffs (see letter dated December 12, 2006, to the Clerk of the Supreme Court by counsel for amicus curiae Product Liability Advisory Counsel, Inc. (PLAC) and The New Jersey Defense Association in *Rowe v. Hoffmann-La Roche, Inc.*, Docket No. 59,454), it is only logical to assume that these nonresidents are likewise taxing the resources of New Jersey, a state in which they do not reside and have no connection. Moreover, as is the case of foreign defendants, the burden on the New Jersey from mass torts consisting almost entirely of domestic out-of-state plaintiffs is an unnecessary one because the forum states’ courts are available to interpret their own laws and protect their own citizens.

The analysis applied in *In re: Vioxx* should also apply to domestic out-of-state plaintiffs. Undoubtedly, New Jersey has compelling public interest in reducing court backlog and spending New Jersey tax dollars on New Jersey residents.

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