

An Adequate Alternative Forum Is Necessary For A Case To Be Dismissed Based Upon The Doctrine Of Forum Non Conveniens

When lawsuits arise out of conduct that occurs in different countries or involves parties located in different parts of the world, the courts in the United States are often called upon to determine whether the United States is an appropriate forum for the lawsuit, or whether the lawsuit should be litigated in a foreign court. It is common for a defendant to bring a motion under the *forum non conveniens* doctrine to seek dismissal of the lawsuit. The *forum non conveniens* doctrine gives trial courts the discretion to decline jurisdiction over a case where it determines that a foreign forum would be more convenient for the parties. The burden is placed upon the defendant, and the defendant must establish that: 1) an adequate alternative forum exists where the case can be filed and litigated; and 2) the balance of private and public interest factors favors dismissal of the case.

Before the doctrine of *forum non conveniens* may be applied to dismiss a case, a trial court must first determine whether an adequate alternative forum is available to the plaintiff. Specifically, the trial court must find that an adequate alternative forum is capable of providing the plaintiff with a sufficient remedy for the wrong suffered. Trial courts frequently look to expert testimony from foreign legal experts to determine if a foreign court will be able to exercise jurisdiction over the parties and whether the foreign court will provide a meaningful forum in which plaintiff may litigate the plaintiff's claims.

The recent decision by the Ninth Circuit Court of Appeals in *Gutierrez v. Advanced Medical Optics, Inc.*, --- F.3d ---, 2011 WL 1312783 (C.A.9 2011) is instructive on the analysis engaged in by the courts on these issues. In *Gutierrez*, Plaintiffs developed infections after eye surgeries that were caused by contaminated products used in the surgeries. Some of the Plaintiffs lost their eyes and others went blind as a result of the contaminated products. The surgery occurred outside of the United States (in Mexico), but the manufacturer of the product was located in the United States (in California). Plaintiffs filed their lawsuit in the United States (in California), but the District Court dismissed the case finding that an alternative and more convenient forum existed outside of the United States (in Mexico). Plaintiffs appealed the trial court's dismissal, but also proceeded to file a new lawsuit in Mexico.

After Plaintiffs filed their new lawsuit in Mexico, the Mexican courts refused to accept jurisdiction of the case and dismissed the case. Plaintiffs then brought this to the attention of the Ninth Circuit in connection with their appeal of the dismissal by the District Court. While finding that the District Court had acted within its discretion to dismiss the case based upon the information available to it when it made this decision (including significant expert testimony), the Ninth Circuit sent the case back to the District Court for further examination in light of the dismissal by the Mexican courts. Because the Mexican courts refused to accept the case when filed by Plaintiffs in Mexico, the Ninth Circuit held that the District Court needed to assess this additional information and determine whether it should reinstate Plaintiffs' lawsuit. The Ninth Circuit noted that: "if the district court determines that the Mexican courts declined to take jurisdiction of Plaintiffs' case because Defendant is not domiciled in Mexico and cannot submit to Mexico's jurisdiction, it would be an abuse of discretion for the district court to dismiss Plaintiffs' case based on *forum non conveniens* grounds." Otherwise, Plaintiffs would be left without a forum in which to litigate the case.

It is important to keep in mind that, in order to escape litigation in the United States based upon the doctrine of *forum non conveniens*, it is necessary that an alternative foreign court will accept jurisdiction of the case. Otherwise, if the only forum in which a party can litigate is in the United States, it is likely the case will remain in the courts of the United States to insure that the party has a remedy for any wrong that has been suffered.

For Further Information, Please Contact:

Nicholas P. Connon, Managing Partner; Chair, Middle East Practice Group; Tel: +1.626.638.1757