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Forum Non Conveniens – A Defendant's Initial Impulse Could Be The Riskiest

By Seth Johnson

Due to the inherent nature – and in fact purpose – of the transportation industry, companies operating in the field of aviation can find themselves facing lawsuits arising from events occurring across the globe or from plaintiffs of any country. The doctrine of *forum non conveniens* has traditionally been an important tool for a defendant in U.S. courts being sued by a foreign plaintiff or domestic plaintiff for conduct abroad. Literally translated into "the forum not coming together," the doctrine provides a court with the discretion to decline to accept jurisdiction over an action in favor of a more convenient forum, despite the fact that jurisdiction and venue may properly exist in the initial court. Additionally, as variations of the doctrine are applied in both state and federal courts, it is likely one of a defendant's first considerations when facing a suit from a foreign plaintiff or stemming from foreign events.

Plaintiffs often seek out the U.S. Court system for the perceived possibility of a larger recovery – American juries are well known for granting large damages awards, and unlike many jurisdictions, the U.S. permits punitive damage awards for private plaintiffs. Historically, defendants often have, as a matter of course, sought a dismissal for *forum non conveniens* whenever possible. If successful, they would deny the plaintiffs access to the U.S. court system with its higher awards, and on many occasions, their action would lead to a settlement based upon the laws of the country where the suit should have been filed, or perhaps an abandonment of the suit altogether.

However, as some foreign countries have become more liberal with their damage awards, particularly in regard to non-resident companies, the decision is no longer clear-cut, and sometimes the decision to seek dismissal on *forum non conveniens* grounds has led to what one commentator has labeled as "forum shopper's remorse" – where, after having obtained the dismissal from U.S. courts that they wished for, defendants are encountering unexpected outcomes in favor of plaintiffs, including substantial judgments. [1]

For example, in *Aguinda v. Texaco, Inc.*,

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Providing Information to Expert Witnesses: A Quick Guide To The Proper Procedures and Potential Pitfalls

By Steven Dimitt

The need for experts in aviation cases is usually paramount to the proper assessment of liability. However, the information given to an expert, if not done properly, can quickly become discoverable by the opposing party. In 2010, the Federal Rules of Civil Procedure were amended to provide more protection to attorney-expert communications. The rules were amended in part due to the rising costs of attorneys attempting to effectively communicate with experts while also keeping the communications from being discovered. While the amended rules afford more protection to communications between experts and attorneys, there are several potential pitfalls that attorneys and their clients must be aware of before communicating with their experts.

(a) What documents and communications are discoverable?

Rule 26 of the Federal Rules of Civil Procedure sets forth the discoverability of communications between experts and attorneys. Currently, the rule protects some attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The rule was amended to protect counsel's work product and ensure that attorneys could interact with retained experts without fear of those communications being discovered. While the rule has been expanded to provide additional protection to attorney-expert communications, there are still three areas of communications that are discoverable:

(1) Compensation. A party can discover communications regarding an expert's compensation. This extends to all compensation for an expert's investigation and testimony provided in relation to a case. Also, any communications about additional benefits to an expert, such as further work in the event of a successful result in the present case is discoverable. This exception also includes compensation for work done by a person or organization associated with the expert. The objective of this exception is to permit full inquiry into such potential sources of bias.

(2) Facts or data considered. A party is permitted to discover facts or data that the opposing party's attorney provided to his or her expert and that the expert considered in forming his or her opinions. This exception to the general attorney-expert communication protection applies only to communications "identifying" the facts or data provided by counsel. Moreover, communications about the potential relevance of the facts or data are protected.

(3) Assumptions. A party can discover any assumptions that an attorney provided to an expert and that an expert relied upon in forming his or her opinions. For example, an attorney may tell an expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusion, all of which are discoverable. This exception is limited to those assumptions that an expert actually did rely on in forming his or her opinions. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception and are not discoverable.

A party may obtain communications outside of these three exceptions only in limited circumstances and by court order. A party seeking to obtain this additional information must show a substantial need and that the party cannot obtain the substantial equivalent without undue hardship. The comments to rule 26 of the Federal Rule of Civil Procedure note that it will be rare for a party to be able to meet this burden given the broad disclosure and discovery otherwise allowed regarding experts.

The amended rules also prevent the opposing counsel from discovering the expert's draft report and disclosures. Thus, the new rules attempt to strike a balance by allowing the opposing party to obtain the facts and data considered by the expert while allowing attorneys and experts to communicate more freely regarding an expert's opinions.

(b) Procedures that should be followed regarding attorney-expert communications.

Although the Federal Rules of Civil Procedure provide some protection to the discoverability of attorney-expert communications, attorneys should still take basic precautions to protect information from becoming discoverable. Attorneys should attempt to provide discoverable materials to experts separately, rather than buried within e-mails overloaded with confidential work product. While organizing and segregating communications that fall within the three exceptions of protected attorney-expert communications may hinder the free flow of communications between attorneys and their experts, it will hopefully alleviate disputes regarding the discoverability of attorney-expert communications by allowing attorneys to accurately determine what information is protected.

(c) Attorneys and their clients should be careful to avoid some potential pitfalls.

- **Potential Pitfall: Communications with people other than attorneys are discoverable.**

The attorney-expert protection extends beyond communications between hired outside counsel of record and their experts. The protection includes communications between a party's attorney, whether in-house or outside counsel, and assistants of

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Texas Supreme Court Clarifies Coverage for Continuous Injuries

by Paige Nobles

On August 23, 2013, the Texas Supreme Court decided *Lennar Corporation v. Markel American Insurance Co.* In doing so, the Court made two important clarifications. First, it held that evidence the insured breached the insurance contract does not excuse the insurer's performance unless the breach prejudiced the insurer (i.e., was material). Second, with respect to continuing injuries, the Court held that although the limits of consecutive insurance policies may not be stacked, the insured may choose among concurrent policies and select the policy that provides the greatest relief.

The jury in *Lennar* awarded a homebuilder over $5 million in damages for the homebuilder's remediation efforts after discovering that an Exterior Insulation Finish System ("EIFS") used on many of its homes was causing significant water damage. Subsequently, a Houston appellate court agreed with the insurance carrier and reversed. The appellate court reasoned that the homebuilder's efforts to remediate the damages without the insurer's consent amounted to a breach of the insurance contract's "consent-to-settle" clause. It also held that the homebuilder offered insufficient evidence that the policy covered the damages as required by the Texas Supreme Court's 2008 decision in *Don's Building Supply Inc. v. OneBeacon Insurance Co.*

The Texas Supreme Court found the appellate court's reasoning unpersuasive. Relying on its decision in *Hernandez v. Gulf Group Lloyds*, the Court held that in order for a breach to be material, and thus excuse performance, it must cause prejudice. Because the jury found the homebuilder's remediation program did not prejudice the insurer, the Court held that the homeowner's breach was not material. Consequently, the homebuilder's breach of the "consent-to-settle" clause did not excuse the insurer's performance under the contract. The Court likewise rejected a similar argument based on the "ultimate net loss" provision as immaterial.

With respect to coverage, the Court rejected the insurer's argument that the jury's award exceeded damages covered by the policy as the jury included the cost of repair for all homes built with EIFS rather than excluding those with little or no damage. In doing so, the Court emphasized that the damage to the homes was a continuing injury, the timing of which would be difficult, if not impossible, to determine. Accordingly, the Court referred to its 1994 holding in *American Physicians Insurance Exchange v. Garcia* and explained that when an injury is continuing, (1) the limits of consecutive policies may not be stacked, (2) the insured may choose among concurrent policies and select the policy that provides the greatest relief, and (3) the insurer may subrogate against the other insurers who provided coverage during the time the injury was occurring. Because the damage to the homes began before or during the policy period, the Court held that the insurer was liable for the total remediation costs.

Continuing injuries, therefore, present the insurer and insured with a compromise. While no single insurer will be subject to stacked policies, one insurer may have to account for the injury up to its limit subject to its subrogation rights. An insured, on the other hand, may not have to show the exact amount of damage that occurred in a particular policy period, but will not be able to stack the consecutive policies in determining coverage.

Interestingly, however, the Court made no mention of the fact that the homebuilder in this case had already settled with the other insurance carriers. It did not consider the seemingly unfair result that the remaining insurance carrier would be unable to subrogate against other insurers.

Northwest, Inc. v. Ginsberg - Supreme Court Clarifies ADA Preemption

By Seth Johnson

In *Northwest, Inc. v. Ginsberg*, a case closely followed by the airline industry, the U.S. Supreme Court clarified the scope of preemption under the Airline Deregulation Act ("ADA"), unanimously reversing the Ninth Circuit and reaffirming the broad reach of the ADA's preemption clause. The opinion, issued April 2, 2014, held a frequent flyer program member's state law claim for breach of an implied covenant of good faith and fair dealing was preempted under the ADA as it sought to "enlarge the contractual obligations that the parties voluntarily adopt."

Rabbi Ginsberg had achieved the highest status available in Northwest's frequent-flyer program, however, Northwest informed Ginsberg he had "abused" the program and terminated his membership relying on a provision in the frequent-flyer agreement stating that abuse of the program, determined at Northwest's sole discretion, may result in cancellation.[1] Ginsberg subsequently filed suit, alleging that Northwest ended his membership as a cost-cutting measure, and asserted causes of action under Minnesota state law for breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation.

The ADA's preemption clause holds that a State "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." and the district court held that Ginsberg's claims, except for breach of contract, all related to Northwest's rates and services and therefore fell within the ADA's express preemption clause. After the appeal of only Ginsberg's good faith and fair dealing claim, the Ninth Circuit reversed, holding that such a claim is "too tenuously connected to airline regulation to trigger preemption under the ADA," and further does not fall within the terms of the ADA's preemption provision as it does not have a "direct effect" on either "prices" or services."

The Supreme Court divided its opinion into three parts. First, the Court rejected Ginsberg's argument that the ADA only applies to state legislation and agency regulations, explicitly confirming that common law claims may be preempted by the ADA. Next, the Court determined that Ginsberg's claims regarding the frequent-flyer program were connected to both Northwest's "rates" and "services."

The Court then defined the central issue as whether Ginsberg's claim was based on a state-imposed obligation or simply one that the parties voluntarily undertook – under prior Supreme Court precedent in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), a state law is preempted if it adds to the parties' agreement, but not if it merely enforces the agreement. The Court declined to categorically preempt all state implied covenants of good faith and fair dealing, stating that in some states, the implied covenant merely holds the parties to the terms of their agreement, but in others it imposes "community standards of decency, fairness, or reasonableness." The Court held the Minnesota law at issue was a state-imposed obligation, and accordingly preempted, because parties could not contract out of the covenant under Minnesota law and Minnesota's application of the law to every contract except employment contracts reflected its application was a policy decision by the state.

The Ninth Circuit has often been an outlier in allowing plaintiffs to pursue state law claims under the ADA – for example, the Supreme Court explicitly recognized the Ninth Circuit was "[r]elying on pre-*Wolens* Circuit precedent" in holding the implied covenant claim in Ginsberg was too tenuously connected to airline regulation to trigger preemption under the ADA. Accordingly, the reversal of the Ninth Circuit in *Northwest, Inc. v. Ginsberg* was a welcome decision for airlines, and should provide increased uniformity in the interpretation of the ADA's preemption clause.

[1] Ginsberg apparently had in the last half year complained 24 separate times regarding travel problems, and received among other things, $1,925 in travel credit vouchers, 78,500 bonus miles, and $491 in cash reimbursements.

the expert witness. While the rules do not specifically list all of the individuals who are protected, the comments to rule 26 indicate that "[o]ther situations may also justify the pragmatic application of the 'party's attorney' concept." However, communications should be limited between the attorneys and their support staff and the experts and their support staff.

Additionally, protected communications are not limited to a single lawyer or single law firm. For example, if an expert is testifying on the same issue in different suits, then the protection applies to communications between the expert and the attorneys representing the party in any of those different suits.

However, the attorney-expert protection does not extend to communications that an expert has with anyone other than the party's counsel about the opinions expressed. Therefore, the experts' discussions with the client, including employees involved in risk management, as well as the client's insurer, are likely discoverable. As a result, communications with an expert hired immediately after an aviation accident should go through an attorney, whether in-house or hired outside counsel.

- **Potential Pitfall: Communications with a hybrid fact/expert witness can be discoverable.**

The attorney-expert protection is limited to communications between an attorney and an expert witness required to provide a report. The following experts are required to provide a report: (1) retained experts, (2) experts specifically employed to provide expert testimony in the case, and (3) experts whose duties as the party's employee regularly involve giving expert testimony. However, there are many experts who are designated that are not required to provide a report. For example, an individual who has factual knowledge relevant to the case and also plans on testifying as an expert—also known as a hybrid witness—is not required to provide a report. In most cases, these hybrid witnesses are employees whose communications with the party's attorney would ordinarily be protected by the attorney-client privilege. However, some courts have held that designating an employee as an expert witness waives the privilege. *See PacifiCorp v. Northwest Pipeline GP*, 879 F. Supp. 2d 1171, 1213 (D. Or. 2012) (holding that a party's employees were "hybrid fact and expert witnesses whose designation as non-reporting experts serves to waive all applicable privileges and protections for items they considered that relate to the topic of their testimony").

The potential impact of designating a hybrid witness as a non-retained expert is illustrated in *United States v. Sierra Pacific Industries*, CIV S-09-2445 KJM EF, 2011 WL 2119078 (E.D. Cal. May 26, 2011). In this case, a party designated two employees who investigated a fire and prepared cause and origin reports as non-retained expert witnesses. The opposing party sought to obtain the communications between these two employees and their attorneys. However, the employees' attorneys claimed that this information was protected by the work product and attorney-client privilege, and thus refused to produce the information. The party seeking the discovery argued that the applicable work product and attorney-client privileges were waived when the employees were designated as expert witnesses because the two employees were fact witnesses as well as expert witnesses who would testify both as to their factual observations as well as their opinions. The court agreed and held that the work product and attorney-client privileges were waived because these hybrid witnesses would testify both as fact and expert witnesses. The court further stated that "[i]f their communications with counsel were protected, any potential biases in their testimony regarding the causes of the fire would be shielded from the fact-finder." However, the court noted that its holding was limited to the factual circumstances of the case and it declined to hold that designating an individual as a non-reporting expert witness waives otherwise applicable privileges in all cases.

Hybrid witnesses, whether pilots or engineers, are routinely prevalent in aviation cases due to the technical nature of the matter. However, while the court's holding in *Sierra Pacific* was limited to the particular factual scenario in that case, it should alert attorneys to the potential impact of designating an employee as an expert witness. Before designating a fact witness as an expert, the parties should assess whether it would be more beneficial to designate an expert whose communications are protected, such as a retained expert or an employee whose duties as the party's employee regularly involve giving expert testimony, rather than a hybrid witness.

The amended Federal Rules of Civil Procedure provide additional protection to attorney-expert communications. However, attorneys and their clients should be mindful that certain state court procedures do not provide as much attorney-expert protection as the amended Federal Rules of Civil Procedure. For example, the Texas Rules of Civil Procedure allow for the discoverability of draft expert reports and attorney-expert communications. As a result, attorneys and their clients should be cognizant of the inherent risks in pre-suit communications with their experts and they should evaluate at the outset of the incident whether their case will likely be filed in federal or state court and assess the protection of their attorney-expert communications accordingly. Whether a case is filed in state or federal court, attorneys and their clients should take an organized and tactful approach to deciding which individuals to designate as experts. Moreover, knowing what information is discoverable and what information is protected will allow communications to flow more freely without risking the communications from becoming discoverable.

Forum Non Conveniens...Continued

142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), Texaco, who would later merge with Chevron Corporation, successfully moved to dismiss a lawsuit on *forum non conveniens* grounds brought by resident of Ecuador seeking damages for oil contamination in the Amazon. Texaco argued Ecuador was an available and adequate forum, and after the case was dismissed from the U.S court system, the plaintiffs filed suit in Ecuador, obtaining a judgment for approximately $18 billion against Chevron.

As foreign legal systems appear in some cases to be trending towards more plaintiff-friendly, or at the very least towards more unpredictable outcomes, defendants sued in the U.S. over foreign events or by foreign plaintiffs may wish to consider alternative litigation strategies.[2] One alternative to *forum non conveniens* that potentially provides a defendant with the quality of the U.S. court system combined with the lower damages awards in foreign jurisdictions is seeking to have the trial court apply the damages law of the country where the plaintiffs reside or the damage occurred.

Defendants can argue through a choice of law motion that an outcome-determinative conflict exists between the domestic and foreign damages law, and therefore the U.S. court must undertake a conflict of law analysis. In essence, the defendant makes many of the same arguments that would be made in a *forum non conveniens* motion – for example, under the Restatement (Second) of Conflict of Laws, the court considers what jurisdiction has the "most significant relationship" to determine which law should apply to a particular issue. See, e.g., *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000). However, rather than argue the foreign forum should exercise jurisdiction, the defendant concedes the U.S. court is proper jurisdictionally and focuses on having the trial court apply the foreign law to the legal issue at hand.

In a recent case in Texas that arose from an aircraft accident in Mexico that involved multiple deaths and injuries, where the plaintiffs were primarily Mexican nationals, the defendants were successful in obtaining a ruling from the trial court that the law of Mexico controlled damages. As a result, the cases were very quickly resolved after the ruling.

A motion to apply foreign damages law can be made separate from and prior to other choice of law motions on separate issues in a case, such as causation. As American courts have often held the damages law of foreign jurisdictions to be adequate, despite the fact it can differ greatly from U.S. law, if the court rules the foreign damages law applies, it can streamline the rest of the case towards a favorable disposition for the defense, as the plaintiffs' hopes of a large damage recovery will be capped, while keeping the case in the familiar territory of the U.S. legal system.

[1] See Michael D. Goldhaber, Forum Shopper's Remorse, Corp. Couns., Apr. 2010, at 63.
[2] Further, if the dismissal is granted, the defendant is usually required to make its witnesses and documents available in the alternative forum, and there are certain countries where there could be a concern for the safety of such witnesses.

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