Imported Chinese Litigation Returned To Sender

Thursday, September 08, 2011

We thank Eamon Joyce at Sidley for alerting us to an interesting *forum non conveniens* decision out of the Fourth Circuit: Tang v. Syntura International, Inc., No. 10-1487, slip op. (4th Cir. Sept. 6, 2011). We've had our own litigation interest in this subject for some time, as Dechert has been involved for more years than some of us care to count in the Blood Products multidistrict litigation (mostly) in Illinois. That's produced a number of favorable *forum non* rulings. See Chang v. Baxter Healthcare Corp., 599 F.3d 728 (7th Cir. 2010) (Taiwanese cases sent back to Taiwan); Abad v. Bayer Corp., 563 F.3d 663 (7th Cir. 2009) (Argentinian cases sent back to Argentina); In re Factor VIII or IX Concentrate Blood Products Litigation, 484 F.3d 951 (7th Cir. 2007) (British cases sent back to the UK); In re Factor VIII or IX Concentrate Blood Products Liability Litigation, 2008 WL 4866431 (N.D. Ill. June 4, 2008) (Israeli case sent back to Israel); In re Factor VIII or IX Concentrate Blood Products Liability Litigation, 408 F. Supp.2d 569 (N.D. Ill. 2006) (Italian and German cases sent back to there respective countries), aff'd on somewhat other grounds, 484 F.3d 951 (7th Cir. 2007) (only the Brits appealed); Doe v. Hyland Therapeutics Division, 807 F. Supp. 1117 (S.D.N.Y. 1992) & Dowling v. Hyland Therapeutics Division, 767 F. Supp. 57 (S.D.N.Y. 1991) (both Irish cases sent back to Ireland).

See also Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984) (DES – back to UK); Lin v. Ortho-McNeil Pharmaceutical, Inc., 2011 WL 3566855 (N.D. Ohio Aug. 12, 2011) (oral contraceptive – back to Taiwan); Lee v. Johnson & Johnson, 2011 WL 3566859 (N.D. Ohio Aug. 12, 2011) (same); In re Fosamax Products Liability Litigation, 2009 WL 3398930 (S.D.N.Y. Oct. 21, 2009) (Fosamax – back to England); Miller v. Boston Scientific Corp., 380 F. Supp.2d 443 (D.N.J. 2005) (stent – back to Israel); Ontario Ministry of Health v. Shiley, Inc., 858 F. Supp. 1426 (C.D. Cal. 1994) (heart valves – back to Canada); Ledingham v. Parke-Davis Division, 628 F. Supp. 1447 (E.D.N.Y. 1986) (dilantin – back to Canada); Stangvik v. Shiley Inc., 819 P.2d 14 (Cal. 1991) (heart valves – back to Scandanavia); In re Vioxx Litigation, 928 A.2d 935 (N.J. Super. App. Div. 2007) (Vioxx – back to the UK).

Tang is interesting because it involves the Peoples' Republic of China, which has a few more people (potential plaintiffs) and larger economic footprint than most other countries. That litigation stemmed from a rather well-published incident where infant formula contaminated

with melamine (perhaps deliberately by entities at the base of the supply chain) killed or injured hundreds of babies in various parts of China. Over a score of companies' (all Chinese) products were implicated. Among other things, the situation prompted unprecedented action by the Chinese government and court system, resulting in the establishment of a broad administrative compensation fund (accepted by 95% of those injured) and also the first Chinese mass tort that we're aware of. See Tang, slip op. at 7-9.

Still, some enterprising lawyers tried to make that litigation the latest Chinese export to the United States. Because one of the 22 companies whose products had been contaminated was a sub- subsidiary of an American holding company, a bunch of plaintiffs brought suit in Maryland, where the holding company was based.

The defendant filed a *forum non* motion to put these plaintiffs on a slow boat, or a fast plane, back to China. The question posed was whether the Chinese legal system had modernized sufficiently that, to what the Chinese might have characterized forty-some years ago as an "imperialist running dog" court, it would now be considered an "adequate forum."

Welcome to the twenty-first century. The answer is "yes."

The test is trifold: the Chinese civil justice system must be: "(1) available; (2) adequate; and (3) more convenient in light of the public and private interests involved." Tang, slip op. at 11. The defendant must establish the first – essentially that it is subject to jurisdiction in the overseas forum. Id. Then, if the plaintiff makes a *prima facie* showing that implicates elements 2 and 3, the defendant must rebut that showing. Id. at 14.

Perhaps the most interesting aspect of the Tang decision is its holding that more than just litigation opportunities factor into whether an overseas forum is adequate. The existence of the Chinese government's fund for contamination victims must also be considered – litigation is not the be all and end all:

"[T]he forum non conveniens doctrine does not limit adequate alternative remedies to judicial ones. I ndeed, the reach of the doctrine extends to nonjudicial alternative remedies such as the Fund, which was established to specifically redress the grievances of contaminated formula victims."

Tang, slip op. at 15. Where have we heard this before? We think it's the same rationale, in a much different context, expressed by Judge Easterbrook in his recent Aqua Dots class certification opinion – where he held that, at times no litigation at all is the preferable route, and lawyers who stirred up litigation couldn't be adequate class representatives.

Beyond that, the Fourth Circuit also held that the judge got the public/private interest factors right. There was no way to litigate a case about Chinese goods, sold to Chinese people in China from a forum half a world away. There was no way to compel witnesses to show up, or to produce documents. Chinese law was unfamiliar to American courts. Further, as a practical matter, litigating the case in the United States would cost an unnecessary fortune in interpreter's fees. Tang, slip op. at 17-18. This was a Chinese controversy – not one to "saddle" the people of Maryland with:

"China has a greater interest in this dispute – the contaminated formula products were distributed through the channels of Chinese commerce and consumed by Chinese citizens. Maryland's residents should therefore not be saddled with resolving the conflict."

Id. at 18.

We agree whole-heartedly. China is now one of the greatest economic powers in the world. It is ready, willing, and able to provide a forum for the legal redress of its own citizens. It would be presumptuous for our courts to rule otherwise.