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A legal update from Dechert's Mass Torts and Product Liability Group

Illinois Federal Court Dismisses 880 Foreign Plaintiffs Who Brought Mass Tort Claims in the United States

Plaintiffs alleging injuries from medicines used in the plaintiffs' home country of Argentina could not sue the U.S. processor of those medicines in the United States, according to a recent federal court decision. Judge John F. Grady of the Northern District of Illinois dismissed the claims of 880 plaintiffs alleging such injuries from medicines taken in Argentina because their home country would be a more convenient forum to hear their claims. *In re Factor VIII or IX Concentrate Blood Products Litigation (Abad v. Bayer Corp.)*, No. 93 C 7452, 2008 WL 189854 (N.D. Ill. Jan. 17, 2008). This is an important decision in an era when mass tort litigation in the United States is attracting more and more plaintiffs from outside the United States who are drawn by large American jury awards and more favorable tort law. In increasing numbers, these non-resident plaintiffs have sought to sue U.S. makers of pharmaceuticals and other products for injuries suffered in their home countries.

Factual Background

In re Factor Concentrate Litigation is the second generation of mass tort litigation that has lasted over 20 years. In the first generation, U.S. plaintiffs with hemophilia sued the companies that process factor concentrate, a medicine to promote clotting that is derived from human plasma. The plaintiff hemophiliacs alleged that the defendants' factor concentrates infected them with the Human Immunodeficiency Virus ("HIV"), which causes AIDS. In 1997, the claims of nearly 7,000 claimants were resolved in a class settlement that applied to all U.S. resident hemophiliacs, and the claims of several hundred opt-outs were resolved over the next few years.

Plaintiffs' counsel then traveled the world and solicited foreign hemophiliacs infected with HIV and the hepatitis C virus ("HCV") to file lawsuits in the United States, based on many of the allegations made in the first generation of the litigation. Between 2003 and 2006, over 2,500 plaintiffs from 25 countries filed suit in Florida, California, and Illinois alleging that the four defendants' factor concentrates infected them with HIV and/or HCV. The Judicial Panel on Multidistrict Litigation transferred the cases to the Northern District of Illinois for pretrial proceedings. Defendants, led by Dechert partner Richard L. Berkman and counsel R. David Walk, Jr., moved to dismiss the claims of the 880 plaintiffs from Argentina based on the doctrine of *forum non conveniens*.

The Court's Decision

In an extensive opinion, Judge Grady ruled that these claims should be litigated in Argentina rather than in the United States. The applicable legal standard required Judge Grady to consider whether Argentina was an available, adequate forum to hear plaintiffs' claims and whether the private and public interests weighed in favor of having the claims heard in Argentina. After carefully parsing the opinions

of experts in Argentine law, the court rejected as implausible the Argentine plaintiffs' claims that an Argentine court would not hear their claims for injuries suffered there and ruled that Argentina was both an available and an adequate forum for their claims. 2008 WL 189854 at *13-14.

The court then weighed the factors used to determine whether it would be more convenient for the parties and the public for the claims to be heard in Argentina or the forum states of Florida, California, and Illinois. Defendants maintained that if the cases remained in the United States, they would be unable to join as third party defendants the many other parties who might have caused the plaintiffs' infections, including foreign doctors who treated plaintiffs and foreign suppliers of factor concentrates and other blood derivatives used by the plaintiffs. The court agreed and found that the inability to join third parties was a "substantial private interest factor weighing in favor of dismissal." *Id.* at *15.

The court then considered the relative ease of access to proof in the two countries. When the motion was filed, defendants had produced all relevant documents and defense witnesses for depositions; what remained was the case-specific discovery about the plaintiffs, including documents and witnesses with information about their medical histories and damages. That evidence was in Argentina, and defendants could seek it only through the Hague Convention, which did not allow pretrial discovery to the extent permitted in the United States. The court, therefore, found that the defendants would be severely prejudiced in their access to relevant evidence about the plaintiffs if the cases remained in the United States, whereas the plaintiffs would not be prejudiced by litigating in Argentina because they could use the existing discovery taken from defendants. *Id.* at *17-18. The court concluded that the private interest factors weighed in favor of dismissal. *Id.* at *20.

The court then considered the public interests, particularly the relative interests of the potential forums in hearing these claims. The court found that Argentina had a strong interest in regulating medicines distributed in Argentina and in providing a forum for citizens who claimed injuries from those medicines. *Id.* at *20-21. Illinois and California, where some defendants had headquarters and processing facilities, had less substantial interests. *Id.* at *21. Florida, where almost all plaintiffs filed suit, had no interest in providing a forum for the plaintiffs' claims, and the court found it inappropriate to impose the burden of jury duty on citizens of a state with no connection to the litigation. *Id.* at *22.

Upon weighing of all the relevant factors, the court concluded that Argentina was a substantially more convenient forum than Florida, California, or Illinois. The court dismissed the claims of the 880 Argentine plaintiffs, provided that the defendants agreed to the following:

- accept service in Argentina;
- satisfy a judgment entered in Argentina;
- toll the statute of limitations until plaintiffs refile their claims in Argentina (provided that they refile within 120 days of the dismissal being final); and
- not object to documents or depositions on the grounds that the evidence was obtained in the U.S. discovery proceedings. *Id.* at *25.

Significance of the Decision

The *Abad* decision is an important victory in the ongoing battle in international mass tort litigation over whether all plaintiffs in the world may sue U.S. defendants in the United States, no matter where the plaintiffs were injured, or whether plaintiffs injured in their home countries should be required to sue there. *Abad* shows that the U.S. court system need not provide a forum for every citizen of the world to sue U.S. companies.

The *Abad* opinion should be an especially useful precedent for U.S. companies seeking to dismiss claims alleging injuries from pharmaceuticals or other products used as a part of medical treatment in the plaintiff's home country. If those claims are litigated in the United States and plaintiffs receive full discovery from defendants before the *forum non conveniens* motion is decided—which will often occur if U.S. plaintiffs have brought similar claims and taken discovery—then foreign plaintiffs will be able to obtain whatever evidence they need about the defendants' conduct through the U.S. discovery process. By contrast, the records of the foreign plaintiff's medical treatment, the witnesses to such treatment, and any potentially liable third parties are all located in the plaintiff's home country, which makes it very difficult to defend those claims in the United States. In such circumstances, the *Abad* decision holds that the foreign plaintiff's claim should be dismissed from the American courts and litigated where the plaintiff and the evidence about the plaintiff reside.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/productliability.

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