

March 22, 2018

## **DELAWARE SUPREME COURT HOLDS THAT FORUM NON CONVENIENS DISMISSALS DO NOT REQUIRE AN ALTERNATIVE AVAILABLE FORUM**

To Our Clients and Friends:

On March 22, 2018, in a 4-1 opinion, the Delaware Supreme Court held that where defendants have demonstrated that litigating in Delaware would result in an overwhelming hardship to defendants, Delaware courts may dismiss suits under the doctrine of *forum non conveniens* even if no alternative forum is available.<sup>[1]</sup> Given the significant number of multinational corporations subject to suit in Delaware, and the challenges those defendants face presenting a meaningful defense where the key documents, witnesses and evidence reside overseas, this ruling will go a significant way toward enabling defendants to better protect their rights to a full and fair trial.

The underlying litigation was filed in Delaware state court by Argentine citizens alleging exposure to pesticides used on Argentine tobacco farms and seeking compensatory and punitive damages against several defendants, including Monsanto Company, Philip Morris Global Brands, Inc., and Philip Morris USA Inc. (“Philip Morris USA”).

Rejecting the rules governing *forum non conveniens* in federal court, and adopting reasoning consistent with the *forum non conveniens* approach in New York’s courts, the Delaware Supreme Court held that the existence of an alternative forum is not a pre-requisite to dismissal, but rather only one of many factors to be considered in making the determination whether “litigating in Delaware would result in an overwhelming hardship to [the defendant].”<sup>[2]</sup>

The Delaware Supreme Court explained that the doctrine of *forum non conveniens* has changed dramatically since it was first recognized by the U.S. Supreme Court in 1947. Citing one study showing that federal courts granted “roughly half of motions to dismiss for *forum non conveniens*,” the Court wrote that “state courts now shoulder more of the transnational litigation.”<sup>[3]</sup> But these “cases are complex and strain judicial resources,” as demonstrated by the present litigation, in which all conduct occurred in Argentina, all documents and witnesses would be located in Argentina, and the Delaware courts would need to apply Argentine law to a dispute that “has no real connection [to Delaware].”<sup>[4]</sup>

International comity also informed the Court’s decision not to require an alternative forum prior to dismissal. The Court recognized that “some countries have erected barriers preventing plaintiffs from pursuing litigation in their home country once a case has been filed in the United States” and that “plaintiffs can take steps to render the foreign jurisdiction unavailable.”<sup>[5]</sup> The Court reasoned that rejecting the available-forum requirement “might encourage foreign jurisdictions to rethink laws and

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rules shifting to the U.S. courts disputes that are more closely connected to their own countries and citizens.”<sup>[6]</sup>

In announcing the rule, the Delaware Supreme Court did not totally foreclose foreign plaintiffs from bringing suit against Delaware companies in Delaware courts because “[t]he degree of the Delaware corporate defendant’s connection to the alleged wrong will still be considered” in the *forum non conveniens* analysis.<sup>[7]</sup> But the Court emphasized that “trial court[s] will ... have the discretion to dismiss a transnational dispute when the defendant has demonstrated overwhelming hardship if the case is litigated in the Delaware courts, even if an alternative forum is not available.”<sup>[8]</sup>

The Delaware Supreme Court’s decision is a significant development in transnational case law. Given the sheer number of businesses incorporated in Delaware, Delaware state court is an obvious target for foreign plaintiffs seeking to avail themselves of American courts, which are widely viewed as plaintiff-friendly. But this decision gives U.S. businesses sued in connection with foreign conduct another arrow in their quivers as they defend against costly transnational litigation.

Gibson Dunn represented Philip Morris USA in the Delaware litigation. Patrick Dennis, Miguel Estrada, Perlette Jura, and Amir Tayrani led the Gibson Dunn team.

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[1] *Aranda v. Philip Morris USA, Inc.*, No. 525, 2016 (Del. Mar. 22, 2018).

[2] *Id.* at 13-14 (quoting *Mar–Land Indus. Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 779 (Del. 2001)).

[3] *Id.* at 14-15 (citing Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 396 (2017)).

[4] *Id.* at 15-16.

[5] *Id.* at 16.

[6] *Id.* at 17-18.

[7] *Id.* at 18.

[8] *Id.*



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