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Problems of Federal and State Court Jurisdiction and Venue in Products Liability Litigation - Defendant's Viewpoint

Maurice L. Noyer

PROBLEMS OF FEDERAL AND STATE COURT JURISDICTION AND VENUE IN PRODUCTS LIABILITY LITIGATION–DEFENDANT'S VIEWPOINT

MAURICE L. NOYER*

PROBLEMS of jurisdiction and venue may be particularly pertinent in the context of the defense of a products liability suit because of the strong likelihood that several alternative forums exist for litigating the claim. Typically, the allegedly defective product is manufactured in State A, sold to a distributor or user in State B, and thereafter passes in the channels of interstate commerce, until it ultimately causes an alleged accident in State C, resulting in injury to the plaintiff, a citizen of State D. In this situation, it is apparent that at least three jurisdictions exist which have a strong connection with the lawsuit. Consequently, it is incumbent upon the attorney defending the allegedly defective product to ascertain whether plaintiff's initial choice of forum is the most appropriate one for litigating the claim against his client. The decision entails a determination as to the substantive law in each jurisdiction as well as considerations of relative tactical advantages and expense to the client. At this same time, a decision must be made as to whether the litigation should be conducted in state or federal court. Once these decisions have been reached, defense counsel will attempt to maneuver the litigation to the particular state or federal forum he deems most favorable for his client. This paper will attempt to examine the modern trend in dealing with this problem of "relocating" the action in a more advantageous forum and outline those steps available to defense counsel to effect the change in jurisdictions.

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* Maurice L. Noyer is a practicing attorney in New York, New York.

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Heretofore, if a plaintiff had commenced his action in an inappropriate or inconvenient forum, the defendant manufacturer, under the "presence" or "consent to jurisdiction" standards enunciated by the Supreme Court in *Pennoyer v. Neff*,[1] could successfully assert the defense of lack of personal jurisdiction on the basis that he was not "doing business" in the forum plaintiff had chosen. Since the manufacturer could be held to be "doing business" in only a handful of jurisdictions, defense counsel had the opportunity to limit the litigation to a forum where it would be convenient to try the lawsuit and where he could anticipate the best possible verdict. However, today, this is no longer the case. In recent years, defense counsel representing manufacturers of aircraft frames and component parts have witnessed the rapid proliferation of so-called "long-arm" or "single act" statutes, which in many instances have expanded a state's jurisdiction over a non-resident or foreign corporation to the limits allowed by due process as defined by the Supreme Court in *International Shoe Co. v. Washington*,[2] *McGee v. International Life Insurance Co.*,[3] and *Hanson v. Denckla*.[4]

In this triumvirate of decisions respecting in personam jurisdiction, the Court greatly expanded a state's power to obtain jurisdiction over a foreign corporation not sufficiently "present" in the forum as to be held to be "doing business" there. In *International Shoe*,[5] the Court prescribed a new jurisdictional test requiring only such "minimum contacts" with the forum state that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice."[6] Subsequently, the Supreme Court in *McGee*[7] held that a single act within the forum state, if relevant to the subject of the litigation, could confer jurisdiction consonant with due process. Finally, in *Hanson v. Denckla*,[8] the Court backtracked only slightly in requiring the plaintiff to demonstrate "that there be some act by which the defendant purposefully avails him-

[1] 95 U.S. 714 (1877). *See* Annot., 24 A.L.R.3d 532 (1969).
[2] 326 U.S. 310 (1945).
[3] 355 U.S. 220 (1957).
[4] 357 U.S. 235 (1958).
[5] 326 U.S. 310 (1945).
[6] *Id.* at 316.
[7] 355 U.S. 220 (1957).
[8] 357 U.S. 235 (1958).

self of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[9]

In response to the Supreme Court's directive, many states proceeded to enact so-called "long-arm" or "single act" statutes. The "long-arm" statutes typically premise the assertion of jurisdiction over a corporation which is a non-resident of the forum state in which plaintiff has commenced his action on one or more of three separate bases of jurisdiction:[10] (i) the commission of a tortious act within the jurisdiction;[11] (ii) the commission of a tortious act outside the jurisdiction causing injury within the jurisdiction if the foreign corporation derives substantial revenue from interstate commerce (thus satisfying the foreseeability test that he should reasonably have anticipated the consequences of the allegedly defective product entering the jurisdiction);[12] or (iii) the transaction of any business in the forum directly related to the cause of action.[13] Long-arm jurisdiction premised on one or more of these three bases for jurisdiction is presently available in forty-nine of the fifty states[14] and is equally available in federal court actions based on diversity of citizenship.[15]

The effect of this continuing proliferation of long-arm statutes has been to emasculate the defense of lack of personal jurisdiction. The limit placed on due process by the Supreme Court in *Hanson v. Denckla*[16] of "purposeful availment" of the privilege of conducting activities in the forum has proved more illusory than real, at least in the context of products liability litigation. Particularly in the aviation industry, the mere fact that the manufacturer has in-

[9] *Id.* at 253.

[10] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 9B.

[11] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(3). An example of a statute premising long-arm jurisdiction on this basis is the Illinois statute, ILL. STAT., ch. 110, § 17(1)(b) (1968).

[12] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(4). The New York statute, CIV. PRACTICE L. & RULES OF THE STATE OF N.Y. § 302(a)(3) (McKinney 1972), premises jurisdiction on this basis.

[13] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(1). The New York statute, CIV. PRACTICE L. & RULES OF THE STATE OF N.Y. § 302(a)(1) (McKinney 1972) is an example of this type of long-arm provision.

[14] Delaware being the sole exception. Under 10 DEL. CODE ANN. § 3104 (1953), suit can be brought against a person not residing in the State only if it is doing business there by branch or agency.

[15] Arrowsmith v. United States, 320 F.2d 219 (2d Cir. 1963); *See* FED. R. CIV. P. 4(d)(7).

[16] 357 U.S. 235 (1958).

corporated an allegedly defective product in the accident aircraft appears to satisfy the criterion of purposefulness required by the Supreme Court's decision. The concomitant expansion of "doing business" jurisdiction available in many states against aircraft manufacturers by reason of distributorship agreements[17] together with the trend toward expansion of long-arm jurisdiction, has meant that the aircraft manufacturer today has only a remote chance of establishing a valid jurisdictional defense.

A noteworthy illustration of this trend in the law is the recent decision of the federal district court sitting in New Hampshire in *Gill v. Fairchild Hiller Corp.*[18] The Court there held that a defendant aircraft manufacturer was automatically amenable to suit where the accident occurred. In that case, which arose out of the crash of a Northeast Airlines FH-227 aircraft, the aircraft and component parts manufacturers moved to dismiss plaintiff's action on the grounds that they conducted no business in the forum. However, the Court denied the motions and unequivocally held that a defendant was subject to the jurisdiction of the forum in which the accident occurred. In so holding, Judge Bownes reasoned:

> All of the defendants are engaged in the manufacture of either airplanes or component parts of airplanes. They must know that it is probable that the aircraft in which the parts are used will be flown all over the United States, if not all over the world. To require that the plaintiffs make a positive evidentiary showing that the defendants intended that either the aircraft or the parts would be used in New Hampshire would erect an unreasonable barrier to law suits against foreign corporations, based not on the practicalities of the situation, but on legal formulas and fictions that bear no relationship to the facts of life in the 1970's. The risk of suit being brought against them in any one of the fifty states is one of the risks that the defendants must bear because of the nature of their business.[19]

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[17] Notable among the decisions on this point are the following: Boryk v. de Havilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965); Delray Beach Aviation Corp. v. Mooney Aircraft Corp., 332 F.2d 135 (5th Cir. 1964); Griffin v. Air South, Inc., 324 F. Supp. 1284 (N.D. Ga. 1971); Scalise v. Beech Aircraft Corp., 276 F. Supp. 58 (E.D. Pa. 1967); Dunn v. Beech Aircraft Corp., 276 F. Supp. 91 (E.D. Pa. 1967); Szantay v. Beech Aircraft Corp., 237 F. Supp. 393 (E.D.S.C. 1965), *aff'd*, 349 F.2d 60 (4th Cir. 1965).

[18] 312 F. Supp. 916 (D.N.H. 1970).

[19] *Id.* at 918.

And in *Duple Motor Bodies, Ltd. v. Hollingsworth*[20] the Court reached a similar conclusion with respect to a foreign manufacturer: "We do not regard it as offensive to fair play or substantial justice or an undue burden on foreign trade to require a manufacturer to defend his product wherever he has placed it, either directly or through the normal distributive channels of trade."[21] Thus a manufacturer, because of the modern methods of product distribution, should be prepared to defend his product in virtually any jurisdiction into which it goes, regardless of the Supreme Court's requirement of "purposeful availment."

Furthermore, the manufacturer in many jurisdictions can no longer argue that the "commission of a tortious act" provision of the long-arm statute requires that the allegedly defective product have been manufactured in the forum state to confer jurisdiction, even in those states where there is no corresponding "transaction of business" provision in the statute. The experiences of Illinois and New York in this connection are relevant. In Illinois, the long-arm statute requires "(b) the commission of a tortious act within this State."[22] However, in the case of *Gray v. American Radiator & Standard Sanitary Corp.*,[23] which involved the alleged negligent manufacture of a safety valve in Ohio, which was thereafter sold to a Pennsylvania corporation, who assembled the component in a hot water heater which exploded in Illinois and caused plaintiff's injury, the Court found that Illinois' long-arm statute conferred jurisdiction under the "tortious act" provision regardless of where the product had been manufactured. The Court based its decision on the intent of the legislators to confer jurisdiction on Illinois courts to the limits permitted by the due process clause.

New York has reached the same conclusion by a different means. The New York statute[24] as originally promulgated contained only "tortious act" and "transaction of business" provisions. In 1965, the New York Court of Appeals in the case of *Feathers v. McLu-*

[20] 417 F.2d 231 (9th Cir. 1970).

[21] *Id.* at 235.

[22] ILL. REV. STAT., ch. 110, § 17(1)(b) (1968).

[23] 22 Ill. 2d 432, 176 N.E.2d 761 (1961); similar decisions were reached in Texair Flyers, Inc. v. District Court, — Colo. —, 506 P.2d 367 (1973) and Newman v. Fleming, 331 F. Supp. 973 (S.D. Ga. 1971).

[24] Now CIV. PRACTICE L. & RULES OF THE STATE OF N.Y. § 302(a)(3) (McKinney 1972).

cas[25] held that the provision of the long-arm statute requiring the "commission of a tortious act" within the jurisdiction precluded the assertion of jurisdiction against a foreign corporation where only the injury arising from the tortious act occurred in New York.[26] In response, the legislature in 1966 amended the long-arm statute so as to cover this seeming loophole in jurisdiction. The statute presently provides:

> (b) commits a tortious act within the state, . . . or
> (c) commits a tortious act without the state causing injury to person or property within the state, . . ., if he
> (i) regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in the state; or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;[27]

Certainly, under section 302 (c) (ii), virtually all manufacturers of aviation products satisfy the "revenue from interstate commerce" requirement, and the "foreseeability" test that their product will travel into all fifty jurisdictions. Whether by judicial decision or by statutory enactment, the effect of this expansion of long-arm jurisdiction is clear as to its consequences for the aircraft manufacturer: he has no defense of lack of personal jurisdiction in many states, and the trend away from such a defense is clear even in those jurisdictions which have not as yet expanded their jurisdiction to the permissible limits of due process.

Given this expansion of the concept of personal jurisdiction over non-resident corporations, it becomes incumbent upon defense counsel in products liability suits to consider alternative means of maneuvering the litigation to the most favorable forum. Assuming that the action is brought in state court and cannot be removed, the doctrine of *forum non conveniens* may be available to accomplish this purpose. The doctrine of *forum non conveniens* is premised on the existence of at least two available forums in which the action might properly have been brought. Essentially, the doc-

[25] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1968).

[26] *Id.*

[27] CIV. PRACTICE L. & RULES OF THE STATE OF N.Y. § 302(a) (McKinney 1972).

trine allows the trial judge in his discretion to dismiss the action in the forum in which plaintiff commenced his action because it would be more convenient and just to litigate the claim in the other forum.[28] The Supreme Court apparently contemplated an expansion of state *forum non conveniens* dismissals when it stated in *International Shoe*[29]: "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."[30] This language can be interpreted to mean that while the Supreme Court felt the states had the inherent power to exercise jurisdiction over foreign corporations with "minimum contacts" with their state, they might decline to do so in certain instances based on a determination that it would be extremely inconvenient, and even unjust, to litigate the claim in plaintiff's chosen forum. However, it should be pointed out that the doctrine is not available in all jurisdictions, and even in those jurisdictions where it is available, some courts take the position that where one of the parties is a resident of the state, the doctrine may not be invoked, even if it involves a foreign tort. Additionally, the courts frequently require the defendant seeking a *forum non conveniens* dismissal to consent to jurisdiction in the alternate forum and to waive any statute of limitations defense he might ordinarily gain as a result of the dismissal.

New York is an example of a jurisdiction where the *forum non conveniens* defense has recently been expanded and has moved away from such arbitrary restrictions on its exercise as the citizenship of the parties involved in the action. In *Silver v. Great American Insurance Co.*,[31] the Court of Appeals discarded the prior rule that a *forum non conveniens* dismissal would be denied whenever a New York resident was a party. The court in *Silver* dismissed an action against a New York corporation by a Hawaii resident because the acts complained of occurred outside the state,[32] and stated:

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[28] A full discussion of the doctrine of *forum non conveniens* is contained 20 AM. JUR.2d *Courts* § 172 *et seq.* (1965).

[29] 326 U.S. 310 (1945).

[30] *Id.* at 317.

[31] 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

[32] The Court of Appeals in *Silver* referred to the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1946), for an analysis of the factors relevant to a determination of *forum non conveniens* motions.

> even though there be no prohibition, statutory or otherwise, against maintaining a particular action in this State, our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York.[33]

Recently, a New York court in *Fertel v. Resorts International, Inc.*[34] reaffirmed the *Silver* decision in dismissing an action involving a foreign tort despite the presence of one of the corporate defendants in New York and despite the fact that a dismissal would compel plaintiff to sue outside the United States. And in *D'Arcy v. Delta Airlines, Inc.*,[35] a wrongful death action arising out of an air crash in Boston, Massachusetts, brought on behalf of a Connecticut decedent against the airline and the manufacturer of certain instruments for the aircraft, a New York lower court granted defendants' motion to dismiss despite the presence of the following contacts with New York:

> (a) one of the representative party plaintiffs was a New York resident;
> (b) the co-defendant manufacturer had its principal place of business in New York;
> (c) the decedent was travelling on a roundtrip ticket from and to New York at the time of the accident.

The case is presently on appeal.

New York has also recently codified this new interpretation of the doctrine of *forum non conveniens*:

> Sec. 327. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.[36]

While New York's development of the doctrine of *forum non conveniens* is as yet atypical of most other jurisdictions, it does represent an attempt to redefine the proper forum for litigating a claim in terms of convenience and justice rather than in terms of a court's

[33] 29 N.Y.2d at 361, 278 N.E.2d at 621, 328 N.Y.S.2d at 402.

[34] 43 App. Div.2d 241 (1st Dept. 1974).

[35] Case not yet officially reported. For federal aspects of this litigation *see* notes 41-42 *infra* and accompanying text.

[36] CIV. PRACTICE L. & RULES OF THE STATE OF N.Y. § 327 (McKinney 1972).

power to assert jurisdiction. It is anticipated that other states will follow this approach so as to bring their statutes more in line with the federal *forum non conveniens* statute embodied in 28 U.S.C. § 1404(a), which will be discussed at a later point in this paper. Consequently, the defense of a products liability suit should take into consideration whether or not the doctrine is available in the state court, and if so, whether or not it is preferrable in the particular case to seek a dismissal in state court or a removal and 1404(a) transfer in federal court.

If plaintiff originally commences the action in the state court, defendant's attorneys must consider the possibility of removing the action to federal court. Many considerations are involved in this decision, among them being the potential for greater discovery by both sides in federal court, the evaluation of a possible verdict in a federal or state court, and the status of the respective trial calendars. Plaintiff's counsel may find that the state court forum is more favorable because personal jurisdiction problems are no longer present and because a *forum non conveniens* defense may not be available, particularly if he is a resident of the forum. Plaintiff would therefore attempt to join as parties defendant as many manufacturers of component parts of the aircraft as are necessary to prevent complete diversity of citizenship, thereby thwarting removal under 28 U.S.C. § 1441. If the defendant manufacturer is involved in the litigation only because he manufactured a component part aboard the aircraft, he may be able to establish that he has been fraudulently joined within the meaning of 28 U.S.C. § 1411 because his product had no causal relationship to the accident. However, such claims of fraudulent joinder are rarely sustained where there is even a remote connection between the component part and the accident. If there is no claim of fraudulent joinder available and the defendant cannot establish any basis for asserting a "separate and independent claim" under 28 U.S.C. § 1441(c), another alternative might be available: an attempt to establish "federal question" jurisdiction under 28 U.S.C. § 1331 or "regulation of commerce" jurisdiction under 28 U.S.C. § 1337 irrespective of the citizenship of the parties.

In this connection, the recent decision of Judge Peirson Hall in *Gabel v. Hughes Aircraft Corp*,[87] is noteworthy. In that case, an

[87] 350 F. Supp. 612 (C.D. Cal. 1972).

action was commenced in the Central District of California against a non-diverse airline defendant (Hughes Air-West) arising out of a mid-air collision between a Marine Corps Phantom jet and a Hughes Air-West DC-9 over Duarte, California. The plaintiff had also filed notice of claim against the United States government and expected to join them as party to the litigation. The Court held that the action could be maintained in the federal court despite the absence of complete diversity of citizenship. Judge Hall reasoned that the alleged violation of Federal Air Regulations promulgated under the Federal Aviation Act created a federal cause of action, and that therefore original "federal question" jurisdiction and "regulation of commerce" jurisdiction was present and warranted the court's retention of the action. While the decision is contrary to previous case authority,[38] it is in line with a discernible trend toward the federalization of air commerce and of the rights and liabilities of the passengers and air carriers.[39] The author believes that, although the government was involved in *Gabel*, the decision should not be so narrowly read as to hold simply that federal jurisdiction was present solely because the United States could only be sued in the District Court. Such a holding could have been more expeditiously handled under the doctrine of "pendent jurisdiction," yet the court went so far as to hold that the violation of a federal regulation itself created federal jurisdiction. If Judge Peirson M. Hall's decision is supported by subsequent case authority, it may indeed prove valuable to defendants seeking to remove actions to federal court based on the presence of "federal question" jurisdiction under the Federal Aviation Act. An aircraft manufacturer may be able to establish that the allegations of the complaint against him involve alleged violations of federal regulations, thus bringing the case directly within the ambit of the *Gabel* decision. Additionally, the fact of removal as to the airline defendant would justify the argument that his case should likewise be removed based

[38] *See, e.g.*, Porter v. Southeast Aviation, Inc., 191 F. Supp. 42 (M.D. Tenn. 1961); Moody v. McDaniel, 190 F. Supp. 24 (N.D. Miss. 1960); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957).

[39] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, 93 S.Ct. 1854 (1973); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944); Archibald v. Pan American World Airways, Inc., 460 F.2d 14 (9th Cir. 1972); United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971); Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 449 (2d Cir. 1956); Lulo v. Saturn Airways, Inc., — F. Supp. — (S.D.N.Y. 1973).

on a theory of ancillary jurisdiction as the claim against the manufacturer and the airline arises from "a common nucleus of operative fact."[40]

However, a recent decision in the Southern District of New York[41] by Judge Frankel reached a contrary conclusion. An action for wrongful death arising from the crash of a Delta Airlines' aircraft at Logan Airport, Boston, Massachusetts, on July 31, 1973, was commenced by a New York co-executor against the airline, a non-resident of the forum, and a New York corporation alleged to have manufactured a component system on the aircraft. The defendants removed the action to federal court, alleging "federal question" and "regulation of commerce" jurisdiction.

The defendant airline then impleaded the United States government in connection with their providing of weather information and air traffic control services to the accident aircraft. Plaintiff moved to remand the case to state court. Defendants opposed the remand on the grounds decided in *Gabel* that the Federal Aviation Act conferred a federal cause of action and that the federal court would have pendent jurisdiction of the claim against the manufacturer. The Court adhered to the previous weight of case authority and remanded the action, specifically declining to follow the *Gabel* decision. The Court, in remanding, stated:

> The interesting question on the motion to remand is whether the reference in the complaint to alleged violations of regulations (where the reference, though general, must be deemed to mean *federal* regulations issued by the FAA) makes that a federal question case, removable as such. While there are strong pressures of sense and policy favoring federal handling of aviation disaster cases like this one, the court concludes that the question must be answered in the negative.[42]

Despite the fact that the *Gabel* decision[43] remains a "lone wolf," the proposition that aviation litigation should be cognizable in federal court is certainly tenable.[44] From defendant's viewpoint, the

[40] United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[41] D'Arcy v. Delta Airlines & Sperry Rand Corp., 73 Ct. 5147 (S.D.N.Y. 1974), not yet officially reported.

[42] *Id.*

[43] 350 F. Supp. 612 (C.D. Cal. 1972).

[44] Cases cited note 39 *supra.*

ability to effect removal in a situation where complete diversity of citizenship does not exist would be invaluable.

The aircraft manufacturer has a particular interest in this idea in that any third-party action against the government is cognizable only in federal district court under the Federal Tort Claims Act.[45] In the context of mass disaster aviation litigation, the government, who certificated the product, and the manufacturer of the product are almost invariably on the same side of the fence. It is therefore extremely important to the manufacturer that the United States be suable in the particular forum where the action is brought.

A related factor to the ability to remove the action is the greater availability in federal court of *forum non conveniens* transfers under 28 U.S.C. § 1404(a) based on the general standard of the "convenience of parties and witnesses and in the interests of justice."[46] The cases decided under the federal statute, like the state court cases, reflect a growing effort by the courts to shift the emphasis away from the power of the court to assert jurisdiction over the foreign corporation to the more appropriate balancing of the relative convenience of alternative forums to the litigants and the witnesses, the pendency of other actions in alternative forums which might result in inconsistent verdicts and the general policy of promoting judicial economy of litigation.

A leading example of the use of *forum non conveniens* transfers under 28 U.S.C. § 1404(a) occurred in *Quandt v. Beech Aircraft Corp.*,[47] where the Court in an action for wrongful death arising out of a plane crash in Italy, granted the aircraft manufacturer's motion to transfer the case to Wichita, Kansas, where the plane was designed and manufactured. The court balanced the convenience to the defendant against the inconvenience to the plaintiff and held that it "tips the scales in favor of transfer."[48]

In terms of the *forum non conveniens* defense, there is far greater maneuverability under the federal statute. The main advantage is that the federal statute provides for a transfer rather than a dismissal. Secondly, a federal case can be transferred out of a juris-

[45] 28 U.S.C. § 1346 *et seq.* (1974).

[46] 28 U.S.C. § 1404(a) (1970). For specific factors used to determine the standard, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

[47] 317 F. Supp. 1009 (D. Del. 1970).

[48] *Id.* at 1012.

diction which has no provision, statutory or otherwise, for *forum non conveniens* dismissals in state court. The effect of the federal provisions is, therefore, to prevent plaintiffs from litigating their claims in their local jurisdictions, where the inconvenience and the expense to the defendant manufacturers would be maximized.

A related provision under federal law is the dismissal for improper venue under 28 U.S.C. § 1406. Under that statute, a transfer or a dismissal may be granted in a forum where venue is improper. Under the federal venue provision,[49] venue against a foreign corporation is proper only in a jurisdiction where the claim arose or where the defendant may be said to be "doing business." Thus, a federal court could hold that while jurisdiction in a particular forum was properly obtained based on the "minimum contacts" standard of a state long-arm statute, venue was improper because the corporation was not 'doing business" in the forum. However, the essentially mechanical federal venue provision in 28 U.S.C. § 1406 is not often employed today bceause of the greater flexibility and ease of transfer (which lessens the inconvenience to the plaintiff) of a 1404(a) transfer. Furthermore, venue is a waivable objection in federal practice, and if it is not asserted at or prior to the time of answering, it may no longer be available.[50]

Another key factor affecting the state vs. federal court determination which has emerged in recent years in aviation litigation is the availability in federal court of multi-district litigation discovery procedures under 28 U.S.C. § 1407. Use of multi-district litigation has proved extremely valuable to defense counsel, both in terms of controlling the litigation and in obtaining favorable settlements with contribution from co-defendants. Plaintiff's attorneys, on the other hand, have found this procedure restrictive for they are now committed to a consolidated program of pre-trial discovery rather than being able to harass the defendants from the sanctuary of an isolated state court action. The participation of the government in pre-trial discovery is also invaluable to the manufacturing defendant. Remote defendants are present and may contribute to any early settlement of the litigation. Furthermore, although the statute specifically provides that a 1407 transfer is

[49] 28 U.S.C. § 1391 (1970).

[50] *See* 28 U.S.C. § 1406(b) (1970); *see also* FED. R. CIV. P. 12(b) and 1 J. MOORE, FEDERAL PRACTICE ¶ 0.146, at 1901 (1974).

solely for purposes of pre-trial discovery, the transferee judge may determine on his own motion to transfer the actions under 28 U.S.C. § 1404(a) for purposes of a trial on liability only. This procedure has recently been used by Judge Bownes in New Hampshire and it resulted in a relatively quick disposition of the entire litigation.

The use of federal class action procedures under Rule 23 of the Federal Rules of Civil Procedure in connection with Multidistrict Litigation apparently will have only limited applicability. In *Petition of Gabel*,[51] Judge Peirson Hall held that wrongful death actions arising out of an airplane crash could be maintained as declaratory class action suits for purposes of trial on the issue of liability only and would thereafter be remanded to the individual jurisdictions for trials on damages. The apparent purpose for the use of class action in this connection would be to minimize litigation of multiple lawsuits involving identical issues of fact with respect to defendant's liability. However, the use of class action procedures in mass tort litigation has not been favorably received. In the Notes of the Advisory Committee on the Federal Rules, commenting on Rule 23, Federal Rules of Civil Procedure, the Committee drafting the rules stated as follows:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[52]

In *Hobbs v. Northeast Airlines, Inc.*,[53] Judge Fullam found the class action procedure was not warranted in wrongful death actions arising out of an air crash despite the presence of common questions on the liability issue. Furthermore, recent Supreme Court decisions[54] have indicated an intention to restrict federal class action jurisdiction in diversity actions. It would therefore appear

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[51] 350 F. Supp. 624 (C.D. Cal. 1972).

[52] 39 F.R.D. 69, 103.

[53] 50 F.R.D. 76 (E.D. Pa. 1970).

[54] *See* Snyder v. Harris, 394 U.S. 332 (1969) and Zahn v. International Paper Co., 94 S.Ct. 505 (1974).

that, despite the *Gabel* decision, class action litigation of aviation products liability suits in federal court will not be available in the future.

In connection with the rise of Multi-District Litigation under 28 U.S.C. § 1407, defense counsel should consider the possibility that applicable substantive law could be affected. Normally, under the Supreme Court decision in *Van Dusen v. Barrack*,[55] a 1404(a) transfer does not result in a change in applicable law because the transferee court must apply the law of the transferor jurisdiction. However, where cases are transferred from numerous jurisdictions, the potential is far greater for the transferee jurisdiction's law being applied. For example, suppose the Panel determines that pretrial discovery involving an air crash should be conducted in Forum A. It therefore transfers 10 cases pending in Forum B to Forum A, which already has 60 cases pending from the same accident. Subsequently, five more cases from Forum C are transferred to Forum A. Forum A has no contribution statute whatsoever, Forum B provides for apportionment of liability between co-defendants, while Forum C provides for contribution based on active-passive negligence only. Should the forum A judge try one "test case" originally brought in Forum A, a substantive right to contibution could be lost. In representing the interests of the defendant manufacturer, it is important for defense counsel to be sure that substantive law with respect to his client is not affected and that all rights, such as the right to obtain contribution from co-defendants, are safeguarded.

It is virtually impossible in so broad a subject and one so dependent upon the intuitive decisions of counsel based on essentially local factors, to formulate any conclusion with respect to the relative merits of state and federal forums in terms of litigating a products liability suit. As has been pointed out, jurisdictional defenses are infrequently sustained in either forum in the light of the nationwide market for aviation products and the foreseeability that a product defectively made could cause an air crash anywhere in the United States, if not in the world. Given that the product manufacturer is suable in virtually every jurisdiction which his product enters and causes an accident, it might be stated as a general proposition that the greater flexibility in federal court of *forum non con-*

[55] 376 U.S. 612 (1964).

veniens transfers, the presence of the United States as a defendant, the potential for consolidating the actions in one forum and trying a single case on liability indicates that more and more defendants will seek to have their claims litigated in a federal forum. Particularly as more and more states expand the right of discovery to the limits permitted under the Federal Rules, defense counsel may well find that it is now the plaintiffs who consider state court a more appropriate forum for them and a forum which the defendant will seek to escape where possible.