1989

The Impact of *Piper Aircraft Co. v. Reyno* on the Foreign Plaintiff in the Forum Non Conveniens Analysis

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I. Introduction

Since 1947, Gulf Oil Corp. v. Gilbert has been the predominant forum non conveniens case. In 1981, the United States Supreme Court returned to the forum non conveniens problem in Piper Aircraft Co. v. Reyno. In Reyno, the Supreme Court refined the forum non conveniens analysis developed in Gilbert. In addition, the Reyno opinion clearly articulated several factors bearing on the foreign plaintiff. These factors, while inherent in the Gilbert analysis, gained significance in Reyno, making it more difficult for the foreign plaintiff to defeat a forum non conveniens motion where relevant events occurred outside the United States.

Section II discusses the basic forum non conveniens analysis developed in Gilbert which continues to be the fundamental framework for the approach to the forum non conveniens issue. Next, the Comment discusses pre-Reyno cases, two granting and two denying a forum non conveniens motion involving foreign plaintiffs. The Comment then discusses Reyno in detail, specifically the changes related to the foreign plaintiff in the forum non

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3 See id. at 241-47.
4 See id. at 247-56; see infra notes 116-144 and accompanying text for discussion of the factors affecting the foreign plaintiff.
conveniens analysis. Section III discusses the California state court approach to *Reyno* as an example of the reasoning that may lead to rejection of *Reyno*. The Comment then reviews the federal approach, as modified by *Reyno*, in two air crash cases, one being a typical analysis and the other involving unusual circumstances that prevented a dismissal. The Comment includes a discussion of the reasons for the disparate results. In conclusion, Section IV discusses the tactics that a plaintiff or defendant may want to consider regarding a forum non conveniens motion.

II. BACKGROUND

A. Gilbert

The plaintiff in *Gilbert* operated a public warehouse in Lynchburg, Virginia, which burned due to the defendant’s allegedly careless gasoline delivery to the warehouse tanks. The plaintiff sued the defendant, a Pennsylvania corporation qualified to do business in Virginia and New York, in the United States Southern District Court of New York. The defendant invoked forum non conveniens, claiming Virginia was the appropriate forum because the plaintiff and most of the witnesses lived there, the defendant did business there, and all of the events concerning the litigation took place in Virginia. The district court dismissed the case to the Virginia court, but the court of appeals reversed, holding that the case should be heard in the plaintiff’s chosen forum of New York. The Supreme Court, in its holding, agreed with the defendant that Virginia was the most convenient forum for the reasons the defendant cited, and because Virginia law applied, a Virginia forum would simplify trial.

In reaching its decision, the Supreme Court discussed the general nature of the forum non conveniens doctrine. First, the Court noted that forum non conveniens presup-

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* *Gilbert*, 330 U.S. at 502-03.
* *Id.* at 511-12.
poses at least two forums where the defendant is amenable to jurisdiction.\textsuperscript{9} If the defendant is not amenable to the alternative forum's jurisdiction, however, a court can remove that obstacle by conditioning the forum non conveniens dismissal on the defendant's agreement to submit to the alternative forum's jurisdiction.\textsuperscript{10} The forum non conveniens analysis then provides the criteria for choosing between the alternative forums.\textsuperscript{11}

As a second step, the Gilbert Court stated the general principle of forum non conveniens as the court's right to refuse to hear a case even though all jurisdictional requirements are met.\textsuperscript{12} Lack of convenience to either the parties or the court justifies refusal, since convenience is the central focus of the forum non conveniens inquiry.\textsuperscript{13} Finally, the Supreme Court emphasized that application of the forum non conveniens doctrine is both discretionary and flexible.\textsuperscript{14}

The Gilbert Court then formulated the basic forum non conveniens analysis, dividing the relevant factors into two areas: the private interests of the litigants and the public interests of the court and the community.\textsuperscript{15} The private

\textsuperscript{9} Id. at 506-07.
\textsuperscript{10} Harrison v. Wyeth Laboratories, 510 F. Supp. 1, 5-6 (E.D. Pa. 1980), aff'd, 676 F.2d 685 (3d Cir. 1982). Although Gilbert did not address this problem, later cases routinely overcame the obstacle of lack of personal jurisdiction by conditioning dismissal on defendant's agreement to submit to the alternative forum's jurisdiction as the Harrison case illustrates.

\textsuperscript{11} Gilbert, 330 U.S. at 506-07. The criteria consists of the "public" and "private" interest factors. See infra notes 15-18 and accompanying text.

\textsuperscript{12} Gilbert, 330 U.S. at 507.

\textsuperscript{13} Id. (the court will consider obstacles to fair trial, but the plaintiff cannot inconvenience the defendant unnecessarily); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246, 249 (1981) ("[T]he central focus of the forum non conveniens inquiry is convenience.").

\textsuperscript{14} See Gilbert, 330 U.S. at 508. The court stated: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court . . . ." Id.

\textsuperscript{15} Id. at 508-09. The court explained that although the doctrine was discretionary and flexible so that outcomes could not be easily predicted, the factors which are important to consider are easily identified. "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name." Id. at 508.
interest factors are: (1) the relative ease of access to sources of proof, (2) the availability of compulsory process for the attendance of unwilling witnesses, (3) the cost of transportation for willing witnesses, (4) the possibility of viewing the premises if appropriate to the case, (5) the enforceability of a judgment rendered in the alternative forum, and (6) all other practical problems that make the trial of the case easy, expeditious, and inexpensive.\textsuperscript{16} The public interest factors consist of: (1) the court's administrative difficulties if litigation proceeds in a congested court instead of proceeding in a forum with a closer tie to the litigation, (2) the burden of jury duty on a community with no relation to the case, (3) the local interest of the forum in deciding a case of local import, and (4) the preference that when possible, a court avoid problems of untangling conflicts of laws or applying foreign law.\textsuperscript{17} An additional factor in some cases is the inability of the defendant to implead other potentially responsible parties because they are not subject to the jurisdiction of the plaintiff's chosen forum.\textsuperscript{18}

Although \textit{Gilbert} emphasized convenience as the critical element of the forum non conveniens inquiry, the Court gave significant protection against the dismissal of the plaintiff from his chosen forum by holding that the plaintiff's choice should not be disturbed unless the balance of

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} at 508-09.

\textsuperscript{18} \textit{Id.} at 511. The defendant could not join the contractor in New York, plaintiff's chosen forum, due to New York's lack of personal jurisdiction over the contractor, a Virginia corporation domiciled in Virginia with no ties to New York. \textit{Id.; see also Reyno, 454 U.S. at 259.} The \textit{Reyno} Court emphasized that convenience strongly favored the resolution of all claims in one trial, stating:

\begin{quote}
The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioner's defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability.
\end{quote}

\textit{Id.}
convenience strongly favored the defendant. 19 Gilbert did not differentiate between the American and the foreign plaintiff in the application of this protection since both parties in Gilbert were American. 20

B. Pre-Reyno Dismissals of Foreign Plaintiffs

Even with Gilbert’s emphasis on protecting the plaintiff’s choice of forum, the courts at times have dismissed foreign plaintiffs when the private and public interest factors clearly pointed to dismissal. Two examples of pre-Reyno forum non conveniens dismissals of foreign plaintiffs are found in Pain v. United Technologies Corp. 21 and Harrison v. Wyeth Laboratories. 22

Pain involved a helicopter crash in the North Sea, following departure from Bergen, Norway. United Technologies, a Delaware corporation, had designed and manufactured the helicopter. A Norwegian corporation, Helikopter Service, owned and operated the helicopter and had no connections to the United States. The crash killed French, British, Norwegian, Canadian, and American citizens. The Norwegian Civil Aviation Administration conducted the official investigation. Norway was also the home of the flight crew and the location of the helicopter wreckage. 23 The foreign survivors of the decedents and one American plaintiff sued for wrongful death in the District of Columbia, alleging breach of warranty, strict liability, and negligence. 24

Pain presented a clear articulation of the basic steps of

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19 Gilbert, 330 U.S. at 508. The court stated: “But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” Id.

20 Id. at 503.

21 637 F.2d 775 (D.C. Cir. 1980).


23 Pain, 637 F.2d at 779. Pain was a French citizen and domiciliary. The Canadian citizen had dual Norwegian-Canadian citizenship but resided in Norway. Id.

24 Id. at 779-80. Five separate actions were brought against United Technologies. The widows and surviving children resided abroad. The sole American plaintiff, the mother of the American decedent, lived in New Hampshire. Id.
the forum non conveniens analysis derived from Gilbert.\textsuperscript{25} The court based its analysis on the observation that forum non conveniens decisions are not pure questions of law; instead, the trial judge engages in an exercise of structured discretion by appraising the practical inconvenience to the court and to the parties of trial in one forum, as opposed to trial in the alternative forum.\textsuperscript{26} In this exercise, the court’s first step is to determine the availability of an alternative forum.\textsuperscript{27} Next, the convenience for the plaintiff of trial in his chosen forum is weighed against the convenience for the defendant of trial in the alternative forum.\textsuperscript{28} If the private interests clearly favor dismissal, it can be granted without weighing the public factors.\textsuperscript{29} If the private interest factors are not decisive as to which forum is clearly more convenient, the public interest factors become decisive because, even with Gilbert’s preference for the plaintiff’s chosen forum, a plaintiff cannot argue that his choice must be given blind deference.\textsuperscript{30} Finally, if dismissal is appropriate, the court must ensure that the plaintiff can file his case in the alternative forum without undue inconvenience or prejudice.\textsuperscript{31}

In discussing the private interest factors, the Pain court focused on an analysis of the relative ease of access to

\textsuperscript{25} Id. at 784-85.
\textsuperscript{26} Id. at 781.
\textsuperscript{27} Id. at 784; see supra notes 9-10 and accompanying text for discussion in Gilbert regarding the presumption of two forums.
\textsuperscript{28} Pain, 637 F.2d at 784.
\textsuperscript{29} Id. If the private interest factors favoring the plaintiffs’ choice is as strong as the defendant’s private interest factors favoring dismissal, then the public factors will tip the balance in favor of or against dismissal. Therefore, when private interests are not equal, a decision can be made to grant or deny the forum non conveniens motion without the step of weighing the public factors. Id.; see Friends For All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 609 (D.C. Cir. 1983). "Pain also indicates that these public interest factors need not be evaluated when the private interest factors are not ‘in equipoise or near equipoise’ . . . ." Friends for All Children, 717 F.2d at 609 (citation omitted).
\textsuperscript{30} Pain, 637 F.2d at 784.
\textsuperscript{31} Id. at 785. The trial court conditioned dismissal on defendant’s agreement to submit to the alternative forum’s jurisdiction and to waive any statute of limitations applicable in the alternative forum, ensuring the absence of obstacles for the plaintiff in the alternative forum. Id.; see infra notes 72-74 and 160 and accompanying text for discussion of other cases involving the same condition.
sources of proof.\textsuperscript{32} With trial in the United States, the court anticipated that the plaintiffs would claim a design or manufacturing defect, in which case the evidence regarding design, manufacture, inspection, and testing of the helicopter would be located in the United States.\textsuperscript{33} If trial occurred in the United States, United Technologies' affirmative defense would be that Helikopter's negligence in the improper maintenance or operation of the helicopter caused the crash.\textsuperscript{34} This evidence was located in Norway, including the records on the servicing of the helicopter, the accident report, and the testimony of Norwegian citizens, all of whom were immune to compulsory process in the United States. Therefore, the United States was an inconvenient forum for the defendant.\textsuperscript{35}

Further, United Technologies intended to contest liability in the United States but had already agreed to concede liability and litigate only the issue of damages at trial in Norway.\textsuperscript{36} The concession of liability in a Norwegian trial eliminated the need for evidence located in the United States, since the American evidence related solely to liability issues.\textsuperscript{37} Norway also had the power of compulsory process over the evidence located there.\textsuperscript{38}

In many such cases, the defendant will be amenable to stipulating liability in a foreign jurisdiction in return for a forum non conveniens dismissal because damages may be much smaller than those generally available in the United States.\textsuperscript{39} Another advantage for the defendant in entering

\textsuperscript{32} \textit{Pain}, 637 F.2d at 786. The court noted that correct appraisal of the relative ease of access to sources of proof required an understanding of each party's theories, in order for the convenience of access to any appropriate evidence to be determined. \textit{Id.}

\textsuperscript{33} \textit{Id. at} 786-87.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.} If United Technologies could prove Helikopter's fault, United Technologies would be relieved of liability. \textit{Id.}

\textsuperscript{36} \textit{Id. at} 780.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981); \textit{Pain}, 637 F.2d at 794 nn.103-04; \textit{infra} notes 124, 133 and 217-219 and accompanying text for discussion of damages as a reason to prefer suit in the United States. "As a moth is
into such an agreement is that the expense of trial in the United States is avoided.\textsuperscript{40} The cost of trial also will be less expensive for the plaintiff when the defendant stipulates to liability, because litigation of the damage issue will be shorter than in a trial involving liability.\textsuperscript{41}

Another significant factor, in the court's opinion, was United Technologies' inability to implead the Norwegian owners and operators of the helicopter in the United States.\textsuperscript{42} The joinder of the Norwegian owners and operators was crucial to United Technologies' defense if trial occurred in the United States. If United Technologies had to sue in a separate action for indemnity or contribution, it would be prejudicial to United Technologies,\textsuperscript{43} a waste of judicial resources compared to one trial settling all issues, and further, a foreign court might deny United Technologies full recovery for a judgment rendered in the United States.\textsuperscript{44} The court thus held that the balance of

drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.” Smith Kline & French Laboratories Ltd. [1983] 2 ALL E.R. 72, 74 (C.A. 1982); see Castanho v. Brown & Root (U.K.) Ltd., [1980] 1 W.L.R. 833, 849 (C.A.). The Castanho court noted that American attorneys come to England seeking plaintiffs who are willing to sue in the United States. The potential damages in the United States are so large that the foreign plaintiff will receive more in the United States even after paying a forty percent contingency fee to the American attorney. Castanho, [1980] 1 W.L.R. at 849.

\textsuperscript{40} Pain, 637 F.2d at 794.


Of special significance in this case is Boeing's agreement that it will concede liability for compensatory damages if action is brought against it in the courts of England or Scotland. Obviously, if this occurs, the trial would be far more limited in scope, duration, and complexity regardless of the forum.

\textit{Id.} at 805.

\textsuperscript{42} Pain, 637 F.2d at 790.

\textsuperscript{43} \textit{Id.} The prejudice against United Technologies would be the weakness of its defense if it were unable to compel the production of evidence and witnesses under the control of Helikopter. See \textit{id.} at 788-90 for description of problems associated with obtaining evidence from foreign jurisdictions through the use of letters rogatory.

\textsuperscript{44} \textit{Id.} at 790.
private interests pointed to dismissal.\textsuperscript{45}

Turning to a discussion of the public interest factors, the \textit{Pain} court listed three principles derived from \textit{Gilbert}: (1) that a court may protect its docket from cases lacking a significant connection to the jurisdiction, (2) a court may legitimately encourage trial in the jurisdiction where the controversy arose, and (3) a court may validly consider its familiarity with the governing law in its decision regarding retention of jurisdiction.\textsuperscript{46} In applying these principles to the facts of the case, the \textit{Pain} court held that Norway was the location of all significant contacts to the case.\textsuperscript{47} The United States had only two contacts: the manufacture of the helicopter in the United States and the residence of one decedent's mother in New Hampshire.\textsuperscript{48} Furthermore, the court found no local or national interest in the dispute, and noted that Norwegian law was likely to govern since the tort occurred in Norway, making Norway the jurisdiction with the most substantial interest in the dispute.\textsuperscript{49}

The \textit{Pain} court made two final points regarding issues directly addressed by \textit{Reyno}: whether or not less favorable law in the alternative forum is a bar to a forum non conveniens dismissal\textsuperscript{50} and whether the foreign plaintiff's choice of forum requires less deference than that of an American plaintiff.\textsuperscript{51} The \textit{Pain} court refused to consider as

\textsuperscript{45}Id. Although the court stated the private interests pointed to dismissal, a sufficiently strong nexus to the forum could outweigh the private factors. \textit{Id.} at 791.

\textsuperscript{46}Id.

\textsuperscript{47}Id. at 792. The significant contacts between the dispute and Norway included the following: the site of the accident was in Norwegian territorial waters, the owners and operators were Norwegian with no connections to the United States, the helicopter maintenance had been performed in Norway, and the crew as well as their training records were in Norway. \textit{Id.}

\textsuperscript{48}Id.

\textsuperscript{49}Id. at 792-93. In discussing the applicability of Norwegian law, the \textit{Pain} court cited with approval Dahl v. United Technologies Corp., 632 F.2d 1027, 1032 (3d Cir. 1980) (holding that forum non conveniens dismissal could not be avoided merely by including a substantive American claim). \textit{Pain}, 637 F.2d at 793.

\textsuperscript{50} \textit{Pain}, 637 F.2d at 794; see \textit{Reyno}, 454 U.S. at 247; see \textit{infra} notes 133-141 and accompanying text for discussion of less favorable law as no bar in \textit{Reyno}.

\textsuperscript{51} \textit{Pain}, 637 F.2d at 795-99 (discussing weight to be given plaintiff's citizen-
an appropriate factor in the forum non conveniens analysis that the defendant might be reverse forum shopping for smaller potential damages.\textsuperscript{52} The Pain court noted that in almost every forum non conveniens analysis the substantive law of each forum will be more favorable to one of the parties.\textsuperscript{53} Thus, there would always be a bar to dismissal if the court had to consider whether the law was less favorable to the defendant or the plaintiff in either forum, since it is unlikely that the law will be identical in the two forums. In regard to the weight given to a plaintiff's choice of forum, the Pain court held that the inconvenience and burdens on the parties and the public overwhelmed the presumption favoring the plaintiff's choice of forum, even where one plaintiff was American.\textsuperscript{54} The Pain court's final point was that federal courts treated forum non conveniens dismissals differently, depending on whether the American plaintiff sued in his own right or merely in name only on behalf of a foreign company.\textsuperscript{55} In the case of the nominally American plaintiff, the courts have generally refused to give special deference to the plaintiff's choice of forum.\textsuperscript{56}

Another pre-Reyno forum non conveniens dismissal occurred in Harrison v. Wyeth Laboratories.\textsuperscript{57} In Harrison, the

\textsuperscript{52} Pain, 637 F.2d at 794; see Note, Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno, 64 Tex. L. Rev. 193, 214-16 (1985) (discussing forum shopping). Furthermore, in this case, the plaintiffs received a trade-off. Even though Norway's damages award might be smaller, since United Technologies had agreed to concede liability in a Norwegian court, the plaintiffs avoided the risk of losing the case on the liability issue as well as avoiding the cost of trial in the United States. Pain, 637 F.2d at 794.

\textsuperscript{53} Pain, 637 F.2d at 794.

\textsuperscript{54} Id. at 797-99. The court stated that although some of the plaintiffs had dual citizenship, being American citizens through inheritance, the citizenship by itself was an inadequate proxy for being an American resident. Id. at 797.

\textsuperscript{55} Id. at 797-98.

\textsuperscript{56} Id. (even American citizens have no indefeasible right of access to the federal courts); see infra note 132 and accompanying text for discussion of this factor in Reyno.

\textsuperscript{57} 510 F. Supp. 1 (E.D. Pa. 1980), aff'd, 676 F.2d 685 (3d Cir. 1982).
plaintiffs, all citizens and residents of the United Kingdom, alleged injury, damages, and in some cases, death from the ingestion of an oral contraceptive in the United Kingdom.\textsuperscript{58} The plaintiffs contended that they had taken the contraceptive in accordance with the directions and instructions accompanying the drug, and that Wyeth Laboratories was responsible for the drug's distribution and marketing in the United Kingdom through its British subsidiary. In addition, the plaintiffs alleged that Wyeth Laboratories had developed, tested, and manufactured the drug in Pennsylvania with knowledge of the drug's risks, but decided to withhold adequate warning of the risks. Therefore, the plaintiffs argued, Pennsylvania had an interest in the litigation because of its direct concern for the safety of a product originating from Pennsylvania, regardless of where the drug actually produced the harm.\textsuperscript{59}

Wyeth Laboratories moved for a forum non conveniens dismissal, arguing that because all the plaintiffs lived in the United Kingdom and all the licensing, manufacture, packaging, prescription, and ingestion of the drug occurred in the United Kingdom, it was a more convenient forum than Pennsylvania. Further, Wyeth Laboratories argued that it made all decisions regarding the marketing of the drug in the United Kingdom in light of the British law and regulations concerning drugs.\textsuperscript{60}

Despite the fact that Wyeth Laboratories made all of its decisions regarding production and marketing in Pennsylvania, the \textit{Harrison} court decided that dismissal was appropriate, as the United Kingdom was the most convenient forum.\textsuperscript{61} In reaching its decision, the \textit{Harrison} court considered essentially the same private interest fac-

\textsuperscript{58} Id. at 2; see infra notes 148-164 and accompanying text for a discussion of a case with facts similar to \textit{Harrison}, where a California state court refused forum non conveniens dismissal because the alternative forum, Great Britain, was an inadequate forum.

\textsuperscript{59} \textit{Harrison}, 510 F. Supp. at 3.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 4.
tors reviewed in *Pain*.\textsuperscript{62} With regard to the relative ease of access to sources of proof, the court found that although evidence was located in both Pennsylvania and the United Kingdom, it was easier to transport the Pennsylvania evidence to the United Kingdom than to transport the United Kingdom evidence to Pennsylvania.\textsuperscript{63} This practical consideration dictated that the United Kingdom hear the case.\textsuperscript{64}

In regard to the public interest factors, the court held the United Kingdom was the more convenient forum for two reasons. First, Pennsylvania had no interest in the conduct of drug manufacturers nor the safety of products whose production and distribution occurred in foreign countries.\textsuperscript{65} The court reasoned that although Pennsylvania had concern for these activities within its borders, the safety of drugs marketed in a foreign country is the proper concern of that country since each country must set its own standards by weighing the drug's merits, the necessity of warnings, and the country's legitimate concerns and unique needs.\textsuperscript{66} Therefore, the United States had no interest in imposing its own views of safety, warning, and duty of care on a foreign country.\textsuperscript{67}

The second public interest factor favoring dismissal was the court's need to apply foreign law if the case was not dismissed.\textsuperscript{68} The federal court applied Pennsylvania's

\textsuperscript{62} Id. at 3-4; see supra notes 32-45 and accompanying text for discussion of the ease of access to proof, inability to implead third parties, and reduced cost of trial if liability is stipulated.

\textsuperscript{63} *Harrison*, 510 F. Supp. at 8.

\textsuperscript{64} Id. Apparently, fewer of the required witnesses lived in Pennsylvania than in the United Kingdom. Id.

\textsuperscript{65} Id. at 4.

\textsuperscript{66} Id.

\textsuperscript{67} Id. To illustrate its point the court identified India as a country with vastly different wealth, resources, values, and level of health care than the United States. Given those differences, India's assessment of a drug's pros and cons might lead it to conclude that the risks did not outweigh the drug's overall benefit to India. Therefore, the United States standards are inappropriate for imposition on another country in some instances. Furthermore, the court noted that fairness to the defendant required that the community affected by his acts judge the defendant according to that community's standards. Id. at 4-5.

\textsuperscript{68} Id. at 5.
choice of law rules in this diversity case since it sat in the eastern district of Pennsylvania. Under Pennsylvania's choice of law rules, the law of the forum most intimately concerned with the outcome of the litigation is applicable, regardless of where the trial is conducted. Thus, the court held that under this analysis, the United Kingdom's law would be applicable even if the trial was held in Pennsylvania.

In addition to the factors considered in Pain, the Harrison court addressed more fully the issue of the alternative, available forum. The court found that although convenience pointed to dismissal, that decision should not insulate the American defendant from a judicial determination of the defendant's liability. To avoid that consequence, the Harrison court conditioned dismissal on the defendant's agreement to consent to the jurisdiction of the alternative forum, to make available in the alternative forum any documents and witnesses needed from Pennsylvania, and to pay any judgment rendered in the United Kingdom court. By this last step, the court insured that the plaintiff did not suffer any undue inconvenience or unfairness from the forum non conveniens dismissal.

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71 Harrison, 510 F. Supp. at 5; see Griffith, 416 Pa. at 1, 203 A.2d at 805-06 (discussing Pennsylvania's most significant relationship test where the policies and interests involved in the issue decide which forum has the most significant contacts to justify the imposition of its laws). This is a flexible approach that allows the interplay of conflicting policy factors. Therefore, if a forum has no policy reason to impose its laws regarding the amount of damages, the forum lacks significant contact. However, if the defendant or plaintiff is a resident of the forum, the forum has a significant interest in imposing its laws and policy on the resident. Griffith, 416 Pa. at 1, 203 A.2d at 806-07.

72 Harrison, 510 F. Supp. at 5-6.

73 Id. at 5.

74 Pain, 637 F.2d at 784-85.
Even before Reyno, the courts dismissed foreign plaintiffs on forum non conveniens grounds assessing the status of the foreign plaintiff as it related to other factors of convenience. As Pain and Harrison illustrate, the forum non conveniens factors can favor dismissal to the foreign jurisdiction on the grounds of convenience of the location of the evidence and applicable law. However, forum non conveniens dismissal of the foreign plaintiff was not automatic solely because of the plaintiff's status as a foreigner.

C. Pre-Reyno Denials of Forum Non Conveniens Dismissals

Two cases illustrate the wide latitude of the courts in the application of a forum non conveniens analysis in regard to the foreign plaintiff prior to Reyno: Fiacco v. United Technologies Corp. and Grimandi v. Beech Aircraft Corp.

Fiacco concerned the same helicopter crash that was at issue in Pain. Unlike Pain, the Fiacco court denied the forum non conveniens dismissal. The Fiacco court viewed the inability of the plaintiffs to commence the action in Norway, due to Norway's lack of personal jurisdiction over the defendant, as a crucial consideration. The court concluded that if a plaintiff had no choice regarding which forum to file in, then the plaintiff did not have to proceed in another jurisdiction merely because the defendant consented to suit there. In regard to the issue of smaller damages available in Norway as compared to the United States, the court acknowledged that this factor does not enter into the forum non conveniens analysis if the plaintiff has an initial choice regarding forums, because the defendant is subject to personal jurisdiction in

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77 Fiacco, 524 F. Supp. at 860 n.3.
78 Id. at 862.
79 Id. at 861.
80 Id. at 862. Most jurisdictions do not follow the reasoning of Fiacco but rather consider the dismissal conditioned on defendant's agreement to submit to the alternative forum's jurisdiction as acceptable. See, e.g., Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 615-16 (6th Cir. 1984).
either forum. However, when the plaintiff has no choice regarding the forum, the court decided that the issue of smaller damages in the alternative forum should receive more weight, since the action can proceed there only with the consent of the defendant.

The Fiacco court, to a greater degree than the Pain court, emphasized that the case was a products liability action with the relevant evidence regarding design and manufacture located in the United States. In a products liability case, significant evidence is usually located in two forums: the forum where the product was manufactured and the forum where the injury occurred. It can be difficult to decide which forum will provide the most convenience regarding the evidence if the evidence located in each forum is significant to the issues in the trial. On the other hand, the difficulty of weighing the conflicting convenience is eliminated once a party stipulates to liability because the need for evidence located in one of the forums is thereby eliminated. The Pain court adopted this solution to grant the forum non conveniens dismissal since the evidence located in the United States was not needed after the defendant conceded liability. The Fiacco court never addressed this solution despite the defendant's identical offer to concede liability in the alternative forum.

By focusing on different factors, the Fiacco court and the Pain court came to different conclusions regarding a forum non conveniens dismissal in regard to the identical

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81 Fiacco, 524 F. Supp. at 862.
82 Id.
83 Id. at 860-61. The court found that the community had a public interest factor in this case because the United States was the site of the helicopter's design and manufacture. Id. at 861.
84 Id. at 860-61.
85 Pain v. United Technologies Corp., 637 F.2d 775, 790 (D.C. Cir. 1980); see supra notes 32-38 for discussion of this issue in Pain.
86 Fiacco, 524 F. Supp. at 860. In Pain the evidence located in the United States pertained only to the liability. Therefore, once United Technologies conceded liability in regard to a trial in Norway, the evidence in the United States was no longer needed. Pain, 637 F.2d at 790.
accident and similar issues. In the discretion allowed under the forum non conveniens doctrine, the Pain court relied on the private factors in that only the Norwegian evidence was needed once the defendant conceded liability, that Norway had compulsory process, and all possible parties could be joined in a Norwegian trial. The Pain court also found that under the public interest factors, Norway, as the site of the accident, had more interest in the dispute, that Norwegian law would probably rule in either forum and that the nominal American plaintiff deserved no extraordinary deference regarding choice of forum.

Fiacco acknowledged that the forum non conveniens analysis under Gilbert would indicate that Norway was the more appropriate forum. The Fiacco court chose, however, to give great weight to the fact that the American plaintiff was a resident of the New York forum and that plaintiff had no choice initially except to file in the New York forum since United Technologies was not subject to the personal jurisdiction of Norway.

The case of Grimandi v. Beech Aircraft Corp. demonstrates how deference for a foreign plaintiff’s choice of forum prior to Reyno could prevent a forum non conveniens dismissal, despite the fact that an alternative forum may be more convenient. In Grimandi, the French plaintiffs sued Beech Aircraft, Pratt-Whitney, and Pratt-Whitney’s
parent corporation, United Technologies, in the United States District Court for Kansas. Beech Aircraft's connections to Kansas included manufacturing the plane involved in the accident, and the location of its principal place of business in Kansas. The basis of the case was a plane crash in France, allegedly due to engine failure.

In discussing the private interest factors, the Grimandi court focused on the relative ease of access to sources of proof and the convenience to the parties of resolution of all claims in one lawsuit. While the court conceded that the case against Pratt-Whitney had more relationship to France than to Kansas, the issues involving Beech required evidence located in Kansas regarding testing and certification of the engine. In addition, Beech expressed a preference to defend itself in Kansas and requested permission to assert a cross-claim against Pratt-Whitney. The court concluded that under these circumstances, all claims could be resolved in one lawsuit only in Kansas, and therefore, Kansas was the most convenient forum for all of the parties.

In regard to the public interest factors, the Grimandi court reasoned that trial was as expeditious in Kansas as in France, that Kansas had an interest in the litigation since Beech manufactured the plane in Kansas, and that with citizens of four different countries involved, no particular country had an overriding local interest. Even the need to apply French law under Kansas' choice of law rules did not persuade the court to dismiss. Rather, the

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93 Id. at 767-79.
94 Id. at 767 (Pratt-Whitney was located in Canada and supplied the replacement engine that failed. United Technologies was a Connecticut corporation).
95 Id. at 778-79.
96 Id.
97 Id.
98 Id.
99 Id. at 779-80.
100 Id. at 780-81. The court refused to change Kansas law from the doctrine of lex loci delicti to the significant contacts test urged by the plaintiff. Id. The court merely noted that at this stage in the proceedings, it was sufficient to recognize that even the significant contacts test would point to Canadian or French law. Id.
court considered this factor to not control in and of itself.\textsuperscript{101}

Finally, while acknowledging that France appeared to be the most convenient forum in regard to accessibility to proof and governing law, the court denied dismissal by relying on the \textit{Gilbert} principle that the plaintiff's choice is respected unless significantly inconvenient to the defendant.\textsuperscript{102} The court did not see itself as having the task of finding the most convenient forum. Kansas was not overly inconvenient, given the preference of the plaintiff and defendant Beech for Kansas, the substantial time and money already invested in the Kansas forum, and the ability of the Kansas forum to resolve all claims in one trial.\textsuperscript{103}

The court's conclusion might have been different if the case had involved only two parties. However, the addition of a second defendant, Beech Aircraft, with its ties to the Kansas forum, the evidence located in Kansas, Beech's expressed desire to defend itself in Kansas, and the probability that evidence located in France could be adequately presented through documents led the court to conclude that Kansas was the most convenient forum.\textsuperscript{104}

Forum non conveniens dismissals, prior to \textit{Reyno}, emphasized the private interest factor of relative ease of access to evidence located in the alternative forum.\textsuperscript{105} Often, the court would consider which evidence could be transported the most easily to the other forum. Since in these cases, the manufacturer of the product was Ameri-

\begin{footnotesize}
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\item \textsuperscript{101} \textit{Id.} at 780; see McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965) (discussing Kansas' doctrine of lex loci delicti). Under lex loci delicti, the law where the injury took place governs. In this case, the crash occurred in France; therefore, French law governs. \textit{McDaniel}, 194 Kan. at 625, 400 P.2d at 1018.
\item \textsuperscript{102} \textit{Grimandi}, 512 F. Supp. at 781; see \textit{supra} notes 19-20 and accompanying text for the discussion in \textit{Gilbert}.
\item \textsuperscript{103} \textit{Grimandi}, 512 F. Supp. at 781.
\item \textsuperscript{104} \textit{Id.} at 778-79. The wreckage of the plane, eye witnesses to the crash, and some documentary evidence was in France. \textit{Id.}
\item \textsuperscript{105} See \textit{Pain}, 637 F.2d at 775; \textit{Fiacco}, 524 F. Supp. at 858; \textit{Grimandi}, 512 F. Supp. at 764; Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa. 1980), aff'd, 676 F.2d 685 (3d Cir. 1982); see \textit{supra} notes 32-38, 63-64, 83-85, and 96 and accompanying text for a discussion of this factor in these cases.
\end{itemize}
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can, the American evidence was often documentary in nature regarding design of product and thus, easily transported. On the other hand, the evidence in the alternative forum frequently would be eye witnesses to the accident whose transportation to the United States for testimony would be quite expensive. Where the defendant stipulates to liability in return for dismissal to the alternative forum, however, the problem with evidence located in the United States is simply eliminated. Therefore, the court does not have to weigh the relative ease of access in the two forums since the evidence in one forum is unnecessary.

The last private interest factor that influences the court to dismiss is the defendant's inability to implead third party defendants in the United States. If the third party is not subject to the personal jurisdiction of the American forum, two court proceedings will be necessary if the case is not dismissed from the American forum. Most courts prefer the efficient device of one trial for all parties. Thus, the necessity of involving third party defendants who are outside the jurisdiction of the chosen forum points to dismissal.

In regard to the public interest factors, courts that dismissed to the alternative forum were most influenced by the lack of their forum's interest in the dispute. These courts regard their role as that of regulating the behavior of the defendant if that behavior occurs within the borders of their forum. When the behavior causing the injury

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106 See Pain, 637 F.2d at 787. The sources of proof in the United States were primarily records concerning the design, manufacture, inspection, and testing of the helicopter. Id.
107 See Fiacco, 524 F. Supp. at 861; Grimandi, 512 F. Supp. at 779. "As far as the cost of obtaining witnesses, it would be more expensive to try the case in the United States if the majority of witnesses are from France." Grimandi, 512 F. Supp. at 779.
108 See Pain, 637 F.2d at 790; see supra notes 32-41 and accompanying text for discussion of the ramifications of a liability concession.
109 See Pain, 637 F.2d at 792-93; Harrison, 510 F. Supp. at 4; see supra notes 46-49 and 65-67 and accompanying text for a discussion of the forum's interest in a dispute.
occurred outside the borders of the forum then the forum where the injury occurred has the strongest interest. This policy approach avoids the problem of an American forum applying foreign law, since under either lex loci delicti or the significant contact test, the foreign forum’s law is the most likely to apply.\(^1\)

The problem of the defendant engaging in reverse forum shopping is handled to some degree by conditional dismissals.\(^1\)\(^1\) Conditional dismissals often involve stipulations to liability, defendant’s agreement to provide witnesses and other evidence in the foreign forum, and an agreement to satisfy any judgment rendered.\(^1\)\(^2\) Conditional dismissals, however, do not address the amount of damages available in the foreign forum, which will usually be much lower than damages awarded in the United States.

The pre-Reyno cases that denied forum non conveniens dismissals typically involved unconventional analysis or unusual fact patterns. For example, courts generally do not employ the rationale of Fiacco that a plaintiff should not have to proceed in a forum where the plaintiff was initially unable to sue, due to the foreign court’s lack of personal jurisdiction over the defendant. In Grimandi, the unusual fact that one of the defendants preferred the plaintiff’s chosen forum and the fact that all of the defendants and plaintiffs were located in different forums

\[^{10}\] See Grimandi, 512 F. Supp. at 780; see supra notes 100-101 and accompanying text; see infra notes 136-141 and 180-184 and accompanying text for further discussion on choice of law.

\[^{11}\] See Harrison, 510 F. Supp. at 5-6; see supra notes 72-74 and accompanying text for discussion of conditional dismissals.

\[^{12}\] See De Melo v. Lederle Laboratories, 801 F.2d 1058, 1059 (8th Cir. 1986) (the district court granted dismissal on the conditions that the defendant submit to the jurisdiction of Brazil, make available any needed documents or witnesses in Brazil, waive any statute of limitations, and pay any judgment rendered in Brazil); Dowling, 727 F.2d at 611, 615-16 (citing In re Richardson-Merrell, Inc., 545 F. Supp. 1130, 1137 (S.D. Ohio 1982)) (Dowling was a products liability case involving a drug developed in the United States and distributed in the United Kingdom. The court conditioned dismissal of the Scottish plaintiffs on the ability of the plaintiffs to proceed in the Scottish forum. If the Scottish courts refused to hear the case, the American court would reinstate the suit).
weighed against dismissal. Dismissal to the French forum would not have resolved the particular conflicts involved in that case. In addition, the motion for dismissal arose after considerable time and expense had already been invested in the Kansas forum, thus, dismissal would not have served the purpose of convenience or the prevention of expense and waste of judicial resources.

D. Reyno

*Piper Aircraft Co. v. Reyno* consolidated the analysis favoring dismissal for the foreign plaintiff suing an American defendant over events occurring in a foreign jurisdiction. While *Reyno* continued the basic forum non conveniens analysis formulated in *Gilbert*, it re-emphasized some points more likely to involve the foreign plaintiff. *Reyno* also distinguished between the American plaintiff and the foreign plaintiff in ways that facilitate the forum non conveniens dismissal of the foreign plaintiff. *Reyno* distinguished between the American plaintiff and the foreign plaintiff in three ways. First, the foreign plaintiff's choice of forum does not require as much deference as that accorded to an American plaintiff. Second, the possibility of less favorable law in the alternative forum ordinarily cannot be given conclusive or even substantial weight. Third, the interest of the United States in de-
terrering American manufacturers from producing defective products is not sufficient to outweigh the local interest of the foreign jurisdiction where the injury occurred as the result of the defective product.120

Reyno concerned the crash of a small commercial plane in Scotland. The five decedents as well as their heirs and next of kin were Scottish. The preliminary report of the British Department of Trade suggested mechanical failure in the plane or its propeller as the cause of the accident, but a review board found no evidence of defective equipment and indicated that pilot error may have been the cause.121 The plane’s registration was in Great Britain, and the owners and operators of the plane were Air Navigation and Trading Co., Ltd. and McDonald Aviation Ltd., both United Kingdom entities.122 Defendant, Piper Aircraft Company, manufactured the plane in Pennsylvania and defendant, Hartzell Propeller, Inc., manufactured the propellers in Ohio.123 The plaintiff, Reyno, admitted to filing the wrongful death suit in the United States because of its favorable laws regarding liability, capacity to sue, and damages, as compared to the Scottish laws.124 The case was initially filed in California but was later transferred to a federal district court in

favorable to him, any other forum by definition is less favorable. Therefore, any dismissal would be inappropriate if less favorable law was a bar, as it would essentially result in the defeat of the purpose of the forum non conveniens doctrine. See infra notes 159-163, 183-184 and 217-218 and accompanying text for discussion of less favorable law.

120 Reyno, 454 U.S. at 260-61. The Reyno Court reasoned that the incremental deterrence produced by trial in the United States was not sufficient to justify the enormous judicial time and resources required with American trial. Id.; see infra note 200 and accompanying text regarding the interest in deterrence.

121 Reyno, 454 U.S. at 238-39. The pilot had obtained his commercial license only three months before the crash. He was flying over high ground at an altitude lower than recommended by his company’s operation manual. Id. at 239.

122 Id. The crash occurred in Scotland, producing the tie to the United Kingdom that constituted a significant public interest factor weighing heavily towards dismissal to the United Kingdom. Id. at 260.

123 Id. at 239. Pennsylvania’s interest consisted solely of the manufacture of the plane in Pennsylvania, a public interest factor. Id.

124 Id. at 240. Ms. Reyno was not related to and did not know any of the decedents. Id. at 239. She was the legal secretary to the attorney who filed suit. Scottish law does not recognize the tort theory of strict liability, permits wrongful-
Pennsylvania.\textsuperscript{125}

In a direct continuation of \textit{Gilbert}, the \textit{Reyno} Court held that the public interest factor of applying Scottish law under Pennsylvania’s choice of law rules was an appropriate factor that pointed towards dismissal.\textsuperscript{126} This factor by itself, however, did not justify dismissal if the balance of the other public and private interests favored retention of jurisdiction.\textsuperscript{127} The \textit{Reyno} Court also agreed completely with \textit{Gilbert} that the need to implead other possible responsible parties clearly pointed to the forum where all claims could be resolved in one action.\textsuperscript{128} The \textit{Reyno} Court considered joinder of the pilot’s estate, Air Navigation and McDonald Aviation as crucial to Piper’s and Hartzell’s defense, since negligence on the part of the pilot, the plane’s owners, or the charter company could completely relieve the defendants of liability.\textsuperscript{129} Although Piper and Hartzell could sue for indemnity or contribution in a separate Scottish action, the \textit{Reyno} court preferred a forum where all claims could be resolved at one time, thus enhancing the principle of convenience which is the core of the forum non conveniens analysis.\textsuperscript{130}

The major significance of \textit{Reyno} to the foreign plaintiff was the Court’s holding that the strong presumption in favor of the plaintiff’s choice of forum was weaker when the plaintiff or real parties in interest are foreign, rather

\textsuperscript{125} Id. at 299-41. Transfer was pursuant to section 1404(a) of Title 28 of the United States Code. \textit{Id.} at 240-41.

\textsuperscript{126} Id. at 259-60; \textit{see also} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

\textsuperscript{127} \textit{See Reyno}, 454 U.S. at 260 n.29. Factors such as ease of access to evidence or the strong local interest of the forum in the dispute may outweigh the need to apply foreign law. \textit{Id.}

\textsuperscript{128} Id. at 259.

\textsuperscript{129} Id.

\textsuperscript{130} Id.
than a resident of the forum. Relying on the policy of convenience, the Court decided that although it is reasonable to assume that the forum is convenient when the plaintiff chooses his home forum, that assumption is less reasonable when the plaintiff is foreign.

Reyno's second significant holding in regard to the foreign plaintiff was that dismissal could not be barred merely by showing that the substantive law of the alternative forum was less favorable to the plaintiff than the law of the chosen forum. Assuming that the plaintiff initially chooses the forum most advantageous to him, dismissal will always be to a less favorable forum. Therefore, dismissal would rarely be proper if less favorable law were a bar. To have held otherwise would have rendered forum non conveniens virtually useless.

The Reyno Court cited other practical problems that result if less favorable law is a bar to dismissal. First, the choice of law analysis becomes very important. The courts have to decide which law applies in the chosen forum, which law applies in the alternative forum, and then compare the rights, remedies, and procedures available in each forum before ruling on dismissal. This type of ex-

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131 Id. at 255.
132 Id. at 255-56. When events occur in a foreign jurisdiction, it is easier and more convenient for the plaintiff to present the evidence there than to arrange for its transport to a distant forum. See Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 202 Cal. Rptr. 773, 784 (Ct. App. 1984).
133 Reyno, 454 U.S. at 247; see Smith Kline & French Laboratories Ltd. v. Bloch, [1983] 2 All E.R. 72, 74 (C.A. 1982) (discussing the factors attracting foreign plaintiffs to the American courts). The court stated: "As a moth is drawn to the light, so is the litigant drawn to the United States." Bloch, 2 All E.R. at 74. Foreign plaintiffs are attracted to the United States by the generous damage awards and the contingency fee arrangements available in the United States that may not be available in the foreign country. Id.; see also Note, supra note 52, at 203-04; Comment, Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff's Choice of an American Forum, 7 B.C. INT'L & COMP. L.J. 31, 39-40 (1984).
134 See Reyno, 454 U.S. at 250. "Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper." Id.
135 Id. at 250-51.
136 Id. at 251.
137 Id.
exercise is contrary to the forum non conveniens doctrine that was designed, in part, to avoid "complex exercises in comparative law."\textsuperscript{138}

The \textit{Reyno} Court also noted a second practical problem. If a foreign plaintiff sued an American manufacturer, the case could not be dismissed if unfavorable law were a bar. The already attractive American courts would become more congested, defeating the forum non conveniens purpose of preventing congested courts.\textsuperscript{139}

The \textit{Reyno} Court did caution that the possibility of an unfavorable change in law is a relevant consideration and is to be given substantial weight, if the remedy in the alternative forum is so clearly inadequate or unsatisfactory as to be no remedy at all.\textsuperscript{140} However, the inability to sue on a theory of strict liability or the possibility of a smaller damage award do not constitute a sufficiently inadequate remedy in and of themselves; only the danger of deprivation of any remedy or the danger of being treated unfairly in the alternative forum can be a bar to a forum non conveniens dismissal.\textsuperscript{141}

Third, \textit{Reyno} held that the incremental deterrence to American manufacturers produced by an American trial was insufficient to justify the enormous time and judicial resources that trial would require.\textsuperscript{142} To give the deterrence factor more weight would complicate the forum non conveniens analysis and defeat its usefulness, just as less

\textsuperscript{138} Id.
\textsuperscript{139} Id. at 252; see supra notes 133-135 and accompanying text for discussion of less favorable law as a bar.
\textsuperscript{140} \textit{Reyno}, 454 U.S. at 254; see, e.g., Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984) (The court based its forum non conveniens denial on the severe monetary limits on damages in the alternative forum. The limit in Ireland, the alternative forum, was $260. By comparison, the alleged actual damages were $125,000.); Canadian Overseas Ores, Ltd. v. Compania De Acero Del Pacifico, 528 F. Supp. 1337 (S.D.N.Y. 1982), (forum non conveniens dismissal denied due to serious questions regarding the independence of the Chilean judiciary when the military junta had the power to intervene), \textit{aff'd}, 727 F.2d 274 (2d Cir. 1984).
\textsuperscript{141} \textit{Reyno}, 454 U.S. at 254-55.
\textsuperscript{142} Id. at 260-61.
favorable law as a bar would defeat the purpose of forum non conveniens.

III. THE IMPACT OF REYNOLDS ON THE FOREIGN PLAINTIFF

Reynolds favors dismissal of the foreign plaintiff suing an American defendant when the events involved occurred in a foreign jurisdiction. The federal courts, however, are not required to grant a dismissal if the remedy in the alternative forum is severely inadequate\(^4\) or if significant time and resources have been devoted already to an American forum.\(^5\) Most state courts are following Reynolds with the notable exception of California. Part A will discuss the atypical state responses to Reynolds in California. Part B will discuss the typical federal application of Reynolds and an atypical federal case where dismissal was denied due to the unusual facts of the case.

A. California State Courts

The state forum non conveniens law is frequently identical to the federal forum non conveniens law.\(^6\) But when state and federal law are not identical, the state court may reject adoption of Reynolds.\(^7\) California state courts have not fully resolved the issue of whether they

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\(^6\) See, e.g., id. at 1154 (case was a wrongful death suit against Pan American and the United States by Uruguayan relatives of decedents killed in crash in New Orleans); Gardner v. Norfolk & W. Ry., 372 S.E.2d 786, 792 (W. Va. 1988) (open court constitutional provision would encourage retention of jurisdiction as dismissal would obviously close the state court to plaintiff).
will follow Reyno or continue to apply California’s forum non conveniens law as it existed prior to Reyno. Although two California court of appeals cases rejected Reyno, a more recent court of appeals case endorsed it.

In the earliest case that rejected Reyno, Holmes v. Syntex Laboratories, Inc., the court vigorously distinguished between California’s forum non conveniens law and the federal law of Reyno. Holmes was a class action suit filed by a group of British women who suffered injury and the spouses of women who died following the ingestion of an oral contraceptive, Norinyl. Syntex was a Delaware corporation with its principal place of business in California. The plaintiffs sued on the basis of negligence, strict liability, breach of warranty, fraud, and misrepresentation. Syntex asserted that its British subsidiary had sole responsibility for all phases of the decision making process, including production, marketing, and distribution of Norinyl in Britain. The plaintiffs alleged, on the other hand, that Syntex was responsible, since the development, testing, marketing, promotion, and advertising occurred under Syntex, and that Syntex caused and allowed Norinyl to be distributed in Britain without adequate warning of known dangerous side effects. Syntex requested a forum non conveniens dismissal citing the location in Britain of evidence regarding liability.

The trial court granted the dismissal, relying on Reyno and the fact that most of the liability evidence was in Britain, including the plaintiffs’ medical records and the records of the various agencies responsible for the drug’s regulation in Britain. The trial court also cited its own congestion and recent financial crisis as additional justifi-

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148 See id. at 380-82, 202 Cal. Rptr. at 777-79; see infra notes 153-168 and accompanying text for discussion of the court’s distinctions.
149 Holmes, 156 Cal. App. 3d at 375-76, 202 Cal. Rptr. at 774-75.
150 Id. at 376, 202 Cal. Rptr. at 775.
151 Id. at 377, 202 Cal. Rptr. at 775.
cation for the dismissal.\(^{152}\)

The court of appeals reversed, holding that *Reyno* did not resolve the issue of whether federal or state forum non conveniens law applied in a diversity case, because the United States Supreme Court in *Reyno* found California law identical to federal law prior to its discussion of the changes made by *Reyno*.\(^{153}\) The *Holmes* court held that California law differed from post-*Reyno* federal law in two significant aspects. First, California law attached far greater significance to the possibility of an unfavorable change in law and second, California law gave substantial deference to the plaintiff’s choice of forum, regardless of whether the plaintiff was foreign.\(^{154}\) The court relied on the forum non conveniens codification in the California Code of Civil Procedure, Section 410.30,\(^{155}\) and the Judicial Council Comment to the Code to reach its conclusion.\(^{156}\) In the court’s opinion, the Judicial Council Comment identified two points as most significant in the forum non conveniens analysis.\(^{157}\) First, the plaintiff’s choice of forum should not be disturbed except for weighty reasons, and second, the court must not grant dismissal if there is no suitable, alternative forum for the plaintiff.\(^{158}\)

The *Holmes* court stated that the effect of a conflict of law rule or some other substantial disadvantage in the alternative forum could be of a character sufficient to deprive the plaintiff of a suitable, alternative forum.\(^{159}\)

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\(^{152}\) *Id.* The court stated that it cost $2,000 per day to keep just one court open during an apparent budget shortfall. *Id.*

\(^{153}\) *Id.* at 380, 202 Cal. Rptr. at 778.

\(^{154}\) *Id.* at 380-81, 202 Cal. Rptr. at 778.

\(^{155}\) CAL. CIV. PROC. CODE § 410.30(a) (West Supp. 1989).

\(^{156}\) *Id.*

\(^{157}\) *Id.* at 377-79, 202 Cal. Rptr. at 776-77.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 381, 202 Cal. Rptr. at 778-79.
Although the plaintiff had an available forum because the trial court had conditioned dismissal on Syntex’s agreement to submit to personal jurisdiction in Britain and to waive any statute of limitations, the *Holmes* court held that the British forum was not suitable for two reasons.\(^{160}\) First, although *Reyno* did not consider the loss of a strict liability cause of action as a deprivation of any remedy,\(^ {161}\) the court concluded that under California law the loss of strict liability was a sufficient disadvantage to the plaintiff to render the alternative forum unsuitable.\(^ {162}\) Second, the *Holmes* court decided the forum was unsuitable because the plaintiff should not be forced to litigate under a system of negligence condemned by the British themselves as inadequate in the field of defective products.\(^ {163}\)

Next, the *Holmes* court discussed the significance of Syntex’s relationship to the chosen forum. The court held that because Syntex had a relationship to California as its principal place of business, in addition to California’s status as the site of the alleged tort, the court could give greater weight to the inadequacy of the British law.\(^ {164}\) Furthermore, the court held that Syntex’s interrogatory answers, acknowledging that all premarketing research and trials occurred in California, imposed an obligation on Syntex to participate in a judicial proceeding in Cali-

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\(^{160}\) *Id.* at 383, 202 Cal. Rptr. at 780. *But see* *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984) (The court found that the disadvantages of United Kingdom substantive law did not make it an inadequate forum. *Dowling* was decided the same year as *Holmes*).

\(^{161}\) *Reyno*, 454 U.S. at 254-55; *see supra* notes 133-141 and accompanying text for further discussion of less favorable law.

\(^{162}\) *Holmes*, 156 Cal. App. 3d at 382, 202 Cal. Rptr. at 780.

\(^{163}\) *Id.* at 387, 202 Cal. Rptr. at 781 (citing *The Law Commission No. 82 & The Scottish Law Commission No. 45, Liability for Defective Products 37* (June 1977) which stated: "Existing rights and remedies in English and Scots law, in respect of injury caused by defective products, are inadequate . . . ."). The court cited the cases of the children born to women who had taken the drug, thalidomide, as one example of the inadequacy of the law. The litigation had taken two decades to conclude and had resulted in modest recoveries for severe deformities. *Id.* at 386, 202 Cal. Rptr. at 782.

\(^{164}\) *Id.* at 388, 202 Cal. Rptr. at 783. The court reasoned that it was not unfair to require corporations to defend in the county where they have their principal place of business and where the tort is alleged to have occurred. *Id.*
fornia even if Syntex's subsidiary had a closer relationship to the drug's testing and distribution in Britain.\textsuperscript{165} The court also noted that it was difficult to imagine why California was an inconvenient forum for Syntex. Although the forum might be inconvenient for the plaintiffs, they had elected to shoulder that inconvenience.\textsuperscript{166}

In a final departure from \textit{Reyno}, the \textit{Holmes} court declared that California had an interest in the foreign marketing of a defective product allegedly developed in California.\textsuperscript{167} This local interest, in the opinion of the court, was sufficient to justify the burden of litigation on a California court, a burden not unfair, inequitable, or disproportionate given the state's interest.\textsuperscript{168}

Two years after \textit{Holmes}, the court in \textit{Corrigan v. Bjork Shiley Corp.}\textsuperscript{169} agreed with \textit{Holmes} that California's forum non conveniens law properly considers the possibility of a change of law, that California does have an interest in the regulation of the foreign marketing of defective products, and that the defendant's relation to California was signifi-

\textsuperscript{165} \textit{Id.}\textsuperscript{166} \textit{Id.} at 389-90, 202 Cal. Rptr. at 784. The plaintiffs were willing to provide for the burden of transporting witnesses and evidence to California. \textit{Id.}\textsuperscript{167} \textit{Id.} at 391, 202 Cal. Rptr. at 785. The court noted that California courts have a responsibility to regulate the foreign marketing of defective products produced in California. \textit{Id.; see supra note 142 and accompanying text for discussion of the contrary position in \textit{Reyno}.}\textsuperscript{168} \textit{Id. Contra} Shiley Inc. v. Superior Court, 250 Cal. Rptr. 793, 799 (Ct. App. 1988). This opinion was modified, a review denied, and ordered not to be officially published. Since the court modified the opinion and ordered that there would be no official publication of the case, this discussion of the case is merely to show the reasoning that led the court to endorse \textit{Reyno}. California Rules of Court state: "An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding . . . ." \textit{Cal. Ct. R. 977}. \textit{Shiley} held that the jurisdiction where the injury occurred had the greatest interest and not the jurisdiction where the defective product was developed. \textit{Shiley}, 203 Cal. App. 3d at 1401, 250 Cal. Rptr. at 801; \textit{see infra} note 201 and accompanying text for discussion of this factor in \textit{Shiley}; \textit{see also} Jennings v. Boeing Co., 660 F. Supp. 796, 806 (E.D. Pa.), \textit{reh'}g granted, 677 F. Supp. 803 (E.D. Pa. 1987), \textit{aff'd}, 838 F.2d 1206 (3d Cir. 1988). The state's interest in regulating the foreign marketing of defective products is outweighed by the local interest of the forum where the injury occurred. \textit{Jennings}, 660 F. Supp. at 806; \textit{see infra} notes 211-213 and accompanying text for discussion of this factor.\textsuperscript{170} \textit{Id.}\textsuperscript{170} 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (Ct. App. 1986).
The Corrigan court disagreed with Holmes, however, in regard to the degree of deference due the foreign plaintiff’s choice of forum and rejected the focus on unfavorable law in the choice of law analysis.  

Corrigan was a wrongful death action based on negligence, strict liability, breach of warranty and design defect. An Australian citizen and resident died after a heart valve, implanted in Australia, allegedly fragmented. Bjork Shiley, a California corporation with its principal place of business in California, was the sole manufacturer of the valve. Bjork Shiley did not allege third party negligence nor did Bjork Shiley try to join any other parties. However, they presented evidence that the Australian medical personnel had improperly handled the valve prior to implantation, contrary to Bjork Shiley’s written instructions. Bjork Shiley agreed to submit to Australian jurisdiction, to pay any Australian judgment, and to pay the transportation costs for trial of any ten past or present employees to Australia if forum non conveniens dismissal was granted.

In denying the forum non conveniens dismissal, Corrigan adopted an intermediate position between Holmes and Reyno. Regarding the foreign plaintiff, Corrigan held that the foreign plaintiff’s choice of forum receives less deference than that of a California resident, even though the

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170 See id. at 178-81, 227 Cal. Rptr. at 254-56.
171 See id. at 176-78, 227 Cal. Rptr. at 252-53.
172 Id. at 171-72, 227 Cal. Rptr. at 249.
173 Id. The valve was a disc prosthesis with a 70 degree opening angle that was never sold or distributed in the United States. Bjork Shiley stopped production of this valve in January, 1983, after the FDA withdrew approval for manufacture. Plaintiffs produced evidence that Bjork Shiley had in its possession at least 20 of these failed valves that had been exported to eight different countries. Litigation over the 60 degree opening valves was pending in the United States where Bjork Shiley sold 60 degree valves. The 70 degree valves were retooled 60 degree valves. Id.
174 Id. at 183, 227 Cal. Rptr. at 257.
175 Id. at 171, 227 Cal. Rptr. at 249. Bjork Shiley presented evidence that the hospital removed the valve from its rigid container designed to protect the valve during shipping and sterilization. The hospital wrapped the valve in paper napkins and a paper bag for the sterilization procedure. Id.
176 Id. at 172, 227 Cal. Rptr. at 249.
rule of substantial deference still applied in California.\textsuperscript{177} The court stated its conclusion was obvious since the court had no discretion to dismiss the action of a California resident except in extraordinary cases.\textsuperscript{178} Therefore, the Australian plaintiff's choice deserved some deference but not enough to dominate the forum non conveniens analysis.\textsuperscript{179}

Second, the Corrigan court explicitly refused to follow the Holmes court's explicit or implicit consideration of the choice of law for the sole purpose of simply deciding which forum provided the most advantageous law for the plaintiff.\textsuperscript{180} Rather, Corrigan's focus in the conflict of law analysis was to determine which forum's interest would be most impaired if its law did not apply.\textsuperscript{181} The fact that the applicable law might be less favorable in one forum was not a basis for choice.\textsuperscript{182} The Corrigan court, however, did not reject the possibility of an unfavorable change in law and the necessary conflict of law analysis in regard to the forum non conveniens analysis as Reyno did.\textsuperscript{183} Corrigan

\textsuperscript{177} Id. at 176, 227 Cal. Rptr. at 252; see supra notes 154-158 and accompanying text for discussion in Holmes regarding the deference due to foreign plaintiffs' choice of forum. In the Holmes case, the court gave the same degree of deference to the foreign plaintiff's choice as the court would have given to an American plaintiff's choice. In the Corrigan case, the court gave less deference to the foreign plaintiff's choice than the court would have given to an American plaintiff's choice.\textsuperscript{178} Corrigan, 182 Cal. App. 3d at 176, 227 Cal. Rptr. at 252 (citing Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P.2d 947, 126 Cal. Rptr. 811 (1976) (despite Hawaii being the most convenient forum, the California residency of the plaintiff prevented forum non conveniens dismissal because in California, once forum non conveniens is granted, the court can no longer protect the interest of its resident since jurisdiction has been lost)).\textsuperscript{179} Id.\textsuperscript{180} Id. at 178, 227 Cal. Rptr. at 253.\textsuperscript{181} Id. at 177-79, 227 Cal. Rptr. at 253-54.\textsuperscript{182} Id.\textsuperscript{183} Id. The court stated: "[I]t is clear, however, that California courts have demonstrated a willingness to assume the burden of resolving conflict of law problems and will not invoke forum non conveniens doctrine simply to avoid a choice of law analysis." Id. at 177, 227 Cal. Rptr. at 253; see supra notes 133-135 and accompanying text for Reyno's handling of the conflict of laws problem as related to less favorable law for the plaintiff in the alternative forum. Reyno rejected less favorable laws as a bar to dismissal thereby avoiding need for complex analysis of choice of law.
gave consideration to the possibility of an unfavorable change in law but refused to allow this factor to decide the forum non conveniens question by itself, agreeing with Reyno that unfavorable law would otherwise always bar dismissal.\footnote{Corrigan, 182 Cal. App. 3d at 182, 227 Cal. Rptr. at 257.}

\textit{Corrigan} agreed with \textit{Holmes} on two other issues. First, the defendant's relationship to the state is significant.\footnote{Id. at 180-82, 227 Cal. Rptr. at 255-56; see supra notes 164-165 and accompanying text for the \textit{Holmes} discussion of the defendant's relationship to the state.} Second, based on California's policy of full compensation which it achieves by application of its own law, the state has an interest in defective products produced in California even though injury occurs elsewhere.\footnote{Corrigan, 182 Cal. App. 3d at 180, 227 Cal. Rptr. at 255; see supra notes 167-168 and accompanying text for the discussion in \textit{Holmes} regarding California's interest in defective products even though the injury occurred outside the forum.}

The \textit{Corrigan} court discussed another \textit{Reyno} factor: the inability of Bjork Shiley to implead the other potential tortfeasors, the Australian medical personnel.\footnote{Corrigan, 182 Cal. App. 3d at 183, 227 Cal. Rptr. at 257.} The court noted that the California forum was inconvenient to the defendant in regard to this factor.\footnote{Id.} However, since the defendant had made no effort to join the other potential tortfeasors, either in Australia or California, the court refused to speculate on how this factor might tip the balance of a forum non conveniens dismissal.\footnote{Id. Presumably, if the defendant had joined the other potential tortfeasors in Australia, the California court would have at least considered dismissal so that all claims could be resolved in one trial in Australia.}

In 1988, a third California court of appeals made a dramatic departure from \textit{Holmes} and \textit{Corrigan}. In this case, \textit{Shiley Inc. v. Superior Court},\footnote{250 Cal. Rptr. 793 (Ct. App. 1988). See supra note 168 for explanation of precedential value of this case.} the court endorsed the \textit{Reyno} approach and criticized the \textit{Holmes} and \textit{Corrigan} decisions. \textit{Shiley} has no precedential value under the California Rules of Court because it was ordered not to be pub-
lished. Therefore, the discussion of *Shiley* is merely to show the court's reasoning that led to its endorsement of *Reyno*. *Shiley* considered California's adherence to the national forum non conveniens policy as the preferable course for the state courts. Like *Corrigan*, *Shiley* was a wrongful death action involving the heart valves manufactured by *Shiley* for world wide distribution.

In regard to the deference given to the foreign plaintiff, the *Shiley* court pointed to a California Supreme Court decision, *Archibald v. Cinerama Hotels*. In the opinion of the *Shiley* court, *Archibald* had already determined, prior to the *Holmes* case, that the plaintiff was not entitled to any particular deference in choosing his forum when the plaintiff was a foreigner or only a nominal resident of California. *Shiley* also criticized *Holmes* and *Corrigan* for their reliance on the Judicial Council Comment to the Code of Civil Procedure, Section 410.30, pointing out that the Council had written the comment in 1969 prior to *Archibald* and *Reyno*.

Further, *Shiley* noted that a legislative amendment to section 410.30 of the California Code of Civil Procedure, passed shortly after *Corrigan*, seriously eroded the emphasis on the defendant's relationship to the state as a factor

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191 See *supra* note 190 for an explanation of the precedential value of the *Shiley* case.
192 *Shiley*, 250 Cal. Rptr. at 797.
193 *Id.* at 794. *Shiley*’s Scandinavian marketing arm sold the valves to a Norwegian and a Swedish patient, who died following implantation in their native countries). *Id.*
194 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976). In *Archibald*, a California resident sued several Hawaiian hotel owners and operators for discrimination between the rates offered to Hawaiian residents and mainland visitors. The court held that a forum non conveniens dismissal of a California resident is inappropriate, except in the extraordinary circumstance where California had no interest in the dispute. Otherwise, the strong state policy of assuring a California resident an adequate forum would prevent dismissal even where California was an inconvenient forum for the defendant. *Id.* at 856-59, 544 P.2d at 951, 126 Cal. Rptr. at 813-15.
195 *Shiley*, 250 Cal. Rptr. at 797.
196 See *id.* at 798. The Judicial Council Comment may have been significantly different if *Archibald* and *Reyno* had been viable doctrines at the time of its writing.
favoring retention of jurisdiction.\textsuperscript{197} \textit{Shiley} considered the amendment as effectively eliminating the defendant's act of incorporating or doing business in California as a significant factor in the forum non conveniens analysis.\textsuperscript{198} The \textit{Shiley} court thought that the application of the forum non conveniens doctrine should consider only justice, fairness, and convenience, and not solely the residence of one of the parties.\textsuperscript{199}

\textit{Shiley} followed \textit{Reyno}'s holding that the incremental deterrence obtained from American manufacturers being sued in an American court for an injury that occurred outside the country could not justify the enormous judicial time and resources required.\textsuperscript{200} Unlike \textit{Holmes}, \textit{Shiley} refused to give the defendant's relationship to the state any significant weight.\textsuperscript{201} Instead, \textit{Shiley} emphasized the public interest factors of congested courts, taxpayer's burden, and the possible flight of business from California as significant factors for granting forum non conveniens dismissals.\textsuperscript{202} \textit{Shiley} also agreed with \textit{Reyno} that the plaintiff's country had the strongest interest in the litigation, and that the presence of third party defendants favored trial where all claims could be resolved in one forum.\textsuperscript{203}

However, the foreign plaintiff in a California state court may be able to successfully defeat a forum non conveniens

\begin{footnotes}
\item[197] \textit{Id.} Section 410.30 of the California Code of Civil Procedure states that "[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." \textit{CAL. CIV. PROC. CODE} \$ 410.30 (West Supp. 1989); see \textit{Credit Lyonnais Bank Nederland, N.F. v. Monatt}, 202 Cal. App. 3d 1424, 259 Cal. Rptr. 559, 563-65 (Ct. App. 1988), for a discussion of the legislative intent of the amendment to broaden the scope of the forum non conveniens doctrine.

\item[198] \textit{Shiley}, 250 Cal. Rptr. at 798.

\item[199] \textit{Id.} at 798-99.

\item[200] See \textit{id.} at 799; see supra note 142 and accompanying text for discussion of this factor in \textit{Reyno}.

\item[201] \textit{Shiley}, 250 Cal. Rptr. at 799-800.

\item[202] \textit{Id.} The court cited routine five-year delays in bringing tort actions to trial. The court suggested that leading businesses and high technology manufacturers might defect to jurisdictions that would not require them to defend against extra-territorial injuries. \textit{Id.}

\item[203] \textit{Id.} at 801; see \textit{Reyno}, 454 U.S. at 258, 260-61; see supra notes 128 and 142 and accompanying text for further discussion.
\end{footnotes}
motion. First, the state has a policy of according some deference to a foreign plaintiff's choice of forum. Second, the state has an even stronger policy that California has an interest in regulating defective products manufactured in California which cause injury outside the state. Furthermore, the Shiley opinion agreed with Reyno that the forum where the injury occurred has the stronger interest. Therefore, the foreign plaintiff in a California state court may defeat dismissal if factors such as the need to implead third party defendants are present.

B. Federal Courts and Air Crash Cases

Federal courts apply Reyno to air crash cases in a manner representative of Reyno's application to products liability cases. The significant issue involved repeatedly is the location of evidence in two forums: (1) the forum where the product was designed and/or manufactured and (2) the forum where the accident occurred. Of the following two cases, Jennings v. Boeing Co. is an example of the usual analysis and resulting dismissal, while the second case, Friends For All Children, Inc. v. Lockheed Aircraft Corp. is an atypical case involving unusual facts that prevented a forum non conveniens dismissal.

In Jennings, the court granted dismissal following an analysis of the private and public interest factors. The plaintiff was the wife of a British resident killed in a helicopter crash in the North Sea. British International Helicopters owned and operated the helicopter which had

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204 See Corrigan, 182 Cal. App. 3d at 176, 227 Cal. Rptr. at 252; Holmes, 156 Cal. App. 3d at 380-81, 202 Cal. Rptr. at 778; see supra notes 177-179 and 154-158 and accompanying text for discussion of the deference given to a foreign plaintiff.
205 Corrigan, 182 Cal. App. 3d at 183, 227 Cal. Rptr. at 255; Holmes, 156 Cal. App. 3d at 391, 202 Cal. Rptr. at 785; see supra note 185 and accompanying text for discussion of the Corrigan case; see supra notes 167-168 and accompanying text for discussion of the Holmes case.
206 See supra note 190 and accompanying text for an explanation.
208 717 F.2d 602 (D.C. Cir. 1983).
209 Jennings I, 660 F. Supp. at 809.
been manufactured by Boeing in Pennsylvania. The Accident Investigation Board of the British Department of Transport determined in a preliminary investigation that the accident resulted from the catastrophic failure of a gear.\textsuperscript{210}

Under the public interest factors, the \textit{Jennings} court decided the sole contact of the forum with the helicopter's manufacture in Pennsylvania was insufficient to warrant the further congestion of the Pennsylvania courts.\textsuperscript{211} Other public interest factors favoring dismissal included Boeing's inability to implead the helicopter's owners in Pennsylvania and the greater interest of the United Kingdom in the dispute.\textsuperscript{212} The United Kingdom's interest consisted of the British regulation of the aircraft in regard to its airworthiness and in flight control, as well as the British ownership.\textsuperscript{213}

Of the private interest factors, the most significant was ease of access to sources of proof. If the case was heard in the United States, liability would be an issue, with critical evidence regarding such liability in the United Kingdom.\textsuperscript{214} Boeing agreed, however, not to contest liability in an English or Scottish court, eliminating the need for any liability evidence from the United States.\textsuperscript{215} With the elimination of the liability issue, trial in the United Kingdom would be a simpler matter than trial in the United States. With only damages to settle, the United Kingdom would be the most convenient forum under the circumstances since it was the location of all evidence relevant to

\begin{footnotes}
\item[210] Id. at 798.
\item[211] Id. at 807. The court noted that ten other suits had already been filed regarding the same crash. A Delaware resident, appointed as administratrix of ten of the decedents estates, filed the other suits. The court considered the manufacture of the helicopter in Pennsylvania insufficient by itself to warrant the congestion of the Pennsylvania courts, especially when the foreign forum had a stronger interest. \textit{Id.} at 807-08.
\item[212] Id. at 806-08.
\item[213] Id. at 807-08.
\item[214] Id. at 805.
\item[215] Id.; see supra notes 33-38 and accompanying text for a discussion of concession of liability in \textit{Pain} and the effect of concession on ease of access to sources of proof.
\end{footnotes}
The plaintiff tried to argue that the lack of punitive damages was a bar to dismissal. The court responded that Reyno's reasoning applied to the loss of punitive damages as well as to compensatory damages. The court further emphasized that convenience was the primary issue in the forum non conveniens analysis even when the plaintiff chose the forum for its favorable law and the defendant sought dismissal to avoid punitive damages.

When the case was reheard, the plaintiff attempted to overcome her status as a foreign plaintiff by claiming that under the Treaty of Friendship, Commerce, and Navigation, she was entitled to as much deference in her choice of forum as an American plaintiff. The court ruled, however, that national treatment under the treaty merely meant treatment no less favorable than that accorded to United States nationals in a like situation. The court reasoned that if a California resident could be dismissed for forum non conveniens reasons as in Reyno, then it was inconsistent to allow the plaintiff any more favorable treatment.

The federal courts, however, do not always grant forum non conveniens dismissal, especially if the case involves unusual circumstances as in Friends For All Children, Inc. v. Lockheed Aircraft Corp. Friends For All Children denied a

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217 Id. at 801.
218 Id. The court stated: "[A]lthough Reyno dealt with a reduction in compensatory damages, and did not expressly address the loss of punitive damages, the Court's reasoning is clearly applicable to such a situation." Id.
219 Id. at 799.
220 Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, United States - Ireland, art. IV, 1 U.S.T. 788, 790, T.I.A.S. No. 2155. Article IV provides that Irish citizens have a right to recovery for injury or death under the United States law if an American would have the right.
222 Id.
223 Id. The court rejected the plaintiff's argument that under the treaty she must be treated as a citizen of the particular state where she filed. Id.
224 717 F.2d 602 (D.C. Cir. 1989).
forum non conveniens dismissal.\textsuperscript{225} While recognizing the principles of \textit{Reyno},\textsuperscript{226} the court ruled that the private interest factors of ease of access to sources of proof and the local American interest outweighed public interest factors of court congestion and the strong interest that the foreign jurisdictions had in the dispute.\textsuperscript{227}

\textit{Friends for All Children} involved a plane crash with Vietnamese orphans aboard outside Saigon, Vietnam. President Ford authorized the Air Force to participate in “Operation Babylift” to evacuate the Vietnamese orphans. Shortly after takeoff the plane lost a cargo door which resulted in the crash. The survivors were flown to America, from where they were subsequently placed in adoption.

This case involved the infants who were adopted by parents who lived outside the United States.\textsuperscript{228} \textit{Friends for All Children}\textsuperscript{229} sued Lockheed, the manufacturer of the plane, alleging negligence in the design and manufacture of the plane, and Lockheed joined the United States as a third party defendant.\textsuperscript{230} In stipulations arising out of the first twelve trials, Lockheed agreed not to contest liability in regard to compensatory damages, the United States agreed not to contest liability for indemnification or contribution for compensatory damages, and each adoptive parent, guardian, or other legal representative agreed to waive all claims for punitive damages.\textsuperscript{231}

Regarding the relative ease of access to sources of proof, Lockheed argued that the stipulations reduced the

\textsuperscript{225} Id. at 610.

\textsuperscript{226} Id. at 606. The court stated: “The \textit{forum non conveniens} motion is governed by the principles most recently articulated by the Supreme Court in \textit{Reyno} and by this court in \textit{Pain}.” Id. (footnote omitted).

\textsuperscript{227} Id. at 610.

\textsuperscript{228} Id. at 603. Of the 250 infants on board, approximately 150 survived. Id.

\textsuperscript{229} Id. at 604. \textit{Friends For All Children} is a private American charity. Id.

\textsuperscript{230} Id. Lockheed alleged in its third party complaint that primary negligence on the part of the United States had proximately caused the accident. Id. The United States involvement in the evacuation of the orphans was extensive, involving the use of the U.S. Air Force under orders of President Ford. Id.

\textsuperscript{231} Id.
remaining issue primarily to damages. Lockeed claimed that a local doctor in each foreign jurisdiction should assess each child's degree of handicap since the degree was dependent on the adoptive culture's evaluation of the child's injuries. The court agreed that this factor standing alone strongly favored dismissal. The court refused, however, to consider this factor by itself because Lockheed had continued to contest whether the crash or other causes had produced the infants' injuries.

Since the crash destroyed the infants' Vietnamese medical records, only the testimony of the Friends for All Children nurses could prove if the infants' handicaps were linked to malnourishment or other problems that occurred prior to the crash. Most of the nurses lived in the United States, making it the most convenient forum in regard to this evidence. Lockheed also contended that the crash had not been severe enough to have caused the infants' injuries. Therefore, the testimony of the plane's crew and numerous engineers and experts, nearly all of whom lived in the United States, was crucial to resolve the issue.

With regard to the accessibility of the evidence, the court considered two factors. First, the previous trials had generated thousands of pages of documents that were relevant to future litigation. Consequently, if the case was dismissed, the burden on a foreign jurisdiction of

292 Id. at 607. The stipulation apparently approached the level of an admission of liability similar to the concession of liability in Pain. Id.; see supra notes 32-41 and accompanying text for discussion of concession of liability in Pain.
293 Friends For All Children, 717 F.2d at 606. Lockheed argued that only a medical expert who spoke the language and knew the mores of the foreign jurisdiction could determine the extent to which the injuries would handicap the child. Id.
294 Id. at 608.
295 Id.
296 Id.
297 Id.
298 Id.
299 Id. at 607-08.
300 Id. Twelve previous trials had generated tens of thousands of pages of documents in English. Id. The trial transcripts alone were approximately 23,000
translating the documents would be enormous. Second, due to the twelve previously decided cases, many attorneys and the courts in the forum were already intimately familiar with the complex litigation in the case. Based on these factors, the court concluded that the American forum was a more convenient forum than a foreign forum.

Comparing the forums' interest in the dispute, the court held that the American interest was stronger than the interest of the foreign jurisdictions where the children were living. Several factors made the American interest stronger. Americans had organized "Operation Babylift," American military equipment and personnel had helped carry out the operation, and American government officials had authorized the undertaking. Lockheed manufactured the plane in the United States, and Lockheed engaged in business activity in the jurisdiction of the forum. Finally, Americans arranged the adoption of the infants into the foreign jurisdictions. Given the extensive American involvement, the court held that sufficient national interest existed to justify the imposition of jury duty, and the court congestion. Further, the court held this involvement outweighed the interest of the foreign forums.

Without the extensive involvement of the United States in the events that were at issue in the trial, forum non conveniens dismissal would have been much more likely. The
foreign infants would have exclusively been the interest of the foreign jurisdiction, and the United States interest related to Lockheed as an American corporation would have been insufficient under Reyno. 249

The other factor that made Friends for All Children unusual was the enormous amount of time and expense already invested in the American forum by the time the motion for forum non conveniens dismissal was made. 250 When extensive time and expense have been invested, the alternative forum is not necessarily more convenient. In these cases, the forum where the issues have been previously litigated is the more appropriate forum.

Jennings, on the other hand, represents the typical case where forum non conveniens dismissal is granted. 251 In Jennings, the forum non conveniens motion was timely. Consequently, the alternative forum remained the most convenient. The American interest was also confined to the defendant being an American corporation, an interest insufficient by itself to override the interest of the foreign jurisdiction where the accident occurred. 252

IV. Conclusion

The factors which are crucial to the forum non conveniens analysis are the ease of access to the evidence, the forum’s interest in the dispute, and the need to impound third parties. However, since the forum non conveniens doctrine is flexible and discretionary after Reyno, even with respect to the foreign plaintiff, the plaintiff or defendant may take advantage of the particular facts of his situation to influence the outcome of the litigation. If the facts justify it, the court may give more weight to a factor than it ordinarily receives. 253

250 See supra notes 240-243 and accompanying text for a description of the time invested and documents generated by previous trials.
251 See supra notes 209-223 and accompanying text for a discussion of Jennings.
252 Jennings I, 660 F. Supp. at 808-09.
253 See Friends For All Children Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 609-10 (D.C. Cir. 1983); see supra notes 244-248 and accompanying text for a dis-
The plaintiff may use several approaches to avoid dismissal. For example, even *Reyno* recognized that if the law in the alternative forum was extremely unfair or inadequate for the plaintiff, then dismissal would be denied.\(^\text{254}\) Likewise, although the American forum usually has only an insubstantial interest in the conduct of American manufacturers when the product causes an injury outside the United States, other United States involvement in the events underlying the dispute may be sufficient to prevent dismissal.\(^\text{255}\) In the same vein, the case cannot be dismissed if the United States is a defendant and refuses to submit to the jurisdiction of a foreign forum.\(^\text{256}\)

The plaintiff may also avoid dismissal through other means. One alternative for the plaintiff is to join other American citizens in the lawsuit so that the chosen forum will consider its interest in the dispute stronger than the foreign forum’s interest. Preferably, these American citizens would be residents of the chosen forum, thereby strengthening the interests of that forum.\(^\text{257}\) The plaintiff may also prevent dismissal by involving numerous plaintiffs and defendants, none of whom are concentrated in any particular forum. Thus, no particular forum would be especially convenient for any of the parties, making it pos-

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\(^\text{254}\) Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); see supra notes 140-141 and accompanying text for a discussion of inadequate remedies which prevent dismissal.

\(^\text{255}\) See *Friends For All Children*, 717 F.2d at 609-10. See supra note 248 and accompanying text for a discussion of the degree and type of United States involvement sufficient to defeat dismissal.

\(^\text{256}\) See *In re Air Crash Disaster Near New Orleans on July 9, 1982*, 821 F.2d 1147, 1168-69 (5th Cir. 1987), *vacated sub nom.* Pan American World Airways, Inc. v. Lopez, 109 S. Ct. 1928 (1989). The plaintiffs sought a recovery against both Pan American and the United States for the death of relatives. Although Pan American agreed to submit to the jurisdiction of a foreign forum and to pay any judgment there, the United States did not. Thus, the court refused to dismiss on the basis that there was not an available alternative forum in which all of the defendants would be subject to jurisdiction. *Id.* at 1168-69.

\(^\text{257}\) *But cf.* Pain v. United Technologies Corp., 637 F.2d 775, 796 (D.C. Cir. 1980). The court stated in this case: "[W]e are not convinced, however, that plaintiffs’ forum choice here deserves extra weight . . . simply because several of the plaintiffs are American . . . ." *Id.*
possible for the plaintiff to maintain the suit in his chosen forum, provided it has some connection to the case.\textsuperscript{258}

Finally, the plaintiff may best avoid dismissal by filing in a state court where \textit{Reyno} is not closely followed as in, for example, California,\textsuperscript{259} or possibly Louisiana.\textsuperscript{260} In California, the plaintiff might avoid dismissal by arguing that the state does have a strong interest in defective products produced inside its borders even though injury occurred elsewhere. Furthermore, the plaintiff might be able to present other policy reasons to persuade the state that its laws should resolve the issue rather than the law of a foreign jurisdiction. Success with this approach in another state will depend on the state's choice of law approach. If the choice of law dictates that the foreign law will apply, avoidance of dismissal produces no advantage.

The plaintiff, however, is not the only party who can influence the outcome of a forum non conveniens motion. The defendant can also facilitate a forum non conveniens dismissal by taking certain actions. Most important is an early motion for dismissal before considerable time and expense are invested in the plaintiff's chosen forum. Otherwise, the court may deny dismissal on the grounds that convenience is not served after considerable time and expense is already invested in the chosen forum.\textsuperscript{261}

The defendant may also concede liability, thus eliminating the need for evidence located in the United States. The private interest factor of relative ease of access to the evidence will then more clearly favor the alternative fo-


\textsuperscript{259} See supra notes 146-206 and accompanying text for discussion of California's forum non conveniens approach.

\textsuperscript{260} In re Air Crash Disaster Near New Orleans, 821 F.2d at 1147 (Uruguayan relatives filed a wrongful death suit in Louisiana federal court following the crash of Pan American Flight 759). The court stated: "In this case, however, Louisiana forum non conveniens [sic] law is substantially different than federal forum non conveniens law." \textit{Id.} at 1154.

\textsuperscript{261} Friends For All Children, 717 F.2d at 609-10; see supra notes 103 and 243 and accompanying text for discussion of the time and expense invested in the initial forum preventing dismissal.
If the defendant does not want to concede liability, he can argue that his evidence is more easily transported to the foreign forum than vice-versa.

Another strong rationale for the defendant to obtain dismissal is the need to implead third parties who are not subject to the personal jurisdiction of plaintiff's chosen forum. Since the courts have a strong preference for resolution of all claims in one trial, dismissal is likely in these cases unless some other factor makes the chosen forum the most convenient.

Although both the plaintiff and defendant may attempt to manipulate the forum non conveniens analysis to their advantage, this manipulation is quite limited for either party despite the flexibility of the Reyno doctrine. Prior to Reyno, the foreign plaintiff clearly had an advantage over the defendant in choosing the forum and maintaining suit there than after Reyno. After Reyno, however, the American defendant clearly has the advantage since forum non conveniens will be granted unless unusual circumstances are involved. The effect of Reyno is to make the forum non conveniens analysis more logical, consistent, predictable, and easier to apply since complex choice of law questions may usually be avoided. These advantages to the Reyno analysis will likely prevent any reversal of the Reyno approach, unless the courts change their view of the American courts' role in the world to requiring the protection of the foreign plaintiff's interests on an equal basis with protecting the interests of the American plaintiff. Finally, Reyno's consistency and logic may also lead to its eventual adoption by all state courts.

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262 See supra notes 32-38, 214-216 and 231 and accompanying text for a discussion of concession of liability.
263 See supra notes 45 and 130 and accompanying text for a discussion of the need to implead third parties as a factor favoring dismissal.