

A V I A T I O N

A L E R T

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## PENNSYLVANIA SUPERIOR COURT REVERSES *FORUM NON CONVENIENS* DISMISSAL OF INTERNATIONAL AIR CRASH CASE, BUT DON'T EQUATE PENNSYLVANIA WITH COOK COUNTY, ILLINOIS (JUST YET)

By *J. Denny Shupe and Barry S. Alexander*

United States courts facing *forum non conveniens* (FNC) motions, at least with respect to lawsuits arising out of air crashes that occur outside of the United States, seem to fall into two distinct camps: Cook County, Illinois, where FNC motions very often are said to go to die,<sup>1</sup> and the rest of the country, where these motions much more frequently are granted.<sup>2</sup> While this characterization might be a slight oversimplification, in practice, it has been seen to be not far from reality.

After the Superior Court of Pennsylvania's decision to reverse the trial court's dismissal on FNC grounds in *Bochetto v. Piper Aircraft Co.*, 2014 Pa. Super 120, 2014 Pa. Super. LEXIS 1180 (June 9, 2014), some have questioned whether Pennsylvania is coming closer to following Cook County's lead. A careful reading of the Court's decision, however, reveals faithful application of preexisting Pennsylvania law in its remand to the trial court for evaluation of what the Court found to be all potentially relevant factors. At the moment, it would be premature for there to be great cause for concern among aviation defendants that

Pennsylvania courts are moving closer to the experience in Cook County for deciding FNC motions related to international air crashes.

### The Lawsuit

The lawsuit in *Bochetto* arises out of the September 15, 2009 crash of a Model PA 34-2023 Seneca V aircraft that was being operated by Aeronautical Academy of Evora (AAE), a flight school near Castro Verde, Portugal. The aircraft was manufactured by Piper Aircraft Co. (Piper) in Florida, and was owned by two different U.S. entities between 1998 and 2001 before being sold to a Belgian company that leased it to AAE. AAE is an independent company but is part of a worldwide chain of flight schools operated by CAE Global Academy (CAE), which also operates a number of flight schools in the U.S.

The three occupants of the aircraft, two students (one was a Dutch citizen and the other had dual Dutch/Australian citizenship) and one instructor (a Spanish citizen), died. The action was brought by an administrator appointed to act on behalf of the estates and the victims' parents, who were citizens of Spain, Netherlands and the Dutch Antilles.

The action originally was brought in Pennsylvania state court against 14 American defendants allegedly associated with the manufacture of the aircraft and its component parts. Piper removed the action to federal court, but it was remanded based on the forum defendant rule.

### The FNC Motion

On February 24, 2012, three of the defendants, including Piper, filed a joint motion to dismiss the action on the ground of FNC, arguing that:

1. See, e.g., *Vivas v. Boeing, et al.*, 911 N.E.2d 1057 (Ill. App. 1st Dist. 2009); *Thornton v. Hamilton Sundstrand Corp.*, No. 1-08-2734 (Ill. App. 1st Dist. Aug. 31, 2009); *Ellis v. AAR Parts Trading, Inc.*, 828 N.E.2d 726 (Ill. App. 1st Dist. 2005); *Arik v. The Boeing Co., et al.*, No. 08 L 12539 (Ill. Cir. Ct., Cook County Feb. 18, 2010).

2. See, e.g., *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011); *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009); *In re Air Crash at Madrid, Spain*, 2:10-ML-02135-GAF, 2011 U.S. Dist. LEXIS 62974 (C.D. Cal. May 16, 2011); *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 792 F. Supp. 2d 1090 (N.D. Cal. 2011); *Pettitt v. The Boeing Co.*, 2010 U.S. Dist. LEXIS 102235 (N.D. Ill. Sept. 28, 2010).

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This is a textbook case for dismissal based upon the doctrine of *forum non conveniens*. [The aircraft] was maintained in Portugal, the pilot was trained in Portugal, the Portuguese government conducted the accident investigation, and all of the nonparty witnesses and relevant documents are in Portugal. All of the decedents are from Europe, and the real parties in interest in this case are from Europe. As several courts have concluded under similar circumstances, this case should be dismissed based upon *forum non conveniens*.

The trial court accepted the defendants' arguments and dismissed the action, subject to a traditional stipulation by all defendants that they would: (1) accept service in a subsequent action in Portugal, (2) admit jurisdiction in Portugal, and (3) waive any statute of limitations defense in any subsequent action filed in Portugal.

### The Appeal

Plaintiffs appealed the trial court's dismissal, contending that the trial court erroneously: (1) failed to give sufficient deference to their choice of forum and (2) misapplied the law of Pennsylvania by analyzing the FNC factors with respect to litigating in Pennsylvania, rather than in the United States as a whole, versus litigating in Portugal.

The Superior Court addressed only the second contention, that the trial court erred in analyzing the private and public interest factors with respect to Pennsylvania, finding it dispositive of the appeal without regard to the level of deference given to appellants' choice of forum. In evaluating this issue, the Superior Court explained at length that it had to apply Pennsylvania, not federal, FNC law. In practice, however, substantive Pennsylvania law applicable to FNC dismissals largely mirrors federal law in that it requires: (1) deference to be given to the plaintiff's initial choice of forum, (2) an alternate adequate forum be available to the plaintiff, and (3) a review of the private and public interest factors set forth by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The Superior Court held that the trial court's failure to consider the action's connections to the United States as a whole was in error. *Bochetto*, 2014 Pa. Super. LEXIS at \*23-24 (citing *Aerospace Financing Leasing, Inc. v. New Hampshire Ins. Co.*, 696 A.2d 810, 815-16 (Pa. Super. 1997) (looking to lawsuit's connections with United States, not just Pennsylvania) and *Piper Aircraft Co. v.*

*Reyno*, 454 U.S. 235, 257-58 (1981) (considering FNC factors relating to the United States at large, not just those that connected the case to the specific state in which the case was venued)).

The Superior Court also deemed deficient the trial court's failure to discuss the *Gilbert* public and private interest factors that arguably weighed in favor of plaintiffs' choice of forum, instead discussing only those that weighed against. *Bochetto*, 2014 Pa. Super. LEXIS at \*28 (citing *Wright v. Aventis Pasteur, Inc.*, 905 A.2d 544, 550, 552 (Pa. Super. 2006)). The Superior Court identified the following factors to be considered as weighing in support of the plaintiffs' choice of forum:

#### Private Interest Factors

- Evidence relating to the design, manufacture and testing of the aircraft is in the U.S.;
- All of the witnesses regarding Appellants' design defect and product liability claims are in the U.S.;
- Evidence relating to the aircraft's two previous American owners and documentation of maintenance and upkeep of the aircraft over that period are in the U.S.;
- Two of the remaining defendant-corporations are registered Pennsylvania corporations, two others maintain principal places of business in Pennsylvania, and another three maintain registered agents in Pennsylvania; and
- The U.S. has a general "interest in ensuring that American manufacturers are deterred from producing defective products."

#### Public Interest Factors

- None of the decedents/pilots, plaintiffs, defendants or parties-in-interest are Portuguese; and
- The United States' general interest "in ensuring that American manufacturers are deterred from producing defective products." (repeated from the private interest factors section).

The Superior Court held that, because it had failed to discuss the factors weighing in favor of the choice of forum or consider the action's contacts to the United States as a whole, the trial court had abused its discretion. Accordingly, the Court vacated the trial court's order dismissing

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the action and remanded the case “for the trial court to conduct a complete and thorough analysis of **all** relevant *forum non conveniens* factors....” *Id.* at \*33 (emphasis in original).

While it can be disheartening for those on the defense side of the aisle to see an FNC dismissal vacated on appeal, the Superior Court’s decision in this case is not in itself cause for alarm because of its focus on factors that were not considered by the trial court. There no doubt will be many eyes focused intently on the trial court’s weighing of the private and public interest factors on remand compared to how those factors historically have been weighed in other state and in federal courts. How the trial court weighs these factors could play a significant role in determining whether Pennsylvania state courts will become more popular with the aviation plaintiffs’ bar in litigation arising out of international air accidents. ♦

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