# Appeals Court Unhappy With Plaintiffs' Advocacy

November 28, 2011 by Sean Wajert

Today we note an opinion that, in its opening words, is about "two appeals that raise concerns about appellate advocacy." Both are appeals from grants of forum non conveniens in multidistrict litigation. See Gonzalez-Servin et al. v. Ford Motor Co. et al., No. 11-1665; Kerman et al. v. Bayer Corp. et al., No. 08-2792 (7th Cir. 2011).

The Ford case was an appeal from an order to transfer a case from the U.S. District Court for the Southern District of Indiana to the courts of Mexico, and was one of many offshoots of litigation arising out of vehicular accidents allegedly caused by defects in Bridgestone/Firestone tires installed on Ford vehicles. All these cases have been consolidated in an MDL.

The 7th Circuit found the lower court's careful and thorough analysis demonstrated that it was acting well within its discretion in deciding that the Mexican courts would be a more appropriate forum for the adjudication of this lawsuit by Mexican citizens arising from the death of another Mexican citizen in an accident in Mexico.

What seemed to bother the panel is that plaintiffs did not cite an FNC case seemingly on all fours with the appeal in their opening brief, though the district court's decision in their case was issued in 2011—long after the prior case. In their response the defendants cited the case repeatedly and asserted that its circumstances were "nearly identical" to those of the present case. Yet, in their reply brief the appellants still didn't mention it, let alone try to distinguish it, said the panel.

The second case involved litigation against manufacturers of blood products used by hemophiliacs, which turned out to be contaminated by HIV. This particular suit was brought by Israeli citizens allegedly infected by the blood products in Israel. The defendants, invoking forum non conveniens, moved to transfer the case to Israel. There were two prior appellate decisions on point, said the panel, including Chang v. Baxter Healthcare Corp., 599 F.3d 728 (7th Cir. 2010), which arose from the same multidistrict litigation. The court said that these plaintiffs' short treatment of the prior cases "left much to be desired."

Overall, said the court, the plaintiffs' "advocacy is unacceptable." The panel then invoked a well-known symbol: "The ostrich is a noble animal, but not a proper model for an appellate advocate." The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist" is "pointless," said the court.

The opinion closes with pictures of an ostrich burying his head in the sand, and of a man in a suit doing the same. The reminder here is, when there is apparently dispositive precedent, an appellant may urge its overruling, or distinguish it, or reserve a challenge to it for a petition for certiorari, but may not ignore it.