

Client Alert

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U.S. Litigation Arising Out of the Air France Flight 447 Accident Dismissed on *Forum Non Conveniens* Grounds for a Second Time: Another Significant Victory for Defendants

The June 15, 2011 decision by the U.S. District Court for the Northern District of California in *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 3:10-md-02114 (N.D. Cal. June 15, 2011) is the second *forum non conveniens* (“FNC”) dismissal of the U.S. litigation arising from the June 2009 accident involving an Airbus 330 aircraft operated as Air France Flight 447. The decision has dealt a substantial blow to an emerging tactic by U.S. plaintiffs’ counsel to attempt to defeat FNC dismissal, *i.e.*, challenging the jurisdiction of a foreign court to attempt to avoid FNC dismissal.

By way of background, Flight 447 was flying from Brazil to France when it crashed in the Atlantic Ocean, killing all 228 passengers and crew on board. The plurality of the passengers and crew were French citizens or residents; only two of the passengers were U.S. citizens. Initial lawsuits brought by the plaintiffs (both foreign and two U.S. citizens) were consolidated by the Judicial Panel for Multidistrict Litigation and sent to the U.S. District Court for the Northern District of California for pre-trial purposes. The consolidated defendants included Airbus S.A.S. and numerous component manufacturers, including Honeywell, Intel, and General Electric. (Air France was named as a defendant only by the U.S. plaintiffs.) Last October, the same court granted the defendants’ FNC dismissal in favor of litigation in France.¹

In December 2010, plaintiffs filed a motion for reconsideration of the October 2010 FNC dismissal after re-filing new, narrower actions comprised only of non-U.S. plaintiffs

and voluntarily restricting their claims to U.S. defendants. The plaintiffs openly advised the district court that they sought to defeat the earlier FNC ruling by restructuring the case so that there would be no European Union domiciliary defendants. According to the plaintiffs, France would not be an adequate alternative forum because French courts would not have jurisdiction over a case brought by non-French plaintiffs against non-French defendants. As a result, in the plaintiffs’ view, the litigation would need to continue in the U.S. Furthermore, the plaintiffs contended that if the re-filed actions were to proceed in the U.S., all of the original lawsuits should proceed in the U.S. as well.

The American component manufacturing defendants moved to dismiss the re-filed actions on FNC grounds and argued that the court should deny the plaintiffs’ motion for reconsideration of the original FNC decision. The district court granted the FNC motion and denied the motion for consideration.

The court stated that a party should not be permitted to “assert the unavailability of an alternative forum when the unavailability is a product of [the party’s] own purposeful conduct.” The court found that the plaintiffs had impermissibly attempted to make France an unavailable forum by omitting French defendants from re-filed lawsuits – the very defendants that the plaintiffs had previously asserted were liable and still seemed to allege were at least partially responsible for the accident. The court also found that the plaintiffs had failed to litigate in the foreign forum in good faith after FNC dismissal as required. In so finding, the court rejected the argument that plaintiffs generally are free to frame their complaints as they wish, stating that the plaintiffs had improperly “engaged in pleading practices deliberately designed to defeat jurisdiction in the foreign forum and circumvent” the FNC order.

The court concluded that the plaintiffs could not render France unavailable through “unilateral jurisdiction defeating pleading, at least where, as

here, (1) a fair reading of those pleadings and common sense shows that French entities are proper Defendants; (2) Plaintiffs already sued French parties and dropped them only after a *forum non conveniens* dismissal; and (3) the Court has not been presented with any new facts that developed after the original dismissal but before the filing of the new actions that plausibly provide a reason for why Plaintiffs removed the French Defendants, other than a desire to defeat the Court's original *forum non conveniens* Order and render France an unavailable forum for the new actions."

Alternatively, the court found that even if it were required to determine the availability of France anew, the French courts still are an available alternative forum and, therefore, FNC dismissal remains appropriate. The court noted that availability does not turn on the ability of the plaintiffs to bring the exact suit that was filed in the U.S. in the foreign forum. Instead, availability turns on the existence of a remedy for the plaintiffs' losses. The court stated that a remedy was available in France because the plaintiffs could have re-filed the originally dismissed lawsuits in France or re-filed the new lawsuits in France and added one or more French defendants to the lawsuits.

Further, because the defendants had agreed not to contest jurisdiction in France and the court found that plaintiffs, "as a condition of *forum non conveniens* dismissal, are obligated as a matter of American law not to contest jurisdiction in France," the only way in which the jurisdictional issue could be raised is if a French court could do so *sua sponte*. After reviewing relevant French law and considering the testimony of French law experts, the court concluded that French trial and appellate courts could not raise the jurisdictional issue *sua sponte*. As such, France was, in fact, available to resolve the case.

This decision will significantly limit a plaintiff's ability to effectively employ an emerging tactic to avoid FNC dismissal, *i.e.*, challenging whether a foreign forum can exercise jurisdiction over the litigation after FNC dismissal. Variations of this tactic have been employed recently in the Flash Airlines litigation (challenging the French court's jurisdiction after FNC dismissal) and the West Caribbean Airways litigation (challenging the

French court's jurisdiction in opposition to the FNC motion). If this decision is followed by other U.S. courts, successful challenges to a foreign court's jurisdiction should be limited to countries in which the foreign court *sua sponte* can raise jurisdictional issues. This decision also significantly decreases the likelihood that plaintiffs will try to restructure their lawsuits post-FNC dismissal by dropping defendants to attempt to prevent a foreign court from exercising jurisdiction. As a result, plaintiffs in future litigation may be forced to refrain from naming potentially liable foreign entities as defendants if they wish to avoid FNC dismissal of U.S. litigation arising out of foreign major aviation accidents.

We will provide a further analysis of this decision in our upcoming Summer 2011 Newsletter.



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¹ For a more detailed examination of the October 4, 2010 decision, please see the Condon & Forsyth LLP October 2010 Client Alert (<http://www.condonlaw.com/newsletters/cAoct2010.pdf>) and the Condon & Forsyth LLP Fall 2010 Client Newsletter (http://www.condonlaw.com/newsletters/fall_2010.pdf).