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JURISDICTION

No Personal Jurisdiction Found Over Lessor Based On Crash Of Helicopter In Forum State In *Bell Helicopter Textron, Inc. v. HeliQwest International, Ltd.*, 385 F.3d 1291 (10th Cir. 2004)

In this recently decided federal appellate court case, the Tenth Circuit was faced with two jurisdictional questions: 1) whether personal jurisdiction existed over the lessor of a helicopter which crashed in Utah; and 2) whether the district court had abused its jurisdiction in declining jurisdiction over a declaratory judgment action filed by the manufacturer of the helicopter against the owner and operator, alleging that GARA¹ barred any claims against Bell.

Bell manufactured the model 212 helicopter in October of 1974, a date which is relevant for GARA purposes, and sold it to the Peruvian Air Force. The helicopter was destroyed in service in 1976, but eventually was salvaged and rebuilt. The ownership of the helicopter changed on a number of occasions and, in 1999, a New Mexico corporation, Copter Lease, LLC, acquired ownership of the helicopter, registered it with the Federal Aviation Administration and then leased the helicopter to HeliQwest International, a Washington State corporation. The lease agreement was negotiated in Canada and provided for an Alberta choice of law provision and forum selection clause.

The helicopter crashed in Utah on January 9, 2000, and was destroyed completely. Nearly two years later, Copter Lease and HeliQwest filed an action in Canada against Bell seeking recovery for the loss of the helicopter and other damages. Two weeks later, Bell filed a declaratory judgment complaint in the U.S. District Court for the District of Utah against Copter Lease and HeliQwest, alleging the applicability of GARA, which generally provides for an 18-year statute of repose on actions for injuries to persons or damage to property arising out of accidents involving general aviation aircraft. If GARA was held applicable, the case seeking recovery for loss of the helicopter could be barred.

Copter Lease moved to dismiss for lack of personal jurisdiction. Granting the motion, the district court reiterated the familiar language that there must be “minimum contacts” between the defendant (Copter Lease) and the forum state (Utah) to make it fair to require the defendant to be haled into that forum. The court held that the “minimum contacts” standard could be met in either of two ways: by continuous and systematic general business contacts with the state (the exercise of general jurisdiction) or if the defendant has purposely directed its activities at the resident of the forum and the case arises out of or relates to those activities (the exercise of specific jurisdiction).

As Bell was alleging specific, not general, jurisdiction over Copter Lease in its declaratory

judgment action, the district court examined whether there was some act by which Copter Lease had purposely availed itself of the privilege of conducting activities within Utah, thus invoking the benefits and protections of its laws and making it fair to require Copter Lease to defend the declaratory judgment action in Utah. The court also looked to the Utah Long Arm statute,² which provides that the specific jurisdiction statute should be applied to the fullest extent permissible under the due process clause of the Fourteenth Amendment.

After examining all of the contacts of Copter Lease with the State of Utah, the district court could not find any actions taken by Copter Lease in Utah which justified subjecting it to the personal jurisdiction of the court.

The Tenth Circuit Court of Appeals affirmed. Copter Lease had no offices, employees or operations in Utah, and had leased the helicopter pursuant to a transaction taking place in and subject to the law of Canada, where the helicopter was to be delivered at the lease inception and returned at the end of the lease. The fact that Copter Lease had leased the helicopter to HeliQwest, which had operated the helicopter in Utah, was not a basis for finding personal jurisdiction over Copter Lease. The Court concluded:

At best, Copter Lease could foresee that because HeliQwest had a facility in Utah it might, at some point, take the subject helicopter to Utah. This mere possibility, even if true, does not suggest that Copter Lease purposely availed itself of the protections of Utah laws.

The Tenth Circuit also rejected Bell's argument that because HeliQwest had attempted to qualify as an official supplier of helicopter services for the 2000 Winter Olympics in Salt Lake City, Copter Lease must have purposely availed itself of Utah's legal protection when it leased the helicopter to HeliQwest, as Copter Lease allegedly should have known that the helicopter may be used in Utah. That assertion, said the Tenth Circuit, "to put it mildly, overstates the claim."

Finally, the Court rejected Bell's argument that Copter Lease solicited business in Utah simply

because it was hoping to lease the helicopter to an entity that could secure contracts with the United States Forest Service, and that entity had contracts covering Utah as well as other western states. "[A] general hope that a party will use a product in a general region is too remote an aspiration to qualify as purposeful availment in a specific state."

The Court of Appeals was unsympathetic to Bell's complaints that it was not provided an adequate opportunity to conduct jurisdictional discovery to enable Bell to delve into Copter Lease's activities in Utah. The Court found that Bell had failed to argue on appeal that the district court had abused its discretion in refusing Bell Helicopter's jurisdictional discovery requests and "[g]iven the very low probability that the lack of discovery affected the outcome of this case," the Tenth Circuit found no abuse of discretion by the district court in denying jurisdictional discovery.

The Tenth Circuit further ruled that the district court correctly declined to assume jurisdiction over the declaratory judgment action as it would not settle the controversy. Not only was Copter Lease not subject to personal jurisdiction in the courts of Utah, not all of the parties who had sued Bell in Canada had been brought by Bell into the Utah declaratory judgment action. Thus, neither Copter Lease nor the other parties would have been bound by any decision of the district court.

Belgian Accounting Firm Enjoined From Pursuing Action In Brussels To Attempt To Avoid Discovery Order In U.S. Securities Fraud Action In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004).

The First Circuit Court of Appeals recently was faced with an issue on which the United States Supreme Court has been silent: When, in order to preserve its jurisdiction, should a United States court enter an order enjoining a party from seeking relief in a foreign country? The issue is one which has some relevance in the fields of maritime and aviation law: shipowners and airlines have filed actions in courts outside the United States to enjoin injured claimants from litigating their cases in

jurisdictions other than where the defendants deem the court truly to be vested with an interest and/or to prohibit claimants from bringing an action where the recovery may be more generous, *i.e.* the United States.

How the First Circuit in *Quaak* arrived at its decision in this international litigation chess match makes interesting and instructive reading. The short answer is that what is currently known as an “antisuit” injunction can be obtained in the United States when such an order is necessary to preserve the U.S. court’s ability to do justice between the parties in cases that are legitimately before it.

The *Quaak* case arose out of the failure of Lernout & Hauspie, a Belgian corporation that developed and licensed speech technologies, including speech recognition software. Prior to its precipitous decline into bankruptcy in November of 2000, L & H had been touted as the “Microsoft of Europe” and was listed on the NASDAQ Stock Exchange in New York. The bankruptcy filing led to a barrage of shareholders’ suits claiming that L & H had made false and misleading statements concerning its earnings, filed false documents with the Security and Exchange Commission (SEC) and engaged in deceptive accounting practices. L & H maintained its U.S. executive offices in Burlington, Massachusetts and also had a subsidiary in Korea. The defendants snared in the investigation of the L & H bankruptcy included Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren (KPMG-B), a Belgian company that served as the auditor for L & H.

KPMG-B, the target of a criminal investigation in Belgium and a principal defendant in the U.S. securities fraud litigation, did not dispute that it was subject to personal jurisdiction in the Massachusetts District Court.

Having successfully negotiated the threshold hurdles of personal jurisdiction and pleading requirements, the Massachusetts securities fraud plaintiffs served document requests for KPMG-B’s work papers. KPMG-B objected, asserting that Belgian law prohibited it from divulging the documents. The securities fraud plaintiffs, however, became civil co-prosecutors in the

ongoing Belgian criminal investigation and in that status were able to view, but not copy, the documents.

The securities fraud plaintiffs moved in the Massachusetts District Court to compel KPMG-B to turn over its work papers, and the magistrate judge rejected KPMG-B’s Belgian secrecy law argument.

Four days before the deadline in the magistrate judge’s order for production, KPMG-B filed an *ex parte* application in Brussels seeking to enjoin the securities fraud plaintiffs from taking any steps to proceed with the requested discovery. KPMG-B also asked the Belgian court to impose a daily fine of €1M for each violation of the proposed injunction. The Belgian court, while not acting on the *ex parte* application, directed that notice be given to the securities fraud plaintiffs and set a hearing in Brussels.

The securities fraud plaintiffs promptly moved before the Massachusetts District Court for an antisuit injunction. Two days later the magistrate judge enjoined KPMG-B from proceeding with its Belgian action, ordered KPMG-B to withdraw the action and not to proceed with the Brussels hearing, and denied KPMG-B’s motion to stay the turnover order of its work papers. KPMG-B immediately appealed to the First Circuit Court of Appeals.

The First Circuit started its discussion by noting that “no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”³

The First Circuit articulated these basic principles: 1) federal courts have to power to enjoin parties subject to their personal jurisdiction from pursuing litigation before foreign tribunals; 2) parallel proceedings on the same *in personam* claim generally should be allowed to proceed simultaneously; and 3) there is a presumption in favor of concurrent jurisdiction.

The basic principles, however, have been applied have differently by various courts and what

has emerged are two views: a “liberal approach” that holds an international antisuit injunction is appropriate whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate the speedy and efficient determination of the case, and a “conservative approach” that holds an antisuit injunction should be granted only when the foreign action either imperils the jurisdiction of the U.S. court or threatens some strong national U.S. policy. The conservative approach accords greater weight to considerations of international comity, *i.e.*, it is less restrictive on the jurisdiction of the foreign sovereign’s courts.

The First Circuit rejected the “liberal approach” (adhered to by the Fifth, Seventh and Ninth Court of Appeals), and adopted the conservative approach (adhered to by the Second, Third, Sixth and District of Columbia Circuits).

The First Circuit said that the liberal approach gave “far too easy passage to international antisuit injunctions.” The First Circuit favored the conservative approach as it recognizes the rebuttable presumption against issuing international antisuit injunctions and is more respectful of principles of international comity. It compels a court to balance competing policy considerations when considering whether to grant an antisuit injunction. Issuing an international antisuit injunction suit “is a step that should be taken only with care and great restraint.”

The First Circuit provided the following guidance for district courts within the First Circuit when determining whether to grant or deny an antisuit injunction:

1. Both suits must involve the same parties and issues. If that condition is not met, no injunction should be granted.
2. Given considerations of international comity, there is a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.
3. The District Court should examine the totality of the circumstance, including the nature

of the two actions, the posture of proceedings in the two countries, the good faith or lack thereof in the parties’ conduct, the importance of the public policies at stake in the litigation and the extent to which the foreign action has the potential to undermine a U.S. court’s ability to reach a speedy and just result.

Against this articulated standard the First Circuit held that the district court had acted correctly in enjoining KPMG-B from pursuing the Belgian litigation. The Court viewed KPMG-B’s attempt to impose a €1M per violation sanction on the securities fraud plaintiffs should they take any steps to enforce the district court’s order requiring the turnover of the KPMG-B work documents to be a chilling “*in terrorem*” tactic which was an effort to effectively strip the district court of any power in the case. Finding that KPMG-B had instituted the Belgian action “in a blatant attempt to evade the rightful authority of the forum court,” the need for an antisuit injunction was clear. In sum, the granting of the antisuit injunction was necessary to preserve the district court’s ability to do justice between the parties in cases that were legitimately before it.

The Court also found that the equities weighed in favor of affirming the district court’s order. The securities fraud plaintiffs already had been nominated as civil co-prosecutors in the ongoing Belgian criminal investigation and had already seen the documents the subject of the production. Accordingly, said the Court, the securities fraud plaintiffs were not “fishing in an empty stream.”

The Court suggested that KPMG-B would have been better off exhausting other options prior to filing the Belgian action attempting to enjoin the securities fraud plaintiffs from proceeding in the U.S. forum. KPMG-B could have appealed the magistrate judge’s order requiring the turnover of documents, or it could have sought clarification from the Belgian courts as to whether the turnover of the documents would violate Belgian law. Having eschewed those options and commenced an action that precipitated a direct conflict with the pending securities fraud action in the District Court

in Massachusetts, KPMG-B was required to “pay the piper.”

While not minimizing the potential difficulty of the situation in which KPMG-B found itself, the Court found that KPMG-B’s election to maintain a major presence in the United States required the corporation to anticipate that it would be subject to suit in the United States and to the discovery rules of the United States judicial system. While the First Circuit emphasized that the district court should take care to demonstrate due respect for any special problem confronted by a foreign litigant on account of its nationality, any foreign national that chooses to engage in business in the United States must demonstrate its respect for the operation of the American judicial system.

The *Quaak* case illustrates the difficulties that foreign corporations face in complying with the laws of their own countries as well as with the laws of the United States. The First Circuit, however, imposed a common sense approach for evaluating these legal problems. When a foreign action is commenced solely to thwart the jurisdiction of a U.S. court, that court is likely to grant an antisuit injunction prohibiting the party properly before it from attempting to foreclose the progress of the lawsuit in the United States.

Endnotes

- 1 General Aviation Revitalization Act (GARA) 49 U.S.C. § 40801.
- 2 Utah Code Annotated § 78-27-24
- 3 Citing Restatement (Third) of Foreign Relations Law of the United States § 442m reporters’ note 1 (1987).

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