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ARIK V. THE BOEING CO.: THE LATEST FROM THE ILLINOIS COOK COUNTY CIRCUIT COURT ON *FORUM NON CONVENIENS*

On February 18, 2010, Cook County Circuit Court (“Cook County”) Presiding Judge William D. Maddux issued a decision in *Arik v. The Boeing Co.*¹ denying a *forum non conveniens* (“FNC”) motion arising out of the crash of a McDonnell Douglas MD-83 aircraft operated as Atlasjet Flight 4203 on November 30, 2007 in mountainous terrain near Keçiborlu, Turkey. Plaintiffs, who were representatives of thirty-two of the fifty-seven accident decedents on this domestic flight, alleged causes of action based on product liability, wrongful death and negligence. Defendants included Honeywell International Inc., which manufactured the Enhanced Ground Proximity Warning System (“EGPWS”) at issue, as well as Boeing and McDonnell Douglas.

This decision underscores many of the points made in last week’s Winter Newsletter. First, Cook County is the single most problematic venue in which to obtain dismissal pursuant to the FNC doctrine of actions in the U.S. that arise out of foreign aviation accidents that bear little or no connection to the U.S. Second, the problematic nature of Cook County is compounded by the fact that Boeing has its headquarters in Chicago, Illinois. Third, FNC motions filed in Cook County relating to major aviation accidents often are decided by Judge Maddux, whose rulings tend to favor plaintiffs, and plaintiffs frequently attempt to game the system to increase the likelihood that Judge Maddux will decide an FNC motion.² Fourth,

despite the natural desire of defendants to want to avoid litigating in Cook County, defendants should take great care when deciding whether to move for dismissal of a case on FNC grounds to an alternate U.S. state, as encouraged by the Illinois appellate courts in *Vivas v. The Boeing Co.*³ and *Thornton v. Hamilton Sundstrand Corp.*⁴ Fifth, defendants must aggressively look for bases by which to remove lawsuits commenced in Cook County (*e.g.*, Multiparty, Multiforum Trial Jurisdiction Act) to federal court to increase the likelihood of a favorable FNC ruling.

In *Arik*, defendants moved for FNC dismissal in favor of litigation in Turkey or, alternatively, the State of Washington. In evaluating the motion, the court addressed: (1) whether the proposed alternative forums were adequate to adjudicate the parties’ dispute; (2) the degree of deference to be accorded plaintiffs’ choice of forum; and (3) whether the balance of public and private interest factors strongly favored dismissal.

Judge Maddux found that Turkey was an adequate alternative forum. The court noted that defendants had agreed to consent to jurisdiction in Turkey and accept service of process there, which the court found established its availability. Furthermore, the court rejected plaintiffs’ argument that the lack of pre-trial discovery under Turkish law and its requirement that a fee be paid by plaintiffs prior to filing a lawsuit rendered Turkey an inadequate forum.

Judge Maddux found that plaintiffs’ choice of forum was entitled to “less deference,” noting that thirty-one of the thirty-two decedents were citizens

and residents of Turkey. (One decedent was a dual Turkish/U.S. citizen who resided in Turkey.) The non-Turkish decedent was a citizen and resident of Austria. Of the plaintiffs, one was a U.S. citizen and resident and “several” were U.S. residents (including a Turkish citizen residing in Chicago), but the “overwhelming majority” of plaintiffs resided in Turkey.

The court then evaluated the public and private interest factors and stated that “[i]n essence, the ultimate test turns on ‘whether the relevant factors, viewed in their totality, strongly favor transfer to the forum suggested by defendant.’”⁵ With respect to the private interest factors, the court noted that all defendants were U.S. corporations and that Boeing and McDonnell Douglas are headquartered in Cook County. Further, while Honeywell is a Delaware corporation with its headquarters in New Jersey, it does business in Illinois and has a registered agent for service of process there.

In language almost identical to that set forth by the Illinois appellate court in *Vivas*⁶ and *Thornton*,⁷ Judge Maddux stated that “[p]otential trial witnesses and evidence in this case are scattered throughout different countries,” including the U.S., United Kingdom, Turkey and Austria, as well as the States of Washington, Arizona, Maryland, New York and Florida.⁸ The court then concluded that “when potential trial witnesses are scattered among various states and countries, no single forum can be more convenient than another.”⁹ The court noted that defendants had not submitted any affidavits asserting that trial in Cook County was inconvenient for any of the witnesses or that Turkey or Washington was more convenient. As a result, the court found that the private interest factors did not strongly favor dismissal.

The court next addressed the public interest factors. While noting that “the accident occurred in Turkey, involved all Turkish citizens and one dual Turkish/U.S. citizen, and was investigated by Turkish authorities,” the court found that the public interest factors did not strongly favor dismissal. In so finding, the court noted that Boeing and McDonnell Douglas are headquartered in Cook County and do business in Illinois and Honeywell does business in Illinois and has a registered agent

there. The court also noted that Illinois residents “have an interest in resolving a matter when Illinois corporations, like Boeing and McDonnell Douglas, who take advantage of Illinois law, are involved in the litigation.”¹⁰ Based on the foregoing, the court found that it was not appropriate to dismiss this action in favor of Turkey.

The court then briefly addressed defendants’ alternative argument in favor of dismissal to the State of Washington. As an initial matter, the court found that defendants’ offer to consent to jurisdiction in Washington as a condition of dismissal established the State of Washington as an available and adequate forum. However, the court rejected defendants’ arguments that Washington was a more convenient forum because the majority of documents and witnesses relating to the design and manufacture of the EGPWS were in or near Washington State and because Washington is closer to California. (McDonnell Douglas had designed and manufactured the accident aircraft in California.) In rejecting these arguments, the court reiterated its prior point: “[T]rial witnesses and evidence are scattered throughout different states. Thus, no single forum can be more convenient than another.”¹¹ Accordingly, the court found that the private and public interest factors did not weigh in favor of the State of Washington and it denied defendants’ FNC motion.

Judge Maddux’s decision in *Arik* highlights the continuing difficulties encountered by aviation defendants seeking FNC dismissal of foreign aviation accidents that bear little or no connection to the U.S. It also highlights a troubling trend for defendants: Judge Maddux continues to decide FNC motions in major aviation accidents filed in Cook County – even if the cases were not initially assigned to him. Plaintiffs in *Arik* gamed the Cook County court system to increase the likelihood that Judge Maddux would decide any FNC motion. Specifically, plaintiffs’ counsel filed multiple lawsuits arising out of the Atlasjet Flight 4203 accident and, although Judge Maddux was not assigned the case originally, it came before him by motion to consolidate the separate actions. He then decided the FNC motion.

The fact that Judge Maddux is deciding FNC motions in most major foreign aviation accidents filed in Cook County is particularly troubling considering his statement in *Arik* that “no single forum can be more convenient than another” when “trial witnesses and evidence are scattered in different states.” If one were to apply this standard in future cases, it becomes difficult to imagine a set of circumstances where a Cook County court (likely with Judge Maddux presiding) would find another forum to be more convenient when determining whether to grant an FNC motion in an action arising out of a foreign aviation accident. Furthermore, this language provides plaintiffs further incentive to name as many U.S.-based defendants in an action with disparate allegations (*e.g.*, negligent maintenance, negligent training, product liability, lessor liability, *etc.*) to ensure that potential witnesses and evidence are “scattered.”

It also should be noted that defendants’ FNC motion was denied even though defendants had moved in the alternative for dismissal in favor of the State of Washington – the state where the EGPWS was designed and manufactured – as suggested by the Illinois appellate court in *Vivas* and *Thornton*. This will be an interesting issue to follow if there is an appeal. As stated in the Winter Newsletter, a defendant’s most prudent strategy to increase the likelihood of a favorable FNC ruling remains to aggressively look for a good-faith basis to remove any such litigation from state to federal court.

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¹ No. 08 L 012539, slip op. (Ill. Cir. Ct. Feb. 18, 2010).

² As set forth in the Winter Newsletter, local court rules and practice substantially increase the likelihood that Judge Maddux will decide FNC motions filed in a case, even if he is not assigned the case in the first instance. For example, if a case is removed to federal court and then remanded, because he is the Presiding Judge, the case typically comes before him for assignment. Likewise, a case typically comes before him if a party requests assignment to a different judge or if the party moves to consolidate more than one action.

³ 392 Ill. App. 3d 644, 911 N.E.2d 1057.

⁴ No. 1-08-2734, slip op. (Ill. App. 1 Dist. Aug. 31, 2009).

⁵ *Id.* at 4 (quoting *Dawdy v. Union Pacific Railroad Co.*, 207 Ill. 2d 167, 172-73 (2003)).

⁶ 392 Ill. App. 3d at 659.

⁷ No. 1-08-2734, slip op. at 4, 11.

⁸ No. 08 L 012539, slip op. at 4-5.

⁹ *Id.* at 5.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 7.