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SUPREME COURT
STATE OF WASHINGTON

No. 80472-9
2007 SEP 18 P 4: 27

BY RONALD R. CARPENTER
SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Petitioner

FILED
SEP 24 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON
AK

BRIEF OF THE BOEING COMPANY AS *AMICUS CURIAE*

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September 18, 2007

VIA E-MAIL

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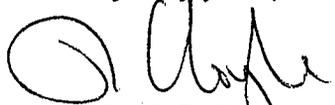
Re: Sales v. Weyerhaeuser
Case No. 80472-9

Dear Sir or Madam:

Enclosed is the Brief of the Boeing Company as Amicus Curiae. A brief was filed yesterday along with the Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner, but that brief was mistakenly overlength. Please substitute this brief for the one filed yesterday.

Please give me a call if you have any questions.

Very truly yours,



Richard C. Coyle

Enclosure

cc: All counsel of Record (see Certificate of Service)

FILED AS ATTACHMENT
TO E-MAIL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Boeing Company is the world's leading aerospace company and one of the largest United States exporters in terms of sales. Because its products are used throughout the world Boeing regularly finds itself in litigation with persons from outside this state and country, particularly in connection with accidents involving Boeing's aviation products. Many of these lawsuits could far more conveniently be tried in foreign forums, and over the years Boeing has prevailed, in this state and elsewhere, on numerous motions to dismiss actions on the grounds of *forum non conveniens*. See, e.g., *Myers v. Boeing Co.*, 115 Wn.2d 123, 794 P.2d 1272 (1990); *Wolf v. Boeing Co.*, 61 Wn. App. 316, 810 P.2d 943, *rev. denied*, 117 Wn.2d 1020 (1991).¹

An issue posed by this case is under what circumstances the procedural differences of a proposed alternative forum render that forum "inadequate" in the *forum non conveniens* analysis. Boeing has a strong interest in seeing that issue resolved in a way that does not unreasonably limit the *forum non conveniens* doctrine. Many foreign forums have laws that differ from our own and procedures that are, or may appear to be, more cumbersome or less efficient. This, however, has never been a reason to reject the foreign forum out of hand.

II. STATEMENT OF THE CASE

This amicus brief addresses two important issues:

¹ Additional reported cases are cited in the accompanying motion for leave to file this *amicus* brief.

When a defendant moves to dismiss an action filed in this state on the ground of *forum non conveniens*, what should be the test for whether another forum is an “adequate alternative forum” for the action?

Does the United States Constitution preclude a state court from conditioning dismissal on a party’s agreement not to remove a case within the federal courts’ removal jurisdiction?

III. ARGUMENT

A. Adequate Alternative Forum.

The first issue concerns the “adequate alternative forum” aspect of the *forum non conveniens* inquiry. In implicitly determining that the federal court asbestos multi-district litigation (“MDL”) proceeding did not supply an “adequate alternative forum,” the Court of Appeals diverged from virtually all precedent on this subject.

The modern *forum non conveniens* doctrine has its genesis in the 1947 decisions of the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (“The doctrine became firmly established when *Gilbert* and *Koster* were decided”). Neither these cases, nor *Werner v. Werner*, 84 Wn.2d 360, 526 P.2d 370 (1974), the seminal Washington case, holds that the proposed alternative forum must be “adequate.”

In *Reyno*, the Third Circuit had held that *forum non conveniens* dismissal was precluded whenever the court in the alternative forum

would apply a law less favorable to the plaintiff. In the context of rejecting that ruling the Supreme Court stated:

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. . . . *In rare circumstances*, . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

454 U.S. at 454 n.22 (cit. omitted; emphasis added).

Prior to *Reyno*, some courts used “adequate” to describe a forum that was open to the parties. *See, e.g., McCarthy v. Canadian Nat. Rys.*, 322 F. Supp. 1197, 1198 (D. Mass. 1971) (“That there is an adequate forum to hear this case in Canada appears from the fact that the Supreme Court of Newfoundland is a court of general trial jurisdiction”); Others suggested that adequacy required some process and/or remedy. *See, e.g., Alcoa S. S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 159 n.16 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980) (en banc) (Trinidad an adequate forum because its judicial system not “wholly devoid of due process”); *Pain v. United Technologies Corp.*, 637 F.2d 775, 784-785 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (“adequate alternative forum” exists because “plaintiff will not be without a remedy”).

Those plaintiffs who tried to give the phrase “adequate alternative forum” broader content were rebuffed. *See, e.g., Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968n.6 (2d Cir. 1980), *cert.*

denied, 449 U.S. 1084 (1981), (rejecting argument that Belgium not “an adequate alternative forum, . . . because . . . proceedings in that court are likely to be inordinately protracted”); *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299, 306 (S.D.N.Y., 1979) (rejecting argument that Italian courts are not an “adequate alternative forum” “because Italian law differs in a number of respects from American law”); *Shields v. Mi Ryung Const. Co.*, 508 F. Supp. 891 (S.D.N.Y. 1981) (“some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate”; “plaintiff’s claim that litigation in Saudi Arabia would be difficult and expensive,” “insufficient to permit the litigation to continue in New York”).

Since *Reyno*, the phrase “adequate alternative forum” is used by the courts to mean a forum that is not only available to the litigants (a requirement generally satisfied by the existence of subject matter jurisdiction and the defendant’s consent be sued there) but also “adequate.” The courts have made it clear in numerous cases that the requirement of “adequacy” is easily satisfied. *See, e.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003) (“[A]lternative forum is adequate if the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court”).²

² *See also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (“This test is easy to pass; typically, a forum will be inadequate only where the remedy provided is so clearly inadequate or unsatisfactory, that it is no remedy at

In this state, the concept of an “adequate alternative forum” was discussed in three prior reported Court of Appeals cases.³ In *Wolf v. Boeing Co.*, *supra*, the court rejected plaintiff’s claim that Mexico was not an adequate forum, stating:

Only where the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all should an unfavorable change in law be given substantial weight. The remedies available under Mexican law do not fall within this category,

61 Wn. App. at 324-325, 810 P.2d at 949. In *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 983 P.2d 666 (1999), the court found that British Columbia was an adequate alternative forum, observing that “it is the rare case where the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” 96 Wn. App. at 541, 983 P.2d at 669. The court concluded that British Columbia was an “adequate alternative forum because the Hills can clearly litigate the essential subject matter of their dispute and recover damage for their losses.” 96 Wn. App. at 541, 983 P.2d at 670.

Klotz v. Dehkhoda, 134 Wn. App. 261, 141 P.3d 67 (2006), *rev. denied*, 160 Wn.2d 1014 (2007), expanded on just how minimal the “adequate alternative forum” requirement is:

all”); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144 (9th Cir. 2001) (“forum will be deemed adequate unless it offers no practical remedy for the plaintiff’s complained of wrong”).

³ This Court has not addressed the content of an “adequate alternative forum” requirement. In *Myers v. Boeing Co.*, *supra*, the Court simply noted that “[i]n granting Boeing’s motion, the trial court first found that an adequate alternative forum was available in Japan. Plaintiffs have not challenged this finding and, indeed, concede that Japanese law provides full compensation.” 115 Wn.2d at 129, 794 P.2d at 1276.

It's undisputed that the parents could file this cause of action and have the underlying subject matter litigated in British Columbia.

I think it's also equally undisputed that their hopes of any type of relief are going to be nominal. But that is not how the cases defin[e] another forum as being inadequate. Instead this is one of those instances where this court needs to accept the fact that another jurisdiction has developed a different jurisprudence, as harsh as it may be from our point of view.

The "adequacy" standard the Court of Appeals adopted in this case is at odds not only with these cases but with virtually every other published decision. The court cited *Sablic v. Armada Shipping Aps*, 973 F. Supp. 745 (S.D. Tex 1997), as a case where the "proposed alternative forum [was] inadequate because a backlog of cases posed the possibility of a lengthy delay in the resolution of the plaintiff's case." *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 229, 156 P.3d 303, 306 (2007). In fact, *Sablic* noted that "Croatia is a war-torn country that, while making great strides towards recovery, is simply too unstable for this Court to find it to be an adequate forum for Plaintiff's suit." *Sablic*, 973 F. Supp. at 748. In contrast to *Sablic*, the evidence cited by the court below of delays in the federal forum consisted of two judges' criticisms of the asbestos MDL proceeding (one eight years old and the other five years old) and anecdotal evidence that one case had no activity for nine or ten *months* following its transfer to the MDL court. *See Sales*, 138 Wn. App. at 234, 156 P.3d at 308.

Boeing is aware of just one other published decision finding a forum inadequate because of the likelihood of a long delay in the alternative

forum. See *Bhatnagar v. Surrenda Overseas Ltd.*, 820 F. Supp. 958 (E.D. Pa. 1993), *aff'd*, 52 F.3d 1220, 1229 (3d Cir. 1995), in which the Third Circuit held the district court ruling “not clearly erroneous” in light of evidence that the Indian court system was “almost on the verge of collapse” and that resolution of the matter in the alternative forum, India, would take 18 to 26 years to resolve. 820 F. Supp at 960.⁴

Until this case, no published decision found mere delay sufficient to render an alternative forum “inadequate.” It is an unfortunate truth that backlogs and delays are present in virtually every court system, including our own. For that reason precepts of judicial comity discourage these inquiries. See, e.g., *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 73 (2d Cir. 1998):

[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards, so such a finding is rare. [I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.

(cits. and internal quotes. omitted.)

The federal MDL proceeding easily meets the standard for an “adequate alternative forum” for plaintiff’s claims and the contrary conclusion of the Court of Appeals was plainly in error.

⁴ Later cases have limited *Bhatnagar* to “the specific facts of that case.” *Glyphics Media, Inc. v. M.V. CONTI SINGAPORE*, 2003 WL 1484145 (S.D.N.Y. Mar. 21, 2003). See also *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006); *Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926, 931 (E.D. Mich. 2001) (“four to ten year delay is not unreasonable”); *Shin-Etsu Chemical Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 777 N.Y.S.2d 69 (App. Div. 2004) (delay of up to 10 years did not render Indian forum inadequate).

B. Federal Supremacy.

The Court of Appeals instructed the superior court to condition any *forum non conveniens* dismissal on an agreement by the defendant not to exercise its statutory right to remove the re-filed action to federal court. This runs afoul of the Supremacy Clause's prohibition⁵ on any state court or state law interfering with a party's access to the federal courts.

It has been established for over a century that a state cannot condition doing business within its borders on a requirement that a corporation waive its right to litigate in federal court. In *Home Ins. Co. of New York v. Morse*, 87 U.S. 445 (1874), the Supreme Court invalidated a Wisconsin law conditioning an insurance company's right to do business in the state on an agreement not to remove any state court suit brought against it. The Court held that the Constitution "secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the [removal statute]." *Id.* at 458. In *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922), the Court invalidated an Arkansas law revoking the right to do business within the state of a corporation that exercised its right to remove. The Court held that the statute unlawfully exacted from the corporation "a waiver of the exercise of its constitutional right to resort to the federal courts." 257 U.S. at 532. More recently, *International Ins. Co. v. Duryee*,

⁵ Article VI of the United States Constitution provides in pertinent part: This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

96 F.3d 837 (6th Cir. 1996), relied on *Terral* to invalidate an Ohio law that “effectively prohibits out-of-state insurance companies from removing cases from state to federal court by barring such companies from further business in Ohio.”

Weyerhaeuser could be sued here simply because it does business here; the Court of Appeals acknowledged that the case had no other connection with this state. *Sales*, 138 Wn.2d at 227, 156 P.3d at 305. Conditioning dismissal on Weyerhaeuser’s waiver of its removal right was an unconstitutional price this state imposed for doing business here. That this arose from judicial rather than legislative action is of no consequence. *See Kansas Public Employees Retirement System v. Reimer & Koger Assocs.*, 4 F.3d 614, 619 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994), in which the court relied on *Terral* and other cases to void a state court order severing an action so as to prevent the Resolution Trust Corporation from removing an entire case to federal court.

The ruling below also runs afoul of Supreme Court cases holding that the Supremacy Clause precludes a state court from enjoining a party from bringing a claim or defense action in federal court. *See Donovan v. City of Dallas*, 377 U.S. 408 (1964), and *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). These cases establish “the general rule that a state court may enjoin neither federal court proceedings nor a party from pursuing federal remedies in federal court.” *Appleton Papers, Inc. v. Home Indemnity Co.*, 612 N.W.2d 760, 764 (Wis. App. 2000). The Washington Court of Appeals in *In re Marriage of Giordano*, 57 Wn.

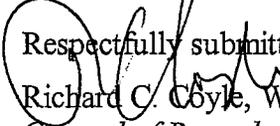
App. 74, 787 P.2d 51 (1990), affirmed an order restraining a party from filing additional harassing and vexatious proceedings but reversed the order on Supremacy Clause grounds “insofar as it may limit Ms. Giordano from pursuing federal remedies.” 57 Wn. App. at 79, 787 P.2d at 54. See also *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 n.8 (1978) (“a state court lacks the power to restrain vexatious litigation in the federal courts”); *Meridian Investing & Development Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 372 (5th Cir. 1980) (“It is settled law that state courts have no authority to bar—by injunction or otherwise—the prosecution of in personam actions in federal courts”) (emphasis supplied).

A state cannot deny a litigant access to the federal courts. Conditioning grant of a *forum non conveniens* dismissal on agreement by defendant not to seek a federal forum oversteps this limit.

IV. CONCLUSION

The Superior Court’s order dismissing this action on the ground of *forum non conveniens* was well within its discretion, and the decision of the Washington Court of Appeals reversing that dismissal was inconsistent with Washington law and in violation of federal law.

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