

NO. 63358-9-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 SEP 18 PM 3:34

EQUITY RESIDENTIAL, et al.,

Plaintiffs/Appellants,

v.

ACE AMERICAN INSURANCE COMPANY, et al.,

Respondents/Appellees.

APPELLANTS' REPLY BRIEF

Todd C. Hayes, WSBA No. 26361
Andre V. Egle, WSBA No. 34687

HARPER | HAYES PLLC
One Union Square
600 University Street, Suite 2420
Seattle, Washington 98101
Telephone: 206.340.8010
Facsimile: 206.260.2852

Attorneys for Plaintiffs/Appellants

 ORIGINAL

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ARGUMENT	2
A. THE INSURERS HAVE THE BURDEN OF OVERCOMING A STRONG PRESUMPTION AGAINST DISMISSAL	2
B. THE INSURERS HAVE NOT CARRIED <u>THEIR</u> BURDEN OF PROVING THAT ILLINOIS IS AN “ADEQUATE ALTERNATIVE FORUM”	5
1. Illinois is Not Even and “Available” Forum.....	7
2. The Associations’ Causes of Action and Kind of Damages are Irrelevant	10
3. Illinois’s Mandatory Joinder Rule Does Not Depend on How Much Money the Policyholder Has.....	12
4. The Illinois Courts Have Already Rejected National Union’s “Future Contingency” Argument	14
5. The Associations’ Relationship to this <i>Washington</i> Lawsuit Is Irrelevant	16
6. This is Not a “Mass Torts” Case Where No Forum Other Than Illinois Is Available	17
C. WHAT EQUITY RESIDENTIAL ARGUED IN OTHER UNRELATED CASES IS IRRELEVANT	19
D. THE “FACTORS” DO NOT OVERCOME THE “PRESUMPTION” THAT THIS LAWSUIT SHOULD BE IN WASHINGTON	21
III. CONCLUSION.....	24

TABLE OF AUTHORITIES

PAGE

CASES

<u>Allied Am. Ins. Co. v. Ayala</u> , 247 Ill. App. 3d 538, 616 N.E.2d 1349 (1993)	passim
<u>Am. Home Assurance Co. v. Nw. Indus., Inc.</u> , 50 Ill. App. 3d 807, 365 N.E.2d 956 (1977)	14, 15
<u>Bituminous Cas. Corp., v. Gust K. Newburg Constr. Co.</u> , 218 Ill. App. 3d 956, 578 N.E.2d 1003 (1991)	11
<u>Burnside v. Simpson Paper Co.</u> , 123 Wn.2d 93, 864 P.2d 937 (1994)	23
<u>Campbell v. Parker-Hannifan Corp.</u> , 69 Cal. App. 4th 1534, 1542 Cal. Rptr. 2d 202 (1999)	3
<u>Consumer Constr. Co. v. Am. Motorists Ins. Co.</u> , 118 Ill. App. 2d 441, 254 N.E.2d 265 (1969)	11
<u>Georgia-Pacific Corp. v. Sentry Select Ins. Co.</u> , 2006 U.S. Dist. LEXIS 33975, at *19 (S.D. Ill. May 26, 2006)	6, 8
<u>Gulf Oil Corp. v. Gilbert</u> , 330 U.S. 501 (1947)	2, 24
<u>Herrera v. Michelin N. Am., Inc.</u> , 2009 U.S. Dist. LEXIS 21022, at *6-7 (S.D. Tex. Mar. 16, 2009)	7
<u>Holzer v. Motorola Lighting</u> , 295 Ill. App. 3d 963, 693 N.E.2d 446 (1998)	passim
<u>Johnson v. Spider Staging Corp.</u> , 87 Wn.2d 577, 579, 555 P.2d 997 (1976)	2
<u>Klotz v. Dehkoda</u> , 134 Wn. App. 261, 265, 141 P.3d 67 (2006)	4
<u>Lynott v. Nat'l Union Fire Ins. Co.</u> , 123 Wn.2d 678, 684, 871 P.2d 146 (1994)	22

TABLE OF AUTHORITIES

	PAGE
<u>Monticello Ins. v. Wil-Freds Construction, Inc.</u> , 277 Ill. App. 3d 697, 661 N.E.2d 451 (1996)	11
<u>Myers v. Boeing Co.</u> , 115 Wn.2d 123, 794 P.2d 1272 (1990)	3, 24
<u>Oglesby v. Springfield Marine Bank</u> , 385 Ill. 414, 52 N.E.2d 1000 (1944)	17
<u>Olpinski v. Clement</u> , 73 Wn.2d 944, 442 P.2d 260 (1968)	3
<u>Pain v. United Techs. Corp.</u> , 637 F.2d 775 (D.C. Cir. 1980)	7
<u>Piper Aircraft v. Reyno</u> , 454 U.S. 235 (1981)	2, 3
<u>Reagor v. Travelers Ins. Co.</u> , 92 Ill. App. 3d 99, 415 N.E.2d 512 (1980)	16
<u>Sales v. Weyerhaeuser</u> , 163 Wn.2d 14, 177 P.3d 1122 (2008)	2, 8
<u>Spokane Research v. City of Spokane</u> , 155 Wn.2d 89, 117 P.3d 1117 (2005)	20
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008)	5
<u>Torgerson v. N. Pac. Ins. Co.</u> , 109 Wn. App. 131, 34 P.3d 830 (2001)	3
<u>Trovillion v. U.S. Fid. and Guar. Co.</u> , 130 Ill. App. 3d 694, 474 N.E.2d 953 (1985)	11
<u>Vasquez v. Bridgestone/Firestone, Inc.</u> , 325 F.3d 665 (5 th Cir. 2003)	7
<u>Wash. Equip. Mfg. Co. v. Concrete Placing Co.</u> , 85 Wn. App. 240, 931 P.2d 170 (1997)	3
<u>Zurich Ins. Co. v. Baxter</u> , 275 Ill. App. 3d 30, 655 N.E.2d 1173 (1995)	passim
 OTHER AUTHORITIES	
B. Currie, <u>Selected Essays on the Conflicts of Laws</u> 75 (1963)	23

I. INTRODUCTION

The Insurers have never carried *their* burden of proving that Illinois is an “adequate alternative forum.” Under Illinois law, the Associations are the type of “necessary” parties whose joinder in a coverage dispute is *mandatory*. But the Illinois courts have no jurisdiction over the Associations, so this dispute cannot be litigated there. No case that the Insurers cite says otherwise, and their arguments trying to avoid the rule are not logical or supported by the law.

The trial court made a more fundamental error: failing to even decide whether the Associations are mandatory parties in an Illinois coverage dispute, and thus whether this case could be resolved there. By failing to address what is a threshold issue in any forum non conveniens analysis, the trial court necessarily applied the wrong legal standard, and thus committed reversible error.

Finally, the Insurers have never shown that the forum non conveniens “factors” overcome the “strong” presumption against dismissal. Because the Equity Companies are seeking insurance coverage for liability arising out of *property damage* in Washington, the relevant evidence regarding this dispute is in Washington. That fact and the other forum non conveniens factors further demonstrate that the trial court committed reversible error in dismissing this case. Accordingly, the

Equity Companies respectfully request that this Court reverse the trial court and remand this case for trial.

II. ARGUMENT

A. THE INSURERS HAVE THE BURDEN OF OVERCOMING A STRONG PRESUMPTION AGAINST DISMISSAL

The primary *substantive* issue in this appeal is whether Illinois is an “adequate alternative forum.” In resolving that issue, this Court should keep in mind several procedural issues.

First, there is a strong presumption *against* dismissing a case on forum non conveniens grounds: “The plaintiff’s choice of forum should *rarely* be disturbed.”¹ Because of that presumption, “[c]ourts generally do not interfere with the plaintiff’s choice of forum where jurisdiction has been properly asserted.”² Significantly, the presumption applies regardless of whether the plaintiff is from Washington. Although ACE contends that under Piper Aircraft v. Reyno,³ “[a] plaintiff’s choice of forum is generally entitled a greater deference when the plaintiff has chosen the *home forum*,”⁴ our Supreme Court has expressly rejected that

¹ Johnson v. Spider Staging Corp., 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

² Sales v. Weverhaeuser, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008).

³ Piper Aircraft v. Reyno, 454 U.S. 235 (1981).

⁴ See *ACE’s Br.* at 24 (citing Piper Aircraft, 454 U.S. at 256) (emphasis added).

distinction – the presumption against dismissal applies equally to non-Washington plaintiffs:

The [Piper Aircraft court's] logic does not withstand scrutiny. The Court is comparing apples and oranges. . . . ***[I]t is not necessarily less reasonable to assume that a foreign plaintiff's choice of forum is convenient.***⁵

Second, the Insurers have the burden of proof here.⁶ The Insurers must therefore make an “evidentiary showing” that Illinois *is* an “adequate alternative forum.”⁷ Conversely, it is not the Equity Companies’ burden to establish that Illinois is *not* an adequate alternative forum. It follows that if this Court has any doubt regarding the law of Illinois (*e.g.*, if this Court determines that Illinois law is unresolved, or the Court is *uncertain* how an Illinois court would rule), then the Court should reverse. The “burden” of proof must not be superfluous; any doubt should be construed against the moving parties.⁸

⁵ Myers v. Boeing Co., 115 Wn.2d 123, 137, 794 P.2d 1272 (1990) (emphasis added).

⁶ See Wash. Equip. Mfg. Co. v. Concrete Placing Co., 85 Wn. App. 240, 248, 931 P.2d 170 (1997) (“The claim of forum non conveniens was an affirmative defense not a claim for affirmative relief.”); see also Olpinski v. Clement, 73 Wn.2d 944, 950, 442 P.2d 260 (1968) (“Defendant has the burden of proof on the issues of his affirmative defense.”).

⁷ Cf. Campbell v. Parker-Hannifan Corp., 69 Cal. App. 4th 1534, 1542 Cal. Rptr. 2d 202, 207 (1999) (explaining that “principal *evidentiary showing*” required by forum non conveniens law is that “trial may be had in the alternate forum”) (emphasis added).

⁸ See, *e.g.*, Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001) (“[R]easonable inferences from the evidence must be resolved against the moving party.”).

Finally, regardless of which party bore the burden of proof below, the trial court had a duty to *determine* whether an “adequate alternative forum” existed.⁹ Thus, although a trial court is vested with the “discretion” to decide whether to dismiss a case on forum non conveniens grounds, it may exercise that discretion only by *first* determining – rightly or wrongly – that an “adequate alternative forum” does in fact exist. It follows that if a trial court expressly states on the record that it is *refusing* to make that determination, as happened here, then the trial court has committed reversible error. A failure to exercise *any* discretion is necessarily an abuse of that discretion.

This is particularly significant because *none of the Insurers dispute that the trial court refused to determine whether the Associations are mandatory parties to an Illinois coverage lawsuit*, and thus whether Illinois is an adequate alternative forum. In fact, two of the Insurers expressly admit that:

When asked if her ruling included a finding as to whether the COAs were necessary parties to the Illinois lawsuit, ***Judge Yu indicated that she was not making a finding on that issue***¹⁰

⁹ See *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67 (2006) (“In deciding whether to dismiss for forum non conveniens, the trial court must first determine whether an adequate alternative forum exists.”) (citation omitted).

¹⁰ *National Surety’s Br.* at 13 (quoting RP 42) (emphasis added); see also *ACE’s Br.* at 18 (acknowledging trial court “refused” to address “how the Illinois court might rule on this [mandatory joinder] issue”).

In effect, Washington forum non conveniens law says a trial court must decide X and Y, but the trial court here decided only Y. Because the trial court refused to even *address* a threshold issue under Washington’s forum non conveniens law, the trial court necessarily applied the wrong legal standard, and thus abused its discretion.¹¹

B. THE INSURERS HAVE NOT CARRIED THEIR BURDEN OF PROVING THAT ILLINOIS IS AN “ADEQUATE ALTERNATIVE FORUM”

Even if the trial court had considered whether Illinois was an “adequate alternative forum,” the Insurers could not have carried their burden of proving that. As the Equity Companies explained in their opening brief, Illinois is not an adequate alternative forum because (a) under Illinois law, the underlying claimant is a “necessary” party in any lawsuit regarding insurance coverage for that claimant’s underlying lawsuit, (b) that underlying claimant is the type of necessary party whose joinder is “mandatory,” *i.e.*, the lawsuit cannot proceed without the underlying claimant’s joinder, and (c) the Insurers failed to establish that the underlying claimants in this case are capable of being joined in an

¹¹ See, e.g., State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (“A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record *or was reached by applying the wrong legal standard.*”) (emphasis added).

Illinois lawsuit (thus failing *their* burden of proving that this lawsuit could be resolved in Illinois).¹²

The Insurers do not dispute this law; they never contend that Illinois does *not* require the joinder of an underlying claimant in a coverage lawsuit between the policyholder and its insurer.¹³ Rather, the Insurers claim that notwithstanding this law, Illinois is an “adequate alternative forum” because the Equity Companies can obtain “*some relief*” there.¹⁴ They also attempt to distinguish the relevant Illinois cases based on their facts and underlying causes of action. These arguments fail because (a) the relevant question is whether the Equity Companies could obtain some relief in Illinois *for the claims at issue in this dispute*, and the Illinois courts would dismiss *this dispute* (in its entirety); and (b) the

¹² See *Equity Companies' Opening Br.* at 11-18. The word “coverage” in the above paragraph is significant, because a policyholder *can* sue an insurer in Illinois *to establish a duty to defend* without joining the underlying claimant. See *Georgia-Pacific Corp. v. Sentry Select Ins. Co.*, 2006 U.S. Dist. LEXIS 33975, at *19 (S.D. Ill. May 26, 2006) (“[U]nderlying tort claimants are not necessary parties to a declaratory judgment action regarding an insurer’s *duty to defend* when the action is filed by the insured.”) (emphasis added). Consistent with that, the Equity Companies sued National Union and Illinois National in Illinois solely to establish those insurer’s *duty to defend*. Coverage for the Underlying Lawsuits is not an issue in that lawsuit (the word “coverage” appears nowhere in the prayer for relief), and National Union’s assertion to the contrary is a patent misrepresentation to this Court. See *National Union’s Br.* at 17 n.3 (claiming Equity Companies sued in Illinois “over coverage” for the Underlying Lawsuits).

¹³ See, e.g., *National Union’s Br.* at 12 (“Illinois courts have acknowledged that there may be situations where a potential claimant may be an indispensable party to a related coverage lawsuit.”).

¹⁴ See, e.g., *ACE’s Br.* at 18.

Insurers' attempts to distinguish the relevant Illinois cases are not legally or logically supportable.

1. Illinois is Not Even an "Available" Forum

The Insurers initially contend that Illinois is an adequate alternative forum notwithstanding the cases cited in the Equity Companies' opening brief because "some relief" is allegedly available in Illinois. But this argument puts the proverbial cart before the horse – "adequacy" of the alternative forum is only relevant if the other forum is first deemed "available."¹⁵ "An alternative forum is considered available if *the entire case* and all parties can come within its jurisdiction."¹⁶

As explained in the Equity Companies' opening brief, if a policyholder and insurer are litigating over insurance coverage for an underlying lawsuit, then the underlying claimant is a "mandatory" party – *i.e.*, the Illinois court will dismiss that *entire lawsuit* unless the underlying claimant is joined.¹⁷ This rule would apply both to the *lawsuits* that ACE

¹⁵ See Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671 (5th Cir. 2003) ("Forum availability and adequacy are *separate inquiries*.") (emphasis added); see also Herrera v. Michelin N. Am., Inc., 2009 U.S. Dist. LEXIS 21022, at *6-7 (S.D. Tex. Mar. 16, 2009) ("The forum non conveniens analysis consists of four inquiries. First, this Court must assess *whether an alternative forum is available*.") (emphasis added).

¹⁶ Vasquez, 325 F.3d at 671 (emphasis added); see also Pain v. United Techs. Corp., 637 F.2d 775, 785 (D.C. Cir. 1980) ("As a *prerequisite*, the court must establish whether an adequate alternative forum exists which possesses *jurisdiction over the whole case*.") (emphasis added).

¹⁷ See, e.g., Allied Am. Ins. Co. v. Ayala, 247 Ill. App. 3d 538, 616 N.E.2d 1349, 1355-56 (1993) (holding "injured claimants are necessary parties to such a [coverage] suit

and National Surety have already filed in Illinois and to any *lawsuit* involving coverage that the Equity Companies might file there: “[I]f the declaratory judgment action is filed by the insurer *or* involves a determination of insurance coverage or both, then the underlying claimant is considered a necessary party.”¹⁸ Thus, regardless of what *remedies* might be available to the Equity Companies in Illinois, “the entire case” at issue in this appeal cannot go forward in Illinois, and Illinois is therefore not even “available.”

The Insurers also fail to meet their burden because Illinois is not in fact an “adequate” forum. An alternate forum is “adequate” only if the plaintiff “can litigate *the essential subject matter* in the alternate forum and recover if successful.”¹⁹ Here, the “essential subject matter” of this dispute is whether the Insurers owe coverage for the Underlying Lawsuits.

because they have a substantial interest in the viability of the policy,” such that trial court erred in entering judgment in coverage case in which underlying claimant had not been joined); Holzer v. Motorola Lighting, 295 Ill. App. 3d 963, 693 N.E.2d 446, 455 (1998) (underlying claimant “correspond[s] to the old class of ‘indispensable’ parties,” such that “court, on application, *shall* direct such person to be made a party”) (emphasis added). Because the Equity Companies have only argued that the Associations’ joinder is mandatory because they are “Type 1” necessary parties – parties who have an interest in the subject matter of the coverage litigation – the arguments in Sections B.2 and B.3 of National Surety’s brief (about joinder of “Type 2” and “Type 3” necessary parties) are entirely irrelevant. Moreover, the Equity Companies have never argued that every “necessary” party is a “mandatory” one (Ayala and Holzer concern only the kind of “Type 1” necessary parties at issue here). So the fact that ACE found cases that were not dismissed for failure to join a “necessary party” is wholly immaterial.

¹⁸ Georgia-Pacific Corp., 2006 U.S. Dist. LEXIS 33975, at *19.

¹⁹ Sales, 138 Wn. App. at 229 (emphasis added).

According to Ayala²⁰ and Holzer,²¹ the Equity Companies could not recover in Illinois if successful because the Illinois courts would dismiss a *lawsuit* containing *that claim*.

The fact that the Equity Companies are *also* suing the Insurers for bad faith and violation of the Consumer Protection Act does nothing to change this analysis. Those claims are based upon the Insurers' *coverage* obligations; but for the fact they *insure* the Equity Companies, the Insurers would owe no good faith or CPA duties. The coverage dispute is therefore the "essential subject matter" of this case. Moreover, if it were enough that a plaintiff could get "some relief" on a claim that is not the "essential subject matter" of the dispute, then no forum non conveniens motion would ever be denied; every jurisdiction allows a plaintiff to recover *some* relief (an award of costs, for example).

In short, because the Equity Companies cannot litigate *coverage* for the Underlying Lawsuits in Illinois without the Associations as parties, and because an Illinois Court would dismiss any *lawsuit* that contained a

²⁰ Ayala, 616 N.E.2d 1349.

²¹ Holzer, 693 N.E.2d 446.

coverage claim, Illinois is neither an “alternative” nor an “adequate” forum.²²

2. The Associations’ Causes of Action and Kind of Damages are Irrelevant

The Insurers next attempt to distinguish Illinois’s mandatory joinder cases on grounds they involved “tort” claims²³ and different types of damages.²⁴ These arguments epitomize the phrase “distinction without a difference.” The point of Illinois’s mandatory joinder rule is that a coverage lawsuit affects the underlying claimant because the lawsuit could foreclose a source of recovery for the claimant’s injuries. The underlying claimant has that same interest whether it sues the policyholder for breach of contract, negligence, or some other cause of action. How the underlying claimant’s lawyer articulated the claimant’s causes of action has no logical bearing on whether the claimant is interested in a source of recovery for those causes of action.

²² The burden of proof issue also resolves National Surety’s argument that the Associations might elect to “waive personal jurisdiction” and be joined in an Illinois coverage lawsuit. *See, e.g., National Surety’s Br.* at 19. This is no more persuasive than arguing that the Illinois courts might simply ignore Illinois law – the question here is whether the Insurers have carried *their* burden of proving that this lawsuit *can* proceed in Illinois, not whether they can envision an argument about how it *might* proceed there.

²³ *See, e.g., ACE’s Br.* at 19 (“The case law that Appellants cite in their opening brief address . . . plaintiffs who were tort victims.”); *National Surety’s Br.* at 18 (“[A]ll of the cases involve tort claimants . . .”).

²⁴ *See, e.g., National Surety’s Br.* at 17-18 (“[T]he majority of cases involve personal-injury claims arising out of auto accidents.”).

The attempted distinction is also factually wrong. The Associations in this case *have* sued the Equity Companies in “tort.”²⁵

Equally irrelevant is the nature of the *damage* that the Associations allege. Neither Ayala nor Holzer says an underlying claimant has an interest in a coverage dispute only if the claimant suffers certain types of injuries. Nor is that distinction logical. Why would it matter whether the underlying claimant has a broken arm, a broken car, or a broken house? The point of the mandatory joinder rule is that the claimant has an interest in whether insurance exists to pay a judgment on the claimant’s lawsuit – whatever its subject matter may be. Consistent with that, none of the cases that the Insurers cite say that a construction defect claimant does *not* have an interest in a dispute over insurance coverage for those defects.²⁶

²⁵ See, e.g., CP 162 (alleging underlying defendants “negligently and otherwise tortiously failed to . . . properly inspect” Timber Ridge condominium); CP 244 (“As a direct and proximate result of the Defendants’ negligence, the Plaintiffs [in Ogard case] have been damaged in an amount to be proven at trial.”); CP 90 (alleging underlying defendants “negligently and otherwise tortiously failed to . . . properly inspect” Balaton condominium).

²⁶ In two of the cases that National Surety cites, Monticello Insurance v. Wil-Freds Construction, Inc., 277 Ill. App. 3d 697, 661 N.E.2d 451 (1996), and Consumer Construction Co. v. American Motorists Insurance Co., 118 Ill. App. 2d 441, 254 N.E.2d 265 (1969), the underlying claimants *were* parties in the coverage action. Trovillion v. U.S. Fidelity and Guaranty Co., 130 Ill. App. 3d 694, 474 N.E.2d 953 (1985), is irrelevant because there the policyholder had already paid the underlying plaintiff at the time the coverage dispute occurred. Bituminous Casualty Corp., v. Gust K. Newburg Construction Co., 218 Ill. App. 3d 956, 578 N.E.2d 1003 (1991), does not even discuss whether underlying claimants are necessary parties in a coverage case – regarding construction defects or otherwise.

3. Illinois's Mandatory Joinder Rule Does Not Depend on How Much Money the Policyholder Has

The Insurers next attempt to avoid Illinois's mandatory joinder rule by claiming it applies only when liability insurance is the underlying claimant's only source of recovery. For example, although National Union concedes that "a potential claimant may be an indispensable party to a related coverage lawsuit" under Ayala,²⁷ the Insurer claims this rule applies only when insurance is the "only potential source of recovery."²⁸ This is relevant, the Insurers say, because "Equity" has "billions" of dollars (and insurance is therefore not the Associations' only source of recovery).

This argument is both legally and factually groundless.

First, nothing in Ayala, Holzer, or any other Illinois case actually says that Illinois's mandatory party rule applies only if liability insurance is the underlying claimant's sole source of recovery. The Illinois cases simply say that because the policyholder's insurance is *an* interest of the underlying claimant, then the claimant is a mandatory party to a lawsuit regarding coverage – period. Moreover, contrary to National Surety's

²⁷ *National Union's Br.* at 12.

²⁸ *National Union's Br.* at 13.

uncited assertion,²⁹ the relevant Illinois cases do not even discuss the policyholder's non-insurance assets. Nothing in Ayala or Holzer indicates that the policyholders in those cases had insufficient non-insurance assets to pay the underlying claimants suing them. Given these omissions and the Insurers' burden of proof, it must therefore be assumed that a policyholder's other assets are in fact *not* a consideration under the Illinois's mandatory joinder rule.

Second, the argument is simply illogical. The purpose of Illinois's mandatory joinder rule is to make the underlying claimant a participant in a case that will affect its interest in the policyholder's liability insurance. Whether that insurance is one of many or the policyholder's only asset, the underlying claimant still has an interest in that policy. The Insurers' argument to the contrary is akin to saying that if a defendant has multiple bank accounts, the underlying claimant could not have an interest in more than one. The fact that a policyholder may have multiple sources of recovery does not mean a claimant is not interested in all of them. Moreover, even if a policyholder did have non-insurance assets, the underlying claimant might still wish to focus exclusively on the policyholder's liability insurance (because, for example, the insurance

²⁹ See *National Surety's Br.* at 18 (“[A]ll of the cases involve tort claimants who may have no ability to recover against the defendant if there was a finding of non-coverage in the declaratory action.”).

proceeds are easier to locate and garnish). Whether a policyholder has other assets besides liability insurance does not affect the underlying claimant's interest in the policyholder's coverage dispute.

Finally, the Insurers' argument is factually unsupported. The plaintiffs/appellants in this case are Equity Residential *and* the four limited liability companies that created the Associations' condominiums. As the verdict form in the Balaton case demonstrates, the Associations might recover from the LLCs, but not Equity Residential, and vice versa.³⁰ This is significant, because although the record in this case shows *Equity Residential* has assets, ***the record contains no evidence that the LLCs have any assets other than the liability insurance at issue in this case.*** Thus, even if this "sole source of recovery" argument were correct, the Insurers have not established that liability insurance is *not* the Associations' "only potential source of recovery."

4. The Illinois Courts Have Already Rejected National Union's "Future Contingency" Argument

Citing a single case, American Home Assurance Co. v. Northwest Industries, Inc.,³¹ National Union claims that the Associations' joinder is not mandatory because they do not have a "present interest" in the Equity

³⁰ See *National Union's Br.* App. B (showing recovery against LLC, but not Equity Residential).

³¹ Am. Home Assurance Co. v. Nw. Indus., Inc., 50 Ill. App. 3d 807, 365 N.E.2d 956 (1977).

Companies' insurance (as opposed to a "future expectancy").³² But American Home is easily distinguishable – the underlying claimant in that case had entered into an agreement *to stay its underlying lawsuit*, promising not to revive it unless certain conditions came to pass.³³ So at the time the joinder issue arose in the American Home coverage case, the underlying claimant *had no claim against the policyholder*. The American Home court therefore held (understandably) that the underlying claimant had no "present and substantial" interest in the policyholder's insurance; the interest was only "contingent."³⁴

Here, by contrast, the Associations have not stayed their lawsuits against the Equity Companies, so they *do* have a present interest in the Equity Companies' coverage dispute. National Union confirms as much by citing Ayala,³⁵ in which the court applied the mandatory joinder rule in a case *involving a still-ongoing underlying action*.³⁶ Consistent with that, at least one Illinois court has held that an underlying claimant's interests in

³² *National Union's Br.* at 12.

³³ See American Home Assurance, 50 Ill. App. 3d at 812.

³⁴ American Home Assurance, 50 Ill. App. 3d at 812 ("It is our opinion that after FBS and Michigan Chemical entered into that agreement, FBS' interest in the instant suit was no longer present and substantial, but contingent upon losses exceeding the \$60 million 'cap.'").

³⁵ Allied Am. Ins. Co. v. Ayala, 247 Ill. App. 3d 538, 616 N.E.2d 1349 (1993).

³⁶ *National Union Br.* at 12-13 ("Illinois courts have acknowledged that there may be situations where a potential claimant may be an indispensable party to a related coverage lawsuit.") (citing Ayala, 616 N.E.2d at 1355).

a policyholder's liability insurance "vest at the time of the occurrence" that causes injury.³⁷

5. The Associations' Relationship to this *Washington* Lawsuit Is Irrelevant

The Insurers next make a series of arguments regarding the fact that the Associations are not parties to this *Washington* lawsuit.³⁸ This entirely misses the point: the Equity Companies have never alleged that the Associations must be parties to a *Washington* coverage lawsuit. Moreover, it is equally irrelevant that the Associations have not moved to intervene in this *Washington* lawsuit. The Illinois mandatory joinder rule does not require that the underlying claimant *want to* join the coverage lawsuit. If the case concerns coverage, then the court has no jurisdiction to resolve it without first joining the underlying claimants – whether the claimants want that or not.³⁹

³⁷ Reagor v. Travelers Ins. Co., 92 Ill. App. 3d 99, 415 N.E.2d 512, 514 (1980) ("As a beneficiary of a liability insurance policy, an injured person has rights under the policy *which vest at the time of the occurrence giving rise to his injuries.*") (internal citations omitted) (emphasis added).

³⁸ See, e.g., *National Union's Br.* at 16-17 ("It is striking that Equity did not name the HOAs as defendants in this coverage lawsuit.").

³⁹ Note that the Equity Companies have never claimed they are raising the necessity of the Associations' joinder *for the Associations' benefit*. Rather, the Equity Companies are citing Illinois's mandatory joinder rule to (a) explain why the Equity Companies initially filed this lawsuit in *Washington*, and (b) demonstrate that Illinois is not an adequate alternative forum. Thus, *National Union's* "ruse" argument is both puzzling and wrong. See *National Union's Br.* at 16-17 (claiming Equity Companies' joinder argument is a "ruse to protect its choice of forum").

6. This is Not a “Mass Torts” Case Where No Forum Other Than Illinois Is Available

The Insurers last argue regarding the mandatory joinder rule that an Illinois court *might* ignore the rule because one federal court did that in one mass tort case, Zurich Ins. Co. v. Baxter.⁴⁰ But ironically, a case that National Union cites in support of this argument explains just how “inflexible” the mandatory joinder rule is:

Where a party has been omitted whose presence is so necessary that a final decree cannot be entered without necessarily affecting his interest, the court should not proceed to a decision of the case on the merits. . . . This rule is inflexible, yielding only when the allegations of the bill disclose a case so extraordinary and exceptional in character as that it is practically impossible to make all parties in interest parties to the suit, *and* further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons.⁴¹

Moreover, Baxter is a unique and distinguishable case. The underlying lawsuit in Baxter was a class action mass tort claim on behalf of thousands of underlying claimants.⁴² Not all were subject to joinder in any one forum, yet *some* had already been joined in the Illinois coverage

⁴⁰ Zurich Ins. Co. v. Baxter, 275 Ill. App. 3d 30, 655 N.E.2d 1173 (1995).

⁴¹ Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000, 1004 (1944) (quoted in *National Union’s Br.* at 13-14) (emphasis added).

⁴² See Baxter, 655 N.E.2d at 1180 (“The present case concerns at least 7,500 underlying claimants.”).

dispute.⁴³ Citing the “extraordinary and exceptional” nature of the case, the Baxter court held that joinder of *all* the underlying claimants was unnecessary because the subset of claimants who *had* been joined – something the Baxter court said “must” occur – would adequately represent the absent ones:

[T]he extraordinary and exceptional character of the present case alone is insufficient to bring it within Oglesby’s narrow exception to the necessary parties rule. Additionally, parties *must be* joined who share the interests of, and are equally likely to bring forth the entire merits as would, the absent underlying claimants. In such a situation, the absent members of the represented class will be bound by the court’s judgment. We note that the present case is readily distinguishable from those *in which no underlying claimants are joined* and the insured asserts it sufficiently represents the interests of the absent claimants.⁴⁴

The Baxter court also distinguished Ayala on grounds the latter case involved a “small” and “definite and finite” number of underlying claimants.⁴⁵

Here, unlike Baxter, the Underlying Lawsuits are not “extraordinary”; they involve just five underlying claimants, all of whom are residents of the same state. Moreover, unlike in Baxter, another forum

⁴³ See Baxter, 655 N.E.2d at 1176.

⁴⁴ See Baxter, 655 N.E.2d at 1179 (emphasis added).

⁴⁵ Baxter, 655 N.E.2d at 1180-81 (“Ayala . . . involved a small number of underlying claimants. . . . Closely related to this first reason, in Ayala . . . there was a definite and finite number of underlying claimants. In the present case, neither the actual number of current underlying claimants nor the number of possible future underlying claimants is known.”).

exists in which all interested parties can be joined (Washington). Most importantly, *none* of the underlying claimants in this case could be joined in Illinois; no subset of underlying claimants would be representing the interests of the non-joined ones – a fundamental requirement of the Baxter holding.

The Insurers have the burden of proving that Illinois *is* an adequate alternative forum – not that it *might be*. It is not enough to simply argue that a court might follow a distinguishable “extraordinary and exceptional” case in lieu of the “mandatory” and “inflexible” rule set forth in Ayala, Holzer, and Oglesby. Because those cases plainly say that this lawsuit could not proceed in Illinois, the Insurers’ citation to Baxter is not enough to carry their burden to prove otherwise.⁴⁶

C. WHAT EQUITY RESIDENTIAL ARGUED IN OTHER UNRELATED CASES IS IRRELEVANT

Without any authority to support the argument, the Insurers also contend that this Court should affirm simply because Equity Residential (one of the *five* Appellants here) argued in a series of unrelated lawsuits

⁴⁶ ACE and National Surety also make a passing reference to the fact that the Equity Companies have moved to dismiss the Insurers’ Illinois lawsuits, but did not argue in those motions that dismissal was necessary because the Insurers failed to join the Associations. *See, e.g., National Surety’s Br.* at 18. The explanation is simple: the Insurers’ Illinois lawsuits are subject to dismissal for a reason even more straightforward than the mandatory joinder rule at issue here – the pendency of this “first-filed” Washington lawsuit.

that Illinois was a better forum *for those lawsuits*. This argument fails for several reasons.

First, this Court should not even consider these unrelated lawsuits. ACE asks this Court to take “judicial notice” of them,⁴⁷ but Washington courts do not do that: “[W]e cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.”⁴⁸

Moreover, the other cases are irrelevant anyway – they fall within the same narrow exception to the mandatory joinder rule set forth in Baxter. Each coverage case that the Insurers cite arose out of a single underlying Florida lawsuit. Like the underlying case in Baxter, that Florida suit was a class-action mass tort case with thousands of plaintiffs.⁴⁹ Thus, joinder of the underlying claimants *in those particular coverage cases* was unnecessary under Baxter.

The Florida case also involved significantly different facts than the Underlying Lawsuits here. The plaintiffs in the Florida case claimed Equity Residential made defamatory statements to their credit agencies, which were located throughout the country (*i.e.*, the “damage” triggering

⁴⁷ See *ACE's Br.* at 6 n.5.

⁴⁸ Spokane Research v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

⁴⁹ See CP 2173 (“Numerosity: The proposed Class, which consists of over 33,000 past and present Florida tenants and co-signers, is so numerous that joinder of all members is impracticable.”).

the underlying liability could not be tied to a particular state). So unlike here, resolving the coverage cases did not require the examination of evidence located in the forum of the underlying lawsuit (or any other single location).

Parties take different positions depending on the relevant facts and law. The issue here is whether this Court – based on these unique facts and Washington law – thinks the Insurers have carried *their* burden of showing that another forum is adequate and available, and that Washington is a less convenient forum. What Equity Residential said in an unrelated case regarding unrelated facts has no bearing on that issue.

D. THE “FACTORS” DO NOT OVERCOME THE “PRESUMPTION” THAT THIS LAWSUIT SHOULD BE IN WASHINGTON

The trial court also erred in dismissing this case because the forum non conveniens “factors” do not demonstrate that Illinois is a *better* forum for this lawsuit. This too is a key burden of proof point: even if Illinois were an adequate alternative forum, the Insurers would have to prove that it is not just an alternative forum, but a more convenient one. This is key, because every argument that the Insurers make regarding Illinois has a counterpart in favor of keeping this case in Washington.

For example, National Union argues that the testimony of Washington witnesses “can be perpetuated and presented to an Illinois

jury via videotape.”⁵⁰ But that is equally true of a Washington jury. Similarly, New York and California witnesses can come to Washington as easily as Illinois. Moreover, the Insurers do not rebut the fact that most of the witnesses regarding *coverage* (as opposed to choice of law issues⁵¹) will be in Washington. Experts, plaintiffs’ counsel, defense counsel – everyone who will know what happened in the Underlying Lawsuits and the extent of covered damages – will all be in Washington.

The Insurers also confuse who has the burden of proof: “Equity is unable to identify any realistic private interest consideration that would favor Washington.”⁵² The Insurers have it backwards; *they* have the burden of establishing why the “private interest considerations” favor *Illinois*. Simply pointing to problems that exist in *both* forums – crowded dockets, out-of-state witnesses – is not enough to sustain that burden.

The Insurers are also mistaken about the need to apply “foreign law” and the access to coverage-related evidence in Washington.⁵³

⁵⁰ *National Union’s Br.* at 19-20.

⁵¹ Underwriters, brokers, and other insurance company witnesses will have no role in this case once the trial court decides what law applies; how the contracts were entered into and the Insurers’ subjective beliefs about what they cover are irrelevant in a coverage dispute. *See, e.g., Lynott v. Nat’l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (“[u]nilateral or subjective purposes and intentions” not evidence in construing insurance policy).

⁵² *National Union’s Br.* at 20.

⁵³ *See, e.g., National Surety’s Br.* at 26 (arguing trial court will not need to consider evidence of property damage in Washington because Illinois law will apply, and defective construction is purportedly not covered under Illinois law).

Washington law will apply in this case for the reasons set forth in the Equity Companies' "choice of law" briefing in the trial court. But more importantly, Washington law *presumptively* applies.⁵⁴ Thus, in deciding whether access to Washington evidence is necessary and whether the trial court will need to apply "foreign law," the presumption is that Washington law applies. That means both the "access to evidence" and "foreign law" factors also favor the Equity Companies.

The Insurers' final error is in attempting to distinguish J.H. Baxter & Co. v. Central National Insurance Co. of Omaha.⁵⁵ That case explains that in a dispute over liability insurance coverage, the forum where the damage occurs is the most logical place for the coverage dispute. The rule has nothing to do with the *nature* of the property damage; claims about oil-damaged dirt have no less relevance to the forum than claims about water-damaged wood. The point is that the evidence establishing coverage is there, and the underlying claimants in that forum have an interest in establishing coverage for their claims. Moreover, the Insurers

⁵⁴ See, e.g., Burnside v. Simpson Paper Co., 123 Wn.2d 93, 101, 864 P.2d 937 (1994) ("[T]he normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course.") (quoting B. Currie, Selected Essays on the Conflicts of Laws 75 (1963)).

⁵⁵ J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha, 105 Wn. App. 657, 20 P.3d 967 (2001).

have cited no Washington case indicating that J.H. Baxter should *not* govern here.⁵⁶

“[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”⁵⁷ Nothing about this case indicates this is the “rare” occasion when a forum non conveniens dismissal was appropriate. The trial court erred in applying the forum non conveniens factors.

III. CONCLUSION

This case boils down to a burden of proof issue. Illinois case law plainly states that an underlying claimant is the type of necessary party who *must* be joined in a coverage dispute – unless the underlying claim is

⁵⁶ The Insurers make several factual misrepresentations that – although they are ultimately immaterial to the forum non conveniens issue – warrant correction:

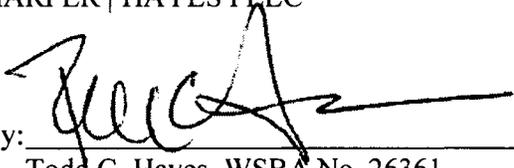
- ACE mistakenly says it has no obligation to defend the Equity Companies. Although the ACE policies do not contain the phrase “duty to defend,” they do obligate ACE to pay the Equity Companies’ defense costs and do so *as those costs are incurred*. See CP 2875.
- ACE claims the Equity Companies have “first-dollar” exposure of \$6.5 million. See *ACE’s Br.* at 6. This is false. One of the ACE policies has just a \$500,000 “retained limit,” requiring ACE to reimburse the Equity Companies’ liability (subject to limits) in excess of that amount, regardless of other policies’ “retained limits.” See CP 2653; Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 690, 186 P.3d 1188 (2008) (policyholder satisfied retention “by paying that amount once”).
- ACE contends this coverage dispute will not involve one of the Underlying Lawsuits (the Ogard case). The Equity Companies filed a motion before the trial court dismissed this case to add the Ogard case as a subject of the parties’ coverage dispute.

⁵⁷ Myers, 115 Wn.2d at 128-29 (quoting Gulf Oil Corp., 330 U.S. at 508 (emphasis added)).

a mass tort *and* another underlying claimant has already been joined. But to the extent this Court has any doubt about that law, the doubt must be resolved against dismissal. The Insurers had the burden of proof – *they* had to show that Illinois is an adequate alternative forum; it was not the other way around. Illinois is not an adequate alternative forum, and the trial court failed to even address the issue. Both points justify reversal.

RESPECTFULLY SUBMITTED this 18th day of September, 2009.

HARPER | HAYES PLLC

By: 

Todd C. Hayes, WSBA No. 26361

Andre V. Egle, WSBA No. 34687

Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, September 18, 2009, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

BY MESSENGER

Duncan K. Fobes
Andrew Kamins
Patterson Buchanan Fobes Leitch
& Kalzer, Inc, PS
2112 Third Avenue, Suite 500
Seattle, WA 98121
Attorneys for Defendant United States
Fidelity and Guaranty Company

BY MESSENGER

James E. Horne
Michelle A. Menely
Gordon, Thomas,
Honeywell LLP
600 University Street, Suite 2100
Seattle, WA 98101
Attorneys for Defendant Admiral
Insurance Company

BY MESSENGER

Stephen G. Skinner
Johnson Andrews & Skinner, PS
200 W. Thomas, Suite 500
Seattle, WA 98119
Attorneys for Defendants International
Specialty Lines Insurance Company; Illinois
National Insurance Company; and National
Union Fire Insurance Company

BY MESSENGER

William F. Knowles
Robert A. Meyers
Laura J. Hawes
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
Attorneys for Defendant ACE
American Insurance Company

BY MESSENGER

M. Colleen Barrett
Barrett & Worden PS
2101 Fourth Avenue, Suite 700
Seattle, WA 98121
Attorneys for Defendant National Surety
Corporation

BY US MAIL

John V. Hager, Esq.
Hager & Dowling
319 East Carrillo Street
Santa Barbara, CA 93101
Attorneys for Defendant
National Surety Corporation

DATED this 18th day of September, 2009.



Jessica A. Gardner

NO. 63358-9-I

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

EQUITY RESIDENTIAL, et al.,

Plaintiffs/Appellants,

v.

ACE AMERICAN INSURANCE COMPANY, et al.,

Respondents/Appellees.

2009 SEP 18 PM 3:34

COURT OF APPEALS DIV. I
STATE OF WASHINGTON

**APPENDIX OF UNPUBLISHED NON-WASHINGTON
AUTHORITIES SUPPORTING APPELLANTS' REPLY BRIEF**

Todd C. Hayes, WSBA No. 26361
Andre V. Egle, WSBA No. 34687

HARPER | HAYES PLLC
One Union Square
600 University Street, Suite 2420
Seattle, Washington 98101
Telephone: 206.340.8010
Facsimile: 206.260.2852

Attorneys for Plaintiffs/Appellants

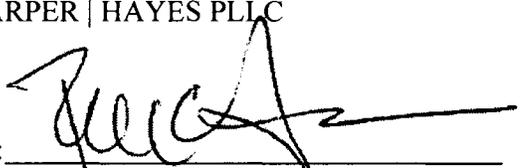
ORIGINAL

Pursuant to GR 14.1(b), Appellants respectfully submit the following unpublished authorities in support of their Reply Brief:

1. Herrera v. Michelin N. Am., Inc., 2009 U.S. Dist. LEXIS 21022, at *6-7 (S.D. Tex. Mar. 16, 2009); and
2. Georgia-Pacific Corp. v. Sentry Select Ins. Co., 2006 U.S. Dist. LEXIS 33975, at *19 (S.D. Ill. May 26, 2006).

RESPECTFULLY SUBMITTED this 18th day of September, 2009.

HARPER | HAYES PLLC

By: 

Todd C. Hayes, WSBA No. 26361
Andre V. Egle, WSBA No. 34687
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, September 18, 2009, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

BY MESSENGER

Duncan K. Fobes
Andrew Kamins
Patterson Buchanan Fobes Leitch
& Kalzer, Inc, PS
2112 Third Avenue, Suite 500
Seattle, WA 98121
Attorneys for Defendant United States
Fidelity and Guaranty Company

BY MESSENGER

James E. Horne
Michelle A. Menely
Gordon, Thomas,
Honeywell LLP
600 University Street, Suite 2100
Seattle, WA 98101
Attorneys for Defendant Admiral
Insurance Company

BY MESSENGER

Stephen G. Skinner
Johnson Andrews & Skinner, PS
200 W. Thomas, Suite 500
Seattle, WA 98119
Attorneys for Defendants International
Specialty Lines Insurance Company; Illinois
National Insurance Company; and National
Union Fire Insurance Company

BY MESSENGER

William F. Knowles
Robert A. Meyers
Laura J. Hawes
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
Attorneys for Defendant ACE
American Insurance Company

BY MESSENGER

M. Colleen Barrett
Barrett & Worden PS
2101 Fourth Avenue, Suite 700
Seattle, WA 98121
Attorneys for Defendant National Surety
Corporation

BY US MAIL

John V. Hager, Esq.
Hager & Dowling
319 East Carrillo Street
Santa Barbara, CA 93101
Attorneys for Defendant
National Surety Corporation

DATED this 18th day of September, 2009.



Jessica A. Gardner



LEXSEE 2009 U.S. DIST. LEXIS 21022

ALEJANDRO VASQUEZ HERRERA, INDIVIDUALLY, AND ON BEHALF OF A.V., JR., A MINOR, A.G.V., A MINOR, P.V., A MINOR, B.V., A MINOR, AND AS HEIR TO MARIA VAZQUEZ, DECEASED, Plaintiffs, vs. MICHELIN NORTH AMERICA, INC. AND MICHELIN AMERICAS RESEARCH & DEVELOPMENT CORPORATION, Defendants.

CIVIL NO. B-07-114

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

2009 U.S. Dist. LEXIS 21022

March 16, 2009, Decided

March 16, 2009, Filed; March 16, 2009, Entered

COUNSEL: [*1] For Alejandro Vasquez Herrera, Individually, and on Behalf of A.V., JR., a Minor, A.G.V., a Minor, P.V., a Minor, B.V., a Minor, and as Heir to MARIA VASQUEZ, Deceased, Plaintiff: Kyle Wayne Farrar, LEAD ATTORNEY, Wesley Todd Ball, Farrar Ball LLP, Houston, TX.

For Michelin North America, Inc., Defendant: Chris A Blackerby, LEAD ATTORNEY, Brown McCarroll LLP, Austin, TX; Thomas M Bullion, III, LEAD ATTORNEY, Germer Gertz et al, Austin, TX.

For Michelin Americas Research & Development Corporation, Defendant: Elizabeth C Helm, Morris Manning & Martin LLP, Atlanta, GA.

JUDGES: Andrew S. Hanen, United States District Judge.

OPINION BY: Andrew S. Hanen

OPINION

MEMORANDUM OPINION AND ORDER

Two motions are pending before the Court. The first is Defendants' Motion to Dismiss Under the Doctrine of

Forum Non Conveniens (the "FNC Motion") in which they seek dismissal of this case, so that it may be re-filed in Mexico. In the event this case remains in this forum, Defendants also filed a Motion to Apply the Laws of Mexico to Plaintiffs' claims (the "COL Motion"). Having considered the motions, the record, and the relevant law, the Court finds that dismissal under the doctrine of forum non conveniens is unwarranted. Accordingly, [*2] the Court denies Defendants' FNC Motion, and denies the COL Motion without prejudice so that the judge who presides over the trial may make that ultimate decision.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs in this action are Alejandro Herrera ("Mr. Herrera") and four of his six children who survived a car crash that occurred in the State of Veracruz, Mexico on August 14, 2006. According to the Original Complaint, the vehicle, a 1987 Toyota truck, was equipped with at least one BF Goodrich Radial All Terrain TA Baja Champion 31 x 10.5/R15 109 tire designed and manufactured by Defendants Michelin North America, Inc. and Michelin Americas Research and Development Corporation (collectively, "Michelin").¹ The tire allegedly suddenly failed, causing the vehicle to roll over on dry, flat pavement, killing Maria Vazquez ("Mrs. Herrera") and her unborn child, and injuring several

others.²

1 On January 1, 2008, Michelin Americas Research and Development Corporation merged with and became a division of Michelin North America, Inc.

2 At the time of the accident, the following ten people were passengers in the Toyota truck (some in the cab and others in the rear bed): Alejandro Vazquez [*3] Herrera, Maria Vazquez Herrera, A.V. (a minor), A.G.V. (a minor), P.V. (a minor), B.V. (a minor), R.V. (a minor), Rosa Herrera Hernandez, Ivana Vazquez, and Stephanie Vazquez. Maria Vazquez Herrera and her unborn child died as a result of the accident.

Alejandro and Maria Herrera were married at the time of the accident. The minor plaintiffs in this suit are their children. Mr. Herrera has two other children from a previous relationship who are not party to this suit, but who were involved in the accident. *See* Defs.' Mot., Ex. A at 12. Rosa Hernandez is Mr. Herrera's mother. Ivana and Stephanie Vazquez are Mr. Herrera's nieces; Ivana from his sister, and Stephanie from his brother.

There is some discrepancy in the pleadings as to whether Plaintiff A.V., Jr. was directly involved in the accident. The Original Complaint states that he seeks damages under a theory of bystander recovery because he was present at the scene of the accident, but during Mr. Herrera's deposition, taken on March 5, 2008, Mr. Herrera does not name A.V., Jr. as a passenger in the vehicle at the time of the accident. *Compare* Pls.' Orig. Compl. at P 13.1 *with* Defs.' Mot., Ex. B at 43-47 (hereinafter "Mr. Herrera's [*4] Dep. at "). The Court notes this discrepancy only for clarity's sake; it had little to no impact on the Court's ruling in this Order.

Plaintiffs sued Michelin alleging causes of action for strict liability (including claims for design defects, manufacturing defects, and marketing defects), breach of express and implied warranties, and negligence. Plaintiffs seek relief in the form of general and exemplary damages and pre and post-judgment interest. All of the Plaintiffs (the "Herrera family") currently reside in Lombard, Illinois, a suburb of Chicago, as they did at the time of the accident and the filing of this lawsuit. *See* Defs.' Mot.,

Ex. A, *passim*. Mr. Herrera is a dual citizen of the United States and Mexico. *See id.* at 9. At the time of the accident, Mrs. Herrera was a lawful permanent resident of the United States and lived with Mr. Herrera and their children in Lombard, Illinois. *See id.* at 19. Three of the four minor plaintiffs, A.V., Jr., B.V., and P.V., were born in the United States, and thus are United States citizens. *See id.* at 12. A.G.V. was born in Mexico, and was a Mexican citizen at the time of the crash. *See id.* at 28. While his status in the United States is [*5] not evident from the contents of the Court's file, he resided with his family in Lombard, Illinois at all pertinent times. *See id.*

Plaintiffs' filed their Original Complaint on August 3, 2007 (DE 1). The parties had been proceeding with discovery for approximately ten months when Michelin filed its FNC Motion on June 5, 2008, arguing Mexico was a more convenient forum for this case (DE 20). Plaintiffs filed a Response to Defendants' FNC Motion on June 25, 2008, contending that this case should remain in the Southern District of Texas (DE 21). On July 3, 2008, Defendants filed their COL Motion (DE 22), and shortly thereafter, a Reply to Plaintiffs' Response to its FNC Motion on July 7, 2008 (DE 24). Plaintiffs' filed a Response to Defendants' COL Motion on July 14, 2008 (DE 26). Defendants' Reply to that response followed on July 24, 2008 (DE 28). In addition, this Court held a hearing on the FNC Motion on November 6, 2008 (the "FNC Hearing").³ Therefore, both the forum non conveniens and choice of law issues are ripe for the Court's ruling.

3 References to this hearing will hereinafter be cited to as "FNC Hrg. Tr. at ."

II. FORUM NON CONVENIENS ANALYSIS

The essence of the forum non [*6] conveniens doctrine is that it permits a court to decline jurisdiction and dismiss a case, even when properly before the court, if the case could more conveniently be tried in another forum. *See In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008). A heavy burden is traditionally imposed upon defendants by the forum non conveniens doctrine, and dismissal is permitted "only in favor of a substantially more convenient alternative." *Id.* at 314 (comparing burden imposed in forum non conveniens setting to that of transferring venue under 28 U.S.C. § 1404).

The forum non conveniens analysis consists of four

inquiries. First, this Court must assess whether an alternative forum is available. *See Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 380 (5th Cir. 2002). An alternative forum is available if "the entire case and all parties can come within the jurisdiction of that forum." *Id.* (quoting *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc)). Second, this Court must decide if the alternative forum is adequate. *See id.* An alternative forum is adequate if "the parties will not be deprived of all remedies or treated unfairly, even though they may [*7] not enjoy the same benefits as they might receive in an American court." *Id.* (quoting *In re Air Crash*, 821 F.2d at 1165 (internal citation omitted)). If an alternative forum is both available and adequate, the Court will then balance a host of private interest factors in order to determine whether dismissal is warranted. *See Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 673-74 (S.D. Tex. 2004). If the private factors do not weigh in favor of dismissal, the Court will consider certain public interest factors. *See id.* at 674.

A. AVAILABILITY AND ADEQUACY

Supreme Court and Fifth Circuit case law have made it clear that a foreign forum is available to plaintiffs haling from the forum's country if the defendant submits itself to that foreign jurisdiction. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981); *see also Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983). Knowing this, Michelin has agreed to "make itself available to the courts of Mexico." Defs. FNC Mot. at 5. Were plaintiffs haling from Mexico, that would end the availability matter. In this case, however, the lone adult Plaintiff is a dual citizen of Mexico and the United States and a long-term [*8] permanent resident of Illinois. *See* Defs.' FNC Mot., Ex. A at 9. Additionally, three of the four minor plaintiffs are United States citizens with no apparent legal status in Mexico, and are also permanent residents of Illinois. *See id.*, *passim*. Hence, this is not the typical forum non conveniens situation of foreign plaintiffs haling from a foreign forum. *See Veba-Chemie*, 711 F.2d at 1245. For that reason, one question the Court has with respect to the availability of Mexico as an alternative forum is: if this case were dismissed and sent to Mexico, would the three minor United States citizen and Illinois resident plaintiffs be denied access to the Mexican courts, even if their father, who has dual citizenship, is permitted to file suit in Mexico? Neither Defendants nor Plaintiffs addressed this issue.

"[D]efendants bear the burden of proof on all elements of the forum non conveniens analysis." *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007). Defendants have not provided the Court with the relevant Mexican law principles, and thus, the record does not indicate whether Mexican law permits parents with legal status, like Mr. Herrera, to sue on behalf of minor children [*9] with United States citizenship only. Therefore, the Court is unable to state with certainty that "the entire case and *all* the parties can come within [Mexico's] jurisdiction." *In re Air Crash*, 821 F.2d at 1165 (emphasis added). Nevertheless, this Court will assume Mexico is an available forum, and will proceed with the forum non conveniens analysis as if Defendants had met their burden on this requirement.

The Court follows this course despite the fact that Plaintiffs argue that Mexico is an inadequate alternative forum because numerous Fifth Circuit cases have held that "Mexico is an adequate alternative forum for tort litigation involving American-made products, despite differences in Mexican and American substantive and procedural law." *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003); *see also Gonzalez*, 301 F.3d at 377 (affirming dismissal of suit against American auto manufacturer on the basis of forum non conveniens in case arising from auto accident in Mexico); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671-72 (5th Cir. 2003) (stating "[t]he fact that Mexico provides a wrongful death cause of action, albeit with severe damage caps, makes [*10] the country an adequate forum"); *cf. In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 707 (7th Cir. 2005).

B. PRIVATE FACTORS

Having determined that Mexico is an adequate forum in this case, and having assumed it is available, the Court will now examine the private interest factors, which include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) the possibility of view of premises, if view would be appropriate to the action; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *See Vasquez*, 325 F.3d at 672. If the private factors weigh in favor of dismissal, a court need not proceed to the public factor analysis. *See Morales*, 313 F. Supp. 2d at 674.

1. Sources of proof

Defendants conclusively established the following facts relating to sources of proof: (1) the truck was purchased in Illinois in 2002, transported to Mexico later the same year, and kept there until the time of the accident; (2) the accident occurred in Mexico; (3) was investigated by Mexican authorities; and (4) the accident victims were [*11] treated in Mexican medical facilities. See Defs.' FNC Mot. at 7; see also Mr. Herrera's Dep., *passim*. Defendants argue that since "a United States court cannot compel the production of documents or persons not in either party's control. . . sources of proof will be easier if this case is tried in Mexico, where the accident occurred and all of the accident-specific witnesses reside." Defs.' FNC Mot. at 8. At the FNC Hearing, Defendants added that some witnesses and medical records from the victims' treating hospital in Veracruz might be necessary for trial. See FNC Hrg. Tr. at 8-9. Plaintiffs counter that "[t]he vast majority of relevant evidence is located in the United States, and is written in English[;] it is much easier to translate one accident report as opposed to thousands of [] documents [] produced by Defendant relating to the design and manufacture of the accident tire[;] all of Defendants' corporate representatives and witnesses reside in the United States and speak English[; and] there are no issues about other witnesses or drivers because this was a single vehicle incident and no eye witnesses have been identified." Pls.' FNC Resp. at 4-5. Given these considerations, [*12] Plaintiffs argue that since each side will retain an accident reconstruction expert, the testimony of the investigating personnel is certainly not necessary to either side's case. See *id.* at 5. Despite this contention, it is clear that any documentary evidence regarding the accident itself and the resulting medical care is clearly in Mexico.

The documentary sources of proof in this case are clearly split between the United States and Mexico, the accident-specific evidence in Mexico being the less voluminous. The Fifth Circuit has ruled that identifying the situs of the wrongful conduct at an American designer's drawing board is not enough to overcome dismissal for inconvenient forum where the production, sale, and alleged failure of the product all occurred in Mexico. See *Vasquez*, 325 F.3d at 674. In this case, however, the tire was not only designed in the United States, it also was manufactured in Alabama. Plaintiffs claim it was purchased in the United States along with the Toyota truck, and Defendants, while expressing doubt regarding this fact, have not offered any proof otherwise.

Unlike in *Gonzalez*, only the alleged failure of the tire in this case is certain to have occurred [*13] in Mexico. Accordingly, the Court finds that the documentary contacts, which split between Mexico and the United States, do not weigh in favor of dismissal.

2. Witnesses

The location of witnesses, especially those beyond the subpoena power of this Court, is an important factor. Initially, the Court notes that in this case, there is no venue, in Mexico or the United States, that has *absolute* subpoena power over all of the non-party witnesses to this action. Cf. *In re Volkswagen*, 545 F.3d at 316 (transferring venue to another division that did enjoy absolute subpoena power over both depositions and the trial); see also *F.R.CIV.P. 45(c)(3)*. Hence, with respect to the location of witnesses to this action, this Court necessarily balances the convenience of two less-than-ideal forums. Bearing that in mind, Defendants have established that the following witnesses are in Mexico: (1) some of the passengers involved in the accident; (2) the official who investigated the accident; (3) the medical professionals who treated the Plaintiffs after the accident; and (4) the members of Mr. Herrera's family who helped maintain the truck during the time it was kept in Mexico. The remaining witnesses, including [*14] Plaintiffs and all of the witnesses from Michelin are in the United States. A court's focus should not rest on the number of witnesses in each locale; rather, it should consider "the materiality [] of the [] witnesses' testimony and then determine their accessibility and convenience to the forum." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1146 (9th Cir. 2001). At the FNC hearing, counsel for Michelin stated:

. . . one of the most central issues about a tire case, is how the tires were maintained. Quite frankly, that's typically the way -- what a tire manufacturer will point to, and what a lot of the evidence is about is whether or not the tire was mistreated during its life. And so the people who maintained the truck, who used it and owned it for the four years, almost four years it was down in Mexico are going to be pretty crucial.

FNC Hrg. Tr. at 15 (emphasis added). Thus, according to Michelin's own testimony, the people who maintained the

truck, and not the investigator or the treating medical personnel, are the key witnesses outside the United States who may provide material testimony for the defense. *See Lueck, 236 F.3d at 1146*. The people who maintained the truck and its tires [*15] were the Herrera's when they visited Mexico and Mr. Herrera's relatives. *See Mr. Herrera's Dep. at 22-24*. Plaintiffs represented to this Court that those family members living in Mexico are willing to testify, if necessary, in the United States, and that they would also make these "crucial" people available to Defendants for deposition when counsel for each side visits the accident scene in Veracruz before trial. *See FNC Hrg. Tr. at 5*. The Court is mindful that these kinds of declarations do not actually commit the persons in question to appear at trial. *See Morales, 313 F. Supp. 2d at 681*. Nevertheless, the fact that some witnesses with material information regarding the subject tire's maintenance are in Mexico is not enough to overcome the convenience derived from the fact that most of the witnesses key to the Plaintiffs' product liability claims, including the Plaintiffs and the Defendants themselves, are in the United States. *See In re Volkswagen, 545 F.3d at 314* ("forum non conveniens dismissal permitted only in favor of a substantially more convenient alternative . . ."). This private factor, therefore, weighs in favor of keeping the case in the United States. At a minimum, it [*16] does not weigh in favor of either side.

3. Possibility of View of Premises

Defendants claim "a view of the premises will be more readily available to a Mexican court," Defs.' FNC Mot. at 7, and that "a Texas jury will be unfamiliar with the road conditions at issue." Defs.' FNC Reply. at 6. Plaintiffs contend that judge and jury "can be educated about the accident scene by photographs, Plaintiffs' testimony, and expert testimony, animations, etc., and that t]he facts of the roadway and its characteristics . . . can be measured, analyzed, and recreated [] by experts[,] "diminishing the need for the jury to view the premises. Pls.' FNC Resp. at 6. In *Morales*, a vehicle-rollover case alleging design defects in the 2001 Ford Explorer, this Court stated that it is more common for juries to personally view accident scenes located abroad because of their unfamiliarity with road conditions. *See Morales, 313 F. Supp. 2d at 679-680*. Given the current availability of cheap, obtainable, and sophisticated cameras, video equipment, and animation software, this factor is taking less and less importance as

either side can present the jury with a clear idea of the road and its condition. *See Snaza v. Howard Johnson Franchise Sys., Inc., No. 3:07-CV-0495-O, 2008 U.S. Dist. LEXIS 103987, 2008 WL 5383155, at *13 (N.D. Tex. Dec. 24, 2008) [*17]* (refusing to dismiss wrongful death action to Mexico on grounds of inconvenient forum, stating that "it is not clear in these days of advanced technology why a physical viewing of the hotel balcony [from which decedent fatally fell] would be necessary").

4. Practical Problems

The Court has not been presented with any insurmountable practical problem, the elimination of which would make trial of this case easier, more expeditious, and less expensive. Of course, a decision by Plaintiffs to file this case in their home forum, the Northern District of Illinois, might have had less practical problems. Michelin also conducts substantial business activity there, eliminating any concern over personal jurisdiction. At the FNC hearing, however, Defendants represented they did not object to the case remaining here in the event the Court denies dismissal pursuant to its FNC Motion. *See FNC Hrg. Tr. at 7*. Hence, this factor does not weigh in favor of dismissal.

C. PUBLIC FACTORS

Due to the fact that the private interest factors do not weigh decisively in favor of dismissal, the Court will consider [*18] the public interest factors. Those factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *See Vasquez, 325 F.3d at 673*.

As to court congestion, Defendants claim Plaintiffs in this case are among "hundreds of foreign plaintiffs" that have sought "a free license to vastly increase the value of their claims by the simple maneuver of filing them in United States courts." Defs.' Mot. at 10. Defendants arguments are misplaced. There are no foreign Plaintiffs in this suit, except for one minor Plaintiff, who has resided in Illinois, both before and after the accident in question. As has been repeated above, Mr.

Herrera is a United States citizen, and three of the other four minor plaintiffs are also United States citizens. The decedent, Mrs. Herrera, was a lawful permanent resident of the [*19] United States. Moreover, this Court's civil docket is manageable and poses no obstacle that the parties would not face in a sister court. Thus, concerns about docket congestion do not weigh in favor of dismissal.

As to having localized controversies decided at home, the Court finds this public factor clearly counsels toward dismissal from Texas. Even if this suit were "localized" in nature, a position this Court does not take, it certainly is not localized in Texas. None of the parties in this suit are Texas residents or citizens, and no other specific connection to Texas exists aside from being Plaintiffs' forum choice. While Michelin conducts substantial business activity in the Southern District of Texas, that is true for practically every judicial district in the United States, and thus, does not provide a point of differentiation for Plaintiffs' forum choice. Indeed, Plaintiffs' counsel conceded at the FNC hearing that it chose the Brownsville Division of the Southern District of Texas as its forum because it was the closest forum to the Mexican witnesses without being in Mexico. *See* FNC Hrg. Tr. at 6-7. That is not enough to justify Texas as a convenient forum.⁴

4 While the fact [*20] that both parties compromise and agree on a venue may make sense and facilitate a more streamlined process, it is not without its pitfalls, especially to the orderly administration of justice. It could easily lead to forum shopping and/or judge shopping. The law contemplates a certain level of strategy being used when a plaintiff picks a forum and when a defendant weighs a decision to file a motion to dismiss or transfer. Nevertheless, the Court must weigh factors beyond those which concern the individual parties.

The third and fourth public interest factors concern choice of law, and are: the interest in having a forum that is at home with the law that must govern the dispute, and the avoidance of unnecessary choice of law problems. For the reasons elaborated below, this Court suggests that a court could find that Mexican law does not govern this dispute, and thus, neither of these factors weigh in favor of dismissal. Before addressing the choice of law issue, the Court notes the final public interest factor, the

unfairness of burdening citizens in an unrelated forum with jury duty, weighs against Texas serving as the forum for this case. There are no Texas parties to this action or [*21] Texas-specific contacts to this litigation, other than being Plaintiff's forum choice and a place where the subject tire is presumably for sale. *See In re Volkswagen, 545 F.3d at 318* (rejecting the mere fact that a product is available in a particular judicial division as a ground for finding that jury duty would not be a burden). Since there are no Mexican parties to this litigation, except the one minor Mexican plaintiff and perhaps Mr. Herrera who has dual citizenship, this factor does not necessarily weigh in favor of dismissal to Mexico.

III. CHOICE OF LAW

Initially, the Court notes that the specific circumstances of this suit do not permit it to totally avoid "unnecessary choice of law problems" since Texas law would almost certainly not control. The fourth public interest factor, therefore, does not counsel towards dismissal. Further, in order to determine whether the third public interest factor in the forum non conveniens analysis weighs in favor of dismissal, this Court must at least review what body of law governs this dispute. A federal district court applies the choice of law rules of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. Texas, [*22] the forum state here, follows the "most significant relationship" approach of the Restatement (Second) of Conflicts of Law (1971). *See Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979)*. Under this test, the Court considers the following contacts: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *See id.; see also RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971)*. It is not sufficient merely to tally the § 145 contacts and choose the state with the greatest number. *See Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); see also Gutierrez, 583 S.W.2d at 319*. The resolution of choice of law questions turns on the qualitative nature of those contacts as affected by the policy factors enumerated in § 6. *See id.* The policy considerations a court weighs under § 6 include:

- (a) the needs of the interstate and

international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative [*23] interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law

(f) certainty, predictability, and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971); see also *Gutierrez*, 583 S.W.2d at 318-319. Factor (d), protecting the justified expectations of the parties, is of lesser importance to this case as it has more bearing on contract disputes. See *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 145 cmt. b (1971).

Initially, the Court identifies the conflict of law which would necessitate the trial court to decide a choice of law issue. See *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 260 (Tex. App.-- San Antonio, 1999). In this case, Michelin asserts that Mexican law should apply because Mexico has an interest in regulating the conduct of manufacturers whose products traverse its highways, and that application of Texas law to this dispute would violate due process norms of fairness. See Defs.' FNC Mot. At 11; see also Defs.' COL Mot. at 8-9. Plaintiffs argue that Texas law should apply [*24] to this case because Michelin does business in Texas, Texas is the forum, the Texas Legislature and courts have a particular interest in regulating conduct of manufacturers that do business in Texas, and finally because the Supreme Court of Texas has recognized "the very substantial interests of the forum state in applying its own laws." Pls.' COL Resp. at 10. Thus, the choice of law presented by the parties to this Court is between Mexican and Texas law. The Court, however, finds Illinois also has a significant connection to this litigation, being Plaintiff's home forum and the place where the truck and presumably the subject tire

were purchased. The Court therefore considers Illinois' contacts to this dispute, along with Mexico's and Texas's, in evaluating the governmental interests at stake. See *Aguiniga*, 9 S.W.3d at 260 (citing *Duncan*, 665 S.W.2d at 421).

Contacts with Mexico in this case include the following: (1) the accident occurred in Mexico; Mr. Herrera is a dual citizen of the United States and Mexico, and took his family to Veracruz once or twice a year to visit his mother and other extended family; (2) Mrs. Herrera, killed in the accident along with her unborn child, was [*25] a Mexican national (but also a legal permanent resident of the United States and permanent resident of Illinois since); (3) at least one other non-plaintiff injured passenger was a Mexican national; (4) one of the minor plaintiffs is a Mexican national (but also a permanent resident of Illinois); (5) the 1987 Toyota truck involved in the accident was registered in Mexico to a Mexican resident (Mr. Herrera's nephew), who helped maintain the truck from December 2002 when it was brought to Mexico until August 2006 when the accident occurred; the accident was investigated by Mexican officials; and (6) the injured passengers and driver were treated at a Mexican hospital.

Texas has only two contacts with this case. First, it is Plaintiffs' chosen forum for this litigation, but that choice is given less deference here since Plaintiff did not file in their home forum. See *Piper Aircraft Co.*, 454 U.S. at 255 (presumption in favor of plaintiff's chosen forum applies with less force when the plaintiff or real parties in interest are foreign). The second contact is that Michelin conducts substantial business activity in Texas and "[t]he Texas legislature and courts have developed an almost paternalistic [*26] interest in . . . the regulation of the conduct of manufacturers that have business operations in the state." *Mitchell*, 913 F.2d at 250.

Contacts with Illinois in this case include: (1) it is the domicile and residence of all Plaintiffs, adult, minor, and the deceased; (2) it is the place where the 1987 Toyota truck was purchased in 2002; (3) it is the place in which Plaintiffs allege the subject tire in this case was purchased along with the truck; and (4) Michelin also conducts substantial business activity in Illinois.

In matters of a tort or personal injury, the situs of the injury determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship. See

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 146(1971). Given that the Second Restatement does not make the place of injury dispositive, and that the *lex locus delicti* rule was specifically overruled by the Supreme Court of Texas in *Gutierrez*, this Court also does not consider the place of the injury dispositive of the present choice of law issue. See *Aguiniga*, 9 S.W.3d at 260; see also *Gutierrez*, 583 S.W.2d at 318.

Turning now to the governmental interests [*27] of the implicated jurisdictions, the Court finds that Texas and Illinois share a similar interest in regulating the conduct of manufacturers who place defective products into their streams of commerce. See *Mitchell*, 913 F.2d at 250 ("[t]he Texas legislature and courts have developed an almost paternalistic interest in . . . the regulation of the conduct of manufacturers that have business operations in the state"); see also *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1404 (7th Cir. 1994) (noting that in Illinois those who sell "unreasonably dangerous" products fall within reach of strict products liability); *Townsend v. Sears, Roebuck, & Co.*, 227 Ill. 2d 147, 879 N.E.2d 893, 907, 316 Ill. Dec. 505 (Ill. 2007) (quoting an Illinois appellate court that found "Illinois has a strong interest in applying its products liability law to regulate culpable conduct occurring within its borders, induce the design of safer products, and deter future misconduct").

Mexico's interest, in contrast with those of Texas and Illinois, has been described by the Fifth Circuit as follows:

[t]he Mexican government has resolved a trade-off among the competing objectives and costs of tort law, involving interests of victims, of consumers, of manufacturers, [*28] and of various other economic and cultural values. In resolving this trade-off, the Mexican people, through their duly-elected lawmakers, have decided to limit tort damages [to create a hospitable climate for investment].

Vasquez, 325 F.3d at 675 n.14. Mexico's interest may therefore lie first and foremost in shielding Mexican corporate defendants from excessive tort liability. Texas state courts opinions have echoed the Fifth Circuit's sentiments in this regard.

For example, in *Gutierrez*, a plaintiff sued for personal injuries suffered in a two-car accident that occurred in the State of Chihuahua, Mexico. See *Gutierrez*, 583 S.W.2d at 313. The plaintiff and defendant driver were both residents of El Paso, Texas. See *id.* The Supreme Court of Texas eschewed *lex locus delicti* as the choice of law rule, adopted the "most significant relationship" test for torts cases, and found that:

[t]he [*29] only contact Mexico has with this case is the fact that accident occurred there. Further, it makes little sense to apply Mexico's measure of damages, which indexes the amount of recovery to the prevailing wages set by the labor law of that nation, when both *Gutierrez* and *Collins* are residents of Texas.

Id. at 319. The Court's language suggests that where no Mexican parties are involved, Mexican law should not apply, even if the accident occurred there.

Also, in *Ford Motor Co. v. Aguiniga*, the plaintiff brought wrongful death and products liability claims for a single-vehicle accident (caused by a faulty fuel pump relay) in Mexico that killed Texas residents on vacation there. See *Aguiniga*, 9 S.W. 3d at 255-56. The surviving passengers were treated in a Mexican hospital, and Mexican authorities investigated the crash. See *id.* at 260. The subject Ford van was manufactured in Michigan and sold to the plaintiff in Louisiana. See *id.* The *Aguiniga* court did not give great weight to the place of the injury because that "rule of law reflects the old mechanical rules of *lex locus delicti* and *lex locus contractus*]; . . . [t]he former was rejected by the Texas Supreme Court in *Gutierrez*." *Id.* In [*30] finding Texas was the only state with an interest, and rejecting Defendants' argument that Mexico has a strong interest in the operation of motor vehicles on its highways, the Court explained that:

[o]ur review of this case established that Mexico has no interest in this litigation. Ford is a United States corporation, not a Mexican corporation. Defendant Marta Velazquez was a Texas resident and a United States citizen. This fact establishes that neither defendant is a Mexican resident, citizen, nor business. Therefore, there is not a Mexican defendant who

would be protected by the limitations in damages under Mexican law.

Id. As in *Aguiniga*, Plaintiffs in this case are United States citizens who were on vacation in Mexico at the time of the accident; they were treated at a Mexican hospital and Mexican officials investigated the crash; the vehicle was purchased in the United States; like Ford, Michelin is a United States corporation; and there are no Mexican defendants. One point of distinction is that the Toyota truck used by Plaintiffs in this case was not "fortuitously" in Mexico, as could be said of the Ford van in *Aguiniga*. Mr. Herrera and his brother took the Toyota truck to Mexico [*31] for their family's use and for personal use on their vacations. Nevertheless, this Court concludes, like the *Aguiniga* court did, that Mexico has a lesser interest in the instant litigation because its governmental interests are not served where none of the plaintiffs are residents of Mexico, and there is no Mexican defendant that would benefit from its damages limitations.

That does not end the choice of law matter, however, because Mexico's lack of interest in this litigation cannot create one in Texas, where none otherwise exists. Indeed, having reviewed relevant Supreme Court case law on the due process limitations on choice of law, the Court agrees with Defendants that application of Texas law to this case would be "an unconstitutional exercise of extraterritorial jurisdiction . . ." Defs.' COL Mot. at 9. Specifically, the Court observes that in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981), the Supreme Court held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law, is neither arbitrary nor fundamentally [*32] unfair." In that case, a decedent living in Wisconsin, but working in Minnesota, took out multiple insurance policies in Wisconsin and was killed in Wisconsin when the motorcycle on which he was riding was rear-ended by another vehicle. *See id.* at 305-06. After his death his widow moved to Minnesota for reasons unrelated to the litigation, and there sued, which courts applied the Minnesota "stacking rule" to the insurance policy (permitting the stacking of separate uninsured motorists policies) in conflict with Wisconsin law. *See id.* In finding that the Minnesota court's application of Minnesota law to the widow's claims was not arbitrary or fundamentally unfair, the Supreme Court

emphasized that Allstate was aware when it issued the policy to decedent that he traveled to Minnesota daily to work for a Minnesota corporation, and that Allstate conducted substantial business activity in Minnesota. *See id.* at 313-18.

Four years later, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), the Supreme Court revisited the constitutional limitations on choice of law. In that case, a Kansas court applied Kansas contract and Kansas equity law to class action claims for interest on suspended [*33] royalties by leaseholders, notwithstanding that over 99% of gas leases and some 97% of the plaintiffs in the case had no apparent connection to Kansas except for the lawsuit. *See id.* at 799-803. The Kansas court refused to apply the laws of the states where the leases were located (mostly in Texas and Oklahoma) and found Phillips liable for interest on suspended royalties as a matter of Kansas law. *See id.* at 803. The Supreme Court held that while Kansas did have an interest in regulating Phillips' conduct in Kansas since Phillips owned property and conducted substantial business in the state, and oil and gas extraction was an important business to Kansas, and hundreds of Kansas plaintiffs were affected by Phillips suspension of the royalties (even though only a few leases in issue are located there), this was not enough for Kansas to have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class. *Id.* at 818-19.

In this case, the fact that Texas is Plaintiff's chosen forum and that the allegedly defective tire was sold by Michelin throughout the United States, presumably in Texas as well, does not create a "significant [*34] contact." Thus, it would be unfair to apply Texas law to this case. *See Hague*, 449 U.S. at 313. This conclusion is buttressed by the Supreme Court's decision in *Shutts*, which specifically rejected as a basis for applying Kansas law in that suit the fact that Phillips conducted substantial business in Kansas. *See Shutts*, 472 U.S. at 821-22. In determining whether a substantial connection exists, a court must focus on whether a state has a connection to the *specific* transaction or event giving rise to the litigation, not whether the Defendant generally has ties to the state. *See id.* Michelin has general business ties in Texas; none specific to this litigation. Plaintiffs have no ties at all to Texas. Accordingly, Texas law should not control this dispute.

Given the minimal interest of Mexico and the total lack of interest of Texas in this litigation, and Illinois' interest in protecting its citizens from defective products sold there, this Court concludes that there is a chance that Illinois law governs the Plaintiffs' claims in this case, under the most significant relationship test as applied in Texas.⁵ Accordingly, the Court hereby DENIES without prejudice Michelin's Motion to Apply [*35] the Laws of Mexico to Plaintiffs' claims (DE 22).

5 The Court makes this conclusion based upon Texas conflict of laws despite the fact that the court in the Northern District of Illinois to which this case is transferred may ultimately reach a different conclusion. Indeed, the Court's cursory examination of Illinois choice of law decisions indicates that while Illinois, like Texas, has adopted the Restatement Second's "most significant relationship" test, there is somewhat of a greater emphasis on the place of injury factor in Illinois, particularly where United States citizens travel to foreign resorts for vacation (which is not the case before this Court), as that factor promotes uniformity of result and certainty regarding the applicable law in future tort suits. *Compare Duncan*, 665 S.W.2d at 420 ("the [*lex locus delicti*] rule's ease of application and uniformity of result d[o] not justify its arbitrary and often inequitable results") with *Spinuzzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (Posner, J.) (applying Mexican law to suit between Illinois plaintiff and American corporation arising out of accident occurring in Mexican resort and stating that "in the absence of a [*36] choice of law clause in the contract between the injurer and the victim, *lex loci delicti* is the only choice of law that won't impose potentially debilitating legal uncertainties on businesses that cater to a multinational clientele while selecting the rule of decision most likely to optimize safety"); and *Townsend*, 879 N.E.2d at 902 (observing that the Restatement Second's presumptive rules - *i.e.*, the § 146 presumption in favor of the place of injury in personal injury suits - had been undervalued causing uncertainty and higher costs of litigation); but see *Esser v. McIntyre*, 169 Ill. 2d 292, 661 N.E.2d 1138, 1141-43, 214 Ill. Dec. 693 (Ill. 1996) (applying Illinois law to suit between Illinois plaintiff and Illinois defendant arising out of slip-and-fall accident occurring at Mexican

hotel and stating that "although both Mexico and Illinois had contacts with the action, Illinois had the most significant relationship, especially considering Illinois' interest in providing tort remedies to its injured citizens").

Having thus followed the Texas choice of law issue to its logical conclusion, the Court now returns to the forum non conveniens analysis for final resolution. To recap, of the private interest factors, none [*37] weigh strongly in favor of dismissal to Mexico. Of the public interest factors, neither court congestion, the interest in having localized controversies decided at home, nor the unfairness of burdening citizens in an unrelated forum with jury duty weigh in favor of dismissal to Mexico, even though those factors do not weigh in favor of a Texas forum either. The remaining public interest factors require the Court to consider the interest in having a forum that is at home with the law that must govern the dispute, and the avoidance of unnecessary choice of law problems. The Court then utilized the Texas approach to conflicts of law, and found that Illinois has a "significant relationship" to this litigation, or at least one that exceeds Texas's. Mexico also has a relationship that exceeds Texas's. An Illinois court would certainly be better versed in Illinois law than this Court, while the application of Mexican law would be foreign to both this Court and most Illinois courts. Further, there is a chance that a court in Illinois would be applying its own law, while there is no chance that this Court would be applying the law of Texas. Accordingly, this Court concludes that having a forum [*38] that has a chance to be at home with the law governing the dispute, potentially weighs against dismissal of this case to Mexico, but more importantly weighs against this Court retaining this case. For that and other foregoing reasons, the Court hereby DENIES Defendants' Motion to Dismiss Under the Doctrine of Forum Non Conveniens (DE 20).

IV. CONCLUSION

The fact that the accident giving rise to this suit occurred in Mexico is a factor for the Court to consider in the forum non conveniens analysis. Nevertheless, it does not require the Court to dismiss the suit based on forum non conveniens grounds, especially where all but one of the Plaintiffs is a United States citizen, all of the Plaintiffs are permanent residents of Illinois, and have been at all times relevant to this litigation, Michelin is United States corporation, the Toyota truck was

purchased in Illinois, the subject tire was manufactured in the United States, and according to Plaintiffs' complaint, sold to Plaintiffs along with the truck in Illinois. The private interest factors regarding sources of proof and witnesses are each split between the United States and Mexico, and the other two factors, view of the premises and [*39] practical problems, did not weigh in favor of dismissal. The current "split" does not equate to Mexico being a "substantially more convenient" forum. *In re Volkswagen*, 545 F.3d at 314. The public interest factors revealed that while Mexico has an interest in this litigation, it is a somewhat limited one, despite the accident having occurred there. Texas has none. *See id. at 318* (observing that the availability of an allegedly defective product in a particular judicial division does not give a court sitting there "a stake [] in the resolution of [the] controversy").

This Court, therefore, finds that the convenience of the parties and witnesses, in the interests of justice, require transferring this case to the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1404(a).⁶ That venue is "clearly more convenient" than the venue chosen by the Plaintiffs. *In re Volkswagen*, 545 F.3d at 315. In reaching this conclusion, the Court emphasizes that it is also denying the motion to apply Mexican law, but is doing so without prejudice. While an argument can certainly be put forth in favor of Illinois law, the choice of law analysis which the transferee court will engage in, [*40] may very well result in the granting of the Defendants' motion should it be reurged. Indeed, there is truly no bar for the transferee court to reconsider the dismissal of this matter to Mexico under the forum non conveniens factors as interpreted in the Seventh Circuit. An order transferring this action to the Northern District of Illinois, Eastern Division, will be entered separately.

⁶ The Fifth Circuit has held that the private and public interest factors a district court applies in a

forum non conveniens case are also appropriate for the determination of whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice. *See In re Volkswagen*, 545 F.3d at 315 (citing *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963)). The foregoing forum non conveniens analysis supports a finding that Illinois would be a more convenient forum for this litigation. Since the burden a moving party must meet to justify a venue transfer is less demanding than that a moving party must meet to warrant a forum non conveniens dismissal, *In re Volkswagen*, 545 F.3d at 314, a fortiori, the private and public interest factors in this [*41] case also support a finding that a venue transfer to Illinois is "[f]or the convenience of the parties and witnesses [and] in the interest of justice." 28 U.S.C. § 1404(a).

Additionally, the Court notes that while Brownsville, Texas may be more convenient for the witnesses in Mexico to reach, this Court has no more power to compel an uncooperative witness to appear than any other federal court, including those in Illinois. Thus, while the cost of travel to Illinois for the Mexican witnesses may be greater, it will at least be balanced by the fact that the Plaintiffs will be in their home forum and travel by the Defendants to Illinois will be comparable to travel to Texas.

SIGNED this 16th day of March, 2009.

/s/ Andrew S. Hanen

Andrew S. Hanen

United States District Judge



LEXSEE 2006 U.S. DIST. LEXIS 33975

**GEORGIA-PACIFIC CORPORATION, a Georgia Corporation, Plaintiff, v.
SENTRY SELECT INSURANCE COMPANY, BRIAN ELKINS, SVETLANA
ELKINS, and McLEOD EXPRESS, L.L.C., Defendants.**

Case No. 05-cv-826-DRH

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
ILLINOIS**

2006 U.S. Dist. LEXIS 33975

May 26, 2006, Decided

COUNSEL: [*1] For Georgia-Pacific Corporation, a Georgia corporation, Plaintiff: Farrah L. Anderson, Womick Law Firm - Carbondale, IL, Carbondale, IL.; Gregory G. Vacala, Rusin Maciorowski et al., Chicago, IL.

For Sentry Select Insurance Company, Defendant: Charles L. Joley, Donovan, Rose et al., Belleville, IL.

For McLeod Express LLC, Defendant: Alison Durphy, Holtkamp, Liese et al., St. Louis, MO.

JUDGES: David RHerndon, United States District Judge.

OPINION BY: David R. Herndon

OPINION

MEMORANDUM & ORDER

HERNDON, District Judge:

I. INTRODUCTION & BACKGROUND

Presently before the Court is a Motion to Remand, filed by plaintiff Georgia-Pacific Corporation ("Ga-Pac") (Doc. 10). Ga-Pac is a Georgia corporation with its principal place of business in Georgia. Ga-Pac transacts certain amounts of its business in Illinois (Doc. 2, P 1).

Defendant Sentry Select Insurance Company ("Sentry") is a Wisconsin corporation with its principal place of business in Wisconsin and also transacts business in Illinois (*Id.* at P 2; *see also* Doc. 1, P 9). Defendants Brian Elkins and Svetlana Elkins are both citizens of Illinois (Doc. 1, P 10). Defendant McLeod Express ("McLeod") is an [*2] Indiana corporation with its principal place of business in Illinois (*Id.*).

McLeod is a trucking company that on or about June 28, 2004, transported and delivered a trailer containing a product shipment obtained at Ga-Pac's Mt. Olive, Illinois, facility to a Procter & Gamble facility in St. Louis, Missouri. On or about July 1, 2004, Brian Elkins was required by his employer, USF Logistics, to unload the trailer containing the Ga-Pac material/product when it reached the Procter & Gamble facility. While unloading the trailer, Brian Elkins was allegedly injured. Brian Elkins and Svetlana Elkins, his wife, filed suit against both McLeod and Ga-Pac, alleging claims of negligence and requesting damages in an amount in excess of \$ 50,000 (hereinafter, the "Underlying Action") (*see* Doc. 2, PP 5-8 and Ex. B).

McLeod had entered into a Contract Carriage Agreement (the "Agreement") with Ga-Pac approximately a year prior to Brian Elkins's alleged accident (Doc. 2, PP9-10 and Ex. C). This Agreement required McLeod to carry certain insurance and to name Ga-Pac as "an additional insured on its Commercial General Liability and Automobile Liability policies"

(Doc. 2, p. 4). McLeod obtained [*3] this primary coverage insurance from Sentry in the form of a truckers/motor carrier policy of insurance to McLeod (the "Policy") (Doc. 2, P 4). McLeod was the named insured on the Policy.

Once Brian and Svetlana Elkins filed the Underlying Action, Ga-Pac tendered its defense to Sentry, stating it was covered as an "additional insured" under the Policy, but Sentry refused this tender of defense and immunity from Ga-Pac (Doc. 2, PP 20-21), apparently finding the circumstances and underlying claims excluded Ga-Pac from coverage. Denial of coverage prompted Ga-Pac to file a declaratory judgment action against Defendants in the Circuit Court of Madison County, Illinois, seeking a determination of whether Sentry owes a duty to defend and indemnify Ga-Pac regarding the Underlying Action (*see* Doc. 2).

Sentry removed Ga-Pac's case to federal court on November 17, 2005, asserting that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332 (Doc. 1). Sentry acknowledges that under 28 U.S.C. § 1441(b), this action, where jurisdiction is based upon diversity, is only removable "if none of the parties in interest properly joined [*4] and served as defendants is a citizen of the State in which such action is brought." Thus, because defendants McLeod,¹ Brian and Svetlana Elkins are all considered citizens of Illinois - the state in which Ga-Pac originally filed this action - removal would be improper. However, Sentry argues that McLeod, Brian and Svetlana Elkins should not be considered for removal purposes because they are nominal parties to the action (Doc. 1, PP 14 - 16). Additionally, Sentry claims an amount in controversy in excess of \$ 75,000 exists, as the Underlying Action seeks aggregate damages in the excess of \$ 100,000 and the Policy limits also exceed the jurisdictional amount (*Id.* at P 6).

¹ Under the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), a corporation "shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business"

Noting that nominal parties need not consent or join in the removal, [*5] Sentry states that it nevertheless made a request for all Defendants to consent to the removal (*Id.* at P 16). While McLeod has consented² (Doc. 4), Sentry explains that Brian and Svetlana Elkins did not give their consent "because they are taking the

position that [they] are not necessary parties to this declaratory judgment action" and so their consent is not required³ (Doc. 1, P 16). However, Sentry offers nothing to affirmatively substantiate this assertion.

2 In fact, McLeod has filed a Motion to Dismiss, asserting that it is not a necessary party to this action and that Plaintiff has not stated a claim against McLeod (Docs. 13 & 14).

3 The Court notes that there is no attorney of record listed for Brian and Svetlana Elkins on the case docket, nor have they filed any responsive pleadings to either the Notice of Removal or Ga-Pac's Complaint.

Ga-Pac challenges the removal, instead filing its Motion to Remand on December 13, 2005 (Doc. 10). Contrary to Sentry's belief, Ga-Pac argues that McLeod, [*6] Brian and Svetlana Elkins *are* necessary parties of interest, thereby making this case not removable under 28 U.S.C. § 1441(b) (Docs. 10 & 11). Ga-Pac further argues that the removal is defective because consent of all defendants (namely, Brian and Svetlana Elkins) was not obtained pursuant to 28 U.S.C. § 1446(b). Sentry has filed a Response in opposition to Ga-Pac's Motion to Remand (Doc. 25).

Examining the relevant pleadings, it is obvious that the central issue determining whether removal was proper is whether McLeod, Brian and Svetlana Elkins can be considered necessary parties of interest to Ga-Pac's suit. For the following reasons, Ga-Pac's Motion to Remand is granted (Doc. 10).

II. ANALYSIS

A. REMOVAL

The removal statute, 28 U.S.C. § 1441, is construed narrowly, and doubts concerning removal are resolved in favor of remand. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). Defendants bear the burden to present evidence of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997). [*7] "A defendant meets this burden by supporting [its] allegations of jurisdiction with 'competent proof,' which [the Seventh Circuit] requires the defendant to offer evidence which proves 'to a reasonable probability that jurisdiction exists.'" *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424,

427 (7th Cir. 1997)(citations omitted). However, if the district court lacks subject matter jurisdiction, the action must be remanded to state court pursuant to 28 U.S.C. § 1447(c).

Whether removal in this case was proper hinges on two aspects. First, as previously explained, under the removal statute, a case cannot be removed to federal district court based upon diversity jurisdiction if any of the necessary party defendants are citizens of the state in which the action was brought. 28 U.S.C. § 1441 (b). Therefore, because defendants McLeod, Brian and Svetlana Elkins are all Illinois citizens, removal would not be proper if they are deemed necessary parties to this action. Second, under 28 U.S.C. § 1446(b), each defendant must consent to removal affirmatively and officially [*8] communicate this to the Court. *See, e.g., Northern Ill. Gas Co. v. Airco Industrial Gases, Div. of Airco, Inc.*, 676 F.2d 270, 272 (7th Cir. 1982). One exception to consent is when the party defendant is considered unnecessary or nominal to the suit. *See Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1134 (7th Cir. 1981). Because it believes Brian and Svetlana Elkins are not necessary parties to this declaratory judgment action, Sentry argues it did not need to obtain their consent for removal.

B. NECESSARY PARTIES

No Seventh Circuit or Supreme Court case law appears to be on point with the central issue in this matter of whether McLeod, Brian and Svetlana Elkins are necessary parties to Ga-Pac's declaratory judgment suit against Sentry. The parties cite to several germane Illinois state appellate opinions and opinions from the United States District Court for the Northern District of Illinois, which the Court will use as interpretative guidance for its analysis.

In removing this case, Sentry relies on the holdings in both *Winklevoss Consultants, Inc. v. Federal Insurance Co.*, 174 F.R.D. 416 (N.D. Ill. 1997) [*9] and *Fathers of the Order of Mount Carmel, Inc. v. National Ben Franklin Insurance Co. of Illinois*, 697 F. Supp. 971 (N.D. Ill. 1988) (Doc. 1, P 12). Sentry asserts that the above cases support the theory that in a duty to defend declaratory judgment action brought by an insured party against the insurer, McLeod, Brian and Svetlana Elkins should be considered nominal parties, not considered for removal purposes. Opposing the removal, Ga-Pac cites to *Flashner Medical Partnership v.*

Marketing Management, Inc., 189 Ill. App. 3d 45, 54, 545 N.E.2d 177, 183, 136 Ill. Dec. 653 (1st Dist. 1989), supporting its remand argument that McLeod, Brian and Svetlana Elkins are instead necessary parties to this declaratory judgment action and, as such, removal was improper because 28 U.S.C. § 1441(b) does not allow a party to remove a case where a defendant is also a citizen of the same state in which the complaint was originally filed (Doc. 10, p. 4) and also because Brian and Svetlana Elkins did not consent to the removal (*Id.* at 3-5).

Essentially, Ga-Pac asserts that according to *Flashner*, tort claimants [*10] in an underlying action have interests in the outcome of a declaratory judgment action regarding insurance coverage, as "a declaration of non coverage would eliminate a source of funds" (*Id.*). Therefore, Ga-Pac argues McLeod, Brian and Svetlana Elkins meet the joinder requirements under *FEDERAL RULE OF CIVIL PROCEDURE 19* to show they are necessary parties to the instant action, explaining that if they were absent from the suit, their interests would not be adequately protected by either Ga-Pac or Sentry (*Id.*).

1. Case Law

a. *Fathers of the Order of Mount Carmel, Inc. v. National Ben Franklin Insurance Co. of Illinois*

In *Fathers*, the district court noted that "[a]n injured party is a necessary party in a declaratory judgment action brought by an insurer against the insured regarding the insurer's obligation to provide coverage." *Fathers*, 697 F. Supp. at 973 (citing *M.F.A. Mut. Ins. Co. v. Cheek*, 66 Ill.2d 492, 363 N.E.2d 809, 811, 6 Ill. Dec. 862, 864 (1977)). Explaining the Illinois Supreme Court's reasoning, the *Fathers* court stated that the injured party was necessary because there was [*11] a distinct likelihood that the insured party would fail to appear in the case filed by the insurer, thereby eliminating the injured party's chances of proving the "viability of the [insurance] policy." *Id.* However, the *Fathers* court reasoned that if the declaratory judgment action had instead been filed by the *insured* against the *insurer*, this would adequately serve to protect the injured parties' interests because it would clearly indicate the insured party wished to properly obtain coverage. *Id.*

b. *Flashner Medical Partnership v. Marketing Management, Inc.*

One year later, the Illinois Appellate Court decided

Flashner. The plaintiff insureds, Flashner Medical Partnership (the individual partners and the corporation itself), filed a suit seeking a declaratory judgment that defendant insurer, Chicago Insurance Company ("CIC"),⁴ had a duty to defend and indemnify the plaintiff insureds in an underlying medical malpractice action. *Flashner*, 189 Ill. App. 3d at 47, 545 N.E.2d at 179, 136 Ill. Dec. at 655. Also at issue was whether the plaintiff insureds were covered under the CIC policy for certain underlying [*12] claims due to various waiver and estoppel issues. *Id.* at 49-50, 545 N.E.2d at 180-81, 136 Ill. Dec. at 656-57.

⁴ CIC was actually a reinsurer, as the plaintiff insured's medical malpractice insurer had been declared insolvent.

One of the issues examined on appeal was whether the underlying tort claimants should be considered necessary parties to the declaratory judgment action. *Id.* As coverage was an issue at controversy in the plaintiff insureds' declaratory judgment action, the state appellate court found the underlying tort claimants were necessary parties because they had a present substantial interest in the outcome of the litigation, as "a declaration of non-coverage would eliminate a source of funds." *Id.* at 54, 545 N.E.2d at 183, 136 Ill. Dec. at 659. Simply stated, the court noted that "[w]here questions of liability insurance coverage are litigated, claimants against the insured are ordinarily necessary parties to the action." [*13] *Id.* (internal citations omitted). Recognizing that even though the underlying tort claimants' interests were likely aligned with the plaintiff insureds' interests in the determination of coverage under the CIC policy, because the plaintiff insureds had sued several other parties for contractual and fraud issues, the court opined, "the success of plaintiff [insureds]' claims against the other defendants might depend upon a determination of non-coverage. Plaintiff [insureds], therefore, might choose to pursue a litigation strategy that could adversely affect the absent tort claimants." *Id.*

c. *Winklevoss Consultants, Inc. v. Federal Insurance Co.*

Nearly a decade later, the United States District Court for the Northern District of Illinois examined the issue of whether underlying tort claimants were considered necessary parties in a declaratory judgment action regarding an insurer's duty to defend and indemnify. See *Winklevoss Consultants v. Federal Ins.*

Co., 174 F.R.D. 416 (1997). In *Winklevoss*, the plaintiff insureds sought a declaratory judgment that an insurance policy issued by the defendant insurer required the defendant [*14] to defend and indemnify them in a separate underlying action brought against the plaintiffs for misappropriation of trade secrets. *Id.* at 416-17. The defendant insurer filed a motion to dismiss the plaintiffs' declaratory judgment action for failure to join an underlying tort claimant as a necessary party in accordance with **FEDERAL RULE OF CIVIL PROCEDURE 19**.

The district court first clarified that under Seventh Circuit precedent, "the issue of whether an insurer must indemnify its insured is not ripe until the underlying litigation ends." *Id.* at 417 (citing *Travelers Ins. Co. v. Penda Corp.*, 974 F.2d 823, 833 (7th Cir. 1992); *United Nat'l Ins. Co. v. Dunbar & Sullivan Dredging Co.*, 953 F.2d 334, 338 (7th Cir. 1992)). This is because the duty to indemnify "turns upon the facts of the underlying suit" and therefore "is triggered, only after the insured becomes legally obligated to pay damages in the underlying action." *Id.* (citations and internal quotations omitted). In contrast, the duty to defend "hinges on a liberal reading of the underlying complaint and thus can be determined on the [*15] pleadings." *Id.* (citations and internal quotations omitted). Therefore, the *Winklevoss* court promptly ordered that the portion of the declaratory judgment action regarding the duty to indemnify be stayed until the underlying tort action was decided, and thereafter considered the defendants' motion to dismiss "only with respect to the duty to defend portion of the litigation." *Id.*

Commencing its analysis, the district court examined the requirements of **Rule 19** joinder. *Id.* Under these **Rule 19(a)** requirements, the *Winklevoss* court found that the underlying tort claimant was *not* a necessary party to the plaintiff insureds' declaratory judgment action against the defendant insurer, "much less indispensable under **Rule 19(b)** . . ." *Id.* Noting that although the Seventh Circuit had not yet addressed the issue, the district court cited to a number of other cases which hold that a plaintiff suing the insured (the "injured party") is not a necessary party to a declaratory judgment action that the insured brings to determine the insurer's duty to defend. *Id.* at 418.⁵

⁵ *Winklevoss*, citing in support, *Fathers of the Order of Mount Carmel, Inc. v. National Ben Franklin Ins. Co.*, 697 F. Supp. 971, 973 (N.D.

Ill.1988); *Evangelical Lutheran Church v. Atlantic Mutual Ins. Co.*, 173 F.R.D. 507, 508-09 (N.D. Ill.1997); *Americas Ins. Co. v. City of Chicago*, 1997 WL 51436, at *1-2 (N.D. Ill. Feb. 3, 1997); *Providence Hosp. v. Rollins Burdick Hunter of Ill., Inc.*, 1993 U.S. Dist. LEXIS 9873, 1993 WL 278552 (N.D. Ill. July 20, 1993); *Sliwa v. Hunt*, 1992 U.S. Dist. LEXIS 17648, 1992 WL 346425, at *2 (N.D. Ill. Nov. 18, 1992).

[*16] The district court then discussed *Fathers* and its rationale behind distinguishing itself from the earlier Illinois Supreme Court holding in *M.F.A. Mutual Ins. Co. v. Cheek*, in which the insurer had sued the insured to determine its coverage obligations. *Id.* (emphasis in original). The Illinois Supreme Court, in *M.F.A.*, had determined that the underlying tort claimant was a necessary party to the declaratory judgment action because its interests in the viability of the insurance policy should not be defeated if the defendant insured chose not to appear, resulting in a default judgment. *Id.* (citing *M.F.A. Mutual Ins. Co.*, 66 Ill.2d at 494, 363 N.E.2d at 811, 6 Ill. Dec. at 864). Yet the *Winklevoss* court noted the distinguishing fact between *Fathers* and *M.F.A.* was that in *Fathers*, it was the insured party who filed suit against the insurer. *Id.* Therefore, the district court believed that "the [plaintiff] insureds' act of bringing the action in favor of a duty to defend belied any risk that they would prejudice the injured parties by failing to appear, [*17] and, as such, adequately protected the injured parties' position." *Id.*

Observing the finding in *Fathers*, the *Winklevoss* court reached the same conclusion though its *Rule 19(a)* analysis of the facts of the declaratory judgment action. The district court determined that complete relief could be accorded without the underlying tort claimant as a party to the suit because all the plaintiff insureds sought was a declaration that the defendant insurer must defend them in the underlying action -- as a purely legal analysis involving the language of the insurance policy and applicable law, the underlying tort claimant's absence would not hinder that type of analysis. *Id.* Secondly, the district court found that the underlying tort claimant had no "stake" in whether the plaintiff insureds were defended by lawyers supplied by the defendant insurer or its own retained attorneys. *Id.* at 418-19 (citing *Flashner*, 189 Ill. App. 3d at 54, 545 N.E.2d at 183, 136 Ill. Dec. at 659).

Therefore, *Winklevoss* made it clear that it found the underlying tort claimant was not a necessary or indispensable party under the joinder [*18] requirements of *Rule 19*, however, only with regard to the duty to defend portion of the plaintiff insureds' declaratory judgment action. *Id.* at 419. To the contrary, if the actions dealt with more than just the duty to defend -- coverage, for instance -- *Winklevoss* indicates that the underlying tort claimant would be a necessary party as such actions "ha[ve] the potential to eliminate a source of funds for the injured claimant." *Id.* ("[B]ecause all these actions⁶ dealt with coverage (not just the duty to defend), they had the potential to eliminate a source of funds for the injured [underlying] claimant.").

⁶ *Winklevoss* citing the following cases: *See M.F.A. Mutual Ins. Co. v. Cheek*, 66 Ill.2d 492, 494-95, 6 Ill. Dec. 862, 863-64, 363 N.E.2d 809, 810-11; *Williams v. Madison County Mutual Auto. Ins. Co.*, 40 Ill.2d 404, 405-08, 240 N.E.2d 602, 603-04 (1968); *Allied American Ins. Co. v. Ayala*, 247 Ill. App. 3d 538, 540, 543, 186 Ill. Dec. 717, 721, 723, 616 N.E.2d 1349, 1353, 1355 (2d Dist. 1993); *American Home Assurance Co. v. Northwest Indus., Inc.*, 50 Ill. App. 3d 807, 808, 812, 8 Ill. Dec. 570, 572, 574-75, 365 N.E.2d 956, 958, 960-61 (1st Dist.1977).

[*19] 2. Whether Underlying Claimants Are Necessary Parties to a Declaratory Judgment Action Brought by an Additional Insured Against an Insurer

To summarize, the case law discussed within this opinion generally holds that underlying tort claimants are not necessary parties to a declaratory judgment action regarding an insurer's duty to defend when the action is filed by the insured. However, if the declaratory judgment action is filed instead by the insurer or involves a determination of insurance coverage or both, then the underlying claimant is considered a necessary party. Moreover, a claim regarding a duty to indemnify is generally not ripe until the underlying litigation is complete, so until that occurs, the indemnity portion of a declaratory judgment lawsuit is typically stayed or dismissed with leave to re-file. Lastly, determination of whether a party is necessary or indispensable to a suit removed to federal court follows federal law, even in a diversity case. *See Winklevoss*, 174 F.R.D. at 419 (citing *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993); *Sliwa v. Hunt*, 1992 U.S. Dist. LEXIS 17648,

1992 WL 3469425 at *1 (N.D. Ill. 1992)). [*20]

The Court's analysis of whether McLeod, Brian and Svetlana Elkins are necessary parties must be determined pursuant to *Rule 19(a)*.

Rule 19(a) states that a party is necessary to a suit if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

(i) as a practical matter impair or impede the person's ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

a. Duty to Defend

Determining the duty to defend "is a question resolved by comparing the allegations of the underlying complaint to the insurance policy." *Connecticut Indem. Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 349 (7th Cir. 2003)(citing *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 531 655 N.E.2d 842, 847, 211 Ill. Dec. 459, 464 (1995)). If the underlying complaint [*21] alleges facts within or potentially within policy coverage, the insurer is obligated to defend its insured, even if the allegations are groundless, false, or fraudulent. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 578 N.E.2d 926, 930, 161 Ill. Dec. 280 (Ill. 1991). Furthermore, if the insurer relies on an exclusionary provision, it must be "clear and free from doubt" that the

policy's exclusion prevents coverage. See *Bituminous Cas. Corp. v. Fulkerson*, 212 Ill. App. 3d 556, 571 N.E.2d 256, 262, 156 Ill. Dec. 669 (Ill. App. Ct. 1991). The Court must liberally construe the underlying complaint and the insurance policy in favor of the insured. See *United States Fidelity & Guaranty Co.*, 578 N.E.2d at 930.

i. Brian and Svetlana Elkins

It is clear from the Policy issued by Sentry to McLeod that Ga-Pac is specifically listed as an additional insured under an endorsement to the Policy (see Doc. 2-3, p. 8). Resolving Ga-Pac's duty to defend claim will only determine who is in charge of Ga-Pac's legal representation -- this will not impede or impair the interests of Brian and Svetlana Elkins in their underlying [*22] suit. Additionally, complete relief regarding the duty to defend can be accorded in their absence.

Following the guidance provided by the available body of case law and analyzing the facts in accordance with *Rule 19*, because this declaratory judgment action was filed by an *insured* (albeit an "additional" insured), Brian and Svetlana Elkins, as the underlying claimants, are not necessary parties for the duty to defend portion of this litigation as their interests will be adequately protected by Ga-Pac. The duty to defend claim is resolved by merely interpreting the Policy with the Underlying Action. Therefore, Brian and Svetlana Elkins will not detract the Court from reaching a just outcome in their absence -- only their filed complaint is required, which is already part of the record in this matter.⁷

⁷ Because the Court does not find Brian and Svetlana Elkins to be necessary parties to Ga-Pac's duty to defend portion of the litigation in this case, it is unnecessary to determine whether they are considered indispensable parties under *Rule 19(b)* at this point.

[*23] ii. McLeod

Even though an argument could be made that McLeod, as the named insured on the Policy, is *not* a necessary party to the duty to defend portion of Ga-Pac's suit,⁸ the Court believes the more appropriate view to be otherwise in this instance. This is not a subrogation action where the insurer is standing in the shoes of the named insured for purposes of filing suit against potential tortfeasors, thereby, at times, rendering the named

insured an unnecessary party. Instead, an additional insured is bringing action against the insurer. Sentry has already agreed to defend McLeod in the Underlying Action but has denied a tender of defense from Ga-Pac.

8 In fact, the Court notes that McLeod has filed a Motion to Dismiss, its argument being that because it believes it is not a necessary party and because Ga-Pac does not state a claim against it, it should be dismissed from this action. However, the Court cannot technically consider motions filed subsequent to the removal if it is determined that there is no jurisdiction and the case should be remanded.

[*24] Reviewing the Policy, the Court observes that the endorsement naming Ga-Pac as an additional insured extends its Policy coverage for "Bodily Injury and Property Damage Liability . . ." (Doc. 2-3, p. 8). As the Underlying Action deals with liability for Brian Elkins's alleged personal injuries, the applicable coverage at issue is the Bodily Injury section of the Policy. Section II of the Policy is entitled "Liability Coverage" (Doc. 204, p. 11). Part of this section states that Sentry's "duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements" (*Id.*).

The Court feels that under a *Rule 19* analysis, McLeod is a necessary party concerning the duty to defend portion of this case. If the Court were to determine a duty to defend Ga-Pac exists under the Policy, it could eventually lead to a further finding of a duty to indemnify, which would have direct bearing on Sentry's coverage amount for McLeod under the Policy. Therefore, McLeod's interests would not be adequately represented by either Sentry or Ga-Pac if it were absent from this suit. Moreover, a judgment regarding Ga-Pac's duty to defend claim [*25] will make declaration concerning the scope and interpretation of the Policy -- McLeod's Policy -- which directly affects McLeod. As such, the Court believes it to be a necessary party under *Rule 19(a)*.⁹

9 Because McLeod was served and does not object to being served and made a party to this suit, an analysis of whether it can be considered an indispensable party under *Rule 19(b)* is unnecessary.

b. Duty to Indemnify

The duty to indemnify is another matter entirely. Whether Sentry has a duty to indemnify Ga-Pac as an additional insured under the Policy "is only ripe for consideration if [Ga-Pac] has already incurred liability in the [Underlying Action] against it." *Premcor USA, Inc. v. American Home Assurance Co.*, 400 F.3d 523, 530 (7th Cir. 2005)(citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill.2d 90, 127, 607 N.E.2d 1204, 1221, 180 Ill. Dec. 691, 708 (1992)). A duty to indemnify only arises "if the insured's activity and the resulting [*26] loss or damage *actually* fall within the [Policy's] coverage." *Outboard Marine Corp.*, 154 Ill.2d at 128, 67 N.E.2d at 1221, 180 Ill. Dec. at 708 (emphasis in original) (internal citations omitted). Therefore, the duty to indemnify is narrower in scope than a duty to defend. *Id.* (internal citations omitted).

i. Brian and Svetlana Elkins

Applicable case law, as previously illustrated, finds that when dealing with an issue of insurance coverage, the underlying claimants are necessary parties, whether the declaratory judgment action is filed by the insured or insurer. Therefore, when Ga-Pac's duty to indemnify claim becomes ripe, Brian and Svetlana Elkins as the underlying claimants will be considered necessary parties.¹⁰

10 The Record does not indicate whether Brian and Svetlana Elkins have been served in this action. However, because Ga-Pac's duty to indemnify claim is not yet ripe, there is no need to currently determine whether Brian and Svetlana Elkins are indispensable parties under *Rule 19(b)*.

[*27] ii. McLeod

Similarly with the named insured under the Policy, when Ga-Pac's duty to indemnify claim becomes ripe, it will be in McLeod's best interest to be a present party to the action. It appears that McLeod's Policy does not allot a separate coverage limitation for additional insureds, such as Ga-Pac. Therefore, any coverage/indemnification funds determined to be owed by Sentry to Ga-Pac will directly affect the amount of coverage/indemnification for McLeod, if it is found partially liable in the Underlying Action. McLeod's own separate and distinct interest regarding coverage under the Policy renders it a necessary party to the duty to indemnify portion of Ga-Pac's declaratory judgment action.

c. Whether Removal Was Proper

Even if the Court were to stay Ga-Pac's duty to indemnify claim until the Underlying Action is complete, or to dismiss it with leave to later re-file, the fact remains that the Court finds McLeod is a necessary party to the duty to defend portion of this suit. Because McLeod can be considered an Illinois citizen, as its principal place of business is in Illinois, the Court finds this case is not removable under *28 U.S.C. § 1441(b)*, [*28] even though Sentry did properly obtain McLeod's consent to the removal. *See, e.g., Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)*. The Court also observes that once Ga-Pac's duty to indemnify portion of the litigation were ripe for determination, McLeod and Brian and Svetlana Elkins would *all* be considered necessary parties, which would further support a finding that this case was not removable under *28 U.S.C. § 1441(b)*. Therefore, the case must be

remanded pursuant to *28 U.S.C. § 1447(c)*.

III. CONCLUSION

For the reasoning as stated within this Order, plaintiff Ga-Pac's Motion to Remand (Doc. 10) is **GRANTED**. This case is hereby **REMANDED** back to the Circuit Court for the Third Judicial Circuit of Madison County, Illinois, with each party is to bear its own costs.

IT IS SO ORDERED.

Signed this 26th day of May, 2006.

/s/ David RHerndon

United States District Judge