No. _____

In The
Supreme Court of the United States

YAO-WEN CHANG, et al.,

Petitioners,

versus

BAXTER HEALTHCARE CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD L. M. GOLDMAN
Counsel of Record
MICHAEL L. BAUM
FRANCES M. PHARES
BAUM, HEDLUND, ARISTEI & GOLDMAN
12100 Wilshire Blvd., Suite 950
Los Angeles, CA 90025
(310) 207-3233
RGoldman@baumhedlundlaw.com

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal multidistrict statute, 28 U.S.C. §1407(a), confers upon a transferee court the authority to decide individualized case-specific pretrial issues such as *forum non conveniens* and statute of limitations notwithstanding the doctrine of *Lexecon** which prohibits a transferee court from self-assignment of a transferred case for trial.

2. Whether an action in federal court brought by foreign plaintiffs against American defendants has been wrongly dismissed on the ground of *forum non conveniens* when a court has affirmatively acknowledged that plaintiffs' chosen forum is convenient for defendants and made no findings that the forum is either vexatious and oppressive or inappropriate.

---

* *Lexecon Inc. et al. v. Milberg Weiss Bershad Hynes & Lerach et al.*, 523 U.S. 26, 118 S. Ct. 956 (1998).

PARTIES TO THE PROCEEDINGS

The petitioners in this case are:

Chang, Yao-Wen	*Chang I, II*
Chen, Ching-Yen	*Chang I, II*
Chen, Tien-You and Shih, M.	*Chang I, II*
Chen, Tseng-Ying, individually and as successor in interest on behalf of Chen, Hsi-Chang	*Chang I, II*
Chiu, Chien-Fu-Me, individually and as successor in interest on behalf of Chiu, Feng-Ching	*Chang I, II*
Chiu, Yue-Feng	*Peng II*
Chiu, Yue-Feng, individually and as successor in interest on behalf of Wu, R-H	*Peng II*
Ho, Chih-Cheng	*Chang I, II*
Ho, Chih-Lung and Ho, Hsueh-Ying, individually and as successors in interest on behalf of Ho, Chih-Cheng	*Ho, Chang II*
Hsieh, Yung-Tso and Hsieh, Cheng-Ju-Yu, individually and as successors in interest on behalf of Hsieh, Tung-Cheng	*Chang I, II*
Huang, Chen-Chen	*Chang I, II*
Huang, Meng-Yuan, individually and as successor in interest on behalf of Tsai, Chih-Ming	*Chang I, II*

PARTIES TO THE PROCEEDINGS – Continued

Huang, Yu-Lan and Chen, Peng-Chang, individually and as successors in interest on behalf of Chen, Neng-Tsung	*Chang I, II*
Huang, Yung-Hsaio	*Chang I, II*
Lei, C-L, individually and as successor in interest on behalf of Ho, D-W	*Peng II*
Li, A., individually and as successor in interest on behalf of Tsai, Song-Ming	*Chang I, II*
Li, Chang-Hsing and Wang, S.	*Chang I, II*
Li, Ping and Li, Liu-Shu, individually and as successors in interest on behalf of Li, Chung-Chang	*Chang I, II*
Li, Po-Wen	*Chang I, II*
Li, Shuen-An	*Chang I, II*
Liao, Chia-Hung	*Chang I, II*
Lin, Chen-Ming and Lin, C-F, individually and as successors in interest on behalf of Lin, Chen-Hsiang	*Chang I, II*
Lin, Pao-Hsin, individually and as successor in interest on behalf of Lin, Chih-Hsien	*Chang I, II*

PARTIES TO THE PROCEEDINGS – Continued

Lin, Yi-Ling, individually and as successor in interest on behalf of Lin, Chih-Ming	*Chang I, II*
Liu, Chin-An and Chang, Yu-Yen, individually and as successors in interest on behalf of Liu, Chia-Wang	*Chang I, II*
Liu, Pai-Chao, individually and as successor in interest on behalf of Liu, Hsin-Tsun	*Chang I, II*
Liu, Yung-Kuei and Chuang, L.	*Chang I, II*
Peng, Da'gan (Da Gung)	*Peng I, II*
Su, W-N and Su-Chang, G-H, individually and as successor interest on behalf of Su, G-Y	*Peng II*
Tai, A-Kan, individually and as successor in interest on behalf of Tai, Ming-Tung	*Chang I, II*
Tsai, Yuan-Tsan and Huang, Mei-Chih, individually and as successors in interest on behalf of Tsai, Hung-Ta	*Chang I, II*
Tseng, Chen Wei	*Chang I, II*
Wang, Ming-Yung	*Chang I, II*
Wu, Mei-Chun	*Chang I, II*
Wu, Mei-Chun, individually and as successor in interest on behalf of Lai, Chao-Yang	*Chang I, II*

PARTIES TO THE PROCEEDINGS – Continued

Yang, D-C	*Peng II*
Yang, Ming-Ching, individually and as successor in interest on behalf of Huang, Yu-Ting	*Chang I, II*
Yu, Wen-Fu	*Chang I, II*

The Petitioners are HIV-infected hemophiliacs or their surviving family members who are citizens and residents of Taiwan (hereinafter "Plaintiffs").

Respondents are Bayer Corporation and its predecessors Miles, Inc. and Cutter Biological; and Baxter Healthcare Corporation and its Hyland Division (hereinafter "Defendants").

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The order of the Seventh Circuit denying plaintiffs' petition for rehearing *en banc* is reprinted here at Appendix ("App.") 103. The final judgment of the Seventh Circuit affirming the district court is reprinted here at App. 18. The opinion of the Seventh Circuit is reported at *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010) and reprinted here beginning at App. 1.

The final judgment order of the district court granting defendants' *forum non conveniens* motion is reprinted here at App. 19. The district court's decision on Defendants' Renewed Taiwan *Forum Non Conveniens* Motion is reported at *In re Factor VIII or IX Concentrate Blood Products Liability Litigation,* 2009 WL 2143764 (N.D. Ill. 2009) and reprinted here beginning at App. 25.

The final judgment order of the district court granting defendants' statute of limitations motion is reprinted here at App. 39. The district court's decision on Defendants' Motion for Summary Judgment on

Taiwan Plaintiffs' Tort Claims on Limitations Grounds is reported at *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 2009 WL 804018 (N.D. Ill. 2009) and reprinted here beginning at App. 47.

The district court's decision denying defendants' Taiwan *Forum Non Conveniens* Motion is reported at *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 595 F. Supp.2d 855 (N.D. Ill. 2009) and reprinted here beginning at App. 62.

STATEMENT OF JURISDICTION

The court of appeals denied the plaintiffs' petition for rehearing and rehearing *en banc* on April 26, 2010. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1407(a) states in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the Judicial Panel on multidistrict litigation authorized by this section upon its determination that transfers

> for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the Panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 7.6 states in pertinent part:

> (a) Actions terminated in the transferee district court by valid judgment, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, shall not be remanded by the Panel and shall be dismissed by the transferee district court. . . . (b) Each action transferred only for coordinated or consolidated pretrial proceedings that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial. . . . (c) The Panel shall consider remand of each transferred action or any separable claim, cross-claim, counterclaim or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings on (i) motion of any party, (ii) suggestion of the transferee district court, or (iii) the Panel's own initiative, by entry of an order to show cause, a conditional remand order or other appropriate order. (d) The Panel is reluctant to order remand

> absent a suggestion of remand from the transferee district court. . . .

STATEMENT OF THE CASE

In May of 2004 plaintiffs filed actions in California alleging that defendants improperly manufactured and sold HIV-contaminated anti-hemophilia medication ("AHF") which infected Taiwanese hemophiliacs with HIV/AIDS. These cases were transferred to a Chicago MDL court and dismissed on individualized case-specific grounds. When it dismissed these actions on case-specific grounds, the MDL-transferee court circumvented multidistrict litigation provisions which limit its authority to centralized and coordinated management of common discovery and pretrial proceedings.

The purpose of an MDL proceeding is to efficiently handle issues which are common to an entire group of litigants. 28 U.S.C. §1407, the multidistrict litigation statute, does not give an MDL court authority to determine individualized case-by-case pretrial issues. Instead, it restricts that authority to the management of pretrial proceedings for the common benefit of all litigants to prevent, for instance, hundreds or thousands of plaintiffs from trying to take the deposition of the same few people.

This Court's landmark ruling in *Lexecon, supra*, defined the limits of a transferee court's authority as originally established by Congress: A transferee court cannot make self-assignments of transferred cases for

trial. Implicit in this ruling is that a transferee court does not have Congressional authority to examine individualized evidence to determine individualized legal claims. Interpreting the term "trial" as referring only to what happens after a jury is selected is too narrow a reading. Black's Law Dictionary defines "trial" as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding." By Black's broader definition, individualized case-specific issues such as dispositive motions on *forum non conveniens* and statute of limitations are clearly trial proceedings. The federal judiciary's centralized multidistrict case-management system was never intended to include individualized case-by-case examinations of evidence and determinations of legal claims. Congress has explicitly left these individualized trial matters to the transferor court – self-assignment for any trial purposes whatsoever is simply beyond the scope of a transferee court's authority.

Examining and deciding individualized issues on a case-by-base basis is not the purpose for which the multidistrict statute was enacted, and no common efficiency is served when the transferee court undertakes such a task. Indeed, as the lower court here acknowledged, "[t]he *forum non conveniens* analysis is *forum-specific*, requiring a close examination of the adequacy of the proposed alternative" (emphasis supplied).[1] A transferee court's action in reaching

[1] *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, U.S.D.C., N.D. Ill., 93 CV 7452, Document 1832, at 3.

beyond that authority to examine case-specific evidence and make individualized legal decisions such as *forum non conveniens* or statute of limitation cannot be reconciled with Section 1407, the rule of *Lexecon* that an MDL-transferee court may not transfer a case to itself for trial, or a plaintiff's historic right to select his forum. Failure to implement *Lexecon's* rationale allows MDL courts to "parlay[ ] a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." *Lexecon*, Kozenski, J. dissenting.[2]

Review of the basic jurisdictional question of whether an MDL court has authority to determine individualized, case-specific issues is necessary to adjust the current practices of MDL courts to conform with the original purposes of Congress in establishing the multidistrict litigation statute, *Lexecon's* doctrine, and a plaintiff's historical right to select his forum.

Moreover, Section 1407 and Judicial Panel on Multidistrict Litigation ("JPML") Rule 7.6(b) specifically provide that "each action transferred only for coordinated or consolidated pretrial proceedings that has not been terminated in the transferee district court *shall* be remanded by the Panel to the transferor district for trial . . . " (Rule 7.6(b) (emphasis

---

[2] *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation. Lexecon Inc. et al. v. Milberg Weiss Bershad Hynes & Lerach et al.*, 102 F.3d 1524, 1540 (1996).

supplied). When an MDL-transferee court determines that pretrial proceedings are complete and suggestion of remand is appropriate but then *solicits objections* to a suggestion of remand, and – notwithstanding that plaintiffs agree with the Court – fails to suggest remand because defendants re-urge the same motion the Court had already decided, it has circumvented the mandate of the federal transfer statute that a case *shall* be remanded to the transferor district for trial at the conclusion of coordinated pretrial proceedings. Without this suggestion from the transferee court, the Panel generally will not order remand. *See* Rule 7.6(d).

Despite explicitly finding that a suggestion of remand was appropriate, the MDL court did not follow through and make the suggestion, choosing instead to keep the cases, examine the evidence, and dismiss plaintiffs' claims on *forum non conveniens* and statute of limitations grounds. Forcing plaintiffs to litigate and re-litigate these individualized evidentiary issues in transferee courts is nothing short of a "remarkable power grab" (*Lexecon*, *id*., at 1540, Kozenski, dissenting) in direct violation of U.S.C. §1407(a), which should be corrected.[3]

---

[3] Similarly to the *Lexecon* plaintiffs, the Taiwanese plaintiffs did not file a motion to remand directly to the MDL Panel. As the court in *Lexecon* observed, "[t]he Ninth Circuit stopped short of expressly inferring a waiver from Lexecon's failure to file a motion for remand directly to the Panel, and any inference of waiver would surely have been unsound . . . In this case . . .

(Continued on following page)

Further, the lower court went well beyond its Congressionally mandated authority when it improperly applied the transferor court's law to dismiss plaintiffs' claims. MDL rules require the law of the home district to be applied in diversity cases. Because a strong potential exists that a transferee court which may have less experience or little or no experience with transferor court's law may mis-interpret or misapply that law – particularly when it is complex or nuanced – sound policy is behind Congress's excluding of individualized case-specific matters from the authority of the MDL court. Here, for example, the Seventh Circuit affirmed the MDL court's interpretation of the home court's "borrowing" statute, governmental-interest test for determining conflicts of law, equitable tolling rules, and *forum non conveniens*, even though the lower court's decision conflicted with the home district's own jurisprudence. The inequities of allowing an MDL court to determine issues of home-district law are apparent: plaintiffs are denied their historic right to select the forum and have their case heard by a court familiar with the applicable law.

---

one can say categorically that a motion before the Panel would have failed; the transferee court denied Lexecon's motion for a remand suggestion simultaneously with an order assigning the case to itself for trial . . ." Likewise, the transferee court rejected the Taiwanese plaintiffs' assent to a suggestion of remand simultaneously with an order assigning dispositive motions to itself for trial. Any inference of waiver by the Taiwanese plaintiffs would also be "unsound."

In short, it is paramount – and the federal rules dictate – that individualized trial issues must be heard by the home court. Despite this directive, MDL courts routinely decide these individualized case-specific issues under the guise of "coordinated or consolidated pretrial proceedings," thereby converting MDL oversight into a warehousing, docket-clearing process. This widespread practice prevents cases from ever being returned to their home district, as the federal rules intended. As Justice Goldberg observed in *Van Dusen*: "[W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack,* 376 U.S. 612, 638-639 (1964). The High Court's review of this egregious practice, which circumvents Congressional mandate, is required to realign multidistrict litigation proceedings with their original purpose – centralized management of consolidated or coordinated pretrial proceedings.

The Seventh Circuit's opinion raises a second important issue of when a court may dismiss a case in favor of a suitable alternative forum. The United States Supreme Court set out the federal doctrine of

forum non conveniens in *Gilbert, Koster, Piper*, *American Dredging* and *Sinochem*:[4]

"[A Plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947). The Supreme Court's analysis of when a plaintiff's chosen forum is inconvenient sets forth fundamental principles, notwithstanding that courts tend to give less deference to a foreign plaintiff's choice of forum, that a case should not be dismissed unless the defendant shows that plaintiff's chosen forum is either vexatious and oppressive or inappropriate. So-called "private interests" factors are balanced to determine inconvenience to the parties, and "public interest" factors are balanced to determine appropriateness of the forum. *Gilbert, supra*, 508-509. Correct application of *forum non conveniens* principles looks to whether the plaintiff's chosen

[4] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *American Dredging Company v. Miller*, 510 U.S. 443 (1994); *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 548 U.S. 422 (2007).

forum is vexatiously or oppressively inconvenient to defendants and not to whether there is another more convenient forum.

In this case, however, the Seventh Circuit Panel rejected the fundamental principles of *forum non conveniens* to dismiss plaintiffs' contract claims and one plaintiff's tort claim.[5] First, it affirmed the lower court's ruling despite that court's failure to find plaintiffs' California forum was vexatious or oppressive for defendants. The Panel instead actually acknowledged that California is *more* convenient for these American defendants, except that they don't want the case heard in the United States. If plaintiffs' chosen forum is neither vexatious nor inappropriate, and if it is acknowledged by the Court and defendants' own expert to be convenient for defendants, then how can the *forum non conveniens* doctrine possibly apply? In essence, the Panel permitted the defendants to forum-shop the case away from California without making them show that California was a vexatious, oppressive or in any way inconvenient forum. Second, the Panel did not address any of plaintiffs' arguments as to why public interest factors favor the California forum – The Panel's opinion is silent as to why the California forum is inappropriate. Over time, lower courts'

[5] All but one plaintiff brought contract claims. One plaintiff who did not sign the contract in question only filed a tort claim. These are the claims which were dismissed on *forum non conveniens* grounds.

incremental modifications of the *forum non conveniens* doctrine to favor dismissals have resulted in a complete disconnection from *forum non conveniens'* original principles. Similarly, the Seventh Circuit's departure from the appropriate use of the *forum non conveniens* doctrine threatens the very foundations of our American court system – unless a plaintiff's choice of forum creates an actual disproportionate hardship for a defendant or the forum is inappropriate, when a court possesses jurisdiction it should exercise that jurisdiction.

A. Background and Proceedings in the Lower Court

1. The defendants are American pharmaceutical companies who manufactured and distributed HIV-contaminated "Factor VIII" and "Factor IX" blood products ("AHF") to treat hemophilia. AHF was processed in the U.S. from paid donors' plasma, including prisoners, i.v. drug users and promiscuous urban gay males, which was known by defendants to be high risk for transmitting blood borne diseases. Plaintiffs are Taiwanese HIV-infected hemophiliacs and their families. Their claims arise from defendants' plasma collection, AHF processing procedures, marketing and litigation strategies implemented in California, which resulted in HIV-contaminated AHF infecting overseas victims and defendants' subsequent damage control in foreign countries.

AHF is a medication which provided hemophiliacs with proteins that stop bleeding. It was

derived from thousands of paid plasma donations which were pooled and chemically processed to make multiple blood products, such as albumin, antibody concentrates and AHF. Because AHF was an injected medication, it was important that donors did not carry blood borne diseases which would be transmitted to hemophiliacs when they injected the medication.

In the late 1970's and early 1980's, federal regulations required AHF manufacturers to use normal healthy donors and manufacturing practices which assured that blood products like AHF were "safe, pure, potent and effective" (21 C.F.R. §606.141). By 1975, because it was known that individuals who engaged in rectal intercourse with multiple same-sex partners had a high prevalence of hepatitis B and other sexually transmitted diseases, it was recommended that such persons be advised against blood donations. Promiscuous urban gay males and prisoners who engaged in such sexual activity would therefore not be considered "normal, healthy donors." Likewise, i.v. drug users who shared dirty needles were unsafe donors because they were likely to transmit their blood borne diseases through infused medications like AHF, which at that time were not virally de-activated.

Notwithstanding, defendants intentionally sought these high-risk donors since their life styles (or prison conditions) exposed them to diseases against which their bodies generated valuable antibodies which could be harvested and sold at high prices. The defendants made multiple products from the same

vats of plasma used to process AHF. While cost effective, without a viral deactivation step, this practice of processing multiple products from the same vats of plasma proved deadly for hemophiliacs.

AHF was first shipped to Taiwan from the U.S. in late 1979. In 1982, the U.S. Centers for Disease Control reported that hemophiliacs were exhibiting signs of a disease previously observed in gay men, later named "AIDS." Defendants quietly met to discuss political, moral and liability issues related to their having used high-risk plasma. By December 1982, after AHF-treated chimpanzees developed AIDS-like symptoms, strong proof existed that AHF was highly likely to transmit the agent that caused AIDS. In 1983 after virally de-activated heat-treated AHF was licensed, defendants began selling the safer product in the U.S. But through June of 1985 they continued to ship excess inventories of un-heated, HIV-contaminated AHF to Taiwan (and worldwide).

A few American hemophiliacs sued for their HIV infections in the mid 1980s. In the late 1980s, many more Americans sued, and in 1997 many claims were settled as part of a global settlement. *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 159 F.3d 1016 (7th Cir. 1998). Other claims "opted out" and were litigated or settled separately. *See, e.g.*, *Waage v. Cutter,* 926 P.2d 1145 (Alaska 1996); *JKB v. Armour, et al.*, verdict 3-20-97; *K.D.D. Smith v. Alpha, et al.,* No. 93-8088, Orleans Parish, LA, jury award 3-15-99, overturned on limitations grounds, but settled.

Meanwhile in early 1998 defendants contracted through Taiwan's Department of Health ("DOH") and plaintiff representatives to pay humanitarian aid of $60,000 US to Taiwan hemophiliacs, asserting that their HIV infection was nothing more than a terrible misfortune and an unavoidable tragedy. The offer included a "most favored nation" clause "which required defendants to increase the compensation to whatever level the defendants agreed to in later settlements with other clotting-factor claimants." App. 11.

On May 22, 2003, the *New York Times* published an article entitled *2 Paths of Bayer Drug in 1980's: Riskier Type Went Overseas*. The article was re-published in Taiwan's newspapers. Plaintiffs also later learned that defendants had paid other HIV-infected claimants greater compensation. Plaintiffs requested enforcement of the most-favored-nation clause. Defendants refused.

2. Plaintiffs filed suit in California in May of 2004, and their cases were transferred to Multi-district Litigation 986 ("MDL 986"), *In Re Factor VIII or IX Concentrate Blood Products Liability Litigation, Second Generation*, U.S.D.C., N.D. Ill., as a tag-a-long.[6] By May of 2004, the MDL 986 court had

[6] MDL 986, which originally involved only American plaintiffs, was formed December 7, 1993, and assigned to the Honorable Judge John Grady. The MDL Panel named the later cases which involved foreign plaintiffs "Second Generation." Second-generation plaintiffs were from Argentina, Austria,

(Continued on following page)

already ordered pretrial discovery in these Second Generation cases.

On September 26, 2007, defendants moved to dismiss plaintiffs' claims on grounds of *forum non conveniens*. For months, through telephone conferences, letter briefs and motions, plaintiffs unsuccessfully sought relevant discovery to defeat the motion, which discovery the court refused to order under the rationale that plaintiffs' requests were too case-specific. Plaintiffs had no choice but to respond to the motion. On January 14, 2009, the court denied defendants' *forum non conveniens* motion because it believed that plaintiffs' tort claims would be time-barred under both Taiwan and California law, making it more "practical" for the California home court to dismiss the claims on statute of limitations grounds than for the claims to be dismissed on *forum non conveniens* grounds, then re-filed in Taiwan and later dismissed in Taiwan on limitations grounds. App. 101.

The MDL court concluded that it appears it "would be appropriate" that "these cases be remanded to the transferor courts in California," and ordered the parties to submit any objections by January 23, 2009. App. 102. On Thursday, January 22, 2009,

---

Brazil, Chile, Colombia, Denmark, Germany, Honduras, Hong Kong, Israel, Italy, Luxembourg, New Zealand, Norway, Panama, Paraguay, Peru, South Africa, Taiwan, Venezuela, the United Kingdom, and the United States.

plaintiffs notified the court that they agreed that the cases should be remanded and therefore had no objection. On Friday afternoon, January 23, defendants moved for summary judgment on limitations grounds and renewed their *forum non conveniens* motion, noticing plaintiffs by email at 3:26 p.m.

On Monday morning, January 26, plaintiffs' counsel telephoned the court's administrative assistant to request a telephone conference between the parties and the court.[7] Instead of setting that conference, the court's administrative assistant advised plaintiffs' counsel to disregard the renewed *forum non conveniens* motion but to respond to the summary-judgment motion. Thus, as ordered by the Court, plaintiffs responded. On March 26, 2009, the Court dismissed plaintiffs' tort claims as time barred for three reasons.[8] It determined that California's choice

---

[7] The lower court prefers telephone conferences to resolve issues rather than formal motion practice.

[8] In that opinion, the lower court incorrectly asserted that plaintiffs had "no objection" to its deciding statute of limitations issues. App. 48. In its later opinion, the court also mistakenly asserted that "instead of agreeing to a suggestion of remand to the transferor courts in California, the parties agreed that we should decide the limitations motion." App. 28. Plaintiffs have never agreed to have the transferee court hear and decide the statute of limitations motion. Prior to defendants filing their limitations motion, plaintiffs actually agreed with the Court that a suggestion of remand was appropriate: "Pursuant to this Court's Order . . . the Taiwanese plaintiffs . . . respectfully state that they have no objection to this Court's suggestion of remand of [their] cases to the transferor courts in California. *See* 93 CV 7452, *supra*, Document 1884. Then, in their opposition to

(Continued on following page)

of law rules and borrowing statute required Taiwan's statute of repose to be applied. Further, it found that California's delayed discovery rule "is of no benefit to the plaintiffs." App. 53.

With the tort claims dismissed, in a "one-two-punch" defendants convinced the MDL court, over plaintiffs' strenuous objections, to reconsider its earlier denial of *forum non conveniens,* this time limited to plaintiffs' contract claims and the tort claim of one plaintiff.[9] The Court then assumed the role of "home court" and decided that a California court might think the contract clause in question was ambiguous. App. 33. If this were the case, then the clause would have to be interpreted. The defendants argued that "practically all of the witnesses with knowledge of the 1998 settlement negotiations are residents of Taiwan . . . " App. 30. Despite plaintiffs' arguments and evidence to the contrary, the lower court agreed with defendants. But the Court also acknowledged that if the contract's "scale-up language required *no* interpretation, California courts

---

defendants' limitations motion, plaintiffs continued to assert that a suggestion of remand was appropriate: "Plaintiffs continue to believe that this court's suggestion that the Taiwanese cases be transferred back to California for adjudication of all remaining issues, including interpretation of California's particular statute of limitations and borrowing statute, was, and . . . is appropriate." *Id.*, Document 1903, at 6.

[9] Notwithstanding plaintiffs' objections, the court stated that the "renewed *forum non conveniens* motion" is "clearly appropriate." App. 28.

could apply the provision as well as the Taiwanese courts." App. 33. Notwithstanding, the MDL court dismissed plaintiffs' contract claims on *forum non conveniens* grounds. Then, despite defendants' failure to show that Taiwan was an adequate alternative forum, it dismissed one plaintiff's tort claim on *forum non conveniens* grounds.

B. The Decision Below

On appeal from the dismissal of plaintiffs' tort claims on statute of limitations grounds and contract claims on *forum non conveniens* grounds, the Seventh Circuit Panel affirmed the MDL court's rulings. First, the Panel agreed with the lower court that Taiwan's statute of repose applied to bar plaintiffs' tort claims:

(1) Rather than determining which forum's interests would be more impaired if its law were not applied – this is the key inquiry of California's "governmental interest test" for determining choice of law questions – the Panel employed a "balancing of interests approach." Using that approach, it determined that Taiwan's statute of repose applied because "a California court would reason that if Taiwan will not provide a remedy to its own citizens, there is no reason for California to do so." App. 10.

(2) Turning to California's borrowing statute and its use of the terms "accrued" and "arose," the Panel said that plaintiffs "misunderstand those terms." App. 10. Plaintiffs argued that their tort claims *arose* in California where defendants'

wrongdoing originated and *accrued* in Taiwan, where the plaintiffs were injured. The Panel disagreed, saying that the claims both arose and accrued in Taiwan, triggering Taiwan's statute of repose.

Second, the Panel rejected as "mistaken" plaintiffs' position that when defendants offered "humanitarian aid," plaintiffs did not suspect that defendants had done anything wrong, and only much later did plaintiffs learn through a *New York Times* article of defendants' fraudulent dumping of HIV-contaminated AHF.[10] Notwithstanding, the Panel determined that California's discovery rule did not "save the plaintiffs' tort claims from dismissal for untimeliness" because plaintiffs had a "reasonable basis" to suspect their cause of action when their counsel negotiated to "settle negligence claims." App. 6.

Third, the Panel affirmed the lower court's dismissal of plaintiffs' contract claims on *forum non conveniens* grounds. Because language limiting the most-favored-nation clause to higher payments only to *Taiwanese* claimants was never included in the contract, plaintiffs asserted that defendants cannot simply insert new terms into the clause to limit it. The Panel rejected plaintiffs' reasoning as "rather implausibl[e]" and determined that it "will be necessary to disambiguate the clause . . . " and that

[10] Defendants' own documents explained that "[i]t was agreed that this [compensation] is not a legal but a humanitarian issue."

"it seems most of the persons to give that evidence live in Taiwan." App. 11. Moreover, the Panel affirmed the lower court's finding that this evidence would be difficult to gather for use in the United States. App. 12. Notwithstanding, the Panel explicitly acknowledged that California was indeed more convenient for defendants: "[T]he only circumstance that would favor holding the trial in California rather than in Taiwan would be the greater convenience for defendants because they are American companies. But as they don't want the case to be tried in California, or indeed anywhere else in the United States, really there is nothing in favor of the American forum." App. 12.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's decision directly contradicts Congress's mandate as enacted in the federal multidistrict litigation statute that transfer of cases under the statute is for consolidated or coordinated pretrial proceedings only, *Lexecon*'s rule that an MDL-transferee court cannot self-assign a transferred case for trial, and a plaintiff's historical right to select his forum.

For years, federal district courts to which cases have been transferred solely for "coordinated pretrial proceedings" under 28 U.S.C. §1407(a), the federal multidistrict statute, have been inappropriately shutting down cases and making sure they never return

to their home court. The latest report of the Administrative Office of the United States, Judicial Business, of the U.S. Courts, Judicial Business 2009, Supplemental Table S-20[11] shows that from the inception of the multidistrict statute in 1968 through 2009, 216,809 actions have been transferred for MDL proceedings and 11,737 cases have been remanded by the MDL Panel – less than six percent of transferred cases have ever returned home.

Although the statistics do not reflect whether cases have been terminated due to global settlements, some other form of settlement, trial verdicts, voluntary dismissals, coordinated-proceeding or case-specific, individualized dispositive motions, the Seventh Circuit's ruling has sanctioned a "maximalist approach to pretrial proceedings"[12] equivalent to permitting an MDL court to self-assign a case for trial. By their very nature individualized case-by-case issues are *not* part of coordinated discovery or consolidated pretrial proceedings, which shall be decided by the home court upon remand. For an MDL court to try these issues is tantamount to its having transferred that case to itself for trial. This practice has gone unchecked for decades, and it should not matter whether the court is examining individualized

---

[11] http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx.

[12] The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation, An Empirical Investigation, http://paperssrn.com/sol3/papers.cfm?abstract_id=1443375.

evidence in the context of a pretrial motion or trial on the merits. Certainly, through either route, MDL courts are violating Congress's command in 28 U.S.C. §1407(a) and the rule of *Lexecon* prohibiting an MDL-transferee court from self-assigning a transferred case for trial.

The creeping, proprietary practice of self-assignment contradicts the purposes for which Congress created the multidistrict statutes. In the late 1960s, it became apparent that coordination among various federal courts was needed to handle complex and protracted civil cases more efficiently. Then Chief Justice Earl Warren appointed an advisory committee to meet and discuss how to efficiently manage separate but related antitrust lawsuits filed in 36 different federal districts. The Committee prepared various orders which operated to coordinate nationwide pretrial discovery, including a document depository. *See* Robert A. Cahn, *A look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 211 (1976). Because of this successful advisory procedure, Congress established laws to effect a similar purpose by transferring "civil actions involving one or more common questions of fact . . . for coordinated or consolidated proceedings." 28 U.S.C. §1407(a).

Courts are required to obey the plain language of a statute. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("courts must give effect to the clear meaning of statutes as written.") Section 1407(a) could not be more clear in that it authorizes

transfers only for "coordinated or consolidated pretrial proceedings." It does not authorize transfer for individualized evidentiary pretrial matters. But when an MDL court examines evidence to dispose of claims on the merits which relate only to a particular case, such as narrow, fact-driven statute of limitations issues, it violates that clear statutory command. Likewise, the statutory mandate is circumvented when an MDL court balances private and public factors to dismiss a transferred case on *forum non conveniens* when the MDL-transferee court is not even the court in which the case will be tried! This practice subverts the multidistrict statute, denies a plaintiff the right to choose his forum, and prevents the home court from deciding for itself whether the chosen forum is inconvenient. What factors may seem inconvenient or inefficient to the transferee court may not seem so at all to the transferor court.

The goal of Congress in enacting a federal multidistrict statute was explained by the newly formed Judicial Panel on Multidistrict Litigation early in the history of the statute. Its purpose or "remedial aim," as shown by the statute's language and "reports of the Congressional Committees and of the Judicial Conference, and by testimony before Congress of its authors," is to "eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-492 (J.P.M.L. 1968). The "objective" was to assure the "just and efficient conduct of such

actions" to avoid "the possibility for conflict and duplication in discovery and other pretrial procedures in related cases" through the use of "centralized management." This was to be accomplished through "transfer of venue of an action for the *limited purpose* of conducting coordinated pretrial proceedings." H.R. Rep. No. 90-1130, 1899-1900 (1968) as quoted in *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 2005 WL 106936 (S.D.N.Y.) (emphasis added).

The fundamental purpose of multidistrict litigation proceedings is not and has never been to examine evidence and determine legal claims on an individualized case-by-case basis. Instead, the clear dictate of the multidistrict litigation statute is to centralize management of common evidentiary issues and ruling to eliminate confusion and conflict at the pretrial stage and to conserve time and resources. This purpose is achieved when an MDL court administers discovery matters and other pretrial issues of common concern to the entire group of litigants. That the statute's reach is restricted to this type of "global" management is reinforced by the statute's language that a case "shall be remanded . . . at or before the conclusion of *such* pretrial proceedings . . . " §1407(a) (emphasis supplied).[13] "*Such*"

[13] In MDL 986 first generation cases, statute of limitations issues and other individualized issues were not determined until after a case had been remanded. *See Halliday v. American*

(Continued on following page)

pretrial proceedings does not refer to just any pretrial proceeding but very specifically to common-issue coordinated pretrial proceedings such as, for instance, setting up a centralized document depository. As the *Lexecon* court observed, "§1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course." *Supra*, 962.

When a case has not been concluded during the pretrial proceedings, the simple and direct rule is that it must be returned to the home district. Each case which is ready for remand "shall" be remanded by the Panel. §1407(a). Once an MDL-transferee court has determined that a case is appropriate for remand, it has no authority to assign the case to itself for trial. Holding onto a case which is ready for remand "'conclusively thwarts the Panel's capacity to obey the unconditional command of §1407(a).'" *In re Patenaude*, 210 F.3d 135, 146 (3rd Cir. 2000), quoting *Lexecon*, 523 U.S. at 36. The transferee court simply does not have authority to examine evidence and determine legal claims in individualized case-specific matters, a practice which amounts to "self-transfer" contrary to Congress's mandate in the multidistrict statute and the *Lexecon* rule.

Red Cross, et al., U.S.D.C., N.D. Cal., 3:99 CV 0378, Document 108, 142.

Additional confusion and conflict result when an MDL court determines individualized case-by-case issues in a diversity case. In such a case the *Manual for Complex Litigation* requires "the law of the transferor district [to] follow[ ] the case to the transferee district." §20.132 (4th ed. 2004). Because a transferee court generally sits in a different district from the transferor court, it may be unfamiliar with the law to be applied, which may result in misapplication of that law. That is exactly what happened here: The Seventh Circuit Panel affirmed the lower court's misapplication of California law. When plaintiffs present direct evidence to defend against summary judgment on limitations grounds, California courts require trial by jury of limitations issues – not trial by the court. Here, plaintiffs produced direct evidence to show why, at the time they received the humanitarian aid, they were unaware of defendants' wrongdoing in knowingly dumping HIV-contaminated AHF, *e.g.*:

- Each plaintiff signed the humanitarian payment agreement based on assertions by defendants that no fault or wrongdoing by defendants had caused his HIV infection.
- At the time the humanitarian aid was negotiated, defendants insisted they were not at fault and that they had won all relevant cases worldwide.

- Defendants' representation was false. By the dates of the humanitarian aid negotiation, Bayer had been found liable for negligently processing HIV contaminated plasma into factor concentrate.
- By the dates of the negotiation, Alaska's Supreme Court had ruled that questions of fact existed as to whether Bayer had fraudulently concealed and misrepresented the relationship between AHF and HIV. *Waage, supra*.
- Plaintiffs were unaware that a decision had been made by Bayer's international marketing director and the marketing committee of its blood products division located in Berkeley, California, to intentionally deplete its inventory of contaminated and unheated Factor VIII and Factor IX product by shipping it to Asia where "the AIDS issue has not become a major problem" for Cutter.
- Plaintiffs were unaware that Bayer had been ordered to cease and did cease distributing non-heat-treated product in the United States.

Defendants did not present contradictory evidence. Nevertheless, the court decided plaintiffs were put on notice that defendants had quietly dumped HIV-contaminated AHF in Taiwan after safer product became available, when defendants advised that plaintiffs' HIV infections were nothing more than a "misfortune" and an "unforeseeable and unavoidable tragedy." Put another way, defendants argued that these plaintiffs had a responsibility and should have

been smart and clever enough to recognize that defendants were dishonestly misrepresenting the truth about their AHF products, and should have rejected the humanitarian offer and sued the defendants. In sum, although the evidence showed genuine issues of material fact, the lower court weighed the evidence and found otherwise, and the Seventh Circuit agreed: "Denial of liability when negotiating a settlement agreement is the norm; it is not evidence of fraudulent concealment of anything." App. 7.

Next, the Seventh Circuit Panel presumed to know how California courts would apply California's borrowing statute, despite the California Supreme Court's recent ruling which specifically leaves open the pertinent question in this case – Does the statute apply based on where the original wrongdoing occurred or where the subsequent injury resulted?[14] App. 8-10. Then the Panel failed to employ the "impairment" prong of California's governmental interests test for determining choice of law. App. 10-11. Finally, it affirmed the lower court's proprietary

[14] *See McCann et al. v. Foster Wheeler LLC*, 225 P.3d 516 (2010). There is little California jurisprudence on the borrowing statute. Plaintiffs relied upon a hundred-year-old California Supreme Court decision, *McKee v. Dodd*, 152 Cal. 637 (1908) and a California federal court opinion, *Dalkilic v. Titan Corp.*, 516 F. Supp.2d 1177 (S.D. Cal. 2007). Inexplicably, the Seventh Circuit ignored *Dalkilic* altogether. The *Dalkilic* court determined that the borrowing statute is triggered by the location where defendant's wrongdoing arises, not where plaintiff is subsequently injured. If the wrongdoing originated in California, the borrowing statute does not apply.

and paternalistic dismissal of multiple contract claims and one tort claim on case-specific, fact-driven grounds of *forum non conveniens*, despite explicitly acknowledging on the record that plaintiffs' chosen forum was indeed more convenient for defendants. App. 12.

Because the home court is literally pushed aside by an MDL court who takes on this paternalistic role in violation of the direct mandate of Section 1407, a home court will never have the chance to make its own decision on issues such as what limitations periods apply to individual claims. Nor does the home court get to decide for itself whether these plaintiffs did in fact sue California-based defendants in the most convenient forum – their own backyard. Indeed, before the instant case was decided, the lower court used this same tactic to dismiss U.K., Argentine, and Israeli plaintiffs on *forum non conveniens* grounds.[15]

---

[15] *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 408 F. Supp.2d 569 (N.D. Ill. 2006) (*Domenico Gullone, et al. v. Bayer Corporation, et al.*, 03 CV 8928, 93 CV 7452), *aff'd* 484 F.3d 951 (7th Cir. 2007), originally filed in the Northern District of California.

In re Factor VIII or IX Concentrate Blood Products Liability Litigation, 531 F. Supp.2d 957 (N.D. Ill. 2008), *aff'd Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009), Broward County Circuit Court, Florida.

In re Factor VIII or IX Concentrate Blood Products Liability Litigation (*Ashkenazi, et al. v. Bayer Corporation, et al.*, 05 CV 2793, 93 CV 7452), 2008 WL 4866431 (N.D. Ill. 2008), originally filed in Northern District of Illinois, Judge Zagel, and transferred to MDL 986.

In each instance, the plaintiffs' right to trial in their forum of choice was effectively thwarted and snatched away by the transferee court's over-reaching grasp, in direct violation of the "straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court . . . " *Lexecon, supra*, 523 U.S. at 40.

The statutory question presented here requires the Court's attention because it directly involves the boundaries of authority Congress granted to federal courts by enacting the multidistrict litigation statute. A system of checks and balances between the judiciary and legislative branches of government has been in place since the earliest days of this country and must be maintained. As the *Lexecon* court pointed out, "the proper venue for resolving whether or not "permitting transferee courts to make self-assignments" is "more desirable than preserving a plaintiff's choice of venue" . . . "remains the floor of Congress." *Supra*, at 40 (citations omitted). Congress has not seen fit to extend the authority of the multidistrict litigation statute. Because the ongoing federal court practice in multidistrict litigation is affecting the substantive rights of scores of litigants who – like plaintiffs here – are losing their historical right to choose the forum in which their case will be heard, review of the question posed is particularly justified.

II. The Seventh Circuit's decision wrongly authorizes district courts to dismiss cases brought by foreign plaintiffs against American defendants on the ground of *forum non conveniens* where a court has acknowledged that plaintiffs' chosen forum is convenient for defendants and without requiring findings that the forum is either vexatious and oppressive or inappropriate.

The Seventh Circuit's ruling also impacts almost sixty-five years of American *forum non conveniens* law. The doctrine of *forum non conveniens* arises from common law and is the ancestor of the U.S.C. §1404 venue transfer statute. It is designed to thwart a plaintiff who intentionally chooses an inconvenient or vexatious and harassing forum. *See In re Air Crash off Long Island on July 17, 1996*, 65 F. Supp.2d 207 (S.D.N.Y. 1999). Ever since the diversity lawsuits between domestic parties brought in *Gilbert* and *Koster*, *supra*, and between foreign plaintiffs and domestic defendants in *Piper, supra,* the *forum non conveniens* doctrine has required at a minimum that a defendant must establish that trial in plaintiffs' chosen forum "would establish . . . oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *Koster, id.,* at 524. Essentially, the fundamental principle advanced by the doctrine is that a forum is

presumed convenient unless the defendant shows either that plaintiff's chosen forum exerts a hardship on it as would amount to vexation or oppression, or that the forum is inappropriate because of considerations affecting the court itself as determined by various private and public interest factors.[16]

The Seventh Circuit Panel rejected these essential principles. Its treatment of *forum non conveniens* was nothing short of extraordinary. First, it decided that the contract's most-favored-nation clause was ambiguous because it is "silent on whether the reference to other claimants . . . is just to other *Taiwanese* claimants." App. 11. Despite the fact that the California transferor court is who should decide whether the clause is ambiguous, the Panel decided that it "will be necessary to disambiguate the clause, and it seems that most of the persons . . . to give such evidence live in Taiwan . . . " App. 11. Thus, it concluded this private interest factor favored Taiwan.[17]

---

[16] 28 U.S.C. §1404(a) (venue transfers) apply the same principles. "Transfer is inappropriate where it merely shifts, rather than eliminates, the inconvenience between the parties." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834 (9th Cir. 1986.)

[17] As noted herein, plaintiffs strenuously objected to the lower court's re-consideration of *forum non conveniens* after it had already denied that motion. Whether a forum is convenient should be decided by the court in which the trial will be conducted. In this instance, that is the California court. If the California court were to decide, as the lower court acknowledged it might, that the contract's most-favored-nation clause is not

(Continued on following page)

Although the lower court found public interest factors favored Taiwan, and plaintiffs appealed those findings, the Panel opinion was silent as to how public interest factors affected the *forum non conveniens* analysis. The upshot is that the Panel affirmed the lower court dismissal without a showing that the plaintiffs' chosen forum was either vexatious and oppressive or inappropriate. Neither touchstone of the *forum non conveniens* doctrine was met. To the contrary, the Panel wrote:

> The only circumstance that would favor holding the trial in California rather than in Taiwan would be the greater convenience for the defendant, since they are American companies. But as they don't want the case to be tried in California, or indeed anywhere else in the United States, really there is nothing in favor of the American forum." App. 12.

It is a substantial oxymoron for the Seventh Circuit to have affirmed the lower court's dismissal of plaintiffs' claims from the more convenient forum for defendants on the grounds of *forum non conveniens*. Quite simply, California is a legitimate, *bona fide* and convenient forum. Both defendants have a sizable presence in California. Bayer prides itself on its 100-year history of operation in California as described on its website:

---

ambiguous and does not need to be interpreted, then it would not matter where witnesses are located.

> "Bayer's rich history in Berkeley, California extends back more than 100 years. In 1903 a small family business known as Cutter Analytical Laboratory moved to a 30 acre lot in the city's west side." Moreover, "[t]he 43-acre campus in Berkeley is the *nerve center* of the company's global biotechnology manufacturing operations which ensures the supply of millions of units of protein therapeutics each day. More than 1,500 people work on the Berkeley campus which is also a major bio-manufacturing site, with its primary capacity devoted to producing a leading [factor concentrate] therapy . . . for the treatment of people living with hemophilia A. The global biotechnology product supply organization is also headquartered in Berkeley" (emphasis supplied).[18]

The other defendant, Baxter Healthcare, has six facilities in California. *See* Baxter 2009 Sustainability Report.[19] Because the defendants have substantial businesses in California directly related to plaintiffs' claims, the California forum was intentionally chosen by plaintiffs as a convenient place for trial. Moreover, the defendants' own expert on *forum non conveniens* agreed that it was legitimate for Taiwanese hemophiliacs to have filed their claims in California, where the defendants' manufacturing plants were located

---

[18] http://biotech.bayerhealthcare.com/locations/berkley.asp.

[19] http://sustainability.baxter.com/company_profile/global_facilities.html?WT.svl=www.baxter.com.

and where Bayer's Far East Marketing Plan directly impacted the sale of AHF in Taiwan and subsequent litigation strategies. As defendant Bayer's Plan – created and implemented by its personnel in Berkeley, California explained: "If we see the need for a heat-treated product in the Far East, we will react to the demand swiftly. Otherwise, we will try to continue to dominate the markets with low-cost standard Koate and Konyne." Given these strong ties to California, the Seventh Circuit lost sight of the defendants' burden of showing that plaintiffs' chosen forum is inconvenient, vexatious, and oppressive.

Although the Seventh Circuit did not consider public interest factors, if it had done so, it is likely to have found these to be, at least, neutral. Judge Posner, writing for the Panel in both this case and a "parallel case" which involved Argentinian HIV-infected hemophiliacs, *Abad, supra*, (App. 1) opined that when a plaintiff argues that the U.S. has a greater interest because the defendant is an American company and the defendant argues that Argentina has a greater interest because the plaintiff is an Argentine, "the reality is that neither country appears to have any interest in having the litigation tried in its courts rather than in the courts of the other country." Rather, "this is ordinary private tort litigation that 'implicates' . . . no national interest. *Abad, id.,* 563 F.3d 663, 668. This case is similar. Although Taiwan's Department of Health assisted in obtaining humanitarian aid for plaintiffs, it has

nothing to gain or lose by this litigation. Further, in a simple contract case, the American court is not being asked to untangle complicated questions of foreign law. Thus, when the litigation is ordinary private litigation involving no complicated questions of law, a balancing of public interests should not result in the plaintiffs' chosen California forum being deemed inappropriate.

Notwithstanding Judge Posner's rationale of neutrality, here, the cascade of wrongdoing arose and had its origins in California: California is among the places where they collected HIV-infected plasma from high-risk California donors in California plasma centers. California is one of the two states where they negligently processed high-risk plasma, including prison plasma from other states, into AHF products in huge processing plants. California is where they stored their inventory of contaminated factor. California is where they planned Far East marketing strategies and from where they distributed and shipped HIV-contaminated AHF. California is where they plotted to conceal the risks of un-heat-treated, HIV-tainted AHF from hemophiliacs, including Taiwan hemophiliacs. California is where they schemed to deliberately dump old stocks of HIV-infected AHF in Taiwan to save the profit margin after safer AHF became available. And California is where they conceived litigation strategies including the humanitarian aid contract. Because defendants' contaminated medicine was shipped worldwide, it was inevitable that harm would occur wherever it was shipped, including Taiwan.

The Seventh Circuit has eviscerated the very essence of the *forum non conveniens* doctrine as implemented in America for over six decades. When a court's *forum non conveniens* analysis recognizes that a forum has greater convenience for a defendant but dismisses the case from that forum regardless, the doctrine has no point anymore. The central inquiry – convenience – is nullified when a court finds that plaintiffs' chosen forum is convenient for defendants because it is their home turf but dismisses the action anyway on the basis of little more than that defendants don't want to try the case in their home forum. With this ruling, the Seventh Circuit allowed defendants to forum-shop the case away from California simply because they don't want to try the case there.

CONCLUSION

The extent of an MDL-transferee court's power to decide individualized, substantive, case-specific issues is a matter of critical concern for courts and litigants alike in large numbers of MDL cases pending throughout the country. Plaintiffs respectfully request that certiorari be granted to establish the limits of a transferee court's pretrial authority.

The widespread practice of using the doctrine of *forum non conveniens* for purposes antithetical to the principles for which the doctrine was devised is a matter of crucial concern. Therefore, plaintiffs also request that this petition be granted to resolve the

issue of whether a court can dismiss on *forum non conveniens* grounds in the absence of a finding that the forum selected is actually inconvenient.

Respectfully submitted,

RONALD L. M. GOLDMAN
Counsel of Record
MICHAEL L. BAUM
FRANCES M. PHARES
BAUM, HEDLUND, ARISTEI
& GOLDMAN
12100 Wilshire Blvd., Suite 950
Los Angeles, CA 90025
(310) 207-3233
RGoldman@baumhedlundlaw.com

Attorneys for Petitioners

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 09-2280, 09-3020

YAO-WEN CHANG, *et al.*,

Plaintiffs-Appellants,

v.

BAXTER HEALTHCARE CORPORATION, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
MDL No. 986 JFG – **John F. Grady**, *Judge.*

SUBMITTED FEBRUARY 12, 2010 – DECIDED MARCH 26, 2010

Before POSNER, EVANS, and TINDER, *Circuit Judges.*

POSNER, *Circuit Judge.* This is a parallel case to *Abad v. Bayer Corp.,* 563 F.3d 663 (7th Cir. 2009), decided by this panel last year. The case was dismissed by the district court, and the plaintiffs have appealed. Ordinarily when all parties to an appeal are represented by counsel, the court directs oral argument unless the parties waive argument and we accept the waiver. But when, as in this case, an appeal is closely related to an earlier appeal, or is successive to it, we are more likely to deny oral

argument on the ground that "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C). We have decided to do that in this case.

Abad was a diversity (technically an "alienage," 28 U.S.C. § 1332(d)(2)(B)) class action on behalf of several hundred Argentines, consolidating a number of suits that had been filed in various U.S. states and transferred by the multidistrict panel to the federal district court in Chicago, pursuant to 28 U.S.C. § 1407, for inclusion in *In re Factor VIII or IX Concentrate Blood Products Litigation*. That is the name that has been given to the pretrial proceedings in a large number of products-liability suits by hemophiliacs who had been infected with HIV (the virus that causes AIDS) that had gotten into the clotting factor that persons afflicted with hemophilia inject into their bloodstreams in order to control bleeding. The plaintiffs charged that the defendants – the manufacturers of the clotting factors – had failed to eliminate HIV from the blood of donors from which the clotting factors had been made, as they could and should have done by applying heat in the manufacturing process.

The class members in *Abad* had acquired and injected and become infected by the contaminated clotting factors in Argentina, and the district court granted the defendant's motion to dismiss the action on the ground of *forum non conveniens* – the doctrine that allows a court to dismiss a suit if there are

strong reasons for believing that it should be litigated in the courts of another, normally a foreign, jurisdiction, in *Abad* the courts of Argentina. We affirmed.

The district court had deferred ruling on the defendant's motion until completion of the plaintiffs' pretrial discovery. The defendant's discovery would have to be conducted in Argentina because that was where the members of the class lived. So while depositions and other documents obtained in the plaintiffs' discovery would have to be translated into Spanish if the suit was litigated in Argentina, documents obtained in the defendant's discovery in Argentina would have to be translated into English if the case was tried in Chicago.

The plaintiffs argued that under Argentine choice of law rules, the substantive law that would be applied if the case were litigated in an Argentine court would be American rather than Argentine law. If true, this would, we said, have been a powerful argument for leaving the case in Chicago. But as near as we were able to determine, it was false. Argentine law would apply wherever the case was tried; and especially because of the dearth of relevant Argentine precedents or other sources of law, the Argentine court would probably do a better (more authentic, legitimate, authoritative) job of applying (if necessary creating) Argentine law than an American court. And we noted that the presumption in favor of a plaintiff's choice of the court in which to litigate (a presumption based in part on the costs and delay involved in restarting a case in another court) is

weakened when the plaintiffs are foreign and could litigate the case in their home court. Thus on balance Argentina was the more convenient, the more suitable, forum for the litigation.

The present case, filed originally in California by residents of Taiwan but transferred by the multi-district panel to the district court in Chicago with the other clotting-factor suits for pretrial proceedings, is similar to *Abad,* although it adds a breach of contract claim to the tort claims. (Like *Abad,* it is actually a series of cases that have been consolidated for purposes of pretrial proceedings.) The main tort claim is that the defendants acquired blood from high-risk donors, processed it improperly in California where they manufactured clotting factors, and after discovering that the factors were contaminated by HIV nevertheless continued to distribute the product in foreign countries while withdrawing them from distribution in the United States. Thus, like the plaintiffs and class members in the *Abad* case, the plaintiffs in this case, or the decedents whom they represent, reside, and obtained and injected the clotting factor, in a foreign country. The plaintiffs also charge that the defendants fraudulently induced them to enter into a settlement agreement that released the defendants from liability in exchange for paying $60,000 to each plaintiff. The breach of contract claim alleges violation of a term of the settlement.

The district judge dismissed some of the plaintiffs' claims as untimely and the others on the

ground of *forum non conveniens*. Although a dismissal on the latter ground is without prejudice, it is appealable, illustrating that the "rule" that dismissals without prejudice are nonfinal and therefore nonappealable under 28 U.S.C. § 1291 is a Swiss cheese. See *Schering-Plough Healthcare Products, Inc. v. Schwarz Pharma, Inc.,* 586 F.3d 500, 506 (7th Cir. 2009); *Taylor-Holmes v. Office of Cook County Public Guardian,* 503 F.3d 607, 609-10 (7th Cir. 2007). In *Mañez v. Bridgestone Firestone North American Tire, LLC,* 533 F.3d 578, 584 (7th Cir. 2008), we compared dismissal on grounds of *forum non conveniens* to "a dismissal for lack of personal or federal subject-matter jurisdiction, which, while foreclosing future litigation of the matter in the court issuing the order, does not preclude a plaintiff from refiling and litigating in a proper forum." And such dismissals, though without prejudice, are of course appealable.

The critical issue so far as the dismissals on the merits are concerned is choice of law. When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred, in this case California. *In re Air Disaster at Ramstein Air Base, Germany, on 8/29/90,* 81 F.3d 570, 576 (5th Cir. 1996); *Johnson v. Continental Airlines Corp.,* 964 F.2d 1059, 1063 n. 5 (10th Cir. 1992); see also *Ferens v. John Deere Co.,* 494 U.S. 516, 521-31 (1990); *Van Dusen v. Barrack,* 376 U.S. 612, 633-39 (1964); *International Marketing, Ltd. v. Archer-Daniels-Midland*

Co., 192 F.3d 724, 729 (7th Cir. 1999); Larry Kramer, "Choice of Law in Complex Litigation," 71 *N.Y.U. L. Rev.* 547, 552 (1996). The plaintiffs' claims that the district judge dismissed on the merits he dismissed as untimely under California law.

California statutes of limitations don't begin to run until the plaintiff discovers, or should in the exercise of reasonable diligence have discovered, that he has a claim against the defendant. *Norgart v. Upjohn Co.,* 981 P.2d 79, 88-89 and n. 3 (Cal. 1999); *Jolly v. Eli Lilly & Co.,* 751 P.2d 923, 927-28 (Cal. 1988); *K.J. v. Arcadia Unified School District,* 92 Cal. Rptr. 3d 1, 10 (Cal. App. 2009). But the discovery rule would not save the plaintiffs' tort claims from dismissal for untimeliness. True, the plaintiffs argue that they didn't have enough information on which to base a suit until a *New York Times* article about the contamination of clotting factors with HIV was published on May 22, 2003, and therefore that their suit, filed in 2004, was timely, since the California statute of limitations for personal-injury claims is two years. Cal. Civ. P. Code § 335.1; *Fox v. Ethicon Endo-Surgery, Inc.,* 110 P.3d 914, 921 n. 3 (Cal. 2005). But as the district court found, the plaintiffs had had a reasonable basis to suspect that they had a cause of action more than five years before the article appeared, when their counsel had begun negotiations with two of the defendants to settle negligence claims arising from the contamination of the defendants' clotting factors with HIV. These negotiations

culminated in the settlement in 1998 on which the plaintiffs' breach of contract claim is based.

The plaintiffs argue that the limitations period should have been tolled by defendants' "fraudulent concealment" because when entering into the settlement agreement they said they had done nothing wrong and that they were offering financial aid purely as a humanitarian gesture. The plaintiffs are mistaken. Denial of liability when negotiating a settlement agreement is the norm; it is not evidence of fraudulent concealment of anything.

The district court was also correct in ruling in the alternative that a California court would apply ("borrow" is the technical legal term) the Taiwanese 10-year statute of repose, because the plaintiffs' tort claims arose under Taiwanese law. The hemophiliacs whom the plaintiffs represent were infected in the 1980s, more than a decade before these suits were brought.

A statute of repose, which is designed specifically for products-liability suits, cuts off liability after a fixed number of years, whether or not the plaintiff should have discovered within that period that he had a claim. A statute of repose thus overrides the discovery rule. It does this because of the long latency of many product defects, which can under a discovery rule impose vast and unpredictable products liability on manufacturers. See *Eaton v. Jarvis Products Corp.,* 965 F.2d 922, 929-31 (10th Cir. 1992); *Pullum v. Cincinnati, Inc.,* 476 So. 2d 657, 659-60 (Fla. 1985);

Davis v. Whiting Corp., 674 P.2d 1194, 1195-96 (Ore. App. 1984).

If the plaintiffs' tort claims arose in Taiwan, California law makes the Taiwanese statute of repose applicable to those claims. The reason is California's "borrowing" statute, which – sensibly designed to discourage forum shopping – provides that "when a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued." Cal. Civ. P. Code § 361; see *McCann v. Foster Wheeler LLC,* 2010 WL 547274, at *8-10 (Cal. Feb. 18, 2010); cf. *Flowers v. Carville,* 310 F.3d 1118, 1123 (9th Cir. 2002) (Nevada law); *Employers Ins. of Wausau v. Ehlco Liquidating Trust,* 723 N.E.2d 687, 694 (Ill. App. 1999). The plaintiffs argue that their claims arose in California, not Taiwan, because it was in California that the defendants failed to process their clotting factors in a way that would prevent contamination by HIV. But with immaterial exceptions (such as trespass, where purely nominal damages can be awarded even if there is no tangible harm, because "a continuing trespass may ripen into a prescriptive right and deprive a property owner of title to his or her land," *Kronos, Inc. v. AVX Corp.,* 612 N.E.2d 289, 293 (N.Y. 1993); see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, p.

75 (5th ed. 1984); *Restatement (Second) of Torts* § 163 and comment d (1965)), there is no tort without an injury. That is the rule in California, e.g., *Buttram v. Owens-Corning Fiberglas Corp.,* 941 P.2d 71, 77 n. 4 (Cal. 1997); *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.,* 463 P.2d 770, 776, (Cal. 1970); *In re Marriage of Klug,* 31 Cal. Rptr. 3d 327, 333 (Cal. App. 2005), as elsewhere. E.g., *Kamelgard v. Macura,* 585 F.3d 334, 340-41 (7th Cir. 2009) (Illinois law); *Abad v. Bayer, supra,* 563 F.3d at 669; *Parris v. State Farm Mutual Automobile Ins. Co.,* 494 S.E.2d 244, 246-47 (Ga. App. 1997); Keeton et al., *supra,* § 30, pp. 164-65. The tort of which the plaintiffs complain thus occurred in Taiwan. See *McCann v. Foster Wheeler LLC, supra,* at *10 n. 5; see also *Rajala v. Donnelly Meiners Jordan Kline, P.C.,* 193 F.3d 925, 928 (8th Cir. 1999) (Missouri law).

The case on which the plaintiffs principally rely, *McKee v. Dodd,* 152 Cal. 637 (1908), was a breach of contract case rather than a tort case. The breach had been committed in New York, the place where payment was due, and the suit was held to have arisen there. A claim of breach of contract is complete when the breach is committed, and indeed one can obtain a judgment in a breach of contract action without proving any loss at all. E.g., *Troyk v. Farmers Group, Inc.,* 90 Cal. Rptr. 3d 589, 628 n. 36 (Cal. App. 2009); *Movitz v. First National Bank of Chicago,* 148 F.3d 760, 765 (7th Cir. 1998); E. Allan Farnsworth, *Contracts* § 12.8, p. 757 (4th ed. 2004). Anyway the plaintiff was in New York when the breach occurred,

so the injury also occurred there, just as it occurred in Taiwan in the present case.

The plaintiffs concede that the suit "accrued" in Taiwan but deny that it "arose" there. They misunderstand those terms. A claim "accrues" when the statute of limitations begins to run; a claim that could not have been discovered by the date on which it arose will not (in a jurisdiction with a discovery rule) accrue then. E.g., *Norgart v. Upjohn Co., supra,* 981 P.2d at 88; *United States Liability Ins. Co. v. Haidinger-Hayes, Inc., supra,* 463 P.2d at 775-77; *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir. 1990). The terms "arose" and "accrued" often are conflated, because, other than in cases in which the discovery rule is invoked, usually the date on which the cause of action "accrues" is also the date on which it "arises." *In re Marriage of Klug, supra,* 31 Cal. Rptr. 3d at 334. The plaintiffs' claims arose in Taiwan, and that's all that matters.

California courts would apply the Taiwanese statute of repose in this case even if there were no borrowing statute. Applying the "balancing of interests approach" that California courts use to resolve conflict of laws issues, a California court would reason that if Taiwan will not provide a remedy to its own citizens, there is no reason for California to do so. See *McCann v. Foster Wheeler LLC, supra,* at *11, *13, *15-16; cf. *Nelson v. Sandoz Pharmaceuticals Corp.,* 288 F.3d 954, 965 (7th Cir. 2002); *Macurdy v. Sikov & Love, P.A.,* 894 F.2d 818, 821 (6th Cir. 1990). What interest has California in

treating Taiwanese plaintiffs more generously than Taiwan treats them?

We turn to the claims that the district court dismissed not as untimely but on the basis, rather, of *forum non conveniens*. One set of claims arises from the settlement agreement that provided the plaintiffs with $60,000 apiece as compensation for the injuries caused by the contaminated clotting factors. The agreement contained what the parties call a "scale-up" clause but would more commonly be referred to as a "most favored nation" clause. The clause required the defendants to increase the compensation in the settlement agreement to whatever level the defendants agreed to in later settlements with other clotting-factor claimants. The contract was negotiated and signed in Taiwan, and while the plaintiffs argue that the scale-up clause is clear on its face and applicable to their claims, the contract actually is ambiguous. For it is silent on whether the reference to other claimants who by receiving higher compensation increase the plaintiffs' entitlement is just to other *Taiwanese* claimants, as the defendants argue, or to other claimants anywhere in the world, as the plaintiffs argue – rather implausibly, given the enormous global variance in damages awards. Evidence beyond the language of the settlement agreement will be necessary to disambiguate the clause, and it seems that most of the persons who are in a position to give such evidence live in Taiwan – the plaintiffs' Taiwanese counsel who negotiated the settlement, a Taiwanese patient representative,

members of the Taiwanese department of health, defendant's Taiwanese outside counsel, and an employee of defendants in Taiwan – while only two live in the United States.

Taiwanese law makes it difficult to gather evidence for use in a trial in a foreign country because Taiwan is not a party to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, http://hcch.net/index_en.php?act=conventions.text&cid=82 (visited Mar. 17, 2010); see 10B *Federal Procedure* § 26:906 (Lawyers ed. 2010). The alternative method of obtaining evidence in a foreign country – sending a letter rogatory to the foreign court, United States Department of State, "Taiwan Judicial Assistance," http://travel.state.gov/law/info/judicial/judicial_669.html (visited Mar. 13, 2010) – seems not to be a very satisfactory means of obtaining evidence from Taiwan. See Kenneth C. Miller & Nancy Pionk, "The Practical Aspects of Litigating against Foreign Corporations," 54 *J. Air L. & Commerce* 123, 146-49 (1988); *Hayes Bicycle Group, Inc. v. Muchachos Int'l Co.,* 2008 WL 4830570, at *2-3 (E.D. Wis. Oct. 31, 2008).

The only circumstance that would favor holding the trial in California rather than in Taiwan would be the greater convenience for the defendants, since they are American companies. But as they don't want the case to be tried in California, or indeed anywhere else in the United States, really there is nothing in favor of the American forum. And as we pointed out in *Abad,* "when application of the doctrine [of *forum non*

conveniens] would send the plaintiffs to their home court, the presumption in favor of giving plaintiffs their choice of court is little more than a tie breaker." 563 F.3d at 667. There is no tie here.

The remaining claim that the district court dismissed on grounds of *forum non conveniens* is the products-liability claim of Chen-Chen Huang that may or may not be time-barred. It is an unusual claim because Huang is not a hemophiliac or a hemophiliac's representative. Rather, she claims to have been infected by sexual relations with her boyfriend who was a hemophiliac (now dead) and is believed to have become infected with HIV from clotting factors manufactured by one of the defendants. The critical issue at trial is likely to be the likelihood that sex with her boyfriend was responsible for Huang's contracting HIV. The pertinent evidence is in Taiwan and for the reason noted earlier would be difficult to obtain for use in a trial in the United States.

A complication is that whether Huang's claim would be time-barred if litigated in a Taiwanese court is uncertain. The defendants say they "candidly told the district court that they do not know whether testimony in Taiwan from, for example, medical providers might impeach Ms. Huang's assertion that she did not know of her HIV infection until 2002, when such testimony could give rise to a limitations defense." Huang responds that this wishy-washy statement fails to satisfy the defendants' burden of proving that Taiwan is an "adequate" alternative

forum, and if it isn't then dismissal on grounds of *forum non conveniens* was improper.

The Supreme Court has said that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," such dismissal is indeed improper, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 (1981), as in such cases as *Nemariam v. Federal Democratic Republic of Ethiopia,* 315 F.3d 390, 394-95 (D.C. Cir. 2003), and *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 677-79 (D.C. Cir. 1996). The alternative forum must provide the plaintiff with "a fair hearing to obtain some remedy for the alleged wrong." *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund,* 589 F.3d 417, 421 (7th Cir. 2009). But the relief need not be as comprehensive or as favorable as a plaintiff might obtain in an American court. *Id.;* see also, e.g., *Piper Aircraft Co. v. Reyno, supra,* 454 U.S. at 249; *Capital Currency Exchange, N.V. v. National Westminster Bank PLC,* 155 F.3d 603, 610-11 (2d Cir. 1998). It would be odd to subject the defendant to an inconvenient forum merely to increase the chances that the plaintiff will prevail on the merits. As the Supreme Court explained in the *Piper Aircraft* case, "jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens*

inquiry, dismissal would rarely be proper." 454 U.S. at 250.

But the cases suggest that if the plaintiff's suit would be time-barred in the alternative forum, his remedy there is inadequate – is no remedy at all, in a practical sense – and in such a case dismissal on grounds of *forum non conveniens* should be denied unless the defendant agrees to waive the statute of limitations in that forum and the waiver would be enforced there. *Norex Petroleum Ltd. v. Access Industries, Inc.,* 416 F.3d 146, 159 (2d Cir. 2005); *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. Bank of Pakistan,* 273 F.3d 241, 246-47 (2d Cir. 2001); *Mercier v. Sheraton Int'l, Inc.,* 935 F.2d 419, 426 (1st Cir. 1991); *Kontoulas v. A.H. Robins Co.,* 745 F.2d 312, 316 (4th Cir. 1984); but see *Yavuz v. 61 MM, Ltd.,* 576 F.3d 1166, 1182 (10th Cir. 2009). There is an exception, however, for cases in which a plaintiff seeks to defeat dismissal by waiting until the statute of limitations in the alternative forum has expired and then filing suit in his preferred forum (with the longer limitations period) and arguing that the alternative forum is inadequate. *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV,* 569 F.3d 189, 202-03 (4th Cir. 2009); cf. *In re Bridgestone/Firestone, Inc.,* 420 F.3d 702, 705-07 (7th Cir. 2005). That is different from the case in which as a consequence of delays inherent in litigation the defendant has acquired an airtight defense of untimeliness in the alternative forum since the litigation began. See *Aguinda v. Texaco, Inc.,* 303 F.3d

470, 475, 478-79 (2d Cir. 2002). The basis for dismissal on grounds of *forum non conveniens* should be the superior convenience of the alternative forum rather than a difference in substantive law that spells doom for the plaintiff's case if it is sent there.

The exception is inapplicable in this case. But this can't help Huang. If her claim is time-barred in Taiwan, it is time-barred in California because, as we know, the California courts would apply the Taiwanese limitations period to a tort claim by a Taiwanese injured in Taiwan. So even if, as she fears, something in Taiwan's statute of limitations will bar her claim if she is shunted to a Taiwanese court, that something would be applied by a California court to bar a suit in California.

We can imagine a case in which the court chosen by the plaintiff has a longer statute of limitations than the court preferred by the defendant and would not apply the other jurisdiction's shorter statute. Then dismissal on grounds of *forum non conveniens* would be tantamount to dismissal on the merits, and if so it would matter what the thinking behind the shorter statute of limitations was. Suppose it was purely procedural or institutional – the jurisdiction with the shorter limitations period lacked confidence that its courts could handle stale evidence but this misgiving was not shared by the court in which the plaintiff had sued. Then no jurisdiction's policy would be served by sending the plaintiff to a court in which his case would be doomed. This case is different because the shorter statute (shorter because the

statute of repose caps the conventional statute of limitations that begins to run upon discovery) expresses a substantive policy that the plaintiff is trying to avoid. Refusing to invoke *forum non conveniens* would give the plaintiff a gratuitous substantive advantage. Convenience favors Taiwan and the statute of limitations applicable to this suit will be the same whether the case is tried there or in California.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

Everett McKinley Dirksen
United States Courthouse
Room 2722 – 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

March 26, 2010

BEFORE: RICHARD A. POSNER, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

Nos.: 09-2280 & 09-3020	YAO-WEN CHANG, et al., Plaintiffs-Appellants v. BAXTER HEALTHCARE CORPORATION, et al., Defendants-Appellees

Originating Case Information:
District Court No: 1:93-cv-07452 Northern District of Illinois, Eastern Division District Judge John F. Grady

The judgment of the district court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	MDL No. 986 No. 93 C 7452 This document relates to: Peng, et al. v. Bayer Corp., et al., Case No. 04 C 4868; Chang, et al. v. Bayer Corp., et al., Case No. 04 C 4869; Ho, et al. v. Bayer Corp., et al., Case No. 06 C 7012; Chang, et al. v. Bayer Corp., et al., Case No. 08 C 5222; Peng, et al. v. Bayer Corp., et al., Case No. 08 C 5223

FINAL JUDGMENT ORDER

IT IS HEREBY ORDERED in light of this Court's Memorandum Opinion and Order dated July 14, 2009 (Docket No, 1939 in Case No. 93 C 7452), dismissing certain claims of Taiwan resident plaintiffs on the ground of *forum non conveniens*, that final judgment is entered dismissing without prejudice the tort

claims of plaintiff Huang, Chen-Chen against Bayer Corporation[1] in *Chang, et al. v. Bayer Corp., et al.,* Case No. 04 C 4869, and the contract claims of all plaintiffs against all defendants in *Chang, et al. v. Bayer Corp., et al.*, Case No, 08 C 5222, and *Peng, et al. v. Bayer Corp., et al.*, Case No. 08 C 5223 (the "*Forum Non Conveniens* Dismissed Claims"). The plaintiffs subject to this order and the cases in which they filed the *Forum Non Conveniens* Dismissed Claims are identified on Exhibit A to this order.

With this Order, the Court's Final Judgment Order dated April 15, 2009 (Docket No. 1924 in Case No. 93 C 7452), and the Court's Memorandum Opinion dated October 27, 2006 (Docket No. 1880 in Case No. 93 C 7452), final judgment has been entered with respect to all claims and all parties in each of the cases in this MDL that were filed by plaintiffs who are residents of Taiwan, including *Peng, et al. v. Bayer Corp., et al.*, Case No. 04 C 4868; *Chang, et al. v. Bayer Corp., et al.*, Case No. 04 C 4869; *Ho, et al. v. Bayer Corp., et al.*, Case No. 06 C 7012; *Chang et al. v. Bayer Corp., et al.*, Case No. 08 C 5222; and *Peng, et al. v. Bayer Corp., et al.*, Case No. 08 C 5223.[2]

---

[1] The tort claims of plaintiff Huang, Chen-Chen against Baxter Healthcare Corporation were dismissed with prejudice by the Court's Final Judgment Order dated April 15, 2009 (Docket No. 1924 in Case No. 93 C 7452).

[2] Plaintiffs previously filed a notice of appeal from the Court's Final Judgment Order dated April 15, 2009.

It is further ordered that in any case in which a plaintiff subject to this Order re-files in Taiwan a *Forum Non Conveniens* Dismissed Claim, Defendants shall abide by the conditions set forth in Defendants' *Forum Non Conveniens* Statement of July 29, 2009.

DATED: July 29, 2009

ENTER: /s/ John F. Grady
United States District Judge

EXHIBIT A
Taiwan *Forum Non Conveniens* Dismissed Claims

***Chang, et al. v. Bayer Corp., et al.*, Case No. 04 C 4869 (*Chang I*)**
All remaining claims in the *Chang I* case not previously dismissed are dismissed, including all claims of the following specific plaintiff against Bayer Corporation:[3]

1.	Huang, Chen-Chen

***Chang, et al. v. Bayer Corp., et al.*, Case No. 08 C 5222 (*Chang II*)**
The entire *Chang II* case is dismissed, including all claims of the following specific plaintiffs:

[3] All claims of all other plaintiffs in the *Chang I* case were previously dismissed with prejudice pursuant to the Court's Final Judgment Order dated April 15, 2009 (Docket No. 1924 in Case No. 93 C 7452).

1.	Chang, Y.
2.	Chen, C.
3.	Chen, T-Y, individually and as successor in interest on behalf of Chen, H.
4.	Chen, S. and Chen, C-Y, individually and as successors in interest on behalf of Chen, K.
5.	Chen, S. and Chen, C-Y, individually and as successors in interest on behalf of Chen, L-Y
6.	Chen, P. and Huang, Y., individually and as successors in interest on behalf of Chen, N.
7.	Chen, T. and Shih, M.
8.	Chiu, C-F, individually and as successor in interest on behalf of Chiu, F.
9.	Ho, C-L and Ho, H-Y, individually and as co-personal representatives on behalf of Ho, C-C
10.	Hsieh, Y. and Hsieh, C., individually and as successors in interest on behalf of Hsieh, T.
11.	Yang, M., individually and as successor in interest on behalf of Huang, Y.
12.	Huang, Y-H
13.	Wu, M., individually and as successor in interest on behalf of Lai, C-Y
14.	Wu, M.
15.	Li, C-H and Wang, S.
16.	Li, P. and Li, L-S, individually and as successors in interest on behalf of Li, C-C
17.	Li, P-W

18.	Li, S.
19.	Liao, C.
20.	Lin, C-M and Lin, C-F, individually and as successors in interest on behalf of Lin, Che-H
21.	Lin, P., individually and as successor in interest on behalf of Lin, C-H
22.	Lin, Y., individually and as successor in interest on behalf of Lin, Chi-M
23.	Yang, K., individually and as successor in interest on behalf of Lin, S.
24.	Liu, C-A and Chang, Y-Y, individually and as successors in interest on behalf of Liu, C.
25.	Liu, P., individually and as successor in interest on behalf of Liu, H.
26.	Liu, Y. and Chang, L.
27.	Tai, A., individually and as successor in interest on behalf of Tai, M.
28.	Tsai, C-H
29.	Huang, M-Y, individually and as successor in interest on behalf of Tsai, C-M
30.	Tsai, Y. and Huang, M-C, individually and as successors in interest on behalf of Tsai, H-T
31.	Li, A., individually and as successor in interest on behalf of Tsai, S.
32.	Tseng, C.
33.	Wang, M.
34.	Yu, W.

***Peng, et al. v. Bayer Corp., et al.*, Case No. 08 C 5223 (*Peng II*)**

The entire *Peng II* case is dismissed, including all claims of the following specific plaintiffs:

1.	Peng, D-G
2.	Chiu, Y-F
3.	Lei, C-L, individually and as successor in interest on behalf of Ho, D-W
4.	Su, W-N and Su-Chang, C-H, individually and as successors in interest on behalf of Su, G-Y
5.	Chiu, Y-F, individually and as successor in interest on behalf of Wu, R-H
6.	Yang, D-C

93-7452.091 July 14, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	MDL 986 93 C 7452 This document relates to: Chang, et al. v. Bayer Corp., et al., 04 C 4869 Peng, et al. v. Bayer Corp., et al., 04 C 4868 Ho, et al. v. Bayer Corp., et al., 06 C 7012

MEMORANDUM OPINION AND ORDER

(Ruling on Defendants' Renewed Taiwan Forum Non Conveniens Motion)

Earlier this year the court dismissed the tort claims of the Taiwanese residents in this multidistrict litigation[1] on the ground that they were barred by limitations. *In re Factor VIII or IX Concentrate Blood*

[1] For the history of the litigation, see *In re Factor VIII or IX Concentrate Blood Products Liability Litigation*, 408 F. Supp. 2d 569, 570-73 (N.D. Ill. 2006), *aff'd In re Factor VIII or IX Concentrate Blood Products Litigation*, 484 F.3d 951 (7th Cir. 2007).

Prods. Liab. Litig., No. 93 C 7452, 2009 WL 804018 (N.D. Ill. Mar. 26, 2009). The plaintiffs have appealed that decision, and the Court of Appeals has stayed the appeal pending this court's decision on the Defendants' Renewed Motion to Dismiss Plaintiffs from Taiwan on Grounds of *Forum Non Conveniens.* That motion is the subject of this opinion.

The tort claims we dismissed as barred by limitations were plaintiffs' negligence claims and their claims that defendants fraudulently induced them to settle the negligence claims. We held that these tort claims are barred by the limitations laws of both Taiwan and California.

Plaintiffs have a remaining claim for breach of contract that is not barred by limitations. This is the claim that defendants address in their renewed *forum non conveniens* motion. The claim is that, as part of the 1998 settlement agreement, the defendants agreed to pay each plaintiff the sum of $60,000 plus whatever sums might be required to make their total payments equal to those received by other persons who settled their claims with the defendants. The parties refer to this provision for the additional payments as the "scale-up" provision of the settlement agreement. Plaintiffs claim that the defendants have breached this scale-up provision by refusing to pay them additional monies necessary to make their payments equal to those received by other claimants.

The parties disagree about the meaning of the scale-up provision. Plaintiffs allege that the other

"claimants" whose payments are to be compared to theirs are *any* claimants with whom the defendants have settled, anywhere in the world. Defendants say the provision refers only to other *Taiwanese* claimants with whom they might settle. Some court will have to decide this dispute, and the choice of that forum is the subject of the defendants' present motion.

DISCUSSION

Defendants contend, for several reasons, that Taiwan is a more convenient forum than either of the transferor courts in California. We will address their arguments in due course, but first we will deal with a threshold question raised by the plaintiffs. They contend that we have already denied the defendants' *forum non conveniens* motion and that the present "renewed" motion is an inappropriate request for reconsideration. (Taiwanese Pls.' Opp'n to Defs.' Renewed Mot. to Dismiss Pls. from Taiwan on Grounds of *Forum Non Conveniens* at 8-9.) Plaintiffs misapprehend the nature of our denial of defendants' initial *forum non conveniens* motion, *In re Factor VIII or IX Concentrate Blood Products Liability Litigation,* 595 F. Supp. 2d 855 (N.D. Ill. 2009) (hereinafter referred to as *Chang*). It is true that we denied the motion, but not on the merits. As far as the merits were concerned, we indicated that they weighed in favor of the defendants and that, "were it not for a practical consideration we [would] discuss in the next section of [the] opinion, we would grant the motion to

dismiss." *Id.* at 874. The "practical consideration" was that the threshold question in the case was limitations, and, were the case to be refiled in Taiwan, the Taiwanese court would give priority to the limitations question, applying the same law that would be applied by the California courts. Therefore, we stated,

> We believe it would be pointless, and that it would impose a needless expense upon the plaintiffs, for us to grant the motion to dismiss, forcing them to refile in Taiwan. The cases should remain in California, where defendants can present the same motion they would present in Taiwan. Should the California courts, or either of them, decide that the claims are not time-barred, the California court could then consider whether a *forum non conveniens* dismissal would be appropriate. *Our denial of defendants' motion at this time is, of course, without prejudice to their renewing it in California should it become appropriate to do so.*

Id. (emphasis added).

Thereafter, instead of agreeing to a suggestion of remand to the transferor courts in California, the parties agreed that we should decide the limitations motion. We then dismissed the tort claims on limitations grounds, and defendants filed their renewed *forum non conveniens* motion. The motion is clearly appropriate. We turn, then, to the parties' arguments regarding the merits of the renewed

motion. Much of what we will say incorporates the analysis we made in *Chang*.

Plaintiff Chen-Chen Huang

The plaintiff Chen-Chen Huang is different from the other plaintiffs in that she was not a party to the settlement agreement. She asserts only the same negligence claim that we dismissed in *Chang*. Our conclusion that the negligence claim is more conveniently litigated in Taiwan than California, for the reasons asserted in *Chang,* 595 F. Supp. 2d at 873, remains unchanged. We will therefore grant the motion of the defendants to dismiss the negligence claim of Chen-Chen Huang on the ground of *forum non conveniens*.

The Remaining Plaintiffs Who Assert Only Contract Claims

The defendants assert three grounds in support of their motion to dismiss the contract claims.

Relative Ease of Access to Sources of Proof and Compulsory Process for Witnesses

This is a "private interest factor" that, in *Chang,* 595 F. Supp. 2d at 869, we found to favor dismissal of the tort claims. As we noted,

> If the defendants could demonstrate that they are significantly limited in the discovery they can obtain in Taiwan in aid of cases

> pending in the United States, and that their ability to obtain necessary discovery would be substantially greater if it were sought in connection with a case pending in Taiwan, that would be a private interest factor in favor of dismissal.

Id. The defendants now argue that the same discovery problems that we found to exist in regard to the tort claims also exist in regard to the contract claims. They maintain that the contract case will hinge on the proper interpretation of the scale-up language and that practically all of the witnesses with knowledge of the 1998 settlement negotiations are residents of Taiwan, not subject to compulsory process for either discovery depositions or trial in California. We agree with defendants. There is, of course, less evidence to collect and present than there was when the case included the tort claims, but the convenience question remains essentially the same. We note, as we did in *Chang,* that discovery in aid of foreign litigation is a limited and cumbersome process in Taiwan, made more so by the fact that Taiwan is not a party to the Hague Convention.

The parties implicitly agree that, if parol evidence is required to interpret the scale-up provision, such evidence will be admissible in Taiwan. We will assume, therefore, that the parol evidence described by the parties would be admissible in Taiwan.

The scale-up provision reads as follows:

> After having paid monetary compensations to some Claimants, if Manufacturer decides to raise the compensation amount of Paragraph 1 of this agreement or provide additional benefits in order to reach settlement with other Claimants regarding Infection Incident, it shall also provide the same additional amount or additional benefits to Claimants who have already been paid.

(Taiwan Pls.' Opp'n, Ex. 44, ¶ 9.) The disagreement between the parties is over the meaning of the word "Claimants." As we noted *supra,* the plaintiffs say it means *any* claimants anywhere in the world. The defendants interpret it to mean only those claimants who are parties to the Taiwan settlement agreement.

The defendants point out that the foregoing quotation of the scale-up provision is a translation from the Chinese language in which the agreement was written, and this makes it more necessary to hear from the Chinese-language negotiators as to what they intended. Defendants argue that plaintiffs "have not identified a single relevant witness in California subject to the subpoena power of a California court." (Defs.' Reply at 4.) Another argument the defendants make is that settlements in other countries, including the $100,000 First Generation settlements in this MDL, had already been made at the time of the 1998 Taiwan negotiations. In view of this, defendants argue that the scale-up language,

"if Manufacturer decides to raise the compensation amount of Paragraph 1 . . . ," does not fit. (*Id.* at 3.)

The plaintiffs have three arguments as to why the scale-up provision can be conveniently litigated in California. First, they argue that the agreement is unambiguous on its face and no parol evidence is required. (Taiwan Pls.' Opp'n at 12.) In their view, all the California courts have to do is apply the plain meaning of the contract, which requires that plaintiffs be paid as much as any other claimant anywhere. (*Id.*)

Alternatively, assuming that parol evidence is required, "voluminous evidence can be found in the United States to show that defendants later favored United States claimants by paying them substantially more for their infection incidents." Moreover, the plaintiffs "would likely be required to file motions in various U.S. courts to unseal these documents," raising concerns "as to whether this evidence would be admissible in Taiwanese courts." (*Id.* at 12-13.)

These arguments are farfetched. The fact of the higher payments is undisputed, and the defendants can easily be required to provide discovery as to their number and amounts.[2] There is nothing "confidential" about the statistical facts, but only about the identities of the recipients, which have been protected throughout this litigation with no resulting problems.

---

[2] Defendants concede as much. Defs.' Reply at 4 n.2.

The situs of defendants' payment records is totally immaterial to any *forum non conveniens* question, as the relevant payment information can easily be produced regardless of where these cases are pending.

As far as the need for parol evidence is concerned, we think the word "Claimants" in the scale-up agreement could well be found to be ambiguous. Aside from any problems resulting from the fact that two languages were being used in the negotiations, plaintiffs assert that "[a]ccording to defendants' internal documents produced in discovery, the amount of the humanitarian aid provided was 'to refer to the compensation amount in other countries,' and Taiwan hemophiliacs were not to be treated 'differently in terms of compensation.'" (Taiwan Pls.' Opp'n at 7.) (In their reply, the defendants comment neither on this assertion nor on plaintiffs' Exhibit 37, which appears to be an English translation of a news article from a Chinese news source. Our own reading of Exhibit 37 leaves us in doubt as to whether it represents any admission by either defendant.)

We agree with the plaintiffs that if the scale-up language required no interpretation, California courts could apply the provision as well as the Taiwanese courts. However, the parties have raised sufficient doubt about the scope of the provision to cause us to conclude that parol evidence is likely to be admissible. And it is quite clear that the bulk of the parol evidence is in Taiwan, where it cannot be easily accessed from California. We find, therefore, that this

private interest factor of ease of access to evidence and compulsory process of witnesses strongly favors the defendants' motion to dismiss.[3]

Translation Costs

In our *Chang* decision, 595 F. Supp. 2d at 872, we held that the substantial translation cost the plaintiffs would have to incur in Taiwan was a private interest factor weighing against the defendants' motion to dismiss. That was because the plaintiffs' tort claims would have required translating a great amount of English-language liability evidence into Chinese for use in Taiwan. This consideration no longer applies, however, because we are no longer dealing with the tort claims. As we have already indicated, much of the evidence on this contract issue is in Chinese; very little of it is in English. Translation costs, therefore, are simply not a factor weighing against dismissal.

Unwilling to concede the point, however, the plaintiffs argue that litigation of the contract claim in Taiwan "would require translation of all the evidence located in the United States into Mandarin Chinese, a costly and time-consuming process, as plaintiffs'

[3] In the event the Taiwanese court determines that the agreement is in fact subject to a plain interpretation, there is nothing that would prevent the court from giving effect to that interpretation.

earlier briefings have explained." (Pls.' Opp'n at 13.) This argument falls of its own weight.

The Local Interest and Resolution of the Contract Claim

In *Chang,* we held that Taiwan has a greater interest than the state of California in resolution of plaintiffs' tort claims, and that this was a public interest factor favoring dismissal. 595 F. Supp. 2d at 872. We believe that the balance tilts even more heavily in favor of Taiwan in regard to the contract claim. We see no interest that the people of California would have in whether these Taiwanese citizens receive increased payments from the defendants, whereas Taiwan certainly has an interest in the welfare of its own citizens and the integrity of the contract negotiations that were conducted with the defendants by officials of the Taiwanese Department of Health.

Plaintiffs argue that "[t]he United States has more interest in deciding the contract claims than Taiwan" and provide a list of defendants' misdeeds in regard to the distribution of their concentrates in Asia and Taiwan. (Pls.' Opp'n at 13-15.) But the issue is not which forum has a greater interest in the now-dismissed tort claims, but, rather, a greater interest in the contract claim. Our conclusion is that Taiwan

has a significant interest and that California has little or none.[4]

Additional Argument by the Plaintiffs

We will now discuss an additional point raised by the plaintiffs beyond what the defendants have argued in support of their motion to dismiss.

Adequacy of Taiwan as a Forum

We indicated in *Chang* as part of our *forum non conveniens* analysis of the tort claims that the claims appeared to be time-barred both in Taiwan and California. This meant that "Taiwan and California are on a par as far as adequacy – or inadequacy – is concerned." 595 F. Supp. 2d at 866. In their opposition to defendants' present motion to dismiss their contract claim, plaintiffs argue that this holding in *Chang* somehow applies to the scale-up claims, making Taiwan an inadequate forum to litigate those claims. (Pls.' Opp'n at 11.) Plaintiffs' short presentation on this point concludes with the assurance that

[4] For The Seventh Circuit has recently commented on the sometimes difficult effort of the courts to find a superior "interest" of one country or another, *Abad v. Bayer Corp., et al.,* 563 F.3d 663, 668 (7th Cir. 2009). The comment will provide welcome guidance to district judge who have to deal with the question. In this case, the superior interest of Taiwan seems clear.

"[d]efendants' motion presents nothing new on this point."

Our limitations ruling in regard to plaintiffs' tort claims has nothing to do with the contract claims, which are not barred by limitations in Taiwan.

CONCLUSION

The relevant factors weigh in favor of dismissal. Taiwan is clearly the forum that provides substantially better access to evidence and compulsory process for witnesses, and the defendants would be severely hampered in that regard should the cases remain in California. Taiwan has a significantly greater interest in the litigation than does California. Cost of translation is not a problem. Litigation in Taiwan will cause little or no inconvenience to the plaintiffs, who would, after all, be litigating in their home forum rather than at a long distance in California.

The defendants' renewed motion to dismiss the Taiwan plaintiffs on grounds of *forum non conveniens* is allowed.

The parties may prepare and submit to the court by July 28, 2009 a proposed judgment order, similar to the other *forum non conveniens* judgment orders we have entered in this litigation, containing the usual protective provisions, and providing for (1) the dismissal of the claim of the plaintiff Chen-Chen Huang, with prejudice, as time-barred, and (2) the dismissal of the contract claims of the remaining

plaintiffs on the ground of *forum non conveniens,* without prejudice to refiling in Taiwan.

DATED: July 14, 2009

ENTER: /s/ John F. Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	MDL No. 986 No. 93 C 7452 [93cv7452] This document relates to: Peng, et al. v. Bayer Corp., et al., Case No. 04-cv-04868; Chang, et al. v. Bayer Corp., et al., Case No. 04-cv-04869; Ho, et al. v. Bayer Corp., et al., Case No. 06-cv-07012

FINAL JUDGMENT ORDER

In accordance with the Court's two Memorandum Opinions and Orders dated March 26, 2009, entered on March 27, 2009 as Documents 1918 and 1920, granting summary judgment in favor of defendants, final judgment is hereby entered as follows in *Peng, et al. v. Bayer Corp., et al.*, Case No. 04-cv-04868 (*Peng*), *Chang, et al. v. Bayer Corp., et al.*, Case No. 04-cv-04869 (*Chang*), and *Ho, et al. v. Bayer Corp., et al.,* Case No. 06-cv-07012 (*Ho*).

All claims of each of the following plaintiffs in the above-captioned cases are dismissed with prejudice as to all defendants for the reasons set forth in the

Court's Memorandum Opinion and Order entered as Document 1918:

	Plaintiff	**Case**
1.	Chang, Yao-Wen	*Chang*
2.	Chen, Ching-Yen	*Chang*
3.	Chen, Shao-Hsiung and Chen, Chung-Yeh-Chih, individually and as successors in interest on behalf of Chen, Keng-Ta and Chen, Lien-Yuan	*Chang*
4.	Chen, Tien-You and Shih, M.	*Chang*
5.	Chen, Tseng-Ying, individually and as successor in interest on behalf of Chen, Hsi-Chang	*Chang*
6.	Chiu, Chien-Fu-Me, individually and as successor in interest on behalf of Chiu, Feng-Ching	*Chang*
7.	Ho, Chih-Cheng	*Chang*
8.	Ho, Chih-Lung and Ho, Hsueh-Ying, individually and as successors in interest on behalf of Ho, Chih-Cheng	*Ho*
9.	Hsieh, Yung-Tso and Hsieh, Cheng-Ju-Yu, individually and as successors in interest on behalf of Hsieh, Tung-Chang	*Chang*
10.	Huang, Meng-Yuan, individually and as successor in interest on behalf of Tsai, Chih-Ming	*Chang*
11.	Huang, Yu-Lan and Chen, Peng-Chang, individually and as	*Chang*

	successors in interest on behalf of Chen, Neng-Tsung	
12.	Huang, Yung-Hsaio	*Chang*
13.	Li, A., individually and as successor in interest on behalf of Tsai, Song-Ming	*Chang*
14.	Li, Chang-Hsing and Wang, S.	*Chang*
15.	Li, Ping and Li, Liu-Shu, individually and as successors in interest on behalf of Li, Chung-Chang	*Chang*
16.	Li, Po-Wen	*Chang*
17.	Li, Shuen-An	*Chang*
18.	Liao, Chia-Hung	*Chang*
19.	Lin, Chen-Ming and Lin, C-F, individually and as successors in interest on behalf of Lin, Chen-Hsiang	*Chang*
20.	Lin, Pao-Hsin, individually and as successor in interest on behalf of Lin, Chih-Hsien	*Chang*
21.	Lin, Yi-Ling, individually and as successor in interest on behalf of Lin, Chih-Ming	*Chang*
22.	Liu, Chin-An and Chang, Yu-Yen, individually and as successors in interest on behalf of Liu, Chia-Wang	*Chang*
23.	Liu, Pai-Chao, individually and as successor in interest on behalf of Liu, Hsin-Tsun	*Chang*

24.	Liu, Yung-Kuei and Chuang, L.	*Chang*
25.	Peng, Da'gan (Da Gung)	*Peng*
26.	Tai, A-Kan, individually and as successor in interest on behalf of Tai, Ming-Tung	*Chang*
27.	Tsai, Cheng-Hsui	*Chang*
28.	Tsai, Yuan-Tsan and Huang, Mei-Chih, individually and as successors in interest on behalf of Tsai, Hung-Ta	*Chang*
29.	Tseng, Chen Wei	*Chang*
30.	Wang, Ming-Yung	*Chang*
31.	Wu, Mei-Chun	*Chang*
32.	Wu, Mei-Chun, individually and as successor in interest on behalf of Lai, Chao-Yang	*Chang*
33.	Yang, Kuei-Chen, individually and as successor in interest on behalf of Lin, Shih-Shui	*Chang*
34.	Yang, Ming-Ching, individually and as successor in interest on behalf of Huang, Yu-Ting	*Chang*
35.	Yu, Wen-Fu	*Chang*

All claims of each of the following plaintiffs in the above-captioned cases are also dismissed with prejudice as to defendant Baxter Healthcare Corporation for the additional reasons set forth in the Court's

Memorandum Opinion and Order entered as Document 1920:

	Plaintiff	**Case**
1.	Chang, Yao-Wen	*Chang*
2.	Chen, Ching-Yen	*Chang*
3.	Chen, Tien-You and Shih, M.	*Chang*
4.	Chen, Tseng-Ying, individually and as successor in interest on behalf of Chen, Hsi-Chang	*Chang*
5.	Chiu, Chien-Fu-Me, individually and as successor in interest on behalf of Chiu, Feng-Ching	*Chang*
6.	Ho, Chih-Cheng	*Chang*
7.	Ho, Chih-Lung and Ho, Hsueh-Ying, individually and as successors in interest on behalf of Ho, Chih-Cheng	*Ho*
8.	Hsieh, Yung-Tso and Hsieh, Cheng-Ju-Yu, individually and as successors in interest on behalf of Hsieh, Tung-Chang	*Chang*
9.	Huang, Chen-Chen	*Chang*
10.	Huang, Meng-Yuan, individually and as successor in interest on behalf of Tsai, Chih-Ming	*Chang*
11.	Huang, Yu-Lan and Chen, Peng-Chang, individually and as successors in interest on behalf of Chen, Neng-Tsung	*Chang*
12.	Huang, Yung-Hsaio	*Chang*

13.	Li, A., individually and as successor in interest on behalf of Tsai, Song-Ming	*Chang*
14.	Li, Chang-Hsing and Wang, S.	*Chang*
15.	Li, Ping and Li, Liu-Shu, individually and as successors in interest on behalf of Li, Chung-Chang	*Chang*
16.	Li, Po-Wen	*Chang*
17.	Li, Shuen-An	*Chang*
18.	Liao, Chia-Hung	*Chang*
19.	Lin, Chen-Ming and Lin, C-F, individually and as successors in interest on behalf of Lin, Chen-Hsiang	*Chang*
20.	Lin, Pao-Hsin, individually and as successor in interest on behalf of Lin, Chih-Hsien	*Chang*
21.	Lin, Yi-Ling, individually and as successor in interest on behalf of Lin, Chih-Ming	*Chang*
22.	Liu, Chin-An and Chang, Yu-Yen, individually and as successors in interest on behalf of Liu, Chia-Wang	*Chang*
23.	Liu, Pai-Chao, individually and as successor in interest on behalf of Liu, Hsin-Tsun	*Chang*
24.	Liu, Yung-Kuei and Chuang, L.	*Chang*
25.	Peng, Da'gan (Da Gung)	*Peng*

26.	Tai, A-Kan, individually and as successor in interest on behalf of Tai, Ming-Tung	*Chang*
27.	Tsai, Yuan-Tsan and Huang, Mei-Chih, individually and as successors in interest on behalf of Tsai, Hung-Ta	*Chang*
28.	Tseng, Chen Wei	*Chang*
29.	Wang, Ming-Yung	*Chang*
30.	Wu, Mei-Chun	*Chang*
31.	Wu, Mei-Chun, individually and as successor in interest on behalf of Lai, Chao-Yang	*Chang*
32.	Yang, Ming-Ching, individually and as successor in interest on behalf of Huang, Yu-Ting	*Chang*
33.	Yu, Wen-Fu	*Chang*

NOW THEREFORE, it is ordered and adjudged that in *Peng* and *Ho* final judgment is entered against all plaintiffs in favor of defendants, dismissing all claims with prejudice, and that in *Chang* final judgment is entered against all plaintiffs in favor of defendant Baxter Healthcare Corporation and against all plaintiffs other than plaintiff Huang,

Chen-Chen in favor of defendant Bayer Corporation, dismissing all claims with prejudice.[1]

DATED: April 15, 2009

/s/ John F. Grady
United States District Judge

[1] It is not the intent of this Order to dismiss any contract claims. In particular, this Order does not affect other claims asserted by certain of the same plaintiffs in *Peng, et al. v. Bayer Corp., et al.*, Case No. 08-cv-5222, and in *Chang, et al. v. Bayer Corp., et al.*, Case No. 08-cv-5223.

93-7452.091 March 26, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LIABILITY LITIGATION	MDL 986 93 C 7452 This document relates to: Chang, et al. v. Bayer Corp., et al., 04 C 4869 Peng, et al. v. Bayer Corp., et al., 04 C 4868 Ho, et al. v. Bayer Corp., et al., 06 C 7012

MEMORANDUM OPINION AND ORDER

(Ruling on Defendants' Motion for Summary Judgment on Taiwan Plaintiffs' Tort Claims on Limitations Grounds)

INTRODUCTION

On January 14, 2009, this court filed a memorandum opinion and order denying the defendants' motion to dismiss the claims of the plaintiffs from Taiwan on grounds of *forum non conveniens*. *In re Factor VIII or IX Concentrate Blood Prods. Liab. Litig.,* 595 F. Supp. 2d 855 (N.D. Ill. 2009). The reason for the denial was that the threshold issue of whether the claims are barred by limitations can

more economically be resolved by the district courts in California than by requiring the parties to resort to the courts of Taiwan.

Thereafter, the defendants requested this court to decide the limitations issue, and plaintiffs had no objection to our doing so. We agreed to take on the defendants' motion, and the parties have filed additional briefs, supplementing the arguments they made on the *forum non conveniens* motion. We will refer to the January 14, 2009 slip opinion as the "*Chang* opinion."

One of the issues we had to address in order to decide the *forum non conveniens* motion was whether Taiwan is an "adequate" forum for the litigation of plaintiffs' claims. The plaintiffs argued that it was not adequate because their claims were time-barred in Taiwan. We agreed that if the claims were time-barred there, this would make Taiwan an inadequate forum. *Chang* at 12.[1] The defendants argued that even if this were true it would not entitle the plaintiffs to litigate their claims in the California district courts, because the limitations law there would be no different. This was because, in defendants' view, the California courts would apply Taiwanese limitations law, and, even if they were to apply California limitations law, that would include

[1] Or, more precisely, "that the defendants [had] not carried their burden of showing that Taiwan [was] an adequate forum." *Id.*

California's "borrowing statute" which, again, would result in the claims being time-barred. Plaintiffs, of course, disagreed with these arguments and contended that under the law of California their claims are not time-barred.

We give this background to explain why it was necessary for us, in deciding the *forum non conveniens* motion, to delve into the limitations law of California. In doing that, however, we did not purport to make any final decision as to whether plaintiffs' claims are in fact time-barred and specifically pointed out that we were only giving our "best judgment as to what might be the outcome concerning limitations" as a part of the necessary *forum non conveniens* analysis. *Chang* at 19 n.7.

We have approached this new motion of the defendants for summary judgment on limitations grounds with a determination to take a fresh look at the law and not merely rely on the analysis we made in *Chang*. Plaintiffs have made some new arguments – one in regard to the borrowing statute in particular – and we have fully considered them.

For convenience, we will sometimes adopt relevant portions of the *Chang* opinion in order to avoid repetition of case citations and quotations from authorities.

WHICH LIMITATIONS LAW APPLIES

The federal courts in California will apply California's "governmental interest test" to determine which limitations law applies to these diversity actions. *Orr v. Bank of America,* 285 F.3d 764, 772 n.4 (9th Cir. 2002). The governmental interest test was explained in *American Bank of Commerce v. Corondoni,* 169 Cal. App. 3d 368, 372-73 (Cal. Ct. App. 1985), and the explanation is quoted in *Chang* at 13. We concluded in *Chang* that California has a lesser interest in what limitations period applies to plaintiffs' claims than does Taiwan, so that, under the governmental interest test, the California courts would apply the limitations law of Taiwan to plaintiffs' claims. *Chang* at 14. The parties have argued this question anew, but we are still persuaded that Taiwan has the greater interest. Accordingly, we now hold that the limitations law of Taiwan applies to plaintiffs' claims. The courts of Taiwan have dismissed substantially identical claims as time-barred in the *Peng* litigation, *Chang* at 14-15, and plaintiffs do not argue that their claims are viable in Taiwan. Accordingly, applying Taiwanese limitations law, we hold plaintiffs' tort claims are barred by limitations.

We recognize that there is an argument on the other side of the governmental interest question, and, to cover the possibility that we are wrong in saying Taiwan has the greater interest, we will also address the question of whether plaintiffs' claims would be barred if California limitations law were applied. This leads us to the question of whether there is any

material difference between the limitations law of Taiwan and that of California. If the statutory time limits of California were to be applied, the claims are barred. Plaintiffs argue, however, that unlike Taiwan, California has a "discovery" rule that tolls the beginning of the limitations period until such time as the plaintiffs acquire or reasonably should have acquired knowledge of the defendants' wrongdoing and the connection between that wrongdoing and plaintiffs' injuries. Plaintiffs argue that due to fraud and concealment by the defendants, they did not learn the necessary information until May 22, 2003, when an article appeared in the *New York Times.* (Pls.' Mem. in Opp'n at 17.) These suits were filed in California in 2004, a year later, and therefore plaintiffs believe they are timely by virtue of the California discovery rule.

The *New York Times* article stated that the defendant Bayer continued to sell non-heat-treated concentrate in foreign countries, including Taiwan, after it knew that its newly-introduced heat-treated product was safer and unlikely to transmit the HIV virus. We will assume, for purposes of this discussion of the discovery rule, that plaintiffs did not know of this allegation until it appeared in the *New York Times* article. The question is whether plaintiffs' ignorance of Bayer's export of factor concentrate that had been discontinued in the United States for safety reasons, and Bayer's alleged concealment of the different way it treated United States and foreign markets, tolled the statute of limitations until the

time the *New York Times* article appeared. We hold that it did not. More than five years prior to the appearance of the article, plaintiffs, through their counsel, had begun negotiations with Bayer and Baxter to settle their negligence claims. Clearly, the plaintiffs suspected that their infections had been caused by infusion of the defendants' factor concentrates and that the defendants had been guilty of negligence in the manufacture and marketing of the concentrates. There is no other explanation for the settlement negotiations with the defendants, which continued until the settlement of plaintiffs' claims in 1998, more than five years before they filed suit.

We disagree with plaintiffs that the limitations period was tolled until they knew all of the facts concerning the defendants' alleged wrongdoing. It is not necessary that a plaintiff know all of the details of the defendant's alleged wrongdoing. It is sufficient that he *suspects* that someone has done something wrong to him. We will quote again from the California Supreme Court opinion in *Norgart v. Upjohn Co.,* 981 P.2d 79 (Cal. 1999), quoted in *Chang* at 16:

> [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof-when, simply put, he at least "suspects . . . that someone has done something wrong" to him (*Jolly v. Eli Lilly & Co.,* supra, 44 Cal.3d at p. 1110), "wrong" being used, not in any technical sense, but rather in accordance with its "lay understanding" (*id.* at p. 1110,

> fn. 7). He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. (*Jolly v. Eli Lilly & Co.,* supra, 44 Cal.3d at p. 1110.) He has reason to suspect when he has "'"'notice or information of circumstances to put a reasonable person *on inquiry*'"'" (*id.* at pp. 1110-1111, italics in original); he need not know the "specific 'facts' necessary to establish" the cause of action; rather, he may seek to learn such facts through the "process contemplated by pretrial discovery"; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place-he "cannot wait for" them "to find" him and "sit on" his "rights"; he "must go find" them himself if he can and "file suit" if he does (*id.* at p. 1111).

981 P.2d at 88-89 (parallel citations omitted). The California discovery rule is of no benefit to the plaintiffs, and their claims are time-barred in California by the lapse of the limitations period, which began to run at the latest in the late 1990s. They did not file these actions until 2004.

Plaintiffs have another problem with California limitations law, which includes the state's "borrowing statute." The statute reads as follows:

> When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of

> the lapse of time, an action thereon shall not be maintained against him in this State.

Cal. Civ. Proc. Code § 361. In *Chang,* we expressed the view that, because plaintiffs' claims are barred in Taiwan, they are necessarily barred in California because of the borrowing statute. *Chang* at 19. We regarded the word "arisen" in the statute as synonymous with "accrued," and held that both the negligence and fraudulent inducement claims had accrued in Taiwan. *Id.*

In opposing defendants' present motion for summary judgment, plaintiffs make a new argument in regard to the borrowing statute. They say that their causes of action did not "arise" in Taiwan, and therefore the borrowing statute does not apply. Instead, plaintiffs argue that their claims "arose" in California, because that is where the defendants' wrongful conduct occurred. In their view, "arise" and "accrue" are not synonymous, and the term "arisen" in the borrowing statute refers simply to a breach of a duty, regardless of whether any injury or damage has resulted. (Pls.' Mem. in Opp'n at 18-22.) In support of their argument, plaintiffs cite the case of *McKee v. Dodd,* 152 Cal. 637 (1908). This was an action brought by a New York creditor on three promissory notes executed by the decedent Dodd in New York in 1891. The Court noted:

> All of these notes by their terms became due and payable before the expiration of the year

> 1891. Shortly after their execution Dodd left New York and never returned.

Id. at 638. Dodd lived for a time in California and then moved to Honolulu, where he resided for several years until his death in 1900. He left property in California, and the New York creditor, McKee, brought suit in California against Dodd's executrix for payment on the notes. McKee obtained a judgment, and the executrix appealed on the ground that McKee's claim was barred by the language of the California borrowing statute:

> Appellant contends that the cause of action "arose" simultaneously in New York State at the time the promissory notes became due and payable, and also in Europe where at that moment [sic] deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed and arose finally in Hawaii upon his arrival there. If this be the true construction of the statute, then admittedly plaintiff's cause of action is barred.

Id. at 640.

The court rejected the defendant's argument as follows:

> It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment, New York State. It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment, New York State. His

> failure in this regard gave rise to the cause of action, and, clearly therefore, that cause of action arose in the state of New York.

Id. at 641. In short, the defendant Dodd had a duty to pay the notes in New York in 1891. "*His failure in this regard* gave rise to the cause of action. . . ." (emphasis added). Defendant's failure to pay was at once the breach of duty and the damage to plaintiff that gave rise to the cause of action.

Plaintiffs read other language in the *McKee* case to mean that under California law a cause of action can "arise" within the meaning of the borrowing statute before there is any injury or damage to the plaintiff. The language they rely just precedes the above-quoted passage:

> A cause of action, as Professor Pomeroy points out with his usual lucidity, arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests.

Id. (citation omitted). (Pls.' Mem. in Opp'n at 19.) When read in the context of the facts and the other language of the opinion, this language relied on by the plaintiffs cannot reasonably be taken as a holding by the California Supreme Court that there can be a cause of action without injury or damage. The facts were that McKee's injury occurred when the notes came due and Dodd failed to pay. The crux of the court's holding was that this was the moment at

which the cause of action arose. It happens that in a promissory note case, unlike a tort case, the breach of the duty and the resulting damage are one and the same: the debtor's failure to pay is the damage sustained by the creditor.

Although *McKee* is the principal basis of the plaintiffs' argument that the California borrowing statute does not apply, the defendants make no reference to the case in their reply memorandum. This is a remarkable omission, but we are able to conclude without help from the defendants that *McKee* does not stand for the proposition that a tort action can "arise" – either in California or Taiwan – without injury or damage to the plaintiff.

We still believe that "arise" in the borrowing statute is synonymous with "accrue." There can be no accrual without injury or damage. California law could not be clearer on this point. *See Chang* at 17-19.[2]

Plaintiffs argue that the drafters of the borrowing statute must have had in mind some difference between "arise" and "accrue" because the statute uses both terms. We acknowledge that this is the normal

[2] The other case plaintiffs rely on for their theory that an action can "arise" without injury is *Dalkilic v. Titan Corp.,* 516 F. Supp. 2d 1177 (S.D. Cal. 2007). The facts of that case are complicated, and we are not altogether sure we understand the holding of the court. If it is that a cause of action can "arise" in California before there is any injury, our understanding of California law is to the contrary.

rule of statutory construction, but we think it does not govern here. If the drafters thought the terms were synonymous, as we believe they did, there would be no inconsistency in using them both.[3]

* * *

As we hope is clear, we regard *McKee* as entirely consistent with the rule that for there to be a cause of action for tort in California there must be damage.[4] *McKee* was not a tort case, let alone a products liability case where there can be a significant time lag between manufacture of the defective product and injury to a person who uses the product. There was no dispute in *McKee* that the cause of action arose in New York when the notes were not paid by Dodd. The issue in the case was whether, having arisen in New York, the cause could thereafter also "arise" repeatedly in other jurisdictions, where it could become time-barred. The Court said no; it arose once

---

[3] The drafters would not be the only ones to have treated the terms as synonymous. The second definition of "accrue" in Webster's Third New International Dictionary is "to come by way of increase or addition: arise as a growth or result. . . ." *Webster's Third New International Dictionary* 13 (1971). Black's Law Dictionary defines "accrue" as "To come into existence as an enforceable claim or right; to arise." *Black's Law Dictionary* 22 (8th ed. 2004). The contextual illustration states: "[T]he plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease."

[4] If the case could somehow be regarded as holding otherwise, it has effectively been overruled by the subsequent California cases.

and only once. And that was the end of the defendant's limitations argument, because (apparently) Dodd's absence from the state tolled limitations until McKee filed suit against the executrix in California.[5] The *McKee* Court had no occasion to discuss the question of whether any cause of action of any kind can "arise" before damage has been sustained.[6]

Plaintiffs' confusion is illustrated by one of the captions in their memorandum:

> Since the defendants' wrongful and fraudulent conduct arose in California, California's borrowing statute is not triggered.

(Pls.' Mem. in Opp'n at 17.) But the borrowing statute does not refer to "wrongful and fraudulent conduct" arising; rather, it speaks of a "cause of action" arising. Plaintiffs have offered no authority for their argument that their *causes of action* for tort arose in California rather than in Taiwan, where the damages occurred.

We hold that the plaintiffs' causes of action for negligence arose in Taiwan because that is where

---

[5] The opinion does not specifically say why McKee's claim was not time-barred in New York, but the fact that the Court cited the Illinois case of *Story v. Thompson,* 36 Ill. App. 370 (1889), involving an Illinois limitations statute providing for tolling when the defendant is absent from the state, seems to indicate that the New York statute had the same kind of provision.

[6] The only possible instance that occurs to us is a suit for injunctive relief to prevent threatened harm.

their injuries occurred. Similarly, their causes of action for fraudulent inducement arose in Taiwan because that is where defendants' alleged misrepresentations were made. The California borrowing statute applies, and that makes Taiwan limitations law applicable to the case. Therefore, the California discovery rule has no application.

CONCLUSION

For the foregoing reasons, we conclude that all of plaintiffs' tort claims are time-barred both in Taiwan and in California. There are no genuine issues of material fact, and the defendants are entitled to judgment as a matter of law. Accordingly, judgment will be entered in favor of the defendants Bayer Corporation and Baxter Healthcare Corporation and against the Taiwanese plaintiffs, dismissing these causes with prejudice. The parties are requested to confer and submit a proposed judgment order within 14 days.[7]

---

[7] The defendant Baxter Healthcare Corporation has made a separate motion for summary judgment based on the absence of evidence that its factor concentrates were used by any of the Taiwanese plaintiffs. In a separate order entered this date, we have granted Baxter's motion as to thirty-three of the thirty-six Taiwanese plaintiffs and denied it as to the remaining three plaintiffs. Entering two judgments in favor of Baxter on the same date could create a problem: the first of the judgments to be docketed would eliminate the action of the thirty-three plaintiffs against Baxter, so that the docketing of the second judgment would have no action to operate upon. To head off this

(Continued on following page)

DATED: March 26, 2009

ENTER: /s/ John F. Grady
United States District Judge

problem, we will enter just one judgment in favor of both defendants, and the judgment will note that as to the thirty-three plaintiffs there is this additional ground for the judgment in favor of Baxter.

93-7452.088 January 14, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LIABILITY LITIGATION	)	MDL 986 93 C 7452 This document relates to: Chang, et al. v. Bayer Corp., et al., 04 C 4869 Peng, et al. v. Bayer Corp., et al., 04 C 4868 Ho, et al. v. Bayer Corp., et al., 06 C 7012

MEMORANDUM OPINION AND ORDER

(Ruling on Taiwan Forum Non Conveniens Motion)

This multidistrict litigation consists of claims against the defendant pharmaceutical companies by citizens of various foreign countries who suffer from hemophilia. The plaintiffs allege that they contracted the HIV and/or Hepatitis C(HCV) viruses from using contaminated blood products manufactured by one or more of the defendants. The products were derived by the defendants from the plasma of paid blood donors and processed by the defendants into blood-clotting "factor concentrates" which could be infused by hemophiliacs. Plaintiffs allege that the viral contamination of the concentrates resulted from a number of

negligent acts and omissions of the defendants in the collection and processing of the blood plasma. A further allegation is that after the defendants discovered the contamination, they withdrew the defective concentrates from distribution in the United States but continued to distribute them in foreign countries for use by unsuspecting foreign citizens, causing them to contract the HIV and/or HCV viruses.

The defendants deny the allegations in the complaints and, in addition, are moving to dismiss each of the cases on the ground of *forum non conveniens.* We have granted the defendants' motion in regard to the claims of citizens of the United Kingdom, *In re Factor VIII or IX Concentrate Blood Products Liability Litigation,* 408 F.Supp.2d 569 (N.D. Ill. 2006), *aff'd, In re Factor VIII or IX Concentrate Blood Products Litigation,* 484 F.3d 951 (7th Cir. 2007); Argentina, *In Re Factor VIII or IX Concentrate Blood Products Litigation,* 531 F. Supp. 2d 957 (N.D. Ill. 2008) (presently on appeal); and Israel, *In Re Factor VIII or IX Concentrate Blood Products Liability Litigation,* 2008 WL 4866431 (N.D. Ill. June 4, 2008) (presently on appeal).

The history of the litigation is recounted in our United Kingdom decision, 408 F. Supp. 2d at 570-73. The present opinion is addressed to the motion of two of the four multidistrict defendants, Bayer Corporation and Baxter Healthcare Corporation, to dismiss the three complaints brought against them by citizens of Taiwan on the ground of *forum non*

conveniens. The three complaints, involving a total of 37 individual plaintiffs, were filed in the United States District Courts for the Northern and Central Districts of California and transferred here by the Judicial Panel on Multidistrict Litigation. (The other two pharmaceutical companies named in complaints brought by citizens of other countries are not named in the Taiwan complaints.)[1]

The three Taiwan complaints are substantially similar. The parties have tended to focus in their briefs on the *Chang* complaint as illustrative, and, for convenience, we will refer to these Taiwan claims as the *Chang* case.[2]

Another difference between *Chang* and the rest of the cases in the MDL is that *Chang* alleges not only the tortious conduct that resulted in plaintiffs' infections, but, in addition, a claim that the plaintiffs were fraudulently induced by defendants to enter into a "humanitarian agreement" (the "Humanitarian Agreement") that purported to release any claims they might have against the defendants in return for a payment of $60,000 to each plaintiff. The allegation is that although the defendants knew at the time of the agreement that plaintiffs' infections had been

---

[1] Another difference is that these plaintiffs are not represented by the court-appointed lead counsel for the MDL plaintiffs, but instead are represented by separate counsel.

[2] We have used similar shorthand to refer to the other cases on which we have ruled: the United Kingdom case is *Gullone*; the Argentina case is *Abad*; and the Israel case is *Ashkenazi.*

caused by the defendants' negligent manufacture of their products, they concealed that fact from the plaintiffs and from the Taiwan Ministry of Health, which participated in the negotiations leading to the agreement and recommended to the plaintiffs that they accept the settlement. The plaintiffs do not make a claim for rescission of the agreement, but seek, rather, to recover damages, including an additional payment based on a "scale-up" provision – a provision of the agreement that calls for plaintiffs to receive additional moneys that might be necessary to make their total payments equal to any that might be received by other persons who settled their claims with the defendants.[3] (The "First Generation" claimants in this MDL settled with defendants for $100,000 per person.)

The defendants deny any fraudulent inducement or concealment and plead the Humanitarian Agreement as a settlement that bars the plaintiffs' tort claims against them.

THE LAW OF FORUM NON CONVENIENS

The defendants argue that the litigation of these claims in either of the California districts would be

[3] The *Chang* complaint appears to assert a hybrid claim in regard to the Humanitarian Agreement, seeking to rescind it for fraud as far as their release of their tort claims is concerned but asking for specific performance of defendants' agreement to pay additional amounts of money to match payments made to other persons.

oppressively inconvenient for them for essentially the same reasons they have successfully moved to dismiss the other foreign claims. Taiwan, in their view, would be substantially more convenient for them and not substantially more inconvenient for the plaintiffs than California.

As we stated in *Abad,*

> The steps involved in a *forum non conveniens* analysis are well-settled. The first step is a two-part inquiry as to whether the proposed alternative forum . . . is *available* and *adequate* for the litigation of plaintiffs' claims. *Kamel v. Hill-Rom Co.,* 108 F.3d 799, 802-03 (7th Cir. 1997) ("An alternative forum is available if all parties are amenable to process and are within the forum's jurisdiction. An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly."). If the alternative forum is both available and adequate, "the district court must then balance the private and public interest factors that emerge in a given case." *Id.* (citations omitted).

531 F. Supp. 2d at 959-60.

AVAILABILITY

The defendants agree as a condition of dismissal that they will accept service of process in Taiwan and that they will not challenge the Taiwanese court's jurisdiction. According to the defendants' expert witness, Peter Tuen-Ho Yang, a Taiwanese law professor,

Taiwanese courts accept jurisdiction by consent (Yang Decl. ¶ 40), and plaintiffs offer no contrary opinion. Defendants also include in their motion to dismiss the additional stipulations we have found sufficient to protect the plaintiffs in *Gullone, Abad* and *Ashkenazi.* (Defs.' Mot. to Dismiss ¶ 2.)

Despite the statement of the Seventh Circuit in *Kamel,* 108 F.3d at 802, that "[a]n alternative forum is available if all parties are amenable to process and are within the forum's jurisdiction," the *Chang* plaintiffs begin their discussion with the statement that "[i]n determining whether Taiwan is an available forum, the issue is primarily whether the alternate forum affords plaintiff an adequate remedy." (Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 11.) Adequacy is a separate question, and we will consider it separately. As for the initial question of availability, we find that Taiwan is an available forum for the litigation of plaintiffs' claims because all parties are amenable to process and are within the Taiwanese court's jurisdiction.

ADEQUACY

A forum is "adequate" "when the parties will not be deprived of all remedies or treated unfairly," *Kamel,* 108 F.3d at 803. According to defendants' expert Professor Yang, all of the remedies sought by plaintiffs are available in the Taiwan courts. (Yang Decl. ¶¶ 41, 43-46.)

Plaintiffs' argument that the Taiwan forum is inadequate is based entirely upon their contention that their negligence and fraudulent inducement claims are probably barred by limitations in Taiwan. (Pls.' Mem. in Opp'n at 11-13.) As proof, they cite a case involving negligence and fraudulent inducement claims similar to theirs, the *Peng* case, which was dismissed by the Taiwan court on limitations grounds. (Pls.' Surreply at 9-11.)[4] (We have recently been informed by the defendants that the Taiwan Supreme Court has rejected the *Peng* appeal, so the result is final.) Plaintiffs' point is that such a limitations bar would make Taiwan a forum where they would be "deprived of all remedies" within the meaning of the test for adequacy. They seem to admit, however, that the *Peng* decision would not affect their contract claim for enforcement of the scale-up provision.

The defendants argue in their reply brief that the ability of plaintiffs to assert their contract claim is *some* remedy, and that is enough. In their view, a time bar for some claims "does not mean that Taiwanese law provides no remedies, only that plaintiffs acted too late to take advantage of the remedies that

[4] The brief was filed by plaintiffs on November 24, 2008 in response to the leave we granted them in our order of October 30, 2008 to file a "surreply" on the limitations issue. The brief bears the confusing title "Plaintiffs' Opposition to Defendants' Motion *Forum Non Conveniens*." In their response to the brief, defendants refer to it as Plaintiffs' Surreply, and we shall do the same.

it offers." (Defs.' Reply at 2.) They provide no case authority for the argument.

In further reply, the defendants argue that the limitations rules in Taiwan and in California are the same. The defendants conclude, therefore, that plaintiffs would suffer no disadvantage by having to litigate their claims in Taiwan as opposed to the federal district courts in California. Putting it another way, whatever inadequacy there is in Taiwan is matched in California, so that the factor of "inadequacy" becomes neutral and is no basis for denying defendants' motion to dismiss. Defendants rely on *Younis v. American University in Cairo,* 30 F. Supp. 2d 390 (S.D.N.Y. 1998) and our own decision in *Abad,* 531 F. Supp. 2d at 971-72. (Reply at 2-3.)

Defendants' assertion that the California courts would apply Taiwanese limitations law is based on a twofold argument. First, California choice-of-law rules use a "governmental interest" test to select the applicable statute of limitations, as explained in *Orr v. Bank of America,* 285 F.3d 764, 772 n.4 (9th Cir. 2002). (Defs' Reply at 3.) Defendants argue that Taiwan's interest in this litigation is, for various reasons, far greater than any interest the State of California may have; therefore, Taiwan limitations law applies. (Defs.' Reply at 3.)

The defendants' other rationale for applying Taiwan limitations law is California's "borrowing statute," which provides that when a cause of action has arisen in a foreign country, and the action is

barred by limitations in that country, it is also barred in California. (*Id.*)

Alternatively, defendants argue that even if they were subject to the ordinary two-year California statute of limitations, plaintiffs' negligence claims would have been barred two years after they discovered they had been injured by defendants' concentrates. Defendants contend that the two-year period had expired years before plaintiffs filed these *Chang* suits in 2004. Thus, plaintiffs' claims are "time-barred under California's two-year statute of limitations just as clearly as under any Taiwanese statute." (*Id.* at 4.)

In their surreply brief, the plaintiffs provide authority for their contention that a limitations bar makes a forum inadequate. They cite *Bank of Credit & Commerce International (Overseas) v. State Bank of Pakistan,* 273 F.3d 241 (2d Cir. 2001). That case does hold that "an adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum." 273 F.3d at 246. Plaintiff sued in New York state court to collect on a loan it had made to the central bank of Pakistan. The defendant removed the case to the federal district court for the Southern District of New York, which granted the defendant's motion for dismissal on the ground of *forum non conveniens.* There is no indication in the opinion that there was any New York statute of limitations that caused any problem, and there is no mention of any borrowing statute. There was, however, a substantial question as to whether the action was barred by limitations in Pakistan. The Court of Appeals held

that the district court had not made an adequate investigation as to whether the action would be time-barred in Pakistan. The case was reversed and remanded for reconsideration of the trial court's decision that Pakistan was an adequate alternative forum.

In holding that a limitations bar makes a forum inadequate, the Second Circuit cited *Mercier v. Sheraton Int'l, Inc.,* 935 F.2d 419, 426 (1st Cir. 1991) and *Kontoulas v. A.H. Robins Co.,* 745 F.2d 312, 316 (4th Cir. 1984). Those decisions do support the conclusion reached by the Second Circuit. In *Mercier,* the plaintiffs brought suit in the District of Massachusetts for an alleged breach of contract to operate a casino in one of the defendant's hotels in Turkey. The district court granted the defendant's motion to dismiss for *forum non conveniens,* relying on the affidavit of defendants' expert, a Turkish law professor. The Court of Appeals found the affidavit insufficient to establish that Turkey was an adequate alternative forum because, *inter alia,* the affidavit did not discuss the question of whether plaintiffs' action would be barred by limitations in Turkey. 935 F.2d at 425. The plaintiffs had called to the attention of the Court of Appeals "authority apparently not provided to the district court suggesting that Turkey has a one-year statute of limitations that would bar the claims sought to be pursued in the present action." *Id.* The case was reversed and remanded for further consideration of the adequacy of the Turkish forum. *Id.* at 430.

There is no indication in the *Mercier* opinion that there was any limitations problem in Massachusetts. It was Turkey that presented the problem, with its unusual one-year limitations period.

Kontoulas was a series of product liability actions involving the intrauterine contraceptive device known as the Dalkon Shield. All of the cases were filed in the district of Maryland by non-residents of Maryland. The multiple defendants moved to dismiss the cases on the basis of *forum non conveniens,* arguing that the plaintiffs' home states or home countries were more convenient fora than the district of Maryland. The district court denied the motion, and the Court of Appeals affirmed. Discussing the motion of the defendant Robins, the Court noted that "Robins has not met its heavy burden of showing for *each individual action* that no statute of limitations in the plaintiff's home state renders that state ineligible to serve as an alternative forum." 745 F.2d at 316. The opinion contains no indication that there was any limitations problem in the district of Maryland.

In their response to the plaintiffs' surreply, the defendants do not discuss these cases. Neither side has cited a Seventh Circuit case on this question of whether a limitations bar makes a forum inadequate, nor have we found any Seventh Circuit authority. However, we think these decisions from the First, Second and Fourth Circuits could well be followed by the Seventh Circuit when it does consider the matter, and we see no reason to think otherwise. One possible

distinction, of course, is that the possible limitations bars in the alternative fora involved in those cases were, as far as we can tell, complete bars of *all* of the plaintiffs' claims, not just some of them. However, it is certainly relevant that the major claims of the *Chang* plaintiffs are their negligence claims, seeking compensation for the debilitating infections allegedly caused by the defendants' concentrates, and their fraudulent inducement claims, seeking to set aside the settlement of their negligence claims. Their contract claims under the scale-up provision are puny in comparison to the negligence claims. We conclude, therefore, that the defendants have not carried their burden of showing that Taiwan is an adequate forum.

But this does not mean that the defendants' motion to dismiss must be denied. We return to the defendants' point that the result would be the same in Taiwan and in California as far as limitations is concerned. If that is true, we do not see why plaintiffs' limitations problem in Taiwan entitles them to litigate the identical question in California. If the rules are identical, it does not appear that the plaintiffs would suffer any greater detriment – at least as far as limitations is concerned – by proceeding in Taiwan instead of California.

Plaintiffs' position, however, is that the California courts will apply different limitations rules than obtain in Taiwan, so in their view, this entire discussion is beside the point. According to plaintiffs, Taiwan is inadequate, and California is adequate. We will proceed, therefore, to an analysis of what

limitations law would be applied by the transferor district courts in California.

The federal courts in California sitting in these diversity cases would apply California's "governmental interest test" to determine what limitations law applies to the actions. *Orr,* 285 F.3d at 772 n.4. In *American Bank of Commerce v. Corondoni,* 169 Cal. App. 3d 368 (Cal. Ct. App. 1985), cited in *Orr,* the court explained this test:

> The court first determines whether the "interest" or policy underlying the law will be significantly furthered by its application to the case at hand. If both California and the foreign state have a strong interest in applying their own law, a true conflict exists. The court then engages in a "comparative impairment" analysis, and applies the law of the state whose interest would be the more impaired if its law were not applied.
>
> Nevertheless, California's general preference is to apply its own law. If the interests of the foreign state will not be significantly furthered by applying its law, the California court must conclude that the conflict is "false" and apply California law.
>
> A "false" conflict between two statutes of limitation occurred in *Ashland Chemical Co. v. Provence* (1982) 129 Cal. App. 3d 790 [181 Cal.Rptr. 340]. There, the parties disagreed over whether California's or Kentucky's statute applied to a guaranty contract. The court noted that the purpose of such statutes is to

> protect the enacting state's residents and courts from the assertion of stale claims. It concluded that this policy would not be advanced if it were to enforce Kentucky's longer limitations period: "*Here California courts and a California resident would be protected by applying California's statute of limitations because California is the forum and the defendant is a California resident. Applying California's statute of limitations would thus advance its underlying policy. . . . In contrast, Kentucky has no interest in having its statute of limitations applied because here there are no Kentucky defendants and Kentucky is not the forum.*" (*Id.,* at p. 794 [181 Cal.Rptr. 340].) The court then applied California's statute.

169 Cal. App. 3d at 372-73 (emphasis added) (citations and quotations marks omitted). The foregoing quotation endorsing the analysis of *Ashland Chemical* indicates that the *Chang* plaintiffs and the defendants Baxter and Bayer misapprehend the nature of California's governmental interest test. They see it as a test of which forum has the greater interest in the underlying subject matter of the action. (Defs.' Resp. to Pls.' Surreply at 5-6; Pls.' Surreply at 15-17.) But where the question is what *limitations* law to apply, it is the forum's interest in

the application of its *limitations* law that is the focus of the test.[5]

Taiwan has an interest in what limitations periods apply to the claims of its citizens, and the *Chang* plaintiffs are Taiwanese citizens. Whatever interest California may have in what limitations periods apply to plaintiffs' claims, we think it is a lesser interest than that of Taiwan because neither the plaintiffs nor the defendants are citizens of California. We conclude, therefore, that under the governmental interest test, the California courts would apply the limitations law of Taiwan to the these claims.

All of this presupposes that there is a difference between the limitations period that would apply to plaintiffs' claims under Taiwanese law and that which would apply under California law. Whether that is true or not is a question that requires discussion. Plaintiffs have attached to their surreply as Exhibit 1 a purported English translation of the decision of the Taiwanese High Court affirming the District Court's dismissal of the *Peng* case, brought on behalf of other HIV-infected users of defendants' concentrates. The negligence claims were dismissed as barred by Taiwan's two-year statute of limitations. (Pls.' Surreply, Ex. 1, at 11.) The High Court pointed out that "the

---

[5] Comparative governmental interest in the subject matter of the case is a public interest factor entitled to consideration in its own right, of course, and we do that *infra* at 32-34.

fact of tortious act claimed by the appellants ended in 1985, to say the latest, and the appellants did not prove any fact of tortious act after 1985 . . . ; yet the appellants did not file for any litigation until May 20, 2004, i.e., 19 years later, it is obvious that the above mentioned statute of limitation for the claim passed already. . . .” (*Id.* at 9.) The High Court also held that the plaintiffs’ claims for fraud in connection with the Humanitarian Agreement were governed by Taiwan’s six-month statute of limitations. (*Id.* at 12-13.) As we noted earlier, the Taiwan Supreme Court has recently rejected the *Peng* plaintiffs’ appeal from the High Court decision.

The *Chang* plaintiffs admit in their surreply brief that *Peng* is “factually similar to the present case” and that “[t]hese Taiwan court decisions [in the *Peng* case] are consistent with the defendants’ assertion that the plaintiffs’ claims herein would also be time barred in Taiwan.” (Pls.’ Surreply at 10.) However, plaintiffs argue that their claims are not time-barred in California because there, unlike Taiwan, the claims are saved by California’s “discovery rule.” But plaintiffs have two problems here. First, as we have just indicated, we believe the California courts would apply Taiwanese limitations law rather than California limitations law. But secondly, assuming California law with its discovery rule were to be applied to plaintiffs’ claims, it is clear that they discovered their claims at least as early as the late 1990s when they began negotiations with the defendants that resulted in the 1998 settlement agreement. The *Chang* suits were not filed until 2004.

What amounts to "discovery" is explained in *Norgart v. Upjohn Co.,* 981 P.2d 79 (Cal. 1999):

> [T]he plaintiff discovers the causeof action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof – when, simply put, he at least "suspects . . . that someone has done something wrong" to him (*Jolly v. Eli Lilly & Co.,* supra, 44 Cal.3d at p. 1110), "wrong" being used, not in any technical sense, but rather in accordance with its "lay understanding" (*id.* at p. 1110, fn. 7). He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. (*Jolly v. Eli Lilly & Co.,* supra, 44 Cal.3d at p. 1110.) He has reason to suspect when he has "'"'notice or information of circumstances to put a reasonable person *on inquiry*'"'" (*id.* at pp. 1110-1111, italics in original); he need not know the "specific 'facts' necessary to establish" the cause of action; rather, he may seek to learn such facts through the "process contemplated by pretrial discovery"; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place – he "cannot wait for" them "to find" him and "sit on" his "rights"; he "must go find" them himself if he can and "file suit" if he does (*id.* at p. 1111).

981 P.2d at 88-89 (parallel citations omitted).

The defendants' final point on limitations is that if California law were applied, the California "borrowing statute" would bar plaintiffs' claims. The statute reads as follows:

> When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State.

Cal. Civ. Proc. Code § 361. Defendants argue that plaintiffs' cause of action "arose" in Taiwan so that the borrowing statute applies. Plaintiffs, on the other hand, argue that their action arose when the defendants committed their tortious acts in California so that the borrowing statute does not apply. (Pls.' Surreply at 19-20.)

The borrowing statute uses the word "arises," which we believe is synonymous with "accrues," a word generally used in statutes of limitation. In *Norgart,* the Court stated:

> Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action. The general rule for defining the accrual of a cause of action sets the date as the time when, under the substantive law, the wrongful act is done, or the wrongful result occurs, and the consequent liability arises. In other words, it sets

> the date as the time when the cause of action is complete with all of its elements.

981 P.2d at 88 (citations and quotation marks omitted). *See also United States Liability Ins. Co. v. Haidinger-Hayes, Inc.,* 463 P.2d 770 (1970):

> Harm is an essential element to negligence actions. Mere threat of future harm, not yet realized, is not enough. (Prosser on Torts (3d) 147.) The cause of action must be matured so that a suit can be based upon it. No action will lie to recover damages if no damages have been sustained. Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action.

463 P.2d at 776 (citations omitted). The *Haidinger-Hayes* opinion cites the third edition of Prosser on Torts at 147. We will quote from the fifth edition of that treatise, which we assume is essentially the same discussion cited by the California Supreme Court in *Haidinger-Hayes*:

> Negligence, as we shall see, is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:
>
> . . .
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal

> cause," or "proximate cause," and which includes the notion of cause in fact.
>
> 4. Actual loss or damage resulting to the interests of another. Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.
>
> It follows that the statute of limitations is generally held not to begin to run against a negligence action until some damage has occurred.

W. Page Keeton et al., *Prosser & Keeton on Torts* § 30 (5th ed. 1984) (footnote omitted).

The plaintiffs' negligence actions arose in Taiwan because that is where all of their infections occurred. No cause of action for negligence accrued, or arose, prior to the infections. The California borrowing statute therefore applies, and if plaintiffs' actions are

time-barred in Taiwan, they are necessarily time-barred in California as well.[6]

The plaintiffs argue that their fraudulent inducement claim arose in California because some of their negligent conduct occurred in California and that conduct is what was concealed from the plaintiffs and the Ministry of Health officials during the negotiations in Taiwan. The argument fails, however, because no cause of action accrued before the alleged misrepresentations were made, and they were made in Taiwan, not California. It is not the conduct concealed, but the concealment that is the gist of the action.

We return to the question of whether it would make a difference to the success of plaintiffs' claims if they were to remain on file in California as opposed to being refiled in Taiwan. We do not see that it would.[7] It appears that the chances of plaintiffs' claims being dismissed as time-barred are equal in Taiwan and California. In other words, Taiwan and

---

[6] In the event the California courts should apply the governmental interest test to reach a different result than we did and find that California rather than Taiwanese limitations law applies to the case, it should be noted that California limitations law would include the California borrowing statute.

[7] We are not, of course, holding that the plaintiffs' claims are time-barred either in Taiwan or in California. What we are addressing is the adequacy of Taiwan as a forum for plaintiffs' claims. Our best judgment as to what might be the outcome concerning limitations is a necessary part of the analysis.

California are on a par as far as adequacy – or inadequacy – is concerned.

PRIVATE INTEREST FACTORS

Inability to Join Third-Party Defendants

The patient profile forms provided to defendants by the plaintiffs indicate that most of them have used various therapies for the treatment of their hemophilia besides the infusion of the defendants' factor concentrates. This suggests to the defendants that these other therapies, such as whole blood plasma and cryoprecipitate provided by other suppliers in Taiwan, may have been the source of plaintiffs' HIV and HCV infections. The plaintiffs would like to have the opportunity of filing third-party actions against these other entities, and that cannot be done in the United States because those entities are not subject to the jurisdiction of the United States courts. In addition, the defendants argue that in order to investigate the likelihood of successful third-party claims in Taiwan, they need litigation pending in Taiwan to serve as a vehicle.

This private interest factor was one we found persuasive in the *Gullone, Abad* and *Ashkenazi* cases. But in those cases, it was clear that if defendants were sued in the United Kingdom, Argentina or Israel, the procedure in those countries would permit the filing of third-party actions. The parties disagree as to whether this is true of Taiwan. Defendants' expert witness, Professor Yang, states in his sworn

declaration that if the *Chang* plaintiffs filed suit against the defendants in Taiwan, "defendants could, if appropriate, add as participants other local or foreign entities who may be responsible for plaintiffs' alleged injuries." (Yang Decl. ¶ 47.) He cites no authority for his statement. The defendants point out:

> If these cases remain in the United States, Defendants will be unable to implead the Taiwanese blood banks that supplied the whole blood, plasma, and cryoprecipitate to these Plaintiffs, and they will be unable to implead any foreign factor concentrate processors. Defendants will also be unable to implead the doctors, hospitals, and other health care providers in Taiwan who administered factor concentrates to the Taiwan Plaintiffs.

(Defs.' Mem. in Supp. of Mot. to Dismiss at 10.)

Defendants go on to argue, citing Professor Yang's Declaration at ¶ 47, that if the plaintiffs were to refile in Taiwan, on the other hand, "they could sue these blood banks, health care providers, and foreign factor concentrate processors in the first instance. If they for some reason did not, Defendants could join these third parties in the litigation. (*Id.*) Since defendants are discussing their inability to "implead" other parties if the cases remain in the United States, it sounds like that when they say "defendants could join these third parties in the litigation," they really mean that they could implead them in the manner that parties are joined in third-party complaints in

the United States. But the argument is misleading. Looking back at what Professor Yang says, it is that "defendants could, if appropriate, add as *participants* other local or foreign entities who may be responsible for plaintiffs' alleged injuries." (Yang Decl. ¶ 47 (emphasis added).) When his deposition was taken by plaintiffs, Yang stated that Article 65 of the Taiwan Code of Civil Procedure is what he had in mind. This Article reads as follows:

> While an action is pending, a party may notify a third party whose legal interests will be adversely affected if such party is defeated. The notified third person may make further notification to another person.

(Yang Dep. at 98-99; Taiwan Code of Civil Procedure, art. 65, Ex. 5 to Defs.' Reply at 11.) Asked whether Article 65 "actually call[s] upon the third party to provide compensation," the witness initially answered, "It's possible," and, then when asked whether "it actually say[s] that," he answered, "Yes." (Yang Dep. at 100.) Clearly, it does not actually say that.

We digress a moment to discuss the qualifications of Professor Yang. He received an L.L.B. in 1964 and an L.L.M. degree in 1967 from National Chung Hsin University in Taipei, Taiwan. He studied law at the University of California at Berkeley and received an L.L.M. in 1976 and an S.J.D. in 1979. He served as Dean of the college of law at Fujen Catholic University in Taipei from 1991 to 1996 and was a member of the law school faculty at that university from 1967 to 2002. He was the president of that

university from 1996 to 2000. Since 2002, he has been the president of St. John's University in Taipei. (Yang Decl. ¶¶ 2-3.) He has never been involved in a product liability case. As far as we can tell, he has never practiced law. He has taught civil procedure classes in law school. (Yang Dep. at 26-27.)

Professor Yang's carefully worded declaration, where he talks about "participation" of third parties in a lawsuit, and his equivocation in his deposition when asked about Article 65 gives us pause as to whether he can be relied upon for the proposition that third-party practice as we know it in the United States is available in Taiwan. Certainly Professor Yang has never had any personal experience in third-party litigation, or, for that matter, in other any kind of litigation.

The plaintiffs' expert witness is Professor Kuo-Chang Huang, another Taiwanese academic with no litigation experience. He received his L.L.B. from National Taiwan University in 1995, then received an L.L.M. degree in 1999 and a J.S.D. degree in 2002 from Cornell University Law School. He worked for the Taiwan International Patent Law Office from January 1997 until June 1998. After graduating from Cornell University, he began teaching as an assistant professor of law. His present position is adjunct associate professor of law at National Taipei University. (Huang Aff. ¶¶ 1-2.) He has written books and articles on civil procedure and has an impressive list of publications. (*Id.* ¶ 3.)

In his affidavit, Professor Huang disputes the assertion of Professor Yang that Article 65 of the Taiwan Civil Code of Procedure permits a defendant to file a third-party action seeking indemnity from a third party:

> 9. *Impleader in the Context of Taiwan's Legal System:* Dr. Yang asserts, "defendants could, if appropriate, add as participants other local or foreign entities who might be responsible for plaintiffs' alleged injuries". *See Yang Declaration ¶ 47.* In fact, however, there is no such device as impleader provided in the FRCP 14 in Taiwan Code of Civil Procedure (hereinafter TCCP). To put it more explicitly, a defendant in Taiwan has no means to implead a third party who should bear the final responsibility for the plaintiff's claim against the defendant. While Articles 58 and 65 under TCCP provide the devices of Litigation Intervention and Litigation Notification, respectively, neither of these two devices performs the function of impleader. Nor do they allow the defendants to assert their claims against any responsible third party in the same proceeding. Yang's assertion that defendants may join third parties to the litigation is simply wrong. Yang's citation of Articles 58 and 65 during his deposition is also misinterpretation of the functions of Litigation Intervention and Litigation Notification. *See Yang Depo pp. 98-100.* I may add that I have advocated in my published articles that Taiwan should adopt

> the device of impleader. However, no such device has been provided for in TCCP.

(Huang Aff. ¶ 9.) In his deposition, Professor Huang gave an articulate explanation of Article 65 and related articles of the Code, demonstrating that, contrary to defendants' argument, there is no impleader in Taiwan. (Huang Dep. at 97-108.) The procedure allows a defendant to "notify" a third party who might be liable to him should the defendant lose to the plaintiff. A notified party then becomes an "intervenor," who, whether he elects to participate in the proceeding or not, cannot dispute any findings vis-à-vis the plaintiff and the defendant (e.g., the amount of damages for which the defendant is liable to the plaintiff) in any later proceeding brought against the notified party. A notified party is entitled to "participate" in the proceeding between the plaintiff and the defendant and presumably may offer evidence and arguments designed to prevent or minimize any findings against the defendant that may later serve as a basis for an action against the third-party intervenor. Nowhere in the Code is there any provision that would permit the defendant to assert a claim against the intervenor in the initial proceeding between plaintiff and defendant.

The defendants have made no effort to explain why they would benefit from notifying possible third-party intervenors in Taiwan. Should defendants be found liable to plaintiffs, they would remain liable to plaintiffs regardless of whether they might be successful in the laborious process of seeking indemnity

against third parties in separate lawsuits. That those third parties might have been "notified" by defendants, and be bound by findings entered by the Taiwan court as between plaintiffs and the defendants, would do nothing to establish any liability of the third parties to the defendants.

We find, therefore, that the private interest factor of inability to join third-party defendants is inapplicable to this case. There is no third-party practice in Taiwan.

Relative Ease of Access to Sources of Proof and Compulsory Process for Witnesses

If the defendants could demonstrate that they are significantly limited in the discovery they can obtain in Taiwan in aid of cases pending in the United States, and that their ability to obtain necessary discovery would be substantially greater if it were sought in connection with a case pending in Taiwan, that would be a private interest factor in favor of dismissal. The defendants say that this is precisely the case. The plaintiffs argue the defendants can obtain all the discovery they need in Taiwan even if the litigation remains in California.

The parties differ as to whether the plaintiffs have provided all of the medical information and medical records requested by the defendants. Defendants use the alleged deficiencies in the plaintiffs' production as an indication of the need to move the cases to Taiwan, where the Taiwanese courts can

ensure that defendants receive the information they require. We have examined the parties' contentions about the medical records and patient profile forms and find that the deficiencies are relatively minor. Moreover, they are of a nature that could be remedied without moving the cases to Taiwan.

The situation is otherwise, however, with regard to persons having knowledge of the plaintiffs' medical conditions, namely, the plaintiffs' treating physicians, family members[8] and other persons having knowledge of the plaintiffs' physical limitations, such as employers. The depositions of a reasonable number of these persons would need to be taken in advance of any trial, and we think it would be much easier to take the depositions in connection with litigation filed in Taiwan than it would be to take depositions in Taiwan in aid of cases pending in California. Defendants' expert, Professor Yang, stated in his declaration that Taiwan is not a signatory to the Hague Convention and that a Taiwanese court will rarely compel parties to produce documents or give testimony in support of foreign judicial proceedings. It can only be done in front of a judge, with all of the questioning conducted by the judge or Taiwanese counsel. (Yang Decl. ¶ 35.) Yang offers no basis for his opinion, and when the plaintiffs took his deposition, they did not ask him about this issue.

---

[8] The testimony of family members might be important to establish the dates of infection for plaintiffs who were infected with HIV or HCV as minors.

Plaintiffs expert, Professor Huang, expresses a different view. He is confident that a court in Taiwan would provide evidence for use in a foreign proceeding to the same extent that the foreign court would do the same thing in aid of a Taiwanese proceeding. A foreign court could draft a letter of request (apparently offering to return the favor) and submit it to the Taiwanese court. (Huang Aff. ¶¶ 15-16.) The witness gives no indication in his declaration that he has had any actual experience in this area of the law or that he even knows of any case where this kind of thing has occurred. When the defendants took Professor Huang's deposition, they did not inquire about this subject.

We are satisfied that the taking of a substantial number of depositions in Taiwan in connection with cases pending in California would be a difficult and cumbersome process, at best. If Professor Huang has any actual knowledge of how it would work, it does not appear from his declaration. It would require some kind of reciprocal commitment on the part of a United States court, but what that would be is completely unclear. The defendants obviously have in mind a considerable number of depositions they would like to take (treating physicians, family members, the plaintiffs themselves, as well as other persons having knowledge of plaintiffs' damages), so the reciprocal undertaking of a United States court would apparently be no small matter. Plaintiffs have not explained how that commitment would be obtained, and we are unwilling to speculate about it.

If the cases were pending in Taiwan, pretrial depositions would not be taken as easily as they are in the United States, but the process would be less complicated than the procedure described by the experts for depositions that might be attempted in aid of cases pending in the United States.

The plaintiffs argue that it really is not necessary to depose anyone in Taiwan because all the material witnesses would be willing to come to California to have their depositions taken. Neither side has presented any evidence from which we could conclude that witnesses either are or are not willing to come to the United States to be deposed. But we think the defendants are correct in assuming that Taiwanese treating physicians, for instance, would likely decline an invitation to appear. Similarly, there are employees of the government of Taiwan who would have important information concerning what representations were made by the defendants during the negotiations that led to the Humanitarian Agreement. If plaintiffs should prevail on their fraudulent inducement claim, the settlement could be set aside and plaintiffs would be free to pursue their tort claims (unless, of course, they are time-barred). On the other hand, if the settlements were not obtained by fraud, that could be the end of the case, with the exception of the scale-up claims. As the defendants put it, "[i]f Plaintiffs are bound by their previous settlements, there will not be any tort claims to pursue." (Defs.' Mem. at 3.) According to the *Chang* complaint, "Taiwan's Department of Health believed that the

settlement was appropriate, fair and reasonable, based upon Bayer's representations. . . . Had Taiwan government officials, in particular, members of the Ministry of Health, known the facts alleged herein, they would not have recommended the 'Humanitarian Payment' agreement to Taiwan's hemophiliacs and their families." (Compl. ¶ 160.) We are not informed as to how many members of the Ministry of Health may have been involved in the negotiations with defendants and the internal discussions which led to the decision to recommend the settlement. There could be quite a few, and we think it unlikely that they would come to California to be deposed.

Plaintiffs' discovery in this case has been fairly simple compared with what the defendants need to do. The plaintiffs' discovery concerns the alleged liability of the defendants, and it has all been done in the MDL, in large part by counsel other than counsel representing the Taiwanese plaintiffs. The wealth of materials accumulated during the years of MDL discovery is available to plaintiffs for the taking. The defendants, on the other hand, are interested in discovery concerning causation and damages. The witnesses having knowledge of these matters are, for the most part, residents of Taiwan. Our conclusion is that Taiwan is the place that offers relative ease of access to sources of proof and compulsory process for witnesses, as far as the discovery needs of the defendants are concerned. That the plaintiffs' discovery needs have been satisfied in the United States is

immaterial to this private interest factor, which clearly weighs in favor of dismissal.

Other Practical Problems

The practical problem that arises if the *Chang* cases should be refiled in Taiwan is the cost of translation. We find it surprising that all documentary evidence would have to be translated into Chinese if the case were tried in Taiwan, even if the judge were English-speaking. But both of the parties' experts, Professors Yang and Huang, stated in their depositions that translation into Chinese would be mandatory. (Yang Dep. at 35; Huang Dep. at 152.)

We turn, then, to the question of whether the plaintiffs' cost of translating their English-language evidence into Chinese would substantially exceed the cost that defendants will have to bear in California if they translate evidence favorable to them from Chinese into English for the benefit of a California court.

To say that plaintiffs paint a gloomy picture would be something of an understatement. They estimate that 83,600 pages would have to be translated from English into Chinese for a trial in Taiwan. Their translator estimates that "it would take one translator 25 years (or 25 translators one year) at a cost of over 4 million dollars to translate this evidence into Chinese." (Plfs.' Mem. in Opp'n at 20.) Defendants assure us, on the other hand, that "if these cases are litigated in Taiwan, the volume of documents that

must be translated would be very limited. . . . Plaintiffs' counsel, who possesses an organized database of discovery documents, can easily identify the relatively small number of documents actually important to the Taiwan Plaintiffs' cases that would need to be translated." (Defs.' Mem. at 13.)

We think the cost of translation for plaintiffs would be substantial and far in excess of any translation costs the defendants would have to bear if the cases remain in California. Should the cases be tried, it is plaintiffs, after all, who have the burden of proving their medical claims. This would require them to bear the major cost of translating the relevant medical evidence from Chinese into English for use in the California courts. They would also have to bear at least a portion of the translation cost for their trial testimony. But we believe plaintiffs' total translation costs in California would still be far less than the cost of translating their English-language liability evidence from the MDL into Chinese for use in Taiwan.[9]

---

[9] Plaintiffs apparently have given no thought to the possibility that the need for translation could be greatly reduced. For instance, surely it would not be necessary to translate the full text of every document. Often only a portion of a document is relevant. In fact, in modern trials it is customary to highlight the relevant portions for the jury, enabling them to ignore the parts that are irrelevant. Not every page of a deposition would have to be translated. The MDL depositions were not taken for evidence, but for discovery, and the portions valuable as evidence are often only a small fraction of the total transcript. As

(Continued on following page)

We find the cost of translation to be a private interest factor weighing against dismissal.

PUBLIC INTEREST FACTORS

The Local Interest in Having this Controversy Decided in Taiwan

The defendants argue that Taiwan's interest in deciding the controversy is far greater than the interest of California. They cite the fact that plaintiffs' medical care is being provided in Taiwan, to a large extent at public expense, and that the problems concerning the plaintiffs' HIV and HCV infections will endure long into the future. Moreover, defendants argue that Taiwan would have an interest in finding out whether, as plaintiffs allege, its Ministry of Health relied on misrepresentations by defendants in recommending that the plaintiffs settle their claims. These considerations are akin to what the Court of Appeals found to be a significant governmental interest of the United Kingdom in the *Gullone* case. *See In re Factor VIII,* 484 F.3d at 959.

---

for the defendants' business records, such as the "40,000 pages of AHF lot records for product shipped to Taiwan" (Pls.' Mem. in Opp'n at 20), it should not be necessary to translate all of the English language contained on 40,000 pages. Instead, it should be possible to prepare charts showing the relevant numbers, as is often done in this country pursuant to Federal Rule of Evidence 1006. In short, plaintiffs make the situation out to be much worse than it really has to be, but notwithstanding the exaggeration, their translation costs in Taiwan would be formidable.

Plaintiffs argue that California has the greater interest in the controversy because the defendants committed many of their tortious acts there. We think Taiwan has the greater interest. For one thing, its interest is current. The plaintiffs' medical care, the cost of it, and all of the problems associated with these viral infections will be a continuing concern of the Taiwanese government. The possibility that its Ministry of Health was misled in the manner alleged is of obvious concern.

If the defendants are guilty of the negligent acts allegedly committed in California, the acts were committed many years ago. There is no indication that the defendants are presently engaged in any negligent or otherwise tortious conduct that should concern the citizens of California. Litigation of these claims of alleged past misconduct might arguably have some deterrent value for the future, but that prospect does not give California an interest in this litigation that equals that of Taiwan. We find, therefore, that this public interest factor favors dismissal.

Avoiding Unnecessary Problems in Conflicts of Law or Application of Foreign Law

The defendants argue that the transferor courts in California would, upon remand of these cases, have to grapple with complicated problems of California conflicts law and Taiwanese substantive law. This

could be avoided if the cases were simply dismissed and refiled in Taiwan. (Defs.' Mem. at 17-19.)

We are unpersuaded. The defendants' argument is couched in general terms, with no specific reference to any particularly difficult legal problem or, for that matter, any legal problem at all. Conflicts of law issues are a staple for federal district judges, and, as far as the Taiwanese substantive law is concerned, it appears from the declarations of Professors Yang and Huang that the law of negligence, fraud and contracts in Taiwan is substantially similar to the law in the United States.

This factor does not apply in this case.

Expeditious Resolution of Litigation

The defendants suggest that the median time for filing to disposition in the Central and Northern Districts of California is about two years, whereas, according to Professor Yang, if the plaintiffs "were to re-file their cases in Taiwan and pursue their cases diligently, they could receive a final judgment from the trial court and the Court of Appeals within one year." (Defs.' Mem. at 19.)

At this juncture, it is clear that if these cases were to be tried there is much discovery that must be done by the defendants, mostly in Taiwan. *See supra* at 28-30. We doubt that all of that discovery could be completed in one year and perhaps not even in two years, whether the cases are pending in California or

Taiwan. Once the discovery is done, the 37 *Chang* claims certainly could not be handled in one trial. Perhaps more than one claim could be joined in a single trial, but in no event could a multiplicity of separate trials be avoided. How long it would take in either forum to complete the trials of these 37 claims is a question as to which "filing to disposition" statistics are almost totally irrelevant. Common experience tells us that jury trials in California would take much longer than bench trials anywhere, including Taiwan, but any attempt to assess how long it might take in either California or Taiwan to complete *trials* (and probably appeals as well) would be nothing but speculation.

We can only conclude that this public interest factor is neutral.

Burdening Citizens in an Unrelated Forum with Jury Duty

Defendants contend that it would be inappropriate to impose upon the citizens of California the duty of sitting for multiple-week trials of these cases that involve no particular interest of California and require translation of much of the evidence from Chinese into English. It would be more appropriate, say the defendants, to refile the cases in Taiwan, where they would be heard expeditiously by judges, without juries.

This argument depends upon the dubious assumption that these claims actually will be tried

somewhere, either in California or Taiwan. As we discussed in *Abad,* 531 F.Supp.2d at 980-81, involving the Argentine plaintiffs, there are many events that could intervene, wherever the cases are pending – settlement, for instance – that would render trials unnecessary. The prospect that any juror will have to sit on one of these cases is so uncertain that we regard this factor as neutral.

STRIKING THE BALANCE

In favor of granting the defendants' motion to dismiss, then, we have the private interest factor of the relative ease of access to sources of proof and compulsory process for witnesses and the public interest factor of Taiwan's interest in having the controversy decided in Taiwan.

Weighing against dismissal is only the private interest factor of plaintiffs' cost of translation from English to Chinese if the cases were refiled in Taiwan.

We believe the two factors favoring dismissal substantially outweigh the disadvantage to plaintiffs in having to incur the increased cost of translation, especially since, as we indicated *supra* at 32 n.9, some portion of the increased cost can be mitigated.

Therefore, were it not for a practical consideration we will discuss in the next section of this opinion, we would grant the motion to dismiss.

A Final Practical Consideration

If we were to grant the motion to dismiss, and the cases were to be refiled in Taiwan, what is the first thing that would happen? The answer is clear. The defendants would move to dismiss on the basis of limitations, citing the *Peng* case. The Taiwanese court would rule on the motion before there was any need for defendants to do the discovery that can be done more easily in Taiwan than in California.

The plaintiffs have virtually conceded that their negligence and fraud claims are time-barred in Taiwan. They rely on their view that their claims would survive under California limitations law. But, as we have seen, the California courts, under the governmental interest approach, will apply the same Taiwanese limitations law that the Taiwanese court would apply. The result, whatever it is, should be the same in California as it would be in Taiwan.

We believe it would be pointless, and that it would impose a needless expense upon the plaintiffs, for us to grant the motion to dismiss, forcing them to refile in Taiwan.[10] The cases should remain in California, where defendants can present the same

[10] Here, the defendants' point about the difficulty of trying to apply unfamiliar foreign law, *supra* at 34, cuts against them. The threshold legal question in this case is whether plaintiffs' claims are time-barred under the limitations law of California. It can hardly be doubted that the federal district courts in California are more familiar with California limitations law than would be the courts of Taiwan.

motion they would present in Taiwan. Should the California courts, or either of them, decide that the claims are not time-barred, the California court could then consider whether a *forum non conveniens* dismissal would be appropriate. Our denial of defendants' motion at this time is, of course, without prejudice to their renewing it in California should it become appropriate to do so.

CONCLUSION

The motion of the defendants to dismiss the plaintiffs from Taiwan on grounds of *forum non conveniens* is denied.

It appears that a suggestion to the Judicial Panel on Multidistrict Litigation Panel [sic] that these cases be remanded to the transferor courts in California would now be appropriate. If either side has an objection to such a suggestion, the objection should be submitted by January 23, 2009.

DATED: January 14, 2009

ENTER: /s/ John F. Grady
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 26, 2010

Before

RICHARD A. POSNER, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

Nos. 09-2280 & 09-3020

YAO-WEN CHANG, *et al.,* *Plaintiffs-Appellants,* *v.* BAXTER HEALTHCARE CORPORATION, *et al.,* *Defendants-Appellees.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. MDL No. 986 John F. Grady, *Judge.*

ORDER

On April 9, 2010, plaintiffs-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.