The Papers of

THURGOOD MARSHALL

290
November 6, 1981

Re: No. 80-848 Piper Aircraft Co. v. Reyno
No. 80-883 Hartzell Propeller, Inc. v. Reyno

Dear Thurgood:

On the whole, I agree with your analysis of the forum non conveniens issue in these cases. I am troubled, however, by the last paragraph of Section II. In my mind, the paragraph gives too much latitude for the domestic forum to evaluate the legal system of the alternate forum. As written, a district court here could examine the sufficiency of the causes of action permitted by the alternate forum. This paragraph thus undercuts the point that a district court should have to engage in "complex exercises in comparative law." We should not permit a plaintiff to defeat a forum non conveniens motion by arguing that the foreign forum's substantive law is "unsatisfactory" by American standards. Rather, the district court's analysis of the law to be applied by the foreign forum should be limited to determining whether that forum would permit litigation on the subject matter in dispute. In addition, by focusing on whether the remedies provided by the alternative forum is inadequate or unsatisfactory, the paragraph implies that a plaintiff could defeat a motion by demonstrating that the statute of limitations has run in the alternate forum. Because it would have no remedy at all in the alternate forum, the plaintiff could argue that the district court may not dismiss the action on forum non conveniens grounds.

I am not wedded to any particular language in this regard, but I do think the language of that paragraph undercuts much of the excellent analysis that precedes it.

Sincerely,

Justice Marshall

Copies to the Conference
Re: No. 80-848 - Piper Aircraft Co. v. Reyno  
No. 80-883 - Hartzell Propeller, Inc. v. Reyno

Dear Thurgood:

Please join me. I feel there is some force in what Bill Rehnquist says in his letter of November 6 concerning the last paragraph of part II, but I am confident that the two of you will be able to work the matter out. It seems to me that the statute of limitations/remedy feature can be controlled by the court receiving the motion; in fact, the Middle District of Pennsylvania resolved it in this very case by requiring waiver.

Sincerely,

Harry

Justice Marshall

cc: The Conference
November 12, 1981

Re: No. 80-848 - Piper Aircraft v. Reyno
    No. 80-883 - Hartzell Propeller v. Reyno

Dear Bill:

I understand the concern you expressed in your memorandum of November 6 regarding the language at the end of Part II; there is some danger that parties opposing motions to dismiss on grounds of forum non conveniens will attempt to introduce choice of law problems in every case by arguing that the remedy offered in the alternative forum is inadequate. I hope that the slight change in wording I have offered—from "approaches no remedy at all" to "is no remedy at all"—will signal to the lower courts and to litigants that the remedy must be totally inadequate before dismissal would be barred for this reason. I recognize that even with the change in wording, the paragraph suggests that plaintiffs may ask the courts to conduct at least a limited exercise in comparative law. My answer to this is that such exercises are necessary. If it really is true that the remedy in the alternative forum is completely inadequate, dismissal should be barred. Requiring the court to make this determination should not be unduly burdensome; it should be able to decide fairly quickly whether the alternative remedy is wholly inadequate.

You suggest that the opinion might be interpreted to mean that dismissal would be barred where the statute of limitations had run in the alternative forum. In my view, motions to dismiss ordinarily should not be granted in this circumstance. Where the forum chosen by the plaintiff was plainly inconvenient, and where it appears
that he purposely delayed filing suit until the limitations period had run in the alternative forum, a decision to dismiss might be warranted. In the typical case, however, dismissal would not be appropriate. In fact, the district courts routinely refuse to grant motions to dismiss on grounds of forum non conveniens unless the moving party agrees to waive any jurisdictional defenses (including statute of limitations defenses) he or she might have in the alternative forum. Such a waiver was made here.

Sincerely,

[Signature]

T.M.

Justice Rehnquist

CC: The Conference
November 19, 1981

Re: Nos. 848 & 80-883 Piper Aircraft Company v. Reyno

Dear Thurgood:

Your second draft is much more palatable to me than your first one, and if we could come to some agreement as to footnote 22 on page 18 I would cheerfully join. The third sentence of that footnote now reads:

"Where the remedy offered by the other forum is clearly unsatisfactory, however, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied."

I have no magic language to suggest to substitute for that sentence, but to me it is too vague and ambiguous as it presently stands: the term "clearly unsatisfactory" is subject to a multitude of definitions. If you could strengthen the language by providing some other definition of a forum which is not an adequate alternative, I will gladly join the second draft changed in this relatively minor fashion. I certainly agree that the Ecuadorian tribunal which you describe in the footnote would not be an "adequate alternative", for the reasons you state, but the term "clearly unsatisfactory" seems to me to be a way by which astute attorneys could get the camel's nose under the tent.

Sincerely,

Justice Marshall
November 23, 1981

Re: No. 80-848 - Piper Aircraft Co. v. Reyno
    No. 80-883 - Hartzell Propeller, Inc. v. Reyno

Dear Bill:

How about the following as a replacement for footnote 21?

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. Gilbert, supra, at 506-507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. Cf. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445 (D.C. Del. 1978) (court refuses to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorian tribunal will hear the case, and there is no generally codified Ecuadorian legal remedy for the unjust enrichment and tort claims asserted).

Sincerely,

T.M.

Justice Rehnquist
Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 24, 1981

Re: No. 80-848  Piper Aircraft Co. v. Reyno
    No. 80-833  Hartzell Propeller, Inc. v. Reyno

Dear Thurgood:

Subject to the minor revisions in footnote 21 which we have discussed being made, I now join your opinion.

Sincerely,

Justice Marshall

Copies to the Conference