

The New Normal: International Litigation and Its Implications for Trial Lawyers

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THE global economy is rapidly reshaping society. Technological advances have helped to spread information about different countries and cultures throughout the world, and this has been a catalyst for new business opportunities in new markets. Large companies have seen the benefits of global commerce for many years. But now, small and medium-sized companies are also seeing international markets as lucrative ways to expand their businesses.

The legal profession is also being reshaped by the global economy. Following the lead of clients, in-house lawyers and outside law firms that support their clients' international business activities have had to become familiar with new areas of the law, different cultural and business norms and new ways of practicing law. Many law firms have gone even further, opening international offices to bring them closer to their international clients and to develop even greater exper-

tise with international laws that affect their clients.

Given the dramatic increase in international commerce that has taken place, it is no surprise that trial lawyers and their clients are also thinking globally when considering their litigation objectives. It is a natural progression; litigation that was first conducted locally within a single state or province expands to national multi-district litigation within a particular country and then to international litigation. Litigation results from one country may be used as precedent in litigation conducted in other countries. Laws that are available in certain countries may create favorable results that can affect business activities elsewhere. Strategic lawsuits may be part of the business strategies of some companies, curbing the activities of competitors in certain jurisdictions or creating leverage for other business negotiations.

Plaintiffs' lawyers have also learned that litigation in international venues can be a

very profitable expansion of their domestic litigation activities. It has become very common for “copycat” litigation to spring up in other countries after first being developed in the United States. Consequently, clients may find themselves facing a repeat of litigation that they thought had concluded, with the litigation now transferred to a foreign jurisdiction.

International litigation against tobacco companies provides a useful illustration of how litigation is now taking place on an international battlefield. This article uses international tobacco litigation as a case study for these trends.

I. Tobacco Litigation History

Litigation against tobacco companies is not new. It has gone on for many decades, having begun in the United States at least as early as the 1950s. For decades the tobacco industry was very successful defending these cases, which contained significant causation and contributory negligence issues.

Notwithstanding their setbacks, the plaintiffs’ bar persisted in bringing new actions in many different states on behalf of individuals and in the form of class actions.¹ Eventually, by the early 1990s, plaintiffs began seeing some success, and that success has increased over the years.

Following some of these early victories, in the mid-1990s state governments jumped on the bandwagon, bringing lawsuits against tobacco companies to recover medical costs expended treating

smokers who developed lung cancer and other diseases allegedly attributable to their smoking. Between 1994 and 1997 there were at least 42 lawsuits by state governments pending against tobacco companies seeking reimbursement for health care costs.²

These state-sponsored lawsuits also began seeing success. For example, in 1996 it was reported that the parent of one of the large tobacco companies settled with several suing states. The settlement reportedly required the tobacco company to pay money, add new warnings to cigarette packages and testify against other tobacco companies.³ Further settlements with states over health care costs occurred. In November 1998, a master settlement was reached between tobacco companies and forty-six states. According to the report, the settlement involved the ban on certain types of advertising, the creation of public education trusts and payment of over \$200 billion over 25 years.⁴

New lawsuits by other government entities also were filed. One such suit was filed by the United States government in the United States District Court for the District of Columbia, seeking to recover medical expenses paid out through Medicare, veteran’s benefits and other military health programs.⁵ That litigation has

² <https://www.library.ucsf.edu/tobacco/litigation/states>.

³ Tobacco Products Litigation Reporter, 1996, p. 11, 3.160-3.174.

⁴ Richard P. Ieyoub, and Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TULANE L. REV. 1859 (2000).

⁵ U.S. Dept. of Justice v. Philip Morris, Inc., Tobacco Products Litigation Reporter, 1999, 4: 3.171-3.220 (D. D.C. 1999).

¹ See, e.g., Broin v. Philip Morris Companies, Inc., aff’d sub. Nom. Ramos v. Philip Morris Companies, Inc., 1999 Fla App LEXIS 3422 (Fla. 4th Dept 1999), filed on behalf of non-smoking flight attendants exposed to second hand smoke on airplanes.

continued for at least 15 years, involved numerous pretrial and post-judgment motions, hundreds of depositions and a number of appeals. Judge Gladys Kessler issued a 1,683 page decision in August, 2006, finding against the tobacco companies.⁶

II. Foreign Country Tobacco Lawsuits

Governments of other countries also joined the fray, filing lawsuits in the United States seeking reimbursement of health care costs. Some of the countries initiating these suits included Guatemala, Venezuela, Bolivia and Nicaragua.

Individual lawsuits against tobacco companies also were filed in other countries. In 1999 a class action lawsuit was filed against major tobacco companies in Australia on behalf of Australians with smoking-related diseases.⁷ England also saw similar litigation filed and ordered dismissed by early 1999.⁸ Subsequent tobacco litigation actions have been filed and proceeded in England since that time.

The success of state government lawsuits against tobacco companies in the United States did not go unnoticed elsewhere. It was not long before lawsuits began to be filed by governments seeking recovery of health care costs in the courts of other countries. Canada was among the

first. British Columbia began the Canadian litigation to recover health care costs in 1998. It was originally brought pursuant to the Tobacco Damages and Health Care Costs Recovery Act (1998). When that Act was found to be unconstitutional, the province amended the Act and the provincial government re-filed the suit in 2001. More recently, in 2012 the British Columbia government announced that it was forming a legal consortium with five other Canadian provinces to continue prosecuting claims against the tobacco manufacturers. Ontario filed its own action against 14 tobacco company manufacturers in September 2009, seeking \$50 billion under the Tobacco Damages and Health Care Costs Recovery Act (2009).

South Korea may be the most recent country to seek recovery of health care costs from tobacco companies. In April 2014, South Korea's National Health Insurance Service (NHIS), a government controlled health insurance organization, filed suit in Korea against the major tobacco companies operating in Korea, including one that had formerly been a government-owned company. According to the World Health Organization, it is the first suit among 37 countries and territories in the Western Pacific by a government organization against tobacco companies.⁹ This suit also marked the first time in Korea that a national agency sued a company that had formerly been owned by the Korean government. The suit seeks approximately \$52 million in medical care costs that are allegedly attributable to tobacco-related diseases.

The NHIS suit is still pending, and no decision has been issued. Interestingly, the

⁶ *United States v. Philip Morris USA Inc.*, 449 F. Supp.2d 1 (D.D.C. 2006), *aff'd* in part and *vacated* in part, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), cert. denied 130 S.Ct. 3501 (2010).

⁷ *Nixon v. Philip Morris (Australia) Ltd.* [1999] FCA 1107.

⁸ *Hodgson v. Imperial Tobacco Ltd.*, Order of Justice Wright, [1998] EWCA Civ .224.

⁹ <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=2987926>.

Korea Supreme Court recently rejected the appeal of the plaintiffs in several cases brought by lung cancer patients and their families against Korean tobacco companies, affirming a lower court decision in favor of the tobacco companies.¹⁰ Among other things, the Supreme Court found that the individual plaintiffs had not proven that their cancer was caused by smoking as opposed to other environmental or biological (genetic) factors. But the NHIS has stated its clear intention to use precedent, data, documents and tactics from other lawsuits in the United States and elsewhere to prove causation. The NHIS may also ask the court to reverse the burden of proof, requiring the manufacturers to prove that cigarette smoke did not affect the health of individual patients whose medical expenses were paid by the NHIS.

III. Other Types of International Litigation

Product liability litigation is but one type of litigation that is being waged on an international stage. There are others. Intellectual property litigation is a prime example.

Most IADC attorneys are probably aware of the “smartphone patent wars” being waged between Apple and Samsung. In 2011, Apple filed suit against Samsung alleging that Samsung had copied iPhone design features in some of Samsung’s competing Android mobile phone devices.¹¹ Samsung counterclaimed against Apple. Multiple other patent infringement

litigation actions between the two competitors followed.

Worldwide more than 50 lawsuits have been filed between those two companies in at least nine countries including the United States, South Korea, Japan, France, Italy, the United Kingdom, Germany, the Netherlands and Australia. The suits have resulted in billions of dollars in awards, product importation bans, injunctive relief and precedent from one suit being used in other suits as well as being used for leverage in negotiations between the parties. Not all of these damage awards, injunctions and importation bans have been upheld, but the companies’ business strategies in conducting this litigation and seeking these remedies is fairly transparent.

IV. Some Tactical Considerations In Light of International Litigation

Attorneys involved with multidistrict litigation in their own country will easily appreciate the implications of this new wave of international litigation. What occurs in one case in one country may appear again and reverberate in other cases in other countries. Defense attorneys and their clients need to remain sensitive to this fact. It is no longer a flat chessboard they are playing on, but it is now more of a 3D chessboard, requiring that litigators look in multiple directions before every move and consider what the implications might be for parallel or future litigation in many other countries.

The precedent created by judgments is one consideration. How may a judgment, for or against your client, be used in litigation in another country? Will a court in another country enforce that judgment

¹⁰ 2007 NA 18883; 2011 DA 22092.

¹¹ www.wsj.com/articles/SB10001424052748703916004576271210109389154.

or determine that it has preclusive effect on claims or on other litigation under doctrines of *res judicata*, collateral estoppel, comity or other doctrines.¹²

How might you limit the effectiveness of a judgment against your client that your opponent attempts to use in a different jurisdiction? Are there differences in evidentiary foundations, procedural processes or in different countries' laws such that the judgment cannot be used for precedent in another country because it would deprive your client of due process?¹³ What other defenses might be available to prevent or limit such use by your opponent?

Legal arguments also must be made with care. In the context of patent litigation, for example, how claims are being constructed and the arguments advanced on claim construction can have a significant impact on other litigation. The arguments might affect claim construction in other patent infringement cases and/or might affect invalidity actions. This could occur where counsel make broad claims construction arguments on an infringement claim and those broadly construed patent claims include claims that are incorporated in prior art. In that manner arguing an overly broad claim

construction could invalidate the patent in another jurisdiction.¹⁴

It is also necessary to consider the applicable law in different jurisdictions when crafting arguments. An available argument or a concession in one jurisdiction, appropriately made under the prevailing law of that jurisdiction, might run afoul of existing laws in another jurisdiction. For example, in an FCPA investigation related to alleged bribery of government officials, a company might concede that money was paid to obtain a contract, but the individual was not a public official and therefore the FCPA was not violated.¹⁵ However, the admission of that conduct might be used against the company in a parallel investigation for violating the UK Bribery Act of 2010 or an investigation for violating the Korean Gift-Giving laws, where such payments made to private individuals who are not government officials may be illegal.¹⁶

Counsel must carefully consider whether their arguments or information that they wish to provide might be construed against their client in other litigation in other countries. Sometimes it is best to refrain from making an available argument, or revealing certain information that might be helpful in an action in one country, because of the potential negative consequences such argument or revelation

¹² See, e.g., *In re Bd. Of Directors of Telecom Argentina, SA*, 528 F.3d 162 (2d Cir. 2008) (recognizing and upholding a foreign court judgment under the doctrine of comity).

¹³ See, e.g., *Osorio v. Dole Food Co.*, 665 F. Supp.2d 1307 (S.D. Fla. 2009), where the court declined to enforce a Nicaraguan judgment in a toxic tort case on due process grounds because Nicaraguan law afforded the plaintiffs an irrefutable presumption of causation which did not comport with United States notions of due process.

¹⁴ <http://sunsteinlaw.com/how-should-the-pro-interpret-patent-claims-the-federal-circuit-weighs-in-yet-again/>.

¹⁵ <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>.

¹⁶ See, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>; CRIMINAL ACT, art. 355-357(Kr.) and MONOPOLY REG. and FAIR TRADE ACT, art. 23, 24 (Kr.).

may have on litigation in another country where success may be more critical.

Another important consideration is the effect that discovery might have on similar cases in the international litigation arena. Many civil law jurisdictions provide very limited discovery. Yet plaintiffs' lawyers may obtain discovery from certain jurisdictions where it is permitted and then try to present that discovery as evidence in other jurisdictions where discovery is not permitted. Is the discovery even applicable to litigation in the other country? For example, perhaps the company that is being sued is merely a subsidiary of the parent and the "bad documents" were never provided or communicated to the subsidiary by the parent and never known, considered or used by the subsidiary. In that case, there might be a strong argument to exclude the use of those documents in a lawsuit against the subsidiary.

At a minimum, counsel need to consider how discovery might be used in other litigation matters, before the discovery is provided. If there is a concern that discovery produced in one case in a particular country might be reused in another case where discovery is not permitted, or where the scope of discovery is much more narrow, consideration should be given to strategies to prevent the use of that discovery in other jurisdictions. Perhaps it might be possible to obtain a court order limiting the use of discovery to only the lawsuit in which the discovery is provided. Sometimes it may be necessary to settle the case in order to prevent having to provide discovery that would otherwise be available to plaintiffs in another jurisdiction.

Consistency of discovery responses is also important. Discovery given in one

country needs to be accurate and consistent with discovery provided for litigation in another country. Clients need to coordinate (or have outside counsel coordinate) to ensure consistency and accuracy of discovery responses so that opponents cannot seize on inconsistencies to undermine the credibility of your client, or to create sanction opportunities based on inconsistent statements in discovery responses.

Another hidden trap that should be considered with international litigation is attorney-client privilege. Many countries do not recognize attorney-client privilege as it is known in the United States and communications that one might expect to be protected may not be privileged in another country.¹⁷ For example, in Korea there is no attorney-client privilege.¹⁸ Therefore, documents between attorneys and their clients are afforded no protection from discovery under the laws of Korea based on any attorney-client privilege. The absence of such a privilege generally is not a problem when dealing with litigation in Korea, because discovery is severely limited in Korean litigation and there is little likelihood that documents reflecting such communications would need to be produced.

But if those communications are shared with clients or attorneys in other countries where discovery generally is permitted, would the documents be discoverable? If the law of the country where the documents were created does not provide an attorney-client privilege, then such a privilege may not be available to be

¹⁷ *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002)

¹⁸ *Astra Aktiebolag*, 208 F.R.D. at 100.

invoked to prevent discovery, even if the country where discovery is requested would otherwise recognize attorney-client privilege for such communications made within that country.

For that reason, when dealing with international litigation matters it is important to know whether communications with your client and co-counsel are protected, and what discovery obligations exist in the country where the communications are being made. It is also important to consider whether communications that are not protected by the attorney-client privilege in the country where they are made would be discoverable in other countries where discovery is permitted before sharing those communications in the other countries.

V. Conclusion

International litigation has become the new normal. Domestic markets limit profits and international markets offer expanded opportunities, even to small and medium companies. Additionally, technology has made it far easier to obtain information on how to penetrate international markets, which has spurred further interest in global commerce. The amount of international trade is likely to increase as the world becomes “smaller.” As that international trade increases, so will international litigation. Therefore, businesses and their attorneys will need to continue becoming knowledgeable about this burgeoning legal practice area.