The agreement must be in writing, signed by the client and the legal representative.

> "Despite the fact that the Order does not establish a legislative cap on recovery of the success fee, there is a requirement that the agreement state whether or not there is to be a voluntarily agreed cap on recovery of fees from damages."

Insurance against defendants' costs

The English Law Society has at the same time negotiated an insurance arrangement. For a flat fee premium which may be as low as 100 pounds sterling, the client can obtain cover against costs awarded against the client in the event of a loss, including disbursements and counsel's fees. Initially the Scheme will exclude medical negligence and some other complex cases.

The policy is only available to the firms who are members of "accident line" and decide to operate the new arrangements under which they must agree that all clients with conditional fee agreements take out the policy. It has been suggested by Professor Michael Zander, *London School of Economics New Law Journal* - 23 June 1995, that the remarkably low premium shows clearly how little risk the underwriters perceive exists.

> "There are about 1,300 firms in the above category. The balance of about 8,500 firms can obtain insurance through Litigation Protection Limited. Their premium is 175 pounds for an indemnity up to 10,000 pounds increasing to 1,500 pounds for an indemnity up to 100,000 pounds."

The future

It seems that the eventual plan is to extend the Scheme to other areas, if it appears to be working in practice. Given that it took some five (5) years from the enactment of the legislation to the proclamation of the Order, extension of the Scheme may not be on the immediate horizon.

Global Mass Torts and The Rights Of Foreign Claimants

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(Paper given at the 1995 ATLA Annual Convention)

Introduction

United States corporations play a significant role in the economies of many countries. The development, manufacturing, marketing of and selling of their products has a significant impact on the lives of many people outside the United States. When such products prove to be defective and injurious to non-American citizens, those claimants are increasingly seeking legal redress and compensation for their injuries in the United States.

Indeed, over the past 15 years, there has been an increase in number of foreign claimants pursuing claims in United States courts, particularly in the area of mass tort litigation. Examples are Agent Orange, Dalkon Shield, Bjork-Shiley heart valves, and most recently, breast implants.

This paper will discuss problems faced by foreign claimants in pursuing their claims in the United States courts, with reference to their access to, and participation in, settlements arising out of mass tort litigation and with a particular focus on the recent breast implant class action settlement.

II. Reasons Why Foreign Cliamants Pursue Claims In United States Courts

Reasons given by foreign lawyers for seeking to bring their clients' claims in the United States are as follows:

1. Problems with United States defendants appearing in the foreign jurisdiction and with executing orders for recovery of any monies awarded in cases against United States defendants in foreign jurisdictions;
2. The defendant(s)' place of incorporation is in the United States;
3. Access to extensive pre-trial discovery procedures in the United States, such as the taking of depositions, are not available in many foreign jurisdictions;
4. More causes of action, such as strict products liability laws, which may not be available in foreign jurisdictions;
5. Access to greater damages awards for their clients;
6. The potential to enter into contingency

arrangements with clients in pursuing such claims; and
7. Access to the American jury system.(E.J. Silva, *Practical Views On Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlannc Settlements,* 28 lEx. INT'L L.J. 479, 480-81.

III. Problems faced by foreign claimants pursuing claims In United States courts

A. Factors affecting the ability of foreign claimants to participate in mass tort litigation and in settlements arising out of such litigation:

1. Successful applications by American defendants to dismiss claims by foreign claimants on the grounds of *forum non conveniens.*
2. No notice, or inadequate notice, of any potential entitlements foreign claimants may have to make a claim in the settlement of mass tort litigation.
3. A lack of appropriate representation of the interests of foreign claimants in the negotiation and settlement of mass tort litigation.

B. Foreign claimants pursuing claims in the United States: the problem of *Forum Non Conveniens*

The cases of *Piper Aircraft v. Reyno* (454 U.S. 235 (1981)) and *Gulf Oil v. Gilbert* (330 U.S. 501 (1947) are authority for ;the principles to be applied by United States courts when considering whether claims are to be dismissed on the ground of *forum non conveniens.* These principles may be summarised as follows:

1. There is a need to balance private and public interest factors in determining whether United States courts are an appropriate choice of forum. Private interests to be considered include access to sources of proof, potential witnesses, ability to compel the attendance of unwilling witnesses, enforceability of judgments, and the costs associated with producing evidence. Public interest factors to be considered are the administrative ease of running a case in a particular jurisdiction, unfairness in burdening citizens in an unrelated forum with jury duty, conflict of law issues, interest in having foreign controversies decided in the foreign jurisdiction, and any advantages in trying a diversity case in a forum familiar with the substantive law governing the action.

In considering such factors, the court has to take into account concessions to be made by the defendants if the foreign claims were to be brought in the foreign jurisdiction, such as waiver of local statutes of limitations and agreement by all defendants to one or more of the following:

i. amenability to suit in the foreign jurisdiction;
ii. enforceability of any judgments against defendants in the foreign jurisdiction; and
ii. evidence admissible in United States courts to also be admissible in the foreign jurisdiction;

2. The defendant(s)' place of incorporation;
3. The parties' respective relationships to the particular United States jurisdiction;
4. The burden that will be placed on the United States court where the claim is sought to be brought;
5. Whether, in all the circumstances, it would be fair and reasonable for the claim to proceed in the particular United States jurisdiction;
6. Little weight should be given to any litigious disadvantage a foreign claimant would suffer by reason of less favourable substantive law in the claimant's local jurisdiction; and
7. Foreign claimants' choice of forum in the United States should carry less weight than a domestic claimant's choice of forum.

Consideration of the above factors by United States courts, particularly federal courts, has made it difficult for foreign claimants to hold forum in the United States.

There have been a number of state court judgments on *forum non conveniens* that appeared to move away from the principles enunciated in *Reyno* and *Gulf Oil* in favour of allowing foreign claimants' choice of forum in the United States.

In particular, the courts in California in the cases of *Holmes* (202 Cal. Rptr. 773 (1984)) and *Corrigan* (227 Cal. Rptr. 247 (1986)) appeared to move away from the principles enunciated in *Reyno* and *Gulf Oil* to focus more on California law. This gave greater deference to foreign claimants' choice of forum and attached greater significance to foreign plaintiffs being subject to less favourable law in the foreign jurisdiction by reason of a claim being dismissed on the ground of *forum non conveniens.* In particular, it was noted in *Holmes* that: "California courts have a responsibility to provide a forum for litigation against corporations utilising this State as their principal place of business for torts committed in California." (202 Cal. Rptr. at 778).

However, in *Shiley, Inc. v. Superior Court,* (250 Cal. Rptr. 793 (1988). *9Id.* at 795.) the California Court of Appeals preferred the federal approach adopted in the cases of *Reyno* and *Gulf Oil,* describing *Holmes* and *Corrigan* as "an unwarranted digression from sound principles

of the law of *forum non conveniens.*" (250 Cal. Rptr. 795 (1988)

Examples of cases where foreign claimants have been successful in maintaining forum in the United States are as follows:

1. In *re Dalkon Shield Litigation,* (581 F. Supp. 135 (D. Md. 1983)) where a number of Australian claimants maintained jurisdiction in the United States on the ground that it was not clear that the foreign jurisdiction (Australia) provided a suitable alternative forum. In this case, the defendants had not discharged their burden of proving suitable alternative forum as they had not made it clear that they were all amenable to suit in Australia. In addition, the court considered that the administrative burden would be too great if all defendants did not consent to jurisdiction in Australia.

2. *Rhodes.* (CV 93-P-14410-8 (N.D. Ala. Apr. 25, 1995) (unreported) (opinion by Judge Pointer)). In a recent judgment by Judge Pointer in the District Court in Alabama in the breast implant litigation, he ruled that New Zealand breast implant claimants could maintain their actions in the United States, as it was not clear that such claimants had viable claims for compensation under New Zealand judicial and administrative systems, and that the number of New Zealand claims was small enough so as not to be "a significant additional burden on United States courts".

In summary, the preponderance of United States law to date has favoured dismissal of foreign claims on the grounds of *forum non conveniens* provided that United States defendants discharge the burden of showing that a suitable alternative forum is available in the foreign jurisdiction and appropriate concessions are made as to time limitations, evidence, witness amenability to suit, and enforceability of judgments in the foreign jurisdiction.

C. Notice to foreign claimants of potential entitlements in mass tort settlement in the united states

When a class action is filed in mass tort litigation in the United States and negotiations take place between the parties to settle claims within the class, foreign claimants need to be made aware of any entitlements they may have to participate in the class action settlement and of any deadlines they may face for the filing of their claims in the United States. This may prove to be crucial to the likelihood of foreign claimants obtaining any compensation for the injuries they have suffered, particularly in circumstances where:

1. The mass tort settlement proposes to settle up the rights of all potential claimants, both now and in the future.
2. The class of claimants who will be entitled to access mass tort settlement funds is determined by the number of claimants who file claims in the United States by certain deadlines and by those who meet certain criteria.
3. Agreement is reached between the parties on a global amount to settle up all claims defined to be within the class, with little or no monies available for future claims. There is concern that one or more of the defendants to any such mass tort litigation will have no monies available for claims that may be brought in the future, particularly in foreign jurisdictions, as all available insurance monies of the United States defendants may have been paid into the mass tort settlement fund.

In light of the matters outlined above, it is, therefore, essential that adequate and fair notice be given to potential foreign claimants of their entitlement to make claims on mass tort settlement funds in the United States.

In past mass tort settlements through class action procedures, there has been criticism of the notice given to foreign claimants, particularly where there is a mandatory class and the rights of potential claimants, both now and in the future, may be settled up as a result of the settlement. For example, in the Dalkon Shield settlement, fewer than 32,000 claims were received from outside the United States. This amounted to one out of every 44 foreign women who had used a Dalkon Shield as opposed to one out of every seven women who had used a Dalkon Shield in the United States. In no foreign country did the response rate come close to that of the United States.

The Robins Company spent $750,000 on giving notice of the bar date to women outside the United States, less than 25 per cent of the amount spent on notice in the United States.

An estimated 1.4 million Dalkon Shields were used in foreign countries, 64 per cent of the number used in the United States.(R. Sobol, *Bending The Law: The Story Of The Dalkon Shield Bankruptcy* 100 (1991)).

It is to be noted that more than 90 per cent of the Dalkon Shields sold outside the United States had been sold in the following seven countries: Canada, England, Australia, South Africa, France, Germany and Mexico. (R. Sobol) Nevertheless, Judge Merhige, the judge presiding over the Dalkon Shield settlement, considered that adequate notice had been given to foreign claimants. He avoided the statistical discrepancies between the domestic

and the foreign response rates by commenting that: "notice had reached 81 countries... [It] is the Court's finding that there are many reasons attributable to the discrepancy in the number of foreign and domestic filings, including *inter alia*, religion, culture, the non-litigious nature of the people, and certain countries' bans on the 'advertising' of such women's products or problems."(Memorandum of Judge Merhige (June 16, 1986)).

In his recent opinion approving the settlement of the breast implant mass tort litigation, Judge Pointer of the District Court in Alabama, acknowledged some of the difficulties faced by foreign claimants in receiving notice of their potential entitlement to register a claim, recognising "both the additional time it took many foreign claimants to request and receive the settlement notices and the 'super' opt-out rights that would later be available to them . . . [and so allowed the court to continue] . . . to accept all exclusions from foreign claimants even up to the date of the hearings." (*Lindsey v. Dow Corning (In re Silicone Gel Breast Implant Prods. Liab. Litig*), MDL 926 (N.D. Ala. Sept 1, 1994) (opinion by Judge Pointer))

However, Judge Pointer went on to point out that if there were any discrepancies in the adequacy of foreign as opposed to domestic notice, he did not perceive such discrepancies to be significant, reasoning that the potential consequences for the two groups of a failure to receive notice of the settlement were quite different:

> "Domestic class members who do not learn of the settlement and consequently do not register or opt out by the 1994 deadlines face the loss of their rights to sue in courts in their own country and retain only the right, which may be of little value, to become late registrants under the settlement. On the other hand, foreign claimants who, not learning of the American settlement, fail to register by. . . the deadline retain all rights to proceed in the court of their own country. Given this fundamental difference in the consequences of failure to receive notice, a strong argument can be made that a claimant-identification program outside the United States would not have even been required. (*Lindsey v. Dow Corning (In re Silicone Gel Breast Implant Prods. Liab. Litig*), MDL 926 (N.D. Ala. Sept 1, 1994) (opinion by judge Pointer) at 5)

Factors such as whether the United States' defendants would be amenable to suit in the foreign jurisdictions, whether any insurance monies would still be available to pay any compensation to foreign claimants in their home jurisdictions, and whether foreign claimants might face evidentiary difficulties in bringing claims against such defendants in their home jurisdiction, were not referred to by Judge Pointer when the above comments were made. He ruled that the "best notice practicable under the circumstances" had been given. (Id.)

In determining whether fair and adequate notice has been given to foreign claimants, it is imperative that a proper analysis be undertaken of how many of the products in question were sold both in and out of the United States, in what countries they were sold, and whether this is represented, on a proportional basis, in the number of claims registered by the deadline for the filing of claims in mass tort settlements. This would be a preferable course to adopt in determining whether reasonable notice was given, instead of giving weight to the number of countries from which claims were received as being good evidence that fair and adequate notice had been given to all potential foreign claimants. (*id., see also* Sobol)

D. Representation of the interests of foreign claimants in mass tort settlements

This paper also focuses on the recent negotiations and settlement that took place in relation to the breast implant mass tort litigation, to highlight some of the issues and conflicts that have arisen in the representation of the interests of foreign claimants in this type of litigation.

At the fairness hearings that took place before Judge Pointer in relation to the approval of the settlement of breast implant claims in 1994, lawyers representing foreign claimants were most concerned with the "perceived inequities" in the allocation of funds between domestic and foreign claimants. (Lindsey at 6) Major objections by those representing foreign claimants were noted to be as follows:

1. None of the attorneys on the plaintiffs' negotiating committee had clients who were foreign claimants.

2. The question of providing opportunities for foreign claimants to participate in the proposed settlement was initiated by a defendant rather than the plaintiffs' negotiating committee.

3. There was a gross disparity in potential benefits afforded foreign claimantsas compared to domestic claimants-particularly the three per cent "cap" under the Disease Compensation Program, the reduction in Scheduled Benefits for foreign claimants under that program, and the exclusion of foreign claimants from participation under Designated Funds I-V.

4. There was a lack of any standards or criteria for paying foreign claimants. (Lindsey at 12)

Judge Pointer acknowledged some of the concerns of those representing foreignclaimants and set out a methodology and procedures for determining amounts payable to foreign claimants. However, while he noted that "those who negotiated the settlement have candidly acknowledged that... [the three per cent "cap"] limitation was based not on any empirical study but rather on pragmatic considerations . . . by the parties as being not so large as to result in offers unacceptable to too many domestic claimants,"(Lindsey at 14.) Judge Pointer went on to approve the three per cent cap in relation to foreign claimants' access to total settlement funds.

Of most serious concern to many of the lawyers representing foreign claimants was the perceived conflict of interest faced by members of the plaintiffs' negotiating committee in attempting to represent the interests of both domestic and foreign claimants, given that no member of the committee actually represented foreign claimants, which in turn, they argued, led to the inequity in the allocation of settlement funds between domestic and foreign claimants, represented by the three per cent cap on access by foreign claimants to the total pool of settlement funds.

Conclusion

As a result of the "perceived inequities" between domestic and foreign claimants in the allocation of funds in mass tort litigation conducted in the United States, as most recently shown in the breast implant settlement and as observed in past mass tort settlements, it is clear that the interests of foreign claimants need to be adequately and fairly represented by lawyers who actually represent the interest of foreign claimants. Further, foreign claimants should be formally recognised by all interested parties for the purpose of negotiations as a separate group of claimants with different interests and considerations to domestic claimants and, consequently, negotiations should take place directly between lawyers representing foreign claimants and the lawyers representing the defendants in mass tort litigation.

At the same time, it is also necessary that all lawyers representing foreign claimants be organised as a group with a clear strategy in place to protect their clients' interests, particularly during the crucial period of negotiations to settle mass tort litigation, for it is during this period that the best opportunity for a fair and equitable share of proposed settlement funds may be achieved on behalf of foreign claimants.

Recent Developments In The Grant Of Limitation Extensions In Queensland - Opportunities For Plaintiffs

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(Paper given at Australian Plaintiff Lawyers' Association "Litigation at Sunrise 26.7.95)

1. In a personal injuries case with the usual three year limitation period, the scheme of ss 30 and 31 of the *Limitation of Actions Act* 1974 as amended could be said to be that:

(i) there must be a material fact of a decisive character relating to the right of action which was not within the applicant's knowledge or means of knowledge until after the second anniversary of the accident (s31(2)(a));

(ii) there must be evidence to establish the applicant's right of action, apart from limitation defence (s31(2)(b); and

(iii) the Court can extend the limitation period for one year from the date the fact came within the knowledge or means or knowledge of the applicant (s 31(2)). So, for example, in the case of a Writ issued on 23 March 1990, the fact had to first come within the plaintiff's knowledge or means of knowledge after 23 March 1989.

2. Section 31(2)(a) requires:

(i) the missing fact to be:
"material" as defined in s 30(a);
"decisive" as defined in s 30(b); and

(ii) the fact not to be within the knowledge or means of knowledge of the applicant until after the relevant date.

3. A fact is not within a person's "means of knowledge" as defined in s30(d) of the Act unless the applicant, who has taken reasonable steps to ascertain the fact, does not know of the fact.

4. According to s30(b), a material fact is of a