

Eighth Circuit Delivers an Inconvenient Truth: Defendants' Forum Non Conveniens Was Untimely, Despite Absence of Express Deadline

May 04, 2021

On April 28, 2021, the Eighth Circuit Court of Appeals issued an [opinion](#) finding that the defendants' motion to dismiss based on the doctrine of forum non conveniens was untimely filed. In doing so, the Eighth Circuit explored the ways that various federal circuits have addressed the timeliness of such motions. Then, without falling in line with any particular circuit's approach, the panel set forth the considerations it viewed as important in determining timeliness in this area of law, where no express deadline is set by rule. The setting is this: A 6-year-old boy was playing on the indoor playground at a Hardee's restaurant in Amman, Jordan. While doing so, he touched an exposed, electrified wire. He was electrocuted and died. His parents sued the defendants in the U.S. District Court for the Eastern District of Missouri. Unlike the franchisee in Jordan, the Hardee's companies in the lawsuit were all American entities. Litigation proceeded for 18 months. Only at that point did the defendants move to dismiss based on forum non conveniens. The district court granted the motion, dismissing the case. The parents appealed. These types of motions are usually decided by first determining whether an adequate alternative forum exists and, if so, by then weighing private interest and public interest factors. It is not clear how a timeliness objection fits into this traditional framework, and no rule sets forth a strict deadline for filing such a motion. Faced with this open question, the Eighth Circuit panel surveyed the landscape. It observed:

Our sister circuits take varying approaches to timeliness. For example, the Fifth Circuit analyzes timeliness as a private-interest factor. And the Third Circuit categorizes timeliness as both a private- and public-interest factor. On the other hand, the Sixth Circuit seems to analyze timeliness as an independent hurdle, requiring a

motion to dismiss based on forum non conveniens to be made within a reasonable time after the party learned the facts that give rise to the motion.

The Eighth Circuit panel did not expressly adopt the approach of any of these circuits. Rather, it announced some guiding considerations for addressing timeliness objections in these circumstances. First, the panel explained that “encouraging parties to file motions to dismiss based on forum non conveniens at an earlier stage of litigation promotes judicial economy. Parties will spend less time, costs, and efforts in front of a court that will ultimately dismiss the case.” Then, it asserted that “when a party spends substantial time in a forum before moving to dismiss based on forum non conveniens, it belies the claim that the forum is truly inconvenient.” Finally, the panel embraced the policy that “considering the timeliness of a motion to dismiss based on forum non conveniens prevents defendants from engaging in impermissible gamesmanship.” In this regard, the panel wrote that, “[o]therwise, defendants could keep an ace up their sleeve by adopting a wait-and-see approach, asserting forum non conveniens only after they have determined that litigation in a U.S. court is going poorly.” With these guiding considerations in mind, the panel reversed, determining that the motion in this case should have been filed earlier because the defendants “knew the facts providing the basis for [the] motion to dismiss from the outset of the case.” The lesson here is that the lack of an express deadline does not translate into the lack of any time constraints whatever. Practitioners should not unduly delay the consideration and filing of motions to dismiss on the basis of the doctrine of forum non conveniens when facts justifying such a motion arise. The defendants in this case learned that inconvenient truth the hard way.

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