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U.S. courts already protect against 'forum shopping'



Mitchell Fuerst

The United States Chamber of Commerce recently initiated a campaign against what it perceives to be "global forum shopping" – a doomsday scenario in which foreigners are portrayed as crawling into United States courts unfairly seeking powerful legal remedies.

Limiting the availability of U.S. courts is a delicate affair which currently lies where it belongs – in the discretion of the courts themselves.

Forum shopping is not new to either state or federal courts. In 1946, the U.S. Supreme Court laid down the rule that has been developed in the more than 50 years since then. The theory of *forum*

non conveniens springs from the policy which seeks to avoid the United States becoming a courthouse to the world.

The U.S. version favors the forum that is most convenient to the parties when other adequate options are available. First, the private interests of the parties are considered – including the location of the parties and the availability of facts, witnesses and relevant sites. If the options under consideration are of equal convenience to the litigants, a variety of public interest factors are considered – including where the events occurred, monitoring courts' caseloads, and avoidance of becoming a courthouse to the world.

Perhaps what frustrates the U.S. Chamber is the uncertainty that comes with a case-by-case determination of the proper

forum. However, considering the infinite number of combinations of events, persons and witnesses, to strip the courts of their discretion could leave judges powerless to send a case to its proper forum, or to retain a case that will not be fairly heard elsewhere.

With a 1996 state Supreme Court ruling, Florida joined the federal courts in considering private and public interests on a case-by-case basis. Florida arrived at the same policy in large part because of the confidence of Latin American litigants in Florida courts and a lack of confidence in their own.

Other states have not taken this step. In this regard, the U.S. Chamber makes a valid point when it argues that a lack of harmonization among the states often leave some state courts as open doors while others, like Florida, require proof that the state is the best forum.

In the European Union and the European Economic Area a "race to the courthouse" system has been adopted under the Brussels and Lugano Conventions.

Under this system, once a case has been brought before a first court, all subsequent courts must stand by. Once the first court determines that it has jurisdiction, all subsequent courts must dismiss the case. This system awards the winner of the race to the courthouse – the first to file.

The intra-European system would likely be impossible in U.S. federal and state courts for two reasons. First, it throws out the discretion of a judge to consider the best forum for the case.

Second, Europe is a relatively small territory operating on a common economic and judicial plane.

Those concerned about forum shopping might consider the following:

- Choose a forum in a contract clause. Maritime contracts have been made on that basis for many years, and forum-selection clauses, though not invincible, are presumptively valid and enforceable.

- Litigation is a cost of doing business. When companies span the globe carrying on activities involving great risks, they can expect to be confronted with the costs of those risks.

- Are the members of the U.S. Chamber so disappointed with the U.S. civil justice system – and so preferential of justice systems of other nations – that they might rather incorporate, bank, look to political infrastructures and avail themselves of legal remedies in other nations, including those remedies relating to patents, contract enforcement and honor of credit? So far, the answer appears to be no.

- We must keep availability of U.S. courts for U.S. litigants. Just as foreign plaintiffs seek relief in U.S. courts for far-off misadventures, so too might U.S. individuals wish to have a forum in which to bring their claims for such activities.

In considering whether doors to U.S. courthouses should be closed, we in the U.S. should consider that they could be closed to us. Although disfavor against foreign litigants is more readily mobilized, U.S. litigants also must surmount *forum non conveniens* challenges as well.

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