IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,329

KINNEY SYSTEM, INC.,

Appellant,

v.

THE CONTINENTAL INSURANCE COMPANY,

Appellee,

BRIEF OF
AMICUS CURIAE
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF APPELLANT

On Certified Question from
The Fourth District Court of Appeal

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INTRODUCTION AND STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is an organization established to express the views of its members, as friends of the Court, in cases involving significant products liability issues.

The case before this Court is not a products liability action; yet, this Court's decision will dramatically impact upon those who sell their products in this state. By virtue of the decision in Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978), this Court has precluded a dismissal based on forum non conveniens if any of the parties are residents of Florida or the cause of action arose here. The decision by the Fourth District Court of Appeal in this case has further emasculated the doctrine by broadly defining "resident" to include foreign corporations licensed to do business in Florida with a place of business in Florida.

This most recent decision, together with Houston, has created a magnet for lawsuits in this state. Manufacturers, like the members of PLAC, who choose to do business in Florida are placed in the untenable position of being required to defend in a forum that may be completely unrelated to the cause of action. At the same time, defendants are unable to fairly and adequately protect themselves against this egregious form of forum shopping.

The certified question in this case[1] provides an opportunity for this Court to examine not only the definition of "resident," but also to reevaluate its ruling sixteen years ago in Houston. That examination will reveal that the Houston approach to forum non conveniens frustrates the fundamental premise of the doctrine, while providing no benefits. A change from Houston is necessary to better serve the interests of all involved.

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[1]The certified question in this case is as follows:

> Is a trial court precluded from dismissing an action on the basis of forum non conveniens where one of the parties is a foreign corporation that:
>
> (a) is doing business in Florida?
> (b) is registered to do business in Florida?
> (c) has its principal place of business in Florida?

STATEMENT OF THE CASE AND FACTS

PLAC adopts the Statement of the Case and Facts as set forth in Appellant, Kinney System, Inc.'s brief.

SUMMARY OF THE ARGUMENT

When the United States Supreme Court adopted the forum non conveniens doctrine in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), it determined that it would be inappropriate to establish rigid rules. Instead, the Court required that there be an examination and balancing of both private and public interest factors in determining which venue would be most appropriate.

Florida's common law forum non conveniens doctrine as adopted in Houston v. Caldwell is entirely inconsistent with this premise because it elevates one fact--residence--above and to the exclusion of all other concerns. Moreover, the concerns expressed in Houston do not justify the rigid rule adopted by the Court. Florida's non-residency requirement, which is not shared by any other jurisdiction in the country, has serious implications for litigants in Florida, the citizens of this state and the judiciary.

Houston fails to account for the private interest factors which the United States Supreme Court found to be critical in an analysis of forum non conveniens. By ignoring such factors as access to witnesses and documents, compulsory process, and the ability to implead parties, defendants are seriously disadvantaged in their ability to defend suits in Florida.

Similarly, public interest concerns are impacted by Florida's rigid formulation of the forum non conveniens doctrine. Because Florida maintains a minority position, it has and will continue to be a magnet for worldwide litigation. Increasing litigation in Florida is counterproductive to the interests of the state and its citizens. Additionally, Florida courts are forced to expend significant judicial resources struggling with difficult choice of law issues when, in fact, another forum may be appropriate. Moreover, concern for other state's interests and notions of comity are ignored when only residency is considered. Finally, the state's interest in attracting foreign corporations to Florida is effectively nullified.

PLAC submits that the Houston decision, which stubbornly adheres to one factor and ignores all of the concerns which are necessary to ensure justice is served, should be replaced by a flexible rule consistent with Gulf Oil.

ARGUMENT

Introduction

The narrow focus of this appeal is whether a foreign corporation that does business in Florida and/or is registered to do business in Florida is a resident for purposes of the common law forum non conveniens doctrine. Appellant, KINNEY SYSTEM, INC., has exhaustively briefed this issue and demonstrated why the Fourth District's definition is incorrect. PLAC's brief focuses on the more compelling issue raised by the certified question as to whether Florida should maintain its rule that places an absolute bar on a forum non conveniens dismissal simply because one party is a resident of the State of Florida.

An examination of the development of the doctrine in the federal courts and in Florida shows compelling reasons why a flexible rule of forum non conveniens is needed in Florida.

I.

THE COMMON LAW DOCTRINE OF FORUM NON CONVENIENS.

A. The Forum Non Conveniens Doctrine as Endorsed by the United States Supreme Court

In the 1947 case of Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), the Supreme Court of the United States recognized the doctrine of forum non conveniens. This doctrine provides a court with discretion to dismiss a case, otherwise properly brought before it, on the grounds that venue is

more appropriate before the court of another state or country and the interests of justice will be served by dismissal.[2]

The Court explained that the venue statutes provide a plaintiff with a choice of forums so that he may be sure there is a place to pursue his remedy. However, "the open door may admit those who seek not simply justice but perhaps justice blended with some harassment." 330 U.S. at 507. Thus, the Court recognized that there are times when a plaintiff may resort to a strategy of commencing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Mindful of this danger and yet unwilling to set forth rigid rules, the Supreme Court enunciated a doctrine that leaves great discretion in the court:

> Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of a remedy.

Id. at 508. The Court concluded that the likelihood of abuse of the rule was minimal since courts are unlikely to renounce their own jurisdiction.

To conduct a forum non conveniens analysis, the trial court must first find that an adequate alternative forum exists that would have jurisdiction over the parties and the subject matter of the litigation. Once a court makes that determination, it may proceed to weigh the relative obstacles and advantages to a fair trial in the forum where plaintiff initiated suit.

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[2]A motion to dismiss based on forum non conveniens is not appropriate unless and until it is determined that the court has jurisdiction and venue is proper. See Gulf Oil, 330 U.S. at 504.

As a guide to the proper exercise of the trial court's discretion, Gulf Oil provided a list of relevant "private interest" factors for a court to weigh in assessing the convenience to the parties in litigating in the chosen forum:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of the case easy, expeditious and inexpensive.

Id. at 508.

The Supreme Court also detailed the following "public interest" factors affecting the convenience of the chosen forum:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that it is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-09.

The themes set forth in Gulf Oil are echoed in the companion case of Koster v. American Lumbermens Mutual Casualty Co., 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947), which was a stockholder derivative suit. Therein, the Court acknowledged the residence of

the plaintiff as a significant factor, yet it also measured the significance of the domicile of the foreign corporation because the suit related to the internal affairs of the corporation. Neither fact was held to be conclusive:

> There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. **But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.** Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under **the doctrine of forum non conveniens, which resists formalization and looks to the realities that make for doing justice.**

330 U.S. at 527-28 (emphasis added).

Until the mid 1970's, Gulf Oil was generally applied as an "abuse of process" rule, i.e., there was a requirement that the defendant be vexed and harassed by plaintiff's choice of forum. See Forum Non Conveniens in America and England: "A Rather Fantastic Fiction", 103 The Law Quarterly Rev. 398, 401 (1987). Beginning in the mid 1970s, however, the courts began shifting toward a "most suitable forum approach." Id. at 404. Thus,

> [No] longer would it be necessary to inquire whether retaining jurisdiction in the United States would vex, harass, or oppress the defendant; instead the focus came to be the

> deceptively simple question of whether the forum selected by the plaintiff was inappropriate because of the lack of contacts between the forum and the dispute. This represented a shift all the way to the most suitable forum end of the spectrum.

Id. at 405. See also Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243 (5th Cir. 1983); Myers v. Boeing Co., 794 P.2d 1272 (Wash. 1990)(failure to prove harassment does not bar dismissal under Gulf Oil).

Thirty-four years after Gulf Oil, the United States Supreme Court again addressed the forum non conveniens doctrine. This time, it was in the context of a products liability action brought by a foreign plaintiff against an American airplane manufacturer. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

In Reyno, the representative of the estates of five Scottish citizens killed in an aircraft accident in Scotland brought wrongful death actions in a California state court, naming as defendants, the American companies that manufactured the plane and the plane's propellers. Following removal of the suit to federal court in California and transfer to Pennsylvania, defendants moved to dismiss on the grounds of forum non conveniens. The trial court found there to be overwhelming connections between the litigants and Scotland and therefore dismissed the lawsuit.

The Third Circuit Court of Appeals reversed, finding that the foreign plaintiff's choice of forum was entitled to substantial weight. Also, it concluded that dismissal was automatically barred

when it would result in a change in applicable law unfavorable to plaintiff.

The Supreme Court of the United States rejected the Third Circuit's analysis, finding it to be too rigid. The Reyno Court removed strict barriers and focused on a balancing of factors. This more flexible formula was evident in several aspects of the Court's decision.

First, the Supreme Court gave less significance to the weight accorded to an unfavorable change in law. The Supreme Court reasoned that "if conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. . . . Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper." Reyno, 454 U.S. at 250.

Second, the Court diminished the emphasis to be placed on plaintiff's choice of forum, when the plaintiff or real party in interest was foreign. The Court found that when a home forum is selected, it is reasonable to assume that this choice was convenient, but plaintiff's choice is not dispositive. 454 U.S. at 255-56. However, when plaintiff is foreign, the Court concluded that the assumption is less reasonable and thus, plaintiff's selection of a forum becomes less significant.

The Court also analyzed and rejected the view that American citizens had such a great interest in ensuring that manufacturers are deterred from producing defective products and that this interest can only be addressed by permitting suit here. The Court's conclusion was that the "incremental deterrence" that would be gained by a forum in the United States is likely to be insignificant when compared to the enormous commitment of judicial time and resources that would be required if the suit were retained. 454 U.S. at 260-61.

In sum, Reyno represents a major shift away from an "abuse of process" standard and toward the "most suitable forum approach." It reinforces the notion of flexibility that is crucial to a forum non conveniens inquiry. It also serves to focus on issues that are relevant in a products liability context. Reyno represents a method by which all litigants have a fair opportunity to present their claims, while at the same time, the Courts are protected from becoming overburdened by suits wherein the connections to the particular forum are minimal.

The forum non conveniens doctrine as enunciated by the federal courts has been embraced by virtually every state. See, e.g., David W. Robertson & Paula K. Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, 68 Tex. L. Rev. 937 (1990) at n. 74-80.

B. Florida's Adoption and Interpretation of Gulf Oil.

Florida, like the overwhelming majority of states, follows the public interest/private interest analysis outlined in Gulf Oil when deciding whether to dismiss a claim based on common law forum non conveniens. See, e.g., Armadora Naval Dominicana, S.A. v. Garcia, 478 So. 2d 873 (Fla. 3d DCA 1985). Significantly, however, Florida engrafted one additional restriction onto its forum non conveniens analysis: that a case cannot be dismissed if any of the parties is a resident of Florida. This restriction was announced sixteen years ago by this Court in Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978).

In Houston, a North Carolina resident filed a suit in Palm Beach County, which arose from an accident in North Carolina with a Florida resident. Defendant moved to dismiss arguing that the action should have been brought in North Carolina. The trial court dismissed the action without prejudice to refile in North Carolina and the Fourth District affirmed. In reaching its conclusion, the Fourth District determined that the residency of a party should merely be a factor to consider when evaluating the appropriateness of a motion to dismiss. The Florida Supreme Court reversed and held that "the doctrine of forum non conveniens is inapplicable to any suit properly filed in this state where either party is a resident of Florida.

The non-residency requirement announced in Houston was a commonly held view at one time. See, e.g., Thomson v. Continental Ins. Co., 427 P.2d 765, 769 (Cal. 1967)(citing jurisdictions that

utilized some form of a non-residency requirement as of 1967). However, in 1972, the pendulum began to swing away from this view with New York's decision in Silver v. Great American Ins. Co., 278 N.E.2d 619 (N.Y. 1972). In that case, the court decided to relax its rule that prohibited the doctrine from being invoked if one of the parties was a resident. After Silver, the trend in state courts toward allowing a flexible approach to the forum non conveniens doctrine accelerated.

In 1994, Florida stands alone in its adoption of Gulf Oil, with the precondition of complete non-residency upon the doctrine. See Alcoa Steamship Co., Inc. v. M/V Nordic Regent, 654 F.2d 147, 155 n.10 (2d Cir.), cert. denied, 449 U.S. 890 (1980); Carnival Cruise Lines, Inc. v. Oy Wartsila AB, 159 B.R. 984, 989 n.2 (S.D. Fla. 1993). The Fourth District's decision in this case takes Florida a step further away from the rest of the states by broadly defining "resident" to include a foreign corporation licensed to do business in Florida with an office in this state.

Sixteen years after Houston, several propositions are evident. First, Houston is wholly inconsistent with the very foundation of the forum non conveniens doctrine and with the application of that doctrine in every other jurisdiction. In fact, the concerns expressed in Houston do not justify the result reached by the Court. Second, by relying on residency as a dispositive consideration, Houston fails to balance the private interest factors. This results in unfair prejudice to a defendant in Florida courts. Third, the Houston analysis does not allow for consideration of public interest

factors. This results in an unnecessary burden on this state, its judiciary, and its citizens.

II.

HOUSTON IS WHOLLY INCONSISTENT WITH THE VERY FOUNDATION OF THE FORUM NON CONVENIENS DOCTRINE.

A. The Houston Approach Directly Conflicts with the Goals Set Forth in Gulf Oil.

The residency barrier set up by this Court cannot be harmonized with Gulf Oil. In fact, Houston is entirely inconsistent with the purposes and goals set forth in Gulf Oil and its progeny.

A cornerstone of the forum non conveniens doctrine is its flexibility. Thus, in Gulf Oil, the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S. at 508. Similarly, in Koster, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate, finding that is one, but only one, factor that may show convenience. 330 U.S. at 527. In Williams v. Green Bay & Western Railroad, 326 U.S. 549, 577, 90 L. Ed. 311, 66 S. Ct. 284 (1946), the Court stated that it would not lay down a rigid rule to govern discretion and that "[e]ach case turns on its facts." In Reyno, the Court concluded: "[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable." 454 U.S. at 249-50.

By placing dispositive emphasis on a party's residence, the Houston decision completely undercuts the forum non conveniens rule. While courts must apply the doctrine cautiously, they cannot diminish it to the point where considerations of convenience, fairness, and justice become subservient to residence. Just because one party is a resident, the Court should not be precluded from balancing the numerous factors which, in reality, determine convenience. In fact, there is no logic to a rule that was intended to promote convenience and fairness, but ultimately resolves the issue on a factor having nothing to do with convenience or fairness. Consistent with the doctrine, residence should only be one of the myriad of facts that the court examines.

Other states have relied upon the foregoing in rejecting a rigid non-residency requirement. For example, the court in Carr v. Bio-Medical Applications of Wash., Inc., 366 A.2d 1089 (D.C. Ct. App. 1976) noted that although plaintiff's residence is an important factor, forum non conveniens relief should be granted when it appears that "another forum is available which will best serve the needs of the public interest." Id. at 1093. Thus, the court rejected the per se rule because "[s]uch an immutable rule is unwarranted and would severely undermine the trial court's broad discretion in such matters." Id.

Similarly, in Gore v. United States Steel Corp., 104 A.2d 670 (N.J.), cert. denied, 348 U.S. 861 (1954), the Court dismissed a tort action brought by a nonresident against a resident corporation arising from an accident that occurred on the corporation's premises

in Alabama. Rejecting the plaintiff's premise that the defendant's residence in New Jersey was determinative, the court stated:

> However, the doctrine, as we construe it, is nondiscriminatory and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens.

Id. at 675-76. Thus, it concluded that the residence of a party is just one of the many relevant factors to be considered. See also 0 (citizenship is "not an impenetrable shield against dismissal . . .," id. at 152 (emphasis in original); "[t]he trend has been away from accordingly talismanic significance to the citizenship or residence of the parties." Id. at 154); Silversmith v. Kenosha Auto Transport, 301 N.W.2d 725, 728 (Iowa 1981) (residence of plaintiff is not a controlling factor when other considerations point strongly in another direction); Gonzales v. Atchison Topeka and Santa Fe Ry., 371 P.2d 193, 199 (1962); Silver v. Great American Ins. Co., 278 N.E.2d 619 (N.Y. 1972).

Amicus Curiae submits that justice can only be served by rejecting Houston and allowing the Court to exercise the discretion that Gulf Oil intended. Barring that, the doctrine has no meaning.

B. The Concerns Expressed in Houston do not Justify the Rigid Rule Adopted by the Court.

The Court in Houston was faced with the decision whether to adopt a rigid rule that automatically eliminated cases from forum non conveniens consideration based on residency or to follow the approach taken by jurisdictions like New York where residency was only one of many factors to be considered. See Silver v. Great American Ins. Co., 278 N.E.2d 629 (1972). While acknowledging the more flexible approach as being a "reasonable policy," the Court cited several reasons why it would decline to follow it: (1) plaintiff's choice of forum is usually favored; (2) there was uncertainty as to whether the alternative state would accept a Florida court's determination of amenability to process in another forum; this issue could be complicated and result in great judicial labor; and (3) the state has a fundamental interest in resolving controversies between its citizens. Id. at 85-86. None of these concerns justify the inflexible rule adopted by the Court.

1. Plaintiff's selection of forum as paramount.

Houston expressed as one of its concerns, the deference to be accorded plaintiff's choice of forum. There are several reasons why Houston's emphasis on this factor is misplaced.

First, the emphasis on plaintiff's choice of forum was based on decisions involving intrastate transfers that are no longer valid. The historical notion that a plaintiff's choice of forum should be honored was premised on the absence of a statute authorizing transfer of venue based on convenience. In other words,

the courts had concluded that a defendant could not nullify a statutorily selected venue, absent some other statute permitting that result. See, e.g., Greyhound v. Rosart, 124 So. 2d 708 (Fla. 3d DCA 1960); Atlantic Coast Line R.R. Co. v. Ganey, 125 So. 2d 576 (Fla. 3d DCA 1960). While these cases related to intrastate transfers rather than interstate dismissals, it is apparent from the reference to cases like Greyhound in the Houston opinion, that the Court was drawing on that body of law to reach its conclusion that plaintiff's choice should be respected. See, e.g., Houston, 359 So. 2d at 860 n.3.

This emphasis on plaintiff's selection changed in 1969, with the enactment of section 47.122, Florida Statutes (1969) governing intrastate transfers. With the adoption of that statute, the courts began a weighing process to determine whether the plaintiff's selection should be honored. The cases interpreting this statute have routinely held that plaintiff's choice of forum is entitled to "meaningful consideration," but it is not "the" paramount consideration. See, e.g., Hu v. Crockett, 426 So. 2d 1275, 1278 (Fla. 1st DCA 1983). By the same token, plaintiff's selection under a Gulf Oil analysis, need not been "the" paramount concern.

Second, Reyno which was decided three years after Houston, makes clear that there can be no rigid approach to examining plaintiff's selection of forum. Where the home forum has been selected, it will not be dispositive, but it will be given deference. 454 U.S. at 435 n.23. Less weight will be given, however, where the forum selected is outside of plaintiff's home

territory. Thus, Reyno reflects the need to consider and balance the plaintiff's choice of forum, rather than to permit plaintiff unbridled discretion in making his forum selection.

A third reason why the weight accorded Plaintiff's selection has diminished since Houston has been the expansion of personal jurisdiction in Florida. Specifically, section 48.193(2), Florida Statutes (1993) enacted in 1984,[3] eliminated the requirement that there be connexity between the activity in the state and the allegedly tortious conduct.

This expansion of personal jurisdiction serves to dilute the significance of the plaintiff's choice of forum, while at the same time increasing the need for the forum non conveniens doctrine as a check against unwarranted forum shopping. Thus, as one commentator noted:

> The effect of that expansion [of personal jurisdiction] has been to make it possible to bring litigation in a forum that has significantly less connection with the cause of action than other forums where it might have been brought; as Lord Denning said with his usual flair, "As a moth is drawn to the light, so is a litigant drawn to the United States" [SmithKline, Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (Eng. C.A. 1982)]. Naturally, resistance to that trend developed, resulting in the common use of forum non conveniens dismissals.

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[3]Section 48.193(2), Florida Statutes (1993) provides:

> A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

William L. Reynolds, The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts, 70 Tex. L. Rev. 1663, 1704 (1992).

Stated another way, the forum non conveniens doctrine serves as a bridge between the boundaries of a jurisdictional analysis and concerns about forum appropriateness.

> Forum non conveniens, although not explicitly dealt with in jurisdictional analysis, was still the bridge that traversed the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums.

Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 699 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991)(J. Cook dissenting) (emphasis in original). By abolishing the doctrine, (or severely restricting it as is the case in Florida), "the court shatters that bridge." Id. at 702.

The court in Silver v. Great American Insurance Co., 278 N.E.2d 629 (N.Y. 1972), similarly recognized that the fact that litigants may more easily gain access to courts--stemming from enactment of long arm statutes and other changes in the law--requires a greater degree of forbearance in accepting suits that have minimal contact with the forum.

2. Issues regarding amenability to service and exercise of jurisdiction are easily and routinely solved.

The second basis for the Houston decision was its concern regarding ensuring amenability of the defendant to process in another forum and the Court's ability to ensure that such determinations will be binding in the alternative forum. The Court

in Houston measured these problems against a rigid rule and concluded:

> [t]he question of amenability of the defendant to process in another state may often times be quite complicated, and its resolution may involve great expenditure of judicial labor. In comparison, the rule of law as set forth in Adams [v. Seaboard Coast Line R.R., 224 So. 2d 797 (Fla. 1st DCA 1969)], although less flexible, is just, is serving well, and is easier to apply . . . . We believe the certainty of resolution of the dispute outweighs the possible benefits achieved by dismissal in favor of a more convenient forum.

Id. at 861.

In fact, however, the issue of ensuring amenability to service in another forum is easily resolved without imposing on judicial resources. This is simply accomplished by a stipulation entered into by the parties, consenting to the alternative forum's jurisdiction, waiving service of process and statutes of limitations. Numerous courts have relied on this procedure to cure the concern expressed in Houston. See, e.g., In re Union Carbide Corp., Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).[4] Thus, concern for service of process in the foreign venue is not an issue.

3. The state's interest in resolving controversies among its citizens.

The last rationale offered in Houston to justify its non-residency rule was the state's interest in resolving its citizens' controversies. 359 So. 2d at 861. However, in Reyno, the Court

[4]In fact, many stipulations go further and agree to provide witnesses and documents in the alternative forum and also stipulate to the enforceability of the judgment.

rejected the validity of the notion that the local forum had an interest in maintaining litigation so as to deter the manufacture of defective products, concluding instead that imposing liability would only provide "incremental deterrence" having an insignificant impact. 454 U.S. at 260.

Similarly, in Myers v. Boeing Co., 794 P.2d 1272 (Wash. 1990), plaintiff argued that a case could not be dismissed where a Washington manufacturer was involved because the state has a valid interest in deterring wrongful conduct. Like the Supreme Court in Reyno, the Supreme Court of Washington rejected this position finding inter alia that "the State's interest in deterrence and holding manufacturers accountable for wrongful conduct is served when plaintiffs are fully compensated for their injuries, regardless of the forum." Id. at 1279.

Finally, it appears that the Court's expression of concern for resolving its citizen's controversies really only focused on the protection of resident plaintiffs. Certainly, if the Court is concerned about all of its citizens, it must also consider its resident defendants, who suffer tremendous hardship by the rigid rule announced by the Court. See, e.g., Piper Aircraft Corp. v. Schwendemann, 578 So. 2d 319 (Fla. 3d DCA 1991)(Ferguson, J. concurring) (corporation that moved its principal place of business to Florida after the subject accident was precluded from obtaining dismissal even though "[t]he decedents, their survivors and the persons injured are all German citizens who reside in Germany. The eyewitnesses, investigators, and medical witnesses also reside in

Germany." Id. at 320) and compare National Rifle Ass'n of America v. Linotype Co., 591 So. 2d 1021 (Fla. 3d DCA 1991) (dismissal proper where all parties are non residents and "the great majority of potential witnesses are located in New York and Washington D.C. . . . . Likewise, since all the relevant documents are located in New York or Washington, D.C., the interest of justice also is served by using the courts in New York or Washington D.C. . . . Id. at 1023).

Based on the foregoing, it becomes clear that each of the concerns which served as the basis for Houston can be satisfied without resorting to the rigid rule set forth therein. Principles of fundamental fairness and justice demand that the rule be changed.

III.

BY IGNORING BOTH PRIVATE AND PUBLIC INTEREST CONCERNS, HOUSTON FAILS TO SERVE THE INTERESTS OF JUSTICE FOR WHICH THE DOCTRINE WAS DESIGNED.

In Gulf Oil and its progeny, the Court set forth a scheme by which to measure whether justice was fairly being served by plaintiff's selection of a forum. That scheme contemplated the balancing of both private and public interest factors to evaluate whether plaintiff's choice should be disturbed. In contrast, the Houston decision completely precludes such an analysis unless its judicially created residency precondition is met. By doing so, Houston has turned its back on significant issues that impact upon this state, its citizens, and litigants in its courts.

A. Private Interest Factors are Ignored by Houston Thereby Resulting in Substantial Prejudice to Litigants in Florida Courts.

The private interest factors focus upon the interests of the litigants in the action. When these are ignored, a defendant may be forced to litigate in Florida without access to sources of proof or witnesses and potentially without the culpable parties. Such a result was precisely what Gulf Oil and Reyno sought to avoid.

1. Access to sources of proof.

Access to witnesses and documents is always of paramount importance. When an accident occurs in another state, the process of finding and deposing those witnesses and obtaining the necessary documents becomes burdensome. If the state has adopted the Uniform Foreign Depositions Act, section 92.251, Florida Statutes (1993), then this court must appoint a commissioner for the deposition. Application is then made to the foreign court for the process necessary to secure the attendance of the witness. Travelers Indemnity Co. v. Hill, 388 So. 2d 648 (Fla. 5th DCA 1980). If the other state has not adopted the Act, then the litigants must determine the appropriate procedure in the witnesses' jurisdiction and abide by those rules. Certainly, these procedures do not provide the litigants with the same level of discovery as would be available if the litigation were conducted in a forum more closely connected to the incident.

When a foreign country is involved,[5] the logistical problems

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[5] In recent years, American courts have become attractive to foreign plaintiffs for a number of reasons. Jury trials are available in American courts while often not available in many

arising in connection with witnesses is far greater than those surrounding out-of-state witnesses. Foreign witnesses are not subject to the jurisdiction of the United States courts, nor do they have any interest in complying with the laws of this country. Since many foreign countries have an entirely different perspective on litigation, it is often considered an affront to the foreign sovereignty for attorneys from this country to attempt discovery abroad. As a result, the complex procedures of the Hague Convention must often be invoked. This provides an inadequate alternative to the discovery procedures available when a witness is merely in another state.

Moreover, because discovery is more limited when dealing with a foreign forum, there may be considerable disparity in treatment of the parties. A foreign litigant will produce discovery pursuant to its own country's stringent rules, while requiring the American defendant to produce evidence pursuant to liberal American discovery rules.

Under a Gulf Oil analysis, these difficulties regarding access to sources of proof would be heavily weighed in the forum non

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other countries. Damage awards are generally higher in the United States courts. Contingent fees are permitted while losing parties are rarely required to pay fees. Pretrial discovery is often more liberal than in other jurisdictions. Finally, the availability of strict liability diminishes plaintiff's burden of proof under prevailing American law. See generally Note, Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno, 64 Tex. L. Rev. 193 (1985).

In fact, Reyno was a direct response to the increasing number of foreign plaintiffs bringing suit in this country arising from claims that have only minimal connections with this forum.

conveniens balance and can lead to dismissal. See, e.g., Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981); Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994); Jennings v. Boeing Co., 660 F. Supp. 796 (E.D. Pa. 1987), aff'd, 838 F.2d 1206 (3d Cir. 1988). In Florida, whether or not defendant can obtain the deposition of the eyewitness or can examine the subject vehicle or product, the lawsuit will remain as long as one party is a resident.

2. Compulsory process of witnesses.

Subsumed within the question of witnesses and documentary evidence is the issue of the availability to compel the attendance of the witnesses at trial. There is always a preference for live testimony because it provides the best opportunity for the trier of fact to evaluate credibility. Yet, unless they voluntarily appear, a trial in Florida involving out-of-state or out-of-country witnesses would necessarily be conducted without these key witnesses. Thus, defendants would be forced to rely on depositions, if they are even available,[6] which will not act as proper substitutes.

This again is the type of problem that the Gulf Oil and Reyno analysis addresses. See, e.g., In re Air Crash Disaster Near Bombay, India on January 1, 1978, 531 F. Supp. 1175, 1182 (W.D.

[6]Again the problem is heightened where a foreign jurisdiction is involved because, as noted infra, the deposition will not be a full American-style deposition, but will more likely be a limited proceeding in accordance with the Hague Convention or other foreign law.

Wash. 1982) (fact that evidence or testimony of foreign witnesses cannot be compelled by a United States district court weighs in favor of trial in foreign forum); Gulf Oil, 330 U.S. at 511 (to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to the court, jury, or most litigants).

3. Ability to implead culpable parties.

Another significant factor often considered in a forum non conveniens analysis is the ability to implead third parties so as to afford a complete resolution of the controversy. Where the incident giving rise to the lawsuit arose in another forum, there is a possibility that some individual or entity that should be a party to the litigation cannot be brought into Florida court.[7] Once again this is a factor that greatly prejudices the defendants, see Jennings; Pain, but that cannot be addressed under Houston.

4. Other considerations that make trial of a case "easy, expeditious, and inexpensive."

The private interest factors also encompass other elements that will render trial more difficult in a particular forum. An obvious problem when the accident occurred abroad is the language barrier. All discovery would require translation and witnesses would likely require interpreters for depositions and trial. This task is time

[7]By way of example, if an automobile accident occurs in Montana, but suit is brought against the vehicle manufacturer in Florida, that manufacturer would be unable to file a third-party complaint against the negligent driver, who, not surprisingly, was a Montana resident.

consuming, burdensome, and extraordinarily expensive. Often, the one to bear that burden is the defendant.

In sum, litigants in Florida courts are faced with a tremendous disadvantage when defending a claim involving an out-of-state or out-of-country incident. By failing to allow consideration of these difficulties, Houston fails to serve justice.

B. The Failure to Consider the Public Interest Factor Detrimentally Affects the Interest of the State, the Judiciary and its Citizens.

In addition to the individual litigant's concerns, public interest concerns are impacted by Florida's rigid formulation of the forum non conveniens doctrine. First, absent any checks on plaintiff's initial forum selection, Florida has been and will continue to be a magnet for worldwide litigation that is counterproductive to the interests of this state and its citizens. Second, the courts are forced to expend unnecessary judicial resources struggling with difficult choice of law issues. Third, the public policy interests of the other state or country are ignored. Finally, the state's interest in attracting foreign corporations to Florida is effectively nullified.

1. The Houston rule encourages forum shopping and results in congestion in the Florida courts.

Frequently, plaintiffs will have a choice of forums in which to sue and they will usually choose to exercise that choice in a manner that is most advantageous to their own interests. The problem of forum shopping is controlled by the forum non conveniens

doctrine. Edward Barrett, The Doctrine of Forum Non Conveniens, 35 Cal. L. Rev. 380, 381-86 (1947).

In contrast, Houston's approach leaves plaintiffs virtually free to select the locale that best serves their interest. This prospect of forum shopping and its negative impact on this state justifies the adoption of the forum non conveniens doctrine as described in Gulf Oil and Reyno.

Moreover, the forum shopping problems that are left unchecked by the Houston decision, are exacerbated by the fact that Florida is the only jurisdiction that has adopted a rule precluding a dismissal if one of the parties is a resident. In short, the Houston decision provides an avenue for litigation that would otherwise be foreclosed. Knowing that the federal forum is likely to dismiss a case with tenuous connections to Florida and knowing that other state courts will do the same, a litigant will seek out Florida. The result, of course, is that Florida has become a magnet for litigation that would not be permitted elsewhere.[8] See Linda J. Silberman, Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 Tex. Int'l L.J. 501, 523 (1993).

A series of decisions from Florida, California, and Texas provide an excellent sampling of the impact of maintaining this minority view. In Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th

[8]See, e.g., Air-Crash Suits Picking Dade as Battleground, The Miami Herald, May 28, 1990, at B1, col. 2 (suits arising from aircraft accidents are not being filed in the countries where the crashes occurred "because Florida makes it easier than most states to file suits from overseas in the state court system.")

Cir.), cert. denied, 474 U.S. 948 (1985), fifty-eight Costa Rican agricultural workers filed suit in a Florida state court against pesticide manufacturers alleging that they sustained personal injuries as a result of exposure to defendant's product in Costa Rica. Defendant removed the suit to federal court and thereafter, moved to dismiss based on forum non conveniens. Plaintiffs responded by arguing that Florida state law, as enunciated in Houston, should apply to bar dismissal rather than federal law as described in Gulf Oil. The district court disagreed with plaintiff, and utilized the federal rule. Under that rule, it concluded that the balancing of factors weighed in favor of venue in Costa Rica and accordingly, it dismissed the suit. That judgment was affirmed on appeal.

In 1985, other members of this group filed suit in California. After removal to federal court, the claim was dismissed on forum non conveniens grounds. Aguilar v. Dow Chem. Co., No. 86-4753 JGD (S.D. Cal. 1987). Again, in 1987, another federal district court in Florida applied federal law to dismiss members of this group on forum non conveniens grounds. Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, on other grounds, 883 F.2d 1553 (11th Cir. 1989).

In 1990, other plaintiffs from the group finally found a friendly forum by filing suit in Texas. A sharply divided court ruled that these plaintiffs were permitted to maintain their suits because the Texas legislature had statutorily abolished the doctrine of forum non conveniens. Dow Chemical Co. v. Alfaro, 786 S.W.2d 674

(1990), cert. denied, 498 U.S. 1024 (1991).[9] This prompted Justice Cook in his dissent to describe the situation as follows:

> Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum. Their efforts are finally rewarded. Today they hit pay dirt in Texas.

Id. at 697.

Such a policy confers no benefit upon the citizens of Florida. Florida is one of the largest states in the nation and it is a center for international commerce. Its judicial backlog is well documented. See, e.g., In re Certification of Need for Additional Judges, 631 So. 2d 1088 (Fla. 1994); In re Certification of Judicial Manpower, 592 So. 2d 241 (Fla. 1992) (citing delays in scheduling trials and noting that the requested judges for that year will not reverse the delays, "but they are crucial to our ability to avoid greater delays than are currently the norm in many circuits." Id. at 245).

Against this backdrop, the obvious question is why would Florida want to increase the burden on its already strained court system? Certainly, concerns regarding the court's administrative burdens are not served. Moreover, Florida citizens whose interests Houston purports to protect are not served. Florida citizens should

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[9]Wisely, in 1993, the Texas legislature adopted a forum non conveniens statute. See Tex. Civ. Prac. & Rem. Code § 71-051 (West 1994). Florida can cut off forum shopping by overruling Houston.

not be required to stand in line behind cases having little connection to Florida.

Another dissenting justice in Dow Chemical put this issue in perspective:

> But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and which have nothing to do with this state except that the defendant can be served with citation here? Why, most of all, should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world? Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? What advantage for Texas does the Court see, or what advantage does it think the Legislature envisioned, that no other jurisdiction has ever seen, in abolishing the rule of forum non conveniens for personal injury and death cases? Who gains? A few lawyers, obviously. But who else?

Id. at 707. (Hecht, J. dissenting). The answer, of course, is no one gains.

2. The choice of law dilemma places an unnecessary burden on the court.

One of the public interest factors cited in Gulf Oil was the appropriateness of holding trial in the forum whose law will govern the controversy, "rather than having a court in some other forum untangle problems in conflicts of laws and in law foreign to itself." 330 U.S. at 509.

Florida has adopted the most significant relationship test in determining whose substantive law to apply to the issues in a case such as this. Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980). Pursuant to this approach, the law of the place of injury will apply unless some other state has a more significant relationship to the occurrence and parties.

Applying the law of another state can be a difficult and time-consuming task requiring the use of experts and an understanding of an entirely different body of jurisprudence. The problem becomes significantly more complicated when litigants ask American courts to conceptualize a foreign legal system quite different from the common law system in which our lawyers and judges are trained, and to adequately and properly apply laws and cases written in a foreign language. If one evaluates the "great expenditure of judicial labor," for this task, Houston at 861, compared to the judicial labor in confirming that a defendant is amenable to process, the latter pales in comparison.

3. The other forum's interest and notions of comity are given no consideration.

An appropriate forum non conveniens analysis also considers the local interest in having the matter resolved in the home forum. Gulf Oil, 330 U.S. at 509. The concerns with respect to comity among the states is thus inherent in the analysis.

The interest of comity and concerns for other forum's interests are heightened in the case of a foreign nation. Thus, in Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994), the court

concluded that under principles of comity and forum non conveniens, the court should decline to exercise jurisdiction.

Moreover, several commentors have suggested that federal interests, rather than state interests are implicated in the allocation of judicial resources between the United States and foreign nations. See Sheila L. Birnbaum & Douglas W. Dunham, Foreign Plaintiffs and Forum Non Conveniens, 16 Brook. J. Int'l L. 241, 261-62 (1990) (arguing that permitting foreign plaintiffs to sue in the United States impedes the opportunity for other legal systems to craft local solutions to their citizen's legal problems); Mark D. Greenberg, The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law, 4 Int'l Tax & Bus. L 155, 179-97 (1986). See also Sequihua. Under this analysis, federal law is the appropriate source of law when implicating the interests of foreign nations. Once again, Houston fails to concern itself with these issues.

4. Houston Deters Foreign Corporations From Locating in Florida.

Another significant public interest concern ignored by Houston is Florida's public policy of encouraging businesses to locate in Florida. Certainly, no argument exists against the proposition that the citizens of Florida benefit when national and international corporations choose this state as their principal place of business.

In fact, this is reflected in The Comprehensive Economic Development Act of 1990, section 288.801, Fla. Stat. (1993). This Act makes elaborate provision for the promotion of international

business in Florida. The Legislature specifically "finds that current efforts in the areas of international trade, export of agricultural products, international investment, international tourism, and international education in Florida need to be strengthened for the promotion of sound economic growth in our state." § 288.801, Fla. Stat. (1993). In the same section, the Legislature declares its intent "to provide for the creation of policies for the future domestic economic development and growth of the state, consistent with a plan for enhancing the business climate and quality of life in Florida and **to implement such measures as are reasonable and proper to reduce governmentally mandated costs of doing business in order to assure that the business climate in Florida remains competitive with other states and jurisdictions.**" Id. (emphasis added).

Because other states do not automatically deny their resident companies the opportunity to have actions against them dismissed on grounds of forum non conveniens, the effect of Houston is to do the reverse of what the Legislature hoped to achieve. Houston has the effect of increasing "governmentally mandated costs of doing business" in Florida and impairs the competitiveness with other states and jurisdictions.

Two cases involving Piper Aircraft Corporation demonstrate this point. In Rubenstein v. Piper Aircraft Corp., 587 F. Supp. 460 (S.D. Fla. 1984), the federal court applied its law to dismiss an action against Piper brought by citizens of West Germany who were injured in an airplane crash in West Germany. After Piper moved its

principal place of business to Florida, the Third District Court of Appeal, following Houston, refused to dismiss an action brought in Florida state court by a foreign plaintiff. Piper Aircraft Corp. v. Schwendemann, 578 So. 2d 319 (Fla. 3d DCA 1991).[10]

Other corporations that provide benefits to this state are similarly penalized strictly by virtue of their presence here, in a context that confers no benefit whatsoever on the residents of Florida. It is hard to imagine that the courts of this state intend to sanction a rule that has such an effect. It is even more difficult to imagine that, given a choice, they would do so in derogation of a recently articulated legislative policy.

In short, if the residency requirement adopted in Houston is permitted to continue, it would demand that the Florida courts ignore all the foregoing obstacles to litigation in favor of a slavish adherence to a single factor. Such a result is illogical, unworkable, and should not be retained.

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[10]Ironically, that accident, like the Rubenstein accident occurred in Germany; yet the result in the federal versus state court was dramatically different.

CONCLUSION

Based on the foregoing, Amicus Curiae submits that this Court should overrule its decision in Houston. At a minimum, the definition of "resident" should be restrict to the corporation's principal place of business.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 9th day of November, 1994, to ARTHUR J. ENGLAND, JR., ESQUIRE, Greenberg & Traurig, 1221 Brickell Avenue, 22nd Floor, Miami, Florida 33128; RAOUL G. CANTERO, III, ESQUIRE, Adorno & Zeder, P.A., 2601 South Bayshore Drive, Suite 1600, Miami, Florida 33133; LEONARD K. SAMUELS, ESQ., Berger & Shapiro, 100 SE 3 Avenue, Suite 400, Ft. Lauderdale, FL 33301-1155; and MARK A. COHEN, ESQ., Mark A. Cohen & Associates, P.A., Capital Bank Building, 1221 Brickell Avenue, Suite 1780, Miami, FL 33131.

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