IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO. 84,329

KINNEY SYSTEM, INC.,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.
_____/

FILED
SID J. WHITE
NOV 9 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

BRIEF OF THE *AMICUS CURIAE*, AT&T CORP., AMOCO CORPORATION, THE DOW CHEMICAL COMPANY, NORTHERN TELECOM (CALA) CORPORATION, PHELPS DODGE INTERNATIONAL CORPORATION, SHELL OIL COMPANY and TEXACO INC.

**IN SUPPORT OF PETITIONER KINNEY SYSTEMS, INC.
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS
CASE NO. 93-2854
PURSUANT TO RULE 9.125
FLORIDA RULES OF APPELLATE PROCEDURE**

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STATEMENT OF THE CASE AND FACTS

AT&T Corp., Amoco Corporation, The Dow Chemical Company, Northern Telecom (CALA) Corporation, Phelps Dodge International Corporation, Shell Oil Company and Texaco Inc. (hereinafter referred to as the "the *Amicus Curiae*") respectfully submit this brief, collectively, as *Amicus Curiae*.

They appear in support of Petitioner, Kinney System, Inc., in addressing the following question, certified by the Fourth District Court of Appeals as one of great public importance: 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?

A. RELEVANT FACTS

Respondent, Continental Insurance Company ("Continental"), is a New Hampshire corporation with its principal place of business in New Jersey (R.1). Petitioner, Kinney System, Inc. ("Kinney"), is a Delaware corporation with its principal place of business in New York (R.1, 56). Continental is an insurance company which, *inter alia*, provides Workers Compensation and Employers Liability Insurance (R.79). Continental was authorized to conduct business and conducted business in Florida (R.1). Kinney, an operator of parking garages (R.14), conducted business in Florida (R.17, 80).

Continental and Kinney entered into a Workers Compensation and Employers Liability Insurance policy in 1987 (R.46). Kinney and Continental also entered into a retrospective and excess retrospective rating agreement ("Retro Agreement")(R.44-51). Pursuant to the Retro

Agreement, Kinney agreed to pay Continental retrospective premiums arising out of adjustments made by Continental. These were based upon the standard premium and incurred losses for the policy period (R.48-49).

After expiration of the policy period, Kinney submitted claims to Continental for payment of losses which occurred during the policy period (R.44-51). Continental paid claims submitted by Kinney and adjusted the retrospective premiums to account for Kinney's loss experience (R.3). Continental then demanded that Kinney pay an additional $339,151.00 (R.3) based upon retrospective premium adjustments (R.78-79). Two of the claims were submitted by Kinney employees who worked in Florida (R.79).

Kinney disputed Continental's payment of certain workers compensation claims and the resulting adjustments to the premium due (R.57). Continental and Kinney were unable to resolve their dispute, and Continental filed its lawsuit in Broward County, Florida (R.1-4). Continental did not allege any Florida connection with the cause of action (R.1-4). Kinney moved to dismiss on the grounds of *forum non conveniens* (R.52-55). A hearing was conducted, and the trial court granted Kinney's motion (R.122-23, T.1-30). Continental appealed from this Order (R.125-26).

The Fourth District Court of Appeal, in an opinion filed August 24, 1994 in Case Number 93-2854, reversed the trial court's dismissal. *Continental Insurance Co. v. Kinney System, Inc.*, 19 Fla. L. Weekly D1792 (Fla. 4th DCA August 24, 1994). The court found that the cause of action accrued outside of Florida but held that Continental, and arguably Kinney,

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were residents of Florida for *forum non conveniens* purposes as prescribed by *National Aircraft Service, Inc., v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th DCA 1986). *Continental Ins. Co.*, 19 Fla. L. Weekly at D1792.

Having found that at least one of the parties was a resident of Florida, despite the finding that neither maintained a principal place of business or headquarters in the State, the Fourth District Court of Appeals reversed the trial court's dismissal of Continental's suit based upon *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), which holds that *forum non conveniens* applies only to cases where "both parties to the action are non-residents of Florida and the cause of action arose outside of Florida." *Houston*, 359 So. 2d at 861. The court noted that the Third District Court of Appeals had "reached a contrary conclusion, requiring that a foreign corporation have its principal place of business or headquarters in Florida in order to be considered resident here for *forum non conveniens*." *Continental Ins. Co*, 19 Fla. L. Weekly at D1792, *citing National Rifle Association of America v. Linotype Co.*, 591 So. 2d 1021 (Fla. 3d DCA 1991).

Acknowledging the conflict between the Districts, the Fourth District Court of Appeals certified the above-referenced question to this Honorable Court as one of great public importance.

SUMMARY OF THE ARGUMENT

Florida currently limits the application of *forum non conveniens* to instances where the cause of action arose outside this jurisdiction *and* all parties are non-residents of the State. The

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Fourth District Court of Appeals reversed the trial court's dismissal of the instant case premised on *forum non conveniens* solely because Continental was deemed to be a resident of Florida. This ruling and the question certified serve to underscore the paradox in Florida's approach to *forum non conveniens*: the effectiveness of the doctrine is eviscerated by the rigid non-residency requirement.

The *Amicus Curiae* suggest that, at a minimum, the question certified should be resolved in favor of the Third District Court of Appeals' approach -- corporate residency should be determined by the corporation's principal place of business. Both the First and Third District Court of Appeals determine corporate residency by the corporation's principal place of business, and this approach is consistent with other jurisdictions' view of contemporary national and international corporate life. Neither Continental nor Kinney should be considered residents of Florida since neither maintains a principal place of business within the State. The *Amicus Curiae* contend that the certified question begs the seminal issue: is non-residency a valid prerequisite to application of the doctrine of *forum non conveniens*? The *Amicus Curiae* assert that this question should be answered in the negative. The overwhelming trend is to give some weight to the residency of the parties in a *forum non conveniens* analysis, but only as one factor to be considered in applying the doctrine. Of all the States which currently recognize the doctrine, Florida stands alone in imposing the non-residency requirement as a condition precedent to a further *forum non conveniens* analysis. This is anomalous, because Florida has otherwise adopted the flexible, multi-factor test embraced by the federal courts.

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The non-residency requirement frustrates the fundamental principles upon which *forum non conveniens* is based -- fairness to the parties and proper consideration of the burden upon the courts and public of the forum State. The current legal, economic and societal conditions of modern life and business in Florida and the nation militate in favor of removing the non-residency obstacle from this State's application of *forum non conveniens*.

Florida's approach to the doctrine narrows its applicability to such a limited set of circumstances that *forum non conveniens* effectively becomes a question of personal jurisdiction. But the doctrine traditionally presupposes the existence of jurisdiction; a minimum contacts finding is not an adequate substitute for a full *forum non conveniens* analysis. The recent broadening of Florida's jurisdictional statutes as well as the trend towards liberalizing the application of the minimum contacts requirement favors adoption of a more effective application of *forum non conveniens*.

The non-residency requirement should be abolished as a prerequisite to the application of the doctrine of *forum non conveniens* in Florida.

ARGUMENT

1. NEITHER CONTINENTAL NOR KINNEY SHOULD BE CONSIDERED RESIDENTS OF FLORIDA FOR *FORUM NON CONVENIENS* PURPOSES

Neither Continental nor Kinney is incorporated in or maintains a principal place of business within the State of Florida. Continental is a New Hampshire corporation maintaining its principal place of business in New Jersey (R.1). Kinney is a Delaware corporation with its

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principal place of business in New York (R.1,56). The Fourth District Court of Appeals found that Continental was a resident of this State simply because it was authorized to conduct business and actually conducted business within Florida, following that District's opinion in *National Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th DCA 1986). Under this approach, when any party to a civil action is a resident of Florida, the trial court is stripped of its discretion to apply *forum non conveniens*. *Houston*, 359 So. 2d at 861. Having determined that Continental was a Florida resident, the Fourth District Court of Appeals did not expressly determine whether Kinney was also a resident.

The Third District Court of Appeals has adopted a narrower view of corporate residency and has held that a corporate party is a resident only when it has its principal place of business in Florida. *See National Rifle Association of America v. Linotype Company*, 591 So. 2d 1021 (Fla. 3d DCA 1991); *Moliver v. Avianca, Inc.*, 580 So. 2d 787 (Fla. 3d DCA 1991); *Piper Aircraft Corp. v. Schwendemann*, 578 So. 2d 319 (Fla. 3d DCA 1991); *Transportes Aeros Mercantiles v. Calderon*, 480 So. 2d 125 (Fla. 3d DCA 1985); and *Southern Railway Co. v. McCubbins*, 196 So. 2d 512 (Fla. 3d DCA 1967). The First District Court of Appeals is aligned with the Third District on this issue. *Adams v. Seaboard Coast Line Railroad Company*, 224 So. 2d 797, 801 (Fla. 1st DCA 1969)(a Virginia corporation's official residence is in Florida when its headquarters and principal place of business are within the State).[1]

[1] Neither the Second nor the Fifth District Court of Appeals appear to have addressed this issue.

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Within the narrow scope of the certified question, the Third District Court of Appeals approach is the better rule. This conclusion was expressed by the trial court in the case *sub judice*. Judge Hinkley ruled in favor of Kinney notwithstanding the Fourth District Court of Appeals' opinion in *National Aircraft Serv., Inc. v. New York Airlines, Inc.* (R.122-23). Modern corporate life has become increasingly complex. In this age of national and multi-national corporations, a business entity's "residence" should not be deemed to be any State where it conducts business. "What may at first glance appear to be the defendant's home may upon closer inspection have no close connection with the defendant's business operations." 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, 1695 (1992). A line must be drawn demarcating natural persons from domestic corporations. For the former, residency is relatively easy to define. For the latter, the definition is less clear. Corporate residency should only be defined with certainty by reference to the corporation's principal place of business.[2] Any broader definition not only runs the risk of causing manifest unfairness to the corporate defendant, particularly where, as here, the cause of action accrued outside the State of Florida, but also creates a burden upon Florida's courts, jurors and taxpayers. Any concern that the application of this standard might result in the dismissal of cases which should properly be

[2] The United States Congress has recognized the nature of modern corporate life providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business". 28 U.S.C. § 1332(c)(1).

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litigated in Florida is allayed by the various other factors considered in a *forum non conveniens* analysis.

The question certified here begs the greater issue: whether non-residency, as a precondition to the application of *forum non conveniens*, has any validity in light of developments in the law, economy and evolution of Florida society? The *Amicus Curiae* respectfully suggest this question should be answered in the negative. The fundamental purpose of the courts is to render justice. In the context of *forum non conveniens*

> "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 for the realities that make for doing justice."

Koster v. Lumbermans Mutual Casualty Co., 330 U.S. 518, 527-528, 67 S. Ct 828, 91 L. Ed. 1067 (1947). Although residency or location of the parties may be significant and may weigh against dismissal for *forum non conveniens*, the doctrine should not be limited to a single absolute factor. *Eaton v. Second Judicial District Court in and for the County of Washoe*, 616 P. 2d 400, 401 (Nev. 1980). The *Amicus Curiae* respectfully submit that the time is ripe to address the larger issue. The non-residency prerequisite to the application of the doctrine of *forum non conveniens* is *not* in the best interest of the litigants, the courts, the State or its citizens.

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2. NON-RESIDENCY OF ALL PARTIES SHOULD NOT BE AN ABSOLUTE PREREQUISITE TO THE APPLICATION OF THE DOCTRINE OF *FORUM NON CONVENIENS*: *HOUSTON v. CALDWELL* SHOULD BE OVERRULED

a. Introduction

In 1978, this Court held that the common law doctrine of *forum non conveniens* is "restricted to the limited category of cases in which both parties to the action are non-residents, and the cause of action sued upon arose in a jurisdiction outside of Florida." *Houston*, 359 So. 2d at 860, *quoting Adams v. Seaboard Coast Line Railroad*, 224 So. 2d 797, 800-801 (Fla. 1st DCA 1969). In doing so, the Court alluded to a long line of previous Florida cases. During the sixteen (16) years that have passed since *Houston v. Caldwell*, Florida and the nation as a whole have undergone significant legal, social, and economic changes which warrant reconsideration of the standard for application of the doctrine of *forum non conveniens*. During this time, the doctrine has undergone significant evolution in other jurisdictions in response to the changing demands of modern society. "Modification implies growth. It is the life of the law." *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 236, 44 S. Ct. 302, 68 L. Ed 646 (1923) (Brandeis, J). The time is ripe for such modification here; *Houston v. Caldwell* should be overruled.

The question certified to this Court throws into high relief the potential for unfairness created by the non-residency prerequisite to *forum non conveniens* ratified in the *Houston v. Caldwell* case. To restrict ruling here to the narrow question certified would be to ignore the

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underlying issue of great public importance: does the non-residency prerequisite for application of the doctrine of *forum non conveniens* frustrate the purpose of the doctrine? For the reasons discussed below, the participants in this *Amicus Curiae* brief contend that it does and respectfully request that this Court avail itself of the opportunity to overrule *Houston v. Caldwell* and adopt a standard more in line with the commercial and economic conditions of this State and the law in other jurisdictions.

b. The Principles Underlying the Doctrine of *Forum Non Conveniens*

The doctrine of *forum non conveniens* "is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1946). The doctrine is typically applied where "an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems'." *Piper Aircraft Company v. Reyno*, 454 U.S. 233, 241, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1982), *citing Koster*, 330 U.S. at 524.[3]

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[3] The U.S. Supreme Court has held that requiring litigation to proceed in an inappropriate forum can be an unconstitutional burden on interstate commerce. *Davis v. Farmers' Co-Op Equity Co.*, 262 U.S. 312, 43 S. Ct. 556. 67 L. Ed. 996 (1923). Florida's restrictions on the application of the doctrine of *forum non conveniens* also raise questions of constitutionality under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. These considerations, however, are beyond the purview of this brief.

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A majority of States, including Florida,[4] have adopted the *forum non conveniens* balancing test enunciated in *Gulf Oil Corp. v. Gilbert*. *See infra*. This test requires that a court initially determine whether an adequate alternative forum exists. *Gilbert*, 330 U.S. at 506-507, *See also Piper Aircraft*, 454 U.S. at 254. If an adequate alternative forum is identified, a presumption in favor of the plaintiff's choice of forum is balanced against various private and public interests. *Gilbert*, 330 U.S. at 508. Private interests include ease of access to sources of proof, the availability of compulsory process to compel the attendance of witnesses and the cost of obtaining such attendance, the need for a view, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. The public interest factors include administrative difficulties for the court, the burden of jury duty on a community which has no reasonable nexus to the cause of action, the interests of the State or nation where the cause of action arose and the difficulties inherent in applying foreign law. *Gilbert*, 330 U.S. at 508.[5] Florida applies this flexible test only when the inconsistently rigid non-residency hurdle has been cleared and, in this respect, is out of step with existing commercial conditions and the development of the doctrine elsewhere.

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[4] *See Armadora Naval Dominicana, S.A. v. Garcia*, 478 So. 2d 873 (Fla. 3d DCA 1985) and *Southern Railway Co. v. Bowling*, 129 So. 2d 433 (Fla. 3d DCA 1961).

[5] It is paradoxical that Florida should apply the flexible *Gulf Oil Corp. v. Gilbert* balancing test while also imposing the rigid prerequisite that all parties be non-residents before a trial court can engage in a *forum non conveniens* analysis.

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The federal doctrine has been described as non-discriminatory because it does not specifically "turn on considerations of domestic residence or citizenship as against foreign residence or citizenship." *Gore v. United States Steel Corp.*, 104 A.2d 670, 676-677 (N.J. 1954). The New Jersey Supreme Court characterized the *Gulf Oil Corp. v. Gilbert* doctrine as "a wholesome one and in furtherance of the sound administration of justice. State courts should not hesitate to follow it in appropriate circumstances." *Gore*, 104 A.2d at 677. Since 1948, the trend among the States has been to accept the federal doctrine or a substantially similar rule of procedure. The *Amicus Curiae* respectfully submit that the time is ripe for Florida to join the ranks of the majority of jurisdictions which have adopted this view and, thereby, to jettison the non-residency prerequisite.

c. The Modern Trend is Acceptance of the Doctrine of *Forum Non Conveniens* Free of the Non-Residency Prerequisite -- Florida Stands Alone in Imposing This Precondition

Forum Non Conveniens derives from the Scottish Doctrine of *Forum Non Competens*. *See Vernor v. Elvies*, 6 Dict. of Dec. 4788 (1610). The principle was applied "to cases in which the court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum." *Longworth v. Hope*, 3 Sess. Cas. (3d Ser.) 1049, 1053 (1865).

The Latin term "*forum non conveniens*" did not gain acceptance in the United States until after 1929. Interest in the doctrine was triggered by the publication of a prominent Law Review article addressing the issue. *See* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM L.REV. 1 (1929). As of 1929, only several of the States applied the

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principle and few used the term "*forum non conveniens.*" *Id.* at 21-22.

After the Supreme Court's 1946 ruling in the *Gulf Oil Corp. v. Gilbert* case, the doctrine gained more widespread acceptance. The California Supreme Court's survey in 1967 noted that fifteen (15) States applied the doctrine. *See Thomson v. Continental Insurance Company*, 427 P.2d 765 (Cal. 1967).[6] The California Court also noted that twelve (12) of these States had some form of non-residency prerequisite for the application of the doctrine. *Thomson*, 427 P.2d at 768-769.[7]

In 1979, the Supreme Court of South Carolina conducted a similar survey, identifying thirty-three (33) States and the District of Columbia which had adopted the doctrine of *forum non conveniens* and noting that only Montana, at that time, had rejected it. *Braten Apparel Corp. v. Bankers Trust Co.*, 259 S.E. 2d 110 (S.C. 1979). Washington was one of the States which adopted the doctrine during the twelve (12) year period between the California and South Carolina surveys. *See Werner v. Werner*, 526 P.2d 370 (Wash. 1974). The *Werner* Court noted that its previous rejection of the doctrine in 1959 (*Lansverk v. Studebaker-Packard Corp.*, 338 P.2d 747 (Wash. 1959)) aligned that State with the minority view. *Werner*, 526 P.2d at 378. In reversing its earlier ruling, the Court opined that the "expanding realm of commercial

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[6] It is ironic that Respondent Continental resists the application of *forum non conveniens* in the case *sub judice* after having advocated its application in this California case.

[7] The Supreme Court of Tennessee conducted a similar survey in 1968, listing sixteen (16) States which accepted the doctrine, but also identifying four (4) States that had expressly rejected it. *Zurick v. Inman*, 426 S.W.2d 767 (Tenn. 1968).

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relationships" mandated that it "forthrightly recognize the doctrine of *forum non conveniens* as an inherent discretionary power of the courts." *Werner*, 526 P.2d 378.

Fifteen (15) years have passed since the South Carolina survey, and the balance now weighs even more heavily in favor of *forum non conveniens*. Thirty-four (34) States and the District of Columbia have adopted versions of the federal doctrine,[8] and eight (8) other States

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[8] Alabama, *See* ALA. CODE § 6-5-430; Alaska, *See Crowson v. Sealaska Corp.*, 705 P.2d 905 (Alaska 1985); Arizona, *See Cal Fed Partners v. Heers*, 751 P.2d 561 (Ariz. Ct. App. 1987); Arkansas, ARK. CODE ANN. § 16-4-101; California, *See* CAL. CIV. PROC. § 410-30 (West 1994); Connecticut, *See Miller v. United Technologies Corp.*, 515 A.2d 390 (Conn. Super. Ct. 1986); Delaware, *See Miller v. Phillips Petroleum Co. Norway*, 537 A.2d 190 (Del. 1988); The District of Columbia, *See* D.C. CODE ANN. § 13-425; Florida, *See Armadora Naval Dominicana, S.A. v. Garcia*, 478 So. 2d 873 (Fla. 3d DCA 1985); Illinois, *See McClain v. Illinois Central Gulf Railroad Co.*, 520 N.E.2d 368 (Ill. 1988); Indiana, *See* IND. CODE ANN. IND. R. TRIAL PROC. 4.4 (West 1994); Iowa, *See Silversmith v. Kenosha Auto Transp.*, 301 N.W.2d 725 (Iowa 1981); Kansas, *See Volt Delta Resources, Inc., v. Devine*, 740 P.2d 1089 (Kan. 1987); Maine, *See Field Industries, Inc. v. D.J. Williams, Inc.*, 470 A.2d 1266 (Me. 1984); Maryland, *See Johnson v. G.D. Searle & Co.*, 552 A.2d 29 (Md. 1989); Massachusetts, *See* MASS. GEN. LAWS ANN. ch 223A, § 5 (West 1994); Michigan, *See Cray v. General Motors Corp.*, 207 N.W.2d 393 (Mich. 1973); Minnesota, *See Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508 (Minn. 1986); Missouri, *See Besse v. Missouri Pacific Railroad Co.*, 721 S.W.2d 740 (Mo. 1986), *cert. denied*, 481 U.S. 1016 (1987); Nebraska, *See Qualley v. Chrysler Credit Corp.*, 217 N.W. 2d 914 (Neb. 1974); Nevada, *See Payne v. Eighth Judicial District Court, County of Clark*, 626 P.2d 1278 (Nev. 1981); New Hampshire, *See Digital Equipment Corp. v. International Digital Systems Corp.*, 540 A.2d 1230 (N.H. 1988); New Jersey, *See Civic Southern Factors Corp. v. Bonat*, 322 A.2d 436 (N.J. 1974); New Mexico, *See Buckner v. Buckner*, 622 P.2d 242 (N.M. 1981); New York, *See* N.Y. CIV. PRAC. L. & R. 327 (McKinney 1994); North Carolina, *See* N.C. GEN. STAT. § 1-75.12; North Dakota, *See* N.D. R. CIV. P. 4; Ohio, *See Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 519 N.E. 2d 370 (Ohio 1988); Oklahoma, *See Groendyke Transport, Inc., v. Cook.* 594 P.2d 369 (Okla. 1979); Pennsylvania, *See* 42 PA. CONS. STAT. ANN. § 5322(e) (1994); Tennessee, *See Zurick v. Inman*, 426 S.W.2d 767 (Tenn. 1968); Utah, *See Kish v. Wright*, 562 P.2d 625 (Utah 1977); Washington, *See Johnson v. Spider Staging Corp.*, 555 P.2d 997 (Wash. 1976); West Virginia, *See Norfolk and Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990); Wisconsin, *See* WIS. STAT. ANN. § 801-63 (1994).

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utilize versions of *forum non conveniens* which are, in varying degrees, similar to the federal doctrine.[9] Two States have noted the doctrine with favor as being potentially useful, but their courts have not yet formally adopted *forum non conveniens*.[10] The courts of three (3) States, Rhode Island, South Dakota, and Virginia, have not addressed the issue. Louisiana has adopted an extremely narrow statutory version of *forum non conveniens*.[11] One (1) State has rejected *forum non conveniens* in the context of Federal Employees Liability Act litigation but has declined to rule on its applicability to general litigation.[12] One State has rejected the doctrine altogether on the grounds that venue is an issue to be decided by that State's legislature.[13]

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[9] Colorado, *See McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373 (Colo. 1976); Hawaii, *See Harbrecht v. Harrison*, 38 Haw. 206 (Haw. 1948); Kentucky, *See Carter v. Netherton*, 302 S.W.2d 382 (Ky. 1957); Mississippi, *See Shewbrooks v. A.C. and S., Inc.*, 529 So. 2d 557 (Miss. 1988); Oregon, *See C.O.W., Inc. v. Motor Vehicles Division, Oregon Department of Transportation*, 586 P.2d 107 (Or. 1978); South Carolina, *See Braten Apparel Corp.*, 259 S.E. at 110; Texas, *See* TEX. CIV. PRAC. & REM. CODE § 71-051 (West 1994); and Vermont, *See Burrington v. Ashland Oil Company, Inc.*, 356 A.2d 506 (Vt. 1976).

[10] Idaho *See Nelson v. World Wide Lease, Inc.*, 716 P. 2d 513, 518 n.1 (Idaho Ct. App. 1986); and Wyoming *See Lohman v. Jefferson Standard Life Ins. Co.*, 525 P.2d 1 (Wyo. 1974).

[11] *See* LA. CODE CIV. PROC. ANN. art. 123 (West 1994).

[12] Montana, *See State ex rel Burlington Northern Railroad Co. v. District Court of the Eighth Judicial Dist., County of Cascade*, 746 P.2d 1077 (Mont. 1987).

[13] Georgia *See Smith v. Board of Regents, University System of Georgia*, 302 S.E.2d 124 (Ga. 1983). This approach appears suspect, as *forum non conveniens* has been universally considered to be an exercise of structured discretion by the trial court. *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980). Although some States have addressed the issue through legislation, this generally occurs after the doctrine has evolved in the courts.

In sum, forty-five (45) States and the District of Columbia have either adopted a version of *forum non conveniens* or have referred to it favorably without formally adopting it.[14] The doctrine remains an open issue in four (4) States and has been rejected by only one. Of the twelve (12) jurisdictions which attached some form of non-residency prerequisite to the doctrine in 1967,[15] eleven (11) have since jettisoned that restriction.[16] It is axiomatic "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States of America*, 290 U.S. 371, 383, 54 S.Ct. 212, 78 L. Ed. 369 (1933) (Sutherland, J.). An overwhelming majority of States have adapted themselves to changing times in revisiting the application of *forum non conveniens*. Florida *stands alone in continuing to attach a non-residency prerequisite to the doctrine of forum non conveniens.*

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[14] Of the major international business and port of entry States, California, Massachusetts, New Jersey, New York and Texas, all have adopted a version of *forum non conveniens* substantially similar to the federal doctrine. Since Florida has emerged as a center for international business as well as a major port of entry, this State should favorably consider the doctrine as it is utilized by similarly situated jurisdictions.

[15] *See Thomson*, 427 P.2d at 768-769.

[16] One commentator has suggested that two (2) other States, Colorado and South Carolina, continue to maintain a non-residency prerequisite, because these jurisdictions absolutely refuse to dismiss an action brought by a resident plaintiff. David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Anti-Suit Injunctions*, 68 TEX. L. REV. 937, 951 n.76 (1992). This is not true. The highest court in each of these States has ruled that great weight should be accorded to a resident plaintiff's choice of forum, such that dismissal based upon *forum non conveniens* should not be granted except under special circumstances. *See McDonnell-Douglas Corp.*, 557 P.2d at 374; *Braten Apparel Corporation*, 259 S.E. 2d at 114.

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d. Legal, Social, and Economic Changes Affecting Florida Since 1978 Militate in Favor of Relaxing the Non-Residency Prerequisite to the Doctrine of *Forum Non Conveniens*

It is anomalous that Florida imposes a non-residency prerequisite to the application of *forum non conveniens* while simultaneously embracing the flexible analysis set forth in *Gulf Oil Corp., v. Gilbert*, once the restrictive prerequisite is met. The *Gulf Oil Corp. v. Gilbert* public interest factors (court congestion, the burden of jury duty, the interests of the alternative forum in deciding a local issue at home, and the problems inherent to applying foreign law), *Gulf Oil Corp.*, 330 U.S. at 508-9, whether considered in the context of *forum non conveniens* or as general policy issues, have particular relevance to this State. Application of the *Gulf Oil Corp. v. Gilbert* public interests factors to contemporary legal, economic, and social conditions in this State reinforces the propriety of relaxing the rigid non-residency prerequisite in favor of the more flexible majority rule.

Florida's growth as a center for national and international business has accelerated substantially since 1978 when *Houston v. Caldwell* was decided. In 1978, the State's population was estimated to be 8,966,395.[17] By 1990, the official census revealed that Florida's population had grown nearly fifty (50%) per cent from 1978 to 12,937,926.[18] In 1993, of

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[17] UNIVERSITY OF FLORIDA, BUREAU OF ECONOMIC AND BUSINESS RESEARCH, POPULATION DIVISION, BULLETIN 48, POPULATION STUDIES (1979) *reprinted in* FLORIDA STATISTICAL ABSTRACT 1979 AT 10 (Ralph B. Thompson et al., eds. 1979).

[18] U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS FLORIDA CP-2-11 (1993).

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Florida's fifty (50) largest employers, thirty-three (33) had corporate headquarters located outside of the State.[19] By December, 1992, forty-seven (47) international banks had established agencies within this State having total assets of $10,735,244,000.00.[20] By the end of 1993, forty-seven (47) Fortune 500 industrial companies, thirty-two (32) Fortune 500 service companies, and 428 multi-national companies had established operations within Dade County.[21] These statistics are highly relevant here, because those numerous corporations, many having principal places of business in other States or foreign countries, are all "residents" of Florida under the Fourth District Court of Appeals' analysis. As such, they may all sue as a plaintiff or be sued as a defendant, regardless of the place where the cause of action arose, the location of witnesses and evidence, and the applicability of foreign law. This is true whether the cause of action is a commercial dispute which accrued in New York or a tort action arising in Bogota.

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[19] Florida Trend, *Top 50 Employers*, NEWCOMER'S GUIDE TO FLORIDA BUSINESS 1993 at 60 (1993). Statistics for the fifty (50) largest employers in Florida are unavailable for years prior to 1984. In 1984, only thirty (30) of the top fifty (50) employers had corporate headquarters outside of Florida. Florida Dep't of Commerce, Division of Economic Development, Bureau of Economic Analysis, Florida's Fifty Largest Employers with their Corporate Headquarters 1984 (July 1985) (unpublished report, on file with the Florida Dep't of Commerce). Interestingly, of those thirty (30), two (2) have since gone out of business, Pan American World Airways, Inc. and Zayre Corporation. Walt Disney Productions, in 1984 a citizen of California, reincorporated as Walt Disney World Co. which, in 1993, has a principal place of business in Florida. *See* Florida Trend, *Top 50 Employers*, NEWCOMER'S GUIDE TO FLORIDA BUSINESS 1993 at 60 (1993).

[20] STATE OF FLORIDA, OFFICE OF THE COMPTROLLER ANNUAL REPORT OF THE DIVISION OF BANKING, *reprinted in* FLORIDA STATISTICAL ANALYSIS, *supra* note 16, at 474.

[21] THE BEACON COUNCIL, MIAMI BUSINESS PROFILE, 1994-1995, 61-66 (Florida Media Associates, Inc., 1994).

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The ramifications of the certified question and the broader issue it begs are far-reaching. The nature of Florida's role in international business and politics underscores an inherent flaw in the logic of the non-residency prerequisite -- Florida's susceptibility to the filing of foreign cases. This is because

> Florida is a singular case, if only because of its location. Miami, for example, lies closer to sixteen (16) Latin American and Caribbean capitols then to Washington, D.C. So while some other border States have the luxury of focusing on Mexico or Canada, Florida must cope with the consequences of serving as the main port of entry for some thirty (30) countries. 'Todays international problems become Florida's problems tomorrow,' said Mark B. Rosenberg, the departing Director of the Latin American and Caribbean Center at Florida International University here. 'Our geography gives us a proximity and immediacy to foreign affairs that we cannot escape.'

Larry Rohter, *Foreign Policy: Florida Has One*, N.Y. TIMES, May 22, 1994, at E1, E5.

The impact of Florida's population growth over the last fifteen (15) years and its role as an international business center is also seen in case filing statistics. During the year 1978, 449,401 actions were filed in the State's County Courts (this does not include 2,133,457 traffic cases), and 356,652 civil and criminal actions[22] were filed in the Circuit Courts.[23] On average, 2,555 cases were filed for each of the 188.5 County Court Judges (once again not including traffic cases) and 1,574 cases were filed for each of 288 Circuit Court Judges. During

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[22] This does not include 187,497 juvenile filings (delinquency and dependency complaints and petitions).

[23] Search of OSCA/Court Programs SRS Database, Office of the State Court Administrator, Tallahassee, FL. (September 30, 1994) (Search for 1978 Court File Totals).

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this same fiscal year, 2,586 cases were added to the Supreme Court's docket, and 9,480 to the dockets of the District Courts of Appeal.[24]

Filing statistics for 1993 cases reflect the effects of Florida's rapid increase in population. Despite four (4) increases in the jurisdictional amount in controversy for County Court civil filings,[25] Circuit Court case filing statistics for 1993 still exceeded 1978 levels.[26] In 1993, 153,317 criminal actions and 439,069 civil actions were filed (neither of these statistics includes reopened cases) -- a total of 592,386 case filings.[27] The County Courts suffered a drastic increase in filings from 1978. In 1993, 381,171 criminal actions and 295,884 civil actions were filed (once again, the statistics do not include reopened cases) -- a total of 677,055 case filings.[28]

A review of the fifteen (15) Florida Supreme Court Certifications of Need for Additional

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[24] STATE OF FLORIDA, JUDICIAL COUNCIL, TWENTY-FOURTH ANNUAL REPORT, FEBRUARY, 1979, *reprinted in* FLORIDA STATISTICAL ANALYSIS 1979, *supra* note 14, at 517. These statistics include criminal actions.

[25] *See* § 34.01(c)(1)-(4), Fla. Stat. (1993).

[26] The 1993 case filings statistics do not include 224,610 juvenile filings (delinquency and dependency complaints and petitions).

[27] Search of OSCA/Court Programs SRS Database, Office of the State Court Administrator, Tallahassee, FL. (September 30, 1994)(Search for County and Circuit Summary Report for interval 01/93 - 12/93).

[28] *Id.*

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Judges since 1978 reveals the overburdened nature of this State's court system.[29] Since 1978, on average, each Certification has requested the creation of just over eleven (11) Circuit Court and nearly four (4) District Court of Appeals judicial positions.

The most recent Certification, February 4, 1994, *In re Certification of Need for Additional Judges*, 631 So. 2d 1088 (1994), noted that all Circuits for which new judgeships were requested were near or "above the 1,825 filings per judge threshold"; and all County judgeships certified represented courts where filing levels exceeded 6,114 per judge. *In re Certification of Need for Additional Judges*, 631 So. 2d at 1091. The 1992 Certification notes substantial delays in the scheduling of trials due to lack of judicial resources. *In re Certification of Judicial Manpower*, 592 So. 2d 241, 244 (Fla. 1992). This Court may take judicial notice of the scarcity of judicial resources. In light of the overburdened nature of Florida's judicial system, the majority view of *forum non conveniens* is compelling; the trial courts are granted discretion to decline the exercise of jurisdiction over a case which is better litigated in an

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[29] See, *In re Certification of Need for Additional Judges*, 631 So. 2d 1088 (Fla. 1994); *In re Certification of Judgeships*, 611 So. 2d 1244 (Fla. 1993); *In re Certification of Judicial Manpower*, 592 So. 2d 241 (Fla. 1992); *In re Certification of Judicial Manpower*, 576 So. 2d 1303 (Fla. 1991); *In re Certificate of Judicial Manpower*, 558 So. 2d 1002 (Fla. 1990); *In re Certification of Judicial Manpower*, 540 So. 2d 820 (Fla. 1989); *In re Certification of Judicial Manpower*, 521 So. 2d 116 (Fla. 1988); *In re Certificate of Judicial Manpower*, 503 So. 2d 323 (Fla. 1987); *In re Certificate of Judicial Manpower*, 485 So. 2d 1259 (Fla. 1986); *In re Certificate of Judicial Manpower*, 467 So. 2d 286 (Fla. 1985); *In re Certificate of Judicial Manpower*, 446 So. 2d 79 (Fla. 1984); *In re Certificate of Judicial Manpower*, 428 So. 2d 229 (Fla. 1983); *In re Certificate of Judicial Manpower*, 396 So. 2d 172 (Fla. 1981); *In re Certificate of Judicial Manpower*, 370 So. 2d 363 (Fla. 1979); *In re Certification Under Article V*, Section 9, 370 So. 2d 365 (Fla. 1979).

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alternative forum.

Since Florida is a major port of entry, both in terms of international business and migration, the effect of "imported" foreign litigation is salient.[30] "Alien plaintiffs seek an American forum because it provides considerable procedural and substantive advantages over the aliens' home forum".[31] The procedural and substantive advantages include extensive discovery, a wider scope of liability theories and the potential for a greater recovery.[32] The liberal nature of the American court system is internationally recognized. "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[33]

"Imported" cases typically require the onerous exercise of interpreting and applying foreign law and unnecessarily burden Florida citizens with time spent as jurors in an action having only the slightest jurisdictional nexus to Florida. *See Gilbert* 330 U.S. at 508-509. This burden is particularly severe in the case of foreign actions where translation of testimony is

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[30] In the context of the residency requirement "[d]uring the 1980's, Florida gained almost 2.8 million persons through migration. That is, almost 2.8 million more persons moved into Florida than moved out." LEON F. BOUVIER & BOB WELLER, FLORIDA IN THE 21ST CENTURY: THE CHALLENGE OF POPULATION GROWTH, at 12 (Center for Immigration Studies Washington, D.C. 1992).

[31] Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens, 71* TEX. L. REV. 351, 352 (1992).

[32] Id.

[33] *Smith Kline & French Laboratories, Ltd. v. Bloch*, 1 W.L.R. 730, 733-34 (C.A. 1982) (Lord Denning, M.R.).

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required. This Court has found that such cases, on average, take "about 25% more time" to conclude,[34] increasing the burden on the trial court and jurors.

As a major port of entry and center for national and international business, judicial restraint is warranted so that Florida does not become the "world's court". As the Oklahoma Supreme Court stated when it embraced the doctrine of *forum non conveniens* in *St. Louis - San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773, 777 (Okl. 1954): "the possible injustices and the possible burden upon local courts, taxpayers, and those leaving their work and businesses to serve as jurors, as well as upon non-resident defendants, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this State" demand that the courts be allowed "in the exercise of their discretion, to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere." Such is clearly the case here. The non-resident prerequisite for application of *forum non conveniens* expands the universe of Florida litigants and effectively eviscerates the utility of the doctrine by making virtually *any* cause of action against a corporation transacting some business here amenable to suit in this forum.

Florida's *forum non conveniens* doctrine, in its present form, applies only to a very narrow band of causes of action accruing outside of this jurisdiction. Only in cases where personal jurisdiction exists, but no Florida resident is a party, does *forum non conveniens* have any practical effect given the present state of the law. The existing application of the doctrine

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[34] *In re Certification of Need for Additional Judges*, 631 So. 2d 1088 (Fla. 1994).

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disregards the very policy considerations which brought it into creation -- fairness and convenience to defendants, to the courts, and to the citizens and taxpayers of this State. Florida's application of the doctrine requires that the trial court accept and retain jurisdiction of even the most transitory action which might have no nexus to the forum other than the residency of one of the parties. This result ignores the principles of national and international comity inherent in the *Gulf Oil Corp. v. Gilbert forum non conveniens* analysis. The non-residency prerequisite also disregards the interests of the forum where the cause of action arose. The alternative forum may have a strong interest in having the matter tried "at home", in the view of its own citizens. *See Gilbert*, 330 U.S. at 509. But such a result is discouraged by existing law.

Observers in other *fora* have suggested that "the only State where the court of last resort has continued to reject the doctrine as a matter of common law is Florida". *Carnival Cruise Lines, Inc. v. Oy Wartsila AB,* 159 B.R. 984, 989 n.2 (S.D.Fla. 1993), *citing Alcoa Steamship Co. v. M/V Nordic Regent,* 654 F.2d 147, 155 n.10 (2d Cir. 1978). Although not strictly accurate, this perception underscores Florida's incongruous position among international business and port of entry states as the last bastion of the non-residency prerequisite.

e. Developments in the Law Governing Personal Jurisdiction Since *Houston v. Caldwell* Militate in Favor of Eliminating Florida's Non-Residency Prerequisite to the Doctrine of *Forum Non Conveniens.*

Since *Houston v. Caldwell* was decided in 1978, the law governing *in personam*

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jurisdiction has undergone several changes. In general, the trend within the State and throughout the nation has been to broaden the scope of personal jurisdiction. The effect of this trend is "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."[35] It has been noted that "broad jurisdictional rules are acceptable, and perhaps preferable, because other doctrines such as *forum non conveniens* are available to take other interests into account. When hardship cases arise, courts usually can refuse to exercise jurisdiction."[36] However, that is not the case when the applicability of the doctrine of *forum non conveniens* requires that a party be a resident. In that circumstance, the broadened jurisdictional rules will govern, eliminating the courts' ability to deal with hardship cases. In fact, the focus on residency of a litigant destroys the application of the doctrine even in those cases where the cause of action's nexus to the forum is so attenuated as to be non-existent and where, if the non-residency prerequisite were scuttled, *forum non conveniens* would otherwise be warranted under a *Gulf Oil Corp. v. Gilbert* analysis.

In 1984, the Florida Legislature, by enacting Ch. 84-2, § 2 at 3, Laws of Fla., created Florida Statute § 48.193(2) which provides that "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

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[35] 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).

[36] Albright, *supra* note 27, at 386.

from that activity." The intent of the Statute was to eliminate the "connexity" requirement liberalizing the extent of *in personam* jurisdiction in Florida.[37] The connexity requirement prohibited an exercise of personal jurisdiction over any person transacting business in the State but not having a registered agent pursuant to Florida Statute § 48.081 if the cause of action did not arise out of business transacted within Florida. The connexity requirement resembles aspects of *forum non conveniens*. This Court, in entering its ruling in *Houston v. Caldwell* in 1978, could not have anticipated that six (6) years later the connexity requirement would be abolished, opening the doors to all manner of litigation having limited or no contacts with Florida.

The matter is further complicated by the United States Supreme Court's decision in *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S. Ct 2105, 109 L. Ed. 2d 631, (1990). *Burnham* held that a non-resident is subject to personal jurisdiction within a State if he is personally served with process while within the State's borders. *Burnham*, 495 U.S. at 628. The courts of this State have embraced *Burnham's* "tag" theory of personal jurisdiction in *Somekh v. Estate of Bernstein*, 614 So. 2d 1229 (Fla. 3d DCA 1993) and *Gotlib v. Ponieman*, 623 So. 2d 631 (Fla. 3d DCA 1993). As a result, if a Florida resident can effect service of process on a non-resident while the non-resident is within the State, personal jurisdiction will exist, and *forum non conveniens* will not apply under *Houston v. Caldwell*.

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[37] See STAFF OF SENATE COMM. ON JUDICIARY-CIVIL, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT (COMM. PRINT 1983). STAFF OF HOUSE COMMITTEE ON JUDICIARY, STAFF SUMMARY ON S. 28 (COMM. PRINT 1983), addressing the same Amendment, notes that "Enactment of this Bill would likely increase the number of lawsuits against non-residents."

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The basic unfairness of this situation can best be appreciated in a hypothetical (though likely) case. Assume that a Florida resident, while travelling in Alaska, is injured in a multi-car accident. The *situs* of the accident, all evidence of liability, witnesses and all potential third party defendants are in Alaska. Alaskan law would assuredly apply to all substantive issues. Yet, if this Florida resident could only serve process upon a defendant while the defendant is vacationing in the State, the courts of Florida would have no discretion to decline to accept jurisdiction over this action. This is exactly the type of hardship case which *forum non conveniens* is designed to deal with.[38] For purposes of this hypothetical, and the vast majority of other factual situations, the doctrine is unavailable in this forum.

f. Public Policy and Judicial Economy Favor Elimination of the Non-Residency Prerequisite to the Doctrine of *Forum Non Conveniens*

This Court's decision in *Houston v. Caldwell* addressed several apparent drawbacks to the application of *forum non conveniens*. The Court seemingly determined that the liabilities outweighed the potential benefits of *forum non conveniens*. The liabilities which this Court cited have been satisfactorily allayed in the opinions of other *fora*; they are revisited herein.

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[38] The inverse of this hypothetical entails an equally unfair result. Assume that a national corporation with a place of business in Florida (satisfying the Fourth District Court of Appeals' definition of "residency") engages in alleged tortious activity in Peru. The alleged tort does not arise from business transacted in Florida, but the corporation is nonetheless likely subject to personal jurisdiction. If the Peruvian plaintiff files suit in Florida, despite the fact that all evidence, witnesses and potential third party defendants are in Peru, and that Peruvian substantive law would govern the litigation, *forum non conveniens* would not apply.

"Under Florida law, the plaintiff's choice of venue is usually favored." *Houston*, 359 So. 2d at 860. This concern is inherent in the *forum non conveniens* analysis. The trial court must accord "a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft*, 454 U.S at 255. The presumption is, however, lessened when the plaintiff is foreign. *Piper Aircraft*, 454 U.S. at 255. Put otherwise, a plaintiff "may select the forum by filing suit in any venue allowed by law. The right of choice of forum, however, is not absolute. A suit is subject to dismissal if it is filed in a forum which is manifestly inconvenient." *Besse v. Missouri Pacific Railroad Company*, 721 S.W.2d 740, 742 (Miss. 1986). The Iowa Supreme Court reached a similar conclusion in *Silversmith v. Kenosha Auto Transport*, 301 N.W.2d 724 (Iowa 1981)(stay ordered pending filing of action in alternative forum pursuant to *forum non conveniens*). "There are limits to which our courts should entertain claims which, despite proper jurisdiction and venue, have virtually no connection with the State." *Silversmith*, 721 S.W. 2d at 729.

Houston v. Caldwell directs that Florida courts lack authority "to transfer a suit to a forum in another State" and that dismissal requires the trial court to make a finding that the defendant is amenable to process in the alternative forum. *Houston*, 359 So. 2d at 860. Although strictly true, courts have created various devices to accomplish such a transfer without resorting to a formal determination of the defendant's amenability to suit in the alternative forum. The current trend is to condition dismissal of an action upon the defendant entering into

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certain stipulations. For example, the court may require the defendant to stipulate that it will subject itself to the jurisdiction of the alternative forum and waive any statute of limitation defense which may have accrued since the filing of the action. *See In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987); and *Carnival Cruise Lines, Inc. v. Oy Wartsila A.B.*, 159 B.R. 984 (S.D.Fla. 1993). Such stipulations ensure that the defendant, having obtained dismissal based upon *forum non conveniens*, will not evade the jurisdiction of its own preferred forum.

Florida "has a fundamental interest in resolving controversies involving its citizens." *Houston*, 359 So. 2d at 861. Notwithstanding, every jurisdiction that has adopted *forum non conveniens* has held that in certain unusual and compelling cases, where the plaintiff's choice of forum works a hardship upon the defendant and the people of the State, this fundamental interest is overridden by other policy reasons.[39] Iowa's Supreme Court, while recognizing "the strong interest in protecting Iowa residents", noted the "opposing policy consideration that the burden of resolving a dispute should not be thrust upon jurors and others in a court system having virtually no relation to its inception." *Silversmith*, 721 S.W. 2d at 729.

Policy considerations responsive to the concerns raised in *Houston v. Caldwell* are manifest in the principles upon which the doctrine of *forum non conveniens* is founded. The

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[39] Two States which have Constitutional provisions regarding access to courts very similar to Florida's Article I, § 20, Fla. Const. (1968) have held that such provisions do not prohibit *forum non conveniens* dismissal of a resident plaintiff's claim. *See Summa Corporation v. Lancer Industries, Inc.*, 559 P.2d 544 (Utah 1977) and *McDonnell Douglas Corp. v. Lohn*, 557 P.2d 373 (Colo. 1976).

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doctrine is based upon "considerations of fundamental fairness and sensible and effective judicial administration." *Adkins v. The Chicago, R.I. & Pac. R.R.*, 301 N.E.2d 729, 730 (Ill. 1973).

In 1990, the Texas Supreme Court abolished the doctrine of *forum non conveniens* on the basis of statutory construction, despite vehement dissent by some of its members. The dissent of Justice Hecht of the Texas Supreme Court in *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), addressed various policy considerations blunted by his brethren and presaged the doctrine's reinstatement by statute in 1993.[40] He noted that to allow non-residents whose causes of action accrued outside of Texas "an absolute right to sue in this State inflicts a blow upon the people of Texas, its employers and taxpayers that is contrary to sound policy." *Dow Chemical Co.*, 786 S.W.2d at, 702. In his scathing dissent, he raised the following (rhetorical) questions:

> "What purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the States' 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, perhaps 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

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[40] TEX. CIV. PRAC. & REM. CODE, § 71.051 (West 1994). Numerous transitory actions which might otherwise have been dismissed based upon *forum non conveniens* were filed in the Texas courts just prior to the effective date of this Statute. For example, a Texas lawyer filed suit on behalf of approximately 2,500 Australian women against Dow Corning Corp. and Bristol-Meyers Squibb Co. seeking damages for defective breast implants. Mike McKee, *Judge Okays Modified $4.25 Billion Implant Settlements*, THE RECORDER, September 2, 1994, at 3.

> 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 anyone to visit?"

Dow Chemical, 786 S.W.2d at 702.

Each of Justice Hecht's points is equally applicable to Florida.

Legal commentators were equally critical of the Texas Supreme Court's opinion. In the context of foreign plaintiffs filing suit in this nation's courts, it has been said that to refuse to dismiss such cases on the grounds of *forum non conveniens* "exports American social policy and necessarily disrupts policies of foreign nations."[41] In such cases, refusing to dismiss may be a violation of international comity.[42]

Justice Cook also dissented in *Dow Chemical Co. v. Castro Alfaro*. He opined that *forum non conveniens* is "the bridge that traverse[s] the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums." *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 699 (Tex. 1990). Without *forum non conveniens*, the "due process clause produces a lopsided and incorrect result: lopsided because it protects a foreign defendant from a foreign plaintiff but leaves a United States citizen exposed to liability from a similar source, incorrect because the Constitution does not afford greater protection to foreign plaintiffs than to American citizens." *Dow Chemical*, 786 S.W. 2d at 700.

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[41] Albright, *supra* note 27, at 362.

[42] "Under the doctrine known as 'Comity of Nations', a court should decline to exercise jurisdiction under certain circumstances in deference to the laws and interests of another foreign country". *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994).

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Gulf Oil Corp. v. Gilbert and its progeny have set forth a flexible and effective framework for fairly resolving those relatively few cases where an otherwise appropriate exercise of jurisdiction and venue works a hardship upon the defendant, the courts, and the public in the forum State. Florida has accepted the modern *Gulf Oil Corp. v. Gilbert* version of *forum non conveniens* but, paradoxically, imposes non-residency as a precondition to its application. This has the resultant effect of eviscerating the purpose and application of the doctrine.

Retaining jurisdiction of true hardship cases strains the boundaries of due process. By imposing the non-residency requirement, Florida impairs a party's ability to defend itself. For example, witnesses in other States or nations are not subject to compulsory process and become unavailable. Third parties, potentially liable in contribution or indemnity or even primarily liable, cannot be joined because they, like the source of the cause of action, are beyond the State's jurisdiction. Congested courts are stripped of their inherent discretion to decline jurisdiction. A State's citizens are subjected to jury duty and its taxpayers to fiscal responsibility for cases bearing no relationship to the forum, while interested residents of the alternative forum become distant spectators. The courts must entangle themselves in the application and construction of foreign law. Private and public interest factors which are the cornerstone of *Gulf Oil Corp. v. Gilbert* are cast aside in favor of an arbitrary focus upon residency.

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CONCLUSION

The New York Court of Appeals has opined that *forum non conveniens* is a doctrine whose "application should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties." *Silver v. Great American Insurance Co.*, 278 N.E. 2d 619, 622 (N.Y. 1972). The court recognized that the doctrine's flexibility is its greatest advantage and is undercut by preconditioning its application to the non-residency of the parties. Likewise, the hardship worked upon the parties to litigation and the State of Florida by requiring an action to be litigated in a clearly inappropriate forum solely on the basis of residency justifies the elimination of the non-residency prerequisite to *forum non conveniens*. This permits this useful doctrine to be available to its fullest extent.

The non-residency requirement has become a legal anachronism whose continued life has a chilling effect on the just application of the doctrine of *forum non conveniens*. Although a narrow construction of residency is appropriate -- particularly in the context of corporate entities -- the abolition of residency as a condition precedent to a *forum non conveniens* analysis is required by the fundamental judicial considerations of fairness and justice.

WHEREFORE, based on the foregoing, the *Amicus Curiae* pray that this Honorable Court reverse the Fourth District Court of Appeals' reversal of the trial court; overrule this Court's opinion in *Houston v. Caldwell*; or in the alternative, adopt the First and Third District Court of Appeals' construction of corporate residency by holding that a corporation is a resident

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only of the State where it has its principal place of business.

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CASE NO. 84,329

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 8th day of November, 1994 to: ARTHUR J. ENGLAND, JR., ESQ. and CHARLES M. AUSLANDER, ESQ., Greenberg Traurig, 1221 Brickell Avenue, 22nd Floor, Miami, Florida 33128; RAOUL G. CANTERO, III, ESQ., Adorno & Zeder, P.A., 2601 South Bayshore Drive, Suite 1600, Miami, Florida 33133; LEONARD K. SAMUELS, ESQ., Berger & Shapiro, 100 SE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301-1155; JOEL S. PERWIN, Podhurst Orseck Josefsberg, 25 West Flagler, Suite 800, Miami, Florida 33130; and WENDY F. LUMISH, ESQ., Popham Haik, 4000 International Place, 100 SE Second Street, Miami, Florida 33131.

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