IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 84,329

KINNEY SYSTEM, INC.,

PETITIONER,

v.

THE CONTINENTAL INSURANCE COMPANY,

RESPONDENT.

BRIEF OF PETITIONER KINNEY SYSTEM, INC.

On Review of a Certified Question of
Great Public Importance
from the Fourth District Court of Appeal

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INTRODUCTION

Petitioner Kinney System, Inc. ("Kinney"), is a foreign corporation doing business in Florida. Kinney was sued by Respondent Continental Insurance Company ("Continental"), also a foreign corporation doing business in Florida. Kinney's motion to dismiss on the footing of common law *forum non conveniens* was granted by the trial court, which recognized wisdom in the more flexible application of the doctrine authorized by precedent of the Third District Court of Appeal.

A panel of the Fourth District recognized its obligation to adhere to the moribund precedent of that district, from which it could not retrench, and the further disability to *en banc* the matter, given that inter-district conflict is manifest, but intra-district conflict wanting. The Fourth District treated this systemic inconvenience sensibly, by certifying a question 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?

Continental Ins. Co. v. Kinney System, Inc., 641 So. 2d 195 (Fla. 4th DCA 1994). The fact of certification by the Fourth District reflects the panel's recognition that its decision was supported by nothing other than district *stare decisis*, without support by the Third District, other Florida courts, or decisions in other jurisdictions.

The Third District's reasoning that a corporation's principal place of business is the basis for residency provided a principled basis for the circuit court's decision to dismiss Continental's action so that it could be pursued in New York. This case involves a dispute regarding calculation of an additional premium over and above those considerable premiums paid by Kinney, which Continental claims to be owed.

Kinney routinely handles billing issues from its corporate headquarters in New York, and this matter was no exception. Continental's central operations are housed in New Jersey, and the insurance agreements at issue were framed in the New York metropolitan area. When negotiations in that vicinity between the parties' corporate executives and counsel did not resolve the dispute, Continental filed suit in Florida.

The circuit court's decision to dismiss the suit as inappropriately brought in Florida was a pragmatic exercise of the doctrine of *forum non conveniens*. Contemporary decisions, including those of the Third District, have reasoned that *forum non conveniens* is an important tool for the judiciary in protecting congested dockets from suits more appropriately brought elsewhere. Fourth District precedent would deny application of the doctrine whenever a foreign corporation is merely doing business in Florida, a resolution which handcuffs the opportunity to apply the doctrine flexibly to a host of cases.

The definition of corporate residency should be equated with principal place of business, and not merely doing business or

being registered to do business, concepts comporting typically to jurisdictional analysis of minimum contacts and due process. The certified question is one of magnified importance in Florida, given adherence to the proposition that *forum non conveniens* does not apply when either party is a resident of Florida.

STATEMENT OF THE CASE

Continental brought suit against Kinney for breach of contract. (R. 1-51). Kinney moved to dismiss the complaint on grounds of *forum non conveniens*. (R. 52-55). After conducting a hearing, and reviewing affidavits of both parties on the subject, the circuit court granted Kinney's motion and dismissed the action. (R. 124). Continental appealed. (R. 125-26).

The Fourth District reversed, finding itself and the circuit court bound by decisions of that district equating the mere doing of corporate business with residency, hence precluding consideration of *forum non conveniens*. *Continental Ins. Co. v. Kinney System, Inc.*, 641 So. 2d 195, 196-197 (Fla. 4th DCA 1994).

The decision of the district court acknowledged conflicting precedent of the Third District, and that Florida's is the minority view in suspending the doctrine when any party is a Florida resident. *Id.* The court certified a question 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?

641 So. 2d at 197.

At the request of Kinney, the district court stayed issuance of its mandate pending review by the Court.

STATEMENT OF THE FACTS

1. Continental's principal place of business.

Continental is a New Hampshire corporation which maintains its principal place of business in New Jersey. (R. 1 at ¶ 1). Continental is an insurance company which provides workers' compensation and employer's liability insurance. (R. 79 at ¶ 3). Continental was authorized to conduct business and conducted business in Florida. (R. 1). Continental Loss Adjusting ("CLA") has a claims office in Broward County. (R. 79 at ¶ 4).

2. Kinney's principal place of business.

Kinney is a Delaware corporation (R. 56 at ¶ 2) which has its principal place of business and corporate headquarters in New York. (R. 56 at ¶ 2). Kinney has an office and operated parking garages in Florida, where it does not maintain a principal place of business. (R. 53 at ¶ 3).

3. The insurance coverage agreement.

(a) The policies at issue.

Continental and Kinney entered into a workers' compensation and employer's liability insurance policy (the "compensation policy"), in 1987. (R. 46 at ¶ 4). Continental sent invoices for insurance premiums to Kinney in New York and, in turn, Kinney

made payments from New York to Continental in New Jersey. (R. 57 at ¶ 5). Kinney paid a standard premium to Continental of $242,817 for workers' compensation insurance coverage in various states which included Florida. (R. 2 at ¶ 4). The producing agent for the insurance policy, Alexander and Alexander, has its principal place of business in New York. (R. 57 at ¶ 6).

The compensation policy covers Kinney offices and parking garages in eight states, across the geographic expanse of the nation from Connecticut to Texas. (R. 12). The precise sites are identified state-by-state in the policy. (R. 18-26). There are several riders in the policy noting differences in the workers' compensation laws of certain of the states covered, and modifying the policy on that basis. (R. 28-33). Pursuant to its contract with Kinney under the compensation policy, Continental paid on behalf of Kinney a total of $171,953 on 41 workers' compensation claims in various states. (R. 80 at ¶ 10).

Kinney and Continental also entered into a Retrospective and Excess Retrospective Rating Agreement ("Retro Agreement"). (R. 45-51). The Retro Agreement obliged Kinney to pay Continental retrospective premiums arising out of adjustments Continental made based upon the standard premium and incurred losses for the policy period. (R. 48-49).

(b) <u>The contract dispute.</u>

After expiration of the policy period, Kinney submitted claims to Continental for payment for losses that occurred during the policy period. (R. 2-3). Continental paid claims submitted

by Kinney and then made adjustments to the retrospective premiums purporting to account for Kinney's loss experience. (R. 3 at ¶ 9).

Continental then demanded that Kinney pay an additional $339,151, (R. 3 at ¶ 10), as a result of these retrospective premium adjustments (R. 78-79 at ¶ 3). These claims included claims submitted by two Kinney employees who worked in Florida, which were adjusted in Ft. Lauderdale by Continental Loss Adjusting. (R. 79 at ¶ 4).

Kinney disputed upward adjustments made by Continental in retrospective premiums due under the Retro Agreement and resulting adjustments to the premiums due. (R. 57 at ¶ 7). Consequently, Kinney retained experts in New York, Coopers & Lybrand and the Lovel Group, to analyze Continental's performance under the Retro Agreement. These experts evaluated Continental's claim handling procedures and performance under the Retro Agreement. (R. 58 at ¶ 9). They examined, in New York, documents that provided the alleged basis for Continental's claim for increased insurance premiums. (*Id.*)

Negotiations ensued between corporate officers and counsel for Kinney and Continental, in the New York metropolitan area. (R. 56-60, 61-62, 78-83). The two corporations were unable to resolve their dispute in New York. (*Id*).

4. <u>Continental sues in Florida</u>.

Continental filed its lawsuit in Broward County, Florida. (R. 1-4). Continental's complaint did not allege a clear Florida

connection with the action. (*Id.*). Kinney acknowledged the availability of an alternative forum in New York (R. 54), and moved to dismiss for *forum non conveniens* (R. 52-55).

Affidavits for and against the motion were filed. (R. 56, 61, 78). A Kinney representative filed an affidavit reflecting its analysis of Continental's errors in calculating premiums, and that this analysis was performed in New York, using experts retained in New York, from documentation made available to Kinney in New York. (R. 57-58).

Kinney's regular outside counsel, located in New Jersey, filed an affidavit identifying forum shopping as the reason expressed to him by Continental's general counsel, for its filing suit in Florida. (R. 61-62). Continental's intention was to compel Kinney to incur additional costs of representation and travel, by filing the law suit in Florida. (*Id.*).

Continental denied this intention. (R. 119). Continental's affidavit on this point came from its vice-president and corporate counsel, who explained to Kinney "in no uncertain terms," in the course of settlement negotiations, that suit would not be brought in New York, but instead in one of the venues where the underlying workers' compensation claims were paid. (R. 119).

The trial court received these affidavits, heard argument (T. 1-30), and granted Kinney's motion (R. 122-23).

5. **The Fourth District's dilemma.**

On appeal, the Fourth District reversed as it was mandated to do by its precedent. The panel opinion took the opportunity, however, to certify a question of great public importance which poses whether adherence to its past decisions correctly interpreted the Florida law of corporate *forum non conveniens*.

The district court expressly recognized that the alleged breach of contract accrued outside of Florida, and that the Third District would have reached the conclusion that neither corporation was a resident of Florida. The panel acknowledged the flexibility inherent in the Third District's position applying *forum non conveniens* to suits between corporations doing business in Florida, but not principally residing here.

The panel further recognized Florida's minority position in refusing to consider the doctrine when any party is a Florida resident.

SUMMARY OF ARGUMENT

A clash between multistate, foreign corporations, on a claim for breach of contract accruing outside of Florida, should not be compulsorily resolved in a Florida court because one or both of the parties are licensed in Florida and do some business in Florida. The decisions of the Fourth District, now inclusive of the panel's conclusion in *Kinney* driven by that district's precedent, are incompatible with precedent of the Court and all the other district courts of appeal that have considered the issue directly or indirectly.

Corporate residency in the context of *forum non conveniens* should be measured by principal place of business, not by merely engaging in business in Florida. The "doing business" criterion is a routine yardstick by which to measure due process minimum contacts concerns for *in personam* jurisdiction to bring suit, but it is an inappropriate guide for forum appropriateness.

The Court recognized as much two months after *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), was decided, when it referenced a corporation's "principal place of business [in] Florida" as the standard for amenability to suit against a forum challenge. *Seaboard Coast Line R.R. v. Swain*, 362 So. 2d 17, 18 (Fla. 1978). *Swain* occupies particularly persuasive space as a contemporaneous interpretation by the Court of its more prominent parallel precedent in *Houston*.

The Third District's equivalency of principal place of business or corporate headquarters with residency makes much more sense for forum analysis. *National Rifle Ass'n of America v.*

Linotype Co., 591 So. 2d 1021 (Fla. 3d DCA 1991). It provides sensible discretion to apply the doctrine when suits arising elsewhere are brought in Florida, a likely occurrence under present conditions when any sizeable corporation does some business in this state, now the fourth most populous in the country.

Neither Continental nor Kinney has its principal place of business in Florida, and this cause of action for breach of contract accrued outside of Florida. In this situation, amenability to suit in Florida should not be foreordained by a corporation's doing some business in Florida. Such immunity to *forum non conveniens* has the practical affect of collapsing the entire doctrine into the question of minimum contacts for suit, by blurring the difference when a multistate corporation is sued.

There is no Florida case law or statutory compulsion for such drastic smothering of this flexible common law remedy. An isolated decision of the Fourth District -- which the *Kinney* panel was obligated to follow -- has misinterpreted *Houston* and ignored *Swain*. *See National Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th DCA 1986). It bears noting that all but one of the Third District's opinions with which conflict is evident and which express the wiser, more flexible application, were decided *after* the 1986 decision of the Fourth District on which the panel was compelled to rely. The one previous express analysis by the Third District came in a concurring opinion. *Transportes Aeros Mercantiles v. Calderon*, 480 So. 2d 125 (Fla. 3d DCA 1985) (Schwartz, Chief Judge,

concurring). The Fourth District's certification of this question of great public importance, without any effort to substantiate the validity of its past precedent, reflects the persuasive qualities of the Third District's analysis, which takes contemporary conditions of corporate multistate activities into account.

The persuasive decisions from other jurisdictions are settled, as well, that principal place of business determines corporate residency when *forum non conveniens* is applied. The vast majority of state courts, however, apply residency as no more than one of several factors in the analysis. *Houston v. Caldwell* has placed Florida distinctively in the minority in making residency determinative. As a result, if *forum non conveniens* is to retain any future vitality in Florida, the *Houston* decision makes it all the more imperative that corporate residency not be equated with merely conducting business in the state.[1/]

The Court need not recede from that precedent regarding the residency of individuals, in order to answer the certified question. Corporate residency should be measured by principal place of business, not by doing business or registration in

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1/ A number of *amici* will recommend that the Court recede from its opinion in *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978). Kinney joins in the assessment that residency of the parties should be a factor considered in the *forum non conveniens* formula, not a point of preclusion for its application to Florida residents. Nonetheless, the Court need not address that issue to resolve the certified question posed, as it pertains to the nonresident status of two foreign corporations.

Florida. Once that principle of law is applied, it is beyond cavil that this case involves two nonresident corporations.

In this case, the evidence demonstrated that the discretionary determination by the circuit court to dismiss the action rested on the inappropriateness of this forum to the majority of witnesses and to Kinney. The contracts at issue were executed outside of Florida, and payment under the contracts was due outside of Florida. Hence, the claim arose outside of Florida and can most conveniently be pursued in another jurisdiction. For a host of reasons, *forum non conveniens* was the prudently drawn discretionary determination of the circuit court. Chief among factors was the pivotal fact that this case arose out of a billing dispute over additional premiums said to be owed based on the provisions of an insurance policy negotiated and executed in the northeast. The two corporate parties are principally headquartered in the New York metropolitan area, where their executive decisions are made and implemented. Florida is not the appropriate forum in which to litigate this dispute.

The case should be remanded to the district court with directions to vacate its decision and affirm dismissal of the action.

ARGUMENT

THIS ACTION BY ONE NONRESIDENT CORPORATION AGAINST ANOTHER NONRESIDENT CORPORATION WAS PROPERLY DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*.

1. Florida law compels the conclusion that a corporation's principal place of business is the measure of its residency.

The certified question posed by the Fourth District requests that the Court address the manner in which residency of corporations should be defined for *forum non conveniens* purposes. Today's doctrinal analysis, which applies the residency of a party as a bar to dismissal on *forum non conveniens* in Florida, makes this the core and critical inquiry, and surely a question of great public importance for the Court, because in-state residency is a condition precedent to application of the doctrine, not a mere consideration in the calculus. *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978).

(a) The Third District's reasoning should prevail.

A rift has developed between decisions of the Fourth District and those of the Third District in particular, on the pivotal application of the residency factor to corporations. The Third District has reasoned that corporate residency should be equated with a corporation's principal place of business, or headquarters. *See National Rifle Association of America v. Linotype Co.*, 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) (Schwartz, Chief Judge, concurring); *Southern Railway v. McCubbins*, 196 So. 2d 512 (Fla. 3d DCA 1967).

The most lucid discussion in this line of decisions is within *Linotype*, which adopted the reasoning of the concurring opinion in *Calderon*. The Third District questioned whether a foreign corporation doing business in Florida, but not headquartered, or principally here, should be ensnared by the residency rule of *Houston v. Caldwell*. *Linotype*, 591 So. 2d at 1022. The court concluded that the two concepts could not be equated, lest potential plaintiffs be encouraged to sue in Florida for no reason other than the availability of the forum against any corporation transacting business in Florida.

The prospects were virtually self-evident, in the Third District's view, that Florida would become a haven for suit on causes of action accruing elsewhere, simply because the corporate defendant was doing business in Florida. The Third District's concern was both pragmatic and real. Florida's forum law as it stands today makes the filing of transitory actions more rather than less likely here than in many other state jurisdictions, and assuredly more likely than in a federal forum.

Stare decisis of the Fourth District impelled the *Kinney* panel to certification, not the logic of the previous decisions of that court from which it could not disentangle. Two decisions of that court are involved, one misapplied *Houston*, while the other did not involve corporate residency. *National Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th

DCA 1986); *Waite v. Summit Leasing & Capital International Corp.*, 441 So. 2d 185 (Fla. 4th DCA 1983).

New York Airlines is an abbreviated decision of three paragraphs which supplies little factual content. The recitations therein do include comment that i) both National Aircraft and New York Airlines were Delaware corporations; ii) both were licensed to do business in Florida; and, iii) both conducted business in Florida. 489 So. 2d at 39. The court specifically rejected pertinence of "the extent to which these [corporations] conduct business in Florida [that being] irrelevant for the purposes of jurisdiction."[2/] 489 So. 2d at 39. It went on to

> hold that foreign corporations licensed to do business in Florida, with a place of business in Florida cannot be prevented from pursuing a cause of action in Florida courts based upon the doctrine of forum non conveniens.

Id. at 39. In reaching this conclusion at odds with the Third District, the court relied on *Houston* and *Waite* which, in turn, both relied principally on the residency in Florida of persons sued in Florida.

In *Houston,* however, a resident of Florida was sued in Florida, by a resident of North Carolina arising out of an automobile accident in North Carolina. In *Waite*, a multistate

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[2/] It can be questioned whether the court's use of the term "jurisdiction" was intended. It may have constituted loose use of that terminology, more than anything else. The court's decision is introduced with the stage-setting statement that "[b]ased upon the doctrine of forum non conveniens the trial court dismissed this case for lack of jurisdiction." 489 So. 2d at 38. Of course, application of the doctrine is not based on lack of jurisdiction, rather it presumes jurisdiction which a court elects not to exercise.

accounting partnership was sued in Florida by a nonresident. The court related that the partnership had an office in Florida and that one of its partners resided in Florida. *Waite*, 441 So. 2d at 185. Those recitations in *Waite* reveal the likelihood that the partnership defendant was a general partnership which could not be sued apart from its constituent partners. The pass-through fiction of the partnership form would not veil the individual partners from direct suit.[3/] A court would not engage in a similar analysis to determine if corporate officers or directors were Florida residents, before determining whether a corporation was principally based in Florida.

It hardly follows from *Houston* and *Waite*, which did not consider the issue of corporate amenability to suit, that a corporation merely conducting some business in Florida cannot defend on the basis that there is a more convenient forum for suit elsewhere. *New York Airline's* reliance on *Houston* and *Waite* is imprudent, not sourced in a sound analytic framework.

(b) The Fourth District is misaligned from all other Florida courts.

Kinney suggests that but for compelled adherence to the mistaken application of *Houston* by the Fourth District, the

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3/ Similarly, to possess federal diversity jurisdiction, there must be complete diversity between all partners of a partnership and the opposing parties. *C.T. Carden v. Arkoma Associates*, 494 U.S. 185, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990). In Florida, not even minimum contacts for jurisdiction are satisfied when a corporate officer acting in his employment capacity from an out-of-state location, is sued in Florida because of an incident at a corporate place of business in Florida. *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993).

Kinney panel would have applied the more reasonable analysis expressed by the Third District's several decisions. Surely, a corporation's principal place of business has been the touchstone analysis of other district courts considering the issue, either directly or indirectly, before and after *Houston*. *See Adams v. Seaboard Coast Line R.R.*, 224 So. 2d 797 (Fla. 1st DCA 1969) (pre-*Houston* decision which relied on corporation's principal place of business in Florida to reject *forum non conveniens* challenge; decision later cited with approval by Supreme Court in *Swain*); *Datamatic Services Corp. v. Bescos*, 484 So. 2d 1351, 1359 n.2 (Fla. 2d DCA 1986) (plaintiff was a Florida corporation, but court not called on to address whether its principal place of business was Florida; court did not address whether *forum non conveniens* doctrine could apply to Florida corporation with principal place of business elsewhere; *forum non conveniens* analysis *dicta* where party had agreed to choice of forum clause in contract).

The abbreviated decision of the Court in *Swain*, particularly coming as it did only two months after *Houston* was decided, confirms the Third District's judgment that *Houston* did not intend to make Florida residents of any foreign corporation merely transacting business in Florida. In *Swain*, a Georgia resident sued Seaboard in Duval County. Seaboard was incorporated in Virginia,[4/] but had its "principal place of

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[4/] That fact is identified in *Adams v. Seaboard Coast Line Railroad*, 224 So. 2d 797, 798 (Fla. 1st DCA 1969), on which both *Swain* and *Houston* rely.

business" in Jacksonville. *Swain*, 362 So. 2d at 18. The Court equated that status with residency, as the predicate for applying the *Houston* rule barring dismissal on *forum non conveniens* where one of the parties -- there the defendant corporation -- resided in Florida.

Adams, decided by the First District before *Houston*, similarly focused on principal place of corporate business as the telling measure.

> [i]t can hardly be contended that suing defendant at the place of its official residence constitutes a harassment or imposition . . . [w]e do not perceive that to institute action against a corporation at the place of its headquarters and principal place of business could be held to constitute forum shopping, even though the cause of action may have accrued in a different locality.

224 So. 2d at 801.[5/]

Similarly in *McCubbins*, another pre-*Houston* decision, the Third District addressed whether a corporation's doing business equated with residency, and found no equivalence. 196 So. 2d at 514. The individual plaintiff resided in Tennessee, and Southern was a Virginia corporation with principal office outside Florida. *Id.* The fact that Southern had an office and agent in Dade

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[5/] *Adams* appears to be the first Florida decision to adopt the conclusion that a *forum non conveniens* challenge cannot be sustained when either party is a resident of the state. That analysis was expressly adopted by the Court in *Houston*. 359 So. 2d at 859-860. Had *Houston* intended not to accept *Adams'* reasoning on the corporate nature of residency, it is surprising that the Court did not state that difference, particularly because it lauded the ease with which the *Adams'* rule could be applied and the justice inherent in that resolution. 359 So. 2d at 861. It surely appears that *Houston* adopted the *Adams* approach for corporations, albeit *Houston* involved individuals.

County, and operated its trains in Florida, did not equate with residency. *Id.* Because the cause of action arose in Tennessee, the court applied *forum non conveniens*.

It is unassailable that the collective consensus of Florida decisions is to treat a corporation's principal place of business as its residency. Based on the fabric of this case law, the certified question can readily be answered. The defining characteristic of corporate residency is principal place of business for application of the doctrine of *forum non conveniens*. A trial court in this state is precluded from dismissing on that basis, only when one of the corporations has its principal place of business in Florida. The Fourth District's decision in *New York Airlines* is aberrant, and adoption of it by the Court would disable the doctrine of *forum non conveniens*, given the extent of contemporary interstate practices by corporations.

2. Merely "doing business" or being registered to do business in Florida is not an adequate measure for corporate *forum non conveniens*.

(a) The inflexibility of a "doing business" test.

Were the court to approve a rule of law that made "doing business," or corporate registration the foundation for assessing *forum non conveniens*, that would have the effect of collapsing the doctrine into jurisdictional analysis. In effect, the doctrine would be without effect. That would constitute a radical departure from current Florida law, and would have no substantial footing in logic. Such a decision would also likely increase the congestion of Florida courts and deter, rather than

increase the business activities of foreign corporations in Florida. These adverse policy affects can be avoided, in part, by rejecting a "doing business" or registration bar to application of the doctrine.

Florida has presently staked itself to a restrictive limitation on the flexibility of *forum non conveniens* law, by tying its consideration to the condition precedent of nonresidency of either party. As matters stand, that has taken Florida well outside the mainstream of federal and state court applications of the doctrine. *See e.g. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (dismissal of suit by citizens of Scotland appropriate under *forum non conveniens* where suit brought by them in principal place of United States business of corporate defendant). *Compare Piper Aircraft Co. v. Schwendemann*, 578 So. 2d 319, 320 (Fla. 3d DCA 1991) (principal place of corporate business in Florida made *forum non conveniens* inapplicable, despite fact that German citizens residing in Germany brought suit on aircraft crash in Germany). *See also Russell v. Chrysler Corp.*, 443 Mich. 617, 505 N.W.2d 263 (1993) (defendant corporation's principal place of business in Michigan did not preclude application of *forum non conveniens* to Michigan-filed suits by Florida residents injured in Florida by automobiles manufactured by Michigan corporation).[6/]

[6/] Kinney leaves to the various presentations of *amici* the debate whether Florida should depart in whole or part from *Houston* and *Swain*, in those circumstances a) where a

(continued...)

The ramification of Florida's departure from the die cast by the United States Supreme Court in *Reyno*, could be and is in the view of some, an expansion of the cases where Florida becomes the forum of choice for suits dismissed on inappropriate forum grounds by other jurisdictions. Speer, *The Continued Use of Forum Non Conveniens: Is it Justified?*, 58 J. AIR L. & COM. 845 (1993) (expressing view that *Reyno* and its progeny place pressure on states adopting a more restrictive version of *forum non conveniens* to emulate their federal counterpart to avoid becoming a dumping ground for otherwise homeless tort litigation).[7]

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[6](...continued)
corporate defendant with its principal place of business in Florida is sued here by residents of another state or foreign country; or b) where a Florida resident with a transitory claim arising outside of Florida, sues in Florida a corporation, such as Kinney, which has its principal place of business elsewhere. The majority trend in that majority of the 50 states applying *forum non conveniens* is to utilize residency of plaintiff or defendant as a factor, not a precondition to application of the principle. Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Anti-Suit Injunctions*, 68 TEX. L. REV. 937 (1990). That policy determination is justified by the need to preserve the integrity of congested courts and by the desire to increase corporate business activities in-state.

In this case, the certified question arises from a circumstance where the cause of action on a contract arose in New York and the two nonresident corporations are the only parties to the suit brought in Florida. The question can be answered by determining that neither corporation is a resident for application of *forum non conveniens*. Of course, to the extent that the Court recedes from *Houston* and *Swain*, it can all the more readily reject the Fourth District's anomalous case law which has held that merely doing business in Florida equals corporate residency.

[7] *See also Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), declining to apply (continued...)

For a variety of reasons, one of which is the "dumping" concern echoed above, the Court should lessen the degree of Florida's departure from the majority trend of jurisdictions in its application of the doctrine. Contrariwise, in the corporate context, a determination that merely "doing business" sufficed to establish corporate residency would displace the *forum non conveniens* doctrine almost entirely.

(b) "Principal place of business" is the factor applied by other jurisdictions.

Most other states considering the question have adhered to the principal place of business factor in determining residency of a corporation.[8/]

In 1994, the West Virginia Supreme Court of Appeals decided that *forum non conveniens* was not presumed unavailable in its state when a defendant corporation is either resident in West Virginia, or registered and authorized to do business in West Virginia. *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d

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[7/](...continued)
Florida law and dismissing action by Costa Rican citizens under federal *forum non conveniens* rules. The case was brought in Florida state court against Dow and Shell Oil Co., multinational corporations, and removed to federal court on diversity of jurisdiction grounds. *Sibaja* cited *Swain*, *Houston*, and *Waite* in the course of deciding in *dicta* that Florida would have precluded dismissal under its residency rule. The Eleventh Circuit's comments as to what would have happened in an unremoved Florida suit are unpersuasive. They reflect misunderstanding of the principal place of business point and did not have the benefit of the Third District's explication of the point in *Linotype* and *Calderon*.

[8/] Of course, in these jurisdictions, as in many others, residency is a factor for consideration, not a reason to preclude application of the doctrine.

285 (W. Va. 1994). It is obvious from the content of the opinion that the court considered a resident corporation to be one principally based in West Virginia, not merely authorized to do business there. 444 S.E.2d at 288-89.

In 1994, the Arkansas Supreme Court dismissed a case for *forum non conveniens* when due to an assignment from an Arkansas corporation, the case became a contract dispute between two Texas corporations doing some business in Arkansas. *Life of America Ins. Co. v. Baker-Lowe-Fox Ins. Marketing, Inc.*, 316 Ark. 630, 873 S.W.2d 537 (1994). The court recognized that had the Arkansas corporation remained the interested defendant, that "a reason for keeping the case in Arkansas would be strongly enhanced." 873 S.W.2d at 540.

In Massachusetts, the Supreme Judicial Court considered the application of *forum non conveniens* to a complex declaratory action on insurance coverage brought by W.R. Grace against numerous insurers of Grace's asbestos claims, ultimately dismissing the case. *W.R. Grace & Co. v. Hartford Accident & Indemnity Co.*, 407 Mass. 572, 555 N.E.2d 214 (1990). The court examined Grace's Connecticut incorporation, with its principal place of business in New York, and the fact that its construction products division was principally housed in Massachusetts. 555 N.E.2d at 215-17. The court also recognized that all the defendant corporations that moved to dismiss did business in Massachusetts. *Id.*

In a decision enlightening for several reasons, the court found that New York was the more appropriate forum. Given the

nature of the case, and that claims arose from various jurisdictions, the court observed the importance of avoiding piecemeal adjudication of common insurance coverage questions. 555 N.E.2d at 218. The case boiled down to a dispute over contract interpretation, to which New York law would govern because the contract was negotiated there, between a large group of insurers with New York ties and Grace -- a "New York based conglomerate," represented by a "New York-based insurance broker . . . ." 555 N.E.2d at 221.

Each of these three decisions reflects a pragmatism to which application of *forum non conveniens* should strive. Part of that practical approach is to reject jurisdictional concepts of presence in a state -- such as "doing business" -- as determinative of the issue of appropriate forum.[9/]

The relevant Restatement of laws also concludes that a corporation's domicil is its place of incorporation or principal

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[9/] Connecticut appears to take a distinct view, its Supreme Court having stated that "[w]here a corporation is actually carrying on business in the state and the plaintiffs make an offer of proof concerning the defendant's in-state activities which supports the allegations [of the complaint], the corporate connection with the state is more than tenuous, and weighs against dismissal." *Picketts v. International Playtex, Inc.*, 215 Conn. 490, 502, 576 A.2d 518 (1990). In that case, however, an American parent corporation residing in Connecticut was sued in Connecticut by Canadian citizens injured by a Canadian subsidiary's product. The case is certainly distinguishable on that score, but the further point should be made that the "talk" in inferior Connecticut courts is that *Picketts* virtually abolished *forum non conveniens* in Connecticut; "[i]t is difficult to imagine after *Picketts* that the granting of a forum non conveniens motion would ever be sustained . . ." *Thomas v. Connecticut Linen Supply Co.*, --- Conn. Supp. ---, 1994 WL 551255 (Super. Ct. Sept. 29, 1994); slip. op. at 3.

place of business, which generally constitutes a proper place for defense of an action. *Restatement (Second) Conflict of Laws* § 84(f).

(c) A "doing business" test would eviscerate corporate *forum non conveniens*.

Turning back to the current condition of Florida law, surely had the court in *Houston* reached the contrary view that jurisdiction is the only appropriate consideration, it would have explicated that departure from precedent precisely, rather than conveying the message enigmatically. *See In re T.A.C.P.*, 609 So. 2d 588, 594 (Fla. 1992) ("common law will not be altered or expanded unless demanded by public necessity, or where required to vindicate fundamental rights").

Nor should the legislature's passage of laws regarding corporate jurisdiction be seen as reflecting legislative abrogation of the *forum non conveniens* principle. An existing common law remedy -- such as *forum non conveniens* -- must be clearly, unequivocally, and expressly extinguished, otherwise the presumption is of a continuation of the common law. *See Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977) (statute designed to change the common law must be clear and unequivocal because the presumption is that no change is intended otherwise); *Ellis v. Brown*, 77 So. 2d 845 (Fla. 1955) (statutes are to be construed in reference to the principles of common law, for it is not presumed that the Legislature intended to make any innovation in the common law other than that which is specified); *see also Mann v. Goodyear Tire & Rubber Co.*, 300 So. 2d 666, 668

(Fla. 1974) (suit against a foreign corporation may be brought where business is transacted in Florida subject to the forum non conveniens statute).

Laws governing the registration of foreign corporations, their authority to transact business, and whether certain activities constitute doing business in Florida, are properly confined to issues of jurisdiction. §§ 607.1501, 607.1507, Fla. Stat. (1993). The Third District concluded in *Linotype*, for example, that section 607.1505, Florida Statutes (1993), on the qualification of a foreign corporation to do business in Florida, "does not make the corporation resident for *forum non conveniens* purposes." 591 So. 2d at 1022.

The Fourth District's seemingly innocuous expression in *New York Airlines* that foreign corporations licensed to do business in Florida, with a place of business in Florida, cannot raise forum appropriateness, comes very close to extinguishing this facet of common law. In its place, Florida courts would be left only with the jurisdictional guidelines of § 48.193, Florida Statutes (1993), which reject the "connexity" requirement, allowing assertions of Florida jurisdiction over any defendant engaged in substantial and not isolated activity in the state, regardless of whether the claim arises from that activity.[10/] Indeed, the Fourth District's position is all the more vexing,

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[10/] Of course, that assertion of jurisdiction must be consistent with due process of law, addressing the question whether a nonresident defendant "should reasonably anticipate being haled into court" in Florida. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989); *Doe v. Thompson*, 620 So. 2d 1004 (Fla. 1993).

because due process challenges to assertions of jurisdiction typically involve only *non*resident defendants, and the Fourth District has made *residents* of a host of corporations who have obtained a license to do business, secured a place for business, and transact some business in the state.

It cannot plausibly be said that *Houston* intended these ramifications. This is not a case where application of *forum non conveniens* would offend sensitivities, by denying to a Florida resident an opportunity to bring suit in Florida. Nor is this a case where application of *forum non conveniens* would deny any party a forum with similar jurisprudential attributes and comforts, a criticism often levied by those who would significantly curtail or even annul this common law remedy.

Contrariwise, this case embodies many of the absurd tail-wagging-the-dog facets which the special concurrence in *Calderon*, later embraced by the Third District, warned against when emphasizing the consideration that a major corporation with multistate contacts may conduct only a small, yet notable part of its business activities in Florida. In this case, for example, endorsing the Fourth District's (and hence Continental's) inflexible view of *forum non conveniens* would provide at least six state jurisdictions that Kinney could not contest as inappropriate locations for suit, assuming that those states applied the Fourth District's formulation. The list would include the three states where covered claims were adjusted, as well as New York, New Hampshire, and New Jersey. This example of forum profusion is an aspect of litigation that courts should

have the capacity to address. Reliance on classifications routinely used for testing jurisdiction is not going to provide that capability. Those components of the certified question which pose whether doing business or being registered to do business in Florida suffice to bar challenge to appropriateness of the forum, should be rejected.

3. In this case, the circuit court exercised proper discretion in dismissing the case for inappropriate forum.

Having established the nonresidency of all parties, the court should direct affirmance of the *forum non conveniens* dismissal in this circumstance because the other elements for its reasoned application were established by Kinney. First, it was undisputed that the contract cause of action sued upon accrued outside of Florida. Second, the circuit court adequately weighed the appropriateness of the forum and the existence of a more prudent alternate jurisdiction, in exercising its discretion to dismiss the action.

(a) The cause of action accrued outside Florida.

Continental's complaint alleged that Kinney breached the Retro Agreement when it failed to pay retrospective premiums to Continental in New York. When determining venue, a cause of action for breach of contract accrues where the contract is breached. *E.g., Borkson, Simon & Moskowitz, P.A. v. Troutman,* 534 So. 2d 928 (Fla. 4th DCA 1988); *Vital Industries, Inc. v. Burch*, 423 So. 2d 1023 (Fla. 4th DCA 1982).

A cause of action for breach of a contract to pay money due under a contract accrues where the defendant is obligated to pay and deliver the money. *Troutman*, 534 So. 2d at 929 (quoting *Schecter v. Fishman*, 525 So. 2d 502, 503 (Fla. 5th DCA 1988)).

Money owed is deemed payable at the creditor's residence or office where it transacts its customary business, unless the parties contractually agree on the place of payment. *See Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So. 2d 8 (Fla. 1967); *Troutman*, 534 So. 2d at 929; *Carter Realty Co. v. Roper Bros. Land Co.*, 461 So. 2d 1029 (Fla. 5th DCA 1985).

The Continental insurance policy and Retro Agreement did not designate any location for payment of premiums. An affidavit filed by Kinney in support of transfer of the action from Florida, reported that Kinney was invoiced for premiums in New York and made payments to Continental from New York. (R. 57). Alternatively, payment was to be made where Continental resided. *See Saf-T-Clean, Inc.*, 197 So. 2d at 8; *Borkson, Simon & Moskowitz,* 534 So. 2d at 929. Continental has its principal place of business in New Jersey, (R. 1), so the alleged payments could have been due by action of law in New Jersey, but certainly not in Florida. *See Saf-T-Clean, Inc.*, 197 So. 2d at 8; *Troutman*, 534 So. 2d at 929.

There has never been serious dispute that the contracts at issue in this commercial dispute were breached by one or the other parties out of state. The mere fact that performance of some duties under a contract take place in Florida does not make it the appropriate forum for a claimed breach of that contract.

(b) Dismissal was for the convenience of the parties and witnesses and in the interests of justice.

A Florida court may exercise its discretion and dismiss the action when a third element of *forum non conveniens* is satisfied -- that the interests of justice and convenience of parties and witnesses recommend that the case be litigated in another forum. *Adams*, 224 So. 2d at 798. The circuit court adequately fulfilled this discretionary duty, based on the evidence presented that Florida was an inappropriate forum in which to proceed.

The parties filed cross-affidavits on the motion. Kinney demonstrated nine factors supporting inappropriateness of the forum: (1) the dispute between Continental and Kinney concerns Continental's performance under contracts entered into in New York; (2) under the contracts sued on Continental was to provide coverage for worker's compensation claims in various states, and was to provide administrative services to Kinney; (3) Kinney retained two experts in New York to review Continental's performance under the contracts and ascertained from the documentary record available to both parties in the Northeast that Continental had committed certain errors and omissions; (4) the retained experts received documents where the documents were located in New York; (5) Kinney had suffered substantial damages as a result of Continental's errors and omissions, which included paying excessive claims for which Continental was to provide coverage and administrative services under the contracts; (6) to Kinney's knowledge all witnesses to the formation of the contracts, the parties' performance of the contracts, computation

amounts claimed by Continental under the contracts, the alleged breach of the contracts by Kinney, and Kinney's defenses to Continental's claims, defenses, counterclaims, and third-party claims and issues arising therefrom are residents of either New York or New Jersey; (7) that the documentary evidence in this case regarding the alleged breach of the contracts by Kinney is located in New York or is under the control of Continental in either New York or New Jersey; (8) Kinney's witnesses are primarily located in New York or otherwise are outside Florida (R. 59, ¶ at 13); and (9) Kinney is without power to compel unwilling out-of-state witnesses to attend trial in Florida. (*Id.* at ¶ 12).

Additionally, where as here the matter concerns the rights and obligations of parties to an insurance policy, the *lex loci contractus* rule implements Florida's choice of foreign law to resolve the disputed contract interpretation. *Lumbermens Mutual Casualty Co. v. August*, 530 So. 2d 293, 295 (Fla. 1988).

In substance, this case involves interpretation of a contract of insurance between two corporations, it does not directly implicate the interests of Florida residents. Continental has paid the claimants seeking workers' compensation coverage, both here and in two other states. The matter reprises much of the discussion from the *W.R. Grace* decision from Massachusetts, albeit that case involved more parties. There, the decisive concerns were that a coverage dispute involving claims arising from various jurisdictions not be adjudicated piecemeal, and that the better forum to adjudicate the matter was

the one state whose law would be applied and where the corporations principally resided. 555 N.E.2d at 218, 221. This case is centered in New York, and while it may have spokes in each of the several jurisdictions where Continental paid claims, the insurance contracts to be interpreted were negotiated in New York.

The court expressly found, among other things, that both Continental and Kinney are foreign corporations that have neither their corporate headquarters nor principal places of business within Florida. (R. 122; T. 28-29). The court further found that the action did not accrue in Florida but, instead, in New York. (R. 123). The trial court also found that the interests of justice would be better served by litigating this matter in New York, where Kinney was amenable to service of process. (R. 123). There was no abuse of discretion where the evidence substantially demonstrated that the interests of justice would be better served by litigating this matter in a forum other than Florida. Requiring a more elaborate or detailed proceeding to determine the motion would undermine its purpose, *Reyno*, 454 U.S. at 259, 102 S. Ct. at 267, particularly where so many factors favored the discretionary decision by the circuit court.

Continental previously acknowledged that apart from the edict in *New York Airlines*, the circuit court had discretion to dismiss the case on *forum non conveniens* grounds, but will urge that a plaintiff's venue selection is paramount. In this case, however, the circuit court had before it credible evidence that Continental's choice to file suit in Florida constituted forum

shopping, in an effort to impose additional obstacles and expense upon Kinney's defensive efforts. (R. 61-62). Forum shopping should, of course, be discouraged. *Adams*, 224 So. 2d at 800 (noting that element in discretionary determination to dismiss for *forum non conveniens*); *see also Yurgel v. Yurgel*, 572 So. 2d 1327 (Fla. 1990) (a central objective of Uniform Child Custody Jurisdiction Act is to discourage shifting of children from state to state as a way of forum shopping); *Wal-Mart Stores, Inc. v. Budget Rent-A-Car Systems*, 567 So. 2d 918 (Fla. 1st DCA 1990), *review denied*, 581 So. 2d 163 (1991) (court applied Florida law to contribution issue, in part to inhibit forum shopping).

The record amply demonstrates that the circuit court exercised "sound discretion" in dismissing the action. *Adams*, 224 So. 2d at 800. The case arose on a contract out of state; the parties reside elsewhere; the convenience of many witnesses is served by dismissal; and, forum shopping was involved. *Id.* Continental's choice of the Florida forum is owed no deference under the circumstances. *See Reyno*, 454 U.S. at 255-56, 102 S. Ct. at 266 (plaintiff's choice of forum deserves less deference when foreign forum selected).

Discretion of the circuit court is the foundation from which the doctrine gains its flexibility. The circuit court properly dismissed the action.

CONCLUSION

The answer to the certified question should reflect the conclusion that it is a corporation's principal place of business

which controls its residency for the purpose of applying the common law doctrine of *forum non conveniens*. The Fourth District's decision should be vacated, with directions to reinstate the order of dismissal entered by the circuit court.

Respectfully submitted,

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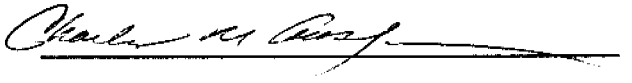

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