

Client Alert.

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New Year, New Ways to Fight the FNC Battle in Illinois *Fennell v. Illinois Central Railroad Co.*

By William O'Connor and Jessica Moore

A recent Illinois Supreme Court case represents an encouraging turn for aviation defendants in a state where it has been nearly impossible to achieve dismissal on *forum non conveniens* grounds in foreign aviation accident cases. The asbestos case of *Fennell v. Illinois Central Railroad Co.*, 2012 IL 113812 (Dec. 28, 2012) involved a *forum non conveniens* motion brought by the defendant where the plaintiff resided in Mississippi, the injury occurred in Mississippi or Louisiana, the defendant maintained offices in Mississippi and Tennessee, and the only connections to Illinois were the location of the attorneys' offices, some documentary evidence, and the location of one of the plaintiff's experts. In reversing the appellate and circuit court decisions denying dismissal on *forum non conveniens* grounds, the Illinois Supreme Court articulated the requirement that courts look at *all* public and private factors in the *forum non conveniens* analysis, and not focus on only one or two factors. While recognizing the trial court's discretion in ruling on *forum non conveniens* motions, the court chastised the circuit court for failing to recognize several private and public factors in its analysis. In ordering dismissal in favor of a Mississippi forum, the court noted "*far less deference*" should be given to the plaintiff's choice of an Illinois forum where the plaintiff does not reside, and the cause of action did not arise, in Illinois.

Although in the asbestos context, *Fennell's* emphasis on considering all public and private factors in the *forum non conveniens* analysis is a promising shift for aviation defendants trying to avoid an historically plaintiff-friendly forum. The Illinois State Court seems to be always open to aviation accident cases, no matter how little connection to Illinois the cases bear. Past attempts by aviation products liability defendants at achieving dismissal on *forum non conveniens* grounds have had little success. In 2009, the Illinois Appellate Court established a high hurdle for *forum non conveniens* dismissal in *Vivas v. Boeing*, when it declared: "when trial witnesses and evidence are scattered throughout different states . . . no single forum can be more convenient than another." This standard has made the required showing of relevant factors "strongly favoring" dismissal hard to come by in Illinois. In line with the *Vivas* decision, the Illinois Appellate Court affirmed a trial court order denying *forum non conveniens* dismissal in *Arik v. Boeing*. The suit involved a plane crash in Turkey, where the plaintiffs' only connection to Illinois was one Turkish-citizen plaintiff who resided in Chicago at the time of the accident. Twice in the short opinion, the court noted that potential witnesses and evidence were scattered among different states and countries and thus, no one forum was more convenient.

Fennell may prove to be a useful weapon for aviation defendants in Illinois State Court looking for a more convenient forum abroad or in the U.S. The opinion cuts against the *Vivas* theory that where there is evidence scattered across multiple states and countries, no one forum can be more convenient. Further, if unsuccessful at the trial court level, *Fennell* gives ample ammunition to attack any *forum non conveniens* denial on appeal where the trial court did not consider all private and public interest factors in the analysis.

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