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## **FORUM NON CONVENIENS**

The landmark case on the procedure to be used when a motion to dismiss based upon forum non conveniens is heard is the case of Kinney System, Inc. v. Continental Ins Co., 674 So. 2d 86 (Fla. 1996). In that case, the Supreme Court established a four-step analysis.

In Kinney, the Supreme Court required that the trial judge first determine whether an adequate alternate forum exists which possesses jurisdiction over the entire case. If the answer to that question is yes, the trial court must then determine that the relevant factors of the private interests of the parties favor the alternate forum rather than Florida, taking into consideration the strong presumption giving the plaintiff the right to initially chose the forum. If a determination of the party's interests are nearly equal, the Court must then determine that there are public interest factors which tip the balance in favor of the alternate forum. If all of those questions are answered affirmatively, the trial court must then determine that the plaintiff can, in fact, reinstate the suit in the alternate forum without either undue inconvenience or prejudice. It is only when all of those tests have been met that a case may be dismissed based upon forum non conveniens.

In TMW Corp. v. D & D Enterprises, Inc., 932 So. 2d 494 (Fla. 4<sup>th</sup> DCA 2006), the Kinney test was applied to affirm a trial court's refusal to dismiss based upon forum non conveniens. In that case, the plaintiff, a Florida corporation, purchased parts for an airplane from the defendant, a California

corporation. A contract was entered into that required the delivery of the parts as well as documentation which would allow the plaintiff to resell the parts. The parts came without the necessary documentation. The contract provided that the parts would be shipped by “UPS-Orange FOB Origin.” Defendant explained that the designation FOB stands for the term “free on board” and that under commercial law the title to the goods passed at the moment of shipping in the State of California. The defendant argued that under Pier Point Developers, L.L.C. v. Whitelaw, 912 So. 2d 18 (Fla. 4<sup>th</sup> DCA 2005), venue for an action for breach of contract was proper where the breach occurred. In this case the defendant argued that if there was a breach, it occurred at the moment of shipping and, in this case, that was in California.

The trial court denied the motion to dismiss and the defendant appealed. The Fourth District reverted to Kinney and its four-step analysis. After making the assumption that California was an adequate alternate forum, the Court turned its attention to the second step in Kinney as to whether the private interests of the parties which include “adequate access to evidence and relevant sites, adequate access to witnesses, adequate enforcement of judgments and the practicalities and expenses associated with the litigation” were at or near equi-pose. Inherent in making this determination, Kinney requires that the trial court take into consideration the strong presumption in favor of the plaintiffs’ choice of an initial forum. The Fourth District pointed out that under the circumstances of this case, it would be just as inconvenient for the plaintiff to litigate in California as it would be for the defendant to litigate in Florida. Thus,

the private interests of the parties were at or near equality. That being the case, the strong presumption in favor of the plaintiff's initial choice of forum tipped the balance in favor of the plaintiff and requires denial of the motion.

The Kinney case and its companion rule, Fla. R. Civ. P. 1.061, set the ground rules for the determination of whether a case can be dismissed based upon forum non conveniens. In the Kinney case, the Supreme Court receded from its opinion in Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978) and adopted the Federal doctrine of forum non conveniens first announced in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1946). The adoption of that doctrine was felt to be necessary to avoid the flood of litigation that was filed in Florida because of what appeared to be a more liberal interpretation of the forum non conveniens doctrine set forth in Houston as compared with the Federal version of that doctrine. Nevertheless, the Kinney tests are designed to ensure both that an adequate and available forum exists for litigation initiated in Florida and that dismissal for forum non conveniens is never granted absent a clear showing that all of the tests set forth in Kinney are met with due consideration to the strong presumption in favor of the plaintiff's right to chose an initial forum.

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