UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984	**MDL No. Docket No. 626 Misc. No. 21-38 (J. F. K.) ALL CASES**

SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF UNION CARBIDE CORPORATION'S MOTION TO DISMISS THESE ACTIONS ON THE GROUNDS OF FORUM NON CONVENIENS

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PRELIMINARY STATEMENT

Union Carbide's moving papers and reply papers set forth a detailed analysis of the facts and the case law on forum non conveniens which mandate dismissal of these actions. This supplemental memorandum of law is limited to the issues the Court permitted us to brief by its order of January 3, 1986.*

ARGUMENT

POINT I

The California Court of Appeals' Decision in Holmes is Inapposite

Plaintiffs have attempted in their supplemental papers to persuade the Court that the California Court of Appeals' decision in *Holmes* v. *Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773, *modified*, 157 Cal. App. 3rd 253 (Cal. App., 1st Dist. 1984) is entitled to "talismanic significance" in the federal courts.* However, their argument is directly contravened by the clear holding of the Court of Appeals in *Holmes*.

The Court in *Holmes* explicitly found that the "California law of non conveniens differs from federal law in two fundamental respects." As the Court recognized, "the rule of substantial deference to plaintiff's

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* Mr. Ciresi stated at oral argument that one of the cases cited by Union Carbide concerning impleader of third parties in India was not at the cite set forth in Union Carbide Corporation's reply memorandum of law. For plaintiffs' reference, we have included copies of the two cases. (See Exhibit A to Supplemental Memorandum of Law). It should be noted that the cases as cited in the brief were indeed correct. Plaintiffs apparently had difficulty with the indexing system of the All India Reports.

choice of forum has much greater importance in California than in federal courts after *Piper*." *Holmes, supra*, 202 Cal. Rptr. at 778. In *Piper*, the Supreme Court held not only that "a foreign plaintiff's choice of forum deserves less deference", 454 U.S. at 256, but also that "[a] citizen's forum choice should not be given dispositive weight. . ." 454 U.S. at 256, n. 23. In California, in contrast, the rule of substantial deference has been accorded to foreign plaintiffs. *Holmes*, 202 Cal. Rptr. at 778. Second, the *Holmes* court recognized that California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a forum non conveniens dismissal.

Of utmost importance to the pending motion, however, was the California court's recognition that "[t]o the extent *Piper* departs from California law—*i.e.*, on the two crucial points asserted, by Syntex—it is inapposite." 202 Cal. Rptr. at 779. Indeed, in a footnote to this discussion, the *Holmes* court recognized that in all other similar contraceptive drug litigation that had been pursued against American parent corporations in the federal courts and in other state courts, the appellate courts had uniformly either affirmed an order granting a forum non conveniens motion or reversed an order denying a forum non conveniens motion in which the foreign subsidiary had either manufactured, distributed, and/or marketed the contraceptive drug in the foreign forum. Those cases, rather than *Holmes*, control the federal court's decision in these actions. See *Dowling* v. *Richardson-Merrell, Inc.*, 727 F. 2d 608 (6th Cir. 1984); *Harrison* v. *Wyeth Laboratories*, 510 F. Supp. 1, *aff'd mem, op.*, 676 F. 2d 685 (3d Cir. 1982); *Jones* v. *Searle Laboratories*, 93 111. 2d 366, (1982); *Bewers* v. *American Home Products Corp.*, 99 A.D. 2d 649, 472 N.Y.S. 2d at 637, *aff'd*, 64 N.Y. 2d 630, 485 N.Y.S. 2d 39, 474 N.E. 2d 247 (1984). The California Court of Appeals stated:

> Because we follow California's law of forum non conveniens in the present case, these decisions are of *limited relevance* here.

202 Cal. Rptr. at 779, n. 3.

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* At the time Union Carbide Corporation received the decision in *Rehm* v. *Aero Engines., Inc.*, 2d Civ. No. B003800 (LASC No. C-381524), the opinion as filed on February 13, 1985 was "certified for publication." (See Exhibit A). The case was given a citation form, 164 Cal. App. 3d 715 and was printed in the advance sheets of West's reporter series. Plaintiffs' counsel informed us on January 3, 1986 that the Supreme Court of California has subsequently depublished the decision. Contrary to plaintiffs' interpretation of the Supreme Court's decision to depublish the *Rehm* case, the effect of such a decision by the Supreme Court cannot be read as an affirmation of the *Holmes* decision since the Supreme Court of California *never* affirmed the Court of Appeals' decision in *Holmes*. As Union Carbide Corporation correctly pointed out in its reply papers, the Supreme Court of California has never affirmed the holding in *Holmes*.

It therefore follows that because the California law of forum non conveniens as construed in *Holmes* concededly departs from federal law in two very fundamental respects, the *Holmes* decision has no relevance in the present litigation.

POINT II

Justice Bhagwati's Speech Demonstrates that the Judiciary in India is fully Cognizant of and Responsive to the Duty it Owes to the Indian People

Plaintiffs have filed supplemental documents concerning Justice Bhagwati's speech on the occasion of the 36th anniversary of the adoption of the Constitution of India. Plaintiffs thereby seek to persuade the Court that the Indian judicial system is incapable of handling these claims and that the poor and disadvantaged of India who were injured at Bhopal have been priced out of the legal system in India. Union Carbide has extensively answered both of these contentions in its reply papers.* It cannot be doubted that plaintiffs highlighted Justice Bhagwati's most vehement criticisms of the Indian judiciary. They failed, however, to put his address in context or to point out some of his more positive statements:

> I believe it should be the function of the Chief Justice of India on the Law Day to deliver an address on the state of the judiciary system, so that the people may know what ails the legal and judicial system, how far the Bench, the Bar and the Government are alive to their responsibility to the consumers of justice and whether any, and if so what steps are being taken to solve the problems and difficulties facing the legal and judicial system.

Plaintiffs could have just as readily cited to the numerous speeches and lectures criticizing the American judicial system by our own Supreme

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* Plaintiffs have not pointed out that Indira Gandhi launched a program of legal aid and even obtained an amendment of the Indian Constitution which provides:

> The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizens by reasons of economic or other disabilities. INDIAN CONSTITUTION, Amendment 42, Article 39A; Abel, Richard L., "Law Without Politics: Legal Aid Under Advanced Capitalism", UCLA L. Rev. 474 Feb. 1985.

Court Chief Justice Warren Burger. (*See, e.g.*, Speech of Chief Justice Warren Burger at the American Bar Association Mid-Year Meeting in April, 1984 attached hereto as Exhibit B). Chief Justice Burger, like Chief Justice Bhagwati in India, has been warning of a crisis in the American courts for many years.

In the mid-seventies, Mr. Justice Burger warned that delay and failure to resolve disputes "can create festering social sores and undermine confidence in society." "Crisis In Courts—New Moves to Speed Up Justice", U.S. NEWS & WORLD REPORT, July 18, 1977, p. 66. "The harsh truth is," as Mr. Justice Burger told the American Bar Association, "that unless we devise substitutes for the courtroom processes, we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated." *Id.*

Other United States judges have predicted that unless these burdens on state and federal courts are alleviated, there is a real danger that routine civil suits will never be heard. Legal experts are uniformly of the opinion that the United States, cannot continue meeting the problems of crowded courts simply by hiring more judges. As Maurice Rosenberg, Professor of Law at Columbia University recognized:

> This country already has more judges and more courts than anyone else in the world. We can't increase the courts in an unbounded way without cheapening the currency of the process.

Id.

More recently, in May, 1985, Mr. Justice Burger urged the American Law Institute to study the possibilities of eliminating personal and property damage lawsuits, juries in complex cases and trials in "multiple disaster" cases. Chief Justice Burger has also questioned whether traditonal jury trials are the most efficacious way to handle multiple disaster claims, such as airplane crashes. "Burger Asks Legal Profession to Consider Major Changes in Law", Washington Dateline, The Associated Press, May 14, 1985, PM cycle. (See Exhibit C).

One of Chief Justice Burger's most critical evaluations of the American judiciary came at the mid-year meeting of the American Bar Association in April, 1984. In that speech, Mr. Justice Burger spoke out on questionable lawyer advertising, costly legal expenses, excessive litigation, weak lawyer disciplinary procedures, discovery abuses and the eroding public confidence in lawyers. (See Exhibit B). The Chief Justice stated: "Our system is too costly, too painful, too destructive, too insufficient for a truly civilized people."

Mr. Justice Burger also condemned the discovery abuses that prevail in the federal courts. He noted the experience of a legal practitioner who lamented the practice that he described as "filing a complaint based

almost on rumors and then embarking on months of extensive pretrial discovery to find out if his client had a case." *Id.* at 65.

As these and many other comments by leading judges and scholars of the American judiciary make clear,* the American system has been criticized as vehemently and as frequently as the Indian judicial system. Indeed, the speeches of Chief Justices Burger and Bhagwati should more appropriately be viewed as "annual speeches to berate the profession", speeches that the highest judicial figures in both countries are almost "required" to make. Such comments by the highest chief justices do a great service to the legal profession, since, although most of the problems inherent in both systems have already been discussed within the profession, those discussions carry less weight than having the chief justices of the respective countries state: "I see this problem from where I sit at the top of the apex and I am concerned." As both Chief Justices Burger and Bhagwati recognize, the single way to ameliorate the problems in the respective judicial systems is to discuss them. Confronting problems should be considered an indictment of either the Indian or the United States system. Rather, Justice Bhagwati's speech, in which he shared his commitment to "this great endeavor in which we are engaged namely to secure social justice to the people of this country" is a tribute to the progress that has been made in the Indian Republic in the 36 years since the adoption of the Constitution of India.

More recently than the speech of Chief Justice Bhagwati referred to by plaintiffs, he wrote on December 7, 1985:

> We would like to dispel an impression in the public mind that claims for compensation cannot be speedily adjudicated in the Indian Courts.

(Order of P.N. Bhagwati directing the expedited adjudication of claims for compensation on behalf of persons affected by a series of gas leaks in New Delhi, India, in November and December 1985).

And, in the hearings being held this week in connection with the claims arising from those gas leaks in New Delhi, Chief Justice Bhagwati has stated that he would decide the issues of liability and damages in the immediate future.

POINT III

Amici's Arguments are Based on Assumption of Union Carbide's Liability and Alleged Control over Union Carbide India Limited, Factors which are Immaterial in the Forum Non Conveniens Context

On analysis, the control issue raised by amici and plaintiffs is a red

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* Union Carbide Corporation, in its reply memorandum of law, referred to some other commentaries which have severely criticized the American judicial system.

herring. It is absolutely irrelevant to the forum non conveniens analysis. Even assuming arguendo that UCIL did not exist, that the Indian employees of UCIL were employees of a branch office of Union Carbide Corporation and that the local Indian contractors of UCIL were in fact local Indian contractors of Union Carbide Corporation, under the forum non conveniens principles enunciated in *Piper* and *Gilbert*, the result is clearly the same—the litigation belongs in India.

Moreover, almost all of the amicus brief's arguments for trial in the U.S. simply proceed on the unfounded assumption that it is self-evident that the American company, Union Carbide Corporation, was the sole proximate cause of a disaster that took place halfway around the world, at an Indian company plant managed, maintained and operated exclusively by Indians, and that no Indian companies or persons were responsible. Paradoxically, amici argue for trial in the U.S. as if trial was already over or unnecessary.

Thus, the amicus brief argues *inter alia* that trial should be here because the "disaster [was] made in the U.S.A." (Amicus Brief at 18) and "Union Carbide is responsible" (*id.* at 3), or because plaintiffs' recovery supposedly will come quicker here (*id.* at 2, 23) and the upshot will be a verdict that will deter alleged misbehavior of American "multinational" corporations (*id.* at 11, n. 11, 19). All of these arguments beg the question of liability and—contrary to all of the controlling case law—seek to have the court reach the liability issue before determining the appropriate forum.

Similarly, the amicus brief simply assumes that Union Carbide controlled Union Carbide India Limited and its Bhopal plant—Amici argues from a hodge-podge of news and trade Union reports and ignores all of the strict legal tests for when one corporation is the alter ego of another and when the "corporate veil" between the two may be pierced. Neither this unproven allegation of control, the allegation that, six years before the disaster, Union Carbide Corporation trained a few of the thousands of Indian plant workers, nor the unfounded assertions that: Union Carbide Corporation's every limited role in the process design over a decade before the disaster proximately caused: the tragedy have any bearing on where trial is most conveniently held.

These issues do not even begin to shift the balance of where most of the relevant evidence is located. Only eleven documents (336 pages) in 78,001 pages seized by the Indian Central Bureau of Investigation and produced by plaintiff have shown any Union Carbide Corporation contact with the Bhopal plant during the almost five-year period between the plant's start-up and the disaster. Moreover, the last American who was employed at the UCIL plant left over two years prior to the disaster. Significantly, in contrast, in *Piper, supra,* the connections of American manufacturers to the accident were plain and direct. And, though the question of the American connection was clear even without the need to resolve disputed issues of control, the Supreme Court affirmed the case's dismissal.

Nor does *Manu International, S.A.* v. *Avon Products, Inc.*, 641 F.2d. 62 (2d Cir. 1981), cited by amici at oral argument, stand for the proposition that allegations of control over foreign subsidiaries are determinative of forum non conveniens motions. *Manu* discussed allegations by plaintiff, a Belgian corporation, that an American corporation alone and in concert with two of its wholly-owned foreign subsidiaries misappropriated the services of its key agent and sources of supply in Taiwan. Significantly, *Manu* preceded the Supreme Court's decision in *Piper;* hence the *Manu* court accorded great weight to plaintiff's choice of forum even though plaintiff was foreign (*id.* at 55), and also suggested that the doctrine of forum non conveniens was nearly outmoded in the jet age (*id.*). Clearly, neither of these approaches can survive *Piper.*

Most significantly, even though the court found support, in the record for Manu's contention that Avon had damaged it through a conspiracy with wholly-owned corporations it controlled (*id.*), the *Manu* court put aside these allegations in deciding the forum non conveniens issue. *Id.* Instead of relying upon control allegations, the court performed a relatively standard forum non conveniens analysis. Examining the location of witnesses and documents, it found that since they were not predominantly Taiwanese, this factor did not favor foreign trial. Moreover, trial in *Manu* could easily be held in the United States because neither a view of the physical location nor a deprivation of live witness testimony was at issue, and key documents were in English, a language most key witnesses spoke (*Id.* at 66-67). In these respects and another key respect—plaintiff represented that if trial were in Taiwan it would abandon the case (*id.* at 67)—*Manu* had facts that were quite opposite to those of the Bhopal cases. Thus, even if its basic approaches had not been completely undercut by the Supreme Court in *Piper*, *Manu* would still not stand for the proposition that allegations of control are relevant to a forum non conveniens determination.

Amici and plaintiffs attempt to narrow the focus of the issues in these cases exclusively to the issue of Union Carbide Corportion's alleged control over its bare-majority owned foreign subsidiary, Union Carbide India Ltd., and Union Carbide's control of the subsidiary's plant design, excluding as a causal factor the day-to-day operations of the subsidiary or the activities of its employees or others on the day of the tragedy and the days and years before. But in case after case following *Piper*—including many cases in which the foreign subsidiary in question was wholly-owned—the bare allegation that injury was proximately caused by an American parent company's design activities in the U.S. has not barred forum non conveniens dismissal, especially when injury followed years after design. *Piper, supra,* 454 U.S. at 260-61; *Dowling* v. *Richardson-Merrell, Inc., supra,* 727 F. 2d 608 (6th Cir. 1984); *Pain* v. *United Technologies Corp.*, 637 F. 2d 772 (D.C. Cir. 1980), *cert denied* 454 U.S. 1128 (1981); *Rubenstein* v. *Piper Aircraft Corp.*, 587 F. Supp. 460 (S.D. Fla.

1984); *Nai-Chao* v. *Boeing Co., supra* 555 F. Supp. 9; *In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980,* 538 F. Supp. 1141 (D.D.C. 1982); *Abiaad* v. *General Motors Corp.*, 538 F. Supp. 537 (E.D., Pa.), *aff'd without op.*, 696 F. 2d 980 (3d Cir. 1982); *Harrison* v. *Wyeth Laboratories, Etc.*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd without op.*, 676 F. 2d 685 (3d Cir. 1982); *Dahl* v. *United Technologies Corp.*, 472 F. 696 (D. Del. 1979), *aff'd*, 632 F. 2d 1027 (3d Cir. 1980). See also, *Purser* v. *American Home Products Corp.*, 80 Civ. 710, slip op. (S.D.N.Y. Jan. 30, 1981).

Were that not the rule, the careful balancing of private and public interests prescribed by *Piper* would never be necessary once plaintiff alleged a design or product defect and control over a foreign subsidiary at the scene of the injury. The balancing analysis of the above-cited cases shows that amici and plaintiffs cannot escape the fact that the Bhopal disaster occurred in India, and involves tens of thousands of Indian citizens living in India, the country with the greatest interest in this litigation.

POINT IV

Amici's so-called "Public Interest" Factors are not Paramount, do not Compel Trial here, and would Compel Every Foreign Case with an American Corporate Party to be Tried here

Amici also argue that such supposed "public interest" factors as the size of these actions, its newsworthiness and attendant public attention, the desirability of well-informed safety regulations and deterrence of negligence favor trial in this Court. None of these factors is nearly as important as the public and private interest factors which indicate that a trial in the United States would be extremely burdensome.

Nor do any of the arguments amici constructs from these factors have any limiting principle where an American corporate party is involved. Forum non conveniens law does not direct that American corporations must always be tried in U.S. courts at the behest of foreign plaintiffs who have suffered injury in foreign lands; that principle would destroy the entire doctrine of forum non conveniens, for there is no logical reason to confine it to "multinationals" and not apply it to any alleged wrongdoing by American citizens.

As to amici's deterrence theory, the *Piper* Court twice rejected arguments that deterrence was a significant factor in forum non conveniens motions. 454 U.S. at 237 n. 24, 260-61, Its reasoning is pertinent here especially when any incremental deterrence the locus of trial carries, compared to the tragedy and potential liability, is weighed against what the *Piper* court deemed "the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 260-61.

The Supreme Court in *Gulf Oil* v. *Gilbert* 330 U.S. 501, 508 (1947), and again in *Piper* identified four important considerations which should be taken into account in forum non conveniens motions. While the Court identified these "public interest" factors, listing them shows that it was not using the term "public interest" in the same sense that amici use it in their brief. The factors the Supreme Court identified were: (1) administrative and practical difficulties for the courts, (2) avoiding undue burdens on juries in localities with no connection to the events, (3) the local interest in having localized controversies decided at home and (4) avoiding the need for the U.S. court and jury to understand and apply foreign legal standards and solve complex problems in conflict of laws. See also *Krimicis* v. *Panoceanic Navigation Corp.*, 83 Civ 5667 (JFK), *slip op.* (S.D.N.Y. November 13, 1985). As defendant's previous submissions have already demonstrated, these "public interest" factors clearly and decisively point to trial in India.

Forum non conveniens law does look to where a controversy is localized. But the real locus of a controversy depends upon the location of the facts in controversy and the real parties in interest, not upon the location of lawyers, commentators or the media audience. For all of the reasons set forth in Union Carbide's prior papers on the motion, this case is overwhelmingly centered in India.

CONCLUSION

For the reasons set forth herein, in the affidavits submitted previously, in Union Carbide Corporation's opening and Reply Memoranda of Law and the affidavits accompanying them, it is respectfully submitted that Union Carbide Corporation's motion to dismiss these actions on the grounds of forum non conveniens should be granted.

Respectfully submitted,

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