

New Jersey Law Journal

ALM

Robert Steinbaum

Publisher

October 26, 2005

Dennis M. Gonski, Esq.
Dollinger, Gonski & Grossman
Suite 212
710 Route 46 East
Fairfield, NJ 07004

Dear Mr. Gonski:

I am pleased to enclose a master reprint of your article, "Comity: More Than A Courtesy, Less Than An Obligation," which was published in the "In Practice" column of this week's *New Jersey Law Journal*.

This master reprint contains copyright permission allowing you and your firm to make unlimited copies. To facilitate making those reprints, your firm may desire to take advantage of the Law Journal's program for providing glossy 4-color reprints, with its discounted rates for authors. A brochure is enclosed.

Your firm may also post the article on its web site. To obtain an electronic version suitable for web posting, please e-mail me, and we will reply with an attached pdf file.

We welcome future submissions.

Sincerely yours,



P. O. Box 20081
238 Mulberry Street
Newark, NJ 07101-6081
www.njlj.com
tel: 973.854.2940
fax: 973.642.0920
rsteinbaum@amlaw.com

STATEWIDE LEGAL AUTHORITY SINCE 1878

New Jersey Law Journal

VOL. CLXXXII—NO. 4—INDEX 236

OCTOBER 24, 2005

ESTABLISHED 1878

IN PRACTICE

CIVIL PRACTICE

By DENNIS M. GONSKI

Comity: More Than a Courtesy, Less Than an Obligation

A comity stay may be the most effective tool in preventing parallel lawsuits in two jurisdictions

A situation occasionally arising in aggressively litigated disputes is the filing of multiple lawsuits venued in different jurisdictions. An insurer files suit in New York or Philadelphia. The insured counters by filing its own lawsuit in New Jersey. Two parallel lawsuits, each in sister states, pending in courthouses located only five miles apart. Each plaintiff claims the traditional right to choose the forum. Each defendant suffers the burden of demonstrating the chosen forum is not appropriate.

What to do? Must there be parallel lawsuits in two jurisdictions?

Proving Serious Inconvenience

With the proximity of New Jersey to both New York and Philadelphia, the traditional doctrine of forum non conveniens may prove difficult to justify. That doctrine applies only where there is a serious inconvenience to litigation in an otherwise proper forum. What serious inconvenience can arise when the com-

peting forum is but a bridge span away? And why should a New Jersey resident be deprived of the right to sue in New Jersey? The mere fact that an action may be already filed in a foreign jurisdiction, even if involving the same parties and issues, does not automatically bar prosecution of a second action here in New Jersey. Indeed, once jurisdiction is properly established, the choice of New Jersey as the forum state will generally be upheld, regardless of how many other actions are pending and no matter when each action was filed. The general rule applied in resolving forum non conveniens motions is to favor retention of properly obtained jurisdiction unless New Jersey, as the challenged forum, is a clearly inappropriate venue.

A forum non conveniens motion will likely not preclude duplicitous litigation. However, that is not the final word. The defendant's failure to establish a forum non conveniens argument does not automatically assure a plaintiff his "day in court" in New Jersey.

The doctrine of comity, however, permits a New Jersey court to order a stay of its own proceedings pending the disposition of a parallel case brought in a foreign court.

The Golden Rule

Comity depends not on jurisdiction; not on legal priorities; not even on

a determination of propriety of forum. Comity is based upon a manifestation of the "golden rule" as extended between courts: Each court shall give respect to the proceedings of others, as it would have others give unto its own, in similar circumstances.

Unlike forum non conveniens, "comity" is known as a rule of judicial "abstention." Comity is applied ad hoc, based in part upon a predilection toward the avoidance of parallel litigation; in part upon respect for the laws of other jurisdictions; and in part upon a policy favoring the efficient use of judicial process. A recent example of a New Jersey ruling in a comity situation is *Exxon Research and Engineering Co. v. Industrial Risk Insurers*, 341 N.J. Super. 489, (App. Div. 2001), where the court described the doctrine of comity as one whose application is dependent upon the special equities in which it arises:

Although the principle of comity grows out of a predilection toward abstention, its application is nevertheless flexible, being dependent upon the 'special equities' of the case, the existence of which are left to the sound discretion of the trial court, which must essentially determine whether it is fair to have its citizens' rights adjudicated by a foreign court. *Exxon Research*, 341 N.J. Super. at 505.

Gonski is a member of Dollinger, Gonski & Grossman of Fairfield, practicing in the area of title insurance law

The language used by the court in the *Exxon Research* case is an apparent softening of earlier expressions of the doctrine, such as found in *Stultz v. Stultz*, 15 N.J. 315 (1954), where the Supreme Court prescribed the application of comity with the use of language such as "forbidden interference" (with pending proceedings in foreign courts) and "propriety of exercise":

Considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief and doing complete justice, unless there be a special equity sufficient in conscience to stay the hand of the defendant. The question is not the existence of the power but the propriety of its exercise in a given case. The rule of comity is grounded in the policy of avoiding conflicts of jurisdiction, unless upon strong grounds, and the general principle that the court which first acquires jurisdiction of the issue has precedence." *Stultz*, 15 N.J. at 319-320, citing Justice Harry Heher in *O'Loughlin v. O'Loughlin*, 6 N.J. 170 at 178-179 (1951).

Comity is therefore to be considered something more than a mere courtesy, but less than an absolute obligation. It has at its gravamen two considerations summarized by Judge A. Dayton Oliphant in *Fantony v. Fantony*, namely: (1) dual jurisdiction over the subject matter of the dispute, and (2) public policy considerations under New Jersey law:

The rule of comity is grounded in the policy of avoiding conflicts in jurisdiction, unless upon strong grounds, and the general principle that the court which first acquires jurisdiction of an issue has precedence, in the absence of special equities. A lit-

igant cannot be compelled to act elsewhere, but may remain in the court which first acquires jurisdiction and abide by the terms of its decree. *Fantony v. Fantony*, 21 N.J. 525, 533 (1956).

Comity Application Test

A general test for comity application was established in *American Home Products Corp. v. Adriatic Insurance Co.*, 286 N.J. Super. 24 (App. Div. 1995):

1) There must be another action already filed in another jurisdiction;

2) Both cases involve the same parties, the same claims and the same legal issues; and

3) The plaintiff will have the opportunity for adequate relief in that other jurisdiction.

Once these three test requisites have been established, the moving party is said to enjoy a "clear entitlement to comity-stay relief" and the burden falls upon the plaintiff to demonstrate that "special equities" exist that are sufficiently compelling to permit a second action to proceed. *Id.*

Borrowing from Federal Law

The New Jersey test for comity is in many aspects very similar to the test used by the federal court to determine the applications of the federal doctrine of abstention. The federal courts, however, apply a series of eight factors in determining the exercise of discretion in the application of the federal doctrine of abstention:

(1) the identity of the court that first assumed jurisdiction over the property; (2) the relative inconvenience of the federal forum; (3) the need to avoid piecemeal litigation; (4) the order in which the respective proceedings were filed; (5) whether federal or foreign law provides the rule of decision; (6) whether the

foreign action protects the federal plaintiff's rights; (7) the relative progress of federal and foreign proceedings; and (8) the vexatious or contrived nature of the federal claim. *Exxon Research and Engineering Co. v. Industrial Risk Insurers*, 341 N.J. Super. at 508 (App. Div. 2001), citing *Finova Capital Corp. v. Ryan Helicopters, USA, Inc.*, 180 F.3d 896, 898-99 (1999). See also, *City of Philadelphia v. Austin*, 86 N.J. 55 (1981), which also borrowed from the federal test.

The doctrine of comity is a most powerful alternative argument in situations where a forum non conveniens application will likely fail.

On a forum non conveniens motion, the movant must demonstrate:

1) Serious inconvenience if the case were to proceed in the plaintiff's chosen forum;

2) A transfer of the case or deferring the case to the motion forum will not result in significant hardship to the plaintiff;

3) The plaintiff's chosen forum is demonstrably improper or inappropriate; and

4) Public and private factors including accessibility of proof; availability of witnesses; administrative difficulties; and availability of a more appropriate forum.

Comity, on the other hand, is animated primarily by judicial discretion, and is freely exercised in favor of a stay when there is already another action pending before a foreign court equally capable of rendering prompt and complete justice, to the same parties on the same issues.

A comity-stay may well be, in the last analysis, the most effective tool in preventing an aggressive defendant from seeking to defeat litigation in an out of state forum, by the mere commencement of parallel litigation in New Jersey. ■