

INTERNATIONAL LITIGATION

*The U.S. Jurisdiction To Prescribe and
the Doctrine Of Forum Non Conveniens*

BY ALLAN I. MENDELSON



SINCE THE 1945 DECISION BY JUDGE LEARNED HAND IN *United States v. Aluminum Co. of America*¹ (colloquially known as the “Alcoa” case), it has become well-established law that the Sherman Antitrust Act—

legislation that was adopted over 100 years ago—applies to and prohibits conduct in foreign countries if that conduct has an illegal “effect” in the United States.² The very important issue today is the extent to which the Sherman Act and other U.S. legislation applies to conduct in foreign countries and the circumstances in which it can be applied. This issue is of substantial importance, especially because recent U.S. Supreme Court decisions do not clearly define the exact reach and limits of U.S. jurisdiction on the international scene. In the United States, this jurisdiction is now known as the “jurisdiction to prescribe”—in contrast to the jurisdiction that we all know as the jurisdiction to adjudicate.³

In the *Alcoa* case, a group of foreign companies (including a company owned by Alcoa, but incorporated in Canada) agreed on quotas to restrict worldwide aluminum production and distribution, including in the United States.⁴ The U.S. government brought a criminal action against the companies, and the parties were found guilty of violating § 1 of the Sherman Act by conspiring to restrict importation of aluminum into the United States.⁵

The number of important similar cases, both civil and criminal, that have been brought under the Sherman Act since the 1945 *Alcoa* decision would be difficult to count. Only the U.S. government can bring criminal actions under the Sherman Act.⁶ Private litigants, on the other hand, bring civil actions and seek to collect treble damages if a violation is found.⁷ It is not at all unusual for the U.S. government to bring a criminal action, for the offending parties to either plead or be found guilty, and then for private parties to bring civil suits seeking treble damages. The cost of engaging in conduct that violates the U.S. antitrust laws is thus so substantial as to discourage all but the most dedicated (or elusive) from engaging in such conduct.

Post-*Alcoa* Antitrust Decisions

A discussion of post-*Alcoa* cases must include not only the interplay between the U.S. and U.K. governments in the quite famous *Laker*⁸ cases, but also the most recent antitrust cases that were brought, apparently jointly, by the United States and the European Commission (EC) against British Airways (BA), Virgin Atlantic Airlines, Lufthansa, Korean Airways, and other international air carriers for fixing cargo and certain passenger rates on North Atlantic and Pacific travel. Though a late starter, the EC is now very aggressive, and in various ways is even more aggressive than the United States about its jurisdiction to prescribe, in which the EC applies its competition law, particularly Articles 81 and 82 of the Treaty of Rome, to conduct, wherever it may occur, that has an anticompetitive effect within the European community states.⁹

But before getting to these most recent cases, three important antitrust cases must be considered. All three—two of which reached the Supreme Court—have been of critical significance in helping to determine the limits of U.S. jurisdiction to prescribe.

The first of these is the so-called *Laker*¹⁰ case, which involved Freddy Laker, an Englishman who was the first

entrepreneur to establish a truly transatlantic low-cost air carrier.¹¹ Though his airline closed after less than five years of operations, Laker left a trail of some of the most important litigation in the U.S. courts.¹² The second case is the so-called insurance antitrust case that was litigated in the early 1990s and decided by the U.S. Supreme Court in 1993—*Hartford Fire Insurance Co. v. California*.¹³ The third case is the 2004 Supreme Court decision in *F. Hoffmann-La Roche Ltd. v. Empagran*.¹⁴ Each of these cases has been of unique importance in American and international law.

The Laker Litigation

Freddie Laker, later to be knighted by Queen Elizabeth on the recommendation of Margaret Thatcher and known as “Sir Freddie,” started his airline service to the United States in September 1977 and shut it down in February 1982.¹⁵ It was a successful “discount” service that reached a level of some 40 weekly scheduled transatlantic flights. Some say that he was forced to shut down because he had overextended himself.¹⁶ Sir Freddie, however, claimed that his shutdown was because of an antitrust conspiracy by BA and others (including Pan Am, TWA, and other major International Air Transport Association carriers) that included predatory price-cutting and other illegal conduct.¹⁷ The case, which Sir Freddie originally filed in the U.S. federal district court in Washington, D.C., seeking treble damages under the Sherman Act, turned out to be a marathon of international litigation.

Very shortly after Laker’s Washington, D.C., filing, BA brought an action in London seeking a declaration of “non-liability” to Laker and an injunction preventing Laker from continuing his suit in Washington.¹⁸ After all, so BA argued, both airlines were British carriers, and there was simply no reason for a dispute between them to be litigated in a U.S. court. The London court agreed and ordered Laker to discontinue his suit in Washington. Laker then immediately appealed the London decision.¹⁹ Within days of that appeal, however, Judge Greene in the Washington, D.C., federal district court enjoined Pan Am, TWA, and the other defendant airlines from joining BA’s London suit and ordered a full hearing.²⁰

Meanwhile, the British government, acting under the U.K.’s 1980 Protection of Trading Interests Act, issued an order preventing BA from complying with any discovery or other order of the federal court in Washington, D.C., and from providing any documents or other evidence to the plaintiffs there.²¹ On appeal from the lower court in London, the London appeals court issued a permanent injunction preventing Laker from pursuing the Washington, D.C., action.²² At the same time, however, a divided U.S. Court of Appeals affirmed Judge Greene.²³ The appellate court concluded that the “prescriptive jurisdiction of the U.S. antitrust laws unequivocally holds that the antitrust laws should be applied,” and that the case should move forward notwithstanding what was happening in London.²⁴

At that point, no one was prepared to predict who would blink. But in a scholarly and exhaustively well-reasoned decision, Sir Kenneth Diplock, of the U.K. House of Lords, concluded that, even though both Laker and BA were British carriers, the U.S. courts nevertheless had jurisdiction over both the parties and the subject matter.²⁵ Lord

Diplock stated that it would be improper for an English court to enjoin Sir Freddie from pursuing a remedy for an alleged antitrust violation in the only court where such a remedy is available.²⁶ And thus, one of the most fascinating and serious international judicial confrontations came to a resolution—but not without definitively: (1) confirming the applicability of the U.S. antitrust laws in a modern international context; (2) illustrating the willingness of U.S. courts to provide a remedy for a foreign plaintiff no different than would be provided to a U.S. plaintiff; (3) possibly discouraging legal practices that have come to be known as anti-suit injunctions or parallel litigation, and finally (4) upholding the prescriptive jurisdiction of the United States but in a manner that did not cause major damage to British Airways.²⁷

Hartford Fire Insurance v. California: *the Insurance Antitrust Case*

The second critical case concerning U.S. jurisdiction to prescribe was a civil suit brought under the Sherman Act by the attorneys general of 19 states and by numerous private parties.²⁸ The suit charged that several American and foreign insurance companies, and especially a number of underwriters at Lloyd's of London, had unlawfully agreed to certain new rules that had the effect of making various forms of insurance and reinsurance unavailable in the U.S. market. These new rules, the plaintiffs argued, eliminated so-called occurrence-based coverage and allowed only "claims-made coverage."²⁹ This change became very important in the context of the asbestos claims in the United States and also the recurring litigation involving underground chemical pollution.³⁰

Under occurrence-based coverage, it made no difference when the damage was discovered, so long as it occurred when the policy was in force, for example, when the asbestos was installed or when the underground chemical pollution originally occurred.³¹ In other words, insurers could almost never close their books on a policy even though the policy was written only for a limited period of time. Under claims-made coverage, if the policy was for a specific time period, a claim would have to be made within that period or be barred forever.

The American plaintiffs argued, and the Lloyd's of London defendants did not dispute, that the problems for the U.S. market all resulted from the fact that it was the London-based companies that had formulated the new policy and had agreed not to reinsure any U.S. insurance companies except for claims-made coverage.³² The London defendants argued, on the other hand, that what they had agreed to was perfectly legal in the United Kingdom and in full compliance with a regime of regulation that had been approved by the British Parliament.³³ In short, the defendants argued, if the conduct was legal where conceived and adopted, it should not be subject to the extraterritorial reach of U.S. law.

After some six years of litigation, the U.S. Supreme Court, in a 5-4 decision, held that so long as British law did not require the British underwriters to act as they did, there was no conflict between British law and U.S. antitrust law.³⁴ Therefore, U.S. antitrust law could legally be applied to the conduct of the British underwriters. In other words, if

the law of the foreign country where the action was taken did not require the action to be taken, then there was no true conflict of laws, and thus the U.S. antitrust laws could apply if the action—even if legal where taken—resulted in unlawful effects in the United States.³⁵ This is perhaps the furthest extension of the prescriptive jurisdiction of the United States approved by the U.S. Supreme Court.

F. Hoffmann-La Roche Ltd. v. Empagran

F. Hoffmann-La Roche happens to be one of the most recent, as well as one of the most fascinating, antitrust cases raising the issue of the reach of the U.S. prescriptive jurisdiction. Beginning in 1989 and continuing for some 10 years, a group of foreign drug manufacturers, led by F. Hoffmann-La Roche Ltd. of Switzerland and BASF of Germany, entered into worldwide market sharing and price-fixing arrangements for the sale of various vitamins used as nutritional supplements.³⁶ Although no U.S. company was involved in the conspiracy, the foreign companies all supplied U.S. companies and otherwise did business in the United States.³⁷

In May 1999, the U.S. Department of Justice announced that F. Hoffmann-La Roche Ltd. and BASF had pleaded guilty to a worldwide criminal conspiracy and had agreed to pay fines of \$500 million and \$225 million, respectively.³⁸ Other foreign firms later pleaded guilty and paid substantial fines.³⁹ Significantly, on this occasion the EC also later weighed in, fining F. Hoffmann-La Roche Ltd. and seven other companies €855 million for participating in the conspiracy.⁴⁰ Shortly thereafter, private U.S. lawyers began to file civil suits seeking treble damages on behalf of American purchasers.⁴¹ Most of these cases—which did not include any foreign plaintiffs—were settled with payments in excess of \$1 billion.⁴² The question that came to the U.S. Supreme Court in 2004 was whether U.S. antitrust laws provided a remedy for foreign plaintiffs who were damaged by the unlawful conspiracy but whose purchases from the conspirators involved delivery of the vitamins outside the United States.⁴³

In a lengthy and well-reasoned decision, Supreme Court Justice Stephen Breyer, rejecting the contention that the sales were all made in only one global market, concluded that the U.S. antitrust laws were not intended to apply to foreign conduct that caused damage to foreigners abroad.⁴⁴ If foreign countries wished to protect their citizens and provide them a remedy against anticompetitive conduct, it was up to them to do so; it was not for the United States to do so in the absence of such a remedy in the foreign country. Justice Breyer also pointed out that several foreign countries had filed amicus briefs in the case, arguing that to apply the treble damage remedy of the Sherman Act would unjustifiably allow the citizens of these foreign countries "to bypass their own less generous remedial schemes." Justice Breyer then laid down what could be very important law for future prescriptive jurisdiction cases in the United States:

"[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."⁴⁵

The U.S. Doctrine Of Forum Non Conveniens

Two other areas of U.S. prescriptive jurisdiction—securities law and maritime law—will be considered in this article to show the similarities and differences in the ways that the United States applies its prescriptive jurisdiction in these areas. But before doing so, it would be useful to focus on another very important emerging area of U.S. law that in fact suggests an unusually interesting trend in the development of U.S. law and practice on the international scene. This is an area in which, as in *F. Hoffmann-La Roche*, it seems that the United States is becoming increasingly reluctant to open its courts and to grant its generous remedies to foreign plaintiffs.

The public is well aware of the many international aviation crashes that have occurred in recent years and of the tragic events that accompany these disasters. What we rarely, if ever, focus on, however, is the litigation that is brought after the tragedy by the victims' survivors. In almost all of these cases, the plaintiffs bring their suits in the United States.⁴⁶ For example, cases were recently brought in the U.S. federal district court in Miami by the survivors of the 160 victims of a crash that occurred in Venezuela in August 2005.⁴⁷ All victims were foreign citizens, the airline was of foreign (Colombian) registry that did not operate or do business in the United States, and the accident occurred on a trip between two foreign points.⁴⁸ In short, there was almost no connection between any aspect of the accident and the United States (except for an individual who lived in Florida and who helped to arrange for the airline to provide the flights between the two foreign points).

The role played by the Florida resident was very minor. Even if it had been major, it would have been appropriate to—as was done—file a motion promptly in the Miami court for a dismissal of the suit based on the doctrine of forum non conveniens. This is a common-law doctrine that has been developing in the United States for at least the past 50 years and that permits a court to direct a case to another court when it concludes that certain public and private interest factors weigh in favor of such a conclusion.⁴⁹ As I have been urging for some time, the doctrine of forum non conveniens should be used in every aviation crash case when foreign victims or their survivors sue in U.S. courts.⁵⁰

There is almost no aviation crash today that does not involve victims of multiple nationalities, including U.S. nationals.⁵¹ Under forum non conveniens, the issue of liability—that is, who was responsible for the crash: the airline, its pilots, air traffic control, the aircraft manufacturer, a subcontractor, etc.—would generally be determined by the U.S. court.⁵² Once liability has been largely determined (or as is often the case—if liability is admitted or stipulated to by the participating defendants in the case), then under forum non conveniens, every foreign plaintiff's suit should be dismissed with directions that it can be refiled in his or her domicile court for determination by that court—not by the U.S. court—of the damages he or she is entitled to receive. To be sure, if the case happens to involve only one or a few foreign passengers on an otherwise U.S. domestic flight, it may be easier simply to resolve their cases here. But in the multiple-party actions brought in the United States following aviation disasters in international air

transportation, forum non conveniens is clearly the preferable and fairer approach for the foreign plaintiff—victims or their survivors.

It is no secret why foreign plaintiffs prefer to sue in the United States. There are at least three reasons. First, they can find excellent lawyers, highly experienced in aviation tort law, who will generally handle their cases on a contingency fee basis.⁵³ Second, there are very substantial opportunities for discovery that are readily available in U.S. courts. And finally, it is well known that recoveries in the United States, for a number of reasons, are much more generous than they are anywhere else in the world.

It seems, however, that for many of the same reasons Justice Breyer did not want to export U.S. law or engage in “legal imperialism” in *F. Hoffmann-La Roche*,⁵⁴ U.S. courts handling aviation disaster cases today likewise believe that foreigners should be compensated under the laws of their domiciles rather than under the laws of the United States. If under the laws of their domiciles they receive only, say, 25 percent of what they would receive in the United States, or if they are required to pay a lawyer even to take their case because there is no contingency fee system in their domiciles, the United States, in the words of Justice Breyer, should not “tr[y] to impose [the U.S. system] in an act of legal imperialism.”⁵⁵

In both the antitrust and the aviation contexts, foreign plaintiffs are trying to use—some would say “game”—the U.S. system and approaches to litigation. It is questionable whether the United States should permit this. It would be better if plaintiffs, as foreign citizens, work to prevail on their governments to pass laws and adopt approaches to litigation that are more similar to those of the United States or, in any event, that are more consistent with the interests of plaintiffs in those countries and in these types of cases.⁵⁶

The Florida case is the first case anywhere in the world to raise the issue whether under the Montreal Convention,⁵⁷ adopted in 1999 largely to replace the 1929 Warsaw Convention,⁵⁸ a U.S. court can apply the doctrine of forum non conveniens to transfer cases to the courts where the foreign plaintiffs live.

In September 2007, Judge Ursula Ungaro of the federal district court in Miami handed down a comprehensive, exhaustively researched, and perceptive decision holding that the legislative history of the 1999 Montreal Convention supported the conclusion that forum non conveniens would continue to be a procedural tool available to U.S. courts to apply in cases where, balancing public and private interest factors, the case should more appropriately be decided in a foreign than a U.S. court.⁵⁹ Aided by a statement of interest filed in the case by the U.S. government (signed by senior officials in the Justice, State, and Transportation departments) in response to a request by Judge Ungaro pursuant to 28 U.S.C. § 517, the court concluded that use of the FNC doctrine under the Montreal Convention was a goal that, despite some foreign skepticism as well as opposition, was both declared and achieved by the U.S. government in the negotiations that led to the adoption of the convention.

Judge Ungaro then ordered the parties to brief the issue whether in the particular circumstances of the case and bal-

ancing the public and private interest factors involved, forum non conveniens should be granted. Given that all the victims of the crash were foreign nationals, that the airline itself was foreign, and that the facts of the case suggested few if any substantial contacts with the United States, Judge Ungaro, on Nov. 9, 2007, dismissed the case on forum non conveniens grounds, noting that defendants had stipulated that, once forum non conveniens was granted, they would submit to the jurisdiction of, and accept service of process from, the courts in Martinique, and would also waive any statute of limitations defenses. Balancing both the public and private interest factors spelled out in *Piper v. Reyno*, Judge Ungaro properly found that the principal issue in the case was the damages to which each plaintiff was entitled, that most of the damage evidence was available in Martinique, that the courts in Martinique were adequate, and that plaintiffs could and should file or refile their lawsuits there.⁶⁰

Judge Ungaro's decision was promptly appealed and is now pending before the U.S. Court of Appeals for the Eleventh Circuit.⁶¹ It is a matter of some significance that the U.S. government has formally entered the case and filed an amicus curiae brief in support of Judge Ungaro's decision. There is no question that, if Judge Ungaro's decision is affirmed, a critically important issue of international law under the 1999 Montreal Convention will be well on the road to a resolution that, consistent with Justice Breyer's decision in *F. Hoffman-LaRoche*, will inevitably lend added impetus and importance to the forum non conveniens doctrine in the federal judicial system.

Securities Law And Maritime Law

No article on the prescriptive jurisdiction of the United States can be complete without at least touching on the subjects of securities law and maritime law. U.S. securities law is full of cases where U.S. courts have allowed the Securities and Exchange Act of 1934 to apply to transactions with a foreign twist.⁶² U.S. maritime law, perhaps in recognition of the long history of international maritime law, seems reluctant to extend the application of U.S. law for almost any purpose⁶³—except the limited (and exceedingly difficult to understand) areas that were involved in the Supreme Court's recent decision in *Spector v. Norwegian Cruise Line Ltd.*⁶⁴

Almost all the cases arising in securities law are litigated under § 10(b) of the 1934 Securities and Exchange Act.⁶⁵ This section makes it unlawful for any person through "any means or instrumentality of interstate commerce ... to use [in the purchase or sale of any security] any manipulative or deceptive device or contrivance in contravention of such rules and regulations [as the Securities and Exchange Commission (SEC)] may prescribe ... in the public interest or for the protection of investors."⁶⁶ It is clear that this is a very broad statute that would seem to have almost universal application.

For the most part, and given the history of dozens of cases that have involved securities fraud, including the famous 1972 decision in *Leasco Data Processing Equipment Corp. v. Maxwell*,⁶⁷ (in which Chief Judge Henry Friendly held against Robert Maxwell, a well-known British citizen),

it may fairly be said that U.S. securities law will be applied to the following types of cases:

1. Cases in which the losses were incurred by U.S. residents, wherever the unlawful acts occurred;⁶⁸
2. Cases in which the losses were incurred by U.S. citizens abroad, but only if the unlawful acts occurred mostly in the United States;⁶⁹ and
3. Cases in which the losses were incurred by foreigners outside the United States, but only if the unlawful acts occurred in the United States and were the direct cause of the harm.⁷⁰
- 4.

Perhaps the best line of cases illustrating the problems in this area are those that arose out of the collapse in the late 1960s of the quite famous Bernard Cornfeld group of companies.⁷¹ These companies were known alternatively as the Investors Overseas Services (IOS) Fund, the Cornfeld Fund, or the Fund of Funds.⁷² The companies had perfected the American style of selling mutual funds, but sold only to customers outside the United States and thus were not subject to SEC jurisdiction. As it would happen, some of the shares ended up in the hands of 22 U.S. citizens residing in the United States. When the stock collapsed, a class action suit was brought on behalf of the 22 citizens and on behalf of all purchasers, wherever located.⁷³

In *Bersch v. Drexel Firestone Inc.*, the court found in favor of the 22 U.S. citizens but dismissed the cases brought by the foreigners, because the unlawful acts did not occur mostly in the United States.⁷⁴ In the companion case of *IIT v. Vencap Ltd.*, the court concluded that a foreign corporation was entitled to bring suit against another foreign corporation because planning of the operation and legal drafting of the major documents occurred in New York.⁷⁵ Indeed, Judge Friendly went so far as to conclude, "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."⁷⁶

It is hard to be certain about the extent to which foreigners, who buy their securities abroad, can sue in the United States. If one predicts on the basis of the *F. Hoffmann-La Roche* decision, all foreigners may be excluded. But if securities law is treated differently than antitrust law, as at least one judge has recently concluded,⁷⁷ then the mere fact that the fraudulent security devices were created in the United States may open U.S. courts to suits by foreigners who bought those securities abroad.⁷⁸

Now, this article will address maritime law, which is relatively easy. Many years ago, the National Labor Relations Board (NLRB) brought suit in order to allow U.S. unions to organize the all-foreign crews aboard shiplines that regularly plied the U.S. trades and that were owned in whole or large part by U.S. owners, but which flew foreign flags—then of Panama, Liberia, and Honduras.⁷⁹ These vessels came to be known as "flags of convenience."⁸⁰ The owners "flagged-out,"⁸¹ so it was called, primarily to avoid taxes and to be able to hire foreign crews free from any modern-day labor law requirements.⁸²

The history that followed can be summed up quickly.

The district court found for the NLRB, but the court of appeals reversed.⁸³ When the case went to the Supreme Court in 1963, the Court decided that no matter the vessels' U.S. ownership or trade routes to and from the United States, the law of the flag governed in maritime law. The Court also held that the NLRB had no jurisdiction under the National Labor Relations Act to interfere in any way with the internal affairs of the vessels, including of course the labor relations of the foreign crews aboard the vessels.⁸⁴

In most other areas of maritime law, U.S. courts have been equally reluctant to extend the thrust of what otherwise might be looked upon as U.S. prescriptive jurisdiction. For example, in cases involving the 1920 Jones Act and its provision that "[a]ny seaman who shall suffer personal injury in the course of his employment may ... maintain an action for damages at law,"⁸⁵ U.S. courts have almost uniformly held that the Jones Act does not apply to foreign seamen on foreign flag vessels, no matter where the seaman signed on or where the injury occurred.⁸⁶

But in the more recent *Spector v. Norwegian Cruise Lines Ltd.*⁸⁷ decision, the U.S. Supreme Court seems to have concluded—though by a very divided court that handed down four separate opinions—that the law of the flag is not totally exclusive. At least some of the provisions in the recently enacted Americans with Disabilities Act (ADA) should be applied to foreign flag cruise vessels.⁸⁸ The plaintiffs in *Spector* alleged that these vessels denied them access to certain public places on board the ships and discriminated against them in the assignment of cabins by assessing surcharges.⁸⁹ A plurality of the Court held that easily achievable remedies like eliminating surcharges were valid, while other remedies like eliminating structural raised barriers (that were presumptively allowed under the international Safety of Life at Sea or "SOLAS" Convention) were not.⁹⁰ Three members of the Court dissented on grounds that, as there was no clear statement of coverage in the ADA, it could not be said that Congress intended the ADA to apply to foreign flag vessels.⁹¹ In any event, this case provides a very good idea of how controversial these issues can be. But at least one thing can be said for the *Spector* decision: it was a decision that not only protected U.S. citizens but also citizens who were disabled and who had contracted for their cruises and boarded the vessels in the United States.

Very Recent Events

In concluding this article, a brief mention should be made of two major cases that have occurred only within the past several months. Both happen directly to involve the EC.

The Airline Price Fixing Cases

In February 2006, EC inspectors raided the European offices of several major European and Asian airlines to search for evidence as to whether they were conspiring to fix transatlantic air freight rates.⁹² At the same time as these raids were occurring in Europe, FBI agents in the United States were raiding the offices of KLM, Air France, and other airlines in Chicago and elsewhere, seeking similar evidence of a price fixing conspiracy.⁹³ The EC announced that it "has reason to believe that the companies concerned may have

violated [a European Union] treaty, which prohibits practices such as price fixing."⁹⁴ The Justice Department made a similar announcement.⁹⁵ On Aug. 1, 2007, BA and Korean Air Lines pleaded guilty in the United States to charges that they had conspired to fix prices for passenger and cargo flights.⁹⁶ Each agreed to pay a criminal fine of \$300 million to the U.S. government.⁹⁷ In addition, BA agreed to pay a \$247 million fine to the U.K. Office of Fair Trading.⁹⁸

Investigators from the U.S. Justice Department said that there were three separate conspiracies—one overarching worldwide cargo rate conspiracy, a second conspiracy involving only BA and Virgin Atlantic on passenger fuel surcharges, and a third involving U.S.–Korean rates.⁹⁹ Although Virgin Atlantic and Lufthansa were deeply involved in the illegal conduct, they were granted amnesty because they were the first to report the illegal activity and had cooperated in the investigation.¹⁰⁰ A number of other international airlines are still under investigation. Meanwhile, on March 11, 2008, European investigators carried out another series of raids or "surprise inspections" on this occasion targeting Lufthansa, Air France-KLM, and perhaps others over suspicions that the carriers had participated in other cartel price fixing activities involving passenger flights between Europe and Japan.¹⁰¹

As was to be expected, private antitrust lawyers in the United States have in the meantime filed numerous treble damage civil suits against all the airlines suspected to have been involved in the criminal conspiracy.¹⁰² All of these suits are pending, though it was reported some months ago that Lufthansa had agreed to pay \$85 million to settle the suits that were brought against it.¹⁰³ At the same time, BA and Virgin have both stated they are not willing to pay any civil damages for the time being.¹⁰⁴ It has since been reported, however, that in mid-February 2008, B.A. and Virgin agreed to pay an amount in excess of \$200 million to settle the treble damage private antitrust suits that were brought against them in the U.S. district court for their illegal agreement to fix fuel surcharges.¹⁰⁵ Meanwhile, investigations seem to be continuing within the EU, the United States and other countries; and it has yet to be determined whether the EU will be assessing its own fines in addition to those already assessed by other governmental authorities.

The Microsoft Case

As recently as Sept. 17, 2007, Europe's second highest court, known as the European Court of First Instance (CFI), affirmed a decision of the EC, holding that Microsoft had abused its dominant market position in Europe and fining Microsoft \$689 million.¹⁰⁶ In *Microsoft Corp. v. Commission*,¹⁰⁷ Microsoft was found to have abused its dominant market position by engaging in the practice of what is generally referred to as "bundling," designed to lockout competitors.¹⁰⁸ On Feb. 26, 2008, moreover, the EC imposed a fine on Microsoft of \$1.3 billion, the "largest fine [the EC] has ever imposed on a company."¹⁰⁹ This latest fine is reportedly to penalize Microsoft for failing to comply with the earlier EC orders to terminate its allegedly unfair competitive practices.¹¹⁰

Looking at these Microsoft decisions in the context of the EC's investigatory efforts in the airline price fixing cases just

discussed, there are three significant (if tentative) conclusions that observers of this area of the law are already drawing from the decisions.

First, the decisions demonstrate an increasing dedication on the part of European regulators and reviewing courts to engage in much the same kind of aggressive assertions of regulatory jurisdiction as have been common in the United States since the 1945 *Alcoa* decision.¹¹¹ No matter the nationality of the perpetrator, so long as there is some unlawful effect felt within the EU, the EU seems not at all reluctant to exercise its prescriptive jurisdiction.¹¹² While there have been other similar cases handled and decided by the EC in recent years—especially the General Electric and Honeywell merger case that the EC found to be illegal in July 2001¹¹³—none of them carry nearly the message as the more recent Microsoft and airline price fixing cases.

Second, because the U.S. Justice Department in 2001 had more or less approved the very same Microsoft conduct as Europe was now finding illegal under the EC's broad concept of what is "abuse of a dominant [market] position,"¹¹⁴ it appears that Europe may now actually be one-upping the United States in its zeal to protect and enhance competition within the EU, if not throughout the world. It is certainly interesting that, when U.S. Justice Department authorities were asked for their views on the earlier Microsoft decision, the assistant attorney general for antitrust criticized it and suggested that "rather than helping consumers, [the decision] may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."¹¹⁵ This statement seems to imply that the EC's objective in its antitrust enforcement efforts is primarily to protect corporate competitors, while the objective of the U.S. Justice Department is to protect consumers.

Finally, the airline price fixing investigation and the Microsoft decision both suggest that Europe is growing increasingly aggressive in the area of asserting its prescriptive jurisdiction. At the same time, the *F. Hoffmann-La Roche* decision and the increasing use by U.S. courts of the doctrine of forum non conveniens both seem to suggest that the United States is moving largely in the opposite direction. Perhaps the law on both sides of the ocean may one day meet at some midpoint. **TFL**

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Endnotes

¹*United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

²See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran*, 542

U.S. 155, 162 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Alcoa*, 148 F.2d at 444; Restatement (Third) Of Foreign Relations Law Of The United States § 455, reporter's note 3 (1987).

³See Restatement (Third) Of Foreign Relations Law §§ 402–16.

⁴*Alcoa*, 148 F.2d at 422–423.

⁵*Id.* at 445.

⁶U.S. Dep't Of Justice, ANTITRUST ENFORCEMENT AND THE CONSUMER (1996), available at pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm.

⁷15 U.S.C. § 15 (1914).

⁸See *infra* part II A.

⁹Treaty Establishing the European Economic Community arts. 81, 82, Mar. 25, 1957, 298 U.N.T.S. 4.

¹⁰*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

¹¹Sam Knight, *Cheap Flights Pioneer Sir Freddie Laker Dies*, TIMES ONLINE, Feb. 10, 2006, www.timesonline.co.uk/tol/news/uk/article729420.ece.

¹²See *infra* notes part II A.

¹³509 U.S. 764 (1993).

¹⁴542 U.S. 155 (2004).

¹⁵See Andreas F. Lowenfeld, INTERNATIONAL LITIGATION AND ARBITRATION 121–36 (3d ed. 1993) for a more extensive discussion of all the *Laker* litigation. The author uses Professor Lowenfeld's casebook in teaching his Georgetown Law School course on International Litigation and Conflicts of Law and wishes to express his appreciation to Professor Lowenfeld for the excellence and timeliness of his casebook.

¹⁶*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126 (D.D.C. 1983); Lowenfeld, *supra* note 15, at 122.

¹⁷*Laker Airways*, 559 F. Supp. at 1126–27; Lowenfeld, *supra* note 15, at 122.

¹⁸Lowenfeld, *supra* note 15, at 121–36.

¹⁹*Id.* at 123.

²⁰*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126 (D.D.C. 1983).

²¹Lowenfeld, *supra* note 15, at 123.

²²*British Airways Bd. v. Laker Airways Ltd.*, (1984) Q.B. 142, 169 (U.K.).

²³*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 956 (D.C. Cir. 1984). Judge Kenneth Starr dissented from the decision, stating that it would "be viewed by many of our friends and allies as a rather parochial American outlook." *Id.* at 956, 958.

²⁴*Id.*

²⁵*British Airways Bd. v. Laker Airways Ltd.*, (1985) A.C. 58, 59–60 (H.L.) (appeal taken from Eng.) (U.K.).

²⁶*Id.* at 80, 93–95.

²⁷Then U.K. Prime Minister Margaret Thatcher reportedly intervened personally with President Reagan to ensure that the U.S. Department of Justice would not issue an indictment; and on Nov. 19, 1984, the department announced that its investigation was being closed "on orders from President Reagan." The civil litigation was settled the following year reportedly also following personal intervention by Prime

Minister Thatcher. See Lowenfeld, *supra*, n.15 at 144–45.

²⁸*Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

²⁹*Id.* at 769, 771, 795, 810.

³⁰George B. Flanigan, Kathleen A. McCullough, & Charles R. McGuire Jr., OCCURRENCE AND CLAIMS MADE: THE ROAD BEHIND AND THE ROAD AHEAD 8, 11–12 (2004).

³¹See *Hartford*, 509 U.S. at 771.

³²*Id.* at 773–78.

³³*Id.* at 797–99.

³⁴*Id.* at 799.

³⁵See *id.* at 799. Lowenfeld believes that the decision on this point, by ignoring the conflict of laws while focusing on the absence of compulsion, improperly confuses conflict with compulsion. See A. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, AM. J. INT'L. L. 42 (1995).

³⁶Press Release, U.S. Dep't of Justice, F. Hoffmann-La Roche and BASP Agree to Pay Record Fines for Participating in International Vitamin Cartel (May 20, 1999), www.usdoj.gov/opa/pr/1999/May/196at.htm.

³⁷David Barboza, *Six Big Vitamin Makers Are Said to Agree to Pay \$1.1 Billion to Settle Pricing Lawsuit*, N.Y. TIMES, Sept. 8, 1999, at C2.

³⁸Press Release, U.S. Dep't of Justice, *supra* note 36.

³⁹See, e.g., Barboza, *supra* note 37, at C2; Press Release, U.S. Dep't of Justice, Canadian Vitamin Company Agrees to Plead Guilty for Role in International Vitamin Cartel (Sept. 29, 1999), justice.gov/atr/public/press_releases/1999/3726.htm.

⁴⁰James Kanter, *A Crackdown on Cartels by European Regulators*, N.Y. TIMES, Dec. 26, 2005, at C3.

⁴¹Brenda Sandburg, *Culture Shock: Chinese Companies are Learning Some Painful Lessons About the American Way of Litigation*, CORP. COUNS., NOV. 2006, at 63.

⁴²Barboza, *supra* note 37, at C2.

⁴³*F. Hoffmann-La Roche*, 542 U.S. 155, 162 (2004).

⁴⁴*Id.* at 164.

⁴⁵*Id.* at 167–69.

⁴⁶See, e.g., *Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001).

⁴⁷*In re W. Caribbean Airways*, 32 Av. L. REP. (CCH) ¶ 15,595 (S.D.Fla. Sept. 26, 2007). Of the 160 victims, 152 were French citizens or residents of Martinique and the remaining eight were Colombian national crew members. See *In re Caribbean Crew Members*; Consolidated Case No. 07-22015 (S.D.Fla. Civ-Ungaro).

⁴⁸*Id.*

⁴⁹See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Change of venue transfers between U.S. federal district courts are governed today by the provisions of 28 U.S.C. §§ 1404 and 1406. When the doctrine of forum non conveniens (FNC) is applied by a U.S. federal district court in an international context, however, there is no comparable or equivalent transfer. Rather, the district court dismisses the lawsuit on the basis of the FNC doctrine but conditions its dismissal by placing various requirements on the moving defendants. These requirements include, for example, that the defendants agree to submit to the jurisdiction of the foreign court, to waive any applicable statute of limitations defenses, to make witnesses and documents available to the foreign court, etc. Because of

such conditions, FNC dismissals are generally viewed as virtually tantamount to transfers, assuming of course that plaintiffs refile their lawsuits in the foreign court and that court otherwise has and asserts jurisdiction over the case.

⁵⁰See Allan I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff*, J. AIR L. & COM. 75, 111 (2003) (hereinafter *The Foreign Plaintiff*); Allan I. Mendelsohn, *Recent Developments in the Forum Non Conveniens Doctrine*, 52 FED. LAW. 45, 46 (2005) (hereinafter *Recent Developments*).

⁵¹See, e.g., *World Briefing: Americas: Cuba: 17 Die in Plane Crash*, N.Y. TIMES, Mar. 15, 2002, at A6; Edward Cargan, *Over 200 Die as Taiwan Jet Crashes in Bad Weather*, N.Y. TIMES, Feb. 17, 1998, at A3.

⁵²*Recent Developments*, *supra* note 50, at 46.

⁵³*The Foreign Plaintiff*, *supra* note 50, at 111.

⁵⁴*F. Hoffmann-La Roche*, 542 U.S. 155, 168 (2004).

⁵⁵*Id.*

⁵⁶It was recently reported that French President Nicolas Sarkozy had publicly suggested that the EC consider adopting a form of class action lawsuit not unlike that commonly used by plaintiffs in the United States for antitrust and securities fraud litigation. See Caroline Byrne & Cary O'Reilly, *Sarkozy, U.S. Lawyers Shift Class-Action Suits to Europe*, N.Y. SUN, July 25, 2007, available at www.nysun.com/article/59069. On April 3, 2008, the EC issued a white paper suggesting that steps should be taken to encourage the adoption of judicial methods within the EU to provide private damages for victims of EU competition law violations. See *97 Antitrust Trade Regulation Report* 353, April 4, 2008.

⁵⁷Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, ICAO Doc. 9148.

⁵⁸Bin Cheng, *A New Era in the Law of Int'l Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 INT'L & COM. L. Q. 833, 833 (2004).

⁵⁹See *In re W. Caribbean Airways*, 32 Av. L. REP. (CCH) ¶ 15,595 (S.D.Fla. Sept. 26, 2007) (preliminary order by District Judge Ungaro).

⁶⁰See *id.* ¶ 15,764.

⁶¹*In re West Caribbean Airways*, 32 Av. L. REP. (CCH) ¶¶ 15,595, 15,764 (S.D. Fla. 2007). *Bapte et al. v. Neuvac Corp., et al.*, (11th Cir., Case No. 07-15828). This author is counsel for the defendant who filed for the forum non conveniens dismissed before Judge Ungaro and is now seeking affirmance by the court of appeals of the application of the doctrine in the case.

⁶²See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

⁶³See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

⁶⁴545 U.S. 119 (2005).

⁶⁵See generally Carlos L. Israels, *Banks and Federal Securities Regulation*, 85 BANKING L.J. 1 (1968); see also 15 U.S.C.A. § 78(j) (West 1997 & Supp. 2007).

⁶⁶15 U.S.C.A. § 78(j).

⁶⁷468 F.2d 1326, 1344 (2d Cir. 1972).

⁶⁸See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968).

⁶⁹See, e.g., *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974,

986 (2d Cir. 1975).

⁷⁰See, e.g., *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

⁷¹See, e.g., *Bersch*, 519 F.2d 974 (2d Cir. 1975); *IIT v. Vencap Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

⁷²Lowenfeld, *supra* note 15, at 105.

⁷³*Id.*

⁷⁴See *Bersch*, 519 F.2d at 987, 991, 1001.

⁷⁵See *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975); Lowenfeld, *supra* note 15, at 107.

⁷⁶*IIT*, 519 F.2d at 1017.

⁷⁷*In re Royal Abold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 356 n.10 (2004).

⁷⁸See also the extended discussion of the securities cases in Lowenfeld, *supra* note 15, at 76–111.

⁷⁹See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12, 14 (1963).

⁸⁰GUIDE TO EMPLOYMENT LAW AND REGULATIONS § 17:64 (1992 & Supp. 2007).

⁸¹See Alexander J. Marcopoulos, *Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience*, 32 TUL. MAR. L.J. 277, 284 (2007) (defining “flagged out”).

⁸²Kirsten Bohmann, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR. L. & COM. 689, 732 (2001).

⁸³*McCulloch*, 372 U.S. at 12. This author was counsel for the NLRB when the case was before both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit. See *Empresa Hondurena de Vapores v. McLeod*, 300 F.2d 222 (1962).

⁸⁴*McCulloch*, 372 U.S. at 20–22.

⁸⁵Jones Act, Pub. L. No. 66–261, § 27, 41 Stat. 988, 999 (1920) (current version at 46 U.S.C.A. § 30104 (West 2007)).

⁸⁶See, e.g., *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 384 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 593 (1953).

⁸⁷545 U.S. 119 (2005) (plurality opinion).

⁸⁸*Id.* at 125.

⁸⁹*Id.* at 133, 134.

⁹⁰See *id.* at 138–39.

⁹¹*Id.* at 149 (Scalia, J., dissenting).

⁹²See Sachi Izumi & Jason Neely, *Global Airlines Probe Widens to Asia*, REDORBIT, Feb. 15, 2006, www.redorbit.com/news/international/392205/global-airlines-cargo-probe-widens-to-asia/; David Lawsky & Jeremy Pelofsky, *Update 4—Airlines Raided in EU, US Cargo Probe*, REUTERS, Feb. 14, 2006, today.reuters.com/news/articlebusiness.aspx?type=basicIndustries&storyID=nL14520882&from=business.

⁹³Izumi & Neely, *supra* note 92; Lawsky & Pelofsky, *supra* note 92.

⁹⁴Lawsky & Pelofsky, *supra* note 92.

⁹⁵*Id.*

⁹⁶Peter Kaplan & James Vicini, *BA, Korean Air to Plead Guilty in U.S. Price Probe*, REUTERS, Aug. 1, 2007, www.reuters.com/article/businessnews/idUSN0135743520070801.

⁹⁷*Id.*

⁹⁸Andrew Compart, *BA, Korean Air Plead Guilty to Price-Fixing*, TRAVEL WKLY., Aug. 6, 2007; Adrian Schofield & Jens Flottau, *BA, Korean See Mammoth Fines in Price-Fixing Probe*, AVIATION DAILY, Aug. 2, 2007, at 1. More recently, in early July 2008, it was disclosed that four foreign airlines (Cathay Pacific, Air France-KLM, SAS, and Martinair) had entered an agreement with the U.S. Department of Justice to plead guilty and pay more than half a billion dollars in criminal fines for fixing air cargo rates. See YAHOO NEWS ASIA, July 6, 2008.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Steve McGrath and Carolyn Hanson, *EU Investigates Possible Price Fixing by Airlines*, WALL ST. J., Mar. 12, 2008, at A22; see also *New Round of EC Collusion Raids Target Carriers Serving Japan*, ATW DAILY NEWS, Mar. 12, 2008, at www.atwonline.com/news/story.html?storyID=12026.

¹⁰²David Knibb & Peter Conway, *Cargo Probe Focuses on Surcharges*, AIRLINE BUS., Apr. 1, 2006; John R. Wilke & Daniel Michaels, *Luftbansa Offers to Cooperate in Antitrust Probe—Deal Could Be Breakthrough in Price-Fixing Inquiry of the Air-Cargo Industry*, WALL ST. J., Mar. 8, 2006, at A3.

¹⁰³Compart, *supra* note 98.

¹⁰⁴*Id.*

¹⁰⁵Adrian Schofield, *BA, Virgin Agree to \$200 US Million Payout in Class Action Suit*, AVIATION DAILY, Feb. 19, 2008, at 2; *Settlement on Airline Price Fixing*, N.Y. TIMES, Feb. 16, 2008, at C04. The airlines agreed to pay some \$59 million to U.S. passengers and almost \$145 million for passengers in the U.K. *2 Airlines Settle Suit on Fuel Fees*, INT'L HERALD TRIB., Feb. 16, 2008, at 11.

¹⁰⁶Kevin J. O'Brien & Steve Lohr, *European Court Faults Microsoft on Competition*, N.Y. TIMES, Sept. 14, 2007, at A1.

¹⁰⁷Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17, 2007).

¹⁰⁸See *id.*

¹⁰⁹Kevin Sullivan, *E.U. Slaps Third Fine on Microsoft*, WASH. POST, Feb. 28, 2008, at D01.

¹¹⁰*Id.*

¹¹¹Lowenfeld, *supra* note 15.

¹¹²The fact that Microsoft has offices and does business within and throughout the EU, as do the airline companies involved in the conspiracies to fix cargo rates and air fares to and from Europe, suggests that the EU's aggressive assertions of its perspective jurisdiction against anticompetitive prices are not ipso facto “extraterritorial.” On the other hand, given the rise and extraordinary expansion of multinational companies in this era of unprecedented globalization, it may rather suggest that the concept of an “extraterritorial” assertion of jurisdiction is rapidly evolving into a relic of 20th century thought.

¹¹³Commission Decision 2004/134 of 3 July 2001, Case No. COMP/M.2220-General Electric/Honeywell, 2004 O.J. (L048) 567 (EC), available at ec.europa.eu/comm/competition/mergers/cases/decisions/m2220_en.pdf.

¹¹⁴Case T-201/04, 2007 WL 2693858; see Press Release, U.S. Department of Justice, Dep't of Justice and Microsoft Corp. Reach Effective Settlement on Antitrust Lawsuit (Nov. 2, 2001), available at www.usdoj.gov/opa/pr/2001/November/01_at_569.htm.

¹¹⁵O'Brien & Lohr, *supra* note 106, at A1.

Ramifications of *Baxter*

The Sixth Circuit's new summary judgment standard for mixed-motive cases offers a difficult standard for defendant-employers while easing the burden for plaintiff-employees. For plaintiff-employees, this case will streamline their ability to have their discrimination cases heard by a jury, as they now merely need to show that a protected characteristic such as race or age played a role in the employer's decision. Conversely, for defendant-employers, by increasing the burden for summary judgment, the new *Baxter* analysis will make it more difficult for an employer to receive a grant of summary judgment, thus increasing the chances of going to trial. Furthermore, this new standard increases the likelihood that plaintiffs will choose to bring any discrimination claim as a mixed-motive claim. Thus, defendants are warned to be on the lookout for an increased number of mixed-motive accusations.

Throughout the circuits, there has been no consensus as to this important standard that acts as a gatekeeper for a case to proceed to trial. It is important for employment counsel to be aware of this widely conflicting split among the circuits. **TFL**

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Endnotes

- ¹42 U.S.C. § 2000e-2(a)(1).
²*PriceWaterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).
³42 U.S.C. § 2000e-2(m).
⁴*Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d

277, 284 (4th Cir. 2004).

⁵42 U.S.C. § 2000e-5(g)(2)(B).

⁶*Rachid v. Jack in the Box Inc.* 376 F.3d 305, 310 (5th Cir. 2004).

⁷Under *McDonnell Douglas/Burdine*, a plaintiff must first prove by a preponderance of the evidence a prima facie case of discrimination; the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection"; then, third, the plaintiff must prove that the defendant's proffered reason was pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

⁸*Trans World Airlines Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding that the *McDonnell Douglas/Burdine* framework is inapplicable when there is direct evidence of discrimination).

⁹*Wexler v. White's Fine Furniture*, 317 F.3d 564, 571 (6th Cir. 2003); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999).

¹⁰*Desert Place Inc. v. Costa*, 539 U.S. 90, 92 (2003).

¹¹*Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

¹²*Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004); *Burstein v. Emtel Inc.*, 137 Fed. Appx. 205, 209 n.8 (11th Cir. 2005) (unpublished).

¹³*Rachid*, *supra* note 6, 376 F.3d at 310; *Machinchick v. PB Power Inc.*, 398 F.3d 345, 352 (5th Cir. 2005).

¹⁴*Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007).

¹⁵To date, the First, Third, and Tenth Circuits have yet to address this issue.

¹⁶*White v. Baxter Healthcare Corp.*, No. 071626, 2008 U.S. App. LEXIS 14188, at *14 (6th Cir. July 3, 2008).

¹⁷*Id.* at *47-48.

¹⁸*Id.* at *48.

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