

Developments in the Field

Bringing Pesticide Injury Cases to US Courts: The Challenges of Transnational Litigation

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I. INTRODUCTION

The expansion of heavy pesticide use and the migration of cash crop farming into remote regions of developing Latin American countries has resulted in dire health consequences for certain local populations. Such is the case amongst the tobacco farming families in Provincia De Misiones, Argentina, whose children have experienced devastating birth defects. The use of civil claims by these Argentinian families to pursue compensation is illustrative of how transnational tort cases brought in the United States (US) can be used as a means of achieving accountability for agribusinesses' harmful practices and products involving pesticides.

Misiones is located in the remote far north-eastern sector of Argentina, where tobacco was first grown in 1930, primarily for use in domestic cigarettes. In the early 1990s, Argentina began promoting and implementing conservational tillage techniques, known as no-till farming, which lessened the impacts of erosion on the land. No-till farming involved the use of pesticides to clear fields before and after crops were grown. At that time, the Monsanto Company was also promoting the use of no-till farming in Argentina, along with the use of its herbicide Roundup.¹ Historically, the primary type of tobacco in Misiones was 'Criollo Misionero', which was native to the region and typically grown on small family-owned farms.² However, tobacco farming in Misiones was transformed with the advent of no-till farming and its corresponding increase in pesticide use, as well as by the prevalence of tobacco brokerage companies for transnational cigarette corporations. From then on, the tobacco grown was predominantly Burley for use in

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¹ Monsanto, 'History in Argentina', http://www.monsanto.com.ar:80/quienes_somos/historia_argentina.aspx (accessed 20 November 2017).

² Information on growing tobacco in Misiones and Philip Morris' involvement is well documented in materials obtained from the University of California, San Francisco: https://www.industrydocumentslibrary.ucsf.edu/tobacco/_ See, e.g., Philip Morris Records, 'Tabacos Norte Report', note 1 (June 1990), <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=lkhg0088> (accessed 9 January 2019).

cigarettes to be sold in the US and around the world.³ While the number of tobacco farms and overall tobacco production in the US have both plummeted since the 1950s, tobacco production in developing countries, where costs and environmental controls are much lower, has greatly increased.⁴

In the mid-1980s, Massalin Particulares, a Philip Morris subsidiary, and certain other entities created Tabacos Norte to purchase Burley tobacco through contracts with farmers in Misiones.⁵ Tabacos Norte was integrally involved with the cultivation of the tobacco in Misiones and, along with Philip Morris USA's Tobacco Technology Group, provided technical support to the farmers. Copious amounts of pesticides were required to farm tobacco intended for the international market and tobacco farmers and their families in Misiones were particularly vulnerable to the consequences of this type of agricultural development. They lived on the same land where they grew the tobacco and their farms were typically less than ten acres with little mechanization and no electricity.⁶ Streams and other surface water on the farms were also used for bathing, laundry and consumption by the families.⁷

Concern about increasing health problems coinciding with the exploding usage of pesticides in Argentina has steadily grown. Largely driven by the growth of Argentina as a leading soy producer that extensively utilizes genetically modified seeds and their corresponding herbicides like Roundup, researchers in Argentina began addressing public health impacts of these herbicides. A team of scientists in Argentina led by Dr Andres Carrasco published a study in 2010 that found glyphosate, the key ingredient in Roundup, caused brain, intestinal and heart defects in the embryos of amphibians at doses lower than those used in the fumigation of soy fields.⁸ This work led to government investigations as well as a lawsuit by an Argentinian environmental organization in 2009, which unsuccessfully sought to ban glyphosate in Argentina due to health and environmental concerns.⁹ In addition, an epidemiology study of a population in bordering Paraguay also found a significant association between parental exposure to pesticides sprayed on soybeans and other crops, and congenital malformations.¹⁰ Finally, Dr Hugo Demaio, a paediatric neurosurgeon in Misiones, reported seeing live births with neural tube defects at rates 70 times higher than in the province overall, and found that all the families with severe deficits came from highly fumigated areas.¹¹ The results of these

³ Philip Morris Records, 'Tabacos Norte Report', note 2.

⁴ Ellen Hickey and Yenyen Chan, 'Tobacco, Farmers and Pesticides: The Other Story', published by the Pesticide Action Network North America (PANNA), 1998.

⁵ Philip Morris Records, 'Tabacos Norte Report', note 2.

⁶ *Ibid.*

⁷ Denis Baranger et al, '*Tabaco y Agrotoxicos: un Eestudio sobre productores de Misiones*' (Editorial Universitaria de Universidad Nacional de Misiones, 2007).

⁸ Alejandra Paganelli et al, 'Glyphosate-Based Herbicides Produce Teratogenic Effects on Vertebrates by Impairing Retinoic Acid Signaling' (2010) 23:10 *Chemical Research in Toxicology* 1586.

⁹ Nicolas Misculin, 'Argentine Herbicide Lawsuit Alarms Soy Farmers', *Reuters* (7 May 2009), <https://www.reuters.com/article/idUSN07337708> (accessed 12 March 2018).

¹⁰ S Benitez-Leite et al, 'Congenital Malformations Associated with Toxic Agricultural Chemicals' (2007) 34:2 *Pediatr (Asuncion)* 111.

¹¹ Medardo Ávila Vazquez and Carlos Nota (coordinators), 'Report from the 1st National Meeting of Physicians in the Crop-Sprayed Towns', organized by the Faculty of Medical Sciences, National University of Cordoba on 27 and 28 August 2010, <http://reduas.com.ar/informe-encuentro-medicos-pueblos-fumigados/> (accessed 12 March 2018).

local investigations support a developing body of scientific studies that associate pesticides with the types of congenital malformations being seen in the children of tobacco farmers in Misiones.¹²

News of the medical community findings on this environmental health hazard led the affected Argentinian families to explore their legal options, including where lawsuits against US companies allegedly responsible for pesticide injuries could be most successful. As set forth below, the families proceeded in a US court in which the law concerning *forum non conveniens* (FNC) at the time of filing was favourable to foreign plaintiffs electing to sue there. However, the ability of plaintiffs to overcome the challenge posed by changes in the FNC law would ultimately determine their ability to proceed against certain agribusiness companies in the US.

II. BIRTH DEFECT VICTIMS APPROACH US COURTS FOR JUSTICE

The US civil justice system provides for monetary compensation for personal injuries suffered by persons harmed by a defendant's product or conduct. In order to proceed with such a claim in US courts, a foreign plaintiff must establish that jurisdiction exists and that the claims are cognizable under the laws of the country where the action arose. A foreign plaintiff must also be prepared to withstand the challenge of FNC, a doctrine that gives courts discretion to decline jurisdiction when the convenience of parties and ends of justice would be better served if the action were tried in an alternative forum.¹³

In February 2012, Tamara Lujan Hupan and seven other children with spina bifida and other birth defects filed a lawsuit, *Hupan et al v Alliance One International, Inc.*, in the US state of Delaware, seeking compensation from certain Philip Morris affiliated companies and Monsanto for their injuries. The plaintiffs chose to proceed in this forum in part because of the well-established record of the civil justice system in the US providing compensation to injured persons, the right to a trial by jury and Delaware's long-time recognition of the right of foreign plaintiffs to bring suit in its courts against companies incorporated therein.¹⁴ Ultimately, a total of 127 children with birth defects from tobacco farming families in Misiones joined in this action. Unlike other actions brought by foreign plaintiffs under the Alien Tort Statute involving violations of the law of nations,¹⁵ this case was filed on the basis of traditional and well-established state tort law.

The *Hupan* lawsuit alleged that 11 Philip Morris defendant companies controlled and were responsible for Tabacos Norte, which negligently supplied Roundup and other

¹² See Brigitte M Blatter et al, 'Spina Bifida and Parental Occupation: Results from Three Malformation Monitoring Programs in Europe' (2000) 16:4 *European Journal of Epidemiology* 343; Jean D Brender et al, 'Maternal Pesticide Exposure and Neural Tube Defects in Mexican Americans' (2010) 20:1 *Annals of Epidemiology* 16; Randolph P Rull et al, 'Neural Tube Defects and Maternal Residential Proximity to Agricultural Pesticide Applications' (2006) 163:8 *American Journal of Epidemiology* 743.

¹³ *General Foods Corp v Cyro-Maid, Inc* 198 A 2d 681, 684–85 (Del 1964). See also Mark D Greenberg, 'The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law' (1986) 4 *International Tax & Business Law* 155.

¹⁴ *General Foods Corp* 198 A.2d at 684 (setting forth six factors governing forum considerations for cases filed by foreign plaintiffs against companies incorporated in Delaware).

¹⁵ 28 U.S.C. § 1350.

pesticides, and required their use as a condition of the agreement to purchase the tobacco grown by these farmers.¹⁶ The suit further alleged that Monsanto manufactured a defective and unreasonably dangerous product, Roundup, which was predominantly used by plaintiffs' parents on their tobacco farms. Plaintiffs claimed that as a result of the families' participation in Tabacos Norte and their extensive use of pesticides (including Roundup), they were exposed to the pesticides on their farms, which resulted in the children's birth defects.¹⁷

A preliminary issue of major significance in *Hupan* was whether Delaware or Argentina law would apply when conflicts of law existed. After extensive briefing and expert evidentiary testimony over two years, the *Hupan* case moved forward on the basis that Argentina law would govern certain substantive legal issues.¹⁸ One of the major impacts of the court's acceptance of Argentina law was that a primary defense, federal pre-emption, was no longer available to Monsanto. Pesticide manufacturers commonly defend 'failure to warn' state tort claims by arguing that they are pre-empted or not permitted when the product label has been approved by the US Environmental Protection Agency.¹⁹

While the *Hupan* case was being litigated, the law on the appropriateness of Delaware as a forum for such cases changed, having a dramatic effect on this litigation and imposing even more challenges for foreign plaintiffs seeking to sue in Delaware. In 2014, the Delaware Supreme Court decided *Martinez v E.I. Dupont de Nemours & Co. (Martinez II)*, finding that a defendant may rely on 'overwhelming hardship' if forced to defend itself in Delaware, thereby allowing Delaware courts to dismiss cases on the basis of the FNC doctrine. The decision reversed prior rulings of lower courts, which had continuously decided that overwhelming hardship was not preclusive or an insurmountable burden.²⁰ Shortly after this decision was issued, Philip Morris filed to dismiss the claims against it in the *Hupan* case, relying on the *Martinez II* decision. The court granted the motion, finding Philip Morris had demonstrated that the requisite overwhelming hardship would exist.²¹ Finally, the Delaware Supreme Court affirmed the lower court's ruling that the availability of an alternative forum need only be considered as a factor in the FNC analysis, but is not a threshold requirement, thereby ending plaintiffs' claims against Philip Morris in Delaware.²²

¹⁶ Ultimately the case proceeded against two tobacco entities: Philip Morris Global Brands, Inc. and Philip Morris USA Inc. (the Philip Morris Defendants), and Monsanto Company, Inc., which were incorporated in Delaware.

¹⁷ The factual allegations against Monsanto, Philip Morris and the role of Tabacos Norte in growing tobacco in Misiones are set forth in Plaintiffs' Complaint filed in *Hupan et al v Alliance One International, Inc.* Case No. N12C-02-171 (Docket Entry Transaction ID 42488572).

¹⁸ See *Hupan v Alliance One Int'l, Inc* Del Super LEXIS 980 (2015) (opinion has not been released for publication).

¹⁹ See the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 1947 (US), prohibiting states from 'imposing any requirements for labeling or packaging in addition to or different from the requirements of FIFRA itself'.

²⁰ *Martinez v E.I. Dupont de Nemours & Co* 86 A 3d 1102 (Del 2014) (upholding the lower court conclusion that the claims of an Argentinian plaintiff for asbestos injuries against the defendant incorporated in Delaware were properly dismissed and purportedly clarifying and guiding the inquiry that should be made on motions based upon FNC).

²¹ *Hupan*, note 17.

²² *Aranda v Philip Morris USA Inc* Del LEXIS 129 (Del 2018) (acknowledging that Delaware is in the minority among states in not requiring that an alternative forum must be found to exist in order to dismiss a case on FNC grounds). The future of the remaining claims against Monsanto in the Delaware courts remains uncertain as the court is yet to render its final decision on whether the claims against Monsanto should be dismissed.

However, the Delaware litigation did involve a full inquiry into the substantive laws of Argentina, which are strongly supportive of such claims. As the Delaware court recognized, ‘Argentina is a civil law jurisdiction with its own courts and court rules that are capable of hearing this type of case ... Argentina has a strong and distinct interest in legal determinations regarding the safety of products that are affecting their children and families.’²³ Accordingly, for the Misiones plaintiffs, the legal option now available and most likely to achieve their objective of obtaining compensation from Philip Morris necessary to care for their life-long birth injuries, is the pursuit of these claims in their home country.

III. CONTINUING TRANSNATIONAL LITIGATION IN THE US AGAINST AGRIBUSINESS

Hupan and other pesticide cases pending in the US²⁴ may assist future foreign plaintiffs by providing a roadmap on forum and other important factors when considering to bring suits in the US. For instance, the decision in *Hupan* that the substantive law of the plaintiff’s home country applies in a US court will assist foreign plaintiffs in overcoming the pre-emption defence commonly asserted by pesticide manufacturers.

Moreover, litigation is ongoing in US courts to hold Monsanto accountable for Roundup’s negative impacts subsequent to the World Health Organization’s 2015 evaluation and classification of the herbicide glyphosate contained in Roundup as a probable carcinogen.²⁵ The first of these cases to go to trial in a US state court resulted in a substantial verdict for the plaintiff.²⁶ A federal US court has also recently found, after an extensive review of the scientific and medical evidence on the carcinogenicity of glyphosate, that such evidence is sufficiently reliable to allow hundreds of cases filed in federal US courts to proceed.²⁷ These results add to the growing body of evidence that pesticides made by US agribusinesses can cause cancer and other serious injury, and should be of utility to other plaintiffs in pesticide injury cases.

IV. CONCLUSION

As the above analysis shows, the FNC doctrine continues to present perhaps the most difficult challenge to foreign plaintiffs seeking to litigate against agribusinesses in US courts for harm done in their home countries. As *Hupan* demonstrates, a court’s final

²³ *Hupan*, note 17, at 13.

²⁴ See *Chavez v Dole Food Co*, No. 1-12-cv-00697-702 (USDC DE) (action involving foreign plaintiffs who brought suit over two decades ago in the US for pesticide injuries. These cases are still pending without resolution).

²⁵ Agency for Research on Cancer (IARC), *Some Organophosphate Insecticides and Herbicides*, Monograph Volume 112 (Lyon: IARC, 2017) 398 (finding a positive association observed for non-Hodgkin Lymphoma in humans).

²⁶ *Johnson v Monsanto*, No. CGC16550128 (Cal App Dep’t Sup Ct (2018), appeal docketed No. A155940 (Cal Ct App 2018)).

²⁷ *In re Roundup Prod Liab Litig*, No16-md-02741-VC, 2018 WL 3368534, at *36 (ND Cal July 10, 2018).

decision on FNC may take years to adjudicate, a factor that foreign plaintiffs must take into serious consideration when deciding whether to proceed in a US court. Since the decision on whether the court is an appropriate forum is at the discretion of the trial judge, courts in other states have interpreted the doctrine of FNC differently than the Delaware courts, permitting foreign plaintiffs to proceed.²⁸ Key to forum considerations is proof that the tortious conduct, such as corporate decision-making on health and safety involving practices or products utilized abroad, took place in the US.²⁹

Holding US agribusinesses accountable in US courts for injuries suffered in foreign countries due to pesticide exposure will continue to be a daunting task. The cases most likely to succeed in Delaware and perhaps other courts in the US will contain strong evidence of corporate decision-making taking place in the US by witnesses also located in the US resulting in harmful pesticide exposure in foreign countries where US agribusiness products and practices are employed. Maintaining forum in a US court will also entail convincing the court at the trial and appellate levels that undertaking such cases does not constitute an overwhelming hardship on agribusinesses, a high but not impossible bar.

²⁸ See, e.g., *Lake v Bayer Corp.* LEXIS 229 (Conn Super Ct 2006); *Varo v Owens-Illinois*, 948 A 2d 673 (NJ Sup Ct App Div 2008); *Ellis v AAARP Parts Trading, Inc* 828 N E 2d 726 (Ill App Ct 2005).

²⁹ See *Erwin v Motorola, Inc* 945 N E 2d 1153 (Ill App Ct 2011) (denying an FNC challenge seeking to move the case from Illinois, where the defendant was headquartered, to another state where the alleged tortious conduct and plaintiff resided).