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## Corrigan v. Bjork Corporation: Will California Ever Again Be an Inconvenient Forum for Foreign Plaintiffs

Carol A. Stickels

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# Corrigan v. Bjork Corporation: Will California ever again be an inconvenient forum for foreign plaintiffs?

## I. INTRODUCTION

In an action brought by a foreign<sup>1</sup> plaintiff in a California state court, a defendant has two options. The defendant can either accept or contest the court's jurisdiction. While the plaintiff's choice of forum may be proper in that it conforms to statutory venue requirements, the court chosen may not be desirable to the defendant in terms of convenience and efficiency.<sup>2</sup> For obvious and legitimate reasons, a defendant usually prefers to be sued where he or she resides or where the plaintiff's injury occurred.<sup>3</sup> In these cases, the problem of an inconvenient forum may be solved by the defendant's invoking the doctrine of forum non conveniens.<sup>4</sup>

In ruling on forum non conveniens motions, the court can refuse jurisdiction and order dismissal of the action if it finds the action is more appropriate in another forum, such as the home forum of the foreign plaintiff.<sup>5</sup> One of the purposes of this doctrine, then, is to limit the trial of actions brought in inconvenient forums.<sup>6</sup> The court may dismiss the case when a trial in the inconvenient forum would " 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.' "<sup>7</sup> The policy behind the forum non conveniens doctrine dictates that little weight should be given to the fact that a change in forum will result in a change in the substan-

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1. For the purposes of this Note, the term "foreign" is used to mean parties who are non-residents of California and parties who are residents of a country other than the United States.

2. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 88 (1985) [hereinafter J. FRIEDENTHAL, CIVIL PROCEDURE].

3. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

4. For a comprehensive history of the doctrine, see Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565, 567-68 (1986); Barrett, *supra* note 3, at 386-89.

5. J. FRIEDENTHAL, CIVIL PROCEDURE, *supra* note 2, at 88-89.

6. Barrett, *supra* note 3, at 404-06.

7. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981) (quoting Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947)).

tive law governing the action.<sup>8</sup> This approach is followed in the federal courts and by the majority of states in forum non conveniens problems. However, this approach is not followed in California state courts. California courts first broke from the majority forum non conveniens approach in *Holmes v. Syntex Laboratories, Inc.*,<sup>9</sup> and later affirmed this decision in *Corrigan v. Bjork Shiley Corp.*,<sup>10</sup> the subject of this Note.

In September 1983, Australian citizens James Corrigan and his two sons brought a wrongful death action against Bjork Shiley Corporation, a California corporation, in the Los Angeles County Superior Court.<sup>11</sup> Bjork Shiley answered the complaint, but on June 14, 1985 filed a motion to dismiss based on the grounds that Los Angeles county was an inconvenient forum and Australia was the proper forum.<sup>12</sup> The trial court denied the motion to dismiss but stayed the action under the forum non conveniens doctrine so that the case could be refiled in Australia.<sup>13</sup> The plaintiffs appealed the court's decision, alleging the trial court abused its discretion.<sup>14</sup>

On appeal, the court reversed. The court held that because the plaintiffs would be unable to bring an identical action in an Australian court,<sup>15</sup> the California forum non conveniens doctrine did not allow for a dismissal of the action. The forum non conveniens doctrine mandated consideration of whether the alternative forum's substantive law would effectively deny an adequate recovery in a case where California had a substantial interest in deciding the matter.<sup>16</sup>

The appellate decision is significant for a myriad of reasons. Under the federal doctrine, courts should not give conclusive or even substantial weight to the possibility of a change in substantive law in a forum non conveniens inquiry.<sup>17</sup> Although the California doctrine is a direct descendant of the federal forum non conveniens doctrine,<sup>18</sup>

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8. *Piper*, 454 U.S. at 241.

9. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

10. 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

11. *Id.* at 172, 227 Cal. Rptr. at 249.

12. *Id.*

13. *Id.*

14. *Id.* at 173, 227 Cal. Rptr. at 250.

15. *Id.* at 179, 227 Cal. Rptr. at 254.

16. *Id.*

17. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

18. *Price v. Atchison, T. & S.F. Ry. Co.*, 42 Cal. 2d 577, 583-87, 268 P.2d 457, 460-63, *cert. denied*, 348 U.S. 839 (1954).

California courts have now repudiated the federal view. In California, a change in law is a significant factor in determining whether an alternative forum is acceptable.<sup>19</sup>

*Corrigan v. Bjork Shiley Corp.*<sup>20</sup> demonstrates further adherence to this California forum non conveniens trend. Here, however, the court focuses not on the change in substantive law, but rather on the impairment of state interests.<sup>21</sup>

This Note analyzes the *Corrigan* court's reasoning by first briefly reviewing the evolution of forum non conveniens and California's departure from the federal standard. This Note then examines whether the California courts are justified in repudiating the federal doctrine in light of its intended application, and examines the *Corrigan* court's determination that Australia was not an adequate forum. In addition, this Note explores the effects of the *Corrigan* ruling on manufacturers and distributors sued in California state courts. Finally, the Note concludes by proposing a more workable standard than the 'comparative impairment of state interests' as set forth in *Corrigan*.<sup>22</sup>

## II. STATEMENT OF THE CASE

On September 8, 1982, Elsie Joan Corrigan, a citizen and resident of New South Wales, Australia, underwent a heart valve replacement and implantation of a Bjork Shiley manufactured disc prosthesis.<sup>23</sup> On September 20, several components of the valve allegedly fragmented and entered Mrs. Corrigan's circulatory system.<sup>24</sup> She suffered cardiac arrest which resulted in her death.<sup>25</sup>

On September 19, 1983, Mrs. Corrigan's surviving spouse, James Corrigan, and their two sons brought a wrongful death action based on products liability in Los Angeles County Superior Court. The suit was against Bjork Shiley Corporation, a California corporation with its principal place of business in Irvine, California.<sup>26</sup> The defendant timely answered the complaint. Neither party alleged any third-party

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19. See, e.g., *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 387, 202 Cal. Rptr. 773, 782 (1984).

20. 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

21. *Id.* at 180, 227 Cal. Rptr. at 255.

22. *Id.*

23. *Id.* at 171, 227 Cal. Rptr. at 249.

24. *Id.*

25. *Id.*

26. *Id.*

negligence at that time.<sup>27</sup>

On June 14, 1985, Bjork Shiley filed a motion to dismiss on the grounds that Los Angeles was an inconvenient forum and that Australia was the proper forum.<sup>28</sup> The defendant presented evidence that the valve was never sold or distributed in the United States and that Bjork Shiley stopped the manufacture and sale of the valve in January 1983 after the Food and Drug Administration (FDA) withdrew its approval.<sup>29</sup> Defendant also acceded to Australian jurisdiction.<sup>30</sup>

The trial court denied the motion to dismiss, but stayed the action so that the plaintiffs could refile in Australia. The judge found that the prejudice to the defendant was greater if the suit remained in California than if the suit were brought in Australia.<sup>31</sup> Plaintiffs appealed the stay on the grounds that the court abused its discretion by staying the action based on the doctrine of *forum non conveniens*.<sup>32</sup>

### III. COURT'S REASONING

The appellate court reversed the trial court's ruling, holding that Australia was not a suitable alternative forum.<sup>33</sup> The court balanced the arguments for and against a dismissal of the action, taking into account any considerations bearing upon the relative suitability of the alternative forums.<sup>34</sup> The court quickly disposed of the "neutral" factors, such as the cost of trial for all parties in California as compared to the cost of trial in Australia, the convenience of each forum for

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27. *Id.*

28. *Id.*

29. *Id.* at 171-72, 227 Cal. Rptr. at 249.

30. *Id.* at 171, 227 Cal. Rptr. at 249. Bjork Shiley also agreed to pay any judgment entered against it in Australia, "to comply with all discovery orders, and to exercise its best efforts and pay the costs of making any 10 of its past or present employees available to testify at trial in Australia." *Id.*

31. *Id.* at 172, 227 Cal. Rptr. at 249-50. The trial court's discretion in granting a stay rather than dismissing the action is questionable in the subject action. Even though the court has the power to stay or dismiss the action in whole or in part on any conditions that may be just, CAL. CIV. PROC. CODE § 410.30(a) (West Supp. 1988), a trial court has no discretion, except in extraordinary cases, to dismiss the suit on *forum non conveniens* grounds in an action brought by a California resident. The court must stay the proceedings until the alternative forum court renders a final decision. *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 858, 544 P.2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). If there is no California plaintiff involved, the inverse proposition of *Archibald* should logically be that a trial court cannot stay an action when there is no California interest to protect.

32. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 172, 227 Cal. Rptr. 247, 250 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

33. *Id.* at 183, 227 Cal. Rptr. at 257.

34. *Id.* at 172, 227 Cal. Rptr. at 250.

witnesses, and the access to physical evidence.<sup>35</sup>

The court next reasoned that while a foreign plaintiff's choice of forum was traditionally given less deference,<sup>36</sup> the substantial disadvantage to plaintiff caused by a change in law may be enough for the court to retain the action and deprive defendant of a suitable alternative forum.<sup>37</sup> The "suitable alternative forum" rule was set forth in *Holmes v. Syntex Laboratories, Inc.*<sup>38</sup>

In *Holmes*, the court created a standard for the consideration of a change in substantive law that was much more liberal than the policy followed in the federal courts.<sup>39</sup> The court considered the suitability of the alternative forum in ruling on a forum non conveniens dismissal. Suitability encompasses factors such as differing conflict of law rules and the substantial disadvantage to the parties in litigating in the alternative forum.<sup>40</sup>

The *Corrigan* court refined the "suitable forum" test. The decision turned on which forum's governmental interest would be more impaired if its law were not applied, as opposed to whether the plaintiffs could be afforded the same recovery in an Australian court.<sup>41</sup> Since Bjork Shiley was the only named defendant, and was a California corporation, the court determined California's interest in hearing the suit was much greater than Australia's interest.<sup>42</sup>

[T]he relationship of the corporation to California, and its activities in manufacturing, processing, packaging, labeling, distributing

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35. *Id.* at 174, 227 Cal. Rptr. at 251. The court described the neutral factors as those which did not "indicate a preference for a particular forum." *Id.* The neutral factors were as follows: The court found that the Australian plaintiffs were willing to come to California and submit to its jurisdiction, and that the California defendant was willing to submit to Australian jurisdiction and pay any judgment rendered against it by an Australian court. *Id.* The action was commenced within the statute of limitations in California and could still be brought within the statute of limitations in Australia. *Id.* at 174-75, 227 Cal. Rptr. at 251. Both sides were willing to assume the expense of a trial in a less convenient forum. *Id.* at 175, 227 Cal. Rptr. at 251. Furthermore, neither forum was more convenient from the standpoint of all the witnesses. *Id.*

36. *See, e.g.*, *Dendy v. MGM Grand Hotels*, 137 Cal. App. 3d 457, 460, 187 Cal. Rptr. 95, 97 (1982); but see also *Holmes v. Syntex Laboratories*, 156 Cal. App. 3d 372, 380-81, 202 Cal. Rptr. 773, 778 (1984) where the court adopted the rule of substantial deference to a plaintiff's choice of forum, even in the case of a foreign plaintiff.

37. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 176, 227 Cal. Rptr. 247, 252 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

38. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

39. *Id.* at 382, 202 Cal. Rptr. at 779.

40. *Id.*

41. *Corrigan*, 182 Cal. App. 3d at 178-79, 227 Cal. Rptr. at 254.

42. *Id.* at 181, 227 Cal. Rptr. at 255.

and selling products in California and sending products from this state . . . "does not lead to a conclusion that prosecution of this action in this state would 'place a burden on the courts of this state which is unfair, inequitable or disproportionate.'"<sup>43</sup>

#### IV. HISTORICAL FRAMEWORK

##### A. *Federal Forum Non Conveniens*

The Supreme Court has long recognized the existence of the power of courts to decline jurisdiction.<sup>44</sup> The federal doctrine of forum non conveniens was first solidified in *Gulf Oil Corp. v. Gilbert* ("*Gilbert*").<sup>45</sup> In *Gilbert*, the Court recognized that, under the doctrine of forum non conveniens, a court may in its discretion resist exercising its jurisdiction in certain instances, even when jurisdiction is authorized by a general venue statute.<sup>46</sup> The Court also held that the plaintiff's choice of forum should rarely be disturbed unless the balance strongly favors the defendant.<sup>47</sup> Later, in *Piper Aircraft Co. v. Reyno*,<sup>48</sup> the Court recognized that a forum non conveniens motion to dismiss could not be defeated merely by showing that the substantive law in the alternative forum was less favorable to the plaintiff's recovery.<sup>49</sup>

Thus, under *Gilbert* and *Piper Aircraft*, giving substantial weight

43. *Id.* at 182, 227 Cal. Rptr. at 256 (quoting *Brown v. Clorox Co.*, 56 Cal. App. 3d 306, 313, 128 Cal. Rptr. 385, 401 (1976)).

44. See, e.g., *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932) (admiralty suit between foreign parties); *Williams v. North Carolina*, 317 U.S. 287 (1942) (criminal prosecution for out of state divorce); *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941) (oil production case); *Broderick v. Rosner*, 294 U.S. 629 (1935) (out of state stockholder liability suit); *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929) (personal injury action arising under Federal Employers' Liability Act); *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312 (1923) (railroad delivery suit).

45. 330 U.S. 501 (1947).

46. *Id.* at 507. The doctrine invests the courts with the discretion to change the place of trial after considering the private and public interests involved. The Court listed the following as important private considerations: the relative ease of access to sources of proof, availability and cost of compulsory process for witness attendance and enforceability of a judgment. Public considerations included administrative difficulties of the courts, the burden on juries when the litigation had no relation to their forum, and local interest in having the case tried at home. *Id.* at 508-09. For further discussion on private and public concerns, see also *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1334 (9th Cir. 1984) and 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 3828, at 278 (2d ed. 1986).

47. *Gilbert*, 330 U.S. at 508.

48. 454 U.S. 235 (1981).

49. *Id.* at 247.

to changes in substantive law is rarely proper.<sup>50</sup>

[I]f conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.<sup>51</sup>

If change in law were determinative, trial courts would be forced to compare the “rights, remedies, and procedures available” under both its own law and the law of the alternative forum.<sup>52</sup> However, the doctrine of *forum non conveniens* was partially designed to avoid complex comparisons of laws.<sup>53</sup> “Public interest factors point towards dismissal where the court would be required to ‘untangle problems in conflict of laws, and in law foreign to itself.’”<sup>54</sup>

When the chosen forum is the plaintiff’s home, great deference is given to the plaintiff’s choice.<sup>55</sup> The courts assume the plaintiff has reasonably chosen the most convenient forum, and the burden is on the defendant to show the forum is both inconvenient to both it and the plaintiff.<sup>56</sup> The assumption of convenience, however, becomes much less reasonable when the case involves a foreign plaintiff.<sup>57</sup> The assumption dissipates since the “central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . . .”<sup>58</sup> But if an action is filed outside the plaintiff’s home forum, the plaintiff probably chose the jurisdiction solely because it offers the most favorable law.<sup>59</sup> Conversely, a foreign plaintiff’s choice of forum should receive less deference. “[T]he deference accorded a plaintiff’s choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case.”<sup>60</sup>

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50. *Id.* at 250.

51. *Id.*

52. *Id.* at 251.

53. *Id.*

54. *Id.* (quoting *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 509 (1946)).

55. *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947).

56. *Id.* at 535 (Reed, J., dissenting).

57. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

58. *Id.*

59. *Id.* at 256 n.24.

60. *Id.* at 257 n.24.



Federal courts follow the *Piper Aircraft* "assumption of convenience" test<sup>61</sup> in granting motions to dismiss on the grounds of forum non conveniens in cases brought by foreign plaintiffs.<sup>62</sup> When the chosen forum is not assumed to be the most convenient forum, courts balance private and public interest factors<sup>63</sup> in order to make a realistic determination of which forum is the most convenient and will better further a just review of the plaintiff's claim. In *In Re Union Carbide Corp. Gas Plant Disaster*,<sup>64</sup> the court found that the private and public interest factors weighed heavily toward the dismissal of the action<sup>65</sup>— so heavily that retention of jurisdiction presented a "paradox" for the court.<sup>66</sup>

[T]o retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism . . . The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice . . . India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.<sup>67</sup>

### B. California Forum Non Conveniens

In the California system, unlike the federal system, a plaintiff may successfully defeat a motion to dismiss on the grounds of forum non conveniens by showing a substantial disadvantage in litigating under the law of the alternative forum.<sup>68</sup> While California's forum non conveniens doctrine is derived from the federal doctrine,<sup>69</sup> the

61. *Id.*

62. See, e.g., *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 845 (S.D.N.Y.), *aff'd*, 809 F.2d 195 (2d Cir. 1986), *cert. denied sub nom.*, *Union of India v. Union Carbide Corp.*, 108 S.Ct. 199 (1987); *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 21 (N.D. Cal. 1982), *aff'd sub. nom.*, *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1982), *cert. denied sub nom.*, *Nai-Chao v. Boeing Co.*, 104 S.Ct. 549 (1983); *cf. Intel Corp. v. Malaysian Airline System*, 652 F. Supp. 1101, 1103-04 (N.D. Cal. 1987).

63. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

64. 634 F. Supp. 842 (S.D.N.Y. 1986).

65. *Id.* at 866-67.

66. *Id.* at 867.

67. *Id.*

68. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 182, 227 Cal. Rptr. 247, 257 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987); *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 387, 202 Cal. Rptr. 773, 782 (1984).

69. *Price v. Atchison, T. & S.F. Ry. Co.*, 42 Cal. 2d 577, 583-87, 268 P.2d 457, 460-63, *cert. denied*, 348 U.S. 839 (1954). The state doctrine is codified at CAL. CIV. PROC. CODE § 410.30 (West Supp. 1988) which reads in pertinent part:

a) Except as provided in subdivision (b), when a court upon motion of a party or on its own motion finds that in the interest of substantial justice an action should be

courts broke tradition and moved away from the federal idea that a foreign plaintiff's choice of forum should be given less deference.<sup>70</sup> In *Holmes v. Syntex Laboratories, Inc.*,<sup>71</sup> the court specifically held that the "resulting disadvantage to [plaintiffs litigating in a forum whose law is inadequate] is a factor that constitutes denial of a 'suitable' alternative forum under California law."<sup>72</sup> *Corrigan v. Bjork Shiley Corp.*<sup>73</sup> further modified this analysis by focusing now on which forum has the greatest interest<sup>74</sup> in hearing the action, rather than on which forum provides the plaintiff with the largest recovery.<sup>75</sup>

### C. Substantive Versus Procedural Aspects of Forum Non Conveniens

In federal courts, forum non conveniens is a common law doctrine.<sup>76</sup> While the doctrine was codified in part,<sup>77</sup> the statute was intended to be a revision rather than a codification of federal common-law.<sup>78</sup> Because the doctrine has federal origins, one may argue that state courts are still obligated to follow the doctrine in their forum

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heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

*Id.*

70. See *supra* notes 57-62 and accompanying text.

71. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

72. *Id.* at 387, 202 Cal. Rptr. at 782.

73. 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

74. The idea of "interest" in this context refers to the idea of governmental interest developed by Brainerd Currie in *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). Currie proposed a two-step analysis to determine when a government had an interest in whether its law was applied in a given action. First, the court construes and interprets the forum's law in terms of its expressed social, economic or administrative policy. *Id.* at 9. Second, the court analyzes the state's relationship to the litigation to determine whether application of the state's law can reasonably be expected to effectuate the policy the specific law creates. If it does, the state has an interest in the application of its law. *Id.* at 9-10. See also, Comment, *supra* note 4, at 570 n.26; Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law*, 4 INT'L TAX & BUS. LAW. 155, 183 n.231 (1986) (urging a broader formulation of governmental interest).

75. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 178, 227 Cal. Rptr. 247, 254 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

76. See *supra* notes 47-52 and accompanying text.

77. The doctrine is codified at 28 U.S.C. § 1404 (1982), which reads in pertinent part: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

78. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).

non conveniens decisions. This question, however, turns on whether the doctrine is seen as substantive or procedural law. While federal common-law may be authoritative, the courts are restricted to developing common-law only in matters of substantial national concern that fall within the powers given the federal government by the Constitution.<sup>79</sup> If forum non conveniens is substantive common-law, the federal doctrine displaces state statutory as well as state decisional law.<sup>80</sup> Furthermore, when federal common-law governs a particular issue, federal law must be applied regardless of whether the case is in federal or state court.<sup>81</sup> If the law is merely procedural, however, the states are not obligated to follow it because there has been no federal legislative mandate.

The idea of a controlling federal substantive law arises from the Supreme Court's decision in *Erie R.R. v. Tompkins*.<sup>82</sup> In *Erie*, the Supreme Court struck down the doctrine of "federal general common-law,"<sup>83</sup> creating the "*Erie* doctrine."<sup>84</sup> The *Erie* doctrine requires federal courts to apply state substantive law, regardless of its origin, unless the state law conflicted with federal law governed by the Constitution or Acts of Congress.<sup>85</sup>

Later cases recognized the true purpose of the *Erie* doctrine was to avoid the potential for state and federal courts to reach different outcomes on the same case. In *Guaranty Trust Co. v. York*,<sup>86</sup> the Court rejected the *Erie* doctrine's labeling of a state's law as substantive or procedural. The Court instead adopted an "outcome determinative" test,<sup>87</sup> which proposed a consistent application of local

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79. J. FRIEDENTHAL, CIVIL PROCEDURE, *supra* note 2, at 223. The recognized areas have traditionally been: (1) admiralty; (2) interstate disputes; (3) matters of international relations; (4) gaps in federal statutory provisions; and (5) legal relations and proprietary interests of the United States. *Id.* at 223-27.

80. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards" [citation omitted]).

81. See, e.g., *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964).

82. 304 U.S. 64 (1938).

83. The doctrine of federal general common-law was set forth in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which allowed the federal courts to create federal common-law on any state matter that had not been set forth in state rules and enactments promulgated by the state legislative authorities, or long-established local customs having the force of law. *Id.* at 12-13.

84. *Erie*, 304 U.S. at 78.

85. *Id.*

86. 326 U.S. 99 (1945).

87. *Id.* at 109.

substantive law in all courts located within the given state.<sup>88</sup> Further discussion of the *Erie* doctrine in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*<sup>89</sup> and *Hanna v. Plumer*<sup>90</sup> created more tests to assist the courts in determining which law to apply in diversity actions.<sup>91</sup>

The *Byrd* "balancing test" calls for a comparison of the competing federal and state policies at issue to determine which policy interest is stronger, and consequently which law should govern.<sup>92</sup> In *Hanna*, courts are admonished to consider the twin aims of *Erie*, which are (1) discouraging forum shopping and (2) discouraging inequitable administration of the law, when deciding which law to apply.<sup>93</sup> If forum non conveniens is indeed substantive, a state law that departs from federal substantive law would not be upheld even if a state law is valid, if such a law promoted the ends the *Erie* Court was trying to protect.

The Supreme Court has not yet decided if the forum non conveniens doctrine is to be an equally applied doctrine. If the doctrine was equally applied, forum non conveniens would be the same in all cases brought within any court of a given state. Since the suit in *Piper Aircraft Co. v. Reyno*<sup>94</sup> was transferred to the Pennsylvania District Court at the lower level,<sup>95</sup> the Court was able to side-step the issue by deferring to the federal doctrine. Interestingly, by deferring to the federal doctrine, the Court overruled the appellate decision in *Reyno v. Piper Aircraft Co.*<sup>96</sup>; the court of appeals also deferred to the federal doctrine, and chose not to decide "between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects."<sup>97</sup>

Lower federal courts, however, generally have held that the forum non conveniens doctrine is procedural, not substantive. In *Sibaja*

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88. *Id.*

89. 356 U.S. 525 (1958).

90. 380 U.S. 460 (1965).

91. Diversity actions as described in U.S. CONST. art. III, § 2, are actions between residents of different states or countries, brought in federal court. *Id.*

92. *Byrd*, 356 U.S. at 536-37.

93. *Hanna*, 380 U.S. at 468.

94. 454 U.S. 235 (1981).

95. *Id.* at 240. The original matter was filed in California state court, and removed to the U.S. District Court for the Central District of California. *Id.* The action was then transferred to the U.S. District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a) at the request of defendant Piper. *Id.* at 241.

96. 630 F.2d 149 (3d Cir. 1980).

97. *Id.* at 158.

*v. Dow Chemical Co.*,<sup>98</sup> a group of Costa Rican agricultural workers brought suit in a Florida state court. The workers claimed they were rendered sterile as a result of exposure to pesticides manufactured by Dow Chemical Company or Shell Oil Company.<sup>99</sup> The case was removed to a Florida district court,<sup>100</sup> which granted a motion to dismiss based on the federal forum non conveniens doctrine.<sup>101</sup> Plaintiffs appealed, claiming that the *Erie* doctrine mandated the application of the state forum non conveniens doctrine.<sup>102</sup>

The court of appeals held that the doctrine "is a rule of venue, not a rule of decision."<sup>103</sup> The decision to exercise jurisdiction does not go to the character and result of the controversy, but is rather a decision that takes place completely apart from any application of state substantive law.<sup>104</sup> The court did, however, leave open an avenue to find that forum non conveniens was substantive. The court recognized that "a judge-made rule *may* qualify as a rule of decision if it substantially affects the 'character or result of a litigation,'" <sup>105</sup> but found that this was not the result in *Sibaja*.

## V. ANALYSIS

### A. *The Corrigan Decision*

1. Was California correct in departing from the federal forum non conveniens standard?

California may be justified in its departure from the federal doctrine. The Supreme Court has failed to rule on whether the common-law federal forum non conveniens doctrine is substantive or procedural,<sup>106</sup> or whether the doctrine is to be applied equally.<sup>107</sup> Thus, the federal mandate regarding forum non conveniens is still unclear. Unless the doctrine is viewed as substantive,<sup>108</sup> state courts would be free to develop their own doctrines. A state, by developing individual

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98. 757 F.2d 1215 (11th Cir. 1985).

99. *Id.* at 1216.

100. *Id.*

101. *Id.* at 1217.

102. *Id.* at 1217-18.

103. *Id.* at 1219.

104. *Id.*

105. *Id.* at 1219 (emphasis in original) (quoting *Hanna v. Plumer*, 380 U.S. 460, 467 (1965)).

106. *See supra* text accompanying notes 79-81.

107. *See supra* text accompanying notes 95-97.

108. *See supra* text accompanying notes 68-70.

guidelines, could choose either to mirror the federal guidelines or to repudiate such limitations, as in California.<sup>109</sup>

A court's refusal to grant a *forum non conveniens* dismissal based on change in substantive law may, however, indicate the doctrine is substantive. As discussed in *Sibaja v. Dow Chemical Co.*,<sup>110</sup> if a decision affects the character or result of the litigation, the doctrine mandating the decision must be considered substantive rather than procedural. Courts may also be circumventing the *Erie* policies<sup>111</sup> by focusing on the projected recovery in the alternative forum. A foreign plaintiff may be receiving preferential treatment at the expense of the resident defendant if he has the luxury of forum shopping, and then is assured that the court will not dismiss the action, simply because the foreign plaintiff's home court does not recognize similar causes of action.

## 2. Did the court rule correctly under Australian law?

In making the *forum non conveniens* decision, the *Corrigan* court sought not to "weigh the worth of the social policy"<sup>112</sup> of the Australian legal system, but to focus on "which forum's governmental interests will be more impaired if its law is not applied."<sup>113</sup> This standard does not make much sense. Reviews such as this are problematic because each forum has already decided which law will apply to afford a just recovery. In Australia, courts always apply Australian law in tort actions.<sup>114</sup> In trying the *Corrigan* action, a California court would apply California law.<sup>115</sup> Each government had already decided application of its own law would result in a just recovery. Therefore, each government's interest would be equally impaired if its law was not applied.

The *Corrigan* court found, however, that California's interest would suffer greater impairment if its law were not applied. The court also found that the plaintiffs would not receive an adequate re-

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109. See *supra* text accompanying notes 79-81.

110. 757 F.2d 1215 (11th Cir. 1985). See *supra* text accompanying notes 103-105.

111. See *supra* text accompanying note 105.

112. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 179, 227 Cal. Rptr. 247, 254 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

113. *Id.*

114. Australian courts adhere to the *lex fori* rule. *Corrigan*, 182 Cal. App. 3d at 179, 227 Cal. Rptr. at 254. *Lex fori* is "[t]he law of the forum, or court; that is, the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought or remedy sought is an integral part." BLACK'S LAW DICTIONARY 819 (5th ed. 1979).

115. *Corrigan*, 182 Cal. App. 3d at 179, 227 Cal. Rptr. at 254.

covery in an Australian court. The strict liability and breach of warranty causes of action would be "circumscribed", as would other unnamed "elements of damage."<sup>116</sup> In reading the court's opinion, the Corrigan's apparently would not be compensated for their loss if they brought the action in Australia. The opinion is misleading in this sense. While Australian products liability law is not identical to the law in California, the Corrigan's would have been afforded a recovery in an Australian court. Such a recovery would be adequate by Australian standards—the Australian government decided that application of its own law resulted in adequate recoveries, regardless of whether plaintiffs were able to recover in as many ways as they would have been able to recover in California. The *Corrigan* court simply set up artificial barriers to determine that Australia was an improper alternative forum in making the forum non conveniens determination.

Australia would have been the proper alternative forum for the following reasons. First, Mr. Corrigan and his sons would have been able to bring a wrongful death action in Australia. In 1846, Australia adopted by statute Lord Campbell's Act which provided for recovery of damages arising from the death of close relatives.<sup>117</sup> The Act has now been consolidated in the Fatal Accidents Act of 1976,<sup>118</sup> and a statutory remedy for wrongful death has been adopted throughout Australia.<sup>119</sup> Wrongful death actions are permitted by certain designated relatives<sup>120</sup> where the wrongful action of the defendant would have permitted the decedent to bring an action had she not died of her injuries.<sup>121</sup> Actions must be commenced within a specific time limit from the date of death.<sup>122</sup> Recovery is limited to damages only for loss of economic or material advantages to the survivors.<sup>123</sup> For the loss of a wife and mother, survivors can claim damages not only for the loss of outside earnings, but also for loss of domestic services in

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116. *Id.*

117. J. FLEMING, *THE LAW OF TORTS* 626 (6th ed. 1983).

118. *Id.* at 626 n.26.

119. *Id.* at 626 n.27.

120. *Id.* at 626-27. The protected relatives are the wife, husband, parents, grandparents, step-parents, children, grandchildren and stepchildren of a decedent. *Id.* Fleming also recognizes that amending legislation has expanded the class of dependents to include half-blood, illegitimate, adoptive and foster relationships, and in some instances even unmarried cohabitants. *Id.* (footnotes omitted).

121. *Id.* at 627.

122. *Id.* In New South Wales, the Corrigan's residence, the statute of limitations is six years. *Id.* at 627 n.36.

123. *Id.* at 629.

looking after the home, husband and children.<sup>124</sup> Damages for grief, funeral and medical expenses are non-recoverable.<sup>125</sup> Thus, the Corrigans would have been able to bring a legitimate wrongful death action in Australia.

Second, the Corrigans could bring a products liability action in Australia. While the *Corrigan* court found actions based on strict liability or breach of warranty would have been circumscribed,<sup>126</sup> the court apparently equated the number of possible causes of action with an adequate recovery. Again, the Corrigans would be provided an adequate recovery under Australian law. Australian courts recognize strict liability in actions for breach of warranty and/or products liability in negligence.<sup>127</sup> While the number of ways to recover is smaller than the number in California,<sup>128</sup> recovery under any method in Australia should be adequate to compensate the plaintiff for his or her loss.

The first method of recovery in products liability is for breach of warranty. To recover for the breach, a plaintiff must show that she or the user was a consumer. The Trade Practice Amendment Act provides a consumer compensation for damages for breach of a manufacturer's express or implied warranty.<sup>129</sup> The consumer's right to recover against a manufacturer, however, is only available in relation to "goods of a kind ordinarily acquired for personal, domestic or household use or consumption."<sup>130</sup> A heart valve replacement, such as the one manufactured by defendant Bjork Shiley arguably would

124. *Id.* at 631.

125. *Id.* at 629-30. Some courts have undertaken to compensate for non-economic loss. *Id.* at 630 n.16. Recovery for grief ("*solatium*"), is computed by giving consideration to the suffering of the claimants, their loss of association and the nature and circumstances of the death. *Id.* at 630. This reform, however, has taken place only in South Australia and Tasmania and in all likelihood would not have applied in this case.

Some states have further allowed for funeral and medical expenses by statute. In New South Wales, for example, this compensation includes recovery for the cost of a tombstone. *Id.* at 630 n.18.

126. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 179, 227 Cal. Rptr. 247, 254 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

127. J. FLEMING, *supra* note 117, at 459.

128. *Corrigan*, 182 Cal. App. 3d at 179, 227 Cal. Rptr. at 254. In California, the plaintiffs alleged products liability, negligence, strict liability and breach of express and implied warranties in their complaint. *Id.* at 171, 227 Cal. Rptr. at 249.

129. Trade Practices Amendment Act, 1978, AUSTL. ACTS P. No. 206, § 74B (hereinafter Trade Practices Act). For a general discussion of the Trade Practices Act, see Gregg & Tzavaras, *The Liability of Manufacturers and Importers under the Trade Practices Amendment Act of 1978*, 10 FED. L. REV. 574 (1974).

130. Trade Practices Act, *supra* note 129, § 74A(2)(a).



not fit into the goods category. Thus, a warranty action would not lie in Australia.

The second method of recovery is under a products liability action in negligence. Australian courts allow recovery for damages caused by dangerous articles which were negligently made.<sup>131</sup> To bring a manufacturer within the reach of an action, the plaintiff must show he was injured, and that the injury was reasonably foreseeable by the manufacturer to someone similar to the plaintiff.<sup>132</sup>

The Corrigan may have had a colorable claim against Bjork Shiley under a negligent design and/or production claim. The plaintiffs apparently had some evidence in their possession of valve design failure, which they presented in their opposition to defendant's forum non conveniens motion.<sup>133</sup> Furthermore, absent sufficient evidence, a claim for negligent production could also lie under a *res ipsa loquiter* theory.<sup>134</sup> Heart replacement valves, such as the one implanted in Elsie Corrigan, do not generally fragment two weeks after implantation absent some type of negligence by the manufacturer. Thus, the Corrigan would have had a viable claim against the defendant under Australian law. The plaintiffs could attempt to recover under an action grounded in products liability negligence. The recovery would likewise be sufficient under Australian standards. Contrary to the findings of the *Corrigan* court, a forum non conveniens dismissal was proper because Australia was an adequate alternative forum.

### 3. What effect will this standard have on California manufacturers?

The California trend towards accepting all lawsuits may have a

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131. S. CAVANAUGH & C. PHEGAN, *PRODUCT LIABILITY IN AUSTRALIA* 163 (1983).

132. *Id.* A manufacturer can be liable for negligent design and/or production. *Id.* at 163-64.

133. *Corrigan v. Bjork Shiley Corp.* 182 Cal. App. 3d 166, 171, 227 Cal. Rptr. 247, 249 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

134. *Res ipsa loquiter*, or "the thing speaks for itself" is a rebuttable presumption or inference that the defendant was negligent. *BLACK'S LAW DICTIONARY* 1173 (5th ed. 1979). Under the doctrine, an inference of negligence can be made where plaintiff produces substantial evidence that the injury was caused by an instrumentality under exclusive control and management of the defendant, and that the occurrence was such that in the ordinary course of events it would not have happened absent reasonable care on behalf of the defendant. *Id.*

The *res ipsa loquiter* doctrine is commonly used in strict liability actions in Australia. J. FLEMING, *supra* note 117, at 467. A showing of control during the process of manufacture is sufficient for a finding of negligence, provided the plaintiff can eliminate himself and other likely extraneous forces as the cause of the injury. *Id.*

detrimental impact on California business. In *Holmes*<sup>135</sup> and *Corrigan*,<sup>136</sup> the courts decided that the foreign plaintiffs' suits can only be removed upon showing that the change in substantive law will not be detrimental to the plaintiff.<sup>137</sup> The courts failed, however, to recognize that refusing removal often disadvantages the defendants. In the great rush to protect the foreign plaintiff, the courts have overlooked the detriment to its own resident defendant. If the cause of action arose outside of California, as in *Corrigan*, a resident defendant may be precluded from bringing equally culpable parties into the lawsuit. For example, in *Corrigan*, the only named defendant was Bjork Shiley Corporation.<sup>138</sup> Bjork Shiley made no attempt to bring in any other defendants,<sup>139</sup> but did present some evidence of negligence on behalf of the Australian hospital staff and doctors.<sup>140</sup> The court, however, reasoned that since Bjork Shiley did not make allegations about third-party negligence, third-party negligence did not exist.<sup>141</sup>

The court's reasoning is at best shortsighted. The reasoning also places a great burden on a defendant to expend a great deal of time and money in the early stages of a lawsuit to discover any other culpable parties, if the existence of such parties is not readily apparent. Third parties may be brought into a lawsuit as cross-defendants,<sup>142</sup> but only if such cross-defendants would be subject to jurisdiction in the forum court.<sup>143</sup>

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135. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

136. 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

137. *See supra* text accompanying notes 21-24, 40-44.

138. *Corrigan*, 182 Cal. App. at 183, 227 Cal. Rptr. at 257.

139. *Id.*

140. *Id.* at 171, 227 Cal. Rptr. at 249. Bjork Shiley presented evidence that the hospital removed the 70-degree valves from the rigid container designed to protect them, and then wrapped the valves in paper napkins and paper bags to sterilize them, contrary to the manufacturer's written instructions regarding sterilization procedures. *Id.*

141. *Id.* at 183, 227 Cal. Rptr. at 257.

142. To file a cross-complaint without leave of court, the cross-complaint must be filed at the time of the defendant's answer, CAL. CIV. PROC. CODE §§ 428.10, 428.50 (West Supp. 1988).

143. CAL. CIV. PROC. CODE § 430.10 (West Supp. 1988). California courts are allowed to exercise jurisdiction in a manner not inconsistent with the California Constitution or the United States Constitution. *Id.*

The United States Supreme Court has recognized proper jurisdiction does not exist in accordance with the Constitution's Fifth and Fourteenth Amendment due process guarantees unless the defendant has minimum contacts with the forum so that maintenance of the suit would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Supreme Court recognized that these minimum contacts may arise out of:

In the *Corrigan* action, even if Bjork Shiley did compile sufficient evidence to grant leave to file a cross-complaint,<sup>144</sup> it may have been precluded from pursuing the cross-action on jurisdictional grounds. Thus, the focus should not be on whether a third party action exists, but rather on whether a third party action could be maintained in the forum court. The effects of the *Corrigan* directive may be costly and, in some cases, devastating to California business. If evidence is not readily apparent at the beginning of the suit to suggest a third-party action exists, courts following the *Corrigan* decision will deny forum non conveniens motions. If culpable parties are later discovered out of the reach of the court, a California manufacturer may be unable to bring an indemnity action. The *Corrigan* decision results in court sanctioned forum shopping, and the costs on defendants will be unreasonable.

### B. Proposed Solution

The "forum interest" standard created by the *Corrigan* court is too vague to determine when trial courts should retain suits brought by foreign plaintiffs. Moreover, the *Corrigan* standard provides no guidelines for a manufacturer to gauge when a forum non conveniens dismissal should be granted.

The court reasons that if a defendant would be subject to jurisdiction because of business in California, the courts likewise have an interest in adjudicating a defendant's allegedly tortious act regardless of where the act occurred.<sup>145</sup> The relationship between business in the state and contact with an accident is too tangential to support a standard for determining a state's interest in hearing an action. This Note proposes a more workable standard.

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(1) continuous and systematic activities in a forum state (*International Shoe*, 326 U.S. at 320); (2) purposely availing one's self of benefits of forum state (*Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); or (3) undertaking an action that will have a substantial effect in the forum state (*Calder v. Jones*, 465 U.S. 783, 788-89 (1984)).

The California courts have also held that minimum contacts must exist to establish proper jurisdiction over a defendant in both federal and state actions within California. See, e.g., *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974); *Rocklin v. Superior Court*, 157 Cal. App. 3d 91, 94, 203 Cal. Rptr. 547, 548 (1984).

144. Bjork Shiley's failure to file a cross-complaint at the time of its answer does not constitute a waiver. Given sufficient evidence, the court should grant leave to file a cross-complaint after filing an answer. *E.L. White v. Huntington Beach*, 21 Cal. 3d 497, 506, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978) (failure to file cross-complaint for implied indemnity did not act as a waiver).

145. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 181, 227 Cal. Rptr. 247, 255-56 (1986), cert. denied sub nom., *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

1. No relationship between the parties and the state.

If a foreign plaintiff brings an action where neither the accident nor the defendant have ties to California, the court should not question whether its tribunal is the proper forum. In deciding a forum non conveniens motion, the court should scrutinize the facts of the case, paying attention to the defendant's proposed choice of forum. When the majority of the witnesses, evidence and other parties are outside California, and the defendant is not a California corporation or using California as its principle place of business, the suit is better heard elsewhere.

This approach has been used by many states, predominantly in airline disaster cases. When the defendant is an out-of-state resident and is merely licensed to do business in the forum state, courts are willing to grant forum non conveniens dismissals. In *Ahmed v. Boeing Co.*,<sup>146</sup> relatives of twenty-two Pakistani citizens killed in an airline crash brought suit in a Massachusetts district court. The crash occurred near Jeddah, Saudi Arabia.<sup>147</sup> Defendant Boeing was a Washington based corporation.<sup>148</sup> The court, balanced the relevant factors, finding it had no interest when "comparative witness and evidence availability, the place of the accident, the nationality of the [plaintiffs] . . . all cut strongly in favor of trial abroad."<sup>149</sup>

The New York Supreme Court discussed state interest in a similar case, *Gilchrist v. Trans-Canada Air Lines*.<sup>150</sup> The *Gilchrist* suit arose from the crash of a Trans-Canada Air Lines plane near Montreal, Canada, during a flight from Montreal to Toronto.<sup>151</sup> Representatives of the Canadian passengers' estates brought an action against Trans-Canada in New York. Trans-Canada was a Canadian corporation, authorized to do business in New York.<sup>152</sup> The court recognized public policy discouraged entertaining suits against non-residents in New York state courts.<sup>153</sup> Although the court recognized public policy did not absolutely prohibit such suits, the court did not find sufficient state interest to retain jurisdiction.<sup>154</sup>

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146. 720 F.2d 224 (1st Cir. 1983).

147. *Id.* at 225.

148. *Id.*

149. *Id.* at 226.

150. 27 A.D.2d 524, 275 N.Y.S.2d 394 (1966).

151. *Id.* at 525, 275 N.Y.S.2d at 395.

152. *Id.*

153. *Id.*

154. *Id.*, 275 N.Y.S.2d at 395-96.

State courts have refused to find a state interest in cases other than airline disaster cases. In *Harvey v. Eastman Kodak Co.*,<sup>155</sup> the Arkansas Supreme Court found that Arkansas had no interest in a cross-action arising out of a suit brought against a non-resident corporation.<sup>156</sup> Harvey brought a negligence action in Arkansas against Vari-Tech Company, a Michigan manufacturer of land surveying equipment.<sup>157</sup> Vari-Tech filed a third-party complaint against Eastman Kodak, a New York corporation, alleging that defects in the surveying equipment resulted from Kodak's negligence.<sup>158</sup> Harvey then filed a direct complaint against Kodak.<sup>159</sup> The court dismissed the plaintiff's complaint against Kodak on the grounds the complaint was insufficient to state a cause of action,<sup>160</sup> and dismissed the Vari-Tech third-party action on the grounds of forum non conveniens.<sup>161</sup> In granting the forum non conveniens dismissal, the Arkansas court determined that either Michigan or New York would be a more convenient forum for adjudication of the claims, because in controversies between nonresidents which arise out of the state, the courts are not obligated to assert jurisdiction.<sup>162</sup>

When both parties are non-residents of California, courts should not assert jurisdiction when a forum non conveniens motion is made. If no significant nexus between the litigation and the state is shown, the mere fact that a defendant is licensed to do business in California is inadequate to create a state interest in hearing the action.<sup>163</sup> The non-resident discussion is not applicable to the *Corrigan* action, as Bjork Shiley was a California corporation.<sup>164</sup> However, a California court following the *Corrigan* "forum interest" standard will assert ju-

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155. 271 Ark. 783, 610 S.W.2d 582 (1981).

156. *Id.* at 786, 610 S.W.2d at 584.

157. *Id.* at 785, 610 S.W.2d at 584.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 789, 610 S.W.2d at 585-86.

162. *Id.* at 788, 610 S.W.2d at 585 (citing *Grovey v. Washington*, 196 Ark. 697, 704, 119 S.W.2d 503, 507 (1938)).

163. See *Anderson v. Great Lakes Dredge & Dock Co.*, 411 Mich. 619, 629, 309 N.W.2d 539, 544 (1981) ("Although the plaintiff's choice of forum is afforded appropriate weight, no significant nexus between the litigation and [the] state has been demonstrated. The 'choice of forum [is] supported only by the fact that it was chosen.'" (quoting *Pacific Car & Foundry Co. v. Penca*, 403 F.2d 949, 955 (9th Cir. 1968)).

164. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App.3d 166, 227 Cal. Rptr. 247 (1986), cert. denied *sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987). While the *Corrigan*s were non-residents, Bjork Shiley was both a California corporation and licensed to do business in the state. *Id.* at 171, 227 Cal. Rptr. at 249.

risdiction if it finds California has *any* interest, as where a non-resident is licensed to do business in California.<sup>165</sup> Thus, if the defendant is a non-resident, the court, after determining it has an interest in the litigation, and a change in law is detrimental to the plaintiff's recovery, will automatically retain the case regardless of whether it is unduly burdensome on the defendant. While California law may be more advantageous to the plaintiff, the state's interest in redressing wrongs is misplaced by providing compensation for an injury not related to the state.

## 2. *Partial relationship between the parties and the state.*

A California trial court should also not assert jurisdiction if there is not a close nexus between the product causing the accident and the defendant. For accidents occurring outside of California where the balance of the witnesses, evidence and other parties are also outside of California, the suit should be dismissed regardless of whether the manufacturer is incorporated or has a principle place of business in California. When there is no close connection between the product and the defendant, the nexus between the suit and the state is insufficient to give rise to a legitimate interest in hearing the action. Further, the case should be dismissed if the defendant agrees to submit to jurisdiction in the plaintiff's home forum. In this category this Note truly parts company from the standard set forth in *Corrigan v. Bjork Shiley Corp.*

A defendant does not automatically have an obligation to participate in judicial proceedings in the California courts merely because it has contact with the state.<sup>166</sup> The plaintiffs should first make "an offer of proof concerning the defendant's in-state activities which supports the allegation that the tortious conduct *occurred* in California."<sup>167</sup> In *Corrigan*, the court found "[t]he declarations, correspondence and other evidence clearly connect [the defendant's] in-state activities with the subject of the action."<sup>168</sup> This statement, however, is not completely true. Bjork Shiley's evidence of the mishandling of the valve<sup>169</sup> did not weigh in the court's analysis of whether the defendant's tortious conduct arose within the state.<sup>170</sup> Thus, the

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165. *Id.* at 179, 227 Cal. Rptr. at 254. See also *supra* notes 44-46.

166. *Corrigan*, 182 Cal. App. 3d at 181, 227 Cal. Rptr. at 255.

167. *Id.*, 227 Cal. Rptr. at 256.

168. *Id.* at 182, 227 Cal. Rptr. at 256.

169. See *supra* note 140 and accompanying text.

170. *Corrigan*, 182 Cal. App. 3d at 182, 227 Cal. Rptr. at 256.

tortious conduct in *Corrigan* was not conclusively connected with California.

If a defendant offers evidence that the tortious conduct occurred out of the forum state, the court should grant a *forum non conveniens* dismissal if the alternative forum is clearly most convenient for the defendant.

In *Blais v. Deyo*,<sup>171</sup> the New York Supreme Court found an insufficient nexus between the accident and tortious conduct within the state, even though defendant Firestone did business in New York and the accident tire was purchased in New York.<sup>172</sup> The court held that the tire purchase was not sufficient to support the plaintiff's allegation that the tortious conduct occurred in New York, even though the plaintiff claimed a tire blowout caused the accident.<sup>173</sup>

In another New York case, *Pharo v. Piedmont Aviation, Inc.*,<sup>174</sup> the court found an insufficient state interest in an action arising from an airline disaster even though one of the defendants was a New York corporation.<sup>175</sup> The court held the residence of a defendant did not create a sufficient nexus between the state and the accident.<sup>176</sup> Again, as in *Blais v. Deyo*, the court seemed to be influenced by the fact that the New York defendant had agreed to jurisdiction in another state.<sup>177</sup>

*Bewers v. American Home Prods. Corp.*<sup>178</sup> provides the best example for refusing jurisdiction. *Bewers* is a products liability action arising from personal injuries caused by oral contraceptives brought by United Kingdom residents against a United States manufacturer.<sup>179</sup> A subsidiary of American Home Products manufactured the oral contraceptives in the United Kingdom,<sup>180</sup> however the plaintiffs alleged the decision to promote, market, sell and distribute the drugs without proper warnings took place in New York.<sup>181</sup> Although one defendant was a New York corporation, and another had a principle

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171. 97 A.D.2d 613, 468 N.Y.S.2d 91 (1983).

172. *Id.*

173. *Id.* The court cited the fact that Firestone agreed to waive the Quebec statute of limitations and to submit to jurisdiction in the Canadian courts as another deciding factor. *Id.*

174. 34 A.D.2d 752, 310 N.Y.S.2d 120 (1970).

175. *Id.*, 310 N.Y.S.2d at 121.

176. *Id.*

177. See *Pharo v. Piedmont Aviation, Inc.*, 97 A.D.2d 613, 468 N.Y.S.2d 91 (1983).

178. 99 A.D.2d 949, 472 N.Y.S.2d 637 (1984).

179. *Id.* at 949, 472 N.Y.S.2d at 638.

180. *Id.*

181. *Id.*, 472 N.Y.S.2d at 639.

place of business in New York, the New York Supreme Court granted a forum non conveniens dismissal.<sup>182</sup> The court held that "the United Kingdom would have the greater interest in determining whether pharmaceuticals . . . were appropriately tested and labelled in that country. Such a determination should be made pursuant to that country's own regulatory scheme and in accordance with its laws."<sup>183</sup>

Naturally, letting a country adjudicate its own regulatory scheme is a large factor in refusing to assert jurisdiction.<sup>184</sup> Imposing our legal solutions on other nations, however beneficial when viewed from the perspective of individual litigants, impedes the opportunity for other legal systems to craft comprehensive legal solutions to their citizens' legal problems.<sup>185</sup> Thus, courts should not assert jurisdiction in an effort to provide remedies not recognized under another country's judicial system. Recovery in a California state court is not warranted unless the court finds a sufficient nexus exists between the tortious activity and the defendant's activities in California. If a state court has no interest in the suit, the court can "best serve the interest of justice by permitting justice to be done elsewhere."<sup>186</sup>

### 3. Actual Relationship Between the Parties and the State.

When the accident occurs outside of California, and the majority of the witnesses, evidence or parties are within California, the state court should carefully consider whether to grant a forum non conveniens dismissal. Thus, when a foreign plaintiff brings a suit, a defendant's California incorporation and/or principal place of business may be sufficient for a strong state interest in the action.

Once a strong state interest exists, a logical standard for determining whether to grant a forum non conveniens motion is which forum has the most significant relationship with the action.<sup>187</sup> The factors considered in determining the extent of this relationship are:

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182. *Id.* at 950, 472 N.Y.S.2d at 639.

183. *Id.*

184. *See supra* notes 64-67 and accompanying text.

185. Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 223 (1985).

186. *Id.*

187. The "most significant relationship" standard is the standard recognized for resolving conflicts of law questions in RESTATEMENT (SECOND) OF CONFLICTS, § 145 (1971). Section 145 reads:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.



(1) where the injury occurred; (2) where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered.<sup>188</sup> If the defendant is a California corporation or has its principal place of business in California, and the product which gives rise to plaintiff's action was manufactured in California, a sufficient state interest may arise to warrant retaining jurisdiction.

In *Rubenstein v. Piper Aircraft Corp.*,<sup>189</sup> the district court granted the defendant's forum non conveniens motion after finding the plaintiff's claim did not have a significant relationship with Florida.<sup>190</sup> *Rubenstein* was a wrongful death action brought against a Pennsylvania corporation that designed and manufactured airplanes in Florida.<sup>191</sup> Although the plaintiff alleged that design and manufacturing defects caused an airplane to crash in West Germany, the court found "all contacts concerning the crash rest within West Germany, save the one contact which Florida maintains as the state in which the plane was designed and manufactured."<sup>192</sup> The court held that the manufacturing contact was insufficient to assert jurisdiction.<sup>193</sup>

The significant relationship standard is not precise. However, it is exact enough to judge when a state's interest is sufficient to warrant asserting jurisdiction in a case involving a foreign plaintiff. If California finds a significant relationship between the parties, the action, and the state, it should have a significant interest to retain a suit even

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

California does not follow the "most significant relationship" standard in resolving conflicts of law, but rather institutes an analysis of which forum's interest will be most impaired if its respective substantive law is not applied. *See, e.g., Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976). Since the issue is jurisdiction rather than conflicts of law, the method chosen by California courts for resolving conflicts should not be relevant to this discussion.

188. RESTATEMENT (SECOND) OF CONFLICTS § 145 comment e (1971).

189. 587 F. Supp. 460 (S.D. Fla. 1984).

190. *Id.* at 461.

191. *Id.*

192. *Id.*

193. *Id.*

though it will add to the congestion in its courts. However, if California's interest is solely in regulating its products as hinted at in *Corrigan v. Bjork Shiley Corp.*,<sup>194</sup> perhaps the state interest in asserting jurisdiction is insufficient to outweigh the detriment to the defendant or defendants involved. In cases involving foreign plaintiffs, California should have no interest in providing retribution if its interest in the outcome of the case is insufficient.

## VI. CONCLUSION

California's departure from the federal forum non conveniens standard has created a situation in which a defendant to a foreign plaintiff's action in a California court may never have the opportunity to have the suit dismissed on forum non conveniens grounds. The *Corrigan v. Bjork Shiley Corp.* decision calls for the retention of the suit where the substantive law of the alternative forum would limit the plaintiff's recovery when compared to recovery in California.<sup>195</sup> The *Corrigan* standard is too broad, and will lead to the retention of many more suits in which the state has no significant interest. For this reason, retention of suits in which the defendant has a significant relationship with California, as proposed in this Note, would further the purpose of the forum non conveniens doctrine, and would lead to a more equitable method of determining when a state's interest arises.

*Carol A. Stickels*

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194. 182 Cal. App. 3d 166, 181, 227 Cal. Rptr. 247, 255 (1986), *cert. denied sub nom.*, *Shiley, Inc. v. Corrigan*, 107 S.Ct. 921 (1987).

195. *Id.* at 178-79, 227 Cal. Rptr. at 254.

