Hello again!

It's been a while since I've written but that's because things have been quiet on the product liability front. I won't be surprised if that continues for the rest of the summer.

I read this week about an interesting decision by the Appellate Division of the New York Supreme Court involving retired (it must be nice to retire in one's early 20s!) professional tennis player Martina Hingis. As some of you may know, she retired from professional competition after several operations on her feet did not completely cure a chronic injury situation. Hingis blamed her condition on her sneakers which were manufactured by Sergio Tacchini ("ST"). Hingis and ST were parties to an endorsement agreement which required Hingis to wear ST apparel, including tennis sneakers, "satisfactory for competition use." The agreement also provided that Italian law controlled and that any disputes would be submitted to courts in Milan.

On May 24, 1999, ST sued Hingis in Milan for not wearing its apparel as required and for making disparaging public remarks about the quality of ST merchandise. Hingis counterclaimed for damages for injuries to her feet and legs due to defectively designed sneakers. That action is still pending.

On June 8, 2001, Hingis sued ST in New York claiming compensatory and punitive damages for her foot and leg injuries. ST moved to dismiss on several grounds including lack of personal jurisdiction and forum non conveniens. The trial court denied the motion on personal jurisdiction grounds but granted it on forum non conveniens grounds. The appellate court has now affirmed the trial court ruling.

As to personal jurisdiction, New York's "long arm" statute is similar to those of other states. Personal jurisdiction over a non-domiciliary is permitted if there is evidence that the defendant (1) committed a tortious act outside the state; (2) that the act caused injury within the state; (3) that the claim arises from that act; (4) that the defendant should reasonably have expected the act to have consequences in the state; and (5) that the defendant derived substantial revenue from interstate or international commerce transactions involving the state. The court summarily found that criteria (1), (3) and (5) were satisfied. As to (2), affidavits from Hingis and her doctor satisfied the court that there was evidence that Hingis' condition was at least aggravated by playing in the allegedly defective sneakers in New York. As to (4), the court looked to evidence that ST knew that Hingis would be wearing its sneakers in competition in New York. Thus, the court held that there was personal jurisdiction over ST.

As to forum non conveniens, the trial court noted that the test is "whether New York is an inconvenient forum and whether another forum is available which will best serve the ends of justice and the convenience of the parties." Specific factors to be considered are "(1) the burden on the New York courts; (2) the potential hardship to the defendant: (3) the convenience of the witnesses; and (4) the unavailability of an alternative forum in which plaintiff may bring suit."

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ST claimed that many relevant documents were in Italian and that many of its witnesses spoke only Italian thus necessitating certified translations and interpreters; that corporate documents and witnesses were in Italy and that it would be disruptive to business and personal lives to send them to New York for trial; that other witnesses (presumably including treating physicians and tennis players and officials) lived far from New York; that Milan was an adequate forum and that Italian law provided appropriate remedies should Hingis prevail; that the parties had agreed on Milan as the forum and an action was already pending there; and that even if the case proceeded in New York, Italian law would control.

Hingis countered by claiming that she was a U.S. domiciliary (although a Swiss citizen), that she would be calling witnesses from the New York area, and that equivalent justice was not available in Milan because of the absence of punitive damages under Italian law.

The trial court found that "it would be unjust, unfair and inconvenient to require defendant to answer in this litigation, especially in light of the already pending Milan action." The court noted that there was scant evidence of "any aggravating factors which would warrant the imposition of punitive damages" and since New York proceedings would be controlled by Italian law, punitive damages would not be available anyway. In its one-page affirmance, the Appellate Division found, "The balance of relevant factors weigh against retention of the action....plaintiff's injury was sustained over a period...during which she had competed all over the world....That plaintiff happened to receive treatment in New York, among other places, does not create a connection so substantial as to warrant retention of the action....plaintiff's claim for punitive damages is at best dubious, and all of plaintiff's other claims herein have substantial equivalents under Italian law."

This New York ruling appears to continue a judicial trend of looking skeptically at claims between foreign litigants where the plaintiff seeks to invoke the jurisdiction of a U.S. court for the underlying (but usually unstated) reason that damages will be larger if he or she prevails. In my experience, many U.S. judges will not hesitate to use their discretion to dismiss on forum non conveniens grounds if the injury predominantly occurs outside the U.S. and the balance of factors favors a foreign forum where an equivalent remedy (even if not equivalent money) is available.

Hope this is helpful. Let me know if you have questions or comments. Enjoy the summer!

Remy

For more information on U.S. product liability please contact Remy Zimmermann, Shaun Sullivan or Alan Schwartz at 203.498.4400. Please visit