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# 9th Circ. Greenlights Foreign Law Issues At Pleadings Stage

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On Sept. 26, in De Fontbrune v. Wofsy (Case No. 14-15790), the Ninth Circuit decided a case of first impression among the appellate courts concerning Federal Rule of Civil Procedure 44.1, which provides that issues of foreign law must be treated as questions of law rather than as questions of fact. In De Fontbrune, the court held that, pursuant to Rule 44.1, courts may consider materials outside the pleadings when deciding issues of foreign law for purposes of a motion to dismiss. In so holding, the Ninth Circuit has provided guidance for courts and practitioners on this important issue.

Ana Reyes

**Federal Rule of Civil Procedure 44.1 in Brief**

Prior to the adoption of Rule 44.1, issues of foreign law were viewed as questions of fact that were required “be proved like other facts.”[1] This approach was intended to aid U.S. courts, to which, in the words of Justice Holmes, foreign legal systems often seemed “like a wall of stone.”[2] However, the “fact” approach to foreign law ultimately became “so entangled in detail and so fertile a field for adversarial machinations that it actually exacerbated the difficulties inherent in proving foreign law.”[3] Or, as another commentator put it, the approach “seem[ed] to maximize expense and delay and hardly seem[ed] best calculated to ensure a correct decision by our judges on questions of foreign law.”[4]

Kristin Shapiro

In 1966, Rule 44.1 was adopted to establish a more uniform and effective approach to determining issues of foreign law. In pertinent part, the rule provides that “[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence,” and that “[t]he court’s determination must be treated as a ruling on a question of law.”

**The De Fontbrune Dispute**

The De Fontbrune case presented the question whether, pursuant to Rule 44.1, district courts may consider materials outside the pleadings when deciding issues of foreign law for purposes of a motion to dismiss. The dispute arose when a photographer, Yves Sicre de Fontbrune, filed suit in California court seeking to enforce a French judgment awarding him two million euros in “astreinte” against Alan Wofsy and Alan Wofsy and Associates (collectively, “Wofsy”) for copyright violations. Under California law, the judgment was not entitled to recognition if it went beyond a simple money damages award and instead constituted a fine or penalty.

Wofsy moved to dismiss, contending that astreinte functioned as a penalty under French law, and submitted a declaration by a French lawyer in support of the motion. In opposition, de Fontbrune submitted a declaration from his own expert on French law, but he also argued that the district court could not properly consider such material for purposes of a motion to dismiss.

Perhaps underscoring the uncertainty on this issue, the district court initially declined to consider the declarations as material outside the pleadings. But, "[i]n a complete volte face," the district court granted Wofsy's motion for reconsideration and held that Rule 44.1 permitted the consideration of such material.[5]

**The Ninth Circuit's Opinion**

In De Fontbrune, the Ninth Circuit held that the district court appropriately considered the expert declarations for purposes of the motion to dismiss. At the outset, the court explained that Rule 44.1 "endeavored to lay to rest [the] antiquated conception of foreign law as question of a fact that must be proved at trial," and instead made "the process of ascertaining foreign law equivalent to the process for determining domestic law, insofar as possible."[6]

Despite the rule's seemingly clear language, the court noted, "confusion and contradiction" have "continue[d] to plague the application of Rule 44.1."[7] For example, courts have repeatedly referred to a party's "burden" of proving foreign law, even though, consistent with Rule 44.1, issues of foreign law are questions of law as to which no burden of proof applies. And, most notably, district courts were split as to whether courts may consider materials outside the pleadings in determining issues of foreign law for purposes of a motion to dismiss, and no court of appeals had squarely addressed the issue.

The Ninth Circuit sought to resolve these "lingering conflicts" in the application of Rule 44.1.[8] The court clearly rejected de Fontbrune's argument that the district court erred in considering the parties' expert declarations in deciding the motion to dismiss. Rather, the court held in no uncertain terms that "under Rule 44.1's broad mandate, foreign legal materials — including expert declarations on foreign law — can be considered in ruling on a motion to dismiss where foreign law provides the basis for the claim."[9]

The Ninth Circuit's decision provides needed clarity to an issue that probably should have been settled 50 years ago, with the adoption of Rule 44.1. Although the decision may run counter to the instincts of many lawyers — who have had it drilled into their minds since first-year civil procedure class in law school that courts may consider only the "four corners" of the complaint in deciding a motion to dismiss — the decision is well grounded in the text and history of Rule 44.1. Rule 44.1 was adopted, in part, as a reaction to the "phenomenal expansion of international trade" following World War II and the "correlative increase in the number of lawsuits in which the law of a foreign country is germane."[10] Globalization has only accelerated since that time, making a uniform and effective procedure for the determination of issues of foreign law all the more important.

De Fontbrune offers strong authority for parties who wish to raise issues of foreign law at the pleadings stage. In light of the opinion, practitioners should not be shy about introducing expert declarations and other materials outside the pleadings concerning issues of foreign law in support of or in opposition to a motion to dismiss.

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[1] Church v. Hubbart, 6 U.S. (2 Cranch) 187, 187 (1804) (Marshall, C.J.).

[2] Diaz v. Gonzales, 261 U.S. 102, 106 (1923) (Holmes, J.).

[3] Arthur R. Miller, Federal Rule 44.1 & the “Fact” Approach to Determining Foreign Law: Death Knell For a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 624 (1967).

[4] 2 McCormick on Evid. § 335, at 463 (6th ed. 2006).

[5] Slip op. at 8.

[6] Slip op. at 10 (internal quotation marks omitted).

[7] Slip op. at 12.

[8] Slip op. at 13.

[9] Slip op. at 5.

[10] Miller, supra note 3, at 615-16.

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