Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Pa. Venue Transfer Ruling Could Help Cases Exit Philly

By **Matt Fair**

Law360, Philadelphia (August 25, 2014, 7:49 PM ET) -- Defense attorneys looking to avoid Philadelphia and its reputation for plaintiff-friendly juries may get help from a recent Pennsylvania Supreme Court decision reaffirming the broad discretion of trial judges to grant venue transfers based on travel burdens faced by key defense witnesses.

Duane Morris LLP partner Sharon Caffrey told Law360 that the Supreme Court's 6-0 decision on Aug. 18 in Alexander Bratic v. Charles Rubendall — which found that a Philadelphia County judge had not abused his discretion when agreeing to transfer a suit against Keefer Wood Allen & Rahal LLP to the Dauphin County Court of Common Pleas — would help ease the burden defendants face when filing forum non conveniens motions based on the hardship their witnesses would face having to litigate in a plaintiff's chosen jurisdiction.

"I think it will be helpful in moving cases out of Philadelphia," said Caffrey, who heads up the product liability and toxic tort division of the firm's trial practice group. "It's a clarification and a statement that the trial courts have discretion and should consider moving cases when it's really going to be inconvenient to defend the case here and where it's no less inconvenient for the plaintiff to be in the other jurisdiction."

The justices used the opinion to reaffirm standards they'd laid out in their 1997 decision in Cheeseman v. Lethal Exterminator Inc., which gave trial courts the latitude to transfer cases if a plaintiff's choice of forum would be "oppressive or vexatious" to a defendant.

But in the nearly two decades since the Cheeseman decision, the justices said, the state's Superior Court had too often upended transfers instead of allowing trial judges to use their discretion to determine when litigating in a plaintiff's chosen forum would place undue burdens on the defense.

"The showing of oppression needed for a judge to exercise discretion in favor of granting a forum non conveniens motion is not as severe as suggested by the Superior Court's post-Cheeseman cases," the court said in an opinion penned by Justice J. Michael Eakin. "Mere inconvenience remains insufficient, but there is no burden to show near-draconian consequences. Although the Superior Court may have reached a conclusion different than the trial court, this does not justify disturbing the ruling; the Superior Court effectively substituted its judgment for that of the trial court, which it may not do."

Drinker Biddle & Reath LLP partner D. Alicia Hickok said that, without establishing a bright-line rule to define vexation and oppression under Cheeseman, the opinion was a strong message to the Superior

Court to allow trial judges to make determinations about the facts in particular cases.

“They said to let trial courts do what trial courts do best,” she said. “That’s a very strong message to the Superior Court that, in instances like this, there had better be a very good reason why they say it isn’t good enough. They are not looking for the Superior Court to be second-guessing and micromanaging.”

The decision upended a precedential en banc ruling out of the state’s Superior Court, which had found that it would not be vexatious or oppressive under the Cheeseman standards to force defense witnesses in a suit accusing Keefer Wood and firm attorney Charles Rubendall of pursuing a frivolous lawsuit against the plaintiffs to litigate in Philadelphia, where the complaint was originally filed in February 2009.

A Philadelphia judge agreed in July 2009 to transfer the case to the Dauphin County Court of Common Pleas in Harrisburg, where the underlying lawsuit against the plaintiffs had been litigated. A three-judge Superior Court panel initially upheld the ruling, but an en banc decision in April 2012 found that the defendants had not met their burden under Cheeseman.

Montgomery McCracken Walker & Rhoads LLP partner Jeffrey Lerman, who represented Rubendall in the case, told Law360 that he saw the decision as an affirmation of the law as it existed prior to the Superior Court’s en banc decision.

“I think the real change would’ve been if the Bratic Superior Court decision wasn’t reversed,” he said, adding that he believed the ruling would lead only to a “marginal increase” in forum non conveniens motions.

He said that the Superior Court had issued a patchwork of decisions dealing with transfer motions in the years since Cheeseman but that none had come close to setting the type of standard that had been created in the en banc Bratic opinion.

“What there was more than anything else were a number of Superior Court decisions that went both ways, and it created a lot of uncertainty,” he said. “The en banc decision removed the confusion as to what the Superior Court was holding and restricted forum non conveniens in a really dramatic way. It imposed a standard that was near draconian and completely removed the focus from the burden of having to litigate at a considerable distance from your witnesses.”

Caffery said that the Supreme Court’s handling of the Bratic case served largely just to amplify the principles it laid out in Cheeseman, without creating a guidebook for judges to determine what exactly constituted vexation or oppression.

“I think it’s just a clarification or an amplification of Cheeseman,” she said. “We could still use some guidance as to what are factors of vexation or oppression. The court has not been real clear on that, but I do think it’s an improvement over where we were.”

Aaron Freiwald, a founding partner at the Philadelphia-based plaintiffs firm Layser & Freiwald PC, said he believes defense attorneys would begin to more aggressively pursue forum non conveniens motions in the wake of the Bratic ruling but that the standard for winning them remained lofty.

“I just got one yesterday,” he said.

And while defendants may be encouraged to try and punt cases out of a plaintiff’s chosen jurisdiction, he

said, attorneys would still be required to prove vexation and oppression enough to convince trial judges.

“Is that one witness? Two witnesses? Five witnesses? Where is the evidence? Where are the facts giving rise? It’s not just as simple as saying give us that one piece of information,” he said. “I don’t think this is going to be some bright-line rule where all of a sudden everyone knows what to do. We’re still going to have disputes about whether a defendant has made a showing.”

Although Freiwald suggested the ruling would encourage defendants to seek venue transfers, Hickok said attorneys would be more measured in determining whether to try to have cases removed from the state’s major litigation magnets of Philadelphia and Pittsburgh.

“Obviously they’re going to have to make a strategic decision,” she said. “You know what you’re facing in Philadelphia County, and you know what you’re facing in Allegheny County. Because a lot of everything else is untested, counsel is going to have to make a strategic determination … as to whether that’s something that’s in the client’s best interest. I don’t think what you’re going to see right now is a knee-jerk reaction where attorneys say, ‘If I can remove a case, I will.’”

While the Supreme Court was clear that traveling from Harrisburg to Philadelphia would create an unreasonable burden for defendants in the case, the opinion suggested that traveling between the four counties immediately surrounding the city — each of which also see a fair share of significant commercial litigation — would likely not meet the Cheeseman threshold.

“As between Philadelphia and adjoining Bucks County … we speak of mere inconvenience,” the decision said. “As between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the [Pennsylvania] Turnpike and Schuylkill Expressway.”

Hickok said it would be important for attorneys to bear that distinction in mind when weighing whether to seek a forum non conveniens motion in Philadelphia.

“What they were pretty clear about is that with the counties around Philadelphia, they’re going to continue with what it said in Cheeseman,” she said. “The mere fact that you might think Delaware County is a better place or is more central isn’t going to get you out of Philadelphia, but if you are in a further county I think the message was pretty clear that you have already established a lot of what you need to establish.”

An attorney for the plaintiffs did not immediately return a message seeking comment.

The appellants are represented by Jeffrey Lerman and and Glenn Rosenblum of Montgomery McCracken Walker & Rhoads LLP and Stephen Kurens.

Bratic and Proko are represented by Joseph Podraza and Richard Sprague of Sprague & Sprague, and Lloyd Parry of Davis Parry & Tyler PC.

The case is Alexander Bratic et al. v. Charles Rubendall et al., case number 21 EAP 2013, in the Supreme Court of Pennsylvania.