

Remembrance of Rules Past: Rule 44.1 at Motion to Dismiss Stage

Jorge A. Mestre—January 11, 2017

Can a district court consider extraneous evidence, such as expert testimony, under Fed. R. Civ. P. 44.1 when deciding foreign law at the motion to dismiss stage? Prior to the enactment of Rule 44.1, the answer was "No," because courts generally treated foreign law as a factual issue, unsuitable at the dismissal stage. *See, e.g., Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 187 (1804) (Marshall, C.J.). Following Congress's adoption of Rule 44.1 in 1966, the answer wasn't so clear because the rule allows courts to "determine" what the law of a foreign state was by "consider[ing] any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Rule 44.1. Importantly, Rule 44.1 treats the court's determination "as a ruling on a question of law."

Which brings us to *De Fontbrune v. Wofsy*, 2016 WL 6953867 (9th Cir. Sept. 26, 2016). In this first-impression case, a copyright holder of photographs of Pablo Picasso's art obtained a French money judgment against infringers that had unlawfully republished those photographs. *Id.* at 2–3. The copyright holder then sued in California district court to recognize and enforce the judgment. *Id.* The infringer sought dismissal, arguing that under French law the money judgment was actually a penalty, which the district court could not recognize and enforce. *Id.* at *2. After initially denying the motion as premature because expert testimony was required to determine the foreign law, the district court reversed itself, finding that Rule 44.1 authorized it to accept expert testimony at the dismissal stage. *Id.* The district court then dismissed the case with prejudice after determining—based on expert testimony—that the French money judgment was a penalty under French law. An appeal followed.

On appeal, the Ninth Circuit stated that "Rule 44.1 authorizes district courts to consider foreign legal materials outside the pleadings in ruling on a motion to dismiss . . . because Rule 44.1 treats foreign law determinations as questions of law, not fact." *Id.* at *4. The appellate court said the rule was meant to end an "antiquated conception of foreign law as 'a question of fact that must be proved at trial and reviewed on appeal only for clear error.'" *Id.* at *4 (citing *Rationis Enters. Inc. of Pan. v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585 (2d Cir. 2005)). That "antiquated concept" was eliminated where trial courts use Rule 44.1 to "ascertain foreign law" in the same fashion as they would "domestic law." *Id.* Fielding expert testimony on this issue didn't trouble the Ninth Circuit because it analogized that judges often undertake "independent *legal* research [as to domestic law] beyond the parties' submissions." *Id.* at *6.

De Fontbrune has wide-ranging implications for cross-border disputes brought in the United States. On a practical level, the decision—which the court noted had been tacitly endorsed by the Eleventh Circuit in *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1349 n. 13 (11th Cir. 2011) and the Seventh Circuit in *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185, 1192-93 (7th Cir. 1985)—means that parties ought to hire foreign-law experts at a case's outset. Gone are the days of deferring foreign law determinations until after expert discovery.

Now parties must use expert affidavits, or even depositions, to prevail at the dismissal stage. *See e.g. Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006); *McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 546 (5th Cir. 2012). Lawyers on both sides of the "v" will have to get used to the idea, an idea already introduced into our collective consciousness by *Twombly*, that it is in fact permissible to go beyond the "four-corners" of a complaint when it comes to foreign law at the motion to dismiss stage. Every lawyer's pleading-stage checklist in cross-border disputes will now necessarily include consulting with and engaging foreign-law experts.

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