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## Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009)

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## Case Note

### *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009)\*

Gary E. Davidson\*\*

#### I. INTRODUCTION

In *Osorio v. Dole Food Co.*, plaintiffs sought to enforce a \$97 million Nicaraguan civil judgment against defendants Dole Food Co. (“Dole”) and Dow Chemical Co. (“Dow”) under the Florida Uniform Out-of-Country Foreign Money-Judgments Recognition Act (the “Florida Recognition Act”).<sup>1</sup> Plaintiffs comprised a group of 150 Nicaraguan citizens alleged to have worked on banana plantations in Nicaragua between 1970 and 1982, during which time they were allegedly exposed to the chemical compound dibromochloropropane (“DBCP”). DBCP is an agricultural pesticide that was banned in the United States in 1977, and in Nicaragua in 1993, after its usage was linked to sterility in factory workers.<sup>2</sup>

A trial court in Chinandega, Nicaragua, rendered the judgment at issue in this case. It awarded Plaintiffs \$97 million—an average award of \$647,000 per plaintiff—under “Special Law 364,” a statute enacted by the Nicaraguan legislature in 2000. According to the Nicaraguan trial court, the purpose of the high award was to compensate plaintiffs for their DBCP-induced infertility and accompanying adverse psychological effects. Defendants appealed the judgment to an intermediate appellate court in Nicaragua. That appeal has remained pending for over four and one-half years, with no indication when a decision will be forthcoming.

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\* This article was originally presented at the Florida Bar International Law Section 8th Annual International Law and Arbitration Conference on February 12, 2010, in Miami, Florida.

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<sup>1</sup> See FLA. STAT. §§ 55.601-607 (2009).

<sup>2</sup> See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009).

Dole and Dow raised several objections to domesticating the Nicaraguan judgment in the Southern District of Florida. They contended that under the Florida Recognition Act, the court should not enforce the Nicaraguan judgment because:

- (1) the Nicaraguan trial court lacked personal and/or subject matter jurisdiction under Special Law 364;
- (2) the judgment was rendered under a system which did not provide procedures compatible with the due process of law;
- (3) enforcing the judgment would violate Florida public policy; and
- (4) the judgment was rendered under a judicial system that lacked impartial tribunals.<sup>3</sup>

The district court held that Dole and Dow had “clearly established their entitlement to non-recognition on *each* of these independent grounds.”<sup>4</sup>

## II. SPECIAL LAW 364

At the heart of the dispute was Special Law 364, enacted by the Nicaraguan legislature specifically to address DBCP claims. “Special Law 364 is unique in that its provisions apply only to DBCP litigation, and only against specific defendants such as Dole and Dow.”<sup>5</sup> Notably, the Law provided that a plaintiff could establish a defendant’s liability through an “irrefutable presumption.” This irrefutable presumption is achieved by a plaintiff demonstrating that (1) they were exposed to DBCP, and (2) that the plaintiff presently suffers from sterility.<sup>6</sup> A plaintiff can establish proof of sterility by providing two certified medical examinations from a nationally accredited institution.

In addition to establishing an irrefutable presumption as to liability, Special Law 364 also provided a minimum damage award of \$125,000 to a prevailing plaintiff. However, the trial court retained the discretion to award significantly higher damages based on comparable damage awards rendered in foreign countries, such as the United States.

As for litigation costs, the Law presumed that a plaintiff was indigent. Consequently, the Nicaraguan government was responsible for covering a plaintiff’s litigation expenses. In contrast, Special Law 364 imposed significant financial burdens on prospective defendants. “For example, defendants are required to post a \$100,000 bond ‘as a procedural prerequisite for

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> *Id.* at 1314.

<sup>6</sup> *Id.*

being able to take part in the lawsuit.”<sup>7</sup> The purpose of the bond, according to the Law, was to cover court costs and to provide compensation for would-be plaintiffs. Moreover, Article 8 of Special Law 364 required a defendant to post a \$15 million bond (approximately) within ninety days of receiving notice of a complaint in order to create a fund which would guarantee payment to plaintiffs.<sup>8</sup>

Article 12 of Special Law 364 also established a mandatory “3-8-3” summary proceeding whereby “defendants have three days to answer the complaint, the parties have eight days to present their evidence, and the court has three days to issue a verdict.”<sup>9</sup> What is more, the Law eliminates any applicable statutes of limitations to a plaintiff’s claims and provides that any resulting judgment is immediately executable despite the pendency of an appeal. Special Law 364 also eliminates review by the Nicaraguan Supreme Court, designating the intermediate appellate courts as the only courts capable of handling DBCP litigation appeals. Lastly, pursuant to Article 7 of Special Law 364, a defendant has the right to select its venue and opt out of the Law by submitting themselves to jurisdiction in the United States.<sup>10</sup>

### III. THE FLORIDA RECOGNITION ACT

The Full Faith and Credit Clause of the U.S. Constitution *does not* require states to recognize judgments rendered by foreign courts.<sup>11</sup> Absent a formal treaty, the effect given to a foreign judgment has historically been governed

by the more flexible doctrine of comity, which, though often couched in the language of mutual respect and obligation, is most accurately described as a matter of grace. . . . A state’s decision to recognize a foreign judgment will inevitably depend on a variety of circumstances which cannot be reduced to any certain rule . . . .<sup>12</sup>

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<sup>7</sup> *Id.* at 1315.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (quoting *Shell Oil Co. v. Franco*, No. CV 03-8846, 2005 WL 6184247, at \*5 (C.D. Cal. Nov. 10, 2005)).

<sup>10</sup> *Id.* Article 7 also requires a defendant to expressly waive the defense of *forum non conveniens* upon submitting itself to the jurisdiction of a U.S. court.

<sup>11</sup> *Id.* at 1322; *see also* *Guinness PLC v. Ward*, 955 F.2d 875, 883 (4th Cir. 1992). *See generally* U.S. CONST. art. IV, § 1.

<sup>12</sup> *Osorio*, 665 F. Supp. 2d at 1322 (citing *Hilton v. Guyot*, 159 U.S. 113, 166 (1895) (“No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State.”) (internal quotations omitted); *U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997)).

In 1994, Florida adopted a variant of the Uniform Foreign Money-Judgments Recognition Act,<sup>13</sup> codified at Florida Statutes section 55.601-607. Florida's Supreme Court has noted that the Florida Recognition Act was adopted to "ensure the recognition abroad of judgments rendered in Florida."<sup>14</sup> Accordingly, the Florida Recognition Act attempts to "guarantee the recognition of Florida judgments rendered abroad."<sup>15</sup>

The Florida Recognition Act makes a foreign judgment *prima facie* enforceable if it "is final, conclusive, and enforceable where rendered, even though an appeal therefrom is pending or is subject to appeal."<sup>16</sup> Once the party seeking to enforce the judgment follows the filing and notice requirements set forth under section 55.603, the judgment will be enforced unless the judgment debtor objects within thirty days. However, the Florida Recognition Act specifically provides three mandatory and eight discretionary circumstances where a foreign judgment is not entitled to recognition in Florida courts.

Specifically, section 55.605 provides:

(1) A foreign judgment is not conclusive if [*non-recognition required*]:

- (a) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- (b) The foreign court did not have personal jurisdiction over the defendant.
- (c) The foreign court did not have jurisdiction over the subject matter.

(2) A foreign judgment need not be recognized if [*non-recognition permitted*]:

- (a) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend.
- (b) The judgment was obtained by fraud.

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<sup>13</sup> See FLA. STAT. § 55.601 (2009); see also *Nadd v. LeCredit Lyonnais, S.A.*, 804 So. 2d 1226, 1228 (Fla. 2001) (the Florida Recognition Act "replaced common law principles of comity relating to the recognition of foreign judgments").

<sup>14</sup> See *Nadd*, 804 So. 2d at 1228.

<sup>15</sup> *Osorio*, 665 F. Supp. 2d at 1323.

<sup>16</sup> FLA. STAT. § 55.603.

- (c) The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.
- (d) The judgment conflicts with another final and conclusive order.
- (e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.
- (f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
- (g) The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.
- (h) The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the United States Constitution and the State Constitution.<sup>17</sup>

Here, the defendants contended that each mandatory ground, as well as the discretionary public policy ground, barred enforcement of the judgment.<sup>18</sup> The district court agreed.

The court found that the plaintiffs had met their initial burden to prove that the Nicaraguan judgment was “final, conclusive, and enforceable where rendered” and that plaintiffs had “satisfied this burden based on their showing that the judgment would be enforceable in Nicaragua under Article 14 of Special Law 364.”<sup>19</sup> The burden then shifted to the defendants, explained the court, to establish one or more grounds for non-recognition.<sup>20</sup> The district court refused to enforce the Nicaraguan judgment, finding that

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<sup>17</sup> FLA. STAT. § 55.605 (2010).

<sup>18</sup> Dole and Dow also asserted that the fraud-based exception to enforcement applied. The district court expressly declined to examine the merits of this contention, limiting its consideration only to the remaining defenses to recognition raised by Dole and Dow. *See Osorio*, 665 F. Supp. 2d at 1323.

<sup>19</sup> *Osorio*, 665 F. Supp. 2d at 1324.

<sup>20</sup> *Id.* (citing *Kramer v. Von Mitschke-Collande*, 5 So. 3d 689, 690 (Fla. 3d Dist. Ct. App. 2008)).

the “defendants ha[d] met their burden on multiple, independent grounds for non-recognition.”<sup>21</sup>

#### IV. ANALYSIS

##### A. The Nicaraguan Trial Court Lacked Personal and Subject Matter Jurisdiction [Florida Statutes section 55.605(1)(b)-(c)]

Under section 55.605(1)(b)-(c), the rendering court must possess *both* subject matter and personal jurisdiction over the defendant. Dole and Dow argued that because they “opted out of Nicaragua’s jurisdiction under Section 7 of Special Law 364, the Nicaraguan trial court lacked jurisdiction over them.”<sup>22</sup> Plaintiffs, on the other hand, argued that “Section 7 d[id] not allow defendants to opt out of Nicaragua’s jurisdiction, but merely provide[d] plaintiffs with a choice of venue.”<sup>23</sup> The district court held that the Nicaraguan trial court possessed neither personal nor subject matter jurisdiction under Section 7 of Special Law 364.<sup>24</sup>

In reaching its conclusion, the court determined that defendants, in electing not to make the deposits as required by Special Law 364, invoked their opt-out rights under Nicaraguan law<sup>25</sup> and thereby divested the Nicaraguan trial court of subject matter and personal jurisdiction.<sup>26</sup> The district court found that Special Law 364 was a “blocking statute” that was intended specifically to prevent courts in the United States from finding that an alternative forum is “available” to hear a plaintiff’s lawsuit.<sup>27</sup> The court further observed that Special Law 364:

appear[ed] to be somewhat unique among blocking statutes in that it operate[d] by establishing onerous conditions under which defendants would litigate and then providing defendants with the right to opt out

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 1326. The court noted that Special Law 364 “accomplishes this by effectively eliminating *forum non conveniens* defenses in the United States in DBCP litigation because it makes the foreign forum so unattractive from a defendant’s perspective. One commentator has opined that the law is an attempt to restore the plaintiffs’ traditional rights under Latin American law, where the plaintiff always has the ‘unfettered right to choose [to litigate] in the defendant’s court.’” *Id.* at 1324 (quoting in part Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 26 (2003)).

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* at 1325 (citing *Scotts Co. v. Hacienda Loma Linda*, 2 So. 3d 1013, 1015 n.2 (Fla. 3d Dist. Ct. App. 2008); Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 KAN. L. REV. 609, 622 (2008)).

of Nicaragua's jurisdiction . . . [Thus, i]t [wa]s beyond dispute that Special Law 364 provide[d] ample incentives for the defendants to exercise their opt-out rights by . . . effectively depriving them of due process in their effort to mount a defense.<sup>28</sup>

In other words, explained the court, either the defendants "have a right to opt out of Nicaragua's jurisdiction, which requires that the court deny recognition under Florida Statutes section 55.605(1)(b)-(c), or they are subject to a legal regime that does not provide due process, which requires denying recognition under Florida Statutes section 55.605(1)(a)."<sup>29</sup> The court noted that plaintiffs confront a classic "Catch-22", in that either circumstance constitutes mandatory non-recognition under the Florida Recognition Act.<sup>30</sup>

The district court rejected plaintiffs' claim that Article 7 did not give Dow and Dole a right to opt out of Nicaragua's jurisdiction by refusing to make the deposits, but instead simply "preclude[d Defendants] from arguing *forum non conveniens* if the plaintiffs decided to sue in the United States."<sup>31</sup> Nicaraguan law, the court determined, plainly could "not prescribe the legal effect that the defendants' actions in Nicaragua w[ould] have in United States courts. Nicaraguan law can only determine what effect such actions w[ould] have in Nicaragua's own courts."<sup>32</sup> The court was also persuaded by the Ninth Circuit's opinion in *Dow Chemical v. Calderon*, which found in dictum that Article 7 "is most reasonably read to provide DBCP defendants with a right to elect jurisdiction."<sup>33</sup>

The district court concluded that Special Law 364 provide[d] that Defendants' refusal to make the deposits and waiver of *forum non conveniens* defenses ha[d] the legal effect, in Nicaragua, of removing the case from the jurisdiction of Nicaragua's trial courts. Special Law 364 d[id] not dictate what legal effect the Defendants' actions w[ould] have in subsequent proceedings in the United States, nor d[id] it purport to do so.<sup>34</sup> Here, "Defendants expressly opted out of Special Law 364 by refusing to make the required deposits and by waiving their *forum non conveniens* arguments in United States courts. These actions had the legal effect of depriving the Nicaraguan courts of jurisdiction."<sup>35</sup> Consequently, Florida Statutes section

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1326 (citing *Dow Chem. v. Calderon*, 422 F.3d 827, 832-33 (9th Cir. 2005)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

55.605(1)(b)-(c) compelled mandatory non-recognition of the Nicaraguan trial court's \$97 million award.

B. Special Law 364 is Incompatible With the International Concept of Due Process [Florida Statutes section 55.605(1)(a)]

In addition to finding that the Nicaraguan trial court lacked both personal and subject matter jurisdiction to render its judgment, the district court also held that “Defendants ha[d] met their burden of proving that the legal regime set up by Special Law 364 and applied in this case d[id] not comport with the ‘basic fairness’ that the ‘international concept of due process’ require[d].”<sup>36</sup> This violation of international due process, the court determined, compelled its non-recognition of the Nicaraguan trial court’s judgment under Florida Statutes section 55.605(1)(a), for “[this] court c[ould] not enforce the judgment because it was rendered under a legal system that did not provide ‘procedures compatible with the requirements of due process of law.’”<sup>37</sup>

1. The Concept of International Due Process

Florida cannot recognize a foreign judgment if it was “rendered under a system which does not provide . . . procedures compatible with the requirements of due process of law.”<sup>38</sup> The *Osorio* court noted that the term “due process” in this context “d[id] not refer to the ‘latest twist and turn of our courts’ regarding procedural due process norms, because it [was] not ‘intended to reflect the idiosyncratic jurisprudence of a particular state.’”<sup>39</sup> Rather, it was “meant to embody an ‘international concept of due process,’ defined as ‘a concept of fair procedures simple and basic enough to describe the judicial processes of civilized nations, our peers.’”<sup>40</sup>

Dole and Dow argued that the procedures under which the Nicaraguan case was tried were incompatible with the requirements of international due process because numerous provisions of Special Law 364 failed to provide “basic fairness” to DBCP defendants subject to its provisions. The court first evaluated the defendants’ claim by examining the scientific basis for the irrefutable presumption of causation afforded to plaintiffs who established DBCP exposure and sperm damage. That evaluation was required to determine whether the presumption constituted a procedure consistent with

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<sup>36</sup> *Id.* at 1345 (citing *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

<sup>37</sup> *Id.* at 1326-27 (quoting in part FLA. STAT. § 55.605(1)(a) (2009)).

<sup>38</sup> FLA. STAT. § 55.605(1)(a).

<sup>39</sup> *Osorio*, 665 F. Supp. 2d at 1327 (quoting in part *Ashenden*, 233 F.3d at 476-77).

<sup>40</sup> *Id.* at 1327 (quoting *Ashenden*, 233 F.3d at 476-77).

due process in light of the medical testimony in the case.<sup>41</sup> The court then analyzed the remaining provisions of Special Law 364 under the rubric of disparate or discriminatory treatment of foreign defendants.<sup>42</sup>

## 2. Special Law 364's Irrefutable Presumption of Causation

The district court determined that Article 9 of Special Law 364 imposed an "irrefutable presumption of causation" between plaintiffs' alleged sterility and their asserted exposure to DBCP in such a way that violated the international concept of due process.<sup>43</sup> "Statutes creating permanent irrefutable presumptions have long been disfavored," especially when they deny the opposing side a fair opportunity to rebut the causal chain.<sup>44</sup> Here, this principle was especially salient because the facts presumed were not necessarily or universally true, particularly in the face of unrefuted medical and scientific evidence indicating that it was factually impossible for what was represented in the Nicaraguan court's judgment to have occurred.<sup>45</sup> Without proof of causation, the link between plaintiffs' injury and defendants' conduct was "purely speculative, and any damages awarded necessarily occur[ed] without due consideration for the defendants' fault."<sup>46</sup>

As a result, the *Osorio* court was "confident" that international due process norms as described in *Ashenden* did "not permit awarding damages, especially of the magnitude awarded here [approximately \$97 million, or \$647,000 per plaintiff], without proof of causation."<sup>47</sup> The court held that "those norms certainly d[id] not permit awarding damages in the face of clear scientific proof of the absence of causation. To do so would require defendants to pay huge sums without proof of fault, indeed, in this case, with proof that they [were] *not* at fault."<sup>48</sup> The court determined that Special Law 364 "constitute[d] an attempt, by legislative fiat, to enact into existence a fact which here d[id] not, and [could] not be made to, exist in actuality."<sup>49</sup> Therefore, the district court "d[id] not hesitate to conclude that awarding damages without regard for fault [wa]s the antithesis of basic fairness both in domestic and international litigation. The Florida Recognition Act contain[ed] enumerated, mandatory grounds for non-recognition of

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1328.

<sup>44</sup> *Id.* at 1332 (quoting *Valndis v. Kline*, 412 U.S. 441, 445 (1973)).

<sup>45</sup> *See id.* at 1335.

<sup>46</sup> *Id.* at 1332 (citing *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 731 (Ind. 1982)).

<sup>47</sup> *Id.* at 1335.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* (quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)).

foreign judgments precisely to prevent courts in this state from becoming a party to such legal caprice.”<sup>50</sup>

### 3. Special Law 364’s Disparate Treatment of Specific Foreign Company Defendants

The court determined that Article 3 of Special Law 364 was not designed to be a law of general applicability, but was instead intended “to target a narrowly defined group of foreign defendants and subject them to discriminatory provisions that d[id] not apply to domestic defendants.”<sup>51</sup> Special Law 364’s limited applicability to a narrowly defined group of foreign companies, combined with its unique discriminatory provisions, “together amount[ed] to a denial of due process” sufficient to compel the court’s non-enforcement of the Nicaraguan trial court’s judgment under section 55.605 of the Florida Statutes.

One of the provisions that Dole and Dow asserted as proof that Special Law 364 targeted them for disparate treatment was the Law’s unique minimum damages requirement - - entitling a successful plaintiff to a minimum damage award of \$125,000.<sup>52</sup> The court concluded that “[b]oth the minimum awards mandated by Special Law 364, and the actual awards in DBCP cases, [were] so disproportionate to the damages commonly awarded in Nicaraguan litigation - - which include damages awarded for injuries significantly more severe than the ones complained of in this case - - that it [wa]s clear that the damages provided for in Special Law 364 constitute[d] extraordinary damage provisions unique in Nicaragua’s legal system.”<sup>53</sup>

The district court also found that Special Law 364 “unfairly discriminate[d] against [defendants] by requiring them, as a condition to defending DBCP claims, to deposit \$100,000 within 90 days after the complaint [wa]s filed and \$15 million within 90 days of receiving notice of the complaint.”<sup>54</sup> It determined that “[n]o other litigants in Nicaragua [were] required to provide deposits which [were] anywhere near the deposit requirements that Special Law 364 impose[d] on DBCP defendants” and that the statute placed defendants in an “untenable jurisdictional conundrum.”<sup>55</sup> Moreover, the court determined that by providing for an appeal only to the intermediate appellate courts, and not to Nicaragua’s Supreme Court, and by limiting intermediate appeals only to instances without a stay of execution, Spe-

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1336.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1338.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1339.

cial Law 364 unfairly targeted U.S. companies in violation of the international concept of due process.<sup>56</sup> In contrast, the Nicaraguan Constitution explicitly provided a right to appeal verdicts of such a magnitude to the country's Supreme Court, and a stay of execution is generally available in Nicaraguan tort actions.<sup>57</sup>

Additionally, the court determined that Special Law 364 discriminated against Dole and Dow by requiring a 3-8-3 summary proceeding<sup>58</sup> for medically complex cases involving male sterility. Although such summary proceedings were common in Latin America, the court found no examples of their application in a case as complex as DBCP liability. "It appear[ed]," the court concluded, "that the clear intent of requiring a 3-8-3 summary proceeding was to unfairly fast track these substantial and complex cases, and thereby deny[ing] DBCP defendants sufficient time to present an adequate defense."<sup>59</sup>

Furthermore, the court found that Special Law 364 violated international due process by abolishing applicable statutes of limitations, despite plaintiffs' argument that their claims would have been timely regardless of the repeal of the statute of limitations period. The district court rejected the plaintiffs' argument for two principal reasons. First, "Plaintiffs ha[d] not shown, nor d[id] the record indicate, that the Nicaraguan trial court found that Plaintiffs did not have timely notice of their purported injuries such that the usually applicable limitations period would not have run."<sup>60</sup> Second, "given that Dole left Nicaragua approximately 30 years ago, and the unrefuted medical testimony that DBCP's effects on sperm quality are proximate to exposure, plaintiffs rendered sterile by DBCP would have known about it decades ago."<sup>61</sup> Plaintiffs' claims, the court concluded, would be time-barred absent Special Law 364's removal of statutes of limitation and imposition of retrospective liability.<sup>62</sup>

Equality before the law, concluded the court, "[wa]s basic to any definition of due process and fair play."<sup>63</sup> Although "[t]his d[id] not mean that foreign parties [could] not be subjected to certain procedural regulations,

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<sup>56</sup> See *id.* at 1339-40.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1340 (noting that "[t]he 3-8-3 procedure provides only eight days for the submission of evidence, even though the standard procedure in Nicaragua permits 20 days").

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1341.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* ("We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." (quoting *Slater v. State*, 316 So. 2d 539, 541 (Fla. 1975)).

such as reasonable security requirements, to ensure their compliance with court orders,”<sup>64</sup> it “[d[id] mean that foreign litigants c[ould] not be subjected to a legal regime unfairly different from that applied to domestic litigants simply because they [were] foreigners.”<sup>65</sup> In sum, the district court found that Special Law 364 contained “numerous unique provisions that applied only to a narrow class of foreign defendants, and operated to their distinct disadvantage in a pronounced discriminatory fashion.”<sup>66</sup> The court concluded that defendants’ disparate treatment under Special Law 364 was “fatally unfair and discriminatory, fail[ed] to provide the minimum level of due process to which all foreign defendants [were] entitled, and [wa]s, therefore incompatible with the requirements of due process of law under the Florida Recognition Act.”<sup>67</sup>

### C. The Nicaraguan Judgment Should Not be Enforced on Public Policy Grounds [Florida Statutes section 55.605(2)(c)]

A foreign judgment should not be enforced on public policy grounds when “enforcement would clearly undermine public confidence in the administration of the law or in the security of individual rights.”<sup>68</sup> The existence of “[a] mere difference between Florida law and foreign law is insufficient to merit non-recognition [of a foreign judgment] on public policy grounds because the Florida Recognition Act sets a high bar for defendants before they can avail themselves of the basis for non-recognition.”<sup>69</sup> In addition to determining that the law applied by the Nicaraguan trial court contradicted Florida law, the *Osorio* court found that the level of contravention was “sufficient to warrant non-recognition on public policy grounds”<sup>70</sup> pursuant to the discretionary language of Florida Statutes section 55.605(2)(c).<sup>71</sup>

The court held that “the irrefutable presumption of causation [under Special Law 364] relied upon in the [Nicaraguan] Judgment [wa]s repug-

<sup>64</sup> *Id.* (citing *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921)) (finding that a statute permitting the attachment of property belonging to a foreign defendant did not violate due process).

<sup>65</sup> *Id.* at 1342 (holding that a “corporation of one state” litigating in the courts of another “cannot be subjected, merely because it is a corporation, to onerous requirements . . . not laid on other suitors in like situations” (citing *Ky. Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 551 (1923))).

<sup>66</sup> *Id.* (citing Defendants’ expert Stephen Schwebel, a judge on the International Court in The Hague for twenty years, who testified that the unfair, discriminatory nature of Special Law 364 exceeded that of any law which he had encountered).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1345 (citing *Somportex, Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971)).

<sup>69</sup> *Id.* at 1345-46.

<sup>70</sup> *Id.* at 1346.

<sup>71</sup> FLA. STAT. § 55.605(2)(c) (2009).

nant to Florida public policy because it deprived [Defendants] of their basic right to defend themselves.”<sup>72</sup> According to the district court, “[f]or a presumption to comport with due process under Florida law (1) there must be a rational connection between the fact proved and the ultimate fact presumed and (2) there must be a right to rebut [the presumption] in a fair manner.”<sup>73</sup> Applying this standard to the instant case, the *Osorio* court concluded that

[T]he presumption of causation in Special Law 364 contradict[ed] known scientific fact and afford[ed] no opportunity for rebuttal. It create[d] liability by legislative fiat and mandate[d] large damage awards without determining whether the defendants actually injured the plaintiffs. Special Law 364's presumption of causation [was] therefore . . . unconstitutional [under] Florida [law].<sup>74</sup>

D. Nicaragua Lacked Sufficiently Impartial Tribunals [Florida Statutes section 55.605(1)(a)]

Lastly, the district court concluded that the Nicaraguan judgment was not entitled to enforcement as Nicaragua lacked impartial tribunals.<sup>75</sup> The Florida Recognition Act “includes the absence of impartial tribunals [in the nation where the Judgment was rendered] as a mandatory basis for non-recognition.”<sup>76</sup> After reviewing pertinent evidence and assessing the credibility of live testimony, the *Osorio* court concluded that the “evidence [wa]s compelling that Nicaragua lack[ed] impartial tribunals.”<sup>77</sup> This conclusion, the court asserted, was “based on the credible evidence that, while on paper and in theory Nicaragua ha[d] all the trappings of an independent judiciary, in practice the judiciary d[id] not act impartially.”<sup>78</sup>

Among other evidence cited, the U.S. State Department’s country report from 2002 (the year that *Osorio* was filed in Nicaragua) concluded that “[Nicaraguan] [j]udges’ political sympathies, acceptance of bribes, or influence from political leaders reportedly often influenced judicial actions and findings. . . . Both lower courts and the Supreme Court rendered controver-

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (quoting in part *Straughn v. K&K Land Mgmt., Inc.*, 326 So. 2d 421, 424 (Fla. 1976)) (internal quotation marks omitted).

<sup>74</sup> *Id.*; see also *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239, 1254 (Fla. 1996) (holding that an analogously irrefutable statutory presumption created an unfair process contrary to state public policy).

<sup>75</sup> *Id.* at 1347 (contending that the district court “admit[s] that it [wa]s not entirely comfortable sitting in judgment of another nation’s judicial system, but d[id] so in deference to the Florida Recognition Act”).

<sup>76</sup> *Id.* at 1347; see FLA. STAT. § 55.605(1)(a) (2009).

<sup>77</sup> *Osorio*, 665 F. Supp. 2d at 1347.

<sup>78</sup> *Id.* at 1347-48.

sial judgments dismissing evidence and convictions against international drug traffickers.”<sup>79</sup> In 2008, the State Department’s assessment of Nicaragua’s judiciary “continued to deteriorate.”<sup>80</sup> “Numerous” other reports also concluded that Nicaragua lacked impartial tribunals, leading the court to conclude that it was “the unanimous view among United States government organizations and officials (including United States ambassadors to Nicaragua), foreign governments, international organizations, and credible Nicaraguan authorities, that the judicial branch in Nicaragua [wa]s dominated by political forces and, in general, d[id] not dispense impartial justice.”<sup>81</sup> Finally, the court found that two well-qualified defense experts had credibly testified that “the problems in Nicaragua’s judiciary exceed[ed] those of any other Latin American country,” and that “in its formal structure, the Nicaraguan judiciary appear[ed] to have all the hallmarks one would expect of a classical liberal, democratic state, but in practice its decisions [were] commonly driven by partisan interests—not the rule of law.”<sup>82</sup>

Facing a similar situation, the Second Circuit in *Bridgeway Corp. v. Citibank* affirmed the district court’s finding that Liberia lacked a system of impartial tribunals.<sup>83</sup> Based on *Bridgeway Corp.*, and “in view of the persuasive evidence that direct political interference and judicial corruption in Nicaragua [wa]s widespread,” the Court held that “the judgment in this case

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<sup>79</sup> *Id.* at 1348 (finding in 2005, the same “Report had omitted the word ‘reportedly,’ which the 2002 Report contained, in its findings regarding political influence and corruption in the judiciary, indicating that in the State Department’s opinion the state of judicial independence in Nicaragua worsened in the years immediately preceding this action”).

<sup>80</sup> *Id.* (quoting 2009 HUMAN RIGHTS REPORT: NICARAGUA, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2010) (“Although the law provides for an independent judiciary, the judicial system remained susceptible to corruption and politicization, and did not function independently. The Judicial Career Law requires that new judicial appointments be vetted by the Supreme Court of Justice (CSJ); however, judicial appointments were often based on nepotism, influence, or political affiliation. Once appointed, many judges were subject to political and economic pressures that affected their judicial independence.”)).

<sup>81</sup> *Osorio*, 665 F. Supp. 2d at 1349 (citing COUNTRY REPORT: NICARAGUA, FREEDOM HOUSE NICARAGUA 5 (2009), available at <http://freedomhouse.org> (last visited Apr. 5, 2010) (concluding that domination of the judiciary by the FSLN and PLC continues); NICARAGUA: INTEGRITY SCORECARD, GLOBAL INTEGRITY SCORECARD 75 (2008), available at <http://www.globalintegrity.org/reports/2004> (last visited Apr. 5, 2010) (noting that efforts to reform the judicial system have had little effect in practice); TRANSPARENCY INT’L NICARAGUA REPORT, TRANSPARENCY INTERNATIONAL: THE GLOBAL COALITION AGAINST CORRUPTION 60 (2007), available at <http://transparency.org> (last visited Apr. 5, 2010) (concluding that the judicial branch is the “weakest point” in Nicaragua’s governmental institutions)).

<sup>82</sup> *Osorio*, 665 F. Supp. 2d at 1350.

<sup>83</sup> 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999).

[could] not be recognized under the Florida Recognition Act because it was rendered under a system which d[id] not provide impartial tribunals.”<sup>84</sup>

#### V. CONCLUSION

The *Osorio* court found

that Defendants ha[d] established multiple, independent grounds under the Florida Recognition Act that compel[led] non-recognition of the \$97 million Nicaraguan judgment. Because the judgment was ‘rendered under a system which d[id] not provide impartial tribunals or procedures compatible with the requirements of due process of law,’ and the rendering court did not have jurisdiction over Defendants, the judgment [wa]s not considered conclusive, and c[ould] not be enforced under [section 55.605(1)(a)-(c) of] the Florida Recognition Act. Additionally, the judgment w[ould] not be enforced because ‘the cause of action or claim for relief on which the judgment [wa]s based [wa]s repugnant to the public policy of this state [pursuant to Florida Statutes section 55.605(2)(c) (2009)].’<sup>85</sup>

Consequently, the district court ordered that Plaintiffs’ \$97 million Nicaraguan judgment would neither be “recognized nor enforced.”<sup>86</sup>

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<sup>84</sup> *Osorio*, 665 F. Supp. 2d at 1350 (quoting in part FLA. STAT. § 55.605(1)(a) (2009) (internal quotations omitted)).

<sup>85</sup> *Id.* at 1352.

<sup>86</sup> *Id.*