

Mercer Law Review

Volume 71
Number 3 *Lead Articles Edition - Contemporary
Issues in Election Law*

Article 11

5-2020

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Recommended Citation

Emory Larkin, Note, *The Eleventh Circuit's Rendezvous with Section 1782*, 71 Mercer L. Rev. 879 (2020).

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The Eleventh Circuit's Rendezvous with Section 1782*

I. INTRODUCTION

As the 2020 election draws near, the United States' divide on matters of foreign relations is more polarized than it has been in decades. Therefore, case law interpreting statutes such as 28 U.S.C. § 1782¹—which provides an avenue to aid litigation in foreign countries—is increasingly relevant in today's society. Section 1782 proceedings do not usually make the front page of the news, and most attorneys can practice their entire career without ever coming across the statute at all, nevertheless, Section 1782 is an important part of foreign litigation and international relations and has been for over 150 years.

Section 1782 proceedings have become more relevant throughout the United States, and at this point, every circuit, and most district courts have dealt with numerous cases invoking a Section 1782 application. The statute allows parties of foreign litigation to file an application requesting the help of the United States in providing domestic discovery materials to litigation happening outside of the United States. In doing so, Congress hoped to provide an efficient avenue to aid foreign litigants as well as show other countries that the United States cooperates with foreign proceedings with the hope that other countries will do the same.²

Section 1782 has statutory requirements that an applicant must meet in order for their application for discovery aid to be granted.³ The power to grant or deny the application has been given to the district courts.⁴ In addition to the statutory requirements, the courts have developed discretionary factors to consider in light of the statute's purpose.⁵

*Thank you to Professor Tim Floyd who has guided me since the start of my law school career and who has advised me on this Casenote. Also, to David and Catherine Larkin, my parents, words do not do justice for how thankful I am for you both.

1. 28 U.S.C. § 1782 (2019).
2. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004).
3. *In re Clerici*, 481 F.3d 1324, 1331–32 (11th Cir. 2007).
4. *Id.* at 1331.
5. *Intel Corp.*, 542 U.S. at 264–65.

Through the decision of *Intel Corporation v. Advanced Micro Devices, Inc.*,⁶ the Supreme Court of the United States expressly stated the factors that must be considered and while presumably helpful, it also opened the door to critical questions.⁷

This year, in 2019, the case of *Dep't of Caldas v. Diageo PLC*⁸ presented two of such issues to the United States Court of Appeals for the Eleventh Circuit as a matter of first impression.⁹ The issue of who bears the burden of proof as to the discretionary factors is one of these questions, and while other circuit courts have ruled on this issue, the Eleventh Circuit has not. The Eleventh Circuit also decided an issue of first impression, for not only this circuit but the other circuits as well, when it held that granting a partial Section 1782 application is allowed even when an applicant filed jointly with other applicants who may not meet the statutory requirements.¹⁰

In deciding these issues of first impression in *Dep't of Caldas*, the court used a rational and balanced approach and ultimately set the stage for a common-sense interpretation of the goals of 28 U.S.C. § 1782.¹¹

II. FACTUAL BACKGROUND

To provide context, the Republic of Colombia is divided into thirty-two territories which are referred to as Departments.¹² In 2016, four of those Colombian Departments prepared to sue two liquor companies in the Republic of Colombia for unfair competition.¹³ The unfair competition claim centered around alleged smuggling of the liquor company products into Colombia.¹⁴

In June of 2016, the Colombian Departments, in light of the anticipated litigation of a foreign proceeding, filed a joint application to obtain discovery under 28 U.S.C. § 1782. The four Departments—Caldas, Cundinamarca, Valle del Cauca, and Antioquia—sought to depose five previous employees of the liquor companies of Diageo PLC, Seagrams

6. *Id.*

7. *Id.*

8. 925 F.3d 1218 (11th Cir. 2019).

9. *Id.* at 1221.

10. *Id.* at 1224.

11. *Id.* at 1223–24.

12. *Information About Departments of Colombia*, COLOMBIAINFO.ORG, <https://www.colombiainfo.org/en-us/colombia/departments.aspx> (last visited Jan. 16, 2020).

13. *In re Dep'ts of Antioquia*, 2017 U.S. Dist. LEXIS 179442, *1, *1–2 (S.D. Fla. Oct. 27, 2017).

14. Brief of Intervenors–Appellants Liquor Companies at *3, *In re Application of Dep't of Antioquia v. Diageo PLC*, 2018 WL 446300, at *3 (11th Cir. Jan. 8, 2018).

Sales Co. Ltd., and Pernod-Ricard S.A. The five previous employees were non-party witnesses to the case. The liquor companies filed an opposition to the Section 1782 application.¹⁵

The United States District Court for the Southern District of Florida referred the application to the magistrate court which issued a report recommending the denial of the Departments' application.¹⁶ The magistrate's reasoning was based primarily on the fact that although two of the four Departments—Valle del Cauca and Cundinamarca—satisfied the statutory requirements, granting the application for those two Departments would basically grant it to all four Departments. The magistrate judge recommended that because all four Departments would benefit from the discovery—even though only two Departments satisfied the statutory requirements—the discretionary factor weighing whether the discovery request circumvents the statute's purpose would be violated too strongly.¹⁷

The magistrate court also decided that the second factor, the receptivity of the foreign tribunal of the United States judicial assistance could not be evaluated because an actual proceeding had not been commenced. The magistrate court recommended the district court should, therefore, use its discretionary powers to deny the application as a whole.¹⁸

The district court adopted the recommendation in part and denied the recommendation in part, finding ultimately that Valle del Cauca and Cundinamarca met the statutory requirements and the discretionary factors weighed in favor of granting the application to those Departments only.¹⁹ The district court disagreed with the magistrate's report that the factor of receptivity could not be evaluated.²⁰ With a lack of controlling precedent, the parties argued over which side had the burden of proof in establishing the foreign tribunal's receptivity.²¹

The district court concluded that both sides would bear the burden of proof because of the nature of the discretionary factors.²² The district court also disagreed with the recommendation that the statute's goals would be circumvented if two of the four Departments were granted the application, if those two Departments satisfied the statutory

15. *In re Dep'ts of Antioquia*, 2017 U.S. Dist. LEXIS 179442, at *1–2.

16. *Id.* at *2.

17. *Id.* at *8–9.

18. *Id.*

19. *Id.* at *16–17.

20. *Id.* at *9.

21. *Id.*

22. *Id.*

requirements and discretionary factors.²³ Ultimately, the district court granted the application for discovery with respect to Valle del Cauca and Cundinamarca and denied the application for Caldas and Antioquia.²⁴ The liquor companies appealed.²⁵

On appeal, the Eleventh Circuit addressed two issues of first impression and affirmed all other issues.²⁶ The issues of first impression concerned, (1) who bears the burden of proof in regard to the receptivity factor, and (2) whether the application could, in fact, be granted in part or if unitary disposition was required.²⁷

Ultimately, the Eleventh Circuit affirmed the district court's decision of both parties bearing the burden of proof in regard to the receptivity factor and affirmed granting the application in part for only the two Departments that satisfied the statutory and discretionary factors.²⁸

III. LEGAL BACKGROUND

For around 150 years, the statute of 28 U.S.C. § 1782 has provided an avenue for seeking United States judicial assistance in obtaining domestic discovery in foreign proceedings.²⁹ In order to grant a Section 1782 application for judicial assistance with discovery, four statutory requirements must be met; if all of the factors are met the court may grant the application.³⁰ However, the statutory requirements are not conclusive because the court also considers four discretionary factors.³¹ Even if all statutory requirements are met, the court may deny the application in light of the weight of the discretionary factors.³²

The statute's purpose is in the "twin aims of providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our

23. *Id.* at *12.

24. *Id.* at *17.

25. *Dep't of Caldas*, 925 F.3d at 1219.

26. *Id.* at 1221.

27. *Id.* at 1222, 1224. Section 1782 applications are typically reviewed using an abuse of discretion standard, with the underlying facts reviewed for clear error. However, the issue of who bears the burden of proof for a federal statute involves legal questions of statutory interpretation and is therefore subject to de novo review. *Id.* at 1221.

28. *Id.* at 1223–24.

29. *Intel Corp.*, 542 U.S. at 247.

30. *Dep't of Caldas*, 925 F.3d at 1221.

31. *Id.*

32. *Id.*

courts."³³ Congress specifically gave the district courts the broad power to respond to international requests for assistance.³⁴

Parallel to a Section 1782 application is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also known as the Hague Evidence Convention.³⁵ The Hague Evidence Convention is a treaty signed in 1970 involving sixty-two countries in which the countries all agreed to provide evidence if needed for judicial proceedings.³⁶ However, 28 U.S.C. § 1782 is essentially the United States' own codified version of the treaty and specifically deals only with other countries requesting evidence from the United States.³⁷

The interpretation of 28 U.S.C. § 1782 gave rise to four requirements that the party seeking discovery must meet in order for a district court to exercise its discretion in granting a Section 1782 application:

- (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.³⁸

Then, in 2004, with the prominent case of *Intel*, the Supreme Court emphasized that just because a district court may grant a Section 1782 application if the statutory requirements are met, it is not required to do so.³⁹ The district courts should, however, exercise their discretion with the twin aims of the statute in mind.⁴⁰ With this decision, the Supreme Court solidified four additional discretionary factors that should always be given consideration when ruling on a Section 1782 discovery application:

33. *Intel Corp.*, 542 U.S. at 252 (internal quotation marks omitted).

34. *In re Clerici*, 481 F.3d at 1331.

35. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1., March 18, 1970 (codified at 28 U.S.C.A. § 1781) ("In civil or commercial matters a judicial authority of a Contracting State may . . . request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.").

36. *Id.*; *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HCCH (October 18, 2019, 12:40 PM), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>

37. 28 U.S.C. § 1782.

38. *In re Clerici*, 481 F.3d at 1331–32.

39. *Intel Corp.*, 542 U.S. at 264.

40. *In re Schlich*, 893 F.3d 40, 46 (1st Cir. 2018).

(1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," because "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is otherwise "unduly intrusive or burdensome."⁴¹

The factors are analyzed and weighed against each party to decide whether to grant the application. The first factor—whether the discovery is sought from a participant in the litigation—arises particularly in situations in which the foreign court does not have jurisdiction over the non-party participant and therefore cannot order them to produce evidence.⁴² Consequently, without the use of a Section 1782 application, the evidence could be unobtainable.⁴³

The next factor concerns the "nature of the foreign tribunal, the character of the proceedings . . . and the receptivity of the foreign government."⁴⁴ This factor concerns the utility of the discovery materials and whether the foreign court will accept the evidence.⁴⁵ In addition, this factor looks to the reciprocity of the country, in other words, whether the foreign country would provide the United States assistance if the roles were reversed.⁴⁶

The factor regarding whether the request circumvents the discovery restrictions of the foreign tribunal is interesting. There is no rule that litigants have to try to obtain the discovery through the foreign court before filing a Section 1782 request, nevertheless, this is still a factor that the district courts consider when deciding whether to grant an application.⁴⁷

The Discovery Scope and Limits set forth by Rule 26 of the Federal Rules of Civil Procedure⁴⁸ are used for the factor of whether the request

41. *In re Clerici*, 481 F.3d at 1334 (quoting *Intel Corp.*, 542 U.S. at 264–65).

42. *Intel Corp.*, 542 U.S. at 264 (2004).

43. *Id.* at 264.

44. *Id.* at 264.

45. *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1040 (N.D. Cal. 2016).

46. *In re Bayer AG*, 146 F.3d 188, 192 (3d Cir. 1998).

47. *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010).

48. FED. R. CIV. P. 26(b)(2)(c)(i) ("[T]he court must limit the frequency or extent of discovery . . . if it determines that: the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.").

is "overbroad or unduly burdensome."⁴⁹ It is not assessed on whether the discovery would be available in the foreign jurisdiction. The courts have noted that "[f]ew if any foreign jurisdictions permit the scope of discovery available in our courts."⁵⁰ A Section 1782 application would become meaningless if it was only ever granted if the discovery would have been permitted in that foreign jurisdiction.⁵¹ In addition, if the court does find that discovery would be unduly intrusive or burdensome, the discovery request could be trimmed and granted only to discovery which would not be unduly intrusive or burdensome.⁵²

The statute becomes tricky in situations where the United States does not have good relations with a country, including circumstances in which the United States does not recognize certain countries' governments at all. In response to these issues, in 1964 Congress stated, "if 'relations with a country [are] so strained as to make the rendering of judicial assistance under this section improper' the federal court should 'use its discretion to deny a request for assistance although the United States and that country are technically at peace.'"⁵³ Similarly, the Trading with the Enemy Act⁵⁴ severs all legal communication with any countries with whom the United States has declared war.⁵⁵

While the *Intel* factors seemed to provide more concrete guidance for the district courts to determine whether to grant or deny applications under Section 1782, there were still questions to be formally answered by the courts such as the "minimum requirements or tests to be met" in regard to the factors.⁵⁶

49. *Mees v. Buitter*, 793 F.3d 291, 302 (2d Cir. 2015).

50. *Id.*

51. *Id.*

52. *Id.*

53. Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 606 (1990) (quoting S. REP. NO. 88-1580, 2d Sess., at 8 (1964), as reprinted in 1964 U.S.C.C.A.N. 3789).

54. 50 U.S.C.A. § 4303 (2019).

55. *Id.* § 4303 (c) provides:

It shall be unlawful . . . For any person . . . to send, or take out of, or bring into . . . the United States, any letter or other writing or tangible form of communication . . . and it shall be unlawful for any person to send, take, or transmit . . . out of the United States, any letter . . . or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy.

56. *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 118 (2d Cir. 2015).

A. Who Bears the Burden?

Who bears the burden of proving the discretionary factors have been met, or not, is one of these questions. A split—developing even before *Intel*, but solidifying strongly thereafter—emerged throughout the circuits.

1. Granted Unless Opposition Proves Otherwise?

Specifically, the United States Court of Appeals for the Second, Third, and Seventh Circuits have analyzed Section 1782 and held that the application should be granted unless the opposing party to the application carries their burden of proving that the discretionary factors weigh against the granting of the application.⁵⁷

The Second Circuit described the issue by stating unless the opposing party was able to offer "authoritative proof" that the foreign court would be unreceptive to the evidence then the district court should grant the application.⁵⁸

The Third Circuit analyzed Section 1782 using legislative history, specifically the Senate Report⁵⁹ which instructed courts to use the Federal Rules of Civil Procedure where a foreign court is silent on the proper procedures.⁶⁰ The Third Circuit stated that Federal Rules of Civil Procedure are known to be extremely liberal and therefore discovery request applications pursuant to Section 1782 should be granted liberally unless the opposing party proves actual facts sufficient to warrant its denial.⁶¹ Then, in 2011, in light of the *Intel* decision, but relying heavily on *Bayer*,⁶² the Third Circuit again concluded that the opposing party is the one who carries the burden.⁶³

The Seventh Circuit decided *Heraeus Kulzer, GmbH v. Biomet, Inc.*⁶⁴ in 2011 and also came to the conclusion that the opposing litigant must be the one to prove "by more than angry rhetoric" that the discretionary factors would go against the statute's objectives.⁶⁵

57. See, e.g., *In re Application for an Order Permitting Metallgesellschaft AG to take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997); *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 190 (3d Cir. 1999); *In re Bayer AG*, 146 F.3d at 196; *In re Chevron Corp.*, 633 F.3d 153, 162 (3d Cir. 2011); *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011).

58. *In re Metallgesellschaft*, 121 F.3d at 80 (internal quotations and citations omitted).

59. S. REP. NO. 88-1580, at 9, reprinted in 1964 U.S.C.A.N. 3789.

60. *In re Bayer AG*, 146 F.3d at 193.

61. *Id.* at 193, 196.

62. *Bayer AG*, 173 F.3d 188.

63. *In re Chevron Corp.*, 633 F.3d at 162.

64. 633 F.3d 591.

65. *Id.* at 597.

2. Equal Burdens?

Contrasting these circuits is the United States Court of Appeals for the First Circuit, which has held that the burden should not solely be placed on the opposing party, but instead should be equally placed on both parties.⁶⁶ The First Circuit concluded that the Supreme Court in *Intel* emphasized the district court's "flexibility and discretion" in balancing the factors and therefore the intent was not to place the burden on either party.⁶⁷ The First Circuit decided that the district courts should be able to look at all the evidence presented by both sides in order to properly analyze the factors.⁶⁸

The First Circuit responded to the Second and Third Circuit's reasoning for the burden falling on the opposing party with the fact that it did not believe that it was necessary in order to keep track of legislative intent.⁶⁹ The First Circuit held that district courts may deny the application in consideration of the discretionary factors regardless of whether or not the opposing party has offered reasoning to that effect; so, ultimately the First Circuit concluded that it was not so much that both sides should bear the burden, but instead that the opposing party should not bear the burden.⁷⁰

3. Burden on Applicant?

Almost no precedent exists for federal cases that have pointed to placing the burden on the party seeking the discovery with the Section 1782 application. In 2013, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*,⁷¹ a case from the United States District Court for the Northern District of California, the issue was slightly danced around. In a recommendation and report, the receptivity factor was found not to have been met when the burden was argued to have been incorrectly placed on the party requesting the application.⁷² The court concluded that because all facts were considered, the issue of the burden of proof was irrelevant to the decision of the case.⁷³ However, there was no precise legal standard binding on this district court on who bore the burden of proof. The court stated that who bore the burden was anything but

66. *In re Schlich*, 893 F.3d at 50.

67. *Id.*

68. *Id.*

69. *Id.* at 50–51.

70. *Id.*

71. 2013 U.S. Dist. LEXIS 8255, *1 (N.D. Cal. Jan. 17, 2013).

72. *Id.* at *62–63.

73. *Id.*

"clear."⁷⁴ Therefore, although the district court ultimately adopted the report and recommendation, the court did not ratify the theory of placing the burden on the requesting party.⁷⁵

B. Grant for One, Grant for All?

Other issues, such as the partial granting of a Section 1782, have never even found their way directly to the court's attention, until 2019. Although the United States District Court for the District of Massachusetts did touch on the issue, it was seemingly glossed over without any objection or appeal from any of the parties.⁷⁶ The district court there analyzed the applicants meeting the requirements and factors separately and granted a partial application in regard to one applicant and not the other.⁷⁷ It is important to note that the applications were filed individually in this instance.⁷⁸

With no clear precedent to follow on whether a partial application may be granted, the Eleven Circuit resolved the question as almost completely an issue of first impression for all eleven circuits.

IV. COURT'S RATIONALE

Here, the liquor companies appealed on the argument that (1) the burden should be placed on Departments as the parties seeking the discovery, and (2) the district court should not have granted a partial application when the Departments filed a joint application.⁷⁹

The Eleventh Circuit addressed these Section 1782 issues of first impression with the statute's purpose at the forefront of its consideration.⁸⁰ The court was only faced with the discretionary factor of receptivity as it relates to the burden of proof and therefore, the court only ultimately analyzed and decided the burden framework for this one factor alone. While the court had ample nonbinding precedent from other circuit's opinions on the issue of who bears the burden of proof, it was left completely to its own judgment on the granting of a partial application.

74. *Id.*

75. *Id.*

76. *In re Chevron Corp.*, 762 F. Supp. 2d 242, 246 (D. Mass. 2010).

77. *Id.* at 246.

78. *Id.* at 245.

79. *Dep't of Caldas*, 925 F.3d at 1222, 1224.

80. *Id.*

A. Burden Framework: A "Middle of the Road" Approach

In deciding who bears the burden of proof in a Section 1782 application, the court analyzed the three main approaches other courts have taken.

The idea of placing the burden of receptivity on the applicant, in this case, the Departments, was a nonstarter for the court. Referencing the unreported, nonbinding district court case of *In re Cathode Ray Tube Antitrust Litigation*, the Eleventh Circuit held that although the burden, in that case, was technically placed on the applicant, the district court still looked at all the evidence and the district court chose not to ratify the part of the report and recommendations of the applicant having the burden.⁸¹ The Eleventh Circuit held that there is essentially no legal precedent for placing the burden of proof on the Departments and moves its analysis onto the other approaches.⁸²

The second approach of placing the burden on the opposing party of the application was also not appealing to the court. The court analyzes several cases from the Second, Third, and Seventh Circuits that have held the objecting party must prove the foreign court would be unreceptive to the evidence obtained in order for the application to not be granted for the requesting party.⁸³

The Eleventh Circuit understood how the reasoning by these circuits is consistent with Congress's intent of "providing equitable and efficacious discovery procedures" and the way they have chosen to do this is treat information as discoverable unless the opposing party can give sufficient reasoning as to why it should not be discoverable.⁸⁴ While the court understood why the circuits chose to place the burden on the opposing party, it ultimately decided the burden would be too much for one party to bear.⁸⁵

The court held that requiring one side to provide proof of a foreign court's lack of receptivity—proving a negative—would not help further the purpose of the discretionary factors, much less the goals of the statute.⁸⁶ The purpose of the statute is for the district court to weigh all the factors when coming to a decision on a Section 1782 application.⁸⁷

81. *Id.* at 1222. (citing *In re Cathode Ray Tube (CRT) Antitrust Litigation*, U.S. Dist. LEXIS 8255, at *63).

82. *Id.*

83. *Id.* at 1222–23.

84. *Id.* at 1222 (quoting *In re Bayer AG*, 146 F.3d at 195).

85. *Id.* at 1223.

86. *Id.*

87. *Id.*

In addition, the Eleventh Circuit stated that some respondents do not have the "wherewithal" to give adequate proof of a foreign court's lack of receptivity.⁸⁸ The court realized that the burden is "daunting" to many parties who will have to respond to these requests and there is no reason to place it on one party alone.⁸⁹

The court decided on the First Circuit's approach of not placing a burden on either party.⁹⁰ Instead, the court decided that both parties need to give evidence to the discretionary factors because the court needs to see all the evidence in order to adequately decide whether to grant the application.⁹¹ The court held that applying a strict burden-shifting framework is not needed and unhelpful.⁹² Instead, this "middle of the road approach will further the goals of the statute."⁹³

The court confidently addressed the liquor companies' argument that the effect of the burden being placed on all the parties will be that neither party will address the issue.⁹⁴ The first rebuttal to this argument was that because *Intel* enumerated this factor as one that the district courts must address, then the district courts will have to address this factor one way or another before coming to a decision.⁹⁵ Secondly, the court stated that applicants sometimes have information that respondents do not and the court should be privy to that information if available.⁹⁶ In addition, the court stated that it is in the applicant's best interest to give evidence of receptivity because if they do not, they obviously run the risk of losing on the factor.⁹⁷ For the third factor about receptivity, the court extended its "use it or lose it" reasoning.⁹⁸ If a party does not provide evidence on the receptivity factor, the party risks having that factor weighed against it.⁹⁹

The Eleventh Circuit ultimately decided the point of the discretionary factors was for the district court to consider all the evidence and come to a knowledgeable decision on the application for discovery, and in order to do this, both sides should have to give evidence of a foreign court's

88. *Id.* (quoting *In re Chevron Corp.*, 762 F. Supp. 2d at 252).

89. *Id.* (quoting *In re Chevron Corp.*, 762 F. Supp. 2d at 252) (noting that the liquor companies could have carried the burden adequately in this specific case).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 1223–24.

99. *Id.*

receptivity.¹⁰⁰ The court decided that not placing the burden on one side or the other furthers the statute's twin aims of "providing efficient assistance . . . and encouraging foreign countries by example."¹⁰¹

B. Formalism: A Non-Issue

In deciding whether it was appropriate to grant a partial application when the Departments filed jointly, the court decided to look at the issue efficiently.¹⁰² The liquor companies argued that granting the application to only two of the Departments, Vale del Cauca and Cundinamarca, is inappropriate because the applications of all four Departments were filed jointly.¹⁰³ The district court granted the applications of Vale del Cauca and Cundinamarca because those Departments satisfied the statutory requirements as well as the discretionary factors.¹⁰⁴

The liquor companies argued that granting it in part is essentially granting it in whole because the discovery will be shared among the Departments, even the ones who did not satisfy the factors.¹⁰⁵ In response, the Eleventh Circuit held that although the liquor companies present a "practical point" it is not a "legal one."¹⁰⁶

The court discussed that if the entire application was denied purely on the basis of it being a joint application, then the Departments would turn around and file separately.¹⁰⁷ Once the Departments filed separately, the applications would be granted for Vale del Cauca and Cundinamarca and those Departments would unquestionably share the information with Antioquia and Caldas.¹⁰⁸ The end result would be exactly the same.¹⁰⁹

100. *Id.* at 1223.

101. *Id.* at 1224 (quoting *Intel*, 542 U.S. at 252).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; Reply Brief of Intervenors–Appellants Liquor Companies at 15, *Dept of Caldas*, 925 F.3d 1218 (No. 17-15267), 2018 WL 1511489, at *15 (The liquor companies argued that Section 1782 should only provide assistance to "participants" in foreign litigation, and the companies stressed that the Departments are expanding the policy "boundlessly" by providing discovery to "non-participants," in this case the ineligible Departments. The liquor companies stated that the "Court should fence off these efforts, apply a reasonable limiting principle to § 1782 applications, and refuse to permit this hijacking of the statute by the ineligible Departments.").

106. *Dep't of Caldas*, 925 F.3d at 1224.

107. *Id.*

108. *Id.*; Reply Brief of Intervenors–Appellants Liquor Companies at 12–13, *Dep't of Caldas*, 925 F.3d 1218 (No. 17-15267), 2018 WL 1511489, at *12–13 (arguing that the granting of the application to the two Departments will grant them to all of the Departments which "renders § 1782 a dead letter").

109. *Dep't of Caldas*, 925 F.3d at 1224.

The court expressly stated that it refused to "order a course of action that would lead to an identical result through far less efficient means."¹¹⁰ The court discussed that Congress never has emphasized any concern with what is done with the discovery after it is acquired from a Section 1782 application.¹¹¹ In addition, the court stated that denying the application in whole for "formalistic" reasons would not coincide with the twin aims of providing efficient assistance to foreign litigation and leading foreign nations by example.¹¹²

Therefore, the Eleventh Circuit affirmed the applications of Cundinamarca and Valle del Cauca.¹¹³

V. IMPLICATIONS

On its face, the Eleventh Circuit's decision will provide a basis for courts to follow for the burden of proof of the receptivity factor and the go-ahead to grant a partial Section 1782 application even when filed jointly. Even more so, the decision will be used as a basis of the burden of proof for all of the discretionary factors. Without a doubt, other cases will arise in the Eleventh Circuit in which the burden of proof of the other discretionary factors is questioned, and this case will serve as strong persuasive authority.

This decision also has a rather significant effect on trial judges and litigants. All Eleventh Circuit trial judges will be able to come to fair decisions across the board by knowing exactly what is expected to be brought forth by both parties. Likewise, litigants will be able to more adequately prepare for trial by knowing that both sides are required to bring forth evidence for their case.

What is interesting to note about this case is that some courts have criticized the reciprocity factor in general and have deemed it not critical in the discretionary factor analysis.¹¹⁴ The argument is that the "liberal intent to provide judicial assistance whether or not reciprocity exists has been acknowledged as a primary statutory goal since section 1782's inception."¹¹⁵

Indeed, the Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure has written

110. *Id.*

111. *Id.* (citing *Glock v. Glock, Inc.*, 797 F.3d 1002, 1007 (11th Cir. 2015)).

112. *Id.*

113. *Id.*

114. *See, e.g.*, *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985); *In re Bayer AG*, 146 F.3d at 192.

115. *In re Bayer AG*, 146 F.3d at 192 (quoting *John Deere Ltd.*, 754 F.2d at 135).

that the sponsors of the legislation hoped that the provisions for formal judicial assistance not only would enable full assistance to be made available, but also would furnish an “. . . example of unilateral, nonreciprocal, internal legislation, . . . which other countries may wish to follow.”¹¹⁶

The argument being that a Section 1782 request is unilateral by nature, the point of its existence is to offer assistance to foreign courts and to lead by example.¹¹⁷ This could potentially be an underlying reason that the Eleventh Circuit decided to make specifically the reciprocity factor a burden that both parties must bear, and may have no indication for the other discretionary factors. So, while this case could be interpreted as potential precedent for the burden of proof for the other discretionary factors, it could also be argued in subsequent cases that the holding is not relevant to the other discretionary factors.

More importantly, with this case, the Eleventh Circuit decided to take a balanced and common-sense approach to the issues instead of a rigid and formalistic approach. With purposivism at the forefront of its decision, the court also suggests an overarching trend toward a balanced, reasonable, efficient, and outcome-determinative approach when deciding issues. It will be interesting to see how the modern and controversial cases surely to be thrown on the dockets of the Eleventh Circuit will potentially be decided using this approach. With the 2020 presidential election just around the corner, foreign relations will continue to change. In the midst of these changes and even if never given recognition for its importance, 28 U.S.C. § 1782 will continue to be an integral part of foreign litigation.

Emory Larkin

116. *John Deere Ltd.*, 754 F.2d at 135 (quoting Amram, *Public Law No. 88-619 of October 3, 1964-New Developments in International Judicial Assistance in the United States of America*, 32 D.C. BAR J. 24, 33 (1965) (emphasis omitted)).

117. *Id.*

