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Product Liability

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Product Liability and Conflict of Laws: *Redux*

In a recent opinion, the Illinois Supreme Court overturned an Illinois Appellate Court First District decision that could have had dire economic consequences for current and future product manufacturers and sellers located in Illinois. *Townsend v. Sears, Roebuck & Co.*, No. 103858, 2007 WL 4200826 (Ill. November 29, 2007). If the supreme court in *Townsend* had failed to reassert the use of traditional presumptive rules in choice-of-law analysis, Illinois businesses might have been besieged by out-of-state plaintiffs seeking application of more liberal Illinois law on product liability and damages. (For further discussion on the Illinois Appellate Court First District holding in *Townsend*, see "Product Liability," *IDC Quarterly*, Vol. 17, No. 1 (2007)).

The case examined whether Illinois or Michigan law would govern certain substantive issues in a product liability and negligence action, where the injury occurred in Michigan, the product was manufactured in South Carolina, the defendant was a New York corporation domiciled in Illinois, and the conduct complained of occurred in Illinois. The parties agreed there were three conflicts with respect to Michigan and Illinois law: liability, compensatory damages, and punitive damages. On interlocutory appeal, the appellate court held that Illinois law applied to all of the issues. *Townsend v. Sears, Roebuck & Co.*, 368 Ill.App.3d 902, 858 N.E.2d 552 (1st Dist. 2006).

In their suit against Sears, the plaintiffs, Michelle Townsend and her 3-year old son Jacob, alleged strict product liability and negligence premised on defective design and a failure to warn relating to a "no-mow-in-reverse" (NMIR) feature on a riding lawn tractor. While on the mower, Jacob's father ran over Jacob's leg while backing up, causing severe injuries. His father had purchased the tractor from a Sears store in Michigan.

Overview of the Second Restatement of Conflict of Laws

Seizing the opportunity to revisit choice-of-law analysis, the supreme court thoroughly analyzed the history and progression of the field. The court acknowledged that it had not recently extensively addressed choice-of-law issues arising from the Second Restatement of Conflict of Laws. Because the analysis of the appellate court lacked proper structure and accuracy, the supreme court set out to provide clarity in what had become an uncertain area of law.

The court noted that any choice-of-law analysis must begin with isolating the issue and defining the conflict. *Morris B. Chapman & Assoc., Ltd. v. Kitzman*, 307 Ill.App.3d 99, 716 N.E.2d 271 (5th Dist. 1999); *Kramer v. Weedhopper of Utah, Inc.*, 204 Ill.App.3d 469, 562 N.E.2d 271 (1st Dist. 1990). The traditional method for determining the proper law to apply relied on *lex loci delicti*, i.e., the law of the place of the wrong. Courts were to apply this rigid maxim regardless of the amount and nature of contacts with either forum. *See* Restatement (First) of Conflict of Laws §§ 377, 378 (1934). Most states eventually abandoned this approach due to harsh and unjust results. Beginning in 1953, the American Law Institute began an ambitious project and eventually produced the Second Restatement of Conflict of Laws in 1971. Many considered the Second

Restatement to be a whole new beast in the conflict-of-laws world, rather than simply a rehashing of old concepts.

In *Townsend*, the supreme court unpacked the methodology of the Second Restatement into three "principal features:" 1) the policies of Section 6; 2) the concept of the "most significant relationship;" and 3) the "connecting factors" in Section 145(2). *Townsend*, 2007 WL 4200826, at *5.

Section 6 has been referred to as the "cornerstone" of the Second Restatement. *Id.*, at *6 (quoting Scoles, Conflict of Laws § 2.14, at 59). It provides that a state should first follow its own statutory directive on choice of law. Where there is no statute, however, the factors relevant to determining which state's law to apply include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971).

The "most significant relationship" concept is also fundamental to achieving the most just result in a choice-of-law analysis. Instead of simply going down the list and placing checkmarks next to each of the applicable contacts, the "most significant relationship" allows a court to evaluate those contacts in a non-arbitrary manner and considers the particular principles invoked. "While section 6 enunciates the guiding principles of the choice-of-law process, the most significant-relationship-formula describes the *objective* of that process: to apply the law of the state that, with regard to the particular issue, has the most significant relationship with the parties and the dispute." *Townsend*, 2007 WL 4200826, at *6 (quoting Scoles, Conflict of Laws § 2.14, at 61).

The third distinct concept critical to a choice-of-law analysis is Section 145(2), which provides that the following contacts should be considered when applying the principles of Section 6: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) of Conflict of Laws § 145(2). Each of the contacts is to be considered "according to their relative importance with respect to the particular issue." *Id.*

Presumptive Rules Make a Comeback

After highlighting what is considered the three key features of the Second Restatement, the court began its most significant discussion of the opinion, relating to the use of presumptive rules in choice of law. Although the Second Restatement revolutionized choice-of-law analysis, it did not completely abandon presumptive rules relating to, for example, different torts. According to the court, not only were courts and counselors overemphasizing the general provisions of the Second Restatement, but they were also underemphasizing the specific presumptive rules, thus leading to malformed decisions. Prior doctrines were not to be completely discarded.

The plaintiffs contended that the supreme court had never expressly authorized presumptive rules in choice-of-law determinations in personal injury cases. As evidence of its earlier acceptance and application of presumptive rules in such situations, the court cited *Ingersoll*, which held that "the local law of the State where the injury occurred should determine the rights and liabilities of the parties, unless Illinois has a *more* significant relationship with the occurrence and with the parties." *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970) (emphasis in original). When the court rejected the plaintiffs' first argument, the plaintiff alternatively asserted that whatever presumption existed in the present case was "easily overcome" by any contact with another state. *Townsend*, 2007 WL 4200826, at *8. The court rejected this argument as well. The court stated that presumptions "may be overcome only by showing a *more* or *greater* significant relationship to another state." *Id.*, at *8 (emphasis in original).

The court's reaffirmation of its adoption of the Second Restatement allowed the court to lay the groundwork for reasserting the preeminence of presumptive rules. In recent years appellate courts had not used these presumptive rules, but it was not because the Second Restatement did not provide for them. The rules were always there—they were just not being applied.

Before a court can go into the particulars of the Second Restatement, then, it must first consider the applicable presumptive rule. The second step tests that rule against the interplay between Sections 6 and 145(2).

For the presumptive rule in personal injury actions, the court looked to Section 146 of the Second Restatement, which provides that "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a *more significant relationship* under the principles stated in section 6 to the occurrence and the parties, in which event the local law of the other state will be applied." Restatement (Second) of Conflict of Laws §146 (emphasis added). Section 146 is the "starting point" for choice-of-law analysis in actions for personal injury. *Malena v. Mariott International, Inc.*, 264 Neb. 759, 651 N.W.2d 850 (2002); *accord McKinnon v. F.H. Morgan & Co.*, 170 Vt. 422, 750 A.2d 1026 (2000); *Morgan v. Biro Mfg Co.*, 15 Ohio St.3d 339, 474 N.E.2d 286 (1984). Even though it cited Section 146, the Illinois Appellate Court First District had afforded it "insufficient consideration." *Townsend,* 2007 WL 4200826 at *9.

The court then applied the facts of the present case to Section 146. The plaintiffs were residents of Michigan; the injury occurred in Michigan; and plaintiffs alleged that the tortious conduct occurred in Illinois. Comments to Section 146 raise such instances where the injury and conduct occur in different states, noting that the law of the state of injury is presumably the law that should be applied. "The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those *relatively rare* situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 146, Comment *c*, at 430-31 (emphasis in *Townsend*). As a result of the injury taking place in Michigan, there was a "strong presumption" that Michigan law applied "unless plaintiffs [could] demonstrate that Michigan bears little relation to the occurrence and the parties, or put another way, that Illinois has a more significant relationship to the occurrence and the parties with respect to a particular issue." *Townsend*, 2007 WL 4200826 at *10.

After completing the first step of identifying the presumptive rule and applying it to the facts of the case, the court turned to step two in order to determine the state with the most significant relationship. Due to disparate Illinois court opinions concerning the relationship between Sections 6 and 145, the supreme court attempted to provide its own roadmap. In prior decisions, the court had first identified the contacts listed in Section 145(2) and then applied the relevant general principles of Section 6 to each of those contacts. *See, e.g.*, *Esser v. McIntrye*, 169 Ill. 2d 292, 661 N.E.2d 1138 (1996); *Nelson v. Hix*, 122 Ill. 2d 343, 522 N.E.2d 1214 (1988). Sensing potential confusion and unnecessary legal nitpicking, the court shied away from sending down a "what comes first" holding with respect to Sections 6 and 145(2). Instead, it stated that in most cases it would not matter if the analysis first began with Section 145(2) or first looked to the Section 6 general principles. What must not be done is simply "counting contacts." *Townsend*, 2007 WL 4200826 at *11. Instead, there should be a deeper examination of the nature of each contact.

The court first assessed how the facts matched up with the four contacts in Section 145(2). The first contact—the place where the injury occurred—pointed solely to Michigan. The court determined that the second contact—the place where the conduct causing the injury occurred—was evenly divided between the two states. The plaintiffs argued that the design of the NMIR feature and business decisions relating to the feature occurred in Illinois. Sears argued that the contributorily negligent acts of the plaintiffs occurred in Michigan. Rather than delving deeper into this contact, the court simply considered the second contact to be evenly split.

The third contact—the domicile, residence, nationality, place of incorporation and place of business of the parties—also was a wash. The plaintiffs were domiciled and resided in Michigan and Sears was headquartered in Illinois. The fourth contact—the place where the relationship between the parties is centered—fell in favor of Michigan. The relationship arose from the purchase of a product in Michigan from a local Sears store doing business in Michigan.

Two of the contacts, therefore, pointed towards the application of Michigan law, whereas the other two contacts did not lend themselves to the law of one state over the other. But because the court should not simply "count contacts," the court closely examined those contacts within the context of the general principles of Section 6.

Rather than addressing all seven general principles and applying each of them to each contact, the court invoked the principles most relevant to personal injury actions, excluding the protection of justified expectations; the certainty, predictability, and uniformity of result; the needs of the interstate system; and the ease in the application of the law to be applied. The court focused on three principles: 1) the relevant policies of the forum; 2) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; and 3) the basic policies underlying the particular field of law.

In Deference to Michigan Law

With a newly-clarified analytical structure now intact, the court then discussed the three conflicts at hand: liability, compensatory damages, and punitive damages. Each of the issues was to be considered on a stand-alone basis. The process of "depecage," as provided in the Second Restatement, separates a case into distinct issues to which choice-of-law analysis is individually applied. Choice-of-law analysis is not an all-or-nothing situation. Certain issues may receive one state's substantive law whereas other issues may fall under another state's purview. The process, then, must be followed for each conflict of law.

On the issue of liability, where Illinois has a strict liability standard and Michigan has a negligence standard for product liability actions based on defective design, the court disagreed with the appellate court's characterization of the policy interests inherent in Michigan's standard of liability. The appellate court considered the strict liability standard to be "pro-consumer" and "pro-corporate regulation," whereas Michigan's negligence standard was "producer protective." *Townsend*, 2007 WL 4200826 at *13. The supreme court found this inaccurate. The court noted that the Supreme Court of Michigan considers the negligence standard to be "*pro*-consumer" because it rewards careful manufacturers by providing incentives to design safe products. Even though Illinois may have an interest in regulating culpable conduct within its borders, the choice-of-law analysis cannot be compromised. Both Michigan and Illinois have an interest in compensating their injured residents, but choice-of-law rules must still apply. Therefore, Illinois law does not trump that of Michigan under these circumstances, especially given the undervaluing of the interests of Michigan in having its own law applied.

With respect to compensatory damages for non-economic damages, the supreme court again disagreed with the appellate court. The appellate court asserted that the issue invoked a separation of powers, arising from the statutory cap in Michigan that would need to be applied in Illinois where such caps were held to be unconstitutional. An Illinois court would then have its hands tied on compensatory damages—due to Michigan's legislature—even though the Supreme Court of Illinois had declared such laws to be unconstitutional. This argument also failed. The court held there was no infringement into the separation of powers under Illinois law because the court would simply be applying a constitutional law of Michigan to a Michigan resident.

Lastly, the court considered punitive damages in product liability actions. The appellate court noted that the allowance of punitive damages by Illinois was designed to regulate corporations while the disallowance by Michigan was designed to protect corporations. After the plaintiff had been made whole (through non-punitive damages), Michigan had no further interest. Illinois, however, still had an interest in regulating adverse corporate behavior. The supreme court did not agree with that analysis. In reaching its decision the court once again relied on Section 146 and its presumptive rule. The appellate court had overemphasized the perceived interests held by both Michigan and Illinois while undervaluing the presumptive rule. Without much elaboration, the court held that the interest of Illinois did not outweigh that of Michigan. Therefore, the presumptive rule prevailed and Michigan law should apply.

Knowing that even its own framework might be misrepresented, the court ended the opinion with a clear-cut rule. It essentially stated that choice-of-law analysis in tort cases must first look to the applicable presumptive rules. Second, a court "must test this presumptive choice against the principles embodied in section 6 in light of the relevant contacts identified by the general tort principle in section 145." *Townsend*, 2007 WL 4200826 at *15. The court concluded: "[t]he presumptive choice controls unless overridden by section 145 analysis." *Id.* at *15.

Conclusion

Recognizing the potential for serious economic fallout if Illinois became a haven for out-of-state product liability plaintiffs, the supreme court wisely stepped back and reasserted traditional choice-of-law rules. Not only did the court protect the economic interests of Illinois (without sacrificing or prejudicing the interests of Illinois citizens and residents), it also clarified the application of choice-of-law principles to product liability cases.

About the Author

James W. Ozog is a partner in the Chicago firm of *Wiedner & McAuliffe, Ltd*. He received his undergraduate degree from Northwestern University and law degree from Washington University in 1977. Mr. Ozog concentrates his practice in product liability defense matters and commercial litigation. In addition to his Illinois defense practice, he is National Trial Counsel for several product manufacturers. He has appeared as lead defense counsel in over twenty states and tried cases to verdict in seven states besides Illinois. He also represents clients on a regular basis in matters before the United States Consumer Products Safety Commission. He is a member of the American Bar Association, DRI, IDC and the Propane Gas Defense Association.