Professional Perspective

Motions to Apply Foreign Law

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The opportunity to apply another state's law in a tort case may seem appealing at first glance, but a thorough analysis may reveal that the proverbial grass is not greener. Before asking the court to review where the injury occurred, where the injury causing conduct occurred, the domicile of the parties and the place where the relationship is centered, counsel must ask themselves a simple question—is asking to apply a foreign state's law beneficial to my client? While seemingly simple, the attorney pursuing this strategy must consider a number of factors and determine whether the full breadth of the foreign state's law is advantageous. This article outlines several points of law to consider before asking a court to apply a foreign state's laws. It examines damages, decided issues of law, statutes of limitations and/or repose, and burdens of proof.

Preliminary Questions

Prior to analyzing the different substantive laws that may be affected by employing the foreign law, attorneys should ask several additional preliminary questions.

- Rather than reflexively seeking to apply the law of another state because the option is available, the attorney must first determine if there is an actual conflict or if asking the court to apply such a motion is a fruitless endeavor.
- Additionally, in instances where multiple defendants are parties to a case does such a motion turn the spotlight on your client and make your client the target? Clearly, such an example largely depends on how the opposing counsel operates and if the client has largely avoided liability to the point of filing.
- The timing of filing also plays a large part in filing a choice of law motion. While there may be a desire to wait until the last moment to file a foreign law motion, certain jurisdictions may require substantive motions (for instance seeking summary judgment) to apply an analysis under both states' laws. Failing to incorporate the foreign law as part of a substantive motion may constitute a waiver of those arguments.
- Taking advantage of a foreign state's beneficial laws can also allow a better settlement on behalf of the client.
- After concluding that a foreign law motion is feasible, it must then be determined if the foreign state's laws are, in fact, beneficial.

Damages Analysis

A major factor in determining whether to employ a foreign state's law involves undergoing a damages analysis. Indeed, there are several sub-issues that should immediately come to mind, involving fault allocation, set-offs, non-parties, and damage caps.

Fault Allocation

Allocation of fault, particularly the usage of joint and several liability and variations thereof, is the first step in any damage analysis. Most states provide for pure joint and several liability or have created their own modified versions of joint and several liability. Only a handful of states have entirely abolished joint and several liability.

- Illinois, on the one hand, applies joint and several liability to allow a plaintiff to recover the entirety of his damages from any one of several tortfeasors—regardless of their share of liability. 740 Ill. Comp. Stat. 100 et. seq. (2020).
- Michigan, conversely, has largely abolished joint and several liability in order to adopt several liability. Mich. Comp. Law § 600.6304 (2020). In Michigan, each tortfeasor is merely responsible for the total damages that follow from the tortfeasor's percentage of fault.

Next, comes an analysis of the foreign state's position on contributory fault or comparative fault. While most states employ a version of comparative fault—allowing for the jury to deduct the Plaintiff's fault from any damages awarded—four states do recognize pure contributory fault.

- Maryland is one of those states and has long adopted and recently upheld its pure contributory negligence laws. This principle can prevent a plaintiff from recovering even if the jury finds the Plaintiff may have acted negligently, in minor ways, to contribute to their injury. *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 690-691 (2013).
- Missouri, on the other hand, subscribes to pure comparative fault and allows for a Plaintiff to recover even if they are ninety-nine percent at fault. MO. Rev. Stat. § 537.765 (2020).
- In a case filed in Missouri where the accident and injury occurred in Maryland, a defendant may elect to file a motion to apply Maryland's law assuming they are confident the plaintiff will be found even marginally at fault.

Set-Offs

All of the above decisions factor greatly into whether the attorney plans on taking a case to verdict—particularly regarding set-offs from settling parties. While, as stated above, Illinois applies joint and several liability it also reduces verdicts by the amount previously settled by any additional co-defendants or parties, otherwise known as set-offs.

Depending on the amount of the set-offs compared to the damages involved, a defendant has the opportunity to either significantly lower its exposure or eliminate it completely. For instance, consider a case where a defendant chooses Illinois law, which applies joint and several liability. Under this scenario, assume the amount in set-offs equals $500,000. Further assume that the jury awards a verdict of $600,000 and finds the defendant twenty percent at fault.

In Illinois, the defendant would only be on the hook for $100,000 due to $500,000 in set-offs. In Michigan, for example, the defendant would be liable for its percentage of fault–$120,000. Under that hypothetical if the total verdict was $500,000 in Illinois, the defendant would not have to pay a dime. The Michigan law-seeking defendant, however, would be liable for $100,000.

Non-Parties

While that type of scenario can result in a major coup for the defendant under Illinois law, the defendant might rather wish to choose the laws of a state that allows for the allocation of fault among non-parties. In many cases, having the ability to place non-parties on the verdict form is an excellent option to minimize the amount of risk and exposure for a client.

To use Illinois and Michigan once again as an example, Michigan requires juries to allocate fault to all persons who caused or contributed to a plaintiff's alleged injuries—regardless of whether or not those persons were ever a party to the case. Mich. Com. Laws § 600.6304(1)(b) (2020) (see also *Barnett v. Hidalgo*, 478 Mich. 151, 169-70 (2007)).

Thus, if the defendant is able to put forth enough evidence to warrant placing a non-party on the verdict form then they are able to force the jury to spread the amount of fault among the number of entities. When there are 24 non-parties on the verdict form in addition to the defendant, for example, each entity would only be 4% at fault if the jury decides to spread the fault among them equally. Under the above-mentioned example between Illinois and Michigan where the verdict resulted in $600,000, the hypothetical defendant in question would only be liable for $24,000 in Michigan—significantly less than if they chose Illinois law.

Damage Caps

Yet another additional consideration are caps on noneconomic damages and whether a court allows recovery for punitive damages. For instance, noneconomic damages for a medical malpractice case in Michigan must not exceed $471,800 unless one of several exceptions applies. Mich. Comp. Laws § 600.1483 (2020). If any of those exceptions apply, the cap on noneconomic damages rises to $842,500. Compare this scenario to Illinois, which does not have a cap on noneconomic damages, having previously determined the concept to be unconstitutional. *Best v. Taylor Machine Works*, 179 Ill.2d 367, 404 (1997).

While the majority of states have caps on punitive damages, several have no cap and only three –Michigan, Nebraska and Washington–do not allow punitive damages at all. Most states that place a cap on punitive damages offer an alternative where plaintiffs can recover up to the cap or several times the amount of compensatory damages–whichever is greater.

Thus, it is necessary to calculate the possible damages under each scenario to determine risk. For instance, Indiana's $50,000 cap on punitive damages compared to Georgia's $250,000 cap may seem appealing at first. However, Indiana also allows for, in the alternative, up to three times the amount of compensatory damages. So, if a plaintiff's medical bills are $200,000 then Indiana's punitive damages laws may not seem nearly as favorable.

Similarly, damages for loss of consortium in wrongful death cases vary from state to state.

- In Pennsylvania, plaintiffs may recover for the loss of consortium in a wrongful death case during the time between the spouse's injury and his or her death. *Amato v. Bell & Gossett*, 116 A.3d 607, 625-626 (Pa. Super. Ct. 2015).
- In Illinois, a widow is precluded from bringing a loss of consortium claim when he or she also brings a count under Illinois' Wrongful Death Act; the two counts are seen as overlapping and superfluous. *Kubian v. Alexian Bros. Med. Ctr.*, 272 Ill. App. 3d 246, 255, 651 N.E.2d 231, 238 (2nd Dist. 1995).

Questions of Law

Another consideration is how questions of law differ among states. While evaluating a client's potential liability or defenses, an examination of the forum state and potential foreign state's laws in order to determine whether either state has ruled on a particular issue that the other state has not is necessary.

- For example, Texas does not offer protection for employment discrimination regarding a person's sexual orientation or gender identity.
- Contrast Texas with Massachusetts, which affords protection for both classes. Mass. Gen. Laws Ann. ch. 151B, § 3A (West 2020).

Therefore, because Texas is undecided on the issue, defense counsel should explore moving to apply Texas law, which would likely provide a more favorable result for the client.

Another example is that while all states recognize that workers compensation is an exclusive remedy for a plaintiff, differing states have a variety of exceptions–some stronger and more abundant than others.

Iowa, on the one hand, has a fairly strong exclusive remedy with limited exceptions. While Tennessee allows an exception for intentional acts, Iowa only allows exceptions for the gross negligence of another employee or in the event an employer is required to carry worker's compensation insurance but fails to comply with the mandate.

Statutes of Limitation and/or Repose

Statutes of limitations provide a set amount of time for a plaintiff to bring a given claim starting when the cause of action accrues, which is typically when a cause of action occurs or an injury is discovered. Personal injury claims, for example, typically have statute of limitations that range from 1-3 years with numerous exceptions based on specific causes of actions–i.e. wrongful death or medical malpractice.

Statutes of repose bar a plaintiff from bringing suit after a set period of time. The difference between statutes of limitations and repose is that the clock for statutes of repose begins to run at the occurrence of a specific event, most commonly an improvement to real property. Thus, as an initial matter, defendants need to immediately determine whether the statute of limitations or statute of repose has run in the forum state and or foreign state.

Elements of Proof

While similar legal principles exist across jurisdictions, the elements of proving a prima facie case and the types of claims that can be brought can differ. Many states, for example, allow strict liability claims in products liability. Michigan, however, does not. Mich. Comp. Laws § 600.2945 *et. Seq* (2020).

In fact, Michigan only allows product defect claims under theories of negligent design of a product, negligent manufacture of a product, negligent failure to warn about some aspect of the product, breach of an express or implied warranty, or misrepresentation or fraud. *Rodger v. Ford Motor Co.*, 2008 WL 4646140 (Mich. App. 2008).

In addition to proving a prima facie negligence case under a defective design claim, a Michigan Plaintiff must also show that the product was not reasonably safe and a practical and technically feasible alternative existed. Mich. Comp. Laws § 600.2946(2) (2020).

A jury considers the feasibility and practicality of a product "according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller." Additionally, the alternative is only feasible if it "would have prevented the harm without significantly impairing the usefulness or desirability of the product" and "if the technical, medical, and scientific knowledge relating to production of the product, at the time the specific unit of product left the control of the manufacturer or seller, was developed, available, and capable of use the production of the product and was economically feasible for use by the manufacturer." Only at that point does the burden shift to the defendant to rebut the plaintiff's claims.

Wisconsin, however, allows for negligence and strict liability claims for defective product claims. Under Wisconsin's product liability statute, a plaintiff can bring a claim for strict liability, either through a manufacturing defect, design defect, or failure to warn, if several conditions are met:

- The product was in a defective condition when it left the possession or control of the manufacturer that left it unreasonably dangerous to persons or property
- The reasonable alternative design existed
- The product was unreasonably dangerous to the user or consumer
- The defect was a cause of the plaintiff's injuries or damages
- The product reached the user or consumer without substantial change in the condition in which it was sold (Wis. Stat. Ann. § 895.047 (West 2020))

After the plaintiff has established the prima facie case for strict liability then the burden shifts back to the defendant. However, in the event the plaintiff is unable to establish a strict liability claim in Wisconsin, they could simply rely upon a negligence claim to show a lack of ordinary care that resulted in injury. *Greiten v. LaDow*, 70 Wis.2d 589, 603 (1975).

Conclusion

In summary, an analysis of the implications of applying a foreign state's laws must look at all aspects of a case, as opposed to a singular issue. While the application of foreign law may be beneficial in one respect, the consequences as to another issue may be devastating.