Gallagher Sharp ATTORNEYS

CLEVELAND OFFICE
Sixth Floor Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
216.241.5310 PHONE
216.241.1608 FAX

TOLEDO OFFICE
420 Madison Avenue
Suite 1250
Toledo, OH 43604
419.241.4860 PHONE
419.241.4866 FAX

DETROIT OFFICE
39111 West Six Mile Rd.
Suite 141
Livonia, MI 48152
734.591.7468 PHONE
734.591.7467 FAX

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I. CHOICE OF LAW

I. Introduction.

Choice of law, *i.e.* what state's law applies, can be outcome-determinative in a case. In other words, a case may be won or lost depending upon what body of law governs. Thus, it is important to make the correct choice of law.

This article discusses how to analyze choice of law issues in Ohio. After noting that Ohio courts look to Ohio choice of law rules, the article focuses first, on choice of law as to insurance coverage, and second, as to underlying losses. The article concludes by offering practical advice when dealing with choice of law issues.

II. Analyzing Choice Of Law Issues.

A. Ohio's Choice Of Law Rules Will Generally Apply To An Ohio Suit.

Generally, whether an action is filed in state court or federal court, a court in Ohio will apply this state's choice of law rules. A state court, of course, is bound to follow state court precedent, which ultimately is handed down by the Supreme Court of Ohio. A federal court, at least in cases where jurisdiction is based upon diversity of citizenship (the plaintiffs and defendants being from different states), must apply the substantive law of the forum state, *i.e.* Ohio, including its choice of law principles.[1]

B. Insurance Coverage Is Analyzed In Keeping With The Restatement Of Conflicts.

Because policies of insurance are contracts (between the insured and the insurer), the policies are subject to principles of contract interpretation. The Supreme Court of Ohio has adopted Sections 187 and 188 of the Restatement of Conflicts (the "Restatement"), which address choice of law in contract cases.[2] Section 187 of the Restatement provides that, generally, the law of the state chosen by the parties to the contract will govern their contractual rights and duties. Insurance policies, though, generally do not specify a choice of law provision. Where a choice of law is not designated,

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[1] See, *Griffin v. McCoach* (1941), 313 U.S. 498, 61 S.Ct. 1023. Cases based upon a federal right are analyzed in keeping with federal law and are beyond the scope of this article.

[2] See, *Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 438-39, 453 N.E.2d 683, 686; and *Gries Sports Ent., Inc. v. Modell* (1984), 15 Ohio St.3d 284, 473 N.E.2d 807, syllabus.

Section188 controls and instructs that the rights and duties of the parties to the contract are determined by the law of the state that has "the most significant relationship to the transaction and the parties."[3]

To ascertain which state has the most significant relationship to the transaction and the parties, courts examine the justifiable expectations of the parties to the contract and consider the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement, Section 188(2)(a)-(d). In insurance cases, the Section 188 analysis often will correspond with the Restatement's view that the rights created by an insurance contract should be determined "by the law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship. ... to the transaction and the parties."[4]

The principal location of the insured risk, therefore, is of critical importance in deciding which state law applies. If an auto policy is under consideration, the focus is most often on where the auto or autos are garaged during the relevant time period.[5] If a court is dealing with a non-auto policy, such as a commercial general liability policy, it usually applies the law of the state where the policy was issued. Courts do so because the state where the policy was issued (*i.e.*, sent to the insured), generally also is the place of contracting, negotiation, performance, the location of the subject matter (the insured's covered activities), and the place of business for at least one of the contracting parties -- the insured.[6]

C. Underlying Claims Are Subject To A Separate Choice Of Law Analysis: Tort Claims Are Subject To The Law Of The State Where The Loss Occurred, While Contract Claims Are Governed By The Law As Determined By The Restatement.

The state law that applies to the interpretation of a particular policy of insurance is not necessarily the state law that applies to an underlying action. In fact, the underlying claim is subject

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[3] Restatement at 575, Section 188(1).

[4] *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 479, 2001-Ohio-100, citing Restatement at 15, Section 6, Comment g, and Restatement at 610, Section 193.

[5] *Ohayon, supra* at 479, citing Restatement at 611, Section 193.

[6] See, Restatement of Conflicts Section 188(2)(a) and (d); and *General Accident Ins. Co. v. Ins. Co. of North America* (Cuyahoga Cty. 1990), 69 Ohio App.3d 52, 59-60.

to a separate choice of law analysis. In practice, it is not unusual to apply the law of one state to interpret a policy of insurance and the law of another state to determine liability in the subject loss.

In tort actions (such as negligence suits) the law of the state where the tort occurred applies to the adjudication of the underlying claim. As the Supreme Court of Ohio explained, "[u]nlike a contracting party, ... a negligent tortfeasor acts without conscious regard for the legal consequences of his or her conduct -- let alone the particular law to be applied to that conduct -- and the parties contesting liability and/or the appropriate measure of damages for the conduct thus 'have no justified expectations to protect'."[7] Accordingly, in *Kurent v. Farmers Ins. of Columbus, Inc.* (1991), 62 Ohio St.3d 242, 581 N.E.2d 533, the contract of insurance itself was governed by Ohio law because the contract was between two Ohio parties. However, the auto accident underlying the case occurred in Michigan. The Supreme Court of Ohio held that Michigan tort law (including its no fault provisions) applied to the accident itself, noting that the "notion that Ohio law somehow controls the amount of damages flowing from torts committed on Michigan highways is akin to a contention that a Michigan resident who commits murder in Ohio is exempt from the death penalty because Michigan law does not recognize capital punishment." *Id.* at 246.

III. **Practical Advice**.

A. In actions filed in Ohio, apply Ohio's choice of law rules whether the suit is filed in state court or in federal court (in diversity of citizenship cases).

B. In determining the parties' contractual rights and duties, consult the Restatement, which instructs one to apply the law of the state that the parties to the contract chose; if no state law was chosen by the parties, apply the law of state that the parties would justifiably expect to apply to their contract -- the law of the state that has the most significant relationship to the contract and its parties.

C. In determining which state has the most significant relationship to the contract and its parties, consider the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.

D. In the context of insurance, realize that the state in which the insured risk is principally located typically is the state which has the most significant relationship to the contract and its parties; *e.g.* for auto policies, where the autos are garaged, and for general liability policies, where the insured's business is located.

[7] *Ohayon*, *supra* at 477, quoting Restatement at 15, Section 6, Comment g.

E. Recognize that a separate choice of law analysis applies to the underlying loss; therefore, the state law that applies to the insurance contract may not be the state law that applies to the underlying claim. If the underlying claim is a tort, the law of the state where the tort occurred controls, but if the underlying claim is contractual, the Restatement will determine the choice of law.

II. SUPREME COURT OF OHIO

A. Employer Intentional Tort Statute Upheld.

Kaminski v. Metal & Wire Prods. Co., 2010-Ohio-1027; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029; *Klaus v. United Equity, Inc.*, 2010-Ohio-1014. The Supreme Court of Ohio found that the employer intentional tort statute, R.C. 2745.01, effective April 7, 2005, was constitutional. That statute limits the circumstances under which an employer may sue his or her employer for workplace intentional injuries, and provides in its entirety:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.
>
> (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, contract, promissory estoppel, or defamation.

The Supreme Court held that the General Assembly acted within its power in enacting the measure, and that there are no constitutional infirmities in the statute. The court concluded that the statute differs from the one that the Supreme Court of Ohio struck down in a prior case, *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 928. These latest decisions limit, but do not overrule, *Johnson*.

The sole dissenter was Justice Paul Pfeiffer.

Therefore, courts will analyze any employer intentional tort cause of action accruing on or after April 7, 2005, in keeping with R.C. 2745.01, not the prior case law (including *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St. 3d 11), which set forth other standards governing these claims. Thus, an employee will have to prove that his or her employer acted with deliberate intent to cause the employee injury. In cases where the employer has deliberately removed a safety guard or deliberately misrepresented a toxic or hazardous substance and caused the employee injury, the employee will have the benefit of a rebuttable presumption that the removal or misrepresentation was committed with intent to injure the employee.

B. Pursuant To Crim.R. 11(B)(2) And Evid.R. 410(A), An Ohio Court May Not Admit, In An Insurance Coverage Action, Evidence Of A Criminal Conviction Based Upon A No Contest Plea.

Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc., 2010-Ohio-1043. The Supreme Court of Ohio, in a 6-to-1 decision, affirmed a court of appeals' reversal of a summary judgment based upon a conviction of criminal arson and insurance fraud. The named insured's officer/shareholder was convicted after a no contest plea to the charges of criminal arson and insurance fraud. The insurance company was granted summary judgment in the fire loss case because the insurance policy excluded coverage for "loss or damages caused directly or indirectly by any of the following * * * Dishonest or criminal acts by you * * *," and stated that the policy was void "in any case of fraud by you as it relates to this Coverage Part at any time" or "if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning * * * [a] claim under this Coverage Part." The high court held: "Crim.R. 11(B)(2) and Evid.R. 410(B) prevent the use of convictions based on no contest pleas in an action for declaratory judgment for insurance coverage." The court rejected the insurance company's arguments that the Evid.R. 410(A) applied only to a plea of no contest, not the resulting conviction; and that Evid.R. 410(A) should be interpreted to apply only to the use of a no contest plea *against* the person who entered it -- not to the former criminal defendant's use of the rule offensively. The court found that the purpose of the rule -- "to encourage plea bargaining as a means of resolving criminal cases by removing any civil consequences of the plea" -- would be thwarted unless the rule applied to any resulting conviction, and that Evid.R. 410(A) specified no exception for offensive versus defensive use. Also, the court found no justification for an exception to Crim.R. 11(B)(2) and Evid.R. 410(A), although the court stated that "[p]ublic policy may indeed call for an amendment to the rules to allow admission of evidence of no contest pleas and convictions in cases such as this, to prevent a wrongdoer from benefitting by the wrong."

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, And Exclusions.

1. Charter Service Driver Is Not An Insured Under The Customer's Liability Insurance; Injured Passengers Are Not Entitled To Obtain the Insurer's Underwriting And Claims Files Because The Contract Of Insurance Is Clear And Unambiguous That Charter Service Driver Is Not An Insured.

Federal Ins. Co. v. Executive Coach Luxury Travel, (Third App. Dist.), 2009-Ohio-5910. The Bluffton University baseball team was traveling in a charter bus to some early season scheduled games in Florida. The bus crashed. Claims were made that the charter service driver was an insured under the omnibus clause of the university's business auto and commercial excess liability policies -- that he was someone "using with your [the university's] permission a covered 'auto' you own, hire, or borrow." Joint stipulations of fact and cross-motions for summary judgment were filed. The trial court declared, and the court of appeals affirmed, that although the university could have refused any of the proposed drivers (if they did not meet with the university's approval) and the baseball coach had some authority to direct the specific activities of the bus and driver, none of these considerations were determinative "because within the context of an insurance contract, the terms 'permission' and 'hire' implicitly require a substantial, if not exclusive degree of authority and control over the bus and driver by the 'permitting' or 'hiring' party, which Bluffton University did not have in this case." The court of appeals also affirmed the trial court's quashing of a subpoena for the business auto insurer's underwriting and claims files. The court of appeals explained that when the contract is clear and unambiguous, the court may look no further than the four corners of the insurance policy to find the intent of the parties.

This case is on appeal to the Supreme Court of Ohio.

2. The Sale Of Stolen Property At Auction Can Be A Covered "Occurrence" As To The Innocent Auctioneer.

Celina Ins. Group v. Yoder & Frey, Inc., (Sixth App. Dist.), 2009-Ohio-4926. Yoder & Frey auctions consigned farm machinery and was insured by Celina Insurance Group. Several pieces of equipment Yoder & Frey auctioned ultimately turned out to be stolen. The purchaser sued for breach of warranty of title, negligent misrepresentation, and unjust enrichment. Yoder & Frey requested defense and indemnity from Celina and, in response, Celina filed a declaratory judgment action. The court held that the sale of the stolen equipment could be an "occurrence" because "while Yoder &

Frey intentionally sold the consigned skid loaders at auction, no evidence suggests that it was its intention to ... sell stolen" equipment. The court found that the sale of stolen equipment was, "from the insured's perspective, 'an unexpected happening without intention or design'."

B. <u>UM/UIM</u>.

1. *Respondeat Superior* Cannot Be Used To Make A Corporation The "Driver" Of A Vehicle Operated By An Employee.

McLaughlin v. Residential Communications, Inc., (Eighth App. Dist.), 2009-Ohio-6789. Two employees acting within the course and scope of their employment were involved in an auto accident. The employee driving the van was indisputably at fault. Because the owner of the van, the driver, and the company all were uninsured, the injured passenger/employee sued his insurer, State Farm, seeking uninsured motorist coverage. The policy required State Farm pay for damages for bodily injury an insured "is ***legally entitled to collect*** from the ***owner*** or ***driver*** of an uninsured motor vehicle...." (Emphasis added). The court of appeals observed that the fellow-servant rule precluded recovery against the driver himself. However, plaintiff argued that he was entitled to recovery based on *respondeat superior*, which made the company the real "driver" of the van. The court disagreed, finding that *respondeat superior* does not act to "substitute the employer corporation as the 'driver' of the vehicle in the place of the actual tortfeasor." Thus, because the plaintiff was precluded from recovering from the owner of the van on other grounds, the policy did not provide coverage.

C. <u>Coverage For Intentional Acts</u>.

1. Criminal Acts Exclusion That Denies Coverage For Accidental Or Negligent Conduct Is Overbroad.

Nationwide Mut. Ins. Co. v. Briggs, (Eighth App. Dist.), 2009-Ohio-6452. A child pled guilty to illegal possession of fireworks after he accidentally set fire to a nearby structure. At the time of the incident his parents were the named insureds on a Nationwide homeowner's policy that included the child. Nationwide filed a declaratory judgment action to deny coverage based on the policy's criminal acts exclusion, which excluded coverage for property damage "caused by or resulting from an act or omission which is criminal in nature and committed by an insured." The court of appeals found that the policy language was overly broad because it did not "differentiate between damages or injuries intended or reasonably expected to result and those damages or injuries which are accidental or result from mere negligent conduct." The court affirmed the trial court's decision that any damage caused by the fireworks was covered.

D. Policy Conditions Of Coverage.

1. An Insurance Policy Condition Requiring The Insured To Bring A UM/UIM Claim Within Three Years Of The Date Of The Accident Is Valid And Enforceable.

Chalker v. Steiner, (Seventh App. Dist.), 2009-Ohio-6533. Chalker was afforded UIM coverage under an insurance policy issued by Grange Mutual Casualty Insurance Company. Chalker was injured in a motor vehicle collision caused solely by the negligence of Steiner. Chalker filed suit against Steiner. Steiner offered to settle for her policy limits approximately four and a half months after the three-year limitations period for making a UIM claim under the Grange insurance policy had expired. Grange denied coverage on that basis, and Chalker sued Grange. The court held that "the limitations provision in this case is unambiguous and enforceable and the exhaustion provision [of the tortfeasor's policy] is a condition precedent to payment rather than the right to file an action for UM/UIM benefits."

2. An Insurer Has A Duty Of Good Faith To Inform Its Insured Of A Policy's Time Limitation Clause If The Insurer Becomes Aware Of A Potential Claim Prior To The Clause's Expiration.

Wilson v. Ohio Cas. Ins., (First App. Dist.), 2009-Ohio-6798. In July 2002 Wilson was driving a vehicle for his employer when he was injured in a collision. At the time, his employer had a commercial auto policy with Ohio Casualty that included UM/UIM coverage. Ohio Casualty became aware of a potential UM claim by Wilson within one month of his injury. Six years later Wilson filed a complaint seeking UM/UIM coverage. The trial court granted Ohio Casualty's dispositive motion pursuant to the policy's three-year limitation clause. The appellate court reversed, holding that the limitations clause was unenforceable because Ohio Casualty was aware of Wilson's potential claim but did not inform Wilson of the limitations period until after it expired. An insurer owes the duty of good faith to its insured, and it was a violation of that duty for an insurer to remain silent about a limitations period in the face of a potential claim. The insurer may provide a copy of the policy to the insured to satisfy this duty.

3. An Insured Breaches The Conditions Precedent To Liability Coverage By Entering A Consent Judgment With The Plaintiff Before Providing The Insurer Notice Of The Claim And Suit.

Novak v. State Farm Ins. Cos., (Ninth App. Dist.), 2009-Ohio-6952. Novak owned a condominium next to an abandoned unit owned by the Fords. The Fords' unit had its heat shut off, a water pipe froze, and a flood saturated the common wall with the Novak unit. The Fords were insured under a State Farm insurance policy issued to the condominium association. Novak sued the Fords for negligence. The Fords never provided State Farm with notice of the suit. Novak and the Fords entered a consent judgment in the amount of $100,000 with an agreement that Novak

would not pursue collection from the Fords. Nowak then sued State Farm under a supplemental complaint. The court found that State Farm was not obligated to provide liability coverage to the Fords because: 1) "under the terms of the insurance agreement, the Fords were not at liberty to settle the lawsuit on their own without the permission of State Farm;" and 2) "the Fords did not take any steps to include State Farm in settlement negotiations, nor did they notify State Farm of the possibility of a settlement." The court found these failures were breaches of the terms of the State Farm policy, thereby discharging State Farm from its obligation to provide coverage.

E. Duty To Defend.

1. Insurer Does Not Have A Duty To Defend Where The Facts As Fleshed Out In Discovery Demonstrate That No Coverage Is Possible Under The Policy.

Smith v. Ohio Bar Liab. Ins. Co., (Ninth App. Dist.), 2009-Ohio-6619. Smith was a lawyer in the firm of Karl & Smith LLC. Simultaneously, he owned the Smith insurance agency, which sold annuities. The Ottos purchased several annuities from the Smith agency. Ohio Bar Liability Insurance Company ("OBLIC") issued a professional liability policy covering Smith "in a lawyer-client capacity on behalf of one or more clients[.]" The policy excluded coverage for "any Claim arising out of or in connection with the conduct or sale of any business enterprise not named in the Declarations." The court held that the instant suit "arises out of" the Smith agency's conduct because even the legal malpractice claims were based upon the sale of annuities by the Smith agency. The court determined that OBLIC had no duty to defend Smith because "the duty to defend may be avoided when facts fleshed out in discovery demonstrate that no coverage is possible under the policy."

F. Miscellaneous.

1. Where Civ.R. 42(B) Conflicts With R.C. 2315.21(B), The Statute Applies And Removes The Trial Court's Discretion In Ruling On A Motion To Bifurcate A Punitive Damage Claim.

Hanners v. Ho Wah Genting Wire & Cable, (Tenth App. Dist.), 2009-Ohio-6481. The trial court recognized the conflict between Civ.R. 42(B) and R.C. 2315.21(B) and determined that bifurcation was a procedural matter and, therefore, Civ.R. 42(B) controlled. The court of appeals determined that a trial court's bifurcation determination under Civ.R. 42(B) is not a final, appealable order. The appellate court, however, concluded that R.C. 2315.21(B) is a substantive law and, therefore, prevails where it conflicts with Civ.R. 42(B). Accordingly, the trial court was required to bifurcate the compensatory damages claims from the punitive damages claim.

2. An Insured May Sue His Insurer For The Costs And Expenses Incurred During His Defense By The Insurer.

Kincaid v. Erie Ins. Co., 183 Ohio App. 3d 748, (Eighth App. Dist.) 2009-Ohio-4372. Kincaid struck a bicyclist with his vehicle. His insurer, Erie Insurance Company, provided him a defense and settled the bicyclist's suit. Kincaid then sued Erie for expenses he claimed to have incurred during the suit, such as copy charges, postage, transportation, parking costs, and missed time from work. The Erie policy provided coverage for "reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit. This includes up to $100 a day for actual loss of earnings." The trial court dismissed Kincaid's claims for breach of contract and bad faith, but the court of appeals reinstated them, finding that Kincaid stated a claim under the Erie policy.