The Lane Law Letter

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We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

As always, we welcome questions and comments regarding our articles. Contact us by phone at 973-512-3244, or by email at law@jclane.com.

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NJ Supreme Court Issues Two Landmark Decisions on Choice of Law

In *Ginsberg v. Quest Diagnostics, Inc.*, the Court ruled that in a case involving defendants situated in different States – here, New York and New Jersey, it is not necessary to decide which State's *substantive* medical liability law should apply. Instead, the Court applied New York law to the New York defendants, and New Jersey law to the New Jersey defendants. In *McCarrell v. Hoffmann LaRoche, Inc.*, the Court dealt not with substantive law, but with the choice of which State's statute of limitations should apply, in a medical product liability case.

The *Ginsberg* case involves a "wrongful life" lawsuit and an unfortunate human story. Tamar Ginsberg and her husband Ari Ginsberg were expecting their child in New York. Their daughter, Abigail, was born in New York. When she was seven months old Abigail was diagnosed with Tay-Sachs disease, an inherited incurable neurological disorder. She died in New York at the age of three years as a result of that disease. Before her birth Ari and Tamar consulted with doctors and others in New York and New Jersey because of a history of that disease in Ari's family. According to the Ginsbergs, none of these medical professionals forewarned of a problem.

After Abigail died, her parents moved to New Jersey. There they sued all of the professionals for "wrongful life." They alleged that the defendants negligently failed to test Ari and advise whether the baby would be born with the incurable disease. Both States recognize that tort and the right to recover for their expenses in caring for the child. But New Jersey also allows damages for the parents' emotional harm. New York prohibits those damages. All defendants urged application of New York law on damages, while the Ginsbergs sought New Jersey law. The lower courts crafted a solution: New York law would be applied to the New York defendants; the New Jersey defendants would face judgment under the more generous New Jersey rule. The New Jersey defendants appealed. They asserted that it is unfair to treat them differently.

The Supreme Court agreed with the lower courts' resolution. Under the current Restatement of Conflicts of Law, a guideline already adopted in New Jersey jurisprudence, the substantive law of the State where the tort occurred should be applied. The New York defendants' alleged negligence occurred in New York; the New Jersey defendants' actions took place in their State. The result seems logical, if not harsh. However, in a case with defendants from numerous states, the Court warns that practicality may require application of the substantive law of a single State.

But, what if the conflict involves the Statute of Limitations?

The *McCarrell* case addresses that issue. It arises from circumstances in Alabama, where plaintiff Andrew McCarrell lives, but with a New Jersey connection.

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Third Circuit Clarifies the Roles of Court and Arbitrator

A trash removal business in New Jersey needed new workers' compensation insurance. It entered into a Reinsurance Participation Agreement with a captive insurance group, believing, as they say, that this agreement provided true workers' compensation insurance. In fact, it was a retrospective reinsurance treaty. The agreement contained an arbitration provision. The ensuing dispute played out in *South Jersey Sanitation Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.* (3d Cir. October 25, 2016).

South Jersey sued Applied Underwriters for fraud, seeking monetary damages and rescission of the contract. Applied moved to compel arbitration of the dispute, pursuant to the arbitration provision. South Jersey opposed, asserting that the court must bar enforcement of the arbitration provision because it is part of a contract allegedly procured by fraud. The Third Circuit disagreed and ordered arbitration.

Applying the Federal Arbitration Act, the Court noted that the claim of fraud in the inducement addressed the contract as a whole, not the arbitration provision specifically. The provision is valid and enforceable. It will be up to the arbitrator to decide the merits of South Jersey's fraud and monetary damage claims.

Editor's Note: What if the arbitrator decides that the contract should be rescinded - does that not also rescind the arbitration provision?

A Contract is a Contract - Even a Contract to Provide Insurance

A.M. Express, a trucking and logistics company, entered into a lease for a unit in a commercial facility owned by Lumer Associates, where it could store nonperishable food products for its customers. The lease agreement required the trucker to obtain insurance that covered the landlord for liability for any loss or damage to the trucker's stored goods, and that contained a waiver of subrogation rights. The trucker failed to obtain that insurance. Later, the floor of the unit collapsed causing destruction of the stored goods. The trucker was clearly not at fault for the collapse. The trucker sued the landlord for the loss, and the New Jersey trial and appellate courts ruled for the landlord in *A.M. Express v. Lumer Associates* (February 2017).

Under New Jersey law, a lease is like any other written contract, stated the Appellate Division. Where the terms of the lease are clear and unequivocal, the courts must enforce those terms as written. A party who fails to perform a lease provision has breached the lease. A.M. Express conceded that the lease provision was clear and unequivocal, and that it did not obtain the required insurance. It also agreed that if it had, its insurance company would have indemnified the landlord, Lumer Associates, for any liability to A.M. Express, and would have waived any right of subrogation against Lumer. Thus, A.M. Express was obligated to provide Lumer with the benefits it would have received had A.M. Express not breached the contract. The complaint was dismissed, and A.M. Express had to bear the loss, all because it did not purchase the insurance called for in the lease agreement.

On the Cover: Congratulations to office manager, Louise Lane, whose photography was once again accepted for display at the New Jersey State Bar Foundation Annual Art Show. From the artist:

> I photographed ***Cloak of Mourning*** in late March 2015. I was on my way to visit my best friend from elementary school. I knew that this would probably be the last time I would see her. Memories from our childhood together flooded my thoughts. It was in this very special moment of quiet solitude that I was able to see that just as the ice would soon be gone, the fog was rising to Heaven, and all was as it was meant to be.

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Andrew underwent a treatment regimen involving Accutane, an acne medicine manufactured in New Jersey by Hoffmann-LaRoche, Inc. Several months later he began experiencing extreme stomach pain and diarrhea and was diagnosed with inflammatory bowel disease. The condition worsened, requiring Andrew to undergo several operations. A few years later Andrew sued Hoffmann-LaRoche in New Jersey and obtained a significant verdict. Hoffmann-LaRoche appealed, arguing that the lower courts should have applied the Statute of Limitations of Alabama, which would bar the lawsuit. The Supreme Court of New Jersey disagreed and applied that State's more flexible "Discovery" rule, holding that the Statute of Limitations does not begin to run until plaintiff's "Discovery" of his cause of action. Under New Jersey's Statute, the lawsuit was filed within the limitations period, and the judgment for Mr. McCarrell was upheld. But why apply the New Jersey Statute of Limitations?

The Court adopted the reasoning of Section 142 of the Restatement (2d) of Conflicts of Law, which addresses choice-of-law issues only as to statutes of limitations. Other sections of the Restatement of Conflicts of Law apply to the choice of substantive law; they favor the law of the place where the injury took place. But Section 142 has a different test. It favors the statute of limitations of the forum state – here, New Jersey – as long as that state has a substantial interest in the maintenance of the claim and there are no "exceptional circumstances" that make that choice unreasonable. The Court found that New Jersey has a substantial interest in the claim, since it involves one of its own companies, and that no countervailing exceptional circumstances existed to apply Alabama's statute of limitations.

Editor's note: What is important here is that New Jersey now chooses Section 142 as the operative choice-of-law rule when the conflict involves statutes of limitations. But the choice-of-law rules as to substantive law favor the law of the state of the injury. Thus, in this case, a court might choose to apply Alabama's substantive law of products liability, and New Jersey's Statute of Limitations. The Supreme Court states that the adoption of Section 142 will lead to "more predictable and uniform results that are consistent with the expectations of the parties." We are not so sure.

NY Appellate Court Gives a Lesson on Forum Non Conveniens

The New York Appellate Division dismissed an insurance coverage case, noting that most relevant factors favored a Massachusetts forum, in *Shipyard Quarters Marina, LLC, v. New Hampshire Insurance Company* (Nov. 2016).

Shipyard Quarters Marina, owned by the plaintiff, a Massachusetts limited liability company of the same name, is located in Boston Harbor. In 2013 the company was sued by the Commonwealth of Massachusetts, which alleged that the marina had fallen into disrepair, its pilings deteriorating, and constituted a public nuisance to the Harbor. The company's manager, Martin Oliner, is a New York resident, and the company's business offices were moved there in 2014. The company notified its insurer, New Hampshire Insurance Company (NHIC), of the Commonwealth's lawsuit and demanded full coverage for the lawsuit as well as the cost of repairs. NHIC agreed to defend the lawsuit under a reservation of rights, declining all other coverage. Shipyard Quarters Marina, LLC, and Martin Oliner brought suit against NHIC, a New York corporation, in New York, for breach of the insurance contract.

New Hampshire moved to dismiss the New York lawsuit, urging that it should proceed in Massachusetts, home of the insured and the insured property, and the principal witnesses and evidence, and whose insurance law would most likely govern the dispute. The Appellate Division affirmed the trial court's decision, agreeing that Massachusetts is the proper forum. The facts that New Hampshire is a New York corporation, and the insured's offices and manager are now in New York, do not constitute a substantial nexus of the dispute to New York. Massachusetts is the more appropriate available forum. The insured is a Massachusetts limited liability company with its principal place of business there; the action seeks coverage for a lawsuit in Massachusetts; the policies concern property located there; the witnesses and evidence located in that State will be dispositive on coverage issues; and, finally, the coverage lawsuit will likely require application of Massachusetts law.

The Court dismissed the New York lawsuit on the condition that New Hampshire Insurance Company agrees to submit to the jurisdiction of the Massachusetts courts, where the coverage lawsuit can proceed.

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Plaintiff Sanctioned for Failure to Attend Independent Medical Exam

A trial judge in Atlantic County, New Jersey, has ordered a plaintiff to pay an IME doctor's no-show fee after failing to attend her scheduled IME. The decision in McInroy v. Village Supermarket, Inc., was issued on August 25, 2016, and approved for publication on February 14, 2017. It is a decision that we and other defense counsel will utilize as the situation arises.

In a routine personal injury case, plaintiff Anne McInroy was scheduled by the defense for an IME. After failing to attend the examination, she was given another appointment, which she also failed to attend. No excuse was given, and there was no call to defense counsel or the examining doctor to advise that she would be unable to attend. A third appointment was made, well in advance of the examination date, and confirmed in writing by defense counsel, as in the first two. The last letter forewarned that a "no-show" fee would be charged to plaintiff if she once again missed her appointment, which she did, again without prior notification. Defense counsel sought an order compelling plaintiff to reimburse them for the no-show fee. The trial judge agreed.

The judge noted the absence of any existing case law on this issue. But he emphasized that a trial judge may exercise his discretion to order reasonable sanctions for failure to abide by discovery requests. The fee of $375 seemed reasonable to the judge, notwithstanding plaintiff's protest that she lives on social security. The judge reasoned that the IME doctor lost valuable time because the appointment was not kept, that defense counsel had no control over plaintiff's attendance, and plaintiff herself offered no excuse for her non-attendance or her failure to advise counsel or the doctor that she would not be able to attend.