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Challenges Faced When Sending the Non-Profit Employee Overseas

I. Resolving Conflicts of Law Questions When Handling International Claims

Injured Abroad:

While on a study abroad trip to Madrid sponsored by an American university in New York, a college student from Texas ventured off campus to a local bar where he proceeded to drink excessively. He continued to drink after his friends departed the bar, and eventually left on his own. In his intoxicated state, he wandered into the street where he was struck by a vehicle and was severely injured along with the driver of the car who hit a light pole. The family of the student filed suit in the U.S., claiming that the university should have done a better job warning the students of the dangers in the area where the school was located, failed to provide a safe area for the students on its foreign campus, and failed to monitor the behavior of the study abroad participants. The student bought an insurance policy in New York for tourist coverage prior to his trip.

Although the student's family likely has grounds to bring suit, there are fundamental questions that automatically surface. Who is the party entitled to bring a lawsuit? Against whom may suit be filed? In what country should the suit be filed? What role does the insurance company play? To properly answer these questions, there are many considerations: (1) what law will apply in the underlying tort claim; (2) what law will apply to the insurance contract for coverage and defense; (3) what role any waivers or releases may play; and (4) what coverage applies.

Conflict of Law Related to Injuries or Claims

Claims of negligence or other torts stemming from the accident are state law claims. Federal courts, in turn, apply the forum state's conflict-of-law rules to determine what law governs state law claims. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). For example, if the injured student sues in the Southern District of Florida, the court would look to Florida conflict-of-law rules to decide whether Florida, or another state's tort law applies. Most states follow the Restatement (Second) Conflicts of Law §§ 146, 175, in which the law of the state where the injury occurred determines the rights and liabilities of the parties, *unless* another state has a more significant relationship to the occurrence/parties, in which that state's laws would be applied.

Both Florida and Texas follow this "most significant relationship" test. In prior Florida and Texas cases, the locations of the injury and actions causing the injury have been considered alongside nationality of the parties or "the place where the relationship between the parties is centered." In *Hoffman v. Ouellette*, 798 So. 2d 42 (Fla. Dist. Ct. App. 2001), for example, a Quebec citizen residing in Florida sustained severe injuries when a motorist (also a Quebec citizen residing in Florida) drove into her picnic table. The plaintiff brought a personal injury action against the defendant, with the court finding that the Florida's conflict of interest analysis required applying Florida tort law, as both the injury and actions causing the injury took place in Florida. Conversely, in *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252 (Tex. App. 1999), the court applied Texas tort law in an automobile accident, even though the accident occurred in Mexico. The parties were mixed Mexican and American nationals, but the vehicle was made in the United States and had been used primarily in Texas – which was enough for the court to find Texas had the most significant relationship to the parties and occurrence.

If the case were brought in a California federal court, however, the conflict of law analysis would be slightly different, as California applies a three-part "state interest analysis /comparative impairment" test. *Van Winkle v. Allstate Ins. Co.*, 290 F. Supp. 2d 1158, 1164 (C.D. Cal. 2003). If a court determines that the laws of the states involved differ, it then assesses the interests of the two states "in having their respective laws applied" and determines which state's interest would be impaired to the greater degree if its law were not applied. *Kilroy Indus. v. United Pacific Ins. Co.*, 608 F. Supp. 847 (C.D. Cal. 1985). In *Bauer v. Club Med Sales, Inc.*, No. C-95-1637 MHP, 1996 WL 310076, at *1 (N.D. Cal. May 22, 1996), a California resident on vacation at Mexican resort fell off an unsecured staircase and died. When deciding whether to apply California or Mexican law, the court found that the two laws for defective premises differed and that both California and Mexico had public policy interests in the enforcement of their own laws. The court ultimately applied Mexico's laws because it had a "sovereignty interest in enforcing its own construction standards within its borders." *Bauer*, 1996 WL 310076, at *4.

Conflict of Law in Insurance Contracts

To properly identify what coverage an insurance policy provides and what remedies may be available under the contract, which state's law applies may be a crucial point. If the insurance contract has a choice of law provision, that provision is ordinarily enforced if the forum has a substantial relationship to the parties and to the transaction. *Access Telecom, Inc. v. MCI Telecomm. Corp.,* 197 F.3d 694, 705 (5th Cir. 1999).

However, if it is possible that the laws of more than one state may apply to a claim, it is important to determine first whether the laws of each state would have a different result. Generally, no choice of law analysis is necessary where there is no substantive conflict between the jurisdictions on the issues to be decided. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985). There are several different choice of law tests that have been adopted throughout the country, although the most prevalent is the "most-significant-contacts" approach, derived from the Restatement (Second) of Conflict of Laws (1971) (hereinafter "Restatement").

Texas, for example, is one such state. *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000). In applying this test, the Court held that it was wrong simply to decide which state has the most significant relationship to the case. Instead, "the Restatement requires the court to consider which state's law has the most significant relationship to the particular ***substantive issue*** to be resolved." *Hughes*, 18 S.W.3d at 205 (emphasis added).

Moreover, contacts with the forum state are evaluated by quality, not number. *Minn. Mining & Mfg. Co. v. Nishika, Ltd*., 955 S.W.2d 855, 856 (Tex. 1996); *Farmers Ins. Ex. v. Leonard*, 125 S.W.3d 55, 62 (Tex. App. 2003).

California assesses some of these factors, but "follows a methodology characterized as the 'governmental interest' approach to choice of law problems." *Kasel v. Remington Arms Co*., 24 Cal. App. 3d 711, 730 (1972). The forum must search to find the proper law to apply based upon the interests of the litigants and the involved states. Under this approach, the relevant contacts stressed by the Restatement are not disregarded, but examined in connection with the analysis of the interest of the states involved in the issues, the character of the contract, and the relevant purposes of the contract law under consideration. *Id*. at 731.

Florida, on the other hand, adheres to the rule of lex loci contractus: "That rule, as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage." *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163–64 (Fla. 2006). This appears to be a more straight-forward test that does not incorporate the Restatement factors or analysis.

The Law Applied

So what does this all mean for our injured student, his family, and potential third parties' legal cases? Under one scenario, the family of the American student sues another American entity: likely the university or the insurance company that provided the student with coverage. The student, who is from Texas, decides to sue in Texas federal court. The university and the insurance company are headquartered in New York. The court would apply Texas' conflict of law rules – the "most significant relationship" test – to determine whether its laws or the laws of another state/country should apply. Given the case law, a court could come out either way on this question: the injury and events causing the injury occurred in Spain, but the parties are residents of two different US states (TX and NY), and one could argue that their relationship is centered on either state. In practical terms, the conflict will likely to be between applying the two U.S. state laws.

The court will also have to decide what law governs enforcement of the insurance contract ensuring coverage and litigation defense for the insured. In this scenario, however, the question should be a relatively straightforward one, especially if both the contract contains a choice of law provision *and* the individual students signed specific choice of law waiver. If there is a choice of law provision in the insurance contract, then that state's law should apply. Courts generally respect the intent of parties to contract. However, if for some reason the court decides not to enforce the choice-of-law provision, under Texas law it would apply the same "most significant relationship" test as it did for the tort claim. Where the accident occurred would be irrelevant, so the court would likely compare New York and Texas policy interests, the parties' expectations, and "certainty, predictability, and uniformity" of applying either state's law to the contract. *See* Restatement (Second) Conflict of Law § 6.

Under a second scenario, the driver of the car sues the American insured company or university. Given limited resources or more favorable law, the injured party may sue in a Spanish court, where it would apply its own conflict of laws analysis. If the injured party decided to sue in a U.S. federal court – let's say he or she chooses Florida federal court for proximity and

convenience – then that court would apply Florida's conflict of law rules. For torts, those are the same as Texas' "most significant relationship" test. Under this scenario, however, the injured party may seek to have Spanish law applied, which would be more likely given that one of the parties is a Spanish national and all relevant events took place in Spain. The insurance conflict of law analysis should essentially follow the same procedure as in the first scenario, with the stated terms of the contract (including the choice of law provision) governing. Once again, if the court invalidates the provision, then it would apply Florida's contract conflict of law rules that favor applying the law of the state where the contract was made.

II. Waiver and/or Release of Liability Provisions

Many organizations taking students abroad for education, charity, or travel will ask the students or their parents to sign a liability waiver or release prior to leaving the country. If an incident occurs while the student is abroad, the organization can be a target for a claim or suit and will often look to the waiver or release language to defend the claim. As with the conflict of law issues discussed above, whether a court will enforce a waiver or release provision depends on a variety of factors, including: 1) the age of the student, 2) the language of the waiver/release, 3) venue/applicable statutory law, and (of course) 4) the facts of the particular incident and the level of the organization's involvement.

Waivers Signed by Parents or Guardians for Minor Child

Courts may consider if the waiver involved was signed by a parent or guardian on behalf of a minor child, and some states have parental immunity. In *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 163 (D. Conn. 2014), the student contracted tick-borne encephalitis (TBE) while on a hiking trip to China sponsored by her boarding school. The student and her parents filed a lawsuit alleging that the school's negligent planning of the trip and careless supervision during the trip caused the plaintiff to fall ill. After a trial, the jury found the school solely liable for the plaintiff's injuries. One of the school's defenses was based on a release of claims signed by the student and her mother. It was a broad release but included an exception to the general waiver of the school's liability and stated "except to the extent that the liability, damage, injury, loss, accident, or illness is caused by the sole negligence or willful misconduct of the School, its officers, trustees, faculty, employees, agents, or representatives." The school asserted it was an error for the court to exclude evidence of parental negligence, which, if found, would have negated the exception.

The court held that, under Connecticut law parents cannot waive the risks of participation in school activities on behalf of their minor children when a child's injury is the result of the defendant's negligence, or when the injury exceeds ten thousand dollars. Therefore, the court asserted, it defied logic for the parental immunity doctrine to bar claims between parties regarding tort liability but allow a party to assert parental negligence for the purposes of triggering a waiver provision to release tort liability. The jury found the plaintiff was "0%" responsible for her injuries. Further, because the school had no viable claim of parental comparative negligence and waived any comparative negligence claims against the plaintiff and her parents, it suffered no prejudice by exclusion of its waiver of liability.

Waiver/Release is Unenforceable if Exculpatory Clause amounts to Contract of Adhesion

General contract law and principles will likely apply to the analysis of waiver clauses if the plaintiff/student has no option other than to sign the document. In *Fay v. Thiel Coll.*, 55 Pa. D. & C.4th 353 (C.P. 2001) a student on a study abroad trip to Peru was subjected to the unnecessary surgical removal of her appendix. The appendectomy was apparently authorized by a Lutheran missionary who was not in any way related to or acting as an agent and/or representative of the sponsoring college. After her appendectomy was completed, plaintiff was sexually assaulted by the same surgeon and anesthesiologist who had performed the surgery. The student sued the college in Pennsylvania for damages related to the surgery and sexual assault.

The college moved for summary judgment arguing that (a) by signing a waiver of liability form, plaintiff waived any and all claims arising out of or in connection with plaintiff's participation in the study abroad trip; and, (b) that a consent form plaintiff was required to sign was a waiver of liability form. It was undisputed that the student was required to sign the waiver and consent form to go on the trip. The court, in denying the motion held that not going was plaintiff's only option other than accepting the contract with the exculpatory clause, and therefore, the waiver of liability was an invalid contract of adhesion. Further, the Court held the consent form was not a waiver of liability form.

A Conspicuous Disclaimer of Responsibility Form May be Enforceable

As discussed in the previous section, a wavier or release in a contract of adhesion may be unenforceable; however, a conspicuous disclaimer of liability may be enforceable. In *Ramage v. Forbes Int'l*, 987 F. Supp. 810 (C.D. Cal. 1997), Plaintiff sued a tour operator after he suffered severe head injuries when his head hit the roof of a motor coach while traveling in Scotland. The tour operator engaged an independent contractor to operate the motor coach. Before the trip, the Plaintiff signed a disclaimer form excluding liability due to independent contractors. The Court held that the validity and conspicuousness of the "Responsibility" disclaimer rendered void all implied warranties regarding the reliability and safety of motorcoaches, and any alleged contractual duty to assure safe travel by providing a motorcoach free of mechanical problems and equipped with seatbelts was waived by plaintiff's valid disclaimer.

Releases May Provide Sufficient Warnings and State Schools May Have Statutory Immunity for Some Actions

In Minnesota, as in many states with tort claims acts, if a claim against the University [of Minnesota] is for "a loss caused by the performance or failure to perform a discretionary duty, whether or not discretion is abused," the University has statutory immunity. In *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999), a student was raped by a taxi driver while participating in a University-sponsored cultural immersion program in Cuernavaca, Mexico. The student sued the University for "failure to warn about various serious risks including the use of taxicabs in Cuernavaca.", and the University moved to dismiss on grounds of the release and waiver signed, as well as statutory immunity. The court dismissed the suit because the undisputed evidence showed the program materials, the release form, the program orientation, and Cemanahuac's orientation all warned students about their safety, and

therefore, University decisions about the program's design were protected by statutory immunity.

Defendants Cannot Waive Liability for Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce

Courts may look to the specific activity of the sponsoring organization to determine if it is the type of act or omission anticipated by a waiver in an effort to narrow the scope of the waiver. In *Tongier v. EF Inst. for Cultural Exch., Inc.*, 29 Mass. L. Rep. 246 (2011), the plaintiffs were the representatives of the estates of three students and a teacher who drowned while swimming off the coast of Costa Rica during an educational tour. They alleged the defendants violated the unfair or deceptive acts statute by engaging in certain misrepresentations and deceptive business practices, including: falsely advertising the safety of the tours, the safety of the participants, and the qualifications of the defendants' representatives. The defendants, who marketed and sold the tour, argued that, before participating in the tour, the decedents executed releases discharging the defendants from liability. Plaintiffs argued the release applied to anticipatory claims unknown at the time the agreement was executed, and they did not know the defendants would later engage in fraud and misrepresentations. The Court determined that public policy disfavored allowing businesses to use waivers to avoid liability for unfair or deceptive acts and allowed the claim to go forward.

Applicable Coverages for Students and University Employees

Another thing to keep in mind is the varying coverage issues that crop up when handling claims for oversees study trips. While employees may qualify as "Insureds" under a policy, the students or volunteers studying or volunteering on behalf of the university may not. Other issues involve coverage territories and medical payments. While an insurance policy may not honor a claim brought by a student for negligence, it may honor claims for medical bills. The policy may also be restricted depending on the type of trip or the country where the trip took place.

In sum, the case law and venue-specific law can vary, but some general themes apply and should be considered by anyone handling a claim or advising a client about the potential security provided by a waiver. How does the statutory and common law in the applicable venue treat waivers? Are there special provisions for minors? Immunity for the organization? Are there public policy considerations? Was the waiver a contract of adhesion? While many courts will generally disfavor enforceability of a waiver, if the document containing the waiver was truly optional for the student and, if the language was conspicuous, the waiver may be enforceable.