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Victor M. Javitch

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**CONFLICT OF LAWS — TESTS DETERMINING WHAT LAW
GOVERNS A CONTRACT**

Employers Liability Assurance Corporation v. Aresty,
11 App. Div. 2d 331, 205 N.Y.S. 2d 711 (1960)

Plaintiff, a New York insurance company, issued an automobile insurance policy to defendant, a resident of New York. When defendant moved to Connecticut, plaintiff issued an endorsement to the policy changing the insured's residence, and at the same time returning part of the premium, due to the lower Connecticut rates. While operating the vehicle in Connecticut, defendant was involved in an accident. Defendant's wife, a passenger in his car, instituted suit against defendant and the driver of the other vehicle, whereupon defendant forwarded the process to plaintiff to defend the action on his behalf. Since under New York law the policy did not afford coverage for the claim asserted by the wife,¹ plaintiff in *Employers Liability Assurance Corporation v. Aresty*² sought a declaratory judgment asserting that New York law rather than Connecticut law governed the insurance contract.

A majority of the court, applying the traditional conflict of laws rule that the interpretation and validity of a contract are determined by the law of the place where the contract is made unless the parties entertain a different intention, found for the plaintiff.³ The majority held that New York law applied in interpreting this contract since the endorsement changing the insured's residence did not indicate a different intention.⁴

In a dissenting opinion, the method by which New York law was applied was severely criticized. Arguing that Connecticut's interest in the outcome of the wife's suit was more directly affected than New York's, the dissenting opinion, favoring the defendant, applied Connecti-

1. "No policy or contract shall be deemed to insure against any liability of an insured because of death or of injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." N.Y. INSURANCE LAW § 167-3.

2. 11 App. Div. 2d 331, 205 N.Y.S.2d 711 (1960).

3. *Ibid.*

4. An endorsement attached to an insurance policy must be read together with the policy, and in such case the endorsement does not abrogate any provision of the policy unless so stated in the endorsement. *Thompson-Starrett Co. v. American Mut. Liab. Co.*, 276 N.Y. 266, 11 N.E.2d 905 (1937). N.Y. INSURANCE LAW § 167-3 has been held to be incorporated into every policy of auto liability insurance issued in New York, and this section is applicable regardless of where the accident occurred, unless the parties specifically reject it. *New Amsterdam Cas. Co. v. Stecker*, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956). However, this case involved a New York resident and was held not applicable to the facts in the reported case. *Employers Liab. Assur. Corp. v. Aresty*, 11 App. Div. 2d 331, 334, 205 N.Y.S.2d 711, 715 (1960). Further, in *Williamson v. Massachusetts Bonding & Ins. Co.*, 142 Conn. 573, 116 A.2d 169 (1955), the Connecticut court in construing this section applied it only to accidents occurring in New York.

cut law in interpreting the contract.⁵ Citing precedent in recent New York cases for using this "center of gravity" or "grouping of contacts" test,⁶ the dissenting judges felt that the application of the law of the place having the most significant contacts with the matter in dispute would bring about the most equitable result.

Historically, three rules have combined to determine the law governing the existence of a contract. As to all matters relating to the validity, execution, and interpretation of a contract, the law applied is the law of the place where the last act necessary to complete the contract was performed.⁷ When the matter in dispute concerns anything relating to the performance of the contract, then the law of the place where the performance is to take place is controlling.⁸ An exception to this latter rule usually results when performance may occur in several states. Here, the law of the place where the contract is made is generally reapplied.⁹ Finally, when the intent of the parties can be determined as to which law should govern, and it is reasonable in relation to the terms of the contract to enforce their intentions, then the intent of the parties may be given priority over the other rules.¹⁰ All of the above rules are subject to the contingency of a court in the state where suit is brought determining whether a pertinent statute is substantive or procedural in nature. If a statute of a state other than where suit is brought is procedural, then the court need not concern itself with the conflict of laws problem, and may apply its own law. If it is substantive, then the general rules apply in determining which state's law is applicable.¹¹

The "center of gravity" test attacks all of the traditional rules as be-

5. *Employers Liab. Assur. Corp. v. Aresty*, 11 App. Div. 2d 331, 336, 205 N.Y.S.2d 711, 718 (1960) (dissenting opinion).

6. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Rubin v. Irving Trust*, 305 N.Y. 288, 113 N.E.2d 424 (1953).

7. *New Amsterdam Cas. Co. v. Stecker*, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956); *Swift & Co. v. Banker's Trust*, 280 N.Y. 135, 19 N.E.2d 992 (1939); *Union Nat'l Bank of Chicago v. Chapman*, 169 N.Y. 538, 62 N.E. 672 (1902); RESTATEMENT, CONFLICT OF LAWS § 332 (1934); GOODRICH, CONFLICT OF LAWS § 107 (3d ed. 1949).

8. *Swift & Co. v. Banker's Trust*, 280 N.Y. 135, 19 N.E.2d 992 (1939); *Union Nat'l Bank of Chicago v. Chapman*, 169 N.Y. 538, 62 N.E. 672 (1902); RESTATEMENT, CONFLICT OF LAWS § 358 (1934).

9. *General Acc. Fire & Life Assur. Corp. v. Ganser*, 2 Misc. 2d 18, 150 N.Y.S.2d 705 (Sup. Ct. 1956). Another view is that the law of the place in which the specific act complained of as a breach was performed governs, when the contract is to be performed at more than one place. Annot., 50 A.L.R. 2d 254 (1956).

10. Nussbaum, *Conflict Theories of Contracts: Cases versus the Restatement*, 51 YALE L. J. 893 (1942); Cook, *'Contracts' and the Conflict of Laws: 'Intention' of the Parties*, 32 ILL. L. REV. 899 (1938).

11. This rule is particularly unsatisfactory because different courts have labeled the same statute both substantive and procedural. N.Y. INSURANCE LAW § 167-3 was held to be substantive in *New Amsterdam v. Stecker*, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956), and procedural in *Williamson v. Massachusetts Bonding & Ins. Co.*, 142 Conn. 573, 116 A.2d 169 (1955). See also Annot., 16 A.L.R.2d 881 (1951).

ing unrealistic. Of comparatively recent origin,¹² it has been given varying degrees of recognition in several jurisdictions.¹³ This doctrine leaves the judicial determination of the applicable law to the forum which has the greatest interest in the outcome of the litigation, but seemingly offers no test to determine what factors will be controlling. Further, whether this doctrine was intended to be applied uniformly in all conflict of laws situations has apparently never been considered.¹⁴

The primary reason given in support of the traditional views is that they are certain and easily applicable. In reality, however, they may be the subject of considerable confusion. To apply the law of the place where the contract is made, it is necessary to determine the last act creating a binding contract. This may often be difficult to assess. Further, when parties live, negotiate, and perform contracts in state X, it is unreasonable to apply the law of State Y merely because the letter of acceptance, which is the last act creating the contract, was mailed from state Y.¹⁵

As previously discussed,¹⁶ it is difficult to determine what law governs performance when the contract may be performed in more than one place. However, even where performance is to be given in only one place, it may be difficult to determine just where that place is.¹⁷ Furthermore, when the contract is silent as to where performance will occur, this test must be abandoned altogether.¹⁸

The "intent of the parties" doctrine has undergone the strongest criticism.¹⁹ It is limited to the law in force in one of the states with which the transaction has a substantial connection. Nonetheless, within limits it gives the parties the power to legislate, which often results in a positive attempt to evade a particular law.²⁰ Further, in many instances

12. First applied in *Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945).

13. See *Sun Ins. Co. v. Clay*, 265 F.2d 522 (5th Cir. 1959); *Alaska Airlines v. Stephenson*, 217 F.2d 295 (9th Cir. 1954); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Rubin v. Irving Trust*, 305 N.Y. 288, 113 N.E.2d 424 (1953); *Jansson v. Swedish Am. Line*, 185 F.2d 212 (1st Cir. 1950).

14. Ohio, like the majority of states, has never adopted the "center of gravity test," but has given judicial recognition to all of the traditional views. See *e.g.* *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941) (for the place of contracting rule), *Pittsburgh, C.C. & St. Louis Ry Co. v. Sheppard*, 56 Ohio St. 68, 46 N.E. 61 (1897) (for the place of performance rule), and *Harrison v. Baldwin*, 3 Ohio C.C. Dec. 154 (1891), *aff'd*, 53 Ohio St. 648, 44 N.E. 1138 (1895) (for the intent of the parties rule).

15. *Cook, 'Contracts' and the Conflict of Laws*, 31 ILL. L. REV. 143 (1936); *Lorenzen and Heilman, Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 573 (1935).

16. See cases cited note 8 *supra*.

17. *Auten v. Auten*, 308 N.Y. 155, 163, 124 N.E.2d 99, 103 (1954); *GOODRICH, CONFLICT OF LAWS* § 110 (3d ed. 1949).

18. *Rittersbusch v. Sexmith*, 256 Wis. 507, 41 N.W.2d 611 (1950); *Thompson v. Lake-wood City Dev. Co.*, 105 Misc. 680, 174 N.Y.S. 825 (Sup. Ct. 1919).

19. See *Cook, 'Contracts' and Conflict of Laws: 'Intention' of the Parties*, 32 ILL. L. REV. 899 (1938).

20. *Ibid.*

where "intent of the parties" has been used, it is fair to say that the parties never had the conflict of laws question in mind at all. A recent criticism of this theory is that actually the "intent of the parties" conceals a choice made by a court in determining the law of that state having the most intimate connection with the problem — the identical formula used in applying the "center of gravity" test.²¹

The "center of gravity" test, though eliminating in certain areas some of the problems caused by the traditional views, brings with it other problems equally disadvantageous. As stated in *Auten v. Auten*,²² the use of this approach gives control to the place having the most interest, enables courts to give effect to the probable intention of the parties, and provides courts with an opportunity to give consideration to the state offering the better result. On the other hand, when contacts are evenly balanced, parties have no way of foretelling prior to a judicial determination which law will be applied. This deprives litigants of any certainty as to the outcome of a case. To have a trial court write the contract for the parties is not only arbitrary, but is also likely to reverse one of the supposed benefits of this theory — to manifest the probable intention of the parties. The possibility of seeking the forum with the better law, and then rationalizing the facts in order to apply the law of that state, is a danger that courts may all too willingly assume.²³

The majority and dissenting opinions in *Employers Liability Assurance Corporation v. Aresty*²⁴ evidence the state of the present law in New York. Several inconsistent rules coexist, none of which overrules or supersedes the others. In *Jones v. Metropolitan Life Insurance Company*,²⁵ the willingness of New York courts to retain all of the rules was indicated. Here, in the same opinion, the court used the place of contracting, the place of performance, and the "center of gravity" tests in arriving at its decision. However, as evidenced by the *Employers Liability* case, the result will not always be uniform when more than one conflict of laws rule is used simultaneously with another, for the place-of-contracting rule resulted in New York law being applied, while the "center of gravity" test resulted in Connecticut law being applied. Therefore, either the traditional rules must be entirely eliminated and the "center of gravity" test uniformly adopted or, if all are to be retained,

21. *London Assur. Co. v. Companhia De Moagens DoBarreiro*, 167 U.S. 149 (1897); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947).

22. 308 N.Y. 155, 124 N.E.2d 99 (1954).

23. *Rubin v. Irving Trust*, 305 N.Y. 288, 113 N.E.2d 424 (1953); Note, 3 UTAH L. REV. 490 (1953).

24. 11 App. Div. 2d 331, 205 N.Y.S.2d 711 (1960).

25. 158 Misc. 466, 286 N.Y.S. 4 (Sup. Ct. 1936).