Choice of Law in Punitive Damage Cases

by John D. Rowell

Over the last decade, U.S. auto manufacturers have adopted a new tack in their efforts to defeat claims for punitive damages. Ford and General Motors argue that the law of their corporate headquarters and their principal place of business, Michigan, should apply to punitive damage claims. Michigan does not allow a civil jury to impose punitive damages. As we all know, California does permit imposition of such damages when a civil plaintiff can show by clear and convincing evidence that the defendant has acted with malice as defined by Civil Code section 3294.

When there is conflict between the laws of two or more states, the courts look to choice of law rules to decide which state's law will be applied. As will be explained in this article, the argument that Michigan law should apply, which has been raised in a number of cases in California, should fail. However, there is support for the argument in some federal decisions and our Courts of Appeal have yet to address the issue. It is a sure bet that the manufacturers will repeatedly raise the argument, at least until a published decision results.

The Applicable Choice of Law Rules

The forum state will apply its choice of law rules. This is true in both federal and state courts. (*Klaxon Co. v, Stentor Electric Mfg. Co*., 313 U.S. 487, 496-97 (1941).) California applies a governmental interest approach and California's choice of law rules are well settled. Many examples of application of California's choice of law rules exist in the area of liability and compensatory damages. However, applying choice of law rules in the context of claims for punitive damages presents unique considerations.

"When the primary purpose of a rule of law is to deter or punish conduct, the States with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of the defendant are located."

Keene Corp. v. Insurance Co. Of North America, 597 F.Supp. 934, 938 (D.D.C. 1984), *citing Restatement (Second) Conflict of Laws* §145, comments c-e, in applying California-type "governmental-interest analysis." See also, *Kelly v. Ford Motor Co.*, 933 F.Supp. 465, 469 (E.D.Pa. 1996).

The rules governing choice of law problems have been settled in California for decades. California follows a three-step "governmental interest analysis" to address conflict of laws claim and determine which law will be applied. *Clothesrigger, Inc. v. GTE Corp.,* 191 Cal.App.3d 605, 612-616, 619, 236 Cal.Rptr. 605 (1987); *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc*., 14 Cal.App.4th 637, 645-646, 17 Cal.Rptr.2d 713 (1993). Generally speaking, California courts will apply California law

unless a party timely requests that the law of a foreign state be applied. Additionally, the party asking that the court apply foreign law must demonstrate that the foreign law will further the interest of the foreign state. *Bernhard v. Harrah's Club,* 16 Cal.3d 313, 317-318, 128 Cal.Rptr. 215, 546 P.2d 719 (1976).

Under the first step of the governmental interest approach, the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California. The fact that two or more states are involved does not in itself indicate there is a conflict of laws problem. *Hurtado v. Superior Court,* 11 Cal.3d 574, 580, 114 Cal.Rptr.106, 522 P.2d 666 (1974). If the relevant laws of each state are identical, there is no conflict. *(Id;* see also *Bernhard, supra,* 16 Cal.3d at 317.)

If, however, the trial court finds the laws are materially different, the trial court then proceeds to the second step and determines what interest, if any, each state has in having its own law applied to the case. *Hurtado, supra,* 11 Cal.3d at 580. Even if the jurisdictions have materially different laws, "there is still no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied." *(Id.;* see also *Bernhard, supra,* 16 Cal.3d at 317.) California law will apply if the foreign law proponent fails to identify any actual conflict or to show the other state's interest in having its own law applied. *Bernhard, supra,* 16 Cal.3d at 317-318; *In re Title U.S.A. Ins. Corp.* 36 Cal.App.4th 363, 372, 42 Cal.Rptr. 498 (1995).

Only where the laws are materially different and each state has an interest in having its own law applied, a situation referred to as a "true" or "actual" conflict, will the trial court take the final step and select the law of the state whose interests would be "more impaired" if its law were not applied. *(Bernhard, supra,* 16 Cal.3d at 320; see also *Offshore Rental Co. v. Continental Oil Co., 22* Cal.3d 157, 164-165, 148 Cal.Rptr. 867, 583 P.2d 721 (1978). This is the third step in California's "government interest analysis." In analyzing the comparative impairment involved, the trial court must determine "the relative commitment of the respective states to the laws involved" and consider "the history and current status of the states' laws" and 'the function and purpose of those laws." *(Offshore Rental Co., supra,* 22 Cal.3d at 166.)

Our Supreme Court recently enunciated and followed this approach in *Washington Mutual Bank v. Superior Court (Briseno)* 24 Cal.4th 906, 919-920,103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001).

The Constitutional Analysis

Before proceeding to a choice of law analysis, *Washington Mutual* teaches that it is necessary to determine whether or not there is sufficient constitutional basis for application of California law.

> "In *Phillips Petroleum Co.* v. *Shutts* (1985) 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628, the United States Supreme Court held that a forum state may apply its own substantive law to the claims of a nationwide class without violating the federal due process clause or full faith and credit clause if the

> state has a 'significant contact or significant aggregation of contacts' to the claims of each class member such that application of the forum law is 'not arbitrary or unfair.' fn. 7 *(Id* at pp. 821-822, 105 S.Ct.2965; *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 Cal.App.4th 637, 649-650, 17 Cal.Rptr.2d 713.)"

Washington Mutual, supra, 24 Cal.4th at 919, 103 Cal.Rptr.2d at 330.

The constitutional requirements *of Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 817-818(1985), are generally satisfied in products liability cases. Virtually every case will have one element which should be sufficient. Cases involving injury or death allegedly as a result of defects in products sold in California, or for use in California, or sold or leased through a manufacturer's network of franchisees or dealerships in California, should satisfy the requirement as should cases involving advertising for the product directed to California, or where the accident or injury foreseeably occurred in California.

Identification of Another State's Law
In Conflict With That of California

The second step, identification of an actual or true conflict, is relatively straight forward. The State of Michigan, by common law rule, does not allow imposition of punitive damages on any civil defendant. *Hicks v. Ottewell,* 174 Mich.App. 750, 756,436 N.W.2d 453,456 (1989); *Kewin v. Massachusetts Mut. Life Ins. Co.,* 409 Mich.401, 295 N.W.2d 50 (1980). Michigan's common law prohibition is in conflict with California's punitive damage statute, Civil Code section 3294.

Obviously, the reprehensible conduct to be punished and/or deterred by California's punitive damage statute is not endorsed by Michigan. Michigan would only limit the nature of damages that could be imposed as a result of engaging in such conduct. However, limitations on the type of damages recoverable are sufficient to bring choice of law rules into play.

The Government Interests Advanced by California's Civil Code Section 3294 Are Two Fold: Punishment and Deterrence

California's punitive damage statute was initially derived from English common law, which allowed imposition of punitive damages. Punitive damages were originally codified in the Field Code. Punitive damages have always been available under California law.

The teaching of numerous California decisions establishes that government interests underlying section 3294 are twofold ~ to punish wrongdoers and to deter future wrongful conduct by the wrongdoer or others whose actions cause injury and/or death to California citizens. *PPG Industries, Inc. v. Transamerica Ins. Co.,* 20 Cal.4th 310, 317, 84 Cal.Rptr.2d 455, 975 P.2d 652 (1999). This second consideration was largely ignored by the federal decisions the manufacturers rely

upon.

In fact our Supreme Court has repeatedly advised that deterrence is the ultimate goal of section 3294.

For example, in *Adams v. Murakami,* 54 Cal.3d 105, 284 Cal.Rptr.318, 813 P.2d 1348 (1991), the Court answered two questions in the affirmative. First, is evidence of a defendant's financial worth necessary before a jury may impose punitive damages? Second, if so, does the plaintiff have the burden of proof on the issue? *Adams* involved a claim brought by the conservator of a 39-year-old female patient who was a diagnosed chronic schizophrenic of low intelligence. While hospitalized she became pregnant when raped by another patient. The patient's child was both mentally retarded and autistic. The conservator alleged, and proved, that the pregnancy occurred as a result of the conscious disregard of Dr. Murakami.

In reaching the conclusion that evidence of financial worth was essential to a valid punitive damages award, the Supreme Court emphasized the importance of effecting deterrence under section 3294. "... [T]he quintessence of punitive damages is to deter future misconduct by the defendant..." *Id.,* 54 Cal.3d at 110,284 Cal.Rptr. at 320. The goal of deterrence is not limited to the defendant, but extends to others who may repeat the wrongful conduct in the future. *Petersen v. Superior Court (Thompson),* 31 Cal.3d 147, 156, 181 Cal.Rptr. 784, 642 P.2d 1305(1982).

Petersen squarely stands for the proposition that one significant goal of California's punitive damages statute is to deter the conduct of persons other than the defendant. To advance this goal, in *Petersen,* the Supreme Court determined to apply its decision in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 157 Cal.Rptr.693, 598 P.2d 854 retroactively as a means of effecting deterrence. *Taylor* held that the malice requirement of Civil Code section 3294 may be satisfied by showing that the defendant was intoxicated along with circumstances indicating a conscious disregard for the consequences.

Obviously the decision to apply *Taylor* retroactively could have no deterrent effect on the particular defendants in each case to which the holding in *Petersen* would apply. By definition those person's wrongful conduct occurred before *Taylor* was published. Thus, those defendants could not have known that they would be subject to imposition of punitive damages. *Taylor* was made retroactive in *Petersen* because the Supreme Court felt that doing so might serve the goal of deterring others by the example made of those defendants.

That California has an interest in deterring conduct, malicious or otherwise, which causes injury to its citizenry, even by out of state corporations, can hardly be doubted. For example, forty years ago, in an action brought to enjoin certain unfair, deceptive and fraudulent business practices under then Civil Code section 3369 (the predecessor to California's unfair competition law), an injunction was issued

precluding a defendant from, among other things, mailing deceptive forms to California residents from Washington, D.C. Against the claim that the injunction was overbroad because it purported to regulate extraterritorial conduct, the Court of Appeal held:

> "In the matter before us, the defendants were ordered to desist from certain conduct unless performed in a specific way. The circumstance that the decree was given an extraterritorial effect does not impair its validity. In granting injunctive relief the court acted *in personam* against the defendants, and it is immaterial that the control it asserts over their actions extends beyond the boundaries of California. *(Title Ins. & Trust Co. v. California Dev.* Co., 171 Cal. 173,152 P. 542; *Taylor v. Taylor,* 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; *Promts v. Duke,* 208 Cal. 420, 281 P. 613; *Tomaier v. Tomaier,* 23 Cal.2d 754,146 P.2d 905; *Tischhauser v. Tischhauser,* 142 Cal.App.2d 252, 298 P.2d 551; *Mills v. Mills,* 147 Cal.App.2d 107, 305 P.2d *6l;Rozan v. Rozan,* 49 Cal.2d 322, 317 P.2d 11.) "Mr. Witkin states the rule succinctly: 'A court with personal jurisdiction of the defendant may enjoin him from doing an act elsewhere, even from instituting a law suit.' (1 Witkin, *Cal. Procedure, Jurisdiction,* sec. 57, p. 327.) Although the defendants in the instant case were enjoined from engaging in the specific acts in California, or elsewhere, nevertheless the effect of the decree was limited to materials to be sent to or received in California and used in this state. In view of the fact that the decree operates solely upon the persons of the defendants, concerns acts which culminate in California, and affects only the residents thereof, we perceive no unwarranted interference with federal function or prerogative.'"

People ex rel. Mask v. National Research Co. of Cal., 201 Cal.App.2d 765, 777, 20 Cal.Rptr.516, 523-24 (1962); *emphasis in original.*

California courts and Legislature remain constitutionally capable and willing to act to deter extraterritorial conduct which has deleterious effects on its citizenry or those non-citizens or businesses within its boundaries.

In *Bernhard v. Harrah 's Club, supra,* the defendant had allegedly advertised in California to invite California residents to its Nevada casino. There Harrah's served liquor to two California residents (the Meyers) who had responded to the advertisements. They became intoxicated and drove back across the border to return home. Their vehicle drifted across the centerline and collided head-on with the plaintiff, who was driving a motorcycle. At the time, California recognized a tavern owner's liability to third persons for injuries caused by the negligent sale of liquor. *Vesely* v. *Sager, 5* Cal.3d 153, 95 Cal.Rptr. 623,486 P.2d 151 (1971). Nevada refused to impose such liability.

The defendant argued that Nevada had an interest in protecting its resident tavern owners from liability. The plaintiff argued that California had an interest in protecting its residents and that California "has a special interest in affording this protection to all California residents injured in California." The analysis of the *Bernhard* Court seems particularly apt:

> "Defendant by the course of its chosen commercial practice has put itself at

> the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state. It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state. California's interest would be very significantly impaired if its policy were not applied to defendant."

Bernhard, supra, 16 Cal.3d at 322-323, 128 Cal.Rptr. at 221.

Both Ford and GM advertise in California. Each has created a network of dealerships to sell its cars in California. As a result of this effort, vehicles are sold and/or leased in California to California residents. The vehicles are specially equipped to comply with California Air Resources Board requirements and shipped to dealers in this State. Just as the *Bernhard* Court found it reasonably certain intoxicated residents would return and cause injury, the manufacturers know that the sale and/or operation of defective vehicles in California will cause injury to California residents and others. In such circumstances, California's interest in deterrence will be significantly impaired if its punitive damage statute is not applied.

Michigan's Governmental Interest in Prohibiting Punitive Damages Is Largely Speculative

Assuming the difference in the type of recovery allowed by California and Michigan is found material, it is then the manufacturer's burden to show that the interests of the State of Michigan which underlie its law would be advanced by applying its punitive damage limitation to these actions.

"[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event [that party] must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it." *Bernhard v. Hurrah's Club, supra,* 16 Cal.3d at 317-318, 128 Cal.Rptr. at 217, quoting *Hurtado v. Superior Court, supra,* 11 Cal.3d at 581, 114 Cal.Rptr. at 110, 527 P.2d at 670.

The manufacturers will point out that two published federal trial court decisions in Michigan and Pennsylvania appear to identify the interests of Michigan which underlie prohibition of punitive damages: *Kemp v. Pfizer,* 947 F.Supp. 1139,1143 (E.D. Mich. 1966); and *Kelly v. Ford Motor Co., supra,* 933 F.Supp. 465.

Kemp was a products liability action brought in Michigan in connection with the death of a Michigan resident allegedly caused by a defective Shiley heart valve that was designed and manufactured in California. *Kemp* was one of the cases that was

denied a California forum as a result of the holding of the California Supreme Court in *Stangvik v. Shiley, Inc.,* 54 Cal.3d 744, 1 Cal.Rptr. 2d 556, 819 P.2d 14 (1991). *Kemp* was brought by the surviving spouse as personal representative of the decedent's estate. The district court found that California had an interest in applying its law and that Michigan had an interest in applying its law to corporations doing business in Michigan. According to the *Kemp* court, where there is a true conflict, and where Michigan has an interest in applying its own laws, Michigan choice of law rules provide that a Michigan forum court will always apply Michigan law. While obviously distinguishable, *Kemp* does identify what it states are Michigan's "strong" interests in prohibiting imposition of punitive damages on corporations doing business in Michigan.

Kelly involved a Ford Bronco II roll-over which resulted in the death of the driver. The accident happened in Pennsylvania and Ford sought summary judgment on the punitive damages claim on the theory that Michigan law, not that of Pennsylvania, would apply. Pennsylvania allows recovery of punitive damages in wrongful death actions, and, as pointed out above, Michigan law does not allow imposition of punitive damages under any circumstances. Pennsylvania choice of law rules follow the *Restatement (Second) of Conflicts of Law* §145. Although the conflict was not between the law of California and that of Michigan (neither would allow recovery of punitive damages in a wrongful death case), the court's analysis of the interest of the state of Michigan in prohibiting punitive damages, and the perceived lack of legitimate interest of the forum state in applying its law allowing punitive damages is consistently relied upon by the defense:

> "... when punitive damages are the subject of a conflict of laws, the domicile or residence of the plaintiff and the place where the injury occurred are not relevant contacts."

Kelly, supra, 933 F.Supp. at 469 (emphasis added), citing *In re Disaster at Detroit Metropolitan Airport on August 16, 1987,* 750 F.Supp.793, 805 (E.D.Mich. 1989), and *Walsh v. Ford Motor Co* 106 F.R.D. 378, 408 (D.D.C. 1985), vacated on other grounds, 807 F.2d 1000 (D.C.Cir. 1986); *In re Air Crash Disaster near Chicago, Illinois,* 644 F.2d 594, 613 (7th Cir.1981); *Dobelle v. National R.R. Passenger Corp,* 628 F.Supp 1518, 1528-29 (S.D.N.Y. 1986); *In re "Agent Orange Prod. Liab. Lit.,* 580 F.Supp. 690, 705 (E.D.N.Y. 1984).

Each of these decisions start with the proposition that Michigan has an interest in applying its punitive damage prohibition in order to protect corporations doing business in Michigan. Specifically, Michigan's governmental interest is identified as an intent to encourage large corporations to locate their headquarters in Michigan. Protection from punitive damages verdicts in other states would advance this interest.

However, as the *Kelly* court concedes, there are no cases from any Michigan state court which either enunciate or identify any state interest in applying Michigan's punitive damage limitation to any action.

In *In re Air Crash Disaster at Sioux City, Iowa,* 734 F.Supp. 1425, 1433 (N.D. 111., 1990), a federal MDL, in which the air crash and deaths occurred in Iowa and

some of the decedents were California residents, the Illinois trial court applied California choice of law rules and concluded that Illinois law on punitive damages should apply. It is not by accident that many choice of law decisions occur in the context of federal Multi-District Litigation. MDL judges are charged with the difficult task of finding ways of broadly resolving issues to avoid the time and expense of case by case resolutions.

Recently, the Ford/Firestone MDL judge certified a class action, concluding that one issue which would be common to all cases would be the application of Michigan law as to Ford, and Tennessee law as to Bridgestone/Firestone. See *In re Bridgestone/Firestone Prod. Liab. Lit.,* 155 F.Supp.2d 1069 (S.D.Ind. 2001) and the subsequent order granting class certification, *In re Bridgestone/Firestone Prod. Liab. Lit.,* 205 F.R.D. 533 (S.D. Ind. 2001). The odd twist to this is that the class action plaintiffs' counsel were arguing that Michigan law applied across the board. Ford and Firestone were arguing that the law of Michigan and Tennessee should not apply. The Seventh Circuit Court of Appeals agreed with the manufacturers and reversed. After taking apart the trial court's choice of law analysis, the Circuit Court unanimously concluded:

> "Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. Lest we soon see a Rule 23(f) petition to review the certification of 50 state classes, we add that this litigation is not manageable as a class action, even on a statewide basis."

In re Bridgestone/Firestone Prod. Liab. Lit., 288 F.3d 1012, 1018 (7th Cir. 2002).

Comparative Impairment Analysis

If, as the federal cases suggest, Michigan has a significant interest in protecting large multinational corporations from imposition of punitive damages, in order to lure them into locating their corporate headquarters in Michigan, that interest will not be substantially impaired by applying California law. Michigan will still enjoy an advantage over other states which allow punitive damages. No plaintiff will be able to assert such a claim against Ford or GM in Michigan. On the other hand, if a vehicle manufacturer locates to another State which allows recovery of punitive damages, it would expose itself to such claims, even in Michigan, as applying the limitation to it in such cases would advance no identifiable state interest.

On the other hand, California's oft-expressed and substantial interest in deterrence will be defeated by application of Michigan law. In its analysis, the *Kelly* Court suggests that states other than Michigan would have no interest in applying their punitive damage statutes to non-resident defendants because such damages are imposed as a regulatory matter, not for compensation. This is a very superficial analysis of the underpinnings of California's punitive damage statute.

Kelly fails to address, or even recognize, California's interest in deterrence, both of in state and out of state actors. *Kelly* fails to consider California's long standing interest in preventing injury to its citizenry. This interest is in addition to that of securing California citizens adequate compensation for injury. *Kelly* fails to take into

consideration the recognized deterrent effect on conduct of the defendant as well as others by imposition of punitive damages. California has long enforced its punitive damage statute against out of state corporations. The *Kelly* court's analysis also fails to address the fact that California has the constitutional ability to regulate those whose actions result in harm to California citizens, particularly when significant portions of that conduct occur in California or when the harm occurs in California.

In *Offshore Rental Co., supra, 22* Cal.3d at 166, 148 Cal.Rptr. at 872-73, 583 P.2d 721 (1978), the Supreme court identified criteria to be examined when resolving "true conflicts":

> "Another chief criterion in the comparative impairment analysis is the 'maximum attainment of underlying purpose by all governmental entities. This necessitates identifying the focal point of concern of the contending lawmaking groups and ascertaining the *comparative pertinence* of that concern to the immediate case.' (Baxter, *Choice of Law and the Federal System,* (1963) 16 Stan.L.Rev. 1, 12.) The policy underlying a statute may be less 'comparatively pertinent' if the original object of the statute is no longer of pressing importance: a statute which was once intended to remedy a matter of grave public concern may since have fallen in significance to the periphery of the state's laws. As Professor Currie observed in another context, 'If the truth were known, it would probably be that [those few states which have retained the archaic law of abatement have done so] simply because of the proverbial inertia of legal institutions, and that no real policy is involved.' (Fn. omitted.) (Currie, *Selected Essays on The Conflict of Laws* (1963) p. 143.)
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> "Moreover, the policy underlying a statute may also be less 'comparatively pertinent' if the same policy may easily be satisfied by some means other than enforcement of the statute itself. Insurance, for example, may satisfy the underlying purpose of a statute originally intended to provide compensation to tort victims. The fact that parties may reasonably be expected to plan their transactions with insurance in mind may therefore constitute a relevant element in the resolution of a true conflict."

In *Offshore,* an effort by the plaintiff to have California law allowing recovery by an employer for injuries to a "key" employee applied, our Supreme Court felt that two factors may have the effect of nullifying or substantially reducing a state's interest in applying its own law. First, in *Offshore,* the only cases in California allowing claims by an employer for negligent injury to a "key" employee were "mostly *dicta". Id.,* 22 Cal.3d at 162,148 Cal.Rptr. at 870. This, combined with the second factor, a lack of recent statement of any interest to be advanced by the application of California law, counseled against its application.

The lack of enunciation of any state interest by either the courts of Michigan or its Legislature should likewise counsel against application of its law.

While federal district courts have offered possible state interests behind Michigan's common law prohibition of punitive damages, the lack of any statement by a Michigan court or by the Michigan Legislature of any policy or state interest advanced by the rule

leads one to conclude that such pronouncements are little more than *ipse dixit.* Absent some first person pronouncement of reasons for the prohibition, California courts are likely to view the Michigan cases as examples of the same "proverbial inertia of legal institutions" Professor Currie attributed to the law of abatement.

Conclusion

Although the California Courts of Appeal have yet to address choice of law in the context of punitive damages claims, the choice of law cases decided in other contexts seem to point to rejection or me manufacturers' arguments. In the California Firestone Tire Coordination, the trial court followed the above analysis. Contrary decisions from federal district courts fail to consider the most important goal of California's punitive damage statute, deterrence. Deterrence not only of conduct by the wrongdoer, but by making an example of the wrongdoer, deterrence of wrongful conduct by others.

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