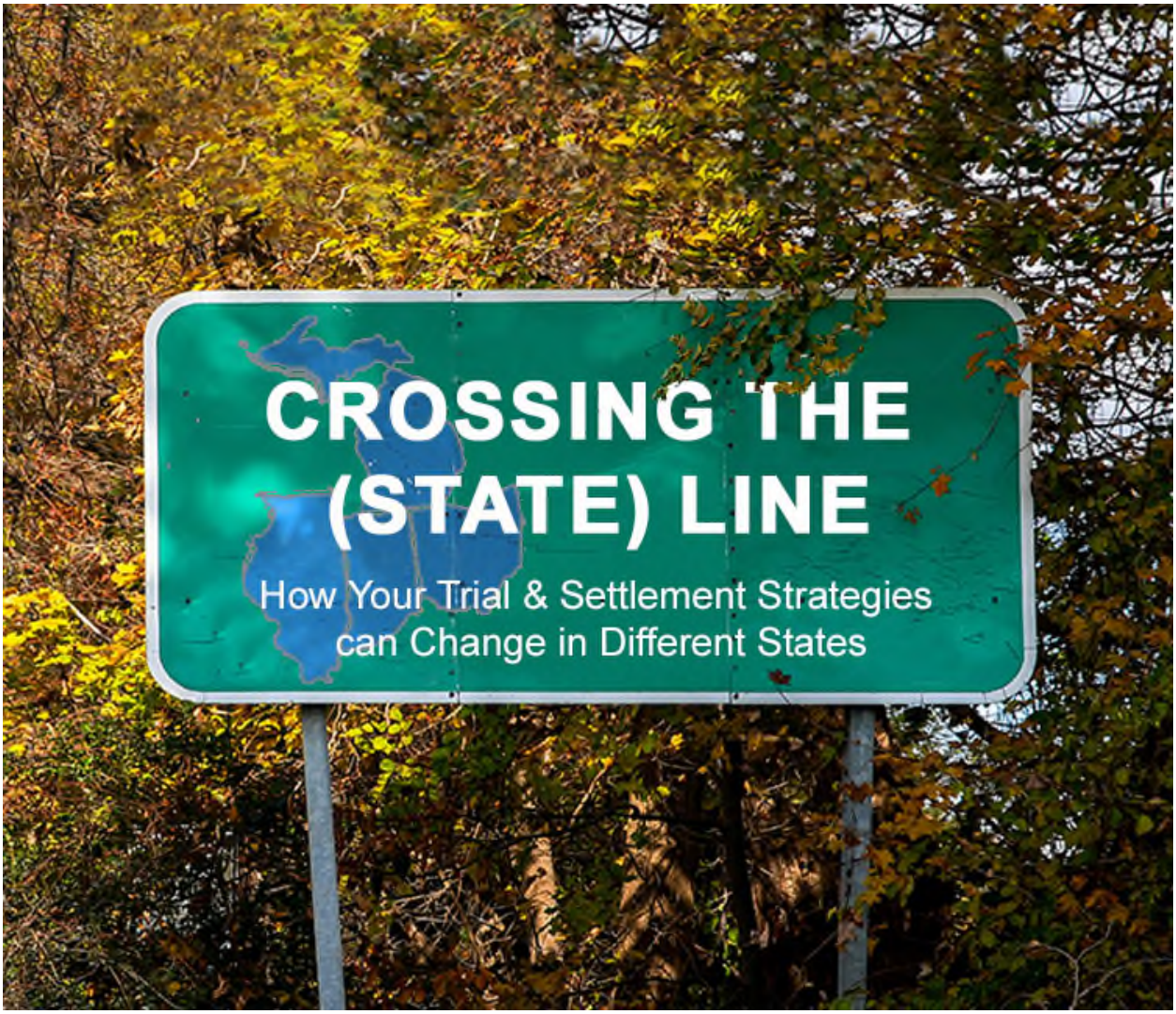

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October 16, 2024

Presented by

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Hypothetical Claim Facts

A. **The Parties:**

1. Plaintiff: Eileen Katract
2. Mall Owner: Hometown Mall LLC
3. Mall Maintenance Contractor: B-Reft
4. Mall Security Contractor: C-Nothing
5. Mall Tenant Restaurateur: Lobster Shack
6. Lobster Shack's Contractor: Tanks-A-Lot, Inc.

B. **The Occurrence:**

Plaintiff Eileen Katract tripped on a live lobster in the food court of the Hometown Mall just outside of the Lobster Shack restaurant where she was working as a server. Her right foot tripped and she fell to the floor on her right side, fracturing her right hip. Katract was wearing flip flops when the incident occurred. Her right eye was bandaged because she had cataract surgery the previous day. She claims she didn't see the lobster she tripped on because her attention was on a second live lobster on the floor to her left.

The afternoon of the occurrence Tanks-A-Lot was in the process of replacing Lobster Shack's leaking fresh lobster aquarium, which was mounted into a wall behind the reception area. After draining the existing aquarium, Tanks-A-Lot put Lobster Shack's eight live lobsters in a bucket with water and an aerator with the expectation it would take less than an hour to replace the leaking tank with a new one. After Katract's injury, only six live lobsters remained in the bucket.

C. **The Litigation:**

Katract sued the mall owner, maintenance contractor and contractor, Tanks-A-Lot, in the Circuit Court of Cook County seeking damages arising from injuries sustained as a result of a dangerous condition in the food court and a failure to warn the plaintiff of that condition. Additionally, the plaintiff sued security contractor C-Nothing for spoliation of evidence for failing to preserve the security footage she claims was material evidence supportive of her claims.

D. The Lease and Contracts:

1. Mall Maintenance Contract: As a condition of procuring the maintenance contract for Hometown Mall, maintenance contractor B-Reft agreed to the following indemnification and insurance language in its contract:

> "11. Indemnity. (a) To the fullest extent permitted by law, Contractor shall, at Contractor's sole cost and expense, defend, indemnify, and hold harmless Owner, Owner's managing agent, Mega Mall Group, Inc., Mega Mall Group, L.P., and their respective officers, directors, shareholders, members, partners, parents, subsidiaries, and any other affiliated or related entities, managers, agents, servants, employees, and independent contractors of these persons or entities ("Owner Parties") from and against any and all claims, liabilities, obligations, losses, penalties, actions, suits, damages, expenses, disbursements (including legal fees and expenses), or costs of any kind and nature whatsoever ("Claims") for property damage, bodily injury and death brought by third-parties in any way relating to or resulting, in whole or in part, from Contractor's (and its subcontractors' and employees') performance or alleged failure to perform the Services or any other breach of this Agreement."

2. Mall Security Contract:

Nothing's contract required it to continuously maintain video surveillance of the lavatories, entrances, parking lots and food court areas of the Hometown Mall during all hours of mall operations and for two hours before and after the mall was open. C-Nothing was required to preserve video footage upon receiving notice of any claim or incident until all such claims were finally resolved by settlement or final order. It is undisputed that Katract's counsel sent a preservation notice and demand for production of the security footage seven days after the incident and that Katract failed to preserve that security video.

3. Mall Lease to Lobster Shack:
Lobster Shack's lease with Hometown Mall requires the landlord to maintain all common areas, including the food court, in a reasonably safe condition, pursuant to Article 5.1 of the Lease, which provides:

> "**5.1. Common Areas.** All parking areas, access roads and facilities furnished made available or maintained by Landlord in or near the Mall, including employee parking area, truck ways, driveways, loading docks and areas, deliver areas, multi-story parking facilities (if any), package pickup stations, elevators, escalators, pedestrian sidewalks, **malls, including the enclosed mall and Food Court, if any,** courts and ramps,

> landscaped areas, retaining walls, stairways, bus stops, first-aid and comfort stations, lighting facilities, sanitary systems, utility lines, water filtration and treatment facilities **and other areas and improvements provided by Landlord for the general use in common of tenants and their customers** and Major Tenants in the Mall "all herein called "Common Areas") **shall at all times be subject to the exclusive control and management of Landlord**, and Landlord shall have the right, from time to time, to establish, modify and enforce reasonable rules and regulations set forth in Section 8.9 and all reasonable amendments thereto."

4. Lobster Shack's Contract with Tanks-A-Lot:

Tanks-A-Lot's construction contract with Lobster Shack provides that Lobster Shack shall defend, indemnify and hold contractor harmless from any and all claims, suits and demands for damages due to bodily injury, property damage or personal injury arising from or related to the work (expressly including replacement of the lobster tank).

5. Additional Insured Endorsements:

Hometown is an additional insured on maintenance contractor B-Reft's CGL policy pursuant to the following Blanket Endorsement:

> "Blanket Additional Insureds
>
> - "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you."

E. Tenders of Defense:

1. Hometown has demanded that maintenance contractor B-Reft defend and indemnify not only Hometown but also Hometown's security contractor C-Nothing for the claims asserted in Katract's lawsuit against them.
2. Lobster Shack has tendered its defense to Tanks-A-Lot pursuant to the indemnity provisions of its construction contract.
3. Lobster Shack has demanded that Hometown indemnify it for indemnity and medical expenses Katract has received and will in the future receive in worker's compensation benefits pursuant to Article 5.1 of its lease and Hometown, in turn,

has tendered Lobster Shack's subrogation claim to B-Reft pursuant to the mall maintenance contract.

F. Jurisdictional Issues:

1. Hometown Mall is a Single Purpose Entity organized in Delaware with its principal place of business in Hometown, Michigan. It is a wholly owned operating subsidiary of Mega Mall Corp., also domiciled in Delaware.
2. Plaintiff Katract is an Indiana resident. She works across the border in Hometown, Michigan where her injury occurred. She filed suit in Cook County, Illinois because most of her medical treatment was provided by doctors located within Cook County and her attorney is located in Cook County.
3. B-Reft is an Ohio corporation having its principal place of business in Ohio but operating on a national scope.
4. Lobster Shack is an Illinois corporation, having its principal place of business in Cook County, Illinois, with operations throughout the Midwest, including in Michigan.
5. C-Nothing is an Indiana corporation having its principal place of business in Indianapolis, Indiana that also operates throughout the Midwest.
6. Tanks-A-Lot Inc. is a Michigan corporation having its principal place of business in Michigan. It has never conducted business in Illinois. Its only arguable nexus to Illinois is having contracted with Illinois corporation Lobster Shack to perform construction work at its location in Hometown, Michigan.

Common Issues to be Adjudicated Across State Lines

A. Reduction/Bar of Recovery for Plaintiff's Comparative Fault

Illinois

1. Illinois has adopted modified comparative fault. Plaintiff's recovery will be reduced by the percentage of comparative negligence assessed by the trier of fact unless that percentage exceeds 51%, in which case the plaintiff is barred from any recovery. 735 ILCS 5/2-1116

2. Open & Obvious Doctrine: In Illinois a landowner or occupier owes a duty to warn, has a duty to warn invitees of known dangerous conditions unless they are "open and obvious," meaning those where the condition and risk are apparent and would be recognized by a reasonable person exercising ordinary perception, intelligence and judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16. There are two limited exceptions to the rule that a property owner has no legal duty to protect others from open and obvious conditions, the "distraction exception" and the "deliberate encounter exception." *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002). Under the distraction exception, a landowner owes an invitee a duty of due care, if he has a reason to expect that the invitee's attention may be distracted, so that he will not discover the obvious condition, will forget about the condition, or will fail to protect himself against it. An open and obvious condition is an affirmative defense under Illinois law, the proof of which will completely negate a cause of action sounding in premises liability.

Indiana

1. Indiana has adopted modified comparative fault. Plaintiff's recovery will be reduced by the percentage of comparative negligence assessed by the trier of fact unless that percentage exceeds 51%, in which case the plaintiff is barred from any recovery. IC § 34-51-2-6

2. Open & Obvious Doctrine: In Indiana, a landowner or occupier has a duty to warn invitees of known dangerous conditions unless they are "open and obvious." When a physical injury occurs because of a condition on the land, the three elements described in Restatement (Second) of Torts Section 343, accurately describe the landowner-invitee duty. *Rogers v. Martin*, 63 N.E.3d 316, 322-23 (Ind. 2016). Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, but only if, he:

i. knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

ii. should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

iii. fails to exercise reasonable care to protect them against the danger.

Both the Indiana Supreme Court and the Restatement instruct that Section 343 "should be read together with Section 343A." See *Roumbos*, 95 N.E.3d at 67; Restatement § 343, cmt. a. Under Section 343A, "A possessor of land is not liable to his invitees for physical harm caused to them by an activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement §343(A)(1)

Michigan

1. According to the comparative-fault scheme for tort actions pursuant to M.C.L. § 600.2957(1), "the liability of each person shall be allocated ... by the trier of fact and ... in direct proportion to the person's percentage of fault." A plaintiff's contributory fault does not bar the plaintiff's recovery of damages. M.C.L. § 600.2958. Rather, "the court shall reduce the damages by the percentage of comparative fault of [the plaintiff]." M.C.L. § 600.2959. Under MCL § 600.2959., recovery of noneconomic damages "are barred whenever the plaintiff is more at fault than anyone else." *Ross v. Parrot's Landing, Inc.*, No. 1:18-CV-725, 2021 WL 5605597, at *4 (W.D. Mich. Aug. 9, 2021)

2. Open & Obvious Doctrine: The doctrine is no longer a complete defense based on lack of duty, but it is now a factor in comparative negligence. The open and obvious nature of a condition remains a relevant inquiry in a premises-liability case regarding a defendant's breach and the plaintiff's comparative fault. *Kandil-Elsayed v. F & E Oil, Inc.*, 512 Mich. 95, 144, 1 N.W.3d 44, 69 (2023)

Ohio

1. Under Ohio law, a plaintiff's recovery will be reduced by the percentage of comparative negligence assessed by the trier of fact, unless that percentage exceeds 50%, in which case the plaintiff is barred from any recovery.

3. Open & Obvious Doctrine: Under Ohio law, a business owner owes no duty to protect an invitee from dangers which are known to the invitee or are so obvious and apparent to the invitee that he or she may be reasonably expected to discover them and protect him or her against them. *Sidle v. Humphey*, 13 Ohio St.2d. 45, 48 (1968) . The Supreme Court of Ohio has held that a premises owner owes no duty to persons entering the premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Company, Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573. The rationale of the open and obvious doctrine is the open and obvious nature of the hazard itself serves as a warning, so owners reasonably may expect their invitees to discover the hazard and take appropriate measures to protect themselves against it. *Simmers v. Bentley Constr. Co*., 64 Ohio St.3d 642, 644 (1992)

   The dangerous condition at issue does not actually have to be observed by the plaintiff to be an open and obvious condition under the law. Attendant circumstances can create an issue of fact as to the open and obvious nature of a hazard. An "attendant circumstance" is "any significant distraction that would divert the attention of a reasonable person in the same situation and thereby reduce the amount of care an ordinary person would exercise to avoid an otherwise open and obvious hazard." *Haller v. Meijer, Inc*., 2012-Ohio-670, ¶10

B. Allocation of Fault to Nonparties

Illinois

Generally, a defendant has the right to rebut evidence of causation and to also establish that the conduct of another causative factor is the sole proximate cause of the injury. *Inman v. Howe Freightways, Inc.*, IL App (1st) 210274 (1st Dist. 2022). But a defendant who enters a good-faith settlement with the plaintiff is discharged from any contribution liability to a nonsettling defendant. *Id.*, *see also*, 740 ILCS 100/2; Settling defendants cannot be apportioned fault and, thus, cannot appear on the verdict form for allocating liability. 735 ILCS 5/2-1117

Indiana

"Nonparty," for purposes of IC §34-51-2, means a person who caused or contributed to cause the alleged injury, death or damage to property, but who has not been joined in the action as a defendant.

Pursuant to IC § 34-51-2-16, a nonparty defense that is known by the defendant when the defendant files the defendant's first answer shall be pleaded as a part of the first answer. A defendant who gains actual knowledge

of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:

> (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
>
> (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

Defendants are required to name nonparties under the Comparative Fault Statute and then permit a jury to allocate the damages. *Mendenhall v. Skinner & Broadbent Co*., 728 N.E.2d 140 (Ind. 2000). As such, the Supreme Court has held that setoffs and credits are not available unless a defendant has named the entity from whom it seeks credit as a nonparty and proved its case against that party.

Michigan

Allocation of Fault to Nonparties – MCL 600 2957. (1) provides, in pertinent part, "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action."

Ohio

The "Empty Chair" defense, or so it has been called, is an affirmative defense under Ohio law that allows a defendant in a tort action to seek an allocation of fault to one or more parties that are not a party to the lawsuit under R.C. 2307.23. This includes a party that is immune, like the plaintiff's employer, for example, or a party that has previously settled with the plaintiff and has already been dismissed from the suit. However, certain procedural and substantive requirements must be followed in order to properly use the Empty Chair defense. For example, it is an affirmative defense that must be raised

before trial and defendants must specifically state the person, persons, or entities for which an allocation of fault will be sought at trial. Best practice is to assert this defense in a responsive pleading like an answer. But the requirements do not end there — a defendant must further put on evidence demonstrating tortious conduct on the part of the Empty Chair defendants. In negligence cases, this means that there must be testimony or some other admissible evidence that the nonparty breached a duty owed to the plaintiff and caused them harm.

C. Joint and Several Liability Among Tortfeasors

Illinois

§ 2-1117. Joint liability.

Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for a plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendant except the plaintiff's employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendants except the plaintiff's employer, shall be jointly and severally liable for all other damages.

Indiana

Pure Several Liability: To determine the liability of each defendant, the jury determines the percentage of fault attributable to each party and any non-party, then multiplies that percentage times the amount of damages. Ind. Code § 34- 51-2-8

Michigan

Generally, any Michigan tort defendant is severally liable for damages attributed to its percentage of fault. MCL 600.6304 provides, in pertinent part:

> 4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and

section 2956 do not apply to a defendant that is jointly and severally liable under section 6312. MCL 600.6304

Romain v. Frankenmuth Mutual. Ins., 762 N.W.2d 911 (Mich. 2009). Absent special circumstances, a party cannot be liable for damages in an amount greater than its percentage of fault.

Ohio

Joint and several liability in Ohio applies to plaintiff's economic damages, if a defendant is found to be more than 50% responsible for an injury or loss. The defendant is only responsible for their share of non-economic damages. O.R.C. 2307.22

D. Contribution Among Joint Tortfeasors

Illinois

§ 2. Right of Contribution. (a) Except as otherwise provided in this Act, where two or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

(c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death, unless its terms so provide, but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

(d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.

(e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship. 740 ILCS 100/2

The bottom line? A joint tortfeasor who settles with the plaintiff and obtains a good faith finding is discharged from liability for contribution from any other tortfeasor and cannot be included in the allocation of comparative fault on the verdict form.

Indiana

Both the common law of Indiana and the Comparative Fault Act prohibit contribution among joint tortfeasors. I.C. § 34-51-2-12; *Mullen v. Cogdell*, 643 N.E.2d 390 (Ind. App. 1994)

Michigan

Contribution claims based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death are no longer viable in Michigan to the extent that a defendant cannot be held liable for damages beyond the defendant's pro-rata share of responsibility. M.C.L. §§ 600.2925a, 600.6304. *Kokx v. Bylenga*, 241 Mich. App. 655, 617 N.W.2d 368 (2000)

Ohio

Ohio law provides for contribution among joint tortfeasors. "If two or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of common liability." Ohio Rev. Code §2307.31(A). "A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability ... is not extinguished by the settlement, or in respect to any amount paid in a settlement which is in excess of what is reasonable. *Id*. at §2307.31(B). In order to be able to seek contribution from a non-settling party, the settlement must specifically release that party from any future liability. Ohio Rev. Code. §2307.32(F). *Beck v. Cianchetti*, 439 N.E.2d 417, 420 (Ohio 1982); *Hartford Accident and Indem. Co. v. Case Co*., 625 F.Supp. 1251, 1255 (S.D. Ohio 1985). A general release of all other parties is not sufficient. *Hartford*, 625 F.Supp. at 1255. In *Hartford*, as part of a settlement, there was a release that provided, "this release is intended to and does hereby extinguish

any claim which Claimants may have against any other persons or entities, whether or not identified as a party in the aforementioned lawsuit, for acts damages, or events in question." The court held that the language of a release did not specifically name or identify the non-settling party, and, therefore, the settling party could not maintain a contribution action against them. *Id*.

E. Workers' Compensation as Exclusive Remedy and Exceptions

Illinois

The Illinois Workers' Compensation Act is the exclusive remedy for employees injured in the course and scope of their employment. However, an employee can escape the exclusive remedy provisions of the Workers' Compensation Act if the employee establishes that the injury: (1) was not accidental, (2) did not arise from his employment, (3) was not received during the course of employment, or (4) was not compensable under the Workers' Compensation Act. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980). Where an employer is alleged to have knowingly, intentionally and illegally exposed an employee to asbestos, his surviving spouse's claim for damages arising from an intentional tort were not barred by the Act's exclusive remedy provisions. *Daniels v. Venta Corporation*, 2022 WL 1115179, at *5 (2nd Dist. 2022)

Indiana

The rights and remedies granted to an employee subject to I.C. § 22-32 through 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, the employee's personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death, except for remedies available under I.C. § 5-2-6.1 (Compensation for Victims of Violent Crimes)

Michigan

MCL 418. 131. (1) provides: "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law. The statute provides the sole tort exception to worker's compensation as the employees sole remedy against the employer.

Ohio

Workplace injuries are ordinarily compensated by the workers' compensation system. In Ohio, employers pay into a state fund out of which employees who are injured in the course and scope of their employment receive remuneration irrespective of fault. Fulton, *Ohio Workers' Compensation Law,* Section 1.2, at 4–5 (4th Ed. 2011). To participate in the fund, employees are deemed to have waived their right to sue their employer in negligence. *Id.,* Section 1.5, at 8. For the vast majority of workplace injuries, a workers' compensation claim is an employee's exclusive remedy. *Van Fossen v. Babcock & Wilcox*, 36 Ohio St.3d 100, 110 (1988). An exception to this rule of exclusivity occurs when an employer's conduct goes beyond mere negligence or even wanton behavior. When an employer's act or omission in a workplace constitutes an intent to injure the worker, such an act or omission is considered to have occurred outside the employment relationship, and the employee may seek redress in a suit on the intentional tort.

F. Waiver, Setoff or Release of Employer if Worker Compensation Lien Asserted

Illinois

In Illinois, an employer's liability for contribution to third parties is capped at the amount of its statutory liability under the Workers' Compensation Act. *Kotecki v. Cyclops Welding Corp.*, 146 III. 2d 155 (1991). However, the *Kotecki* Cap may be waived if an employer enters into an indemnification agreement prior to the commencement of litigation in which the employer agrees to assume full liability of damages. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 208 (1977); *see also, Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 559 (2007)

Indiana

I.C. § 22-3-2-13 governs an employer/carrier's right to reimbursement of workers' compensation benefits paid to an employee from the proceeds of any settlement or judgment resulting from a third-party action. Under the statute, the employer/carrier has a lien on those proceeds. In addition, the statute provides that when an employee settles with a third party, the employer/carrier's obligation to pay future compensation benefits is terminated. Because the statute provides that the employer/carrier has a lien, there are no steps required to perfect a lien. However, good practice dictates notifying all counsel involved in a third-party action the amount of workers' compensation benefits and contact information for the individual responsible for negotiating a lien.

When an employer/carrier pays out statutory benefits, including medical and Temporary Total Disability benefits, those amounts are recoverable from a judgment or settlement obtained by the employee against a third party. The employer/carrier's lien, however, will be reduced by one-fourth for the attorney fees if recovered without suit and by one-third if recovered with suit. In addition, the employer/carrier shall pay the pro rata share of costs associated with the employee bringing the suit. This would include deposition fees, witness fees (i.e., experts), filing fees and so forth. If the employer/carrier elects to waive its right to recover on its lien, then it is not responsible for sharing in the cost of bringing the action. Likewise, any recovery on the lien can also be reduced by the comparative fault of the employee, which would reduce his ultimate recovery against the third party. See I.C. § 34-51-2-19.

The Indiana Supreme Court decided the effect of failing to obtain consent from an employer/carrier to settle a third-party liability case in *Smith v. Champion Trucking Co.*, Inc., 925 N.E.2d 362 (Ind. 2010). In *Smith*, the employee was involved in an auto accident and sustained injury. The employer moved to dismiss the workers' compensation action, arguing that the employee's settlement with the driver of the other vehicle, before resolution of the workers' compensation claim, barred his right to further benefits. The Indiana Supreme Court agreed with the employer and noted that even when the amount of settlement recovered in the third-party liability suit is less than the potential recovery of workers' compensation benefits, it does not alter the statutory language requiring the employer/carrier's consent to settlement of the third-party liability suit, nor does it serve to allow an employee to continue receiving workers' compensation benefits. Following on the heels of *Smith*, the Indiana Court of Appeals was called upon to determine whether an employer/carrier must reduce its workers' compensation lien in the same proportion that the employee's full recovery was reduced in the third-party liability suit. *Kornelik v. Mittal Steel USA, Inc.*, 952 N.E.2d 320 (Ind. Ct. App. 2011)

In *Kornelik*, the employee filed a motion to adjudicate the employer/carrier's lien on the third-party liability settlement and for declaratory judgment. The Indiana Court of Appeals decided that the employer/carrier was required to reduce its lien by one-third for attorney fees and its pro rata share of costs. However, the employer/carrier was not required to reduce its lien in the same proportion that the recovery in the third-party liability suit was reduced because the employee failed to obtain the employer's consent. Without the written consent of the employer, a settlement of the third-party liability case is valid only if the employer/carrier is protected in full by court order. As a result of these decisions, an employee can be barred from receiving continued workers' compensation benefits. The employee may also be obligated to pay all the recovery in the third-party liability settlement, less attorney fees and

costs, to the employer/carrier if consent to settlement is not obtained. Such a dire result is certainly not in the best interest of the employee. As a best practice, attorneys involved in the third-party liability suits should always contact the employer/carrier before entering into settlement negotiations and ensure the workers' compensation lien is protected in full. Furthermore, obtaining the written consent of the employer/carrier can prevent future litigation regarding the amount of recovery on the workers' compensation lien.

Michigan

Not applicable in Michigan

Ohio

Not applicable in Ohio

G. Contractual Indemnification

Illinois

Contracts of indemnity against one's own negligence are generally valid and enforceable, provided that the indemnitor's obligations are set forth in clear and explicit language. *Buenz v. Frontline Transp. Co.*, 368 Ill.App.3d 10 (1st Dist. 2006)

Statutory Exception:

The Illinois Construction Contract Indemnification for Negligence Act (740 ILCS 35/1 (West 2012)), provides, in pertinent part:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Indiana

An agreement to indemnify another for the other's own negligence is valid only if it is undertaken knowingly and willingly. *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*, 583 N.E.2d 142, 145 (Ind. Ct. App. 1991). Such indemnity agreements are disfavored by the courts because an undertaking

by one party to pay for the negligence of another is an extraordinary, harsh burden that no party would lightly accept. These agreements must be clear and unequivocal and will be strictly construed. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 757 (Ind. Ct. App. 2002). To clearly and unequivocally indemnify an indemnitee for the indemnitee's own negligence, the indemnity provision must meet the following two criteria:

> The indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application; and
>
> The indemnification clause must expressly state in clear and unequivocal terms that it applies to the indemnification of the indemnitee by the indemnitor for the indemnitee's own negligence.

BC Osaka, Inc. v. Kainan Inv. Groups, Inc., 60 N.E.3d 231, 234–35 (Ind. Ct. App. 2016).

The validity and enforceability of indemnity agreements can be affected by statutes or public policy. In construction contracts, for example, an indemnity agreement that purports to indemnify the indemnitee for its sole negligence is void. Ind. Code § 26-2-5-1. Courts have held that the words "sole negligence" in this statute are not the same as the words "own negligence." Thus, as long as the provision does not obligate an indemnitor to indemnify the indemnitee for the indemnitee's own, sole negligence, it is not invalid. *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*, 583 N.E.2d 142, 145 (Ind. Ct. App. 1991). To read the statute to prohibit all agreements where a promisee may be indemnified for damages caused in part by its own negligence and in part by others would delete the word "sole" from the statute. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 757 (Ind. Ct. App. 2002). In another example, the waiver of the landlord's duties in a residential lease is void under Ind. Code. § 32-31-8-4, and this statute may apply to invalidate a residential tenant's agreement to indemnify the landlord for the landlord's negligence. *Ransburg v. Richards*, 770 N.E.2d 393 (Ind. Ct. App. 2002)

Michigan

"With regard to acts of simple negligence, however, it is widely held to be socially beneficial to permit the allocation of costs and mitigation of risk through indemnity agreements, liability insurance, or otherwise."

Home-Owners Ins. Co. v. Allied Prop. & Cas. Ins. Co., 152 F. Supp. 3d 956, 965 (W.D. Mich.), aff'd, 673 F. App'x 500 (6th Cir. 2016)

Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses. The only legal restriction upon indemnity in the subcontractor context is the prohibition on indemnification against the sole negligence of the contractor. MCL 691.991

Ohio

In Ohio, contractual indemnification is a legal arrangement where one party agrees to compensate another party for certain costs and expenses, usually related to third-party claims. The intent of the parties involved determines the nature of the indemnity relationship, which can vary based on a number of factors. There are certain things to be aware of in Ohio related to contractual indemnification. (1) Anti-indemnity statute: Ohio Revised Code §2305.31 makes it void and unenforceable for an indemnitee to shift responsibility for their negligence to the indemnitor in a construction contract. This applies to contracts related to design, planning, construction, and more. (2) Indemnification in public works design: Ohio Senate Bill 56, which went into effect in March 2023, limits indemnification to third-party claims in public works design contracts. (3) Common law indemnity principles: In *Wildcat Drilling v. Discovery Oil and Gas*, 2023-Ohio-3398, the court found the longstanding common law indemnity principle requiring notice of a potential claim is not effective where parties to a contract agreed to an express indemnity provision that lacks a notice provision.

According to the court, the parties' adoption of an express indemnification provision evidences a clear intent by the parties to deviate from common law rights as to indemnity, even if the contract does not contain language that expressly abrogates common law. The implications of the decision could be significant for companies with contractual indemnification provisions in their current form contracts. If the provision does not contain notice requirements, for instance, a party can no longer rely on Ohio common law to impose upon the opposite party an obligation to provide notice. Accordingly, companies seeking to enforce indemnity provisions should be sure to include notice requirements in their indemnity provisions going forward and amend current indemnity contracts to include such terms.

H. Implied Indemnity

Illinois

Illinois recognizes implied indemnity obligations where a promise to indemnify may be implied by law where a blameless party (the indemnitee) is derivatively liable to the plaintiff based on the party's relationship with the one who actually caused the plaintiff's injury (the indemnitor). To state a cause

of action for implied indemnity, a party must allege: (1) a pre-tort relationship between the third-party plaintiff and the third-party defendant; and (2) a qualitative distinction between the conduct of the third-party plaintiff and the third-party defendant. Classic pretort relationships, which have given rise to a duty to indemnity, include lessor and lessee (*Mierzejwski v. Stronczek*, 100 Ill.App.2d 68 (1st Dist. 1968)), employer and employee (*Embree v. Gormley*, 49 Ill.App.2d 85 (2nd Dist. 1964)), owner and his lessee (*Blaszak v. Union Tank Car Co.*, 37 Ill.App.2d 12 (1962)), and master and servant (*Gulf, Mobile & Ohio R.R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill.App. 148 (1951)).

Indiana

The right to indemnity may be implied at common law only in favor of one whose liability to a third person is derivative or constructive, and only as against one, who has by his wrongful act, caused such derivative or constructive liability to be imposed upon the indemnitee. *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669 (Ind. 1991). Exemplar are claims based on respondeat superior.

Michigan

"In order to establish an implied contract to indemnify, there must be a special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification." *Palomba v. East Detroit,* 112 Mich.App 209, 217; 315 NW2d 898 (1982)

Courts recognize implied contracts where parties assume obligations by their conduct. *Williams v Litton Sys, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989). A contract implied in law, or a quasi- or constructive contract, does not require a meeting of the minds, but is imposed by a fiction of law to allow justice to be accomplished. See *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929). Courts "employ the fiction with caution, and will never permit it in cases where contracts, implied in fact, must be established, or substitute one promisor or debtor for another." *Id.*

Ohio

Ohio recognizes implied indemnity. In Ohio, implied indemnification can occur when the law requires a party to be held responsible for a loss, even though they didn't actually cause it. The most common situation in which implied indemnity exists is where one party is vicariously liable. The party seeking indemnity must not be at fault.

I. Formal Offer of Judgment Available

Illinois

Illinois does not have a state court corollary to Fed. R. Civ. P. 68 for making a formal offer of judgment and shifting costs, if it is not accepted, and the recovery obtained is less than the formal offer.

Indiana, Ind. R. Civ. P. 68

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, thereof, and at that point the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence, thereof, is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made, but not accepted, does not preclude a subsequent offer. When liability of one party to another has been partially determined by verdict or order of judgment, but the amount or extent of liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial, if it is served within a reasonable time, not less than 10 days prior to the commencement of hearings, to determine the amount or extent of liability.

Michigan

Michigan provides for an offer of judgment under MCR 2.405. Assuming a rejection, the rule imposes costs in favor of the party to whom the adjusted verdict is more favorable.

"Adjusted verdict" means the verdict plus interest and costs from the filing of the complaint through the date of the offer. "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment. The court may refuse to award an attorney fee award in the interest of justice

Ohio

Ohio does not have a state court corollary to Fed. R. Civ. P. 68 for making a formal offer of judgment and shifting costs if it is not accepted and the recovery obtained is less than the formal offer.

PERSONAL JURISDICTION UNDER THE LONG ARM STATUTE:

J. Choice of Law Issues

Illinois

Under Illinois choice of law principles, a court applies the choice of law rules of its own state. *Townsend v. Sears, Roebuck and Company*, 227 Ill. 2d 147, 155 (2007). Illinois follows the methodology set forth in the Restatement (Second) of Conflict of Laws (Second Restatement). Restatement (Second) of Conflict of Laws § 6 (1971); *Id*. Pursuant to section 146 of the Second Restatement, the presumption is that the law to be applied in a case involving, as here, personal injury is the law of the state where the accident or injury occurred "unless, with respect to the particular issue[s], some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied." Restatement (Second) of Conflict of Laws § 146 (1971); *Townsend*, 227 Ill. 2d at 164–65, 316 Ill. Dec. 505, 879 N.E. 2d 893

An Illinois choice of law analysis requires a determination of: (1) whether there is a conflict between the substantive law of Illinois and another state involved in the controversy that will affect the outcome of the litigation; and, (2) which state has the most significant relationship to the dispute. *Id.*, at 155-57, 159-60

Generally, any Michigan tort defendant is severally liable for damages attributed to its percentage of fault. MCL 600.6304 provides, in pertinent part:

> 4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312. MCL 600.6304.

Romain v. Frankenmuth Mutual. Ins., 762 N.W.2d 911 (Mich. 2009). Absent special circumstances, none of which apply here, a party cannot be liable for damages in an amount greater than its percentage of fault.

In Illinois, by contrast, defendants whose fault is allocated at more than 25% for the plaintiff's harm are jointly and severally liable for the damages awarded. 735 ILCS 5/2–1117. And Illinois tortfeasors who have settled in good faith and who have been dismissed from the lawsuit are exempt from section 2–1117 and, therefore, may not be apportioned fault by the trier of fact. *Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st) 132905 *12, 26 N.E. 3d 448, 452, 389 Ill. Dec. 358, 362 (1st Dist. 2015)

In *Denton*, Illinois residents sued in Illinois against foreign corporations and another Illinois resident, seeking damages arising out of an accident that occurred in Indiana when an Indiana resident drove his vehicle the wrong way down a highway and caused a multi-vehicle chain reaction of collisions. *Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st) 132905 *3, 26 N.E. 3d 448, 449-450, 389 Ill. Dec. 358, 359-60 (1st Dist. 2015). The wrong way Indiana motorist's estate settled with the plaintiff before suit was filed. *Id.* Certain defendants moved for application of Indiana law to the case. The trial court denied the motion.

The appellate court reversed the trial court finding, in pertinent part:

> There can be no serious doubt that the relevant tort law of Illinois and Indiana are quite different. First, the two states have different approaches to allocating fault among joint tortfeasors. In Illinois, all defendants found liable are jointly and severally liable for the plaintiff's past and future medical expenses. 735 ILCS 5/2–1117 (West 2012). A defendant who is at least 25% at fault is jointly and severally liable for all other damages, as well, while a defendant whose fault falls below this 25% threshold is only severally, or proportionately, liable for all other damages. *Id*. Under Illinois's joint and several liability law, if Johnson were found responsible for 25% of the damages caused to plaintiffs, then he could nonetheless be responsible for the full amount of damages.
>
> *Id*., *10, 26 N.E. 3d 448, 451, 389 Ill. Dec. 358, 361 (1st Dist. 2015)

There is a legal presumption that the local law of the state where the injury occurred (Michigan) applies in determining the rights and liabilities of the parties unless Illinois has a more significant relationship to the conflict. *Denton* 2015 IL App (1st) 132905 *19 (1st Dist. 2015). The plaintiff has the burden of overcoming this presumption by demonstrating "Illinois has a more

significant relationship to the occurrence and the parties with respect to a particular issue." *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 166 (2007)

The potential outcome-determinative conflicts of law concerns the court addressed in *Denton* are presented by Katract's lawsuit. Under Michigan law, like Indiana, liability amongst joint tortfeasors is several only, whereas under Illinois law, liability is joint and several should a defendant be found liable for 25% or greater fault in causing the injuries. And under Michigan law, the jury is instructed to apportion fault to identified nonparties, while under Illinois law if, for instance, B-Reft's codefendants settle and the court enters a good faith finding, the jury would not be instructed to consider the fault of those settling codefendants.

FORUM *NON CONVENIENS* CONSIDERATIONS:

Illinois Law on Interstate Forum *Non Conveniens*:

The focus of interstate *forum non conveniens* is whether the case is being litigated in the most appropriate state. *Fennell v. Illinois Cent. R. Co.*, 2012 IL 113812, at ¶ 13, 369 Ill. Dec. 728, 987 N.E. 2d 355 (2012). "The doctrine of *forum non conveniens* is founded in considerations of fundamental fairness and sensible and effective judicial administration." *Id.* At ¶ 14, *citing, Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). Illinois courts employ the analytical framework of *Gulf Oil* in *forum non conveniens* cases. *Fennell v. Illinois Cent. R. Co.,* at ¶ 13

The private interest factors to be considered include: (1) convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) all other practical considerations that make a trial easy, expeditious and inexpensive. *Fennell*, 2012 IL 113812, at ¶ 15, 369 Ill. Dec. 728, 987 N.E. 2d 355

"The relevant public interest factors include: the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; and the interest in having local controversies decided locally." *Fennell v. Illinois Cent. R. Co.,* 2012 IL 113812 at ¶ 16; *Gulf Oil*, 330 U.S. at 508–09, 67 S. Ct. 839

Assessment of forum *non conveniens* motions requires the court to evaluate the total circumstances of the case in determining whether the balance of

factors strongly favors dismissal in favor of a more appropriate forum. *Fennell v. Illinois Cent. R. Co*., 2012 IL 113812, at ¶ 17, *citing, Gridley v. State Farm Mutual Automobile Insurance Co.,* 217 Ill. 2d at 170, 298 Ill. Dec. 499, 840 N.E.2d 269, *citing, First American Bank v. Guerine,* 198 Ill. 2d 511, 516, 261 Ill. Dec. 763, 764 N.E.2d 54 (2002). No single factor is dispositive to a *forum non conveniens* analysis. *Fennell v. Illinois Cent. R. Co*., 2012 IL 113812, at ¶ 17.

The plaintiff's chosen forum is given "substantial deference," if the plaintiff is a resident of that forum. However, "the presumption favoring the plaintiff's choice of forum is also diminished where the plaintiff's injury does not occur in his chosen forum." *Czarnecki v. Uno-Ven Co.,* 339 Ill. App. 3d 504, 508 (1st Dist. 2003). Dismissal of a Cook County complaint based on the doctrine of interstate *forum non conveniens* is proper where the only connection to the plaintiff's chosen forum is the plaintiff's residence in Cook County. *Kerry No. 5 LLC v. Barbella Group LLC,* 2012 IL App (1st) 102641, ¶ 38 (1st Dist. 2012) (affirming trial court's dismissal of a Cook County lawsuit filed by a Cook County resident where the transaction occurred in Florida and the defendants were all Florida residents, on interstate *forum non conveniens* grounds).

Here, Katract's choice of Cook County as her forum deserves no deference as she is not a Cook County resident. The only nexus of Cook County to Katract's claim is her medical providers. Almost all relevant private and public factors favor Michigan or Indiana, and Katract's Illinois lawsuit should be dismissed under the doctrine of forum *non conveniens.*

Indiana

Tort Actions (Modified Traditional Test) – In tort cases Indiana choice-of-law analysis now involves multiple inquiries. As a preliminary matter, the court must determine whether the differences between the laws of the states are "important enough to affect the outcome of the litigation." *Hubbard Manufacturing Co., Inc. v. Greeson,* 515 N.E.2d 1071 (Ind. 1987). If such a conflict exists, the presumption is that the traditional *lex loci delicti* rule (the place of the wrong) will apply. Under this rule, the court applies the substantive laws of the "the state where the last event necessary to make an actor liable for the alleged wrong takes place." This presumption is not conclusive, however. It may be overcome if the court is persuaded that "the place of the tort 'bears little connection' to this legal action." (*Popovich v. Weingarten*, 779 F. Supp. 2d 891, 896-97 (N.D. Ind. 2011); *Simon v. United States*, 805 N.E.2d 798, 804-05 (Ind. 2004))

Contract Actions (Most Intimate Contacts Test) - Indiana applies the law of the forum with the most intimate contact to a contract dispute. The court assesses the most intimate contacts by considering: (a) the place of contracting, (b) the

place of contract negotiation, (c) the place of performance, (d) the location of the contract's subject matter, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See* Nat'l Union, 940 N.E.2d at 814.

Indiana doesn't employ *depecage* — analyzing separate issues within claims to assign state law for each issue— but instead treats each independent claim separately for purposes of choosing applicable law, *see, e.g., Ky. Nat. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 919 N.E.2d 565, 575-76 (Ind. Ct. App. 2010) ("Although Indiana allows different claims to be analyzed separately, it does not allow issues within those counts to be analyzed separately ... For example, an Indiana court might analyze a contract claim and a tort claim independently but would not separately analyze and apply the law of different jurisdictions to issues within each claim."). (*Litsinger v. Forest River, Inc*., 536 F. Supp. 3d 334, 357 (N.D. Ind. 2021); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp*., 940 N.E.2d 810, 813-14 (Ind. 2010))

Michigan

For a case filed in Michigan, under applicable Michigan choice-of-law rules, Michigan law controls unless a "rational reason" to do otherwise exists. *Sutherland v. Kennington Truck Serv., Ltd.*, 454 Mich. 274, 286 (1997); *Burney v. PV Holding Corp.*, 218 Mich. App. 167, 172 (1996) (stating that Michigan applies the *lex fori* rule to legal malpractice claims, which provides that "the law of the forum state (*lex fori*) should apply unless there is a 'rational reason' to displace it.").

A two-step analysis determines whether a rational reason to displace Michigan law exists. First, does any foreign state have an interest in having its law applied? If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. Should a foreign state have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. While this analysis favors Michigan law, nevertheless, Michigan courts apply another state's law where the other state has a significant interest and Michigan has only a minimal interest in the matter." *Hall v. Gen. Motors Corp.*, 229 Mich. App. 580, 582 (1998)

Ohio

Initially, when addressing any conflict of law, Ohio courts apply the choice-of-law rules of the forum state. See *Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 US 487 (1941). Ohio has generally adopted the choice of law rules set forth in the Restatement.

In contract cases, Ohio law applies Restatement of the Law 2d, Conflict of Laws (1971), Section 188 to determine the law of the state that has the most significant relationship to the transaction and the parties. *Reserve Assoc. Ltd. v. Selective Ins. Co. of South Carolina,* 2007-Ohio-6369 ¶13. "When applying section 188, * * * one does not simply tally up the number of contacts existing for each state; instead, the importance of each particular contact must be assessed with reference to the choice of law principles in section 6 and the contact's 'relative importance with respect to the particular issue.'" *McDonald v. Williamson,* 2003-Ohio-6606, ¶20. (citation omitted)

Restatement of the Law 2d, Conflict of Laws (1971), Section 188(2) provides:

> "In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties."

The plain text of Section 145(1) of the Restatement states that the section provides the choice-of-law rules for "an issue in tort." 1 Restatement, Section 145(1), at 414. Applying the "most significant relationship" test of Section 145 of the Restatement when resolving choice-of-law tort actions is consistent with decisions of courts elsewhere. For an issue of tort, Section 145, therefore, focuses the *choice-of-law* analysis on factors other than the "principal location of the insured risk," 1 Restatement, Section 193, Comment c, at 612, such as the location of the injury and the location of the tortious conduct, which may be different from the location of the insured risk.

FORUM *NON CONVENIENS* CONSIDERATIONS:

Ohio Law on Interstate Forum *Non Conveniens*:

The doctrine of forum *non conveniens* permits a court to dismiss an action in order to further the ends of justice and to promote the convenience of the parties, even though jurisdiction and venue are proper in the court chosen by the plaintiff. See *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St.3d 123 (1988).

In determining whether a dismissal is proper on the basis of forum *non conveniens*, the trial court must consider the facts of each case, balancing the private interests of the litigants and the public interest involving the courts

and citizens of the forum state. See *id*. Important private interests include "'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Chambers, supra*, quoting *Gulf Oil Corp. v. Gilbert*, 222 U.S. 501, 508 (1947)

Public interest factors to be considered include the administrative difficulties and delay to other litigants caused by congested court calendars, the imposition of jury duty upon the citizens of a community, which has very little relation to the litigation, a local interest in having localized controversies decided at home, and the appropriateness of litigating a case in a forum familiar with the applicable law." *Chambers* at 127, citing *Gilbert, supra* at 508-509

Because the central purpose of a forum *non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice of forum deserves less deference than that of a plaintiff who has chosen his home forum. See *Chambers* at 127.

PLUNKETT COONEY

What Sets Us Apart

Clients tell us that they consider Plunkett Cooney to be a unique law firm because they see us as determined, distinctive and fearless whenever we undertake an assignment on their behalf. Ours is among the most accomplished litigation and trial firms in the Midwest, and we have built a reputation as a leading provider of litigation and transactional services.

Plunkett Cooney has a rich tradition of providing the very best in comprehensive legal representation. Our attorneys understand the importance of total client satisfaction, whether the call for our services takes us into the boardroom or the courtroom. It may sound cliché, but at Plunkett Cooney we care about our clients. We consider them to be not only our partners in business but a part of our family as well.

Our attorneys will take the time to understand your business, industry and goals before offering important legal advice. They will provide aggressive representation in litigation, advising you when to settle or when to take your case to trial. Your calls will be returned promptly, your matters will be explained thoroughly and your assignments will be staffed appropriately, all with the goal of achieving the best possible legal result while keeping your bottom line in mind.

PLUNKETT COONEY

Firm Overview

Established in 1913, Plunkett Cooney is one of the Midwest's oldest and most accomplished full-service law firms. Headquartered in metropolitan Detroit, Plunkett Cooney has grown up at the heart of the industrial Midwest and the automobile industry.

With seven offices in Michigan and one location in Columbus, Ohio; Chicago, Illinois and Indianapolis, Indiana; Plunkett Cooney provides exceptional legal services to a diverse family of clients who are located across a wide geographic area. The firm employs approximately 300 people, including approximately 140 attorneys, many of whom are nationally recognized experts. Plunkett Cooney has achieved the highest rating (AV) awarded by Martindale-Hubbell, a leading, international directory of law firms.

As one of the Midwest's premier law firms, Plunkett Cooney is a leader in the use of computer technology and the implementation of firm-wide quality assurance initiatives. Creative fee structuring, cost-efficiency and an ever-growing and diverse client base are also keys to our firm's long history of success.

But, above all, the people of Plunkett Cooney and their commitment to providing excellent legal services are what sets our firm apart from the competition. We strive daily to build lasting client relationships based on trust, integrity, quality and professionalism.

PLUNKETT COONEY

Geographic Coverage

While Plunkett Cooney's geographic footprint includes the states of Michigan, Ohio, Indiana and Illinois, the firm's practice extends far beyond these physical boundaries.

Plunkett Cooney attorneys are fully licensed to practice in 15 states and Washington, D.C. When specific matters require admission to other state and federal courts, they routinely receive pro hac vice admissions to assist their clients.

As one of the Midwest's leading business and litigation law firms, Plunkett Cooney attorneys have the privilege of working with clients in a range of industries, including banking and finance, construction, cyber-security, foodservice, health care, insurance, real estate, telecommunications and transportation, among others.

In addition, Plunkett Cooney is a founding member of ALFA International, a global legal network of 145 member firms across the globe and 80 in the United States. Plunkett Cooney's ALFA affiliation allows the firm to use its local expertise to deliver highly effective legal solutions while drawing upon the collective wisdom and experience of other member firms across the country and around the world.

PLUNKETT COONEY

Substantive Areas of Practice

Plunkett Cooney is a professional corporation. It is organized internally by groups (practice areas), providing the most efficient and cost-effective use of attorneys, support staff and technical resources. Your contact with Plunkett Cooney will have access to every practice area and will draw upon our full range of legal expertise in providing you service.

Below is a partial list of the areas of law in which our attorneys specialize. The following pages contain descriptions of the practice areas we feel would be of initial interest to you.

- Administrative & Regulatory Law
- Alternative Dispute Resolution
- Antitrust and Unfair Competition Litigation
- Appellate Law
- Architects & Engineering Liability
- Banking, Bankruptcy & Creditors' Rights
- Business & Commercial Litigation
- Business Enterprises Law
- Business Law
- Civil Rights
- Construction Law
- Consumer Litigation
- Corporate Compliance
- Corporate & Tax Law
- Criminal Law (White Collar)
- Directors & Officers Liability
- Education Law
- Environmental, Energy & Resources Law
- Estate Planning
- Fire Loss Claims
- Franchise Law
- Government Relations, Public Policy & Regulatory Law
- Healthcare Law
- Insurance Law
- International Law
- Intellectual Property Litigation
- Labor & Employment Law
- Litigation
- Marine Liability
- Medical Liability
- Mergers & Acquisitions
- Motor Vehicle Negligence/No-Fault
- Municipal Law
- Nursing Home & Long-term Care Liability
- Pharmaceutical Liability
- Premises Liability
- Private Client Services
- Product Liability
- Professional Liability
- Real Estate Law
- Reorganization
- Retail Liability
- Tax Law
- Telecommunications Law
- Title Insurance
- Toxic Torts
- Trucking & Transportation Law
- Workers' Compensation Law
- Zoning, Planning & Permitting

Introduction to Plunkett Cooney's Presenters

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