

**IN THE UNITED STATES DISTRICT COURT FOR MARYLAND
Southern Division**

EDMUND D. HEFFERNAN, II, <i>et al.</i>	:	
<i>Plaintiffs</i>	:	
v.	:	Case No. 1:05-cv-1888
ERIE INSURANCE EXCHANGE	:	
<i>Defendant</i>	:	

**DEFENDANT’S MOTION IN LIMINE TO PRECLUDE
THE USE OF DELAWARE LAW ON THE ISSUE OF DAMAGES**

COMES NOW the Defendant, Erie Insurance Exchange, by and through its attorneys, McCarthy Wilson, LLP and Charles E. Wilson, Jr., and pursuant to Rule 7(b) of the Federal Rules of Civil Procedure, respectfully requests that this Honorable Court resolve the conflicts of laws issue presented by this case and rule that Maryland substantive law, not Delaware law, will be applied to the determination of damages in this matter. In support thereof, the Defendant states as follows:

1. The above-captioned breach of contract action has been brought by Plaintiffs, Maryland residents, against their insurer for uninsured motorist benefits under their automobile insurance policy, entered into in Maryland.
2. The automobile accident which gives rise to Plaintiffs claims occurred in Delaware.
3. Plaintiffs have notified Defendant of their intent to rely on Delaware law in determining the damages available to them.

4. There are substantial differences between Delaware law governing damages and Maryland law on damages. Most notably, in Maryland there is a statutory cap on non-economic damages. Delaware has no such cap.

5. Delaware and Maryland law also differ on the types of damages parents are able to recover for the loss of a minor child. For example, Maryland permits parents to recover a greater sum for funeral expenses than does Delaware.

5. As detailed further in the accompanying Memorandum of Points and Authorities, Maryland conflicts of laws rules point to the application of Maryland substantive law in this case.

6. As detailed further in the accompanying Memorandum of Points and Authorities, Maryland has the most significant relationship to this action.

7. As detailed further in the accompanying Memorandum of Points and Authorities, Delaware is an uninterested jurisdiction, and has no interest in seeing its laws applied to the resolution of this case.

WHEREFORE, the Defendant, Erie Insurance Exchange, respectfully requests that this Honorable Court:

A. Grant its Motion in Limine to Preclude the Use of Delaware Law on the Issue of Damages;

B. Preclude the application of Delaware law to the issue of damages;

C. Rule that Maryland substantive law will be applied to determine damages;

D. Grant such further and additional relief as this Court deems just and proper.

Respectfully submitted,

McCARTHY WILSON, LLP

By: _____ /s/

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2006, a copy of the foregoing **Defendant's Motion in Limine to Preclude the Use of Delaware Law on the Issue of Damages** was sent via electronic and mailed first-class, postage prepaid to:

Samuel H. Paavola, Esquire
One Willow Street
Annapolis, MD 21401-3112

Jeffrey E. Thompson, Esquire
124 N. Commerce Street
Centerville, MD 21617

_____/s/
Charles E. Wilson, Jr., #2154

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EDMUND D. HEFFERNAN, II, *et al.* :

Plaintiffs :

v. : **Case No. 1:05-cv-1888**

ERIE INSURANCE EXCHANGE :

Defendant :

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT’S MOTION IN LIMINE TO PRECLUDE
THE USE OF DELAWARE LAW ON THE ISSUE OF DAMAGES**

Introduction

The above-captioned breach of contract action arises out of Plaintiffs’ claims for underinsured motorist benefits pursuant to an automobile liability insurance policy Plaintiffs had with the Defendant insurer. Plaintiffs Edmund and Diane Heffernan are Maryland residents. On April 18, 2003, Plaintiffs’ minor daughter, Mallory Heffernan (hereinafter “Decedent”), was killed in an automobile accident in Delaware when the driver of the car in which she was a passenger apparently fell asleep at the wheel. The Decedent and the other occupants of the vehicle, all Maryland residents, had attended a concert in Pennsylvania the night of April 17, 2003, and after dropping off friends in New Jersey, were on their way back to Maryland, driving through Delaware when the accident occurred at approximately 6:30 a.m.

The driver of the vehicle in which Decedent was riding, John McMahon, Jr., was also a minor, and covered for the accident under at least two automobile liability

insurance policies issued to his mother—a New Jersey policy issued by the New Hampshire Insurance Co. and a Maryland policy issued by Progressive Insurance. The liability limits of both the New Hampshire and Progressive policies have been offered to the Plaintiffs, in exchange for a full release of the driver, Mr. McMahon, from further liability for the accident.

At the time of the accident, Plaintiffs themselves had two automobile insurance policies in effect. Plaintiff Edmund Heffernan drove a vehicle which was provided to him by his employer, and which was covered under a policy issued by Lumberman's Insurance Co. Plaintiffs have not yet provided Defendant with a copy of the Lumberman's policy, so Defendant does not yet know if that policy is applicable to this accident. Additionally, Plaintiffs carried an automobile insurance policy with Defendant Erie Insurance Exchange, which covered two other vehicles owned by the Plaintiffs. *See* Amended Declarations Sheet for Pioneer Family Auto Policy, attached hereto as **Exhibit 1**. The Erie policy carried uninsured/underinsured motorist benefits, payment of which Plaintiffs demanded following payment of the limits of the policies covering the driver. Additionally, Plaintiffs carried a personal catastrophe insurance policy with Erie, which provides coverage for the Decedent's death. *See* Declarations Sheet for Personal Catastrophe Policy, attached hereto as **Exhibit 2**.

Plaintiffs and Defendant were unable to come to an agreement on issues of liability and the amount of benefits to be paid, and Plaintiffs subsequently brought suit in the Circuit Court for Baltimore City, Maryland. Defendant then removed the case to this Court pursuant to diversity jurisdiction. One of the issues which has arisen, and which

this Motion attempts to address, is a choice of law question. Plaintiffs desire the application of Delaware substantive law to the determination of damages in this case. Defendant believes Maryland law is the appropriate law to apply.

The Relevant Facts for Resolving the Choice of Law Question Are Undisputed

In resolving choice of law questions, the courts examine several factors and principles. These factors and principles differ between tort and contract actions. In a tort action, the courts may consider: (1) the place where the wrong occurred; (2) the place where injury occurred; and (3) the place where the relationship between the parties, if any, was centered. In a contract action, the courts will look primarily to: (1) the place where the contract was entered into; (2) the place for performance; and (3) the place of breach. Different courts give different weight to each factor, and the specific choice of law rules adopted by Maryland courts are discussed below.

In the present case, the facts which are relevant to the various choice of law factors to be applied are not in dispute. Therefore, this Court will not have to make any factual decisions before it is able to rule on the legal issue of choice of laws. The parties agree on the following relevant facts:

- The Plaintiffs are Maryland residents.
- Plaintiffs carried an automobile liability insurance policy with Erie Insurance Exchange, and a personal catastrophe insurance policy with Erie Insurance Exchange.

- The vehicles owned by Plaintiffs and covered under the automobile insurance policy were registered and garaged in Maryland, at Plaintiffs' residence.
- The automobile insurance policy was delivered to Plaintiffs at their Maryland address.
- The personal catastrophe insurance policy was delivered to Plaintiffs at their Maryland address.
- Plaintiffs paid all premiums on the automobile insurance policy under Maryland insurance rates.
- Plaintiffs paid all premiums on the personal catastrophe policy in Maryland.
- The accident which resulted in Mallory Heffernan's death occurred in Delaware.
- Mallory Heffernan died in a hospital in Delaware.
- Plaintiffs received notice of the accident in Maryland.
- Plaintiffs were at the hospital in Delaware when they learned of their daughter's death.
- The driver of the vehicle in which Mallory Heffernan was a Passenger, John McMahon, Jr., was a Maryland resident.
- Mr. McMahon was covered for the accident under two insurance policies, one issued in New Jersey and one issued in Maryland.

- The liability limits of both of these policies have been offered to the Plaintiffs.
- Plaintiffs made a demand to Erie Insurance Exchange in Maryland, under both the automobile insurance policy and the personal catastrophe insurance policy, for damages arising out of the death of their daughter.
- Plaintiffs and representatives of Erie Insurance Exchange attempted to negotiate in Maryland.
- Erie Insurance Exchange denied Plaintiffs' claims in Maryland.
- Should Erie be found liable under the two insurance policies, performance, by way of issuing a check to Plaintiffs, will be due in Maryland.

These facts are undisputed by the parties. What is in dispute is the proper application of these facts to the choice of law rules, and the resulting outcome. Below is Defendant's analysis of the way these facts apply to the choice of law rules, and the inescapable conclusion that Maryland substantive law applies in this matter.

Maryland Choice of Law Rules

Because this Court sits in Maryland, Maryland choice of law rules are used to determine whether Maryland or Delaware substantive law applies to this action. Artis v. Bildon Co., 139 F.3d 887, n.1 (4th Cir. 1998). Maryland applies *lex loci* choice of law rules. Under the theory of *lex loci contractus*, questions regarding the interpretation and enforceability of contracts are governed by the law of the place where the contract was made. Ward v. Nationwide Mutual Auto. Ins. Co., 328 Md. 240, 614 A.2d 85 (1992).

The principle of *lex loci delicti*, applicable in tort actions, holds that the law of the place of the wrong governs. Md. Code, Courts and Judicial Proceedings, §3-903.

Nature of the Case

This is a breach of contract action. Defendant issued an automobile liability policy to Plaintiffs, which included uninsured/underinsured motorist coverage. The Plaintiffs are now suing to recover those benefits. None of the Plaintiffs' claims against the Defendant sound in tort theory, and there is certainly no allegation that Defendant contributed to the accident which resulted in Mallory Heffernan's death in Delaware. Any duty owed to the Plaintiffs by the Defendant arises out of the insurance contract. The questions at issue here are whether Defendant has breached a Maryland insurance contract and, if so, what damages Plaintiffs are entitled to recover. As discussed below, both of these questions should be resolved using Maryland law.

Application of the Maryland Choice of Law Rules to this Case Lead to the Use of Maryland Substantive Law

1. As a Breach of Contract Action, Maryland Law Applies to this Case

“Actions by insured or persons covered under insurance policies, against their insurers, for benefits under first-party coverages such as PIP or uninsured motorist, are contract actions and are generally controlled by principles applicable to contract actions.” Ward v. Nationwide Mutual Auto. Ins. Co., 328 Md. 240, 614 A.2d 85 (1992). Because this is a contract action, we look to *lex loci contractus* principles to choose the proper law to apply in this matter. Under the principle of *lex loci contractus*, the substantive law of Maryland should govern this action, rather than the law of Delaware.

“The *locus contractu* of an insurance policy is the state in which the policy is delivered and the premiums are paid.” AETNA Casualty & Surety Co., v. Souras, 78 Md. App. 71, 77, 552 A.2d 908, 911 (1989). There can be no dispute that in this case the *locus contractu* of the policy is Maryland. The insurance policy was delivered to the Plaintiffs in Maryland, to cover vehicles registered in Maryland, garaged in Maryland, and primarily driven in Maryland.¹ Plaintiffs, Maryland residents, paid the policy premiums in Maryland. Therefore, Maryland is the *locus contractu* and Maryland law should govern this contract action, under the principle of *lex loci contractus*.

2. Public Policy Requires That Maryland Law Be Applied

One of Maryland’s substantive laws, implicated in this action, is a statutory cap on non-economic damages. Black v. Leatherwood Motor Coach Corp., 92 Md. App. 27, 39, 606 A.2d 295, 300-301 (1992). Delaware does not impose such a cap. Therefore, whether Maryland or Delaware substantive law is applied to this case will have a significant impact on the amount of damages available to the Plaintiffs.

This case involves a Maryland insurance policy, issued under the laws of Maryland and based on those laws. Maryland has a strong public policy in creating reasonable insurance rates. This policy was behind the Maryland Legislature’s decision to enact the statutory cap on non-economic damages:

The General Assembly’s objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. . . A cap on noneconomic damages may lead to greater ease in calculating premiums,

¹ See Declarations Sheets for automobile insurance police and personal catastrophe policy, attached hereto as **Exhibits 1** and **2**, which make clear that the policies were issued and delivered to Plaintiffs at an address in Queenstown, Maryland, and that the automobile liability policy covers vehicles registered in Maryland.

thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services. Black v. Leatherwood Motor Coach Corp., 92 Md. App. 27, 47, 606 A.2d 295, 305 (1992), *citing* Murphy v. Edmonds, 325 Md. 342, 369-370, 601 A.2d 102 (1992).

Maryland has a strong interest in seeing its laws applied to cases involving Maryland insurance contracts, such as the one at issue here, so that Maryland's public policy will not be undermined.

The Plaintiffs' insurance contract was entered into in Maryland. The premiums paid by the Plaintiffs were based on Defendant's reliance on Maryland public policy and the existence of the cap on non-economic damages. By entering into an insurance contract in Maryland, the Plaintiffs contracted for the reasonable insurance rates ensured by the existence of the cap. Therefore, Maryland public policy is best advanced if this case is tried under Maryland substantive law.

3. Even if This Were a Tort Action, Maryland Law Should Be Applied

If Plaintiffs want Delaware law applied to this case, they would have to characterize this as a tort case, rather than a contract case. Even if Plaintiffs are successful in this characterization, which is doubtful given the clearly established law of Maryland that actions for uninsured motorist benefits are contract actions, the principles of *lex loci delicti* still point to the application of Maryland law. *Lex loci delicti* holds that the law of the place of the wrong governs. Md. Code, Courts and Judicial Proceedings, §3-903. In the present case the alleged wrong was Defendant's refusal to pay underinsured motorist benefits to Plaintiffs. This refusal occurred in Maryland, following

Plaintiffs' demand for those benefits, which was also made in Maryland. There is no allegation that Defendant committed any wrong in Delaware. Therefore, even if Plaintiffs' claims against Defendant did sound in tort, they would not be for any tort allegedly committed in Delaware. Thus Delaware law does not apply to this matter and Maryland law is the proper law to be applied.

4. Delaware is an Uninterested Jurisdiction, With No Contacts or Relationship to this Case

In addition to Maryland choice of law principles pointing to the application of Maryland law, the simple facts of this case reveal that Delaware just has no interest in this case or in the application of its law to this matter. This suit implicates no Delaware residents, no Delaware corporations, and no Delaware contracts. The only connection Delaware has to this case is that a fatal accident occurred on its roads. However, this case is not really about that accident, and certainly does not implicate any Delaware negligence or transportation laws. Delaware has no interest in seeing its laws applied to a Maryland insurance contract held by Maryland residents. Maryland, however, does have an interest in applying its laws to this case, and therefore, Maryland law should be applied.

Even If This Court Determines That Delaware Law Should Be Applied, Delaware Choice of Law Rules Point Back to the Use of Maryland Law

Should this Court determine that Maryland choice of law principles point to the application of Delaware law, an analysis of Delaware's choice of law rules points back to Maryland. Delaware applies "the most significant relationship" test to determine which jurisdiction's law applies. Travelers Indem. Co. v. Lake, 594 A.2d 38 (Del. 1991).

In a contract action such as this, Delaware determines the most significant relationship by considering the five contacts listed in the Restatement (Second) of Conflicts, §188(2). These factors are: (1) the place of contracting; (2) the place of negotiating the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. When applied to this case, almost all of the factors point exclusively to the application of Maryland substantive law, and none point to the use of Delaware law.

(1) The two contracts implicated in this action (the automobile insurance policy and the personal catastrophe insurance policy) were both entered into in Maryland, where the Plaintiffs reside and where the contracts were delivered. (2) The two contracts here are standard contracts, and no real negotiation took place. (3) Performance of the contracts by both parties was in Maryland. Plaintiffs paid their premiums in Maryland and Defendant's obligations under the contracts involved disbursing monies to the Plaintiffs in Maryland. (4) The automobile insurance contract covered vehicles registered in Maryland and garaged in Maryland at the Plaintiffs' residence. The personal catastrophe insurance policy covered various events which might occur in the lives of the Plaintiffs, Maryland residents. Therefore, the subject matter of both contracts was located in Maryland. (5) The Plaintiffs' reside in Maryland. Defendant is a Pennsylvania corporation which does business in Maryland.

Clearly, the weight of the above contacts indicate that Maryland has the most significant relationship to this case, not Delaware. In fact, if the above contacts are taken

into consideration, Delaware has no relationship to this contract action at all. Therefore, even if this Court finds that Maryland choice of law rules point to the use of Delaware law, it is clear that Delaware choice of law rules point to Maryland, and the doctrine of renvoi should be applied.

Conclusion

It is very clear that Maryland law properly applies to this case. This is a breach of contract action, and Maryland choice of law principles clearly require the application of Maryland substantive law. Furthermore, Maryland public policy will be undermined if Maryland law is not applied. Finally, Maryland has the most substantial relationship to this case, as Delaware has no interest in the application of its contract law to this case, involving a Maryland insurance contract held by Maryland residents. For all the foregoing reasons, Defendant respectfully requests that this Honorable Court rule that Maryland substantive law will be applied to this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2006, a copy of the foregoing **Memorandum of Points and Authorities in Support of Defendant's Motion in Limine Regarding Application of Maryland Law** was sent via electronic and mailed first-class, postage prepaid to:

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