THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-15045
	)	
GLIATECH, INC., et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
MEDMARC CASUALTY INSURANCE COMPANY, et al.,	)	Adversary Proceeding No. 02-1416
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
GLIATECH, INC., et al.,	)	**MEMORANDUM OF OPINION**
	)	
Defendants.	)	

The plaintiff insurance companies ask for a declaratory judgment that the product liability insurance policies issued by them to the Gliatech debtors-defendants do not cover punitive damage claims. The defendants take a contrary view, asking for a declaration that they are covered for punitive damages if a lawsuit is filed in a state where public policy permits such insurance.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTUAL OVERVIEW AND THE POSITIONS OF THE PARTIES

Medmarc Casualty Insurance Co. issued a series of commercial insurance policies to Gliatech, Inc., Gliatech Medical, Inc. (aka Gliatech R&D, Inc.), and GIC, Inc. (collectively, Gliatech) from 1995 through July 1, 2002. Federal issued excess insurance policies to Gliatech in 2000 and 2001 that follow form to the Medmarc policies. The policies cover Gliatech's products-completed operations, including a medical product called ADCON-L which Gliatech developed, manufactured, and distributed worldwide. ADCON-L is a surgical gel designed to reduce scarring after back surgery. The policies obligate Medmarc to defend ADCON-L claims made against Gliatech to date. The claims that have been made so far allege that defects in the ADCON-L product caused bodily injury to the claimants.

This dispute centers on insurance policies issued in 1998 and the following years. The policies do not have a choice of law provision. The insurers argue that Ohio law must govern these contracts. Because Ohio law prohibits insuring against punitive damages, the insurers contend they are not liable for any punitive damage award that may be entered against Gliatech.[1] Gliatech counters that it specifically bargained with Medmarc for punitive damage coverage where permitted by law and that to protect that expectation, Ohio law should not control.

FACTS

The parties presented evidence at trial and also stipulated to certain facts.

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[1] Ohio Revised Code § 3937.182 states: "No policy . . . of liability insurance . . . that is covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages." OHIO REV. CODE § 3937.182. *See also, State Farm Mut. Ins. Co. v. Blevins,* 168, 551 N.E.2d 955, 958 (Ohio 1990) (noting that Ohio law disfavors insurance coverage for punitive damages). *But see Celotex Corp. v. AIU Ins. Co. (In re Celotex Corp.)*, 152 B.R. 652, 659 (Bankr. M.D. Fla.) (applying Ohio law) (citing *State Farm Mut. Ins. Co. v. Blevins*, 551 N.E. 955, 958 (Ohio 1990), as creating a vicarious liability exception).

A. The Stipulated Facts[2]

(1) Plaintiffs have filed this action for declaratory relief to determine whether either has any obligation to provide coverage to Gliatech for any punitive damage claims.

(2) Gliatech filed Chapter 11 petitions in this Court on May 9, 2002.

(3) Gliatech, Inc. was a Delaware corporation with its principal place of business in Ohio.

(4) Medmarc is a mutual insurance company domiciled in Vermont, with its principal place of business in Virginia.

(5) Federal is an Indiana corporation with its current principal place of business in New Jersey, and during the years of Gliatech's operation, maintained a place of business in Massachusetts.

(6) Medmarc issued the following claims-made commercial insurance policies to Gliatech, which policies provide insurance coverage to Gliatech (among other things) for their products-completed operations and which policies were renewed annually for several years:

(a) Policy No. GLA1210194RMA, which policy was effective from July 1, 1995 through July 1, 1996 (the "1995 Medmarc Policy").

(b) Policy No. GLA1215492RMA, which policy was effective from July 1, 1996 through July 1, 1997 (the "1996 Medmarc Policy").

(c) Policy No. GLA1217642RMA, which policy was effective from July 1, 1997 through July 1, 1998 (the "1997 Medmarc Policy").

(d) Policy No. 98OH380009, which policy was effective from July 1, 1998 through July 1, 1999 (the "1998 Medmarc Policy").

(e) Policy No. 99OH380013, which policy was effective from July 1, 1999 through October 11, 1999.

(f) Policy No. 99OH020001, which policy was effective from October 11, 1999 through July 1, 2000.

(g) Policy No. 00OH020002, which policy was effective from July 1, 2000 through July 1, 2001 (the "2000 Medmarc Policy").

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[2] *See* Docket 93.

(h) Policy No. 01OH020002, which policy was effective from July 1, 2001 through July 1, 2002 (the "2001 Medmarc Policy").

(collectively, the "Medmarc Policies")

(7) Medmarc countersigned and issued the policies described in Paragraph 6 in Virginia.

(8) The Medmarc Policies described in Paragraph 6 relate to Gliatech's products, including a medical product called ADCON-L, which product Gliatech developed, manufactured, and distributed throughout the United States and abroad.

(9) ADCON-L is a surgical gel designed to reduce scarring after lumbar back surgery.

(10) The Medmarc Policies described in Paragraph 6 obligate Medmarc to defend ADCON-L claims made against Gliatech to date, which claims (including lawsuits and claims that have not been reduced to suit) involve bodily injuries alleged to have been suffered as a result of defects of ADCON-L and which claims have occurred in several states, including the State of Virginia.

(11) In 2000 and 2001, Federal issued from Boston, Massachusetts the following excess insurance policies to Gliatech:

(a) Policy No. (01)7970-68-79, which policy was effective from February 11, 2000 through July 1, 2001 (the "2000 Federal Policy"); and

(b) Policy No. 7970-68-79, which policy was effective from July 1, 2001 through July 1, 2002 (the "2001 Federal Policy").

(collectively, the "Federal Policies")

(12) The 2000 Federal Policy follows the form of the 2000 Medmarc Policy.

(13) The 2001 Federal Policy follows the form of the 2001 Medmarc Policy.

(14) Gliatech has notified Federal that claims exist, but Federal has not so far been called upon or required to defend or indemnify any ADCON-L claims or settlements.

(15) Gliatech secured all of the Medmarc Policies and the Federal Policies through its broker, Britton-Gallagher & Associates of Cleveland, Ohio ("Britton-Gallagher").

(16) The negotiations for the Medmarc Policies and the Federal Policies were documented by telephone, fax, and electronic mail between Ohio, Virginia and Massachusetts.

(17) The Medmarc Policies and the Federal Policies were mailed from Virginia and Massachusetts, respectively, and were delivered to Gliatech through Britton-Gallagher in Ohio.

(18) Gliatech paid premiums from 1997 to 2001 from its Ohio headquarters to Britton-Gallagher in Ohio, and the premiums were then forwarded to Medmarc and Federal in Virginia and Massachusetts, respectively.

(19) The Medmarc Policies and the Federal Policies provide worldwide coverage.

(20) The 1995, 1996 and 1997 Medmarc Policies include the following provision:

> "We agree that this policy does not apply to a claim of or indemnification for punitive or exemplary damages whether in the form of fines, penalties, multiplication of compensatory awards or damages, or in any other form whatsoever."

(21) In July 1997, Britton-Gallagher requested that Medmarc delete the punitive damage exclusion from the 1997 Medmarc Policy.

(22) On July 15, 1997, Medmarc advised Gliatech that it could delete the punitive damages exclusion for a premium charge of 10%.

(23) The punitive damages exclusion was not removed from the 1997 Medmarc Policy.

(24) The punitive damages exclusion was removed from the 1998 Medmarc Policy, and all subsequent Medmarc policies issued to Gliatech.

B. The Trial Evidence[3]

At trial, Medmarc called as a witness Jeffrey Stroud, the Medmarc casualty underwriter involved in Gliatech's insurance. Gliatech called Sheri Bartos and Bruce Ball from Britton-Gallagher, Gliatech's insurance broker. The parties also submitted joint exhibits.

The disputed issues of fact at trial concern the events that led up to Medmarc issuing the 1998 policy. These findings of fact reflect the court's weighing of the evidence, including

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[3] This matter was heard on the merits. (Docket 66). The parties limited their evidence and arguments to the issue of choice of law, an issue that was addressed earlier on cross motions for summary judgment. The summary judgment motions were denied because there was a genuine issue of material fact regarding the parties' justifiable expectations. (Docket 72, 73).

determining the credibility of the witnesses. In doing so, the court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogden (In re Trogden), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

* * * * *

In the years in question, Gliatech purchased its insurance policies through Britton-Gallagher, an insurance broker. Bruce Ball and Sherri Bartos were the primary people at Britton-Gallagher who worked on the Gliatech account. Ball, the agency's CEO, has more than 20 years experience in the insurance field and is the one who worked directly with Gliatech's representative to identify Gliatech's insurance needs and fill them. Bartos is also a 20-year veteran in the insurance business and a long-time Britton-Gallagher employee. Basically, Ball would confer with the client and give information to Bartos, who would then research possible carriers to provide coverage, obtain bids, and give the comparative bid information to Ball. The process was fluid; there were exchanges between and among Gliatech, Ball, Bartos, and the carriers as they explored different options such as amount and extent of coverage and cost. Ultimately, Gliatech would decide which policy it wanted to purchase.

Medmarc specializes in insuring medical device companies that make and sell products for the medical industry. Bartos dealt with Jeffrey Stroud of Medmarc when she was trying to place coverage with that carrier. Stroud also has an impressive background in the insurance business, including nine years with Medmarc as an underwriter. In his role as an underwriter, he decides what coverage to write, what the terms will be, and what premium to charge.

Speaking generally, Medmarc has a form that it uses for all products liability coverage. The insured and Medmarc then negotiate over whether to add endorsements to the basic policy or delete them if they have been in a prior year's policy. An endorsement can either expand or restrict coverage.

The standard policy states in part that Medmarc:

> . . . will pay those sums that [the insured] becomes legally obligated to pay as damages because of "bodily injury" or "property damage" included within the "products-completed operations hazard" to which this insurance applies.

The 1995 and 1996 policies issued by Medmarc to Gliatech include two relevant endorsements, the first of which restricted coverage and the second of which expanded it:

Endorsement # 8 EXCLUSION-PUNITIVE OR EXEMPLARY DAMAGE:

> We agree that this policy does not apply to a claim of or indemnification for punitive or exemplary damages whether in the form of fines, penalties, multiplication of compensatory awards or damages, or in any other form whatsoever.

Endorsement # 10 WORLDWIDE COVERAGE ENDORSEMENT

> . . . It is agreed that the insurance afforded by this policy for Products Liability and Completed Operations Coverage shall apply anywhere in the world (and is subject to local jurisdictions) subject to policy limits on products sold, handled or distributed by the named insured.
>
> It is further agreed that such insurance as is afforded by the policy for Bodily Injury or Property Damage shall apply within the country or countries indicated in the schedule below when such

> claims are made and prosecuted outside of such country or countries. [schedule omitted]

The policies also included an endorsement titled "OHIO CHANGES-CANCELLATION AND NONRENEWAL." The endorsement, which is mandatory in Ohio, provides an insured with additional protection by regulating cancellation and nonrenewal terms.

The relationship between insurer and insured was uneventful in 1995 and 1996. In 1997, as part of the negotiations leading up to the issuance of the 1997 policy, Gliatech asked Britton-Gallagher to obtain punitive damage coverage. Carol Salupo (Gliatech's account representative at Britton-Gallagher) responded by asking Medmarc to delete the punitive damage exclusion from the policy. Stroud replied that "[w]e can delete the punitive damages exclusion for a premium charge of 10%." (Jt. exh. 16). Ball took this information back to Rod Dausch, Gliatech's vice-president of finance, who decided that Gliatech did not want to change the coverage at that time. As a result, Medmarc issued the 1997 policy with endorsement #8, which excluded punitive damage coverage.

When it came time to purchase coverage for the 1998 year (July 1, 1998 through July 1, 1999), Gliatech once again instructed Britton-Gallagher to obtain punitive damage coverage. This time, the coverage was a priority for Gliatech. Bartos investigated keeping the insurance with Medmarc or moving it to Chubb. Bartos called Stroud and asked what the charge would be to remove the punitive damage exclusion. Stroud replied that Ohio would not allow an endorsement that affirmatively provided punitive damage coverage, but Medmarc could remove the exclusion for a 10% additional premium. This was consistent with the information Stroud had given to Salupo the year before.

A word of explanation. According to Bartos, there is an understanding in the industry as to the significance of including an exclusion for punitive damages and removing the exclusion.

The understanding is that when an endorsement is included that excludes punitive damage coverage, there is no punitive damage coverage anywhere. When a policy *drops* the endorsement and is silent on the punitive damage issue, the insured is covered for punitive damages in any state where those damages are insurable by law. Some states permit punitive damage insurance and others do not; Ohio does not permit it. In other words, when the policies included endorsement #8 which excluded punitive damages, Gliatech did not have any punitive damage coverage whatsover. By dropping the exclusion, Gliatech would still not be insured against punitive damages if a party sued in Ohio because Ohio does not permit such insurance. If, however, in the course of its worldwide operations Gliatech was sued in a state that did permit such insurance, Gliatech would have the benefit of the insurance.

Bartos has negotiated more than 100 product liability policies over the years with 20-25 different carriers, which is the basis for her understanding. Ball testified to the same understanding based on similar experiences. Both Ball and Bartos had clear recollections of the conversations and events leading up to the 1998 policy and the court finds their explanations to be satisfactory and their testimony credible.[4]

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[4] Stroud testified to a different understanding. While Bartos has a clear recollection of her conversations with Stroud on this topic, he does not have any recollection. He does not think he would have told her there was a 10% premium for dropping the exclusion because Medmarc does not generally charge for dropping the exclusion. His written statement to the contrary in 1997 was, he thinks, a mistake. According to Stroud, the only punitive damage coverage Medmarc offers is a most favored venue endorsement that affirmatively states punitive damages are covered where allowed by law. He could not write a policy with that endorsement in Ohio. He did not, however, ever tell Bartos that dropping the exclusion would not make any difference in the coverage provided nor did he tell her that Medmarc intended to take the position that Ohio law governed the policy and protected Medmarc from paying any punitive damages. He did not offer a convincing explanation for what effect it would have to drop the exclusion, stating that he thought it probably meant that a court would decide the issue at a later point. In the insurance companies' trial brief, it states that "the parties knew that dropping the punitive damages exclusion would only provide Gliatech for [sic] insurance coverage when punitive damages are imposed vicariously against a corporate insured." Plaintiffs' trial brief at 3. (Docket 74). There was nothing in Stroud's testimony to support this.

Returning to the 1998 policy negotiations, Bartos also obtained a quote from Chubb for insuring Gliatech. Chubb also quoted her a 10% additional premium to remove the punitive damage exclusion from the products liability policy.

Ball reported to Dausch that they had been successful in obtaining punitive damage coverage and presented the Chubb and Medmarc proposals for his consideration. Gliatech chose to place its insurance with Medmarc, dropping the punitive damage endorsement. Gliatech understood this to mean that something had changed between the 1997 and 1998 policies: in 1997, Gliatech had no punitive damage coverage because of the endorsement; in 1998, Gliatech had such coverage in states that permit punitive damages to be insured because the endorsement had been removed.[5] The policies issued for 1999, 2000, 2001, and 2002 did not have the punitive damage exclusion endorsement either. If Bartos had been told that Medmarc would take the position that Ohio law applied to the policy with the result that it would deny all punitive damage coverage regardless of the forum, she would have placed the Gliatech insurance with another carrier. Bartos has not had any other situation where a carrier dropped a punitive damage exclusion and then claimed it would not cover punitive damages in any venue under any circumstances.

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[5] The evidence was inconclusive as to whether Gliatech actually paid an additional 10% premium as the cost of dropping the exclusion. Among other things, there was no testimony as to how such a premium would be calculated; i.e. 10% of what? The 1997 and 1998 policy premiums cannot be directly compared because they did not provide identical coverage on coverage limits and the rate was based on different projected product sales. Even if Medmarc did not charge an additional 10% (whatever that might have meant), it would not change the representations made by Medmarc concerning providing punitive damage coverage in certain situations.

C. Pending punitive damage claims

There are several bodily injury claims pending against Gliatech that include requests for punitive damages. The parties provided this description of the claims:[6]

1. *Steven Larsen v. Gliatech, Inc., Pharmacia Corporation, Mercy General Hospital, and Christopher Neuberger,* Sacramento (California) Superior Court Case No. 02AS01887.

2. *Jack Lawrence Bunch and Carolyn Bunch v. Wright Medical Technology, Inc.; Gliatech Inc. a/k/a Gliatech Medical Inc., a/k/a Gliatech R&D Inc.; Pfizer, Inc.; and Pharmacia Corporation*, Knox County (Tennessee) Circuit Court Case No. 1-489-03. Subsequently, this case has been moved to federal court, styled as *Jack Lawrence Bunch and Carolyn Bunch v. Wright Medical Technology, Inc.; Gliatech, Inc, a/k/a Gliatech Medical Inc , a/k/a Gliatech R&D Inc.; Pfizer, Inc.; and Pharmacia Corporation*, United States District Court Eastern District Tenn., Case No. 03-00479.

3. *Eileen and Joseph Wawrzynek* v. *Gliatech Inc.*, United States District Court Eastern Dist. Pennsylvania, case No. 03-5346. It should be noted that plaintiffs in this action (the "Wawrzyneks") had previously agreed not to pursue a claim for punitive damages in exchange for . . . dismissal from this Adversary Proceeding. They have nonetheless pled a cause of action for punitive damages, and efforts are underway to persuade them to amend. The Wawrzyneks never filed a proof of claim in the Debtors' bankruptcy cases. The Wawrzyneks, however, filed a Motion for Relief from Stay, and on December 12, 2002, the Court entered an Agreed Order Granting the Motion to Modify Stay to Permit Prosecution of Pending Personal Injury Suit, docket no. 398. The Wawrzyneks did not object to the Plan, which provides that product liability creditors would not be able to recover estate assets other than insurance policy proceeds.

4. In addition, the claims of Clair Prior, Barbara Carrington, Eileen O'Neill and Dorothy Lavender (recently granted a modification of the automatic stay) will be asserted by amendment of an action presently pending in Massachusetts. The plaintiffs in the present action, *Prior, et al. v Pharmacia Corporation, Pfizer, Inc. Nobel Hospital and Mercy Hospital*, Hampton County (Massachusetts) Superior Court Case No. HDCV 2003-00861, do not seek punitive damages. The Plaintiffs, however, seek treble damages and it is possible that when Gliatech is added as a nominal defendant, the complaint could be amended to include punitive damage[] allegations against Gliatech only.

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[6] As the evidence did not address these pending claims, the parties provided this information at the court's request. (Docket 96, 98).

> 5. Pursuant to the Stipulation and Agreed Order Granting Joint Motion of Debtors and Certain Product Liability Claimants to Modify Automatic Stay and Provide Waiver of Distribution from the Estates, entered by the Court on April 8, 2004, docket no. 1273 . . . Mr. Larsen, the Bunches, Ms. Prior, Ms. Carrington, Ms. O'Neill and Ms. Lavender, have all agreed to release any claims against the Debtors' estates, withdraw their proofs of claim filed in these cases, and only pursue the Debtors' insurance policies and proceeds. They have also agreed not to receive any distribution pursuant to the Debtors' Amended Liquidating Chapter 11 Plan[.]

(Docket 98) (emphasis deleted). A choice of law is required because Ohio, California, Tennessee, and Pennsylvania have different laws on whether punitive damages are insurable.[7]

DISCUSSION

A. The positions of the parties

Medmarc and Federal request a determination that the policies do not provide Gliatech with coverage for punitive damages.[8] Their request is premised on Ohio law being chosen as the applicable law on that issue because Ohio law does not permit insurance coverage for punitive damages. *See* footnote 1.

Gliatech opposes this request and asks that the insurance companies be required to indemnify punitive damages. Gliatech argues that it expected that Ohio law would *not* apply and given that expectation, the issue of punitive damage coverage should be determined under the law of the state where each lawsuit is filed. According to the parties' supplemental joint statement, lawsuits asking for punitive damages are now pending in California, Tennessee, and Pennsylvania.

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[7] *See generally* Richard L. Blatt, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE §§ 8.15, 8.45, 8.48, and 8.52 (2004) (discussing the laws of Ohio, California, Tennessee, and Pennsylvania on this issue).

[8] This request for declaratory judgment is appropriate under the circumstances. *See* Memorandum of Opinion regarding motion to dismiss and cross motions for summary judgment (Docket 72).

Gliatech also argues that any ambiguity in the policies must be construed in their favor. The insurance companies respond that Gliatech knew the insurance companies would not and could not insure it for such damages and "that dropping the punitive damages exclusion would only provide Gliatech [with] insurance coverage when punitive damages are imposed vicariously against [it]." Plaintiffs' trial brief at 3. (Docket 74).

B. Choice of law

The policies do not include choice of law provisions. As Ohio is the forum state, its rules control the choice of law determination. *See* Memorandum of Opinion regarding motion to dismiss and cross motions for summary judgment. (Docket 72). Ohio's choice of law rules provide that when a contract does not include a choice of law provision "the law of the state with the more significant relationship to the contract should govern disputes arising from it." *Nat'l Union Fire Ins. Co v. Watts*, 963 F.2d 148, 150 (6th Cir. 1992).

To determine which state has the more significant relationship to a contract, Ohio has adopted the test set forth in the Restatement (Second) of Conflict of Laws § 188. *Id.* That section tells courts to consider these state contacts: (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. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (2003).

Ohio also looks to restatement §6 in doing the §188 analysis. Section 6 identifies these additional factors: "(a) the needs of the interstate and international systems; (b) the relevant

policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied." RESTATEMENT (SECOND) CONFLICT OF LAWS § 6.

Read together, restatement §§ 188 and 6 provide Ohio's general framework for the resolution of choice of law issues in the insurance contract setting. *See Int'l Ins. Co. v. Stonewall Insurance Co.*, 86 F.3d 601, 606 (6th Cir. 1996). The list of factors and contacts is not exclusive and they need not be given equal weight in every circumstance. *Id.* Choice of law determinations "are frequently fact driven and each case has to be analyzed within its own factual context." *Id.* at 608.

The insurance companies argue that Ohio law should control the issue of punitive damage coverage because Ohio has a significant relationship to the policies. Their argument focuses on the contacts which Ohio has with the parties and their dealings. Gliatech, on the other hand, argues that those contacts do not favor any particular state and the determination should focus on the parties' justifiable expectations which favor the application of the various laws of the states where each lawsuit is filed.

Restatement § 188

§§ 188(2)(a) and (2)(b)

The first two contacts, the place of contracting and negotiation, favor the application of Ohio law. The insurance policies appear to have been made in Ohio because they were delivered to Gliatech in that state through its agent. *See* Comment (e) to restatement § 188(2). ("As used

in the Restatement . . . the place of contracting is the place where occurred the last act necessary . . . to give the contract binding effect[.]"). The contracts were also negotiated primarily in Ohio. This is so even though the policies were negotiated by telephone, fax and electronic mail between Ohio, Virginia, and Massachusetts because the insurance companies were doing business in Ohio, the policies include Ohio endorsements and the premiums were paid to Gliatech's agent in Ohio and then forwarded to the insurance companies. While these contacts favor the application of Ohio law they are not particularly significant in this context. *See* Comment (e) to restatement § 188(2) (noting that: (1) the place of contracting standing alone is a relatively insignificant contact and (2) the place of negotiation "is of less importance when there is no single place of negotiation and agreement[.]").

§ 188(2)(c)

The place of performance must also be considered. The policies provide Gliatech with worldwide coverage which obviously insures it in all 50 states. The policies also require the insurance companies to provide a defense for Gliatech in any state in which a product liability suit is filed. Under these facts, the contracts are to be performed in multiple locations; i.e., the states where the debtors are sued and in which the insurance companies are required to provide a defense and coverage. Claims for punitive damages have been made in California, Pennsylvania, and Tennessee. This factor favors the application of the laws of those states.

§ 188(2)(d)

The next contact to be considered is the subject matter of the policies. The subject matter of a contract corresponds to the insured risk described in § 193 of the restatement. *See Ohayon v.*

Safeco Ins. Co. of Ill., 747 N.E.2d 206, 211 (Ohio 2001). *See also* Comment (e) to § 188(2).[9] "An insured risk, namely the object or activity which is the subject matter of the insurance, has its principal location . . . in the state where it will be during at least the major portion of the insurance period." RESTATEMENT (SECOND) CONFLICT OF LAWS § 193 (Comment (b)).

There are two potential ways to characterize the subject matter of the policies at issue. The subject matter can be viewed as Gliatech's potential product liability. *See Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 606 (6th Cir. 1996) (finding that the insured risk under a liability policy was the possibility of adverse tort judgments). This is the view supported by Bartos's testimony because it is patently clear that Gliatech purchased the policies with the intention of obtaining coverage for its potential product liability including punitive damages. The policies provide worldwide coverage and the debtors' medical products were developed, manufactured and distributed throughout the United States and abroad. Therefore, because Gliatech can be sued in any state and there does not appear to be a principal location of the subject matter of the policies, no particular state's laws are favored by this factor. Alternatively, the potential depletion of Gliatech's assets can be viewed as the insured risk. *Id.* Under that view, Ohio as the principal location of the debtors' business is the state most connected to the

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[9] Section 193 of the restatement deals specifically with insurance contracts and provides that the validity of and rights created by a casualty insurance policy are to be determined by the law of the state which the parties to the contract understood to be the principle location of the insured risk during the term of the policy unless (with respect to the particular issue) a different state has a more significant relationship under the principles stated in restatement § 6. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 193. Section 193 is most often applied when the insurance policy deals with a specific physical thing, such as property or chattel, or deals with a localized risk. Section 193 does not apply here because Gliatech's policies did not insure specific property and did not deal with a localized risk. Also, to the extent the insured risk is viewed as Gliatech's potential product liability there was no "principle location" of that risk. Alternatively, to the extent the insured risk is viewed as the potential depletion of Gliatech's assets, there is no evidence that the parties had come to any understanding regarding the principal location of that risk.

subject matter of the policies. The better view based on the facts presented is that the subject matter of the policies was Gliatech's potential liability. As this is a risk which depends on the law of the state which governs the claim, this factor weighs in favor of applying the laws of the various states on the issue of punitive damage coverage.

§ 188(2)(f)

The final factor to be considered is the place of incorporation and business of the parties. Gliatech is a Delaware corporation and its principal place of business is Ohio. Medmarc is a Vermont insurance company and its principal place of business is Virginia. Federal is an Indiana corporation which has done business in Massachusetts and New Jersey. Once again, these contacts do not favor the application of any particular state's laws.

Restatement § 6

The principles set forth in § 6 of the restatement must next be considered. Several of them are not particularly significant to this dispute. The needs of the interstate system, the relevant policies of other interested states, the policies underlying the field of insurance law, certainty, predictability and uniformity and ease in determining and applying the law are principles which are not directly relevant to the issue of punitive damage coverage and a decision in this case will not impact them. Also, Ohio has not adopted an exception to its choice of law principles which would require consideration of its public policy. *See Nationwide Mut. Ins. Co. v. Ferrin,* 487 N.E.2d 568, 569 (Ohio 1986). Consequently, Ohio's policy regarding punitive damages is not particularly relevant either. Finally, restatement § 6 requires consideration of the policies and interests of other interested states. Although each state which allows punitive damage coverage may have an interest in the application of its laws to protect its citizens in actions pending in that state, that interest is attenuated when considered in the context of this declaratory action regarding liability insurance coverage.

The protection of justified expectations is the final principle to be considered under restatement § 6 and in this case it is the most significant one. *See, for example, Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601 (6th Cir. 1996) (addressing the question of coverage for an insured's liability to a tort plaintiff and determining that protection of justified expectations was the most significant choice of law factor to be considered). Gliatech's medical products were made and distributed throughout the United States and overseas and insurance coverage for punitive damages was important to it. The evidence establishes that Gliatech specifically negotiated with Medmarc for that coverage; as a result of those negotiations, the parties dropped the punitive damage exclusion from the 1998 policy and the years following. Gliatech had a clear understanding that it had obtained punitive damage coverage to the extent it was sued in any state where those damages are insurable by law. On the other hand, based on the negotiations and the absence of a choice of law provision in the policies, the insurance companies did not have a justifiable expectation that any particular state's law would apply to the policies on the issue of punitive damage coverage. Consequently, the parties' justified expectations regarding coverage are best protected by finding that the insurance companies' liability for punitive damage coverage is to be determined by applying the laws of the various states where product liability actions have been filed against Gliatech.

* * * * *

Upon consideration of the contacts and factors set forth in restatement §§ 188 and 6, the insurance companies' obligation to provide coverage for punitive damages to Gliatech should be determined based on the laws of the particular state where each lawsuit requesting an award of punitive damages is filed.

CONCLUSION

For the reasons stated, judgment will be entered in favor of the defendants, with the court finding that the insurance companies' obligation to provide coverage for punitive damages under the policies issued in 1998 and succeeding years is to be determined by the laws of the state where the claim against Gliatech is filed.

A separate judgment reflecting this decision will be entered.

Date: 6 August 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by clerk's office email and by the Bankruptcy Noticing Center on:

Diana Thimmig, Esq.
Donald Erickson, Esq.
Sean Malloy, Esq.
Ned Searby, Esq.

THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-15045
	)	
GLIATECH, INC., et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
MEDMARC CASUALTY INSURANCE COMPANY, et al.,	)	Adversary Proceeding No. 02-1416
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
GLIATECH, INC., et al.,	)	**JUDGMENT**
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, judgment is entered in favor of the defendants, with the court finding that the plaintiffs' obligation to provide coverage for punitive damages under the policies issued in 1998 and succeeding years is to be determined by the laws of the state where the claim against the defendants is filed.

Date: 6 August 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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