SEMTEK INTERNATIONAL INCORPORATED	*	IN THE
	*	CIRCUIT COURT
Plaintiff		
v.	*	FOR
LOCKHEED MARTIN CORPORATION	*	BALTIMORE CITY
Defendant	*	Part 20
	*	Case No.: 97183023/CC 3762
	*	

****

MEMORANDUM AND OPINION

I. Case Summary

This case arises out of an unconsummated commercial enterprise between Semtek International Incorporated (hereinafter "Semtek") and Merkuriy, Ltd. (a Russian entity) involving the commercialization of a former Soviet military satellite and the launch of additional satellites as part of an international communications system.[1]

On August 9, 2002, pursuant to Section 10-504 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, Lockheed filed a notice of intention to rely on the law of Massachusetts. Semtek filed a motion to preclude Lockheed from seeking application of Massachusetts law on November 12, 2002, and on December 2, 2002, Lockheed filed its opposition to Semtek's motion. Semtek's reply in support of its motion to preclude application of Massachusetts law was filed on December 17, 2003.

II. The Statutory Requirement of Notice

[1]For procedural history, see this court's earlier opinion on Lockheed's motion to dismiss, issued March 20, 2002, pp. 1-3.

Maryland Law provides that:

> A party may also present to the trial court any admissible evidence of foreign laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken of it, reasonable notice shall be given to the adverse parties either in the pleadings or by other written notice.

Md. Code Ann. [Cts. & Jud. Proc.] §10-504.

Without citing authority, Semtek argues that Lockheed failed to provide reasonable notice of its intent to rely on Massachusetts law. Maryland courts have interpreted reasonable notice liberally. *See, e.g.*, *Morris v. Peace*, 14 Md. App 681, 685-86 (1972) (notice of intent to rely on foreign law was reasonable when given one day before trial, and the trial judge indicated a willingness to grant a continuance in order to avoid surprise), *Parkside v. Linder*, 252 Md. 271, 273 (1969) (notice deemed inadequate where defendant "received no notice of appellant's intention to rely on foreign law"). Under the unique circumstances of this case, the Court believes that Lockheed's notice is reasonable.

Semtek argues that it has been prejudiced by Lockheed's delay in filing notice. Again, no authority is cited. Semtek points to Lockheed's acknowledgment that notice may be filed up to the start of trial "provided that there is no prejudice to the other party." Lockheed Br. at 4. Prejudice in the outcome has not specifically been set forth in Maryland case law, however, as a criterian for determining reasonable notice. Rather, it is imperative that no *unfair surprise* would result from a tardy notice of intent to rely on foreign law. *Frericks et al v. General Motors Corp.*, 274 Md. 288, 297 (1975). In this case, Semtek has not been unfairly surprised since the trial is not scheduled to take place until April 4, 2003[2] and the parties have made a joint request to the court to continue the trial date until September 22, 2003. Discovery is still ongoing and cannot be completed pursuant to the original schedule. Again, under the circumstances presented, the Court finds that Lockheed has complied with §10-504 of the Courts and Judicial

[2]See amended pre-trial scheduling order filed November 28, 2001.

Proceedings Article.

III. Judicial Estoppel

It is well established in Maryland that "a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action." *Stone v. Stone*, 230 Md. 248, 253 (1962), *Gordon v. Posner*, 142 Md. App. 399, 426 (2002).[3] Judicial estoppel prohibits litigants from taking advantage of inconsistent positions in different cases to the detriment of opposing parties, thereby creating the perception that either the first or the second court was misled. *See Stone*, 230 Md. at 253; *Eagan v. Calhoun*, 347 Md. 72, 87-88 (1997); *Gordon*, 142 Md. App. at 428; *Roane v. Washington County Hosp.*, 137 Md. App. 582, 592, *cert. denied*, 364 Md. 463 (2001); *United Book Press, Inc. v. Maryland Composition Co., Inc.*, 141 Md. App. 460, 469 (2001).

Recently, the United States Supreme Court explained that the purpose of the judicial estoppel doctrine is "'to protect the integrity of the judicial process,'" by "'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *New Hampshire v. Maine*, 121 S. Ct. 1808, 1814 (2001) (citations omitted). The Court identified several factors generally present in cases where courts have invoked the doctrine, including: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) the party has "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled;'" and (3) the party "seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the

[3]For discussion of judicial estoppel, see this court's earlier opinion on Lockheed's motion to dismiss, issued March 20, 2002, pp. 4-8.

opposing party if not estopped." 121 S. Ct. at 1815 (citations omitted).

Fourth Circuit cases identify the "determinative factor" as "intentionally mis[leading] the court to gain unfair advantage." *Tenneco Chems., Inc., v. William T. Burnette & Co., Inc.,* 691 F.2d 658, 665 (4th Cir. 1982); *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26 (4th Cir. 1995); *Lowery v. Stovall, et al.*, 92 F.3d 219, 225 (4th Cir. 1996).

Lockheed appears to have occupied inconsistent positions.[4] This court is not aware of any advantage that Lockheed would gain through the application of foreign law, however, nor does it have any evidence to support a finding of intentionality. Consequently, defendant is not estopped from relying on Massachusetts law.

IV. *Lex Loci Delicti*

Both parties agree that Maryland has adopted the *lex loci delicti* choice of law approach, under which the court uses the law of the jurisdiction where the wrong took place. While plaintiff concedes that "Maryland courts have not yet specifically spoken as to the issue of where the 'wrong' occurs in cases of pecuniary injury," *Banca Cremi v. Brown*, 955 F. Supp. 499, 522 (D. Md. 1997), it uses federal and out-of-state law to support its contention that the "wrong" in this case can be defined as the last act necessary to complete the tort. *Mid-Atlantic Telecom, Inc. v. Long Distance Services*, Inc. 32 Va. Cir. 75 (1993), *Insurance Company of North America, Inc. v. United States Gypsum Co.*, 639 F. Supp. 1246, 1248-49 (W.D. Va. 1986). Semtek alleges that Lockheed ghost-wrote the facsimile sent from Sirivin in Russia from its Bethesda, Maryland location. It further alleges that high-level Maryland-based executives discussed "the commercial

[4] On December 7, 2001, Lockheed argued successfully in its motion to dismiss that Semtek's Count III failed to state a cause of action under Maryland law. Lockheed was also successful in its motion to dismiss Count IV because the allegations contained in that count are duplicative of those contained in Count II. It now seeks to proceed under the law of Massachusetts.

development of the Russian satellites as well as how to overcome the Russians' contractual commitment to Semtek's marketing that satellite capacity" at a meeting in Bethesda. Affidavit of Steven Shuman, Semtek Exhibit 1, p. 2. Characterizing these acts as the last acts necessary to complete the tort, Semtek would have this court apply Maryland law.

Lockheed urges this court to apply Massachusetts law, since it is the home state of the plaintiff and therefore where the financial injury was suffered. Lockheed argues that this approach has been pronounced as the law in Maryland, *Philip Morris, Inc. v. Angeletti*, 358 Md. 689 (2000), *Johnson v. Orowheat Foods Co.*, 785 F.2d 503 (4th Cir. 1986), and provides federal and out-of-state authority indicating a similar interpretation. *See, e.g.*, *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 554, 555 (M.D. N.C. 1999) (holding that "the state where the injury occurred in a fraud claim is the state in which the plaintiff suffered the economic impact"); *Glass v. Southern Wrecker Sales*, 990 F. Supp. 1344, 1348 (M.D. Ala.1998) ("courts consistently conclude that the state where the injury occurred in a fraud claim is the state in which the plaintiff suffered the economic impact."); *Management Science America, Inc. v. NCR Corp*., 765 F. Supp. 738, 740 (1991) ("Federal courts applying the law of these forums to fraud claims consistently have considered the tort to have been committed in the state where the economic loss occurred and not where the fraudulent misrepresentations were made.").

In *Philip Morris, Inc. v. Angeletti*, 358 at 746, the Court of Appeals cited *Johnson v. Orowheat Foods Co.*, 785 F.2d at 511, to illustrate the point that under Maryland's *lex loci delicti* conflict of law jurisprudence, the place of the injury is the place where the injury was suffered, not where the wrongful act took place.[5] Several federal cases specifically applying

[5]*See Philip Morris, Inc. v. Angeletti*, 358 at 747-48 where the Court of Appeals ordered the plaintiff class in a mass tort case decertified due to the lack of cohesiveness of their issues. The court ruled that Maryland law would not necessarily apply to all members of the class since the alleged injury-in-fact, nicotine dependence, "clearly may

Maryland law, in addition to those cited by Lockheed, have come to the same conclusion. *See, e.g., Georgetown College v. Madden*, 505 F. Supp. 577, 569 (D. Md. 1980) ("In tort actions, Maryland applies the doctrine of lex loci delicti; the applicable substantive law is the law of the place of the wrong, i. e., the law of the state in which the injury occurs."), *Upgren v. Executive Aviation Services*, Inc. 326 F. Supp. 709, 711-12 (D. Md. 1971), *quoting* Annotation, 77 ALR 2d 1266 (1961) at 1273 ("the general rule is that the place of the tort ... is *the place where the injury or death was inflicted* and *not the place where the allegedly wrongful act or omission took place*").

Although the *lex loci* doctrine in Maryland as applied to tort cases involving pecuniary injury is unclear, *see Banca Cremi v. Brown*, *supra*, this court will apply analogous choice of law principles to the instant case. These principles dictate that the place of injury is the place where the harm was sustained. Accordingly, Massachusetts law will be applied, since Semtek alleges financial harm to its business, which is located there.

V. Conclusion

Lockheed has complied with the requirements of §10-504 of the Courts and Judicial Proceedings Article by providing reasonable notice. Judicial estoppel is not applicable here since there is no evidence of intentionality or unfair advantage. The *lex loci delicti doctrine* provides that the law of the jurisdiction in which the injury was sustained should be applied. Here, the pecuniary harm was felt in Massachusetts, so the law of that state applies. Accordingly, plaintiff Semtek's motion to preclude defendant Lockheed from seeking application of Massachusetts law is **DENIED**.

---

have occurred in a state other than Maryland." Even though this case involved personal injury claims, it provides evidence that Maryland's highest court would look to the place where the injury was suffered in any such choice of law analysis.

ALBERT J. MATRICCIANI, JR.
Judge
February 11, 2003

cc:
Jack D. Lebowitz, Esquire
Vadim A. Mzhen, Esquire
Lebowitz & Mzhen, L.L.C.
10 Crossroads Drive
Suite 105
Owings Mills, Maryland 21117

Andrew W. Zepeda, Esquire
Lurie & Zepeda
9107 Wilshire Boulevard
Suite 800
Beverly Hills, California 90210

Leslie N. Reizes, Esquire
Reizes Law Firm, Chartered
1177 George Bush Boulevard, Suite 308
Delray Beach, FL 33483

Francis B. Burch, Jr., Esquire
Anthony L. Meagher, Esquire
Brett Ingerman, Esquire
Piper Rudnick, L.L.P.
6225 Smith Avenue
Baltimore, Maryland 21209

Robert E. Willett, Esquire
Richard W. Buckner, Esquire
Jess B. Frost, Esquire
O'Melveny & Meyers, L.L.P.
400 South Hope Street
Los Angeles, California 90071

Thomas V. Girardi, Esquire
Girardi & Reese
1126 Wilshire Boulevard
Los Angeles, California 90017

Walter K. Lack, Esquire
Steven C. Shuman, Esquire
Engstrom, Lipscomb & Lack
10100 Santa Monica Boulevard
Suite 800
Beverly Hills, California 90067