

Finding and Keeping Your Forum Choice of Law in Allocation Cases



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Identifying Potential Forums: What Jurisdictions' Laws Are in Play?

- The place of contracting;
- The place of negotiation of the contract;
- The place of performance;
- The location of the subject matter of the contract; and
- The domicile, residence, nationality, place of incorporation and/or place of business of the parties.
 - At time of contracting
 - At time of occurrence
 - At time of suit
 - At time claims were being handled
- Principle Location of the insured risk
- Jurisdiction with the most significant interest

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Identifying Potential Forums: What Jurisdictions' Laws Are in Play?

- For products claims
 - Place of manufacture?
 - Where the majority of claims were filed?
 - Where the claims were managed?
- For Environmental sites
 - Place of Contracting
 - Location of Site
 - Single site in single jurisdiction?
 - Multiple sites in multiple jurisdictions?
 - Site(s) in one jurisdiction impacting another?
 - Location where waste was generated
- Hybrid or other claims
 - Claims against a multi-state organization regarding pedophiles who have been moved to different jurisdictions
 - Products causing environmental damage
 - Pesticides
 - Lead paint



Benefits of Securing a Favorable Jurisdiction

- Choice of law decisions can be outcome determinative
 - Allocation issues
 - method
 - Trigger period
 - Number of occurrences
 - Deductibles and SIRs
 - Other Issues
 - Application of Pollution and other exclusions
 - Policy interpretation and ambiguity
- Impact on settlement
 - Even before choice of law rulings are made, the choice of forum can have a significant impact on the party's evaluation of their case, and therefore on their settlement posture.
 - Policyholders and Insurers tend to view certain jurisdictions as more or less favorable



Whose Law is the Most Favorable?

- What are the key issues in your case?
 - Policyholder's Perspective
 - The law of which state maximizes the policyholder's insurance recovery
 - All sums v. pro-rata allocation
 - Allocation to coverage chart rather than to policyholder
 - File in the state with the law maximizing recoveries and urge the application of the law of the forum state

Whose Law is the Most Favorable?

- Insurer's Perspective

- Different insurers on the same program may have different key issues, and desire different choice of law rulings.
- Allocation issues
 - Method: All Sums, Stacking, Pro-Rata, Time and Limits
 - The coverage profile, exposure and underlying insolvencies may make a disfavored method more attractive
 - Trigger: Where you sit in the timeline is important.
 - Exposure trigger may be preferred by insurers in later years
 - Manifestation trigger may be preferred by insurers in earlier years
 - Triple or continuous trigger may be preferred if the allocation period is long, and the insurer has relatively few years of coverage



Whose Law is the Most Favorable?

- Insurer's perspective (continued)
 - Number of occurrences
 - Are there policies without applicable aggregate limits?
 - For insurers without aggregates, getting a single occurrence ruling may be the key issue
 - For excess insurers that sit above an insurer without aggregates, or where the underlying aggregate is greater than the pre-occurrence limits, a multiple-occurrence ruling may be desirable
 - Deductibles and SIRs
 - Allocation to the insured
 - Insolvencies,
 - Unavailability of insurance
 - Lost, missing, or alleged policies
 - Uninsured periods
- Non-allocation issues
 - Pollution exclusions
 - QUALCOMM Issue

How Do You Get There?

- Absent choice of law provision in the policy, the forum determines choice of law rules
- Federal courts use the choice of law rules of the State in which they sit.
- Depending on the forum's rules and the facts of your case, you may need to file suit in State A to get State B's law.



Some Examples of Differences in Allocation Rules Among the States That Explain Forum Selection Decisions

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One Example of A State Favoring Pro-Rata Allocation with The Policyholder Absorbing Gaps

- New York

One Example of a Jurisdiction Adopting a Pro-Rata Allocation And Allocating Only To The Solvent Coverage Block (At Least For Some Post-2004 Insolvencies)

- **New Jersey**

- *Farmers Mutual*

- Policyholder and Insurers debate the scope and implications of *Farmers Mutual*
 - *Ward Sand* decision on holding that *Farmers Mutual* does not apply to pre-2004 insolvencies currently pending before the NJ Appellate Division

One Example of an “All Sums” Allocation Jurisdiction

- California



Some Recent Cases In Which An Insurance Company Has Filed First In New York

- *One Beacon American Ins. Co. v. Colgate Palmolive*
- *American Home Assurance Co. v. Port Authority of N.Y. & N.J., et al.*
- *Certain Underwriters at Lloyd's, London, et al. v. AT&T Corp., et al.*
- *Geico, et al. v. WRG Asbestos PI Trust*



Case Study: Coverage for NFL Concussion Lawsuits

- *National Football League et al. v. Fireman's Fund Insurance Co., et al.*, Case No. BC490342 (L.A. Superior Ct. California), first filed immediately after the California Supreme Court decision in *State of California v. Continental Ins. Co., et al.* (Judge John Wiley held that NFL was “selective and tactical” in choosing California and that NY was a better venue for the case).
- *Altera American Ins. Co. v. National Football League, et al.*, Case No. 652813/2012 and *Discovery Property & Casualty Co., et al. v. National Football League, et al.*, Case No. 652933/2012 (Sup, Ct, N.Y.) (Judge Jeffrey Oing ruling that the NY action could proceed despite “first filed” rule).

Case Study: Honeywell

- Tolling Agreement was Set to Expire After Years of Unsuccessful Settlement Negotiation.
- Insurance companies filed in Minnesota at end of the first day after tolling agreement expired.
- Honeywell sued first thing in the morning in Arizona.
- Minnesota court deferred to Arizona court.
- Arizona court applied law of the site rather than Minnesota law.
- Case settled shortly thereafter.

Case Study: Champion

- Insurance companies sued Champion in NY.
- Champion filed in Washington state with more insurance company parties (excess, state guaranty funds) and more causes of action (breach of contract seeking dollar damages, consumer protection causes of action).
- NY court deferred to more comprehensive action in Washington.
- Washington court then applied Washington choice of law due to location of a Washington site (Commencement Bay) based on “significant interests”.
- Case settled shortly thereafter.



Basic Choice of Law Approaches

- Lex Loci Contractus – place of contracting
- Place of Wrong
- Restatement Approach
 - Principle location of the insured risk
 - Jurisdiction with the most significant interest
- Place of Performance
- Governmental Interest
- Hybrids

Place of Contracting

- Traditional, fairly bright line, fairly predictable
 - Where is the place of contracting?
 - Place where final act needed to form the contract takes place?
 - Place of delivery of the policy?
 - Place of last countersignature?
 - Place where application for insurance was accepted?
 - Place where contract negotiated?
 - Location of broker?
 - Location of underwriter?
 - Location of insured or its risk management department?

Restatement

- Restatement § 188 contacts for contracts in general
 - (1) the place of contracting;
 - (2) the place of negotiation of 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

Restatement § § 193 & 6

- **Restatement § 193: Principle Location of the Insured Risk**
 - For casualty insurance policies, the place where the parties understood to be the principle location of the insured risk at the time the policy was in effect should be a prime consideration, unless another state has a more significant relationship under the principles stated in § 6.
 - Principle location of risk discounted for risks that are typically multistate (products)
- **Restatement § 6: Most Significant Relationship Factors**
 - (1) the needs of the interstate and international systems;
 - (2) relevant policies of the forum;
 - (3) relevant policies of other interested states and the relative interests of the states in the determination of a particular issues;
 - (4) the protection of justified expectations;
 - (5) the basic policies underlying the particular field of law;
 - (6) certainty, predictability and uniformity of result; and
 - (7) ease in the determination and application of the law to be applied.

Restatement

- Restatement § 188 contacts (the significant relationships):
 - (1) the place of contracting;
 - (2) the place of negotiation of 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.

California Civil Code § 1646

- “[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made.”
 - Identifying place of performance
 - Is there a defense obligation?
 - Awareness that coverage would be afforded in the jurisdiction where the underlying action was brought
 - Some California Courts have reject that approach because there is not one specific place of performance. *Global Décor, Inc. Cincinnati Ins. Co.* 2011 U.S. Dist. LEXIS 64529 (C.D. Cal. June 16, 2011).

New York

- Center of gravity or grouping of contacts (at time of contracting)
 - Location of insured risk
 - Insured's principal place of business
 - Location of placing broker
 - Location where premiums were paid
 - Insurer's place of business
- May also consider readily identifiable public policy underlying state's law showing a strong governmental interest
In re Allstate 81 NY2d 219 (1993)

New Jersey

- Combination of Government Interest Test and Restatement's Most Significant Relationship factors.
- “Because the law of the place of contract generally comports with the reasonable expectations of the parties concerning the principle situs of the insured risk, that forum’s law should be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield” Gilbert Spruance v. Pennsylvania Mfrs. Ass'n Ins. Co. 134 NJ 96, 102 (1993).
 - Restatement Sections 6, 188 and 193 provide “guidance”
 - For Environmental claims, state where site is located usually has the greatest government interest
 - But not always!

Pennsylvania

• Governmental Interests analysis

- Blending of “governmental interest” and “most significant relationship” tests. Considers:
 - Place of contracting
 - Place of negotiation of contract
 - Place of performance
 - Location of subject matter of the contract
 - Residence and place of business f parties
 - Principle location of the insured risk.
- Often “the jurisdiction with the most significant interest has been interpreted to be either the place of the occurrence that requires coverage or the insured’s headquarters.” Eli Lilly & Co. 769 F.2d at 882

Choosing the Courthouse

- Environmental site in State A
- Policies issued in State B to State B Insured, through State B Broker.
- State A applies Lex Loci Contractus
- State B applies governmental interest
- Party desiring State A law would file in State B, while party desiring State B law would file in State A.

The Advantages of Filing First

- **The First Filed Rule & Comity**
 - Given substantially identical issues and parties, a court should defer to the first filed action the basis of comity and stay the later action
- Opponent may not file in another jurisdiction
- Even if second suit is filed and not stayed, filing first can give your action a head start in the race to judgment

The Race to the Courthouse is Just the Beginning

- Options for the Party who lost the race:
 - The first filed rule applies if the parties, issues and claims are substantially the same in both actions
 - If you file a more comprehensive action in your preferred jurisdiction, comity does not require the second court to issue a stay
 - Additional parties
 - Insurers
 - Some insurers are reluctant to add insurers to a DJ
 - Policyholders– multiple companies claiming to have succeeded to policy rights
 - Additional policies – additional years or layers
 - Additional claims – other sites or product streams
 - Burford Abstention if first filed suit is in Federal Court, and second is in State Court
 - Forum Non Conveniens challenge to first filed action
 - Other “Special Equities” weighing in favor of second court maintaining jurisdiction –Sensient Colors v. Allstate Ins. Co, 193 N.J. 373 (2008)

The Race to the Courthouse is Just the Beginning

- Defending your forum: Anti-suit injunctions
 - an anti-suit injunction is appropriate to “prevent[] duplicative litigation that might lead to conflicting results, and to prevent the waste of judicial resources and unnecessary legal expenses.” *Jay Franco & Sons v. G Studios, LLC*, 34 A.D.3d 297, 298 (N.Y. App. Div. 1st Dept. 2006)

Complicating the Choice of Law Analysis

- Can different jurisdictions' law apply to different policies?
 - In allocation cases, this can raise problems for both insurers and policyholders
 - If there is a uniform allocation is not for all policies, there is a risk of:
 - Double recoveries
 - Gaps in allocation
 - Confusion for Court

Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp. 36 A.D. 17, 32 (N.Y. App. Div. 1st Dep't 2006), aff'd 9 N.Y.3d 928

- Products Claims
- Prior to 1962, FW's principle place of business was in NY, after 1962, in NJ
- Settled Insurers paid based on NY law and Pro-Rata Allocation
- F-W argued that Non-Settling Insurers' policies were governed by NJ law, and that allocation as to them should be based on time and limits
 - NY App. Div. agreed. Concluded that post-1962 settled and unsettled policies would have been deemed to have been governed by NJ law because they were issued to FW while it was based in NJ (all pre-1962 policies had been settled)
 - Court discounted the risk that lower-level policies in earlier years settled for more than they would have been allocated under NJ law, giving FW a double recovery.
 - Court indicated that all policies should not be lumped together for Choice of law analysis, leaving open the possibility of different governing law for different policies

Lonza v. Hartford Ins.

359 NJ Super 333 (App. Div. 2003)

- Environmental claims, with sites in Illinois & Rhode Island
- All policies except 1983 primary were issued to Lonza in NJ
- 1983 Zurich primary issued to Lonza's parent in NY
- On trigger and allocation, Trial Court applied New Jersey to all policies except the 1983 Zurich Primary, to which it applied the law of the site.
 - Zurich granted s/j for the Rhode Island site, based on Rhode Island's use of the manifestation trigger
 - Under NJ allocation, no excess insurer would be reached, and Zurich primary had been dismissed
 - but if Rhode Island law applied to entire loss at Rhode Island site, 1979 excess would be reached, and Insured would fare better if all policies governed by Rhode Island law than it would under trial court's mixed approach
- On appeal, insured argued for Rhode Island law for both primary and excess policies (only the Rhode Island site was at issue on appeal)
 - App Div. affirmed law of the site as to Zurich primary
 - Reversed as to excess policies, holding that the law of the state that governs allocation and trigger for the primary must also govern the resolution of those issues for the excess coverage

How Many Jurisdictions Law Govern a Single Policy?

- Uniform contract interpretation approach:
 - One governing law for contract, regardless of the specific issue or number of sites
 - Consistent interpretation and predictability when applied to multi-state losses
 - A policy's language has same interpretation regardless of where the claims are
 - More conducive to a consistent, unified coverage program
 - Arguably defers forum shopping
 - But different insurance policies covering the same loss may be governed by different law
 - Different policies with the same language may be given different effect
 - What does that do to the reasonable expectations of the parties?
- Site specific and government interest approaches
 - More likely to provide uniform choice of law ruling for all policies involved with the same claim. See Restatement § 6 factors 6 & 7: certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.
 - May depend on when the government interest is evaluated: at time of contracting, at time of occurrence, or at time of suit
 - Different law for different sites or claim types means the same policy language in the same policy may have conflicting meanings.