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SPECIAL ADVERTISING SECTION

Avoid The Insurance Company "Forum Shopping-Spree" – Policyholders Can Protect Themselves From Litigating In The Wrong Jurisdiction

Is it possible that a corporate policyholder might litigate against its insurance company in a jurisdiction with no ties whatsoever to the policyholder or the claim? Similarly, even if an action proceeds in a venue in which the policyholder or claim is located, could the law of a foreign jurisdiction still apply to the interpretation of the insurance policies? Although such results may seem counterintuitive, insurance companies often attempt to force litigation in jurisdictions where they believe the applicable law will be most favorable to them and least favorable to policyholders. Even when the action is brought in a court in the same state that the policyholder is located, insurance companies often argue that the law of another jurisdiction should apply to the interpretation of the insurance policies at issue. These related tactics are commonly referred to as "forum shopping" – and policyholders that are unaware and unprepared can find themselves litigating in the wrong place with the wrong law. How can policyholders avoid this "forum shopping-spree"?

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Different Tests for Choice of Law

The substantive law to be applied when interpreting an insurance policy is often a critical factor in determining whether the policy provides coverage for a loss. Different jurisdictions have developed different, and often conflicting, laws with respect to the interpretation of insurance policies. Accordingly, determining whether a "conflict-of-law" exists, and if so, deciding which state's law will apply to the policies at issue, is usually one of the first determinations that a court must make. Yet many policyholders are unaware that such a dispute might even arise with respect to the insurance policies that they purchased to provide valuable coverage and peace of mind.

Just as states have reached different conclusions with respect to substantive legal issues concerning insurance, they also have adopted various tests for determining which state's law applies to an insurance policy. This "choice of law" analysis can be decided by a wide range of factors depending on the state in which the action is brought. New York courts, for example, often look to the law of the jurisdiction having the greatest interest in the litigation. Other states' courts, such as Georgia, Alabama and Florida, have applied the *lex loci contractus* rule, or "the law of the place of contracting." Several additional tests have been applied in other jurisdictions, including the "functional choice-of-law approach" (Massachusetts), the "substantial contacts" test (Mississippi), the "pertinent contacts" test (Louisiana), the "most significant relationship" test (Texas and Delaware), and the "governmental interest" test (California). Jurisdictions sometimes will apply more than one of these approaches.

Determining the appropriate choice of law standard is important in the context of forum selection for at least two reasons: (1) it would make no sense to bring an action in a presumably favorable jurisdiction where the choice of law test in that state will result in the application of another state's law; and (2) it is equally dangerous to mistakenly assume that simply because an insurance company insti-

tutes an action in a particular jurisdiction, the law of that state necessarily will apply. Thus, understanding the effect of the conflict-of-law rules and the choice of law tests in all potential jurisdictions in which an insurance coverage action might be initiated is critical to both assessing the correct jurisdiction in which a lawsuit should proceed, and preventing an insurance company from improperly forcing a policyholder into the wrong jurisdiction.

Insurance Companies' Self-Serving Arguments

When arguing in favor of their preferred forums, insurance companies seemingly have no problem propounding divergent arguments on essentially similar choice of forum and choice of law issues. For example, in one recent matter in New York Supreme Court, *OneBeacon America Insurance Company v. NL, Inc., et al.,* Case No. 603429 (N.Y. Sup. Ct., N.Y. County), Certain Underwriters at Lloyd's, London opposed a defendant's motion to dismiss a New York action in favor of a subsequently filed Texas action in part because the New York action was filed first by almost six weeks. Certain Underwriters argued in that case that a delay of six weeks in filing a second action required dismissal of the defendant's later-filed action under NY CPLR 3211(a)(4).

In a similar case, Certain Underwriters filed an action in New York *after* a more comprehensive lawsuit was filed in Connecticut. See Certain Underwriters at *Lloyd's, London, et al. v. Hartford Accident & Indem. Co.*, 16 A.D.3d 167 (1st Dep't 2005). The Appellate Division, in affirming the lower court's grant of a motion to dismiss Certain Underwriters' New York action, held that "Inasmuch as it was plain that this action was motivated simply by plaintiffs' wish to gain a tactical advantage through forum shopping, the court properly exercised its discretion in dismissing the complaint pursuant to CPLR 3211(a)(4)."

The court also noted that the reinsurance policies at issue in the case contained a "service of suit" clause, which provided that Certain Underwriters would submit to the jurisdiction of any court of competent jurisdiction in the United States, with all matters determined in accordance with the law and practice of such court. Hartford exercised its contractual rights under this provision and chose to litigate in Connecticut. According to the Appellate Division, "that choice should not be effectively undone by what must be viewed under the circumstances as a purely expedient . . . New York declaratory judgment action." Accordingly, applying a service of suit clause, if one is present in the corporation's insurance policies, could provide a basis for keeping an action in the proper jurisdiction.

Conclusion: Know Where You Belong

One of the unfortunate results of the insurance companies' "forum shopping-spree" is the creation of a "race to the courthouse" mentality in insurance coverage litigation. As a result, policyholders must educate themselves regarding the appropriate jurisdiction in which to resolve disputes with their insurance companies. This fact and law-based determination often involves examining numerous factors including, among others, the location of the corporation, the site of the loss, and the place where the insurance policies were sold and delivered. Experienced counsel often can assist in quickly providing an education regarding the various potential jurisdictions and the effect that the application of their law might have. Policyholders should safeguard their rights accordingly, or risk finding themselves stuck litigating in a jurisdiction chosen by an insurance company on a "forum shopping-spree."

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