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Insurance Policy Choice of Law Provision Again Faces Public Policy Challenge

Insights for Insurers Alert | 3 min read
Dec 24, 2020

A Missouri federal district court became the second court within the past 15 months to consider whether a state's public policy overrides an insurance policy's choice of law provision. *Maritz Holdings v. Certain Underwriters at Lloyd's London*, No. 4:18-CV-00825 SEP, 2020 U.S. Dist. LEXIS 222400 (E.D. Mo. Nov. 30, 2020), involved an insurance coverage dispute over alleged losses arising out of cybersecurity events. After the underwriters denied coverage, the insured filed suit, asserting claims for breach of contract as well as a bad faith under Missouri's vexatious refusal to pay statute.[1] The policies contained a choice of law provision designating New York law as the applicable law governing disputes arising out of the policies. The Underwriters asked for judgment on the pleadings as to the bad faith claim "because it is made under Missouri law, and therefore fails to state a claim under the applicable governing law."

While recognizing that "contracting parties may choose the state whose law will govern the interpretation of their contractual rights and duties," the court held:

The Missouri vexatious refusal statute ... relating as it does to the equitable and fair treatment of Missouri insureds, is not just a matter of Missouri substantive law, but also a declaration of state public policy. . . . And in this case, there is a clear local interest to be protected by its application. Under these circumstances, the Court finds that the choice-of-law provisions in the Insurance Contracts do not preclude [the insured's] statutorily prescribed remedy for allegedly vexatious conduct by Underwriters.

A choice of law provision was similarly challenged last year in a California case where the insured asserted various defenses, including late notice. *Pitzer Coll. v. Indian Harbor Ins. Co.*, 251 Cal. Rptr. 3d 701, 447 P.3d 669 (2019). New York law was designated in the policy's choice of law provision. The insurer successfully argued to the California federal district court that it was not required to demonstrate prejudice to prevail on its late notice defense under New York law (which applies a no-prejudice rule to insurance policies issued and delivered outside of New York). On certified questions from the Ninth Circuit following the insured's appeal, the California Supreme Court noted that choice of law provisions generally are enforceable unless the law conflicts with a state's fundamental public policy and that state has a materially greater interest in the determination of the issue than the designated state.[2] The court concluded that California's notice-prejudice rule is a fundamental public policy of the state, but left

the issue of whether California had a materially greater interest than New York in the determining the outcome of the coverage issue to the Ninth Circuit.

Takeaway Thoughts

Although choice of law provisions generally will be enforced, the *Maritz Holding* and *Pitzer College* decisions are reminders to insurers that express policy terms may be subject to public policy-based challenges in certain circumstances. These considerations should be kept in mind when evaluating choice of forum in coverage actions.

[1] Mo. Rev. Stat. § 375.420 ("[I]f it appears from the evidence that [an insurance] company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.")

[2] *See, e.g., Nedlloyd Lines B.V. v. Superior Court*, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992) (Consistent with the "modern approach of section 187 of the Restatement Second of Conflict of Laws," choice of law provisions "are usually respected by California courts.")

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