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The Role Of Emails In Insurance Choice-Of-Law Analysis

Law360, New York (October 11, 2012, 1:43 PM ET) -- Not all property insurance policies include choice-of-law provisions, and the selection of state law can determine coverage. This article examines how different choice-of-law analyses may apply, taking into consideration how policies may be formed by entities in different states, often through electronic communication.

Regardless of which test applies, the place of formation of the contract may be significant. Of course, any analysis should begin with the language of the policy: some policies contain choice-of-law provisions, while in other policies, a merger clause or a countersignature provision may determine the place of contracting.

A Scenario

A company, incorporated and with its headquarters in state A, decides it might be able to procure a better property insurance policy for its factory, located in state B. The company contacts its retail insurance broker, located in state C, by email. The retail broker contacts a wholesale broker in state D and provides information on the desired policy. The wholesale broker documents the needs of the company (including the value of the factory and perils it wishes to insure against) and solicits bids from a number of possible insurers, again by email.

An insurer, located in state E, responds to the wholesale broker, and the wholesale broker and the insurer negotiate by email. The wholesale broker then informs the retail broker that the insurer in state E has provided the most favorable quotation, and the retail broker conveys this to the company. The company asks the retail broker to secure coverage; the retail broker contacts the wholesale broker.

The wholesale broker requests that the insurer bind the account per the quotation terms. The insurer then confirms binding of the policy and, in a separate email, sends the binder to the wholesale broker. The wholesale broker forwards the policy to the retail broker in state C, who sends it to the company in state A, which forwards it to the business manager of the factory so there is a policy on site in state B.

As the above scenario plays out, none of the communications may include the words “offer,” “counter” or “accept.” Or if these words are used, the communications themselves may or may not meet the legal definition of an offer, counteroffer or acceptance. If there is a dispute over insurance coverage for the factory, what state’s law would apply?

Choice-of-Law Doctrines

In diversity cases, federal courts apply the choice-of-law doctrine of the state in which they sit. Muldoon v. Tropitone Furn. Co., 1 F.3d 964, 965 (9th Cir. 1993). For example, a federal court in Georgia will conduct a choice-of-law analysis under Georgia law to determine which state's law applies to the policy.

There are three basic choice-of-law doctrines, with some state-specific variations.

Restatement (Second) Approaches

The first, and most common, is the restatement (second) approach (sometimes referred to as the significant contacts test), though there are at least two variations of this analysis. In the first variation, the court will weigh a number of factors as outlined in Section 188 of Conflicts of Laws section of the restatement.

Under Section 188, the factors are weighed based on how important they are to the issue and may include 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 factors regarding the parties (domicile, residence, place of incorporation and place of business).

Under the Section 193 approach, courts should apply the law of the state where the insured risk is principally located unless another state has a more significant relationship to the transaction or parties.[1] See Pen Coal Corp. v. William H. McGee and Co. Inc., 903 F. Supp. 980 (S.D. W. Va. 1995). The court should consider the needs of interstate and international systems, relevant policies of forum and other states and the need for uniformity and predictability.

Therefore, under either restatement (second) approaches, the place the contract is formed is relevant, though it may not be determinative.

If the Section 188 approach applies to the above scenario, the specific issues in dispute would determine which factors are the most important, and, under a fact-specific analysis, a court could conceivably apply the law of state A, B, C, D or E.

If the court applies the version of the restatement (second) approach, based on Section 193, then state B's law would appear to apply because the property at issue is located there, unless a party can show that another state had a more significant relationship to the transaction or parties. (Further, some courts, even applying a general "significant contacts test," have found that the where the property at issue is located is the factor to be given the greatest weight. See, e.g., Bank of Darien v. Badger Mut. Ins. Co., 141 F.3d 720 (7th Cir. 1998).)

The comments to Section 193 note that the court should apply the law of the state where the damaged property is located even if the policy insures risks in multiple states. Restatement (second), Conflicts of Laws, § 193, comment f.

However, in this scenario, because both the policyholder and the insurers are based in other states, and the contract negotiations took place outside of State B, the parties may be able to show that another state had a more significant relationship to the transaction or the parties.

Lex Loci Contractus

The place the contract was formed is determinative in the second most common approach, used in approximately a dozen states. Lex loci contractus, "the place the contract was made," is usually described as where the "last act" necessary to complete the contract took place. Under some states' laws, the general rule is that an insurance policy is formed where it is delivered, which is the "last act essential to the completion of the contract." Johnson v. Occidental Fire & Cas. Co., 954 F.2d 1583-84 (11th Cir. 1992) (applying Georgia choice-of-law analysis under lex loci contractus).

Delivery usually is defined as the act of the insurer of placing a policy in the control of the insured or someone on his or her behalf. In the above scenario, if the facts indicate that the wholesale broker had an agency relationship with the policyholder (likely determined by whether the policyholder agreed to the delivery, or it was sent to the wholesale broker pursuant to the policyholder's direction), then the policy may have been delivered to state D, and state's D law would apply. If the wholesale broker was not the policyholder's agent, then likely the policy would be considered delivered to the retail broker in state C, and state C's law would apply.

Under some other states' laws, the contract is formed where it is accepted, which arguably may be different from where it is delivered. In the above scenario, that could mean that if the wholesale broker was authorized to accept the policy terms on behalf of the insured, then state D's law may apply. If only the retail broker was authorized to accept the policy terms, then state C's law may apply.

Agency may be determined by a fact-specific analysis, and, in the choice-of-law context, will likely be conducted under the agency law of the state where the court sits. However, based on the specific facts, there may be an argument that acceptance of all of the policy terms only took place upon delivery of the policy. Finally, a countersignature provision in some policies indicates that the policy is not valid until signed by the policyholder. In this instance, the state where the policy is countersigned is the "last act" under a lex loci analysis.

Governmental Interest

Some jurisdictions have used a governmental interest test. Sometimes, but not always, this doctrine overlaps with the "significant contacts" approach discussed above. The traditional approach under California's choice-of-law analysis, for example, dictates that if the state laws at issue are different, the court is to weigh the interest of each jurisdiction in having its own law applied or which jurisdiction's interest would be more impaired if its laws were not applied.

However, this doctrine may be superseded by a statute, which states that 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 of the law and usage of the place where it is made." Cal. Civ. Code §1646; see also Frontier Oil Corp. v. RLI Ins. Co., 153 Cal. App. 4th 1436 (2007) (applying this statute but analyzing the governmental interest doctrine and noting that the California Supreme Court has not ruled on whether the statute is to be applied to insurance policies).

As applied to this scenario, the California statute could mean that state B's law would apply if the parties showed that the contract was to be performed (which some cases have interpreted to mean where the damage occurred because that was where monies were to be paid to compensate for property damage). If the parties cannot make this showing, then a lex loci analysis would appear to apply.

State-Specific Statutes

Additionally, some states have insurance-specific or other statutes that may control in certain instances. For example, in Alabama, “All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof.” Ala. Code § 27-14-22.

The determining factor appears to be whether the application for insurance was taken within Alabama. In the above scenario, it appears that an Alabama court would apply Alabama law if the retail broker (who takes the application) is located in Alabama, regardless of where the property at issue or the other parties are located.

Conclusion

Regardless of which test applies, the place of formation of the contract may be significant. It is the crucial issue in the lex loci states but may also be relevant to the restatement (second) approach (applying Section 188) and under the California statute. Similar issues may arise under other state statutes.

The place the policy was delivered or accepted — which sometimes will determine where the contract was formed — may be especially problematic in the age of electronic communication. In a variation on the above scenario, if the insurer sends the policy electronically to the wholesale broker but carbon copies the retail broker to which state was the policy delivered? What if the wholesale broker forwards the policy simultaneously to the retail broker and the insured? Is there a distinction between who is in the “to” and who is in the “CC" field of an email?

What if the insurer merely informs the wholesale broker that the policy may be downloaded from the insurer’s secure website? Further, email communications tend to be much less formal than traditional business letters; the players in the above scenario may never use words such as “offer,” “acceptance,” “counteroffer” or “delivery.”

Because case law regarding place of contract negotiation and formation is largely based on in-person transactions or on correspondence or delivery by mail, attorneys may find themselves attempting to analogize or distinguish factual scenarios that are very different from how the insurance industry operates today. See Fed. Ins. Co. v. PGG Realty, 2007 U.S. Dist. (S.D.N.Y. 2007) (noting in choice-of-law analysis that marine policy negotiations, though largely conducted by email, primarily took place in New York); Boise Tower Assoc. v. Capital Joint Master Trust, 2005 U.S. Dist. (D. Idaho June 22, 2006) (noting in choice-of-law analysis in development project dispute that the place-of-negotiation factor “is not as clear cut as it was 40 years ago, before modern telecommunications.”).

One of the first steps attorneys should take when evaluating a property insurance dispute is to perform a choice-of-law analysis. This analysis will be factually specific and will sometimes require a detailed review of underwriting correspondence among the insured, the insurer and any brokers or other parties involved.

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[1] Section 193 applies to “Contracts of Fire, Surety, or Casualty Insurance.” Although this section appears to supersede Section 188 in many property insurance disputes, the comments note that this section may not apply to movable property such as ships and trucks, or “where the policy covers a group of risks that are scattered throughout two or more states,” or where a state other than the principal location of the insured risk is not the state of most significant relationship to the transaction and the parties. Restatement (Second), Conflicts of Laws, § 193, Comments a, b, d. Further, some states’ common law tests were developed based on Section 188 and thus an analysis based on that section may still be good law.

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