Cray • Huber

# Illinois Coverage Basics

## *A Good Choice of Law Argument Can Save Insurers From Illinois' Worst Coverage Rules*

The State of Illinois has some of the most unique insurance coverage laws in the country. Unfortunately, many of those interesting coverage rules are distinctly unfavorable to liability insurers. In fact, some of those rules can be fatal to an insurer's coverage positions. So, it is important to know how and when Illinois' anti-insurer laws can be legitimately avoided. One often overlooked tactic is to challenge whether Illinois law should even apply to a particular coverage dispute (i.e., arguing that the coverage laws of another state should apply).

**Choice of law analysis determines which state's law should govern a case.**

Not all coverage actions filed in the Illinois courts are necessarily governed by Illinois' coverage laws. When a case has both Illinois connections and connections with other states, any party may ask the court to decide which state's law should apply. The body of law that provides the standards for making these determinations is generally known as "conflicts of law." The legal analysis that courts use to determine which state's law should apply to a given case is called a "choice of law" analysis.

In most cases, choice of law analyses are somewhat difficult and complex. When an insurance policy contains a choice of law designation (for example, "disputes concerning the meaning and application of this policy shall be determined by the laws of Pennsylvania"), the courts generally will enforce that choice of law designation. However, in all other instances, the choice of law determination requires application of several legal criteria to the multi-faceted factual background of the dispute.

Unless a policy contains an explicit choice of law provision, the choice of law question in any insurance coverage dispute is governed by the "most significant contacts" test. Costello v. Liberty Mutual Fire Insurance Co., 376 Ill.App.3d 235, 240 (1st Dist. 2007). Under the "most significant contacts" test, a court must identify each of the states having material contacts with the dispute and evaluate which of those states has the most significant contacts with the coverage dispute. Under this test, the state having the most significant contacts with the dispute is the state that will supply the law used to decide the dispute.

At the outset, the "most significant contacts" test requires a court to locate where (i.e., in which state) each of the following contacts is located:

- the location of the subject matter of the insurance
- the place of delivery of the policy

- the domicile of the insured
- the domicile of the insurer
- the place of the last act to give rise to a valid policy
- the place of performance of the policy
- any other place bearing a rational relationship to the coverage dispute

*See* Lapham-Hickey Steel Corp. v. Protection Mutual Insurance. Co., 166 Ill.2d 520, 526-527 (1995).

Courts do not decide the choice of law question by simply making a tally of the various states' contacts; rather, those contacts are evaluated in light of the relevant states' policies and those states' interests in the particular coverage issue. Costello, supra, 376 Ill.App.3d at 240. Of all the factors considered, the most important are the place where the policy was issued and delivered, and the place where the last act necessary to create a binding insurance contract occurred. Lapham-Hickey, supra, 166 Ill.2d at 527.

**When should a choice of law motion be considered?**

Performing a choice of law analysis is often difficult and complex, so it is not practical to undertake the effort in every file. However, whenever an insurer is negatively impacted by one of Illinois' worst coverage rules, it may be wise to consider a choice of law challenge, simply because almost any other states' laws will likely be more favorable. Based on that rationale, when a problem arises in a coverage dispute due to any one of the following Illinois rules, a potential choice of law challenge should be evaluated:

- estoppel barring coverage defenses (*see* Employers of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127 (1999))

- targeted tender rendering "other insurance" clause unenforceable (*see* John Burns Construction Company v. Indiana Insurance Company, 189 Ill.2d 570 (2000))

- constructive tender where no actual tender has been made (*see* Cincinnati Companies v. West American Insurance Company, 183 Ill.2d 317 (1998)

A choice of law challenge can level the playing field for an insurer by effectively neutralizing some of Illinois' worst coverage rules. Moreover, even if Illinois' laws generally support a given coverage defense, the authority provided by another state's law may prove to be even stronger. If a coverage dispute involves contacts with multiple jurisdictions, there is always the potential that application of another state's law will provide stronger authority for the insurer's coverage position. One or more Illinois contacts with the dispute do not necessarily mean that Illinois law must apply.

* * *

If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.