Cray • Huber

Illinois Coverage Basics

Illinois' Worst Insurance Rules Can Often be Avoided by a Well-Developed Choice of Law Argument

As every reader of this publication knows, Illinois law can be problematic for liability insurers engaged in coverage litigation. Almost every edition of this monthly publication reports another bad development in Illinois insurance law. Efforts to distinguish or limit the effect of those unfavorable Illinois insurance rules are not always effective. A far better approach, when the facts allow, is to persuade a court in a coverage case that the insurance law of a state other than Illinois should apply.

Just because a coverage case may be filed in Illinois, or may arise in Illinois, does not necessarily mean that Illinois insurance law should apply. If some of the geographical connections underlying the relationship between an insurer and its insured fall outside of Illinois, a court may be called upon to make a "choice of law" decision, which means that the court must decide whether to apply the law of Illinois or another state's law to decide the insurance coverage issues. A successful choice of law argument can relieve an insurer of the burden of Illinois' worst insurance rules.

Choice of Law Analysis for Insurance Coverage Cases

Choice of law arguments are sometimes overlooked in coverage cases because the traditional choice of law standards were complex and unclear. But, the standards are now much clearer than they once were. Although the choice of law standards for coverage cases remain complex, that complexity can be an opportunity for insurers.

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

In Lapham-Hickey Steel Corp. v. Protection Mutual Insurance. Co., 166 Ill.2d 520, 526-527 (1995), the Illinois Supreme Court instructed that, at a minimum, the "most significant contacts" analysis should encompass an evaluation of each of the following contacts in an insurance coverage dispute:

- 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

The Court in Lapham-Hickey did not specify which of these contacts is the most significant; it directed only that the weight to be given each contact should depend upon the particular coverage issue in dispute. More recent cases have been more helpful.

A predominant theme in the Illinois choice of law rulings in insurance coverage cases is that the interpretation of an insurance policy should be certain, predictable and consistent, regardless of where a loss occurs or where the underlying suit may be filed. Consequently, the courts look for the location which is the most likely to have been contemplated by the parties as the source of the law to govern their contract. In particular, the courts look to the history of the procurement and delivery of an insurance policy to determine whether the parties intended the policy to be an Illinois contract or a contract to be governed by the laws of another state.

A recent Illinois First District Appellate Court opinion reexamined the "most significant contacts" standard and which contacts should be considered to be the most significant in a liability coverage case. In Liberty Mutual v. Woodfield Mall, __ Ill.App.3d __, 941 N.E.2d 209 (1st Dist. 2010), the Appellate Court instructed that the place where an underlying suit is filed against an insured is entitled to "little or no" weight in the "most significant contacts" analysis. It also found that the location of the insured loss should be given little weight if the business of the insured extends beyond the boundaries of the State. According to the Appellate Court in the Woodfield Mall case, the focus of the "most significant contacts" inquiry should be to determine the place that has the most active, dynamic and dominant role in the procurement of the policies -- not simply the insured's principal place of business, but the place where the decision making and actions directed to the procurement of the policy took place.

Tactics

A choice of law analysis should be placed at the top of an insurer's checklist in any coverage case that has Illinois connections. In such a case, the choice of law position should be formulated at the earliest possible point and be asserted consistently in presentations to the court. Early notice of the insurer's choice of law position is important to neutralize the court's natural assumption that the law of the forum state should control.

The development of evidentiary facts to establish a choice of law position is critical. An effective choice of law analysis is primarily a factual analysis, not a legal analysis. Consequently, facts established by proper affidavits should provide the foundation for an insurer's choice of law argument.

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