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Defense Trial Counsel of Indiana
INDIANAPOLIS INDIANA

The administrative offices of the DEFENSE TRIAL COUNSEL OF INDIANA are located at
9505 Copley Dr., Indianapolis, Indiana 46260
Telephone (317)580-1233; Fax (317)580-1235;
E-mail: lmortier@dtci.org; http://www.dtci.org;

EXECUTIVE DIRECTOR: Lisa Mortier
SUBSCRIPTION RATES: $50 per year, payable to DTCI.

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CHOICE-OF-LAW ANALYSIS AND INDIANA INSURANCE CONTRACTS

Belinda R. Johnson-Hurtado*

I. Insurance Policies in General

In liability insurance contracts such as commercial general liability insurance policies ("CGL") and automobile insurance policies, an insurance company promises to defend and indemnify the insured if the insured is sued due to its business operations. The standard language of these policies requires the insurer to pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies. In addition, the policies generally provide that if coverage is triggered under the policy with respect to a specific event, the insurer must defend the insured against any "suit" seeking damages. Ordinarily, the policies apply to bodily injury or property damage occurring anywhere within the United States.[1] A conflict over policy interpretation (*i.e.*, whether it provides coverage to a particular event and which damages are covered) arises when the claimed injury occurs outside the state in which the insured purchased the policy. In such a case, determining which jurisdiction's law applies can be complicated

II. Is There a Conflict of Law?

When a potential claim arises outside the state in which the policy was issued, coverage will depend on the laws of the state that is found to govern the interpretation of the policy. Merely that two states are involved does not in itself indicate that there is a conflict of laws since those states may resolve coverage issues in the same way. In such a case, there would be no conflict-of-law issue. Therefore, before engaging in a conflict-of-laws analysis, a court must first determine whether the coverage issue would be decided differently in the different jurisdiction. If the outcome would be the same, there is no need for a conflict-of-law analysis. However, if the jurisdictions would resolve the coverage issue differently, a court will need to engage in a conflict-of-law analysis. The first step in that process is to ana-

* Ms. Johnson-Hurtado is a 2002 ICLEO fellow and a 2005 graduate, cum laude, from the Mauer School of Law in Bloomington. She is an associate attorney at Clendening Johnson & Bohrer, P.C. in Bloomington, Indiana.

[1] Although there are other insurance contracts to which a conflict-of-law analysis would apply, such as life insurance policies, this article focuses on liability insurance policies.

lyze whether the parties have effectively chosen which state's law will apply in their contract.[2] In other words, have the parties agreed to a particular forum in case of a dispute?

III. PARTIES' SELECTION OF GOVERNING LAW

A forum selection clause is an agreement of the parties to litigate disputes in a particular court.[3] Parties may consent by contract to personal jurisdiction by courts through a forum selection clause if the clause is (1) freely negotiated, (2) just and reasonable under the circumstances, and (3) not obtained through fraud or overreaching such that the agreeing party would be deprived of a day in court.[4] Thus, it is well settled that, in determining the validity of a forum selection clause, a court must examine whether the clause is freely negotiated and just and reasonable under the circumstances.[5]

In determining whether a forum selection clause was freely negotiated, the court applies a fact-sensitive test comparing the bargaining positions of the parties in privity of the contract.[6] The inquiry is similar to the test employed when determining whether a contract is unconscionable due to a disparity in bargaining power.[7] A contract is unconscionable "if there exists a great disparity between the parties which leads the weaker party to sign the contract unwillingly or without awareness of its terms."[8] However, a mere disparity in bargaining power, without more, is not sufficient to render a forum selection clause unconscionable.[9] Although "[i]nsurance policies rarely epitomize an equal bargaining relationship between the contracted parties, this superior bargaining position, by itself, does not render the policy unconscionable."[10]

Specifically in regards to the prototypical insurance form contract, the Indiana Supreme Court has stated:

> Insurance policies are prepared in advance by insurance and legal experts, having in view primarily the safeguarding of the interests of the insurer against every possible contingency. The insurer not

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[2] Rockwood Ins. Co. v. Illinois State Med. Inter-Ins. Exch., 646 F. Supp. 1185,1187 (N.D. Ind. 1986).

[3] Forum selection clauses govern only claims that fall within the scope of the clause. Jallali v. National Bd. of Osteopathic Med. Examiners, Inc., 908 N.E.2d 1168 (Ind. Ct. App. 2009).

[4] *See* Adsit Co., Inc. v. Gustin, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007); Farm Bur. Gen. Ins. Co. v. Sloman, 871 N.E.2d 324, 329 (Ind. Ct. App. 2007); Dexter Axle Co. v. Baan USA, Inc., 833 N.E.2d 43, 48 (Ind. Ct. App. 2005).

[5] *Solman*, 871 N.E.2d at 329.

[6] *Dexter*, 833 N.E.2d at 49.

[7] Horner v. Tilton, 650 N.E.2d 759, 763 (Ind. Ct. App. 1995), *reh'g denied*.

[8] *Id.*

[9] *Sloman*, 871 N.E.2d at 330.

[10] Bosecker v. Westfield Ins. Co., 724 N.E.2d 241, 244 (Ind. 2000).

> only fully knows the contents of the writing, but also adequately comprehends its legal effect. The insured has no voice in fixing or framing the terms of [the] policy, but must accept it as prepared and tendered, usually without any knowledge of its contents, and often without ability to comprehend the legal significance of its provisions.[11]

Although the court has recognized the "one-sided nature of such policies," they have been held to be freely negotiated.[12]

In addition to being freely negotiated, the clause must also be just and reasonable.[13] Most times, no public policy reason exists to prevent parties from establishing venue through a contractual provision.[14] As the court of appeals has put it, "this is because forum selection clauses typically serve as a worthy tool to limit the fora in which a company may be sued, to dispel any confusion about where suits arising from the contract must be brought, and to pass on economic benefits to consumers in the form of reduced prices reflecting the savings that a company enjoys by limiting the fora in which it may be sued."[15] Nevertheless, the validity of these clauses may come into question when they "interfere with the orderly allocation of judicial business . . . ."[16]

In this regard, the Indiana Court of Appeals found that a forum selection clause in an uninsured motorist policy was not just and reasonable. In *Farm Bureau v. Sloman*, Sloman's auto insurance policy with Farm Bureau had a forum selection clause that required both contractual liability and the extent of compensable damages to be determined in Michigan, the state in which the policy was purchased. However, because the accident occurred in Indiana, when Lund (an Indiana driver) merged into the right-hand lane in front of Sloman, the court determined that requiring the contractual liability to be tried in Michigan, but Lund's liability and the extent of damages to be tried in Indiana, was unjust and unreasonable.[17] The bases of this decision included (1) Farm Bureau, since it maintained a financial interest in the Indiana suit, would have to intervene or risk being bound by the trial court's judgment, and (2) because avoidance of multiple suits involving the same parties and same issues "has historically been of great concern in In-

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[11] *Id.* (quoting Glens Falls Ins. Co. v. Michael, 74 N.E. 964, 969 (1905)).

[12] *Id.*

[13] *Id.*

[14] Mechanics Laundry v. Wilder Oil Co., 596 N.E.2d 248, 252 (Ind. Ct. App. 1992), *reh'g denied*.

[15] *Id.* at 251.

[16] Northwest Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990).

[17] *Sloman*, 871 N.E.2d at 333.

diana," the multiple suits required by the forum selection clause were contrary to this interest.[18]

If the parties have failed to designate an agreed-upon forum, or if the forum selection provision is invalid, the court will need to decide which law governs. To do so, Indiana courts will look to Indiana's choice-of-law doctrine in making this determination.

IV. INDIANA'S CHOICE-OF-LAW ANALYSIS

When faced with a choice-of-law question, the decision is made by the courts of the state in which the suit is pending.[19] What follows is an analysis of Indiana's choice-of-law theory. Indiana courts need not apply the law of a sister state if that law violates Indiana's public policy, but the doctrine is not unlimited.[20] To "justify [Indiana] courts in refusing to enforce a right of action accruing under the laws of another state as against the policy of this state the prosecution of such action must appear to be against good morals or natural justice, or prejudicial to the general interests of the citizens of this state."[21]

Once it is established that there is a conflict of laws, Indiana follows the approach formulated by the *Restatement (Second) of Conflict of Laws* when deciding which law to apply.[22] If such a conflict is found involving insurance contracts, Indiana courts use the "most intimate contacts" test.[23] The court considers all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact.[24]

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[18] *Id.* at 331-33. Although this uninsured motorist provision is distinguishable from situations that can arise under liability policies where a contractor or other business contracts to perform business operations in a state other than the state in which it purchased insurance, the principles must be considered when analyzing a forum selection provision if contained in an applicable liability policy.

[19] American Employers Ins. Co. v. Coachmen Indus., Inc., 838 N.E.2d 1172 (Ind. Ct. App. 2005).

[20] Schaffert v. Jackson Nat'l Life Ins. Co., 687 N.E.2d 230, 234 (Ind. Ct. App. 1997).

[21] *Id.*; *see also* Rockwood Ins. Co. v. Illinois State Med. Inter-Ins. Exch., 646 F. Supp. 1185, 1190 (N.D. Ind. 1986) (applying Illinois law to the dispute would undermine the policies behind the Indiana pro rata rule and would encourage non-Indiana insurers to delay settlement and litigate in hopes of receiving a windfall to the detriment of Indiana insurers).

[22] *Coachmen Indus.*, 838 N.E.2d at 1176. Indiana has rejected the lex loci contractus approach (the place of contracting) to determine which forum's substantive law is applicable. Hartford Accident & Indem. Co. v. Dana Corp., 690 N.E.2d 285 (Ind. Ct. App. 1997), *trans. denied*.

[23] *Schaffert*, 687 N.E.2d at 233.

[24] *Coachmen Indus.*, 838 N.E.2d at 1178. However, although Indiana courts look to the law of the state with the most intimate contact with the transaction, the validity of a contract will generally be determined by the lex loci contractus. Norfolk & W. Ry. Co., v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 94 (N.D. Ind. 1976).

A. RESTATEMENT (SECOND) OF CONFLICT OF LAWS

1. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

a) The needs of the interstate and international systems,

b) The relevant policies of the forum,

c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

d) The protection of justified expectations,

e) The basic policies underlying the particular field of law,

f) Certainty, predictability and uniformity of result, and

g) Ease in the determination and application of the law to be applied.[25]

2. The Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

a) The place of contracting,

b) The place of negotiation of the contract,

c) The place of performance,

d) The location of the subject matter of the contract, and

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[25] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

e) The domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.[26]

3. Contracts of Fire, Surety or Casualty Insurance

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.[27]

V. CHOICE-OF-LAW ANALYSIS IN ACTION

A. *ROCKWOOD V. ILLINOIS STATE MEDICAL INTER-INSURANCE*[28]

Dr. Paul was a physician licensed to practice medicine in both Indiana and Illinois. He was insured by ISMIE, an Illinois insurer, throughout the United States. He was insured by Rockwood, an Indiana insurer, only within Indiana. As a result of allegedly negligent medical care rendered during the policy periods of both policies, Dr. Paul was sued in Illinois. ISMIE and Rockwood contended that their own policy provisions regarding other insurance should be interpreted by the laws in their respective states as to whether each was a primary or excess insurer. Neither policy specified which state law would govern in the event of a dispute. Rockwood then brought a declaratory judgment action against ISMIE in the United States District Court for the Northern District of Indiana to determine the liability of each of the policies. The district court found that if Indiana law were used, ISMIE and Rockwood would share primary liability. It also found that under Illinois law, Rockwood would be primarily liable and ISMIE would be excess insurance. Therefore, there was a conflict between the state laws, and the court had to engage in the intimate contacts test.

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[26] *Id.* § 188.

[27] *Id.* § 193. Section 193 is useful in analyzing section 188(2)(d). *American Employers Ins. Co.*, 838 N.E.2d at 1177.

[28] 646 F. Supp. 1185 (N.D. Ind. 1986).

The court found several of the factors to be considered (*i.e.*, the place of contracting, negotiation, and place of business) were of equal weight as to both Rockwood and ISMIE. Therefore, it placed more emphasis on the remaining factors, the place of performance and the location of the subject matter.[29] ISMIE argued that because (1) the underlying suit (for medical malpractice) was in Illinois, (2) the plaintiff in the underlying suit was an Illinois resident, (3) discovery, negotiations, and so forth, would take place in Illinois, and (4) any money paid in resolution would be paid to an Illinois resident, that Illinois law should govern.[30] However, the court noted that §section 188 of the *Restatement* considers the acts of the parties to the contract in analyzing a conflict of laws, not the acts of the plaintiff in the underlying suit against the insured.[31] "Where the 'underlying plaintiff' resides, chooses to bring suit, or may receive payment can carry little weight in comparison to the location of the subject matter of a professional liability insurance policy."[32] The court found that "[u]nlike the place where the underlying suit might be filed, the area in which a professional may practice under his insurance is almost certain to be a 'bargained for' term of the contract."[33]

In that case, ISMIE covered Dr. Paul for his medical practice throughout the United States while Rockwood insured Dr. Paul only within Indiana. The court cited *Norfolk & Western Railway Co. v. Hartford Accidental & Indemnity Co.*,[34] which considered the nationwide effect of the insurance contract and the place where the tort liability arose to be the most significant factors in deciding which state's law to apply.[35] In *Norfolk*, the court concluded that because the insurance policy covered the insured in every state, it therefore incorporated the substantive law of every state in which the insured's activities might take place.[36] That conclusion was consistent with the "true test for determining the proper law governing a contract . . . [that] is the intent of the parties."[37] Therefore, the district court found that ISMIE, which insured Dr. Paul nationwide, could claim neither that it did not intend to insure his practice in Indiana nor that it could not have anticipated the application of Indiana law to a dispute arising out of the insured's activities in Indiana.[38]

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[29] *Id.* at 1188.

[30] *Id.* at 1189.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] 420 F. Supp. 92, 94 (N.D. Ind. 1976).

[35] *Id.*

[36] *Id.*

[37] *Id.* (citing Sullivan v. Savin Bus. Machs. Corp., 560 F. Supp. 938, 939 (N.D. Ind. 1983)).

[38] *Id.*

Ninety percent of Dr. Paul's practice appears to have been in Indiana during the time relevant to the case. "The *Restatement* explains that even if the principal location of the risk shifts to some state other than that understood at the time of contracting, application of the law of the other state would not be unfair to the insurance company, if the company had reason to foresee that there might be a shift in location."[39] The *Restatement* also comments:

> There may also be occasions when following the issuance of the policy the principal location of the risk is shifted to some other state. In such a situation, this other state will have a natural interest in the insurance of the risk and it may be that its local law should be applied to determine at least some issues arising under the policy. In any event, application of the local law of the other state would hardly be unfair to the insurance company, at least with respect to some issues, if the company had reason to foresee when it issued the policy that there might be a shift to another state of the principal location of the risk.[40]

The court stated that although Illinois had an interest in giving its contracts the effect their language commands, ISMIE could "clearly have foreseen the application of Indiana law when it provided coverage for activities taking place in Indiana."[41] Further, the court noted that ISMIE had the power to bargain freely for specific choice-of-law clauses, limitations on policy territory, or other more creative provisions.[42] The court found that applying Illinois law to the dispute would undermine the policies behind the Indiana pro rata rule and would encourage non-Indiana insurers to delay settlement and litigate in hopes of receiving a windfall to the detriment of Indiana insurers.[43] It would also likely encourage Indiana insurers to bring suit, as Rockwood did, to require participation from both insurers. Therefore, the court found that Indiana law governed the declaratory judgment action.

B. *AMERICAN EMPLOYERS INSURANCE CO. V. COACHMAN INDUSTRIES*[44]

Coachman was an Indiana corporation with its principal place of business in Indiana but with many manufacturing facilities throughout the United States. One wholly owned subsidiary was CIT, a Texas corporation with its principal place of business in Texas. After the Texas facility closed, it was

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[39] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. d.

[40] *Id.*

[41] *Rockwood*, 646 F. Supp. at 1190.

[42] *Id.*

[43] *Id.*

[44] 838 N.E.2d 1172 (Ind. Ct. App. 2005).

put on notice of a claim against it for environmental contamination of neighboring land. There were numerous insurance policies entered into by Coachman, naming CIT as an additional named insured. These insurers were located in many different states. The policies, all entered into by Coachman, contained no choice-of-law clauses. In determining whether Texas or Indiana law applied to the breach-of-contract and bad faith action brought by Coachman against the various insurers, the court engaged in an intimate contacts evaluation to determine which substantive law applied.

The court found the first, second, and fifth factors of section 188 to be indeterminate and accorded them very little weight in its decision. The third factor, place of performance, "is the location where the insurance funds will be put to use."[45] As the environmental damage occurred in Texas, this factor weighed in favor of Texas law. However, this factor was given little weight as the place of performance "can bear little weight in the choice of the applicable law when . . . at the time of contracting it is either unknown or uncertain . . . ."[46]

> In this case, the funds will be put to use in Texas, as that is the state in which the Grapevine Site [CIT] was located. However, this factor bears little weight in our choice of law determination because at the time of contracting, the place of performance was uncertain because of Coachmen's subsidiaries throughout the country, although they were primarily located in Indiana.[47]

The court gave the most weight to the fourth factor, the location of the subject matter of the contract. In the case of contracts for casualty insurance, this factor was the "principal location of the insured risk during the policy's term."[48] The comments to the *Restatement* indicate that "the location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state."[49] This factor is also accorded greater significance when the other *Restatement* factors do not point primarily to one forum.[50] As this case was one for environmental damage in multiple jurisdictions, the court applied the "uniform-contract-interpretation approach." The court found that the "principal location of the insured risk" is the state with the largest number of insured sites.[51] The

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[45] *Coachmen Indus., Inc.*, 838 N.E.2d at 1180.

[46] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e).

[47] *Id.*

[48] *Id.*

[49] RESTATEMENT (SECOND) OF CONFLICT OF LAW § 193 cmt. b.

[50] Kelley Buick of Atlanta, Inc. v. TIG Ins. Co. 2005 WL 3238325, 4 (N.D. Ind. 2005); Hartford Accident & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 293 (Ind. Ct. App. 1997), *trans. denied*.

[51] *Coachmen Indus., Inc.*, 838 N.E.2d. at 1180.

rationale for this approach was that as the number of sites increases, so does the risk of an occurrence.[52] Further, the risk must be determined at the time the contract is formed.[53] Therefore, although the CIT site existed when the policy was formed, because Indiana had always had the largest number of insured sites, Indiana law was found to apply to the dispute.[54]

C. *NAUTILUS INSURANCE CO. V. RUETER*[55]

Several small corporations were associated with American Community Services ("ACS"), an Indiana-based magazine clearinghouse that sold magazines by contracting with the small corporations who would hire door-to-door salesmen to sell certain magazines. The small corporations were insured by Nautilus, with ACS as an additional insured on their respective CGL policies. After several individuals were victims of violent crimes committed by various door-to-door magazine salesmen employed by the small corporations, Nautilus filed an action in United States District Court for the Northern District of Indiana, asking the court to find that the civil complaints against Nautilus for negligent hiring and negligent supervision did not fall within coverage of CGL policies. Nautilus argued that Indiana law applied because the corporations were incorporated in Indiana. Further, ACS was an Indiana corporation with its principal place of business in Michigan City, Indiana. The claimants, the Estate of Shirley Reuter (Shirley was murdered by a door-to-door salesman in her New Jersey home) and Justin Chretien (who was assaulted by a salesman in Virginia), argued that Illinois law applied because Illinois had the most intimate contacts with the insurance contracts in that the policies were countersigned, as required by Illinois law, by the Illinois Department of Insurance. The choice-of-law determination in this case was especially important as the substantive law of Indiana and Illinois differed as to whether negligent hiring can constitute an occurrence under an insurance policy.

1. Place of Contracting

Comments to section 188 of the *Restatement (Second) Conflict of Law* instructs that the place of contracting is "the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect . . . ."[56] However, the place of contracting standing alone, is often insignificant.[57] ACS initially procured the insurance policies on behalf of the corporations from its Indiana location. However, the small

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[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] 537 F.3d 733 (7th Cir. 2008).

[56] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e.

[57] *Rueter*, 537 F.3d at 738.

corporations reimbursed ACS for the cost of the premiums. The insurance agents that ACS used worked for Sun Insurance in New Jersey. The policies, however, were ordered from and underwritten by a Pennsylvania insurance company. However, the policies were countersigned by the Illinois Department of Insurance.[58] Under Illinois law, the insurance contracts were in effect only after they were approved by the Surplus Line Association of the state.[59] This fact weighed in favor of applying Illinois law to the contracts. But Indiana has downplayed the significance of countersignatures that are required by state law as indicators of the place of contracting.[60] Therefore, due to the different parties involved, the court could not "pinpoint the place of contracting," therefore, this factor was not determinative.[61]

2. Place of Negotiation of Contract

Usually, this factor is a "significant contract."[62]

> The state where contract negotiations occur has an interest in the legality of the negotiations themselves, as well as the ultimate agreement. However, "[t]his contact is of less importance when there is no one single place of negotiation and agreement, as for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone."[63]

Because the negotiations in this matter took place via telephone between ACS and Sun Insurance, and via e-mail or fax between Sun Insurance and the underwriter, the court could not identify a particular place of negotiation as negotiations occurred in Indiana, New Jersey, and Pennsylvania, but none in Illinois.

3. Place of Performance

> The place of performance "is the location where the insurance funds will be put to use." [*Coachman*, 838 N.E.2d at 1180.] If a contract is to be performed in a particular state, that state has "an obvious interest in the nature of the performance and in the party who is to perform." *Restatement (Second) of Conflicts § 188 cmt. e.* However, the place of performance will not significantly affect the choice-of-law analysis when "(1) at the time of contracting it is ei-

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[58] *Id.* at 739.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 739.

[62] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e.

[63] *Rueter*, 537 F.3d at 739.

> ther uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue.[64]

Because the insurance of this corporation that sold magazines door-to-door was unknown at the time of contracting, the court found the factor indeterminate as to which state's law applied.

4. Location of Subject Matter

The Court intended to address this factor within its analysis of the place of incorporation. It did, however, note that the policies at issue were surely intended to insure risks located, to some extent, in Illinois.[65]

5. Domicile, Residence, Nationality, Place of Incorporation, and Place of Business

"At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state."[66] In *Rueter*, all the insureds were incorporated in Indiana. ACS, the additional insured, had its primary place of business in Indiana. However, the primary places of business for the corporations were not as clear cut. One of the small corporations listed on the insurance declaration that its principal place of business was Illinois. However, the provided address was for a residential home of ACS's founder and the phone number was an Indiana phone number. Further, one of the small corporations, by failing to respond to Nautilus's request for admission, admitted to many facts that would indicate it was not an independent entity and that its business address in Illinois was a sham. Further, the two other small corporations failed to respond to the lawsuit; therefore, the only fact known about them was that they were incorporated in Indiana.

Because no factor was compelling or conclusive, the court considered the overall number and quality of contacts to decide whether Indiana law should apply to the contracts.[67] It concluded that if it "were to apply Illinois law for the insurance policies involving [the two non-responding corporations], [it] would effectively replace the multi-factor approach outlined in § 188 with a single-factor determination by which the law of the state identified on the insurance policy would automatically govern a contract dispute, absent a choice-of-law provision."[68] As to the responding corporation

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64 *Id.* at 740.

65 *Id.*

66 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e.

67 *Rueter*, 537 F.3d at 741-42.

68 *Id.* at 742.

whose evidence about its principal place of business was conflicting, the court remanded for a resolution of those factual issues.

The Seventh Circuit found that these first four factors failed to conclusively call for applying either Indiana or Illinois law; therefore, the fifth factor was determinative.[69]

VI. Practice Pointers and Points to Remember

1) In the absence of a forum selection clause, identify and analyze every state that may have a connection with the insurance policy, the contracting parties, or the subject matter of the policy, including

   - where the application was completed and submitted;
   - where negotiations occurred;
   - where the policies were executed and where premiums were paid;
   - where insurance brokers, if used, were located;
   - from where the policies were issued and/or delivered;
   - where the individuals or entities were domiciled or located;
   - the territorial coverage covered by the policy; and
   - where the accident or dispute took place.

2) Determine if there is a conflict of laws between the potentially applicable jurisdictions. If so, engage in the conflict-of-law analysis using the law of the jurisdiction where the suit will be brought.

3) If some factors are of equal weight with respect to both jurisdictions, they may be less important to the overall analysis and counsel will want to emphasize other disparate factors.

4) If one factor yields different answers when applied to many defendants, then it may be indeterminative for choice-of-law purposes because it fails to clearly favor any party.

5) If the policy covers the insured in every state, as most CGL policies do, the insurer will have a hard time claiming that it failed to anticipate providing coverage to the insured in a particular state. Further, such broad coverage provides ample opportunity for the insurer to "reasonably foresee" a location of risk in each state

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[69] *Id.* at 738.

6) As to the place of contracting:

> Standing alone, the place of contracting is a relatively insignificant contact. To be sure . . . issues involving the validity of a contract will, perhaps in the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will often be the state of the parties' common domicile as well. By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.[70]

7) "The 'most important contact is the principal location of the insured risk during the term of the policy.' The rights created by the insurance contract are determined by the law of the state where the risk or subject matter is located. The comments to the Restatement indicate that 'the location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state.'"[71]

8) Although in liability insurance contracts the place of performance can be important, the subject matter of a life insurance policy has no fixed location but instead follows the insured wherever she goes.[72] Therefore, the place of performance is usually irrelevant.

9) The general rule is that distinct corporations, even parent and subsidiaries, are presumed separate.[73]

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[70] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e.

[71] *Coachmen Indus.*, 838 N.E.2d at 1180 (citing Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926, 931 (Ind. Ct. App. 1999)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. b.

[72] Schaffert v. Jackson Nat'l Life Ins. Co., 687 N.E.2d 230, 233 (Ind. Ct. App. 1997).

[73] *Coachmen Indus.*, 838 N.E.2d at 1177.