Federal court in Florida provides helpful case study in insurance "choice of law" tactics

September 29, 2015

The Southern District of Florida recently issued an opinion that addresses some rarely discussed nuances of insurance choice of law disputes. *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, No. 12-CV-81397, 2015 WL 4648617 (August 5, 2015).

In *Sun Capital*, the insured renewed a primary Professional Liability policy from Houston Casualty Company, and a follow-form excess policy from Twin City Fire Insurance Company. To renew the excess policy, the insured's broker emailed Twin City's underwriter: "please consider this email as the formal order to bind coverage for Sun Capital's renewal GPL coverage." *Id.* at *4. Twin City's underwriter responded, from his office in New York, with an email stating: "we are pleased to provide you with the following Binder For Insurance" and attaching a binder. *Id.*

In the ensuing coverage litigation, the insured filed a Motion For Choice Of Law Determination, and contended that Florida law governed its policy (a "fact intensive" inquiry). In response, the insurer cited New York law. The court noted that Florida forums apply the *lex loci contractus* choice of law rule. Applying the rule, the court concluded that "the last act necessary to create an insurance contract occurred in New York when the insurers' agents accepted Plaintiff's agent's formal offer to bind coverage." (Emphasis added.) The court acknowledged a long list of cases cited by the insured in which the state of delivery was controlling in a *lex loci contractus* conflicts analysis, but noted that many of those rulings state only that the place of delivery can be controlling to the "last act" inquiry. In this particular case, the court ruled that the insurer's transmission of its acceptance was the last act forming the policy. The court also explained that the primary policy, which the excess policy in dispute followed, was clearly governed by New York law.

Insurance litigation tacticians can take six lessons from this ruling:

1. Even in *lex loci contractus* states, the delivery address on the declarations page does not necessarily control the choice of law analysis.
2. When a dispute involves a **renewal** policy, delivery is less relevant, because the terms of the contract have already been agreed by the parties.
3. When a dispute involves a **broker**, every step in the chain of communications should be considered as the "last act" to form the contract.
4. In cases involving **excess** policies, there is authority supporting application of the state law governing the primary policy—arguably applicable even if that would be a different state from where the excess policy was finalized.
5. A "**motion for choice of law determination**" can be a helpful tactic, particularly in claims involving uncertainty when time is of the essence.
6. Most importantly, insurers should be able to *litigate* choice of law battles without "fact intensive" discovery.

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