

Recent Presentations Demonstrate Importance Of Choice Of Law

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The law that applies to an insurance contract can be very important. I recently presented on this important fact during a Feb. 17 Minnesota CLE webinar entitled, “Insurance Coverage for Punitive Damages in Minnesota,” and on Feb. 20 at the ABA Insurance Coverage Litigation Committee’s mid-year meeting on “Insurance Transfer in Asset Deals/Stock Deals.” While on their face these two presentations appear to be very different, what struck me was the overriding fact that the outcome of a coverage dispute involving either issue would depend heavily on what state’s law applied. When dealing with coverage for punitive damages, the states are split on whether, as a matter of public policy, a policyholder should be allowed to obtain coverage for punitive damages awards. The majority of states allow parties to freely contract for this coverage. However, a minority hold that allowing coverage for punitive damages would eliminate the deterrent effect that punitive damages were meant to serve. On the topic of insurance transfer, the recent *Fluor v. Superior Court* decision in California found that anti-assignment provisions in an insurance contract would be void if the covered loss had already been sustained at the time of the transfer. *Fluor* overruled the previous *Henkel Corp. v. Hartford* decision, which held anti-assignment provisions would preclude transfer of an insurance policy with respect to a claim unless that claim had been reduced to a sum of money at the time of the transfer. Again, courts are split. Some courts, like the *Pilkington North America, Inc. v. Travelers Casualty & Surety Co.* court in Ohio, will not enforce anti-assignment clauses if a covered loss (i.e. damage) existed at the time of the transfer. Other courts, like the Indiana court in *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, find that insurance does not transfer if the loss went unreported, even if damage existed at the time of policy assignment. These two distinct insurance issues demonstrate that the law governing the coverage case can be outcome-determinative. Therefore, the decision up front on where and how to issue the policy, along with where to start a coverage dispute, can be as important to your case as the facts and policy language.

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