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Enforceability of Forum Selection and Choice of Law Clauses in Coverage and Extra-Contractual Disputes

Insurance policies increasingly contain bargained-for forum selection provisions, addressing whether disputes between the insurer and insured must be resolved in a designated state's courts. Other clauses require alternative dispute resolution (ADR) procedures, either in advance of or in lieu of seeking remedies in court. Many of these same insurance policies that contain choice of forum or ADR clauses may also contain choice of law clauses.

However, all of these clauses may be susceptible to challenge by policyholders and their counsel. Results can vary significantly, depending upon which courts are called upon to resolve the challenges to choice of forum, ADR and choice of law clauses; and depending upon what states' laws may apply to the resolution of these challenges. This can sometimes make it difficult for claims representatives to believe what they are seeing in apparently clear language on the face of their insureds' policies. In these circumstances, it also becomes difficult for insurers to follow a certain and inexpensive path to resolution of insurance coverage and extra-contractual disputes. Take-aways from this panel discussion will include:

- Venue of the lawsuit(s) is important: federal courts apply federal forum-selection law, and apply their home states' substantive choice-of-law principles.
- Federal *forum non conveniens* jurisprudence may be altered by "strong public policy" in the forum's home state, declared by statute or by common law.
- Choice of forum clauses and ADR clauses in insurance policies may be even more vulnerable to state statutes that specifically regulate insurance policies.
- Choice of law clauses in insurance policies may be vulnerable to "a fundamental policy" of a state with materially greater interest in the legal issue.
- When extra-contractual claims are alleged, there may be different rules and results.

1. Choice of Forum & Alternative Dispute Resolution Clauses

A. When Contractual Choice Of Forum Clauses Are On Solid Legal Grounds, and When They Are More Vulnerable To State-Based Statutes

"Choice of forum" clauses address an agreed venue for lawsuits, which is a matter that would otherwise be governed by generalized statutes in both federal courts (28 USC § 1391) and state courts. The doctrine of *forum non conveniens* permits courts to resist parties' imposition on its jurisdiction, even though the venue is authorized by the letter of the general venue statute.

The *forum non conveniens* issue is typically addressed early in state or federal court litigation, especially when the court is being requested to dismiss outright. In federal court, Rule 12(b)(3) and 28 USC § 1406(a) provide for dismissal only when venue is "wrong" or "improper"; in other words, non-compliant with the general federal statute, 28 USC § 1391. Requests to transfer venue of a proceeding from one federal court to another based upon 28 USC § 1404(a) must similarly be made with reasonable promptness. The statute, first enacted by U.S. Congress in 1948, is commonly understood to codify the common law *forum non conveniens* doctrine.

The basic analysis required for a *forum non conveniens* motion is to (1) determine the proper degree of deference to plaintiff's choice of forum; (2) consider whether defendants are proposing an adequate alternative forum; and (3) weigh the relevant private and public interests implicated in the choice of forum. Enforcement of a valid forum selection clause is achieved either when the plaintiff files suit in the contractually designated forum; or when the defendant that is sued in a different jurisdiction successfully moves to enforce the forum selection clause by a motion to transfer the proceeding to the contractually designated forum pursuant to 28 USC § 1404(a).

Although supported by US Supreme Court authority, forum selection agreements are nevertheless often subject to challenges or even competing proceedings, for which insurers' claims representatives and their counsel must be prepared. US Supreme Court authority has supported such contractual clauses based on the strong presumption favoring enforcement of freely-negotiated choice of forum provisions. These cases have correspondingly imposed on litigants a requirement to make strong showings to overcome this presumption.

In *Stewart Organization v. Ricoh*, the US Supreme Court held in 1988 that federal law, and not state law, would govern a federal court's decision on whether to give effect to contractual forum selection clauses. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988). Copier manufacturer Ricoh and its dealer in Alabama agreed to courts in Manhattan, New York, as the exclusive forum for any case or controversy arising out of their contract. The federal district court in Alabama had denied Ricoh's § 1404(a) motion to transfer in the face of Alabama's "state public policy" that it may refuse to enforce choice of forum provisions when they point to out of state venues. The Supreme Court held that 28 USC § 1404(a) governed, as an instruction of U.S. Congress entitled to federal supremacy, the issue purportedly addressed by Alabama's public policy. The parties were entitled to expect their contractual forum selection clause would receive the consideration Congress had provided when it enacted 28 USC § 1404(a), not "no consideration (as Alabama law might have it)." *Stewart Org. v. Ricoh*, 487 U.S. at 32-33. As the concurring opinion of Justice Kennedy stated, "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Id.* at 33-34. Enforcing such negotiated clauses would beneficially avoid costs to parties and the courts.

Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas, 134 S.Ct. 568 (2013) was a unanimous US Supreme Court decision that further instructed federal courts to enforce "contractually valid" forum-selection clauses in all but the most exceptional cases. It refined the analysis of such clauses on a § 1404(a) motion to transfer, requiring the party contravening the clause to carry the burden of showing that public-interest *forum non conveniens* overwhelmingly disfavor transfer. Private interest factors are no longer considered when a forum selection clause is in effect. This same ruling would arguably apply to contractual forum selection clauses that are contained within insurance policies.

Atlantic Marine involved a construction project to build a child-care facility in Fort Hood, Texas, on property owned by the federal government; and a contractual provision stated that all disputes between the parties arising out of the subcontract were to be litigated in Virginia. *Id*. at 575. The Supreme Court held that forum-selection clauses pointing to a federal district should be enforced by a motion to transfer under § 1404(a) and that the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Where a forum selection clause is at issue, the private interest factors will be disregarded, and a district court may consider arguments about public-interest factors only. The Court reversed the Fifth Circuit's decision denying transfer and held that only under extraordinary circumstances unrelated to the convenience of the parties should such a *forum non conveniens* or § 1404(a) motion be denied. *Id.* at 580-81.

From a similar source, US Supreme Court authority expanding upon the general rule that a forum selection clause is presumptively valid, jurisdictions across the country have established their own potentially distinct tests for non-enforcement of such clauses. The 1972 opinion in *M/S Bremen v. Zapata Offshore Co.* required any party challenging forum selection clauses to show "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 407 U.S. 1, 15 (1972). The *Bremen v. Zapata* opinion added that contractual forum selection clauses were unenforceable if enforcement "would contravene a strong public policy of the forum in which suit is brought," identifying that such "strong public policy" could be declared either by statute or by common law.

The Supreme Court observed in *Stewart Org. v. Ricoh* in 1988 that it had a problem with making the applicability of federal statute 28 USC § 1404(a) depend on the content of state law. *Stewart Org. v. Ricoh*, 487 U.S. at 31 n.10. State laws should not be able to render forum-selection clauses automatically *void*, where they could not pre-empt a district court's consideration of the issue by rendering such clauses automatically *enforceable*. *Id.* Nevertheless, modern applications of *Bremen v. Zapata* around the country exhibit the varying degrees to which different courts, both federal and state, may make room for individual states' public policies that are hostile to forum-selection clauses.

On one hand, some jurisdictions prohibit all forum selection clauses, such as Idaho (Idaho Code § 29-110, prohibiting "every" forum-selection clause); or prohibit them in special contexts such as franchise agreements respecting franchise locations within the state, such as California (California Business & Professions Code § 20040.5). In such cases, even federal courts that are bound to apply federal statute 28 USC § 1404(a) have challenged the validity of forum selection clauses and essentially held them automatically void. In 2014, three different federal districts in California circumvented application of *Atlantic Marine* because it had referenced "valid" forum selection clauses, and because "strong public policy" of California as set forth in its franchise agreements statute would render the clause invalid. *Frango Grille USA, Inc. v. Pepe's Franchising Ltd.*, 2014 U.S. Dist. LEXIS 182207, *5-8 (July 21, 2014) (and citations therein). Such a retroactive voiding (based on the content of state law), applied to forum selection clauses that *Atlantic Marine* might well call "contractually valid," arguably presents the very problem that the Supreme Court indicated in 1988 that it was attempting to avoid.

On the other hand, Florida is a jurisdiction that has adopted more a fact-dependent test for invalidating forum selection clauses, thereby adhering more closely to the instructions in *Bremen v. Zapata* that there is a heavy burden to clearly show that enforcement would be unreasonable and unjust before such contractual provisions can be invalidated. Florida's test applies equally to forum selection clauses in insurance policies and in other contracts. Under *Land O'Sun Mgmt. Corp. v. Commerce & Industry Ins.*

Co., 961 So. 2d 1078 (Fla. 1st DCA 2007), Florida courts generally apply the *Bremen v. Zapata* rules to enforceability of insurance policy choice of forum clauses. If the foreign forum selection clause would not contravene strong public policy as enunciated by statute or judicial fiat in either competing forum, if it would not transfer an essentially local dispute, and if it is not the result of one party's unequal bargaining power, it is enforceable in Florida. *Illinois Union Ins. Co. v. Co-Free, Inc.*, 128 So.3d 820 (Fla. 1st DCA 2013).

Insurance policy forum selection clauses are most vulnerable when a state statute, issued specifically to regulate insurance policies, refuses to allow enforcement of foreign forum selection clauses. As the Florida District Court of Appeal observed in *Co-Free, Inc.*, state legislatures know how to be specific in prohibiting enforcement of insurance policy forum selection clauses. Based on the authors' research, the majority of states have not enacted such specific prohibitions, but a minority of states have. In that minority of states, arguments that such specific insurance-regulation statutes express "strong public policy" opposing foreign forum selection clauses would then be further bolstered by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)), whereby U.S. Congress provided for "reverse preemption" to give supremacy to state statutes enacted "for the purpose of regulating the business of insurance."

B. Extra-Contractual Claims May Yield Divergent Results on Choice of Forum

Forum selection clauses can be equally applicable to contractual and tort causes of action. Extra-contractual claims against insurers (colloquially called "insurance bad faith" claims) are commonly compared to torts. This is not surprising where the standards for proving "insurance bad faith" often require proof of unreasonable conduct – the same standard employed for establishing a defendant's breach of duty in negligence cases.

Longstanding case law has extended broadly-worded choice of forum clauses that are otherwise enforceable in insurance contracts to govern not only the coverage issues, but also extra-contractual issues. The Seventh Circuit held a forum selection clause would apply because "where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain [as to the appropriate forum for litigation]." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993) (*citing Coastal Steel Corp. v. Tilghman Wheelabrator*, Ltd., 709 F.2d 190, 203 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938 (1983)). *Hugel* addressed a claim for "tortious interference with a business relationship," and for breach of fiduciary duty arising from allegedly wrongful disclosures made during the insurer's investigation. This holding suggested that any extra-contractual claim, which could not have been asserted "but for" the existence of the insurance policy, would be subject to the same choice of forum clause that governed contractual issues.

However, specific terms used in the choice of forum clause can be determinative. For example, Ninth Circuit jurisprudence draws a line between "mandatory" forum selection clauses which "confer exclusive and mandatory jurisdiction"; and "permissive" clauses which merely grant jurisdiction to a particular forum without ruling out concurrent jurisdiction in other forums. The "mandatory" clause is enforced, but the "permissive clause" may not be. *Hunt Wesson Food, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987). In the Ninth Circuit, bad faith claims are controlled by a forum selection clause for disputes on the meaning, interpretation or operation of any term, condition, definition or provision of the policy, as long as the claims relate to an interpretation of the contract and it is impossible to separate the alleged unreasonable conduct from the issue of what the insurance contract required. *Radian International, LLC,*

v. Alpina Ins. Co., 2005 WL 1656884, *2-4 (N.D. Cal. 2005), *citing Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988).

C. ADR/Arbitration Clauses Often Present Special Circumstances

Arbitration clauses are subject to unique supporting provisions of law, chiefly the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Courts must indulge every presumption in favor of arbitration under the FAA, based on U.S. Supreme Court jurisprudence over 30-plus years. Notable supporting authorities include *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011), which concluded the federal FAA preempts and displaces any conflicting state law that was enacted for the purpose of prohibiting outright the arbitration of a particular type of claim. The FAA's provisions apply in either federal or state courts.

This theoretically would mean that federal authorities including the Supreme Court opinions applying the FAA would also tend to uphold arbitration provisions in insurance contracts. Such rulings would be supported by arbitrations' perceived benefits, including the relief an overburdened judicial system receives when disputes are agreed to be resolved outside of the courts. Generalized choice of forum clauses and other types of ADR clauses may not carry the same perceived benefit as an arbitration ADR clause, where, for example, the choice of forum clause may simply shift the venue of dispute proceedings from one burdened court to another.

However, when regulating the business of insurance is the purpose of a state statute that prohibits arbitration, the McCarran-Ferguson Act thereby joins the state law side of the preemption battle: in such circumstances, "reverse preemption" in favor of the state statute often defeats federal FAA preemption.

For example, the Washington Supreme Court held in *Washington State Department of Transportation v. James River Ins. Co.* 176 Wn.2d 390, 292 P.3d 118 (2013), that binding arbitration agreements in insurance contracts are void and unenforceable pursuant to a Washington statute, RCW 48.18.200. This statute governed insurance contracts "delivered or issued for delivery" in Washington and covering subjects located, resident or to be performed in Washington; and prohibited their construction according to the laws of another state except as specified therein. The portion of RCW 48.18.200 addressing "jurisdiction of action against the insurer" prohibited binding arbitration agreements in insurance contracts because according to the court, the legislative intent was to protect the rights of Washington policyholders to bring an original "action against the insurer" in the courts of Washington. *Id*. at 399. The McCarran-Ferguson Act would shield RCW 48.18.200 from preemption by the FAA, because it was a state statute enacted "for the purpose of regulating the business of insurance."

Conversely, Montana's *Bixler v. Next Fin. Group, Inc.*, 858 F.Supp.2d 1136 (D. Mont 2012) found that the FAA preempted, and the McCarran-Ferguson Act could not save by reverse preemption, Montana's state law invalidating insurance policy agreements (other than "between insurance companies") to arbitrate any controversy arising after the agreement was made. This Montana ruling may be an outlier. First, the Montana statute's location within the Montana Uniform Arbitration Act was a central basis for the court's conclusion that its enactment was highly unlikely to have been for the purpose of regulating the business of insurance. The court held that only provisions of the separate "Montana Insurance Code" were for the express purpose of insurance regulation. Second, other states have considered the same or substantially similar language in their statutes and apparently concluded their statutes were directly enacted for the purpose of regulating insurance. E.g., *McKnight v. Chicago Title Ins. Co.,* 358 F.3d 854, 858-59 (11th Cir. 2004) (Georgia law); *Mutual Reins. Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934-35 (10th Cir.

1992) (Kansas law); *Scott v. Louisville Bedding Co.*, 404 S.W.3d 870, 880-82 (Ky. Ct. App. 2013); *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205 (Mo. Ct. App. 2011).

Even where FAA preemption prevails and upholds a contractual arbitration provision, the contract itself is still subject to all general contract-based defenses that may be available under law or in equity. One such generalized defense that remains available to potentially invalidate an arbitration clause is the common law doctrine of "contractual unconscionability." Courts applying this doctrine to render contractual provisions void or otherwise unenforceable have divided the concept into two categories: "procedural" and "substantive unconscionability." In totality, the doctrine is designed to address the core concern of one party's absence of meaningful choice regarding a contract provision that is so unfairly one-sided as to shock the conscience. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013). In other words, whether the agreement is unreasonably favorable to one party, considering in context its commercial setting, purpose and effect. Arbitration provisions are susceptible to unconscionability arguments if they dispose of a party's procedural legal remedies, and if they appear in what might be fairly termed "contracts of adhesion," for example employment contracts and click-through end-user agreements.

"Procedural" unfairness considers the circumstances of contract formation, and exists when the stronger of two contracting parties presents the arbitration provision without any meaningful opportunity for negotiation, and surprises the weaker party by including the provision in a lengthy form without calling attention to it. "Substantive" unfairness denotes the existence of a one-sided contract provision, for example when only one party to the contract is unilaterally obligated to arbitrate its disputes. Developing case law in certain states holds that either form of unconscionability can suffice to override FAA preemption. *Romney v. Franciscan Medical Grp.*, 186 Wn.App. 728 (2015) (distinguishing Washington from California). However, as the concept has evolved in other jurisdictions' case law, procedural unfairness standing alone may not suffice to void a provision that substantively is not unduly harsh or oppressive.

Courts have thus far resisted contract proponents' arguments that common law unconscionability was created to apply only to arbitration clauses, and not to other contractual clauses, for example in a string of recent reported and unreported California cases involving non-insurance contracts. *Carlson v. Home Team Pest Defense*, 2015 WL 4881994 (Aug. 17, 2015); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013). It remains to be seen whether "contractual unconscionability" will gain widespread appeal as a basis for seeking invalidation of the insurance policy choice of forum clauses referenced in Section 1.A. above.

2. Choice of Law Clauses

One of the first questions for a claims representative to answer, upon receiving notice of a claim, is which state's law will apply. Here too, ostensibly clear contractual choice of law provisions can often be challenged and results may vary, depending at times on the type of claim involved and whether claims handling or contract interpretation alone is at issue.

A. Law of the State Chosen to Govern Contractual Rights and Insurance Coverage Rights May or May Not Apply

Resolution of choice of *law* issues would involve different standards than those employed for the resolution of choice of *forum* issues detailed above. However, as a practical matter the issues are interwoven: the forum court applies its own state's choice-of-law rules to resolve the conflicts between the substantive laws of two competing states. Further, the forum court is likely to be most familiar with its own state's laws and not the competing state's laws, which could potentially influence its decision on which law to apply.

When the parties to an insurance policy have chosen the laws of one state in their contract, many jurisdictions simply apply Restatement (Second) of Conflicts of Laws § 187 to resolve whether the choice of law provision will be applied as written. For example, New York courts generally enforce a clear and unambiguous choice of law clause contained in an agreement so as to give effect to the parties' intent. *Frankel v. Citicorp Ins. Servs. Inc.,* 913 N.Y.S.2d 254, 259 (2010).

Restatement § 187 provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Restatement § 187(1) does not address the resolution of conflicts between the laws of different states, but merely provides for incorporation by reference. Courts applying Restatement § 187(2) to determine choice of law issues, based on an insurance policy's explicit choice of law provision, therefore consider whether the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. *Beatie & Osborn LLP & Patriot Scientific Corp*., 431 F. Supp. 2d 367, 378 (S.D. N.Y. 2006). California's analysis begins with the question of whether "the chosen state has a substantial relationship to the parties or their transaction," or "there is any other reasonable basis for the parties' choice of law," before then addressing whether California's fundamental policy is involved and which state has the materially greater interest in determination of the particular issue. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466, 834 P.2d 1148 (1992). Where there is no reasonable basis for the chosen forum, the choice of law clause may become unenforceable without reference to fundamental policy. However, the chosen state may have a sufficient interest in the outcome of the dispute even if only one

party to the contract was incorporated in the selected choice-of-law state, and executed the contract there. *In Re: ATP Oil & Gas*, Case 14-03280, at *9-10 (S.D. Tex. Bankr., June 5, 2015); *Frankel*, 913 N.Y.S.2d at 259-60.

If there is no conflict with "fundamental policy" as referenced in § 187(2)(b), then the parties' choice of law will generally be enforced. To date, the difference has not been clearly delineated between "*fundamental* policy" under the Restatement, and "*strong* public policy … whether declared by statute or by judicial decision" that the U.S. Supreme Court suggested would be necessary before refusing to enforce choice of forum clauses. *Bremen v. Zapata*, 407 U.S. at 15. Only a few states, notably Louisiana, Texas and Washington, have statutes providing that insurance policies "delivered" there or "payable" there (TX) may not be construed according to the laws of any other state. Whether such statutes are "a fundamental policy" of each state may be subject to dispute. *Beatie & Osborn*, 431 F.Supp.2d at 381. But if a "fundamental" conflict is present, the law of the state with the greater interest in the issue generally will be applied.

The "rule of § 188" referenced in Restatement § 187(2)(b) comes into play only as a further requirement of the § 187(2)(b) analysis: that the "greater interest" state whose "fundamental policy" would be violated must also satisfy the factors for choice of law as enunciated in Restatement § 188. Most insurance claim handling professionals and their counsel are familiar with the five § 188(2) factors that are used to determine which state has a materially greater interest in the contract, in the event of conflicting laws in different states that arguably apply to an insurance policy containing no choice of law clause. The § 188(2) factors are: (1) the place of contracting, (2) the place of negotiation, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. These factors are not to be applied mechanistically but qualitatively (based on the nature of the contract), in deciding which state has the most significant relationship to the parties and the contract.

The "rule of § 188" also includes the § 188(1) provisions for the most significant relationship to be determined under the following general principles stated in § 6:

> 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.
>
> Restatement (Second) Conflict of Laws § 6 (1971).

Whether an effective choice of law has been made in an insurance policy therefore depends on a weighing of all applicable factors in a given jurisdiction, and there may be many threshold requirements to satisfy before a clear contractual choice of law clause may be voided, or even restricted in effect.

B. Extra-Contractual Claims May Present Special Circumstances on Choice of Law

The law is unsettled in most jurisdictions regarding whether an otherwise-enforceable choice of law provision in an insurance policy regarding contractual insurance coverage issues is also enforceable and directs the law that must be applied to resolve extra-contractual issues. One argument in favor of this approach is that the interests of economy, ease of application, and uniformity of result should require the application of one state's law to all the issues in the entire action. *Home Ins. Co. v. Serv. America Corp.*, 654 F. Supp. 157, 158-59 (N.D. Ill. 1987). The applicable state's law, the argument would go, should be the same state's law that the parties agreed would apply to the contract itself.

Broad contractual provisions on Choice of Law may be properly determined to require resolution of extra-contractual issues under the same law as the contractual issues, for example where the clause reads as follows:

"In the event that the insured and [Insurer] have any dispute concerning or relating to this policy including its formation, coverage provided hereunder, or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the insured agrees with us that the internal laws of [State] shall apply without giving effect to any conflicts or choice of law principles."

Presented with such broad-sweeping language, it would be reasonable for a court to conclude the parties explicitly contracted to address "any dispute … relating to this policy" including extra-contractual issues, and not merely the interpretation of insurance policy provisions, under the agreed state's laws.

Even choice of law provisions that more narrowly reference only disputes about the policy's meaning, interpretation or operation could well apply to certain types of extra-contractual claims, especially those that require a determination of the insurer's coverage obligations under the policy. Courts that so hold have relied on the bad faith claim being "inextricably intertwined" with the contract claim, such that the same law should govern both claims. *Commerce & Indus. Ins. Co. v. United States Bank Nat'l Ass'n*, 2008 WL 4178474 (S.D.N.Y. Sept. 3, 2008). Similar arguments may also be made regarding other bad faith claims such as allegedly untimely or unreasonable claim handling, given that if there was no contract at all, there could be no claim of bad faith. *Redmond v. Sirius Intern. Ins. Corp.,* 2014 WL 197909 (E.D. Wisc. 2014).

Where the insurance policy's choice of law provision is not phrased sufficiently broadly, however, what law applies to extra-contractual issues may be determined independently from the choice of law clause applied to the contractual issues. Restatement (Second) of Conflict of Laws' most significant relationship test, to be considered in a tort conflict of law analysis, is found at § 145. Where Restatement § 145 applies, the court must evaluate these contacts both quantitatively and qualitatively, according to their relative importance to the particular issue at hand:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Where multiple states' laws may potentially apply to extra-contractual claims, courts analyze these contacts based on their relative importance to those claims. Arguments advanced by policyholders headquartered in a particular state, if they want that state's law to apply, may include that their home state has a substantial interest in deterring bad faith conduct of insurers within that state. E.g., *Newmont USA Ltd. v. American Home Assur. Co.,* 676 F.Supp.2d 1146, 1163-64 (2009). Conversely, the state where an insured was sued may be argued to constitute the "center" of the parties' relationship with regard to the insurer allegedly unreasonably handling that lawsuit, while the state of insured's headquarters at the time of contracting could be argued to have the more significant relationship to the contractual interpretation issues. As demonstrated by these alternative arguments, if an insurance policy's choice of law clause becomes inapplicable or unenforceable with regard to some or all extra-contractual claims, the results may be unpredictable for all parties concerned.