

Delaware Supreme Court Reverses \$13.7M Judgment Underscoring Importance Of Choice Of Law Analysis

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The first step in any coverage analysis is determining which jurisdiction's laws govern the coverage issues. This can be outcome determinative as demonstrated by the Supreme Court of Delaware's recent decision in *Travelers Indemnity Company v. CNH Industrial America, LLC*, Case No. 420, 2017 (Del. Jul. 16, 2018), in which the choice of law analysis made a \$13.7 million difference.

The sole issue in the case was whether three Travelers' policies issued in 1972, 1978, and 1985 were validly assigned to CNH by Tenneco, Inc. and Tenneco's subsidiary, J.I. Case, Inc., as part of a 1994 corporate reorganization in which Tenneco and J.I. Case assigned certain assets and liabilities to CNH. If the policies were validly assigned, they covered approximately \$13.7 million in historic asbestos-related liabilities arising from J.I. Case incurred by CNH. If they were not validly assigned, however, there was no coverage for such historic J.I. Case related liabilities for CNH.

The validity of the assignments, in turn, depended on the state law governing the dispute. If Wisconsin law applied as asserted by CNH, the policies' anti-assignment provisions could be overcome and would not invalidate the assignments. If Texas law applied as asserted by Travelers, the policies' anti-assignment provisions would be enforceable and would invalidate the assignments of the policies from Tenneco and J.I. Case to CNH, because neither Tenneco, J.I. Case, nor CNH sought Travelers' consent to assign the subject policies from Tenneco and J.I. Case to CNH.

The policies were silent on choice of law, so the court applied the "most significant relationship" test from the *Restatement (Second) of Conflict of Laws* which has been adopted by a number of other jurisdictions as well. The court noted that the Restatement generally provides the validity of a contract of insurance and the rights created thereby are governed by the law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy. It declined to apply that general rule, however, because it is inapplicable to policies such as the policies before it that provide "broad-based coverage across many jurisdictions for a company's enterprise-wide risks." *Id.* at 9.

The court determined that when policies insure risks spread over a number of jurisdictions, the court should weigh five factors to determine which jurisdiction's laws govern policy related issues: (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 (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.* at 9-10. The court further stated that when dealing with a corporate insurance program covering risks across many jurisdictions, the dispute should not be focused on the nature of the underlying claims triggering the insurance coverage; rather, it is more appropriately focused on how the policies should be interpreted and the expectations of the insurer and insureds with regard to policy interpretation at the time the policies were issued. In this regard, the court found that the expectations of the parties are best served by providing policy terms a meaning that does not vary based on the location of a particular claim, and applying the law of the state with the most significant relationship to the formation of the insurance contracts. It additionally noted that this promotes consistency in the law's application to the policies despite the fact that the policies may cover claims in any number of different jurisdictions. *Id.* at 10-11.

Applying these principles to the case before it, the court found that Texas had the most significant relationship to the parties and the dispute, because Tenneco had negotiated the policies on behalf of itself and its subsidiary, J.I. Case, in Texas; Tenneco had paid the premiums from Texas; and Tenneco had managed the insurance program from Texas, and because Tenneco was domiciled, incorporated, and conducted business in Texas. Given these factors, it was reasonable for

Travelers, Tenneco, and Tenneco's subsidiary, J.I. Case, to expect Texas law to apply to the policies at the time they were issued. The court also found that Texas had the most material interest in how the policies should be interpreted since the policies were negotiated, contracted, and managed in Texas. *Id.* at 12-13.

The court rejected CNH's argument and the lower court's reasoning that Wisconsin law should apply because that is where the particular subsidiary at issue, J.I. Case, was headquartered and the particular liabilities at issue were incurred. The court stated:

Here, applying the law where each Tenneco subsidiary was located could allow "the meaning of the contract[s] to vary arbitrarily." Applying the law of Texas, which has the most significant relationship to the parties and the dispute, maintains "certainty, predictability and uniformity" in interpreting the insurance contracts and provides "ease in the determination and application of the law."

Id. at 14.

This case is a stark reminder of the importance of an early and accurate choice of law analysis. It also provides guidance for courts in Delaware and other jurisdictions that have adopted the *Restatement's* most significant relationship test as to how to address choice of law issues in the context of comprehensive, multistate insurance policies and programs.

To discuss any questions you may have regarding the issues addressed in this Alert, or how they may apply to your particular circumstances, please contact Patrick M. Aul at (704) 348-3447 or paul@cozen.com.