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Whose Law is it Anyway?
Thinking Critically About Choice-of-Law Questions for Additional Insureds

By Nicholas M. Insua

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Complex issues abound in the context of coverage for additional insureds. Unfortunately, there often is little guidance in this area, and parties must wade through the mire of the relationships and transactions giving rise to litigation involving additional insured coverage to figure out even the most basic issues.

Who is an Additional Insured

A party may be an additional insured and not even know it. It is important to recognize what situations might implicate the rights of an additional insured, so if you find yourself in that situation, you can ask the initial question: Am I an additional insured under someone else's insurance policy for this claim?

For example, if a contractor is sued by an employee of a subcontractor, potentially applicable policies include the liability policies of the contractor and subcontractor, a design professional's general liability and errors and omissions liability policies, and policies purchased by the property owner. Frequently a party will be included as an additional insured or additional/named insured on the insurance policies of some or all of these other entities. Additional insured clauses or endorsements are used to provide additional insurance coverage to the additional insured. Sometimes a named insured will pay extra in premiums to purchase this additional insured coverage and, therefore, it makes sense to pursue this additional source of insurance.

In the asbestos context, for instance, a company that uses asbestos-containing products on its premises may contract out for the installation or removal of these products. For this work, the premises owner may name the contractor as an additional insured under its comprehensive general liability insurance. Thus, if employees of the contractor are exposed to asbestos, the contractor may seek compensation from the insurance company of the premises owner as an insured. Likewise, an energy company may hire subcontractors to assist it with cleanup or remediation projects. If the employees of those contractors wind up suing the energy company, it may be that the energy company is an additional insured on the policies of the contractors. Countless circumstances may arise in which additional insured coverage could be in play.

> ***"[A]n additional insured's problem and concomitant liability should be governed by the law of the jurisdiction that has the greatest interest in that particular problem."***

What Law Governs Claims by Additional Insureds

One issue that policyholders and additional insureds probably do not consider until the problem arises is what law governs claims for coverage by an additional insured. It is tempting to presume that it will be the same as the law that applies between the insurance company and the policyholder. Apart from the virtue of simplicity, that answer is especially appealing because most choice-of-law tests are framed for a bipartite relationship, emphasizing concepts such as negotiation and execution and issuance and delivery. On the other hand, an additional insured may receive a copy of the insurance policy, but usually that will not meet the technical requirements for "delivery" as such, which is a legal term of art.

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Likewise, while certificates of insurance may be sent to additional insureds, certificates of insurance are not insurance policies and most courts, unfortunately and sometimes absolutely incorrectly, do not give much if any weight to a standard-form "Acord" certificate of insurance being spit out and sent to an additional insured. It is thus easy to slide into a choice-of-law analysis that focuses on the first named insured, even if a claim or dispute concerns insurance coverage for an additional insured.

The first step in any choice-of-law analysis for an additional insured is to understand that an additional insured enjoys separate and distinct rights and obligations under an insurance policy. Other than perhaps sharing liability limits, an additional insured is not, or at least should not be, stuck in the same boat as a first named insured. For instance, if a first named insured gives late notice of an occurrence, that late notice should not be imputed to an additional insured that gives otherwise timely notice for the same occurrence. Many insurance policies contain provisions specifically differentiating between the rights and obligations of separate insureds. Even without such a provision, however, the principle applies to all policies based upon the purpose of the policy for each insured.

An additional insured is made an additional insured to cover its problems. Its problems by and large are its own and not those of the first named insured. At a minimum, those problems potentially impose full liability on the additional insured. Thus, an additional insured's problem and concomitant potential liability should be governed by the law of the jurisdiction that has the greatest interest in that particular problem. Understood in those terms, it is apparent that the first named insured properly has little to do with the analysis.

The Iowa Supreme Court used this common-sense approach in *Gabe's Construction Co. v. United Capitol Insurance Co.* Gabe contracted to install a gas feeder and distribution facility in Iowa for a third party. Gabe subcontracted with Svode, and as part of that subcontract, required Svode to add Gabe as an additional insured on Svode's insurance policies. Svode did so under its insurance policy with United Capitol Insurance Company ("United").

During the work, an accident occurred involving a truck owned by Svode, which had been parked by a Svode employee. Svode and Gabe were sued in relation to the accident. Gabe was sued for negligence in failing to take proper safety precautions for the project.

United maintained that, under the Restatement (Second) of Conflict of Laws, Minnesota law governed Gabe's claim because

"Surely the more relevant authority is this Court's admonition …, against a party's play[ing] 'fast and loose' with the courts."

Answer on page 3

"[t]he insurance policy was procured in Minnesota by Svode, a Minnesota corporation with its primary business in Minnesota, through a Minnesota agent." United also argued that it would be "illogical" to apply the law of the place of the alleged tort, as that would lead to different laws applying to the same insurance policy.

The court disagreed with United and held that Iowa law controlled the dispute between Gabe and United. The court observed that the policy stated specifically that it "applied separately to each insured" and that, although the policy was sold to Svode in Minnesota, an endorsement added Gabe as an additional insured "for the sole and express purpose of protecting Gabe from liability arising from the project in Iowa." The court thus concluded that "the principal location of United's risk during the term of Gabe's endorsement was in Iowa."

The *Gabe* court's analysis might be thought of as part of the burgeoning jurisprudence founded on the Restatement (Second) of Conflict of Laws eschewing the old *lex loci* contractus rule for the "law of the site." However, by emphasizing the separate and distinct rights that the additional insured, Gabe, had under the policy, the decision put a unique gloss on this otherwise common question. By thinking critically about a common question, Gabe persuasively broke through the *lex loci* contractus versus "law of the site" stalemate.

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a WHO SAID WHAT?

American Home Assurance Company, Brief of Appellees at 35, dated September 14, 1992, *American Home Assurance Co. v. Belvedere Insurance Co.*, Ltd., No. 92-7689 (2d Cir.)

"Whose Law is it Anyway?" continued from p3

Conclusion

Additional insureds and their lawyers should avoid falling prey to the assumption that what's good for the goose is good for the gander, that if the law of jurisdiction X is or was applied to a first named insured's claim, then X's law must be applied for an additional insured's claim as well. Depending on the differences in lawm that syllogism can wreak havoc, and could cost millions or billions of dollars in coverage. All of the good law in the world isn't worth a dime if it's not going to apply in your case. Why concede a case away when the stakes are so high? Do not assume that factors such as negotiation, execution, issuance, and delivery, will determine choice of law, as those factors have no relevance to the additional insured-insurance company relationship.

The trap of complacence is set and ready to spring. Don't step in it. Think critically instead and have the proper law apply to additional insured coverage questions.

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Nicholas M. Insua is an attorney in the New Jersey office of Anderson Kill & Olick. Mr. Insua's practice concentrates on insurance recovery litigation on behalf of policyholders. Mr. Insua is co-author of "Business Income Insurance Disputes." The guide — which focuses primarily on the side of the policyholder — will help you to prepare for unexpected business disruptions and income losses which can be trigged by many events, from large-scale disasters to a street closing. Mr. Insua can be reached at (973) 642-5864 or ninsua@andersonkill.com.

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