

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-0311-PL-2073

GUIDANT CORPORATION, et al.,)
)
Plaintiffs,)
)
vs.)
)
ALLIANZ INSURANCE COMPANY, et al.,)
)
Defendants.)

**ORDER DENYING ANTI-SUIT INJUNCTION
AND LIFTING STAY**

Introduction

Plaintiffs ("Guidant") seek indemnification and liability coverage upon numerous multi-state insurance contracts. Defendant Allianz Insurance Company ("Allianz") moved to dismiss and defer to a prior pending Illinois action alleging fraud against Guidant Corporation only. The Court denied Allianz's motion to dismiss, but stayed the action pending the Illinois disposition of the fraud issue only. Nevertheless, other Defendants intervened in Illinois on liability coverage claims.

Guidant now seeks anti-suit injunction to stop the Defendants in the Illinois action. The Court denies the anti-suit injunction, but lifts the stay since Indiana law likely applies and the Court is not confident the parties or other courts will proceed with comity.

Procedural Background

Multiple claims for bodily injury and civil penalties are pending against Guidant related to its Ancure device. Allianz insures Guidant's liability under umbrella policies.

On November 6, 2003, Allianz filed a state court action in Illinois largely seeking rescission for fraud against Guidant Corporation only, solely related to Guidant's renewal of its 2000 policy. On November 8, 2003, Guidant and its related companies filed this action largely seeking declaratory judgment for coverage from Allianz and six other separate insurers for the underlying Ancure actions.

In Illinois, Guidant Corporation moved to dismiss, and Allianz moved to enjoin this case. In January 2004, the Illinois court, by Judge Sheen, found the facts of the alleged fraud related to Illinois because the "place of last act" involved a local producer, Aon Risk Specialists, in Illinois. The court denied Guidant Corporation's motion to dismiss, and also denied Allianz's motion to enjoin this case.

In Indiana, Allianz moved on March 15, 2004 to dismiss this action arguing "comity" should apply, and this Court should allow Allianz to proceed in Illinois on its fraud claim. In Illinois, Guidant filed a counterclaim on March 17, 2004 and moved to partially stay the Illinois action regarding the separate underlying Ancure lawsuits. The stay was denied and affirmed on appeal.

On May 25, 2004, this Court denied Allianz's motion to dismiss, but found "comity" and stayed this action allowing Allianz to proceed in Illinois on its fraud claim only. The Court specifically found:

The Court denies Allianz's motion to dismiss, but stays the action pending the Illinois disposition of the fraud issue only...

This Court is also informed that co-defendants here may seek to intervene in the Illinois action. This Court assumes such motion may be denied to maintain the consistency, uniformity and comity that this Order is intended to achieve...

Comity is best exercised if the Illinois court resolves Allianz's fraud claim against Guidant in Illinois, and Guidant can subsequently seek coverage from Allianz, and the other insurers, in Indiana. Therefore, the claims against Allianz should remain in Indiana pending an Illinois resolution of the fraud claims...

This court acts with the confidence that the Illinois court, and the parties, will respect this Court's finding of comity, and further litigate this matter accordingly.

The Court further finds this order serves the best interests of all parties, and both courts, and anticipates the parties and Illinois court will concur.

Despite the Court's confidence, the co-Defendants here continued to intervene in the Illinois action shortly afterwards. Unfortunately, Judge Sheen then unilaterally determined the Illinois case was a liability contract coverage case, and transferred it to the local Illinois chancery division in 2004. The parties have continued to litigate various procedural aspects of the Illinois action, almost all of which are related to the coverage issues.

On September 1, 2005, Guidant moved for an "anti-suit" injunction to stop these Defendants from proceeding in Illinois. The Court heard arguments on October 6, 2004.

Law

The Court previously found "comity," and afforded the parties and the Illinois court the opportunity to proceed accordingly. Comity is a principle of equitable discretion in which Indiana courts may respect pending proceedings in other states for convenience, courtesy, goodwill, and uniformity. American Economy Ins. Co. v. Felts (2001), Ind. App., 759 N.E.2d 649; George S. May Intemat'l Co. v. King (1994), 629 N.E.2d257.

But most importantly, this case should be governed by the correct choice of law rules.

Indiana's choice of law rules require application of the law of the state with the "most intimate contacts" under five factors:¹

¹ Indiana courts will not engage in "depreceage", or the process of analyzing different issues in one case under the laws of different states. Simon v. U.S. (2004) Ind., 805 N.E.2d 798.

1. Place of contract;
2. Place of negotiation;
3. Place of performance;
4. Location of subject matter;
5. Domicile of parties.

The domicile of the insured is the most important factor in insurance contracts under Indiana choice of law rules. Bedle v. Kowars (2003), Ind. App., 796 N.E.2d302; Schaffert v. Jackson National Life Insurance Company (1997), Ind. App., 687 N.E.2d 230,233.

Under Illinois choice of law rules, insurance policy provisions are likewise governed by the location of the subject matter, place of delivery of contract, domicile of the insured or the insurer, and place of performance, the "place of last act" to give rise to a valid contract, and the place bearing rational relationship to general contract. Lapham-Hickey Steel Corp. v. Protective Mutual Insurance (1995), Ill., 655 N.E.2d 842. But more importantly here, two Illinois cases have specifically stated that the law of the State where the policy was issued or delivered governs an insurance policy. United States Fire Insurance Co. v. CNA Insurance Cos. (1991), Ill. App., 572 N.E.2d 1124; Jadczak v. Modern Service Insurance Co. (1987), Ill. App., 503 N.E.2d 794. Similarly, Hartford Accident and Indemnity v. Dana Corp. (1997), Ind. App., 690 N.E.2d 285, the Indiana Court of Appeals found choice of law analysis in multi-state insurance coverage cases presents only one main factor - location of subject matter/risk - and found such location is Indiana when the insured is an Indiana company.

But under both states, a choice of law analysis is not required unless there are choice of law conflicts - and the choice make a difference in the outcome. Sterling Financial Management v. UBS Paine Webber (2002), Ill. App., 782 N.E.2d 895; Allen v.

Great American Reserve Insurance Company (2002), Ind., 766 N.E.2d 1157. There is one specific and significant difference between Indiana and Illinois here: Waste Management Inc. v. International Surplus Lines Ins. Co. (1991), Ill., 579 N.E.2d 322 in which the Illinois Supreme Court held that the attorney-client privilege and work-product doctrine are inapplicable between a policyholder and its insurer, even during the pendency of insurance coverage litigation. No Indiana court has adopted this reasoning.²

Discussion

Indiana Law Likely Applies

The parties contracted multi-state insurance coverage agreements, absent any choice of law provisions, and now sue in different states.

First, a choice of law analysis is required since there is a conflict of law, and it makes a difference in the outcome. Although Indiana and Illinois are relatively similar in choice of law rules, there is an apparent conflict regarding the one factor upon which Judge Sheen relied when Illinois retained jurisdiction: the so-called “place of last act” factor. Otherwise, Indiana and Illinois choice of law rules both generally favor the law of the state in which the insurance policy was issued, that is, Indiana. Furthermore, Illinois’ Waste Management doctrine is stridently indifferent to Indiana’s common law privileges. Its application will undoubtedly change the nature of the litigation as a whole. So, pending final determination, this Court finds Indiana law is likely to apply, perhaps under both states’ choice of law rules.

² *Waste Management* is not the majority rule across the country. See *Rockwell Int’l Corp. v. Aetna Cas. & Surety Co.*, 26 Cal.App.4th 1255 (2nd Dist. 1994) (rejecting *Waste Management*’s cooperation clause analysis and common interest doctrine analysis because they are “inconsistent with California statutory law); *Imperial Corp. of America v. Durkin*, 167 F.R.D. 447, 452 (S.D. Cal. 1995) (disagreeing with *Waste Management*, and finding that the common interest doctrine only applies where there is no adversarial relationship between an insured and its insurer); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386 (D. Minn. 1992) (finding the court’s reasoning in *Waste Management* to be “fundamentally unsound” and ignores the “express statutory language of Minnesota’s attorney-client privilege”).

The Court's Finding of Comity Is Vacated

The most important factor of comity is *uniformity*. Originally, this Court determined how subsequent proceedings would cause the least conflict.

Allianz's main claim is the alleged fraud of Guidant in Illinois. Guidant's main claim is the coverage of its risk by Allianz, and six other companies, in Indiana. Therefore, the Court found it consistent, courteous and uniform for Illinois to proceed according to its jurisdictional finding over Allianz's fraud claim. Likewise, it found the logical exercise of comity allowed this Court to proceed appropriately upon the larger multi-state coverage claims. But subsequently, the Illinois court decided on its own to declare the Illinois case a "coverage" case. The co-Defendants continued to intervene in Illinois despite this first-filed case in Indiana, the Court's comity finding, and its confidence in the parties' accord. This Court can no longer maintain comity since comity has not engendered the uniformity for which it was ordered.

Conclusion

Indiana law likely applies, and comity is not effective. Therefore, the best interests of the parties, and both courts, is served by denying the anti-suit injunction and lifting this Court's previous stay. Although there is some merit and equity in Guidant's request to enjoin the Defendants in Illinois, the record in both states suggests that the risks and disadvantages of a race to judgment are still preferable to a multi-year, multi-state procedural debacle.

Order

Guidant's Motion for Anti-Suit Injunction is denied.

The Court's May 25, 2004 Order finding comity is vacated.

The Court's May 25, 2004 Order finding stay pending Illinois decision on fraud claim is lifted and vacated.³

The Defendants shall file answer or responsive pleading within fifteen (15) days of the date of this Order.

The Court shall conduct a case conference for all parties on October 27, 2005 at 1:30 p.m.

Dated this 10th day of October, 2005

David J. Dreyer, Judge
Marion Superior Court

³ On September 2, 2005 the Court ordered a stay allowing Guidant to pursue its request for anti-suit injunction. On September 8 and October 6, 2005 the Court also entered orders clarifying the scope of the stay. Those orders are now moot and vacated accordingly.