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CHOICE-OF-LAW RULING IN MASSACHUSETTS DIMINISHES COVERAGE FOR RHODE ISLAND PUBLIC UTILITY

by Marilyn B. Fagelson

The Appeals Court of Massachusetts recently dealt a blow to policyholders by choosing to apply Massachusetts law to the coverage of environmental contamination in Rhode Island.

In *OneBeacon America Insurance Company v. Narragansett Electric Company*, a Massachusetts insurer brought a declaratory judgment action in Massachusetts against a Rhode Island public utility, NEC, to determine its coverage obligations for environmental contamination at several sites. Reasoning that the contaminated sites were nearly all in Rhode Island, that they were operated by a Rhode Island public utility, and that Rhode Island utility customers had an interest in who would bear the clean-up costs, the trial court ruled that Rhode Island law would apply to the case.

The Appeals Court reversed, ruling that the coverage issues should instead be decided under Massachusetts law – which favored the insurer. In Massachusetts, the courts have adopted what is called a "functional choice-of-law analysis" that is guided by the Restatement (Second) of Conflict of Laws. Under this analysis, "the rights created by a contract of casualty insurance are to be determined by the local law of the State that the parties to the insurance contract understood would be the principal location of the insured risk." The insured risk is not necessarily where the injury occurred but rather where the policyholder is domiciled.

In applying these choice-of-law rules, the Appeals Court focused on the circumstances surrounding the procurement of the primary policies. Notwithstanding that NEC was a Rhode Island utility, the insurance had been purchased by NEC's Massachusetts corporate parent from a Massachusetts insurer through a Massachusetts broker. The corporate parent's goal had been to coordinate insurance for itself and its subsidiaries and NEC was the only subsidiary outside of Massachusetts. Although the fact that NEC was a public utility gave the Appeals Court some pause, it concluded that Massachusetts had the greatest connection to the insurance transaction because of the structure of the companies and the interest of the parent in integrating its coverage into a single program "underwritten as one risk."

The Appeals Court turned a victory for NEC under Rhode Island law into a decidedly less favorable conclusion under Massachusetts law. The substantive law of the two states differ in two significant respects. First, Rhode Island construes provisions for coverage of contamination that is "sudden and accidental" as requiring only a showing that the losses were

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unintended and unexpected. By contrast, Massachusetts construes "sudden and accidental" as requiring contamination to take place within a relatively short period of time, a requirement that NEC could not meet with regard to at least one site. Second, Rhode Island applies joint and several allocation to environmental claims, under which NEC's insurers would have been required to pay for the entire loss, up to the limits of their policies. On the other hand, Massachusetts applies pro rata allocation, requiring NEC to bear the expense allocated to periods in which there is no insurance.

The Massachusetts Supreme Court has not ruled on choice of law under similar circumstances so an appeal of *OneBeacon*, if brought, will be worth following. Other jurisdictions have addressed these issues. For instance, in *Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, the New Jersey Supreme Court adopted the "site-specific" approach to choice-of-law determinations in the casualty insurance context, an approach that would presumably lead to a different result in *OneBeacon*. If nothing else, *OneBeacon* reminds us that where the law controlling the outcome of the case differs from state to state, the strategic choice of the jurisdiction – if such a choice exists – may make all the difference in the result.

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