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Choice-Of-Law Principles Affecting Insurance Bad-Faith Claims

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Commentary

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I. Introduction

Parties to liability insurance contracts typically enter into the contract in a particular state. Liability insurance policies, such as automobile policies, usually cover accident risks in other states, too. When more than one state is implicated in litigation concerning an insurer's good- faith obligations to its insured, questions sometimes arise as to which jurisdiction's law governs those obligations. The choice-of-law rules of the jurisdiction where such litigation takes place governs the determination of which jurisdiction's law will apply. Because choice-of-law rules and available bad-faith remedies vary among jurisdictions, an early choice-of-law determination can help parties assess the nature and scope of any potential bad-faith exposure.

However, the application of choice-of-law rules can present difficulties. Choice-of-law rules often involve the identification, assessment and weighing of several interrelated factors. Because of this, a determination of a forum's choice-of-law rules does not always permit a reliable prediction of the applicable law.

This article provides a brief overview of three different sets of choice-of-law rules used by different states in bad-faith cases. In the examples discussed, there may be questions about whether a state appropriately applied its choice-of-law rules. An assessment of whether a state appropriately applied its choice-of-law rules in these cases is beyond the scope of this article.

States vary in their characterization of bad-faith theories.[1] Some jurisdictions treat bad-faith actions as a breach of contract, while others treat them as tort actions.[2] Moreover, states apply different standards, such as a "totality of the circumstances" or a "gross disregard" standard, to determine whether an insurer committed bad faith.[3] These differences can affect a state's choice-of-law determination in a bad-faith case.

II. *Restatement (Second)* Approach: Arizona

Under section 6(2) of the *Restatement (Second) of Conflict of Law*, the forum court must first weigh several factors to determine generally whether the forum or foreign state law governs where there is no statutory directive of its own state on choice-of-law. The section 6(2) factors are:

1. the needs of the interstate and international systems,
2. the relevant policies of the forum,
3. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
4. the protection of justified expectations,
5. the basic policies underlying the particular field of law,
6. certainty, predictability and uniformity of result, and
7. ease in the determination and application of the law to be applied.[4]

Section 145(2) of the *Restatement (Second)* establishes the choice-of-law principles for tort actions. The law of

the state that has the most significant relationship to the tort and the parties applies. Courts should consider the following factors:

1. the place where the injury occurred,
2. the place where the conduct causing the injury occurred,
3. the domicile, residence, nationality, place of incorporation and place of business of the parties, and
4. the place where the relationship, if any, between the parties is centered.[5]

Section 188(2) of the *Restatement (Second)* applies to contract actions. In the absence of a choice-of-law provision, the court must apply the law of the state which has the most significant relationship to the transaction and the parties in light of the factors in section 6.[6] The section 188(2) factors are:

1. the place of contracting,
2. the place of the negotiation of the contract,
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.[7]

Arizona courts view a bad-faith claim as a tort and apply the *Restatement (Second)* approach. *Bates v. Superior Court*[8] illustrates how Arizona applies that approach. In 1975, Gloria Bates, a Michigan resident, sustained injuries in an automobile accident in Illinois that required ongoing treatment. Nationwide had issued an auto liability policy to her husband in Michigan. She made claims for her treatment through her insurance agent in Michigan.

After the accident, Mrs. Bates moved to Arizona. She continued to file claims through her insurance agent in Michigan. In 1984, her insurance agent retired so Nationwide transferred her claims to an adjuster at its home office in Ohio. In 1985, the new adjuster requested Mrs. Bates to see a doctor to determine if she required continued treatment. She did so, and that doctor opined that she did not require continued treatment. Nationwide then denied coverage for future treatment.

Mrs. Bates sued Nationwide in Arizona for breach of contract and bad faith. Nationwide filed a motion for partial summary on the choice-of-law issue, asserting that Michigan law applied. The choice-of-law question was relevant because not all of the potentially interested states permitted bad-faith claims; Ohio and Arizona allowed such claims, but Michigan did not permit first-party bad-faith claims.[9]

The trial court granted Nationwide's motion for partial summary judgment, finding that Michigan law applied based on the *Restatement (Second)* factors. The Supreme Court of Arizona accepted *certiorari* review. The Supreme Court of Arizona vacated the lower court's ruling and instead found that Arizona law applied.[10]

The Supreme Court of Arizona applied the *Restatement (Second)* approach and noted that bad faith is a tort under Arizona law.[11] Weighing the factors of section 145, the court first considered where the injury occurred, where the injury-causing conduct occurred, the geographic disposition of the parties and where the parties' relationship was centered.[12]

The court found that Mrs. Bates suffered her alleged damages after Nationwide denied her claims while she was in Arizona, so Arizona was the place where the injury occurred.[13] The court also found that Ohio was where the injury-causing conduct occurred because Nationwide made the decision to deny coverage for future treatment there.[14]

The court then considered the geographic disposition of the parties. Mrs. Bates was in Arizona, Nationwide was headquartered in Ohio and Nationwide conducted extensive business in Arizona.[15] The court concluded that the geographic-disposition-of-the-parties factor was inconclusive.[16] However, the court gave greater weight to the residence of the alleged tort victim under comment (e) of section 145 of the *Restatement (Second)*.[17]

The court found that the parties' relationship was centered in Ohio because Mrs. Bates submitted the claims there and Nationwide denied the claims there.[18] The court observed that Arizona and Ohio had equally significant relationships to the matter.[19] The court therefore examined the relationship of each jurisdiction in light of the general factors in section 6.[20]

The court also considered the "justifiable expectations of the parties."[21] Nationwide argued that it expected

Michigan law to apply because it negotiated and executed the policy there and it originally adjusted the claims there. The court went on to explain why it did not believe that "such expectations were justified."[22] First, the matter was not unique to Nationwide's Michigan business.[23] Second, Nationwide's policy was not limited to Michigan, and Nationwide could anticipate that Mrs. Bates might relocate or be involved in an accident in other states.[24] If so, Nationwide would adjust the claim in other states.[25] The court therefore found that Nationwide did not have a justifiable expectation that Michigan law would be the exclusive law governing the policy.[26] Because of the relationships with Ohio and Arizona, the court found that either Nationwide or Mrs. Bates could reasonably expect that the laws of either Arizona or Ohio would apply.[27]

The court found that the significant contacts of Ohio and Arizona were the same.[28] Under the *Restatement (Second)* approach, the court had to apply the law of the place of injury unless another state had a more significant relationship.[29] Because Ohio did not have a more significant relationship, Arizona law governed.[30]

The *Restatement (Second)* approach does not provide guidance as to how to weigh the factors identified and courts often differ on how to apply this test. Because of this, critics argue that the *Restatement (Second)* approach is essentially subjective to the particular court utilizing that approach so that "the uncertainty of the analysis prevents parties from predicting which state law will apply with any level of confidence."[31]

III. Governmental Interest Test: California

California applies a "governmental interest" test to determine which law applies in a bad-faith case.[32] First, the court determines whether the substantive law of the states at issue differs.[33] If so, the court examines each state's interest in applying its law to determine if there is a "true conflict."[34] If each state has a legitimate interest in applying its law, the court compares the impairment to each jurisdiction under the other state's rule of law, meaning that the court determines which state's interest would be more impaired if its policy were subordinated to the public policy of the other state.[35]

Denham v. Famers Insurance Co.[36] illustrates how California courts apply the "governmental interest" test in a bad-faith claim. In July 1982, while driving in Nevada, Aldene Denham, a California resident, sustained serious injuries when Jerome Beetow, a resident of Nevada, ran into her. The Denhams sued Mr. Beetow in federal district court in Nevada.

Farmers had issued an automobile liability policy to Mr. Beetow in Nevada. Prior to judgment, Mrs. Denham demanded $50,000 from Farmers to settle the claims against Mr. Beetow. Farmers refused to settle.

In February 1985, the court entered judgment for Mrs. Denham for $151,761 with punitive damages of $15,671, and $5,000 for her husband Scott Denham for loss of consortium. These amounts exceeded the liability limits of Farmers' policy.

In April 1987, the Denhams executed their judgment against Mr. Beetow. The Denhams obtained Mr. Beetow's rights against Farmers and then sued Farmers in California, asserting both third-party and first-party bad-faith claims. The trial court sustained Farmers' demurrer to the complaint without leave to amend. The Denhams appealed.

The California appellate court first addressed whether the Denhams' complaint stated a third- party bad-faith cause of action against Farmers.[37] To resolve the issue, the court had to choose between California and Nevada law.[38]

In applying the "governmental interest" analysis, the first step the court took was to examine both states' laws.[39] The court observed that California permitted third-party bad-faith claims under certain limited circumstances.[40] (Specifically, in 1988, the Supreme Court of California ruled that section 790.03 of the California Insurance Code did not create a private cause of action in *Moradi-Shalal v. Firemen's Fund Insurance Companies*.[41] Previously in *Royal Globe Insurance Co. v. Superior Court*, the court had ruled that section 790.03 of the California Insurance Code created a private cause of action against insurers who commit the unfair trade practices described in that section.)[42] The court concluded that the Denhams' bad-faith claim could proceed under California law.[43]

Nevada, by contrast, did not recognize third-party bad-faithclaims.[44] Even though California permitted the Denhams' third-party bad-faith claim while Nevada did not, the court observed that a "true conflict" was not necessarily presented.[45] A "true conflict" arises only if

both states have an interest in having their law applied.[46] Only if each state has a legitimate but conflicting interest in applying its own law will the court be confronted with a "true conflict" case.[47]

The court noted that California had an interest in regulating the practices of insurers within California and an interest in affording redress to California residents damaged by unfair insurer practices.[48] California's interest in regulating insurers within California, however, was irrelevant because Farmers' refusal to settle occurred in Nevada.[49] California therefore had no legitimate interest in the possible deterrent effect of its third-party cause of action on conduct in Nevada.[50] The court, however, noted that the Denhams were California residents.[51] California therefore had an interest in protecting them from the unfair practices of insurers.[52]

Nevada's interest in applying its law was twofold.[53] First, Nevada had an interest in regulating insurers within Nevada and in protecting Nevada insureds.[54] This was because Nevada "has acknowledged the insurer's duty to act in good faith and deal fairly with its insured."[55] However, Nevada had not extended protection against bad-faith practices to third-party claimants."[56] Thus, Nevada also had an interest in protecting its defendant insurers as well as its insureds because Nevada insureds would ultimately bear the cost of extending the insurer's liability to third persons.[57]

The court concluded that both California and Nevada had an interest in applying their laws, and, as a result, a "true conflict" existed.[58] Having identified a true conflict, the court used the "comparative impairment" approach to determine which state's interest would be more impaired if its policy were subordinated to the public policy of the other state.[59]

The court noted that one factor courts consider under the comparative impairment approach is whether the policy underlying each state's law "is one that was much more strongly held in the past than it is now."[60] The court observed that California's interest in applying its law was "clearly not as strong as it would be had *Royal Globe* not been overruled."[61]

Another factor the court considered was the location of the injury. The injury occurred in Nevada.[62] Although the place of the wrong is not necessarily the applicable law for all tort actions, the situs of the injury remains a relevant consideration.[63] California's only link to the case was that the plaintiffs resided there.[64] Under the circumstances, applying California law would abrogate the interest of a jurisdiction such as Nevada in the application of its law to a situation arising out of an insurance policy written in Nevada, insuring a Nevada resident for an accident that occurred in that state, and where the complained of conduct of the insured occurred, although its effect was upon a third party residing in California.[65] The court was satisfied that Nevada had the greater interest in regulating the conduct of the insurer, as well as in protecting the insurer, and through it the insured, against third-party bad-faith claims.[66]

Thus, the court concluded that Nevada law controlled the Denhams' third-party bad-faith claim.[67] Because Nevada did not recognize such claims, the court found that the complaint failed to state a cause of action.[68]

The second issue the court addressed was whether the plaintiffs' complaint stated a first party bad faith cause of action against Farmers.[69] Specifically, the question was whether a judgment creditor could execute upon a judgment debtor's cause of action against its insurer under Nevada law.[70] The court did not explain how the insured or a judgment creditor in this case could bring a first-party bad-faith claim in a third-party liability setting under the facts before the court.

Having concluded that Nevada law permitted execution upon a cause of action, the court found that the plaintiffs' complaint contained facts sufficient to state a first-party bad-faith claim against Farmers.[71] Accordingly, the court reversed the trial court's order sustaining the insurer's demurrer to the first-party bad-faith cause of action.[72]

Much like the *Restatement (Second)* approach, the governmental interest test is complicated and does not provide guidance as to the weighing of the factors involved so that courts often differ on how to use this test. Because of this, critics of the governmental interest test argue that it is prone to manipulation and promotes forum bias.[73] The Ninth Circuit Court of Appeal has characterized this test as an "amorphous and somewhat result-oriented approach."[74]

IV. *Restatement (First)* Approach: Florida

Under the *Restatement (First)* approach, courts identify the area of law at issue, such as tort or contract.[75] A specific set of rules governs each area of law.[76] For example, in tort actions *lex loc delicti*, the place of the wrong, controls.[77] In contract actions, *lex loci contractus*, the place where the agreement was made, governs issues of the interpretation, existence and nature of the contract.[78] *Lex solutionis*, the place where the contact is to be carried out, governs issues of performance.[79] Questions of remedy are determined by *lex fori*, the law of the forum.[80]

Florida employs the *Restatement (First)* approach. Florida courts have consistently applied *lex loci contractus* to insurance coverage disputes.[81] A bad-faith claim in Florida arises in contract.[82] With respect to choice of law in an insurance bad-faith case, however, courts applying Florida law do not always apply *lex loci contractus*. Instead, some courts have determined that the court must first ascertain the nature of the bad-faith cause of action against the insurer and then discern the choice-of-law rule that applies.[83] This has led to differing results concerning the applicable bad faith law in cases using the Florida approach.

A. State Appellate Cases

1. *Government Employees Insurance Co. v. Grounds*

The Supreme Court of Florida discussed choice-of-law in bad-faith claims in *Government Employees Insurance Co. v. Grounds*.[84] This case involved an auto liability policy that Geico issued to a Mississippi resident in Mississippi. The insured was involved in an auto accident in Florida and sued his insurer in Florida for bad-faith failure to settle after an excess judgment. The insurer argued that the claim should be barred because Mississippi law did not permit insureds to recover excess judgments from their insurer.

The First District Court of Appeal below found that Florida law applied.[85] It stated in *obiter dicta* that a bad-faith claim was "a hybrid which has some of the aspects of a tort action and some aspects of an action *ex contractu*."[86] The Supreme Court of Florida granted *certiorari* review "on the basis of conflict for the limited purpose of expunging certain language contained in the First District Court of Appeal decision which directly conflicts with this Court's decision in *Nationwide Ins. Co. v. McNulty*. . . ."[87]

The Supreme Court of Florida reasoned that expunging the appellate court's language where the lower court said in *obiter dicta* that a bad-faith claim was a hybrid tort and contract action did not alter the lower's court ultimate decision that Florida law applied as opposed to Mississippi law, which did not allow excess judgment recoveries.[88] The court characterized the bad-faith claim as relating to performance under the insurance contract because, according to the court, the insurer breached its obligation to provide its insured a "good faith defense to the action."[89] The court explained that the obligation of the contract (or lack thereof) and matters concerning performance are determined by the law of the place of performance under traditional conflict of laws principles.[90] The *Grounds* court cited to a United States Supreme Court decision, *Scudder v. Union National Bank*, among other cases.[91] In *Scudder*, the Court succinctly summarized the *Restatement (First)* approach:

> Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought.[92]

The *Grounds* court pointed out that the place of performance was Florida, where the insurer maintained and defended the cause of action against the insured.[93]

The result of *Grounds* was that the law of the place of performance applied to the third-party bad-faith claim. Several years after *Grounds*, the Supreme Court of Florida confirmed that *lex loci contractus* applies to insurance coverage disputes in automobile policies in *Sturiano v. Brooks*.[94] That case was not a bad-faith case and the court did not address *Grounds*.

2. *Sturiano v. Brooks*

In *Sturiano*, the Sturianos, residents of New York, had purchased automobile insurance in New York six years prior to an automobile accident in Florida. After the carrier issued the policy in New York, but before the accident, the couple began spending the winter months

in Florida each year. As a result of the accident, Mr. Sturiano died. Mrs. Sturiano then sued her husband's estate. A jury returned a verdict for Mrs. Sturiano.

The Florida appellate court reversed the verdict, holding that the doctrine of *lex loci contractus* required the application of New York law because the parties executed the contract there.[95] Under New York law, Mrs. Sturiano failed to state a claim. (New York law prescribed that unless the insurance policy specifically included coverage for claims between spouses, the action was barred).[96] The appellate court certified a question to the Supreme Court of Florida, asking it to clarify whether the rule requiring that the law of the jurisdiction where the contract was executed should apply.[97]

In confirming the applicability of *lex loci contractus*, the Supreme Court of Florida held that New York law applied.[98] The Supreme Court of Florida applied New York law to the litigation because the automobile insurance policy was executed there, even though the accident occurred in Florida. The court reasoned that allowing one party to modify the contract by simply moving would substantially restrict the power to enter into valid, binding and stable contracts.[99]

B. Federal Trial Court Cases

Each of the three federal district courts in Florida have addressed choice-of-law issues in bad-faith cases against insurers in the wake of *Grounds* and *Sturiano*. These courts have arrived at different results.

1. The Northern District Of Florida

The Northern District of Florida applied the law of the place of performance in a third-party bad-faith claim in *Teachers Insurance Co. v. Berry*.[100]

On May 6, 1990, Dennis Nicholson, who was driving John Berry's car in Florida, was involved in an auto accident, resulting in the death of Alonzo James. Teachers insured Messrs. Berry and Nicholson under an automobile liability insurance policy executed in Pennsylvania. After the death of her son, Mr. James' mother, Debra King, considered filing a wrongful death suit against the defendants in Florida.

On September 10, 1990, counsel for Mr. James' estate wrote a letter to Teachers. Counsel offered to release Messrs. Berry and Nicholson from liability for the death of Mr. James in return for Teachers' tender of the $25,000 policy limits. The settlement offer contained conditions. Ultimately, Teachers did not timely respond to the demand. The bad-faith claim stemmed from the insurer's failure to settle the wrongful death claim against its insureds.

In the diversity action, the court had to determine whether Florida or Pennsylvania law applied to the bad-faith claims. The court determined that *Sturiano's* holding did not apply to the case.[101] *Sturiano* concerned issues of insurance coverage, whereas the *Berry* court determined that the case "entails more TIC's [Teachers'] performance under the insurance policy than the execution or interpretation of the same."[102]

Even though the auto insurance policies were issued in Pennsylvania, the Northern District of Florida held that Florida law controlled the bad-faith issue in the case based upon the "place of performance" language in *Grounds*.

2. The Middle District Of Florida

a. *Allstate Insurance Co. v. Clohessy*

The Middle District of Florida addressed choice-of-law in a first party bad faith case in *Allstate Insurance Co. v. Clohessy*.[103] In that case, Allstate, an Illinois company, issued a Florida automobile insurance policy to Mary and John Clohessy. They lived in both Connecticut and Florida. While the family was in Connecticut, a car struck and killed Brendan Clohessy as he, Mary and Liam were crossing the street. The driver did not have automobile insurance.

Brendan's estate filed a claim for uninsured motorist benefits under the policy issued to Brendan's father, John Clohessy. Mary and Liam also made claims for uninsured motorist coverage under John's policy, alleging claims based on emotional trauma and psychological stress after witnessing Brendan's death.

Allstate filed a declaratory judgment action in the Middle District of Florida after paying the policy limit of $200,000 per person for the death of Brendan. Mary and Liam filed a counterclaim alleging bad faith on the part of Allstate for failing to negotiate or come to a determination of the extent of damages and its inaction.

In the diversity action, the court had to determine whether Florida or Connecticut law applied to the counterclaim for bad faith. The Clohessys argued that because the accident occurred in Connecticut, the uninsured motorist was a Connecticut resident and the Clohessys were living in Connecticut at the time, Connecticut had the most significant relationship to the accident. The court rejected the "significant relationship test" because it found that test applied only in personal injury suits.[104] The court declared that the Clohessys' counterclaim "is purely an action sounding in contract."[105]

Relying upon *Sturiano*, the court found that the Supreme Court of Florida applied the law of the state where the contract was executed.[106] The district court noted that *Sturiano* specifically concerned coverage issues and contractual interpretation in an automobile insurance context. As such, the district court applied Florida law to the Clohessys' bad-faith claim, despite that the accident occurred in Connecticut.[107]

b. *Shin Crest PTE, Ltd. v. AIU Insurance Co.*

In an unpublished opinion after *Clohessy*, the Middle District of Florida applied the law of the place of performance in a third-party bad-faith claim where the insurer failed to defend its insured in a Florida lawsuit.[108]

In *Shin Crest*, Doreen and Donald Blair were visiting friends in Florida in 2001. Mrs. Blair sat on a chair that caused her to fall and injure herself. Shin Crest, a Taiwanese company, manufactured the chair. Sam's Club sold the chair. AIU issued two commercial general liability policies, a 2000 policy and a 2001 policy, that were potentially implicated. AIU issued the policies to Shin Crest in Taiwan. As a vendor of Shin Crest's products, Sam's Club was an additional insured under the policies. The Blairs sued Shin Crest and Sam's Club ("the Blair I suit"). In 2004, the Blairs voluntarily dismissed Shin Crest without prejudice.

In a letter dated February 21, 2005, AIU informed its insured, Shin Crest, that it intended to settle the Blair I suit on behalf of Sam's Club for the remaining limits under the 2001 policy. AIU advised its insured, Shin Crest, that it would not be included in the release and that the Blairs intended to file another suit against Shin Crest prior to the expiration of the statute of limitations. AIU also told Shin Crest that the settlement would completely exhaust the limits of the 2001 policy, and as such, Shin Crest would have to defend itself against the Blairs' claims.

On March 22, 2005, the Blairs filed another suit against Shin Crest ("the Blair II suit"). On March 31, 2005, AIU settled the Blairs' claims against Sam's Club despite the insured's objections. On June 8, 2006, AIU sent a denial letter to Shin Crest regarding the Blair II suit. Shin Crest then entered into a stipulated settlement agreement with the Blairs that resulted in entry of a $12-million judgment against Shin Crest in the Blair II suit.

Shin Crest subsequently sued AIU in federal court alleging (1) breach of contract regarding the 2000 policy; (2) declaratory judgment as to the 2000 policy; and (3) bad faith as to the 2000 and 2001 policies. AIU filed a motion to dismiss.

The court had to determine whether Taiwanese or Florida law governed the insured's bad faith claim.[109] The court observed that Taiwan did not recognize bad faith claims.[110] In relying upon *Grounds*, the court found that Florida law applied because the place of performance was Florida, where the lawsuits against the insured were maintained and defended by the insurer.[111] Accordingly, Florida law governed the third party bad faith claim.

3. The Southern District Of Florida

a. *Pastor v. Union Central Life Insurance Co.*

In *Pastor v. Union Central Life Insurance Co.,*[112] the Southern District Court of Florida applied *lex loci contractus* to determine the applicable law in a first party bad faith claim.

In 1979 and 1981, Pastor, an insurance salesman, purchased two disability insurance policies from Union Central, his employer. In 1993, Pastor underwent prostate cancer surgery. Following his recovery, Pastor suffered depression that eventually precluded him from working any longer.

Pastor sought disability benefits under his two policies. Union Central repeatedly denied that Pastor was disabled. Finally, in 1995, Pastor obtained a judgment in

state court declaring him disabled. Union Central did not pay the judgment until 2001. Pastor then filed a bad-faith claim alleging that Union Central committed bad faith throughout the course of litigation.

Pastor sought relief under Florida's bad-faith statute, section 624.155 of the Florida Statutes. Because New Jersey law applied to Pastor's bad-faith claim, Florida's bad-faith statute did not apply.[113] As such, the court dismissed his complaint for failure to state a claim.[114]

In the diversity action, the court had to determine whether New Jersey or Florida law applied. After looking at the Supreme Court of Florida's language in *McNulty*, the court found that a bad-faith claim by an insured against an insurer lies in contract.[115] Accordingly, the court applied *lex loci contractus*, aligning itself with the Middle District's ruling in *Clohessy*.[116]

The court grappled with applying the substantive laws of one state to disputes involving the payment of claims and applying the laws of another state to the bad-faith claim.[117] In applying *lex loci contractus*, the court reasoned that the rule "seeks to avoid such a fragmented result."[118]

b. *Clifford v. Commerce Insurance Co.*

In an unpublished opinion after *Pastor*, the Southern District of Florida applied the law of the place of performance in a third-party bad-faith claim where the insurer failed to settle a claim in Florida.[119]

In *Clifford*, Joseph Clifford was driving his motorcycle in Miami when a car driven by Marie Denis hit and injured him. At the time of the accident, Ms. Denis had automobile insurance from Commerce with liability limits of $20,000. Commerce had executed and delivered the policy to Ms. Denis in Massachusetts, where she used to live. Mr. Clifford demanded the policy limits, but Commerce failed to settle in a timely manner.

Mr. Clifford sued Ms. Denis for his personal injuries and obtained a $4,185,000 jury verdict. He then filed a third-party bad-faith claim against Commerce. The court, sitting in diversity, had to determine whether Massachusetts or Florida law applied to the bad-faith action.

The court noted that Commerce did not dispute coverage.[120] Instead, the plaintiff's bad-faith claim raised questions about Commerce's "performance under the contract (or lack thereof)."[121] In relying upon *Grounds*, the court found that Florida law controlled bad-faith insurance issues in cases where the underlying personal injury or wrongful death lawsuit was brought and defended in Florida and where settlement negotiations took place, regardless of where the insurance contract was executed.[122] Because the insurer's conduct giving rise to the plaintiff's bad-faith claim took place in Florida (Commerce did not present any evidence or argument to the contrary), the court applied Florida law to the bad-faith dispute.[123]

The court distinguished *Pastor*, where the court dismissed the insured's first-party statutory bad-faith claim because the insurance contract was executed in New Jersey.[124] The court said: "[u]nlike the present case, however, *Pastor* involved a first party statutory claim that 'necessarily involve[d] interpreting the provisions of the contract.' "[125] The court further explained that, although the state court had already decided the underlying coverage issue in *Pastor*, the subsequent bad-faith case "would have inevitably turned on whether Union Central's policy interpretation for denying benefits was so unreasonable as to constitute bad faith."[126]

4. Overview Of Florida Law Discussing Choice-Of-Law In Bad-Faith Cases

The federal district courts' application of Florida's choice-of-law rules appear to depend upon the facts when it comes to bad-faith insurance claims. As the Northern District of Florida in *Berry* said, the first step in determining the applicable law to the case is "ascertaining the nature of a bad faith cause of action against an insurer and then discerning the Florida choice of law rule that applies."[127]

In cases involving first-party bad-faith cases, the Middle and Southern Districts determined that the underlying disputes concerned coverage issues and so the courts applied the law where the policy was made. The Northern, Middle and Southern Districts also addressed third-party bad-faith claims where the insurer failed to either defend its insured or settle claims against its insured and interpreted those facts to amount to a performance-based dispute, and so the courts applied the law of the place of performance.

The Supreme Court of Florida has not addressed choice of law in insurer bad-faith cases since *Grounds*. *Sturiano* states that a carrier's duties and obligations are a matter of contract and that the law of the place where the contract was executed governs the contract. Those contractual duties and obligations would presumably include claims handling, defense and claim payments in both first and third-party settings because bad-faith claims in Florida arise out of a carrier's contractual duties and obligations. Whether S*turiano sub silentio* receded from *Grounds* in determining bad faith choice-of-law under Florida law remains to be seen.

Aside from unresolved questions left in the wake of *Grounds* and *Sturiano*, critics of the *Restatement (First)* or traditional approach typically argue that it is too rigid and mechanical.[128] In addition, critics discredit the approach because it often requires courts to make blind choices, resulting in the application of a state's law even though that state has no interest in the action.[129]

V. Conclusion

States apply different choice-of-law rules in bad-faith cases. Applying choice-of-law rules can become complicated, and often involves the identification, assessment and weighing of several interrelated factors. Because of this, a determination of a forum's choice-of-law rules does not always permit a reliable prediction of the applicable law. Moreover, the appropriate application of a state's choice-of-law rules may be subject to dispute. Nonetheless, an early choice-of-law determination can still help parties assess the nature and scope of any potential bad-faith exposure.

Endnotes

1. Douglas G. Houser, *Choice of Law for Bad Faith Insurance Claims*, 30 TORT & INS. L. J. 37 (1994).

2. *See, e.g.*, Royal Globe Insurance Co. v. Chock Full O'Nuts Corp., 86 A.D.2d 315 (N.Y. App. Div. 1982) (New York treats bad faith claims as contract actions); Bates v. Superior Court of the State of Arizona, 749 P.2d 1367 (Ariz. 1988) (Arizona treats bad faith claims as tort actions).

3. *See, e.g.*, State Farm Mutual Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 63 (Fla. 1995) (Florida applies "totality of the circumstances" standard to bad faith claims); Pavia v. State Farm Mutual Automobile Ins. Co., 626 N.E.2d 24 (N.Y. 1993) (New York applies "gross disregard" standard to bad-faith claims).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

5. *Id.* § 145(2) (1971).

6. *Id.* at § 188(2).

7. *Id.*

8. 749 P.2d 1367 (Ariz. 1988).

9. *Id.* at 1369.

10. *Id.* at 1372.

11. *Id.* at 1369.

12. *Id.* at 1370.

13. *Id.*

14. *Id.* at 1371.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1372.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 30 TORT & INS. L. J. at 41.

32. Arno v. Club Med Inc., 22 F.3d 1464, 1467 (9th Cir. 1994).

33. *Id.*

34. *Id.*

35. *Id.*

36. 262 Cal. Rptr. 146 (Cal. Ct. App. 1989).

37. *Id.* at 147.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 148 (discussing Moradi-Shalal v. Firemen's Fund Ins. Co., 758 P.2d 58 (Cal. 1988)).

42. *Id.* at 147 (discussing Royal Globe Ins. Co. v. Superior Court, 592 P.2d 329 (Cal. 1979)).

43. *Id.* at 148.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 149.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (quoting Zimmerman v. Allstate Ins. Co., 224 Cal. Rptr. 917 (Cal. Ct. App. 1986)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 152.

72. *Id.*

73. Jason E. Pepe, *Kansas's Conflict of Laws Rules for Insurance Contract Cases: It's Time to Change Policies*, 46 KAN. L. REV. 819, 820 (May 1998).

74. 22 F.3d at 1467.

75. Sonya Haller, *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*, 44 OHIO ST. L. J. 239, 242 (Winter 1993).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.*, State Farm Mutual Automobile Insurance Co. v. Roach, 945 So. 2d 1160, 1163 (Fla. 2006).

82. *See* Nationwide Mutual Ins. Co. v. McNulty, 229 So. 2d 585 (1969).

83. *See, e.g.*, Teachers Insurance Co. v. Berry, 901 F. Supp. 322, 324 (N.D. Fla. 1995).

84. 332 So. 2d 13 (Fla. 1976).

85. Government Employees Ins. Co. v. Grounds, 311 So. 2d 164, 168 (Fla. 1st DCA 1975).

86. *Id.*

87. 332 So. 2d at 14.

88. *Id.*

89. *Id.*

90. *Id.* at 15 (citing Scudder v. Union National Bank, 91 U.S. 406, 412-13 (1875)).

91. *Id.*

92. Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875).

93. *Id.*

94. *See* Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988).

95. *Id.* at 1127.

96. *Id.*

97. *Id.* at 1128-29.

98. *Id.* at 1129.

99. *Id.* at 1130.

100. 901 F. Supp. at 322.

101. *Id.*

102. *Id.*

103. 32 F. Supp. 2d 1328 (M.D. Fla. 1998)

104. *Id.*

105. *Id.* at 1331.

106. *Id.*

107. *Id.*

108. *See* Shin Crest PTE, Ltd. v. AIU Ins. Co., 2008 WL 728388 (M.D. Fla. 2008).

109. *Id.* at *2.

110. *Id.* at *4.

111. *Id.* at *2.

112. 184 F. Supp. 2d 1301 (S.D. Fla. 2002)

113. *Id.*

114. *Id.*

115. *Id.* at 1305.

116. *Id.* at 1307.

117. *Id.* at 1308.

118. *Id.*

119. *See* Clifford v. Commerce Ins. Co., 2009 WL 3387737 (S.D. Fla. 2009).

120. *Id.* at *1.

121. *Id.*

122. *Id.*

123. *Id.* at *2.

124. *Id.*

125. *Id.* (citing Pastor, 184 F. Supp. 2d at 1306).

126. *Id.*

127. 901 F. Supp. at 324.

128. 44 OHIO ST. L. J. at 243.

129. *Id.* ■

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