Title: “Public Policy Considerations Concerning Forum Selection Clauses in Insurance Contracts”

Keywords: Insurance, Insurance Law, Insurance Contracts, Forum Selection Clauses

General Information:

This research project provides a comprehensive examination of the legal issues concerning forum selection clauses in insurance policy contracts. Forum selection clauses are found in many commercial contracts today and the enforceability of such clauses are a commonly litigated issue in the courts. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the United States Supreme Court held that forum selection clauses are generally enforceable but that if the clause was unreasonable under the circumstances, then a court could refuse enforcement.

The U.S. Supreme Court in *M/S Bremen* developed a four part test to examine the validity of forum selection clauses generally: first, whether the clause was induced by fraud or overreaching; second, whether the enforcement of the forum selection clause would deprive the plaintiff of a fair day in court due to inconvenience or unfairness; third, whether the enforcement of the forum selection clause would deprive the plaintiff of a remedy; and finally, if the enforcement of the forum selection clause would contravene public policy.

Some courts, like the United States District Court for the Northern District of Illinois, have struck down a forum selection clause for being contrary to public policy. For instance, in *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F.Supp.2d 901 (N.D. Ill. 2013), the Court found that a forum selection clause in an ERISA disability benefits plan was not enforceable because it conflicted with the statutory delegation of Congress in ERISA that an ERISA action may be brought where a plan is administered or where a breach took place (*see* 29 U.S.C. § 1132(e)(2)).

However, many other courts have upheld forum selection clauses. Typical is a case like *O’Hara v. First Liberty Insurance Corp.*, 984 A.2d 938 (Pa. Sup. Ct. 2009). In the *O’Hara* case, the Pennsylvania Superior Court upheld a forum selection clause which required the insured to bring any lawsuit under the insurance policy in the “county and state” of the insured’s “legal domicile.” As to public policy concerns regarding forum selection clauses, the Court noted that “only in the clearest of cases may a court declare a contract void as against public policy.”
Key Takeaway:

Cases involving the enforcement of forum selection clauses in insurance policy contracts vary widely in outcomes, but the majority of decisions have upheld forum selection clauses. However, courts have not incorporated principles such as the “reasonable expectations” doctrine of insurance law when analyzing forum selection clauses in insurance policies.

This paper proposes a several part balancing test to examine forum selection clauses in insurance policies. These factors to be balanced would include:

1. Examination of the type of insured under the policy (i.e., whether the insured is an individual or commercial entity). In cases where the insured is an individual, a forum selection clause would be less likely to be enforced;
2. Examination of type of claim at issue in the case (i.e., breach of contract actions and negligence would be more likely to be subject to a forum selection clause, but cases involving intentional torts and bad faith would be less likely to be subject to the clause for policy reasons);
3. Could the insured reasonably expect the forum designated in the forum selection clause? (Incorporating the reasonable expectations doctrine in insurance law);
4. The location of the parties, witnesses, documents and evidence relating to the case (included by some courts);
5. Was the clause freely negotiated, and is it fair and reasonable under all the circumstances? (Currently included in the analysis of many courts).

Additional Information:

This paper will be presented at the 2016 Midwest Academy of Legal Studies in Business conference in April 2016.
Contact Information:

Professor Chad G. Marzen
Assistant Professor of Legal Studies in Business
Florida State University, College of Business
821 Academic Way, Room 521
P.O. Box 3061110
Tallahassee, Florida 32306
Telephone: (641) 425-8202
E-Mail: cmarzen@fsu.edu