# COMPREHENSIVE CONSTRUCTION DEFECT CLAIMS & COVERAGE SUPERCONFERENCE

**November 5-7**
2008

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# Which State's Law Controls These Policies

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## NOTES

# Which State's Law Controls These Policies?

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The views expressed in this paper are the authors' views only, and not necessarily those of the firm or its clients.

## I. Introduction

In disputes involving commercial general liability ("CGL") coverage for construction defects ("CD coverage"), courts across the country are divided concerning the meaning of "occurrence," "property damage," and various "business risk" exclusions. If an insurer delivers a policy to a contractor in State X, which deems the ordinary consequences of defective construction to be outside the definition of "occurrence," and the policyholder constructs a defective building in State Y, which takes an opposing view, a central question will be whether the law of State X or of State Y controls.

The first part of this article compares the two principal choice-of-law approaches: *lex loci contractus* and the Restatement (Second) of Conflicts of Law ("the Second Restatement"). The second part examines special concerns that arise as to "additional insureds" in CD coverage litigation. Finally, this article highlights practical concerns regarding the presentation of choice-of-law arguments before trial courts.

## II. Enforceability of Choice of Law Provisions

Most insurance policies do not contain choice of law provisions which identify a particular state's law as applicable should a dispute between the insurer and insured arise. However, where such provisions are included in an insurance policy, most courts will find them enforceable, subject to certain public policy considerations and the requirement that the selection bears a reasonable relationship to the parties and the subject matter at issue.1 Enforcement of

1 Bruce v. Allianz Life Ins. Co., 247 F.3d 1133 (11th Cir. 2001), cert. Denied, 534 U.S. 1065 122 S.Ct. 666 (2001) (applying Georgia law to uphold choice of law provision in contract).

these provisions is based upon the principle that parties to a contract are free to agree as to what law will govern their transaction. *Herring Gas Co., Inc. v. Magee*, 22 F.3d 603 (5th Cir. 1994) (applying Mississippi law); *see also* 17A Am. Jur. 2d Contracts § 261.

Some courts, however, such as those in New Jersey, reject parties' choice of law selection, holding instead that such provisions are ignored where the insured risk is in New Jersey. For example, in Param Petroleum Corp. v. Commerce Industry Ins. Co., 296 N.J. Super. 164, 686 A.2d 377 (App. Div. 1997), the insured, a New Jersey corporation, sought coverage under a liability policy for property located in New Jersey. The insurance policy at issue contained both a forum-selection clause, which provided that litigation could only be brought where the insurer was located, and a choice of law provision, which required that the law of the state where the insurer was located governed the substantive issues in the case. In rejecting both the forum and choice of law provisions in the policy, the court considered the insurer-insured relationship, and, analogizing to a franchisor-franchisee relationship, noted the disparity in bargaining power in both situations and concluded that parties to an insurance contract should never be permitted to "negotiate away the protection of our courts." Id. at 167-172, 886 A.2d at 378-381. Therefore, the court concluded that choice of law provisions should be ignored where the insured risk is located in New Jersey. Id. at 170, 868 A.2d at 380.2

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Notably, the insurance policy in Param covered environmental contamination arising out of underground storage tanks owned by the insured. Choice of law decisions in Courts considering pollution and contamination coverage cases are notorious for selecting the form state's law as governing the substantive issues in the case.

2 The insurance policy in Param covered environmental contamination arising out of underground storage tanks owned by the insured. It is worth noting that the law of the "site" or location of the property at issue, is most often the law applied in environmental coverage disputes, especially where such property is located in the forum state, as courts find that the state where the contamination exists has the paramount interest in resolving issues related to insurance potentially applicable to the clean-up of the contaminated property.

## III. Common Law Approaches to Choice-of-Law

In the absence of a choice of law provision, courts determine choice-of-law applying two different approaches.

### A. *Lex Loci Contractus*

*Lex loci contractus* is the traditional choice-of-law approach set forth in the first Restatement of Conflicts. A substantial minority of states follow this older rule that requires, in a choice-of-law situation involving a contract dispute, the application of the law of the state where the contract was made.[3] The state where the contract was made

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[3] **Alabama B** *Ex parte Owen*, 437 So.2d 476, 481 (Ala. 1983) ("[A]labama follows the traditional view that a contract is governed as to its nature, obligation, and validity by the law of the place where it was made, unless the parties intend the law of some other place to govern, or unless it is to be wholly performed in some other place."). **Arkansas** - *Southern Farm Bur. Cas. Ins. Co. v. Craven*, 89 S.W.3d 369, 372-73 (Ark. App. 2002) ("Choice-of-law questions regarding insurance coverage have traditionally been resolved by applying the law of the state where the insurance contract was made (the *lex loci contractus* rule) . . . Arkansas courts have not applied the significant contacts analysis in a case involving an insurance contract, but it has been applied in the case of ordinary contracts." (internal citations omitted)). **Florida** - *Sturiano v. Brooks*, 523 So.2d 1126, 1130 (Fla. 1988) ("In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement."). **Georgia** - *Convergys Corp. v. Keener*, 276 Ga. 808, 812 (2003) ("[U]ntil we are convinced that there is a better approach, Georgia will continue to adhere to the traditional conflict of law rules."). **Kansas** - *Safeco Ins. Co. of America v. Allen*, 262 Kan. 811, 822 ([W]here there is a conflict of laws, Kansas follows the general rule that the law of the state where the insurance contract is made controls." (internal citations omitted)). **Maryland** - *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 573 (1995) ("[O]ur courts have applied the rule of *lex loci contractus* to matters regarding the validity and interpretation of contract provisions. (internal citation omitted))." **New Mexico** - *Ferrell v. Allstate Ins. Co.*, 188 P.3d 1156, 1172-73 (N.M. 2008) ("Currently only eleven states, including New Mexico, continue to follow the choice-of-law rules set forth in the Restatement (First) with respect to contract claims . . . (however) the Restatement (Second) is a more appropriate approach for multi-state contract class actions."). **Oklahoma** - *Harvell v. Goodyear Tire and Rubber Co.*, 164 P.3d 1028, 1033-34 (Okla. 2006) ("[I]n Oklahoma, the established choice of law rule in contract actions known as *lex loci contractus* is that, unless, the contract terms provide otherwise, the nature, validity, and interpretation of a contract are governed by the law where the contract was made."). **South Carolina** - *Lister v. NationsBank of Delaware, N.A.*, 494 S.E.2d 449, 455 (S.C. App. 1997) ("It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the *lex loci contractus* governs. If the contract be silent thereabout, the presumption is that the law governing the enforcement is the law of the place where the contract is made."). **Tennessee** - *Messer Griesheim Industries, Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 474-75 (Tenn. Ct. App. 2003) ("Tennessee follows the rule of *lex loci contractus*."). **Virginia** - *Black v. Powers*, 628 S.E.2d 546, 554 (Va. App. 2006) ("It is a long-standing rule in Virginia that >[t]he nature, validity, and interpretation of contracts are

usually means the state where the last act in the formation of the insurance policy occurred. The last act of formation is when the policy is delivered to the insured.[4] Thus, under a general application of the rule, if an insurer delivers a policy to a contractor in State X, and the contractor performs work in State Y, the law of State X will control the interpretation of the policy because the contract was delivered in State X.

B. The "Location of the Risk" "Exception" to the Lex Loci Rule

Courts applying *lex loci contractus* favor the rule because *lex loci contractus* "furnishes needed certainty and consistency in the selection of applicable law." *Southern Farm Bureau Cas. Ins. Co. v. Craven*, 89 S.W.3d 369, 372 (Ark. App. 2002). While predictability and stability are plainly desirable, the rigid application of *lex loci contractus* to choice-of-law questions involving general liability policies can lead to counter-intuitive results. For example, if, in State X, an insurer delivers a CGL policy to a contractor who builds commercial properties only in State Y, the parties would probably understand State Y to be the principal location of the insured risk and would reasonably expect the laws of State Y to control the policy. A number of states which follow *lex loci contractus* recognize exceptions to the rule to prevent outcomes that are inconsistent with the reasonable expectations of the parties. *See Burgess v. Allstate Ins. Co.*, 334 F.Supp.

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governed by the law of the place where [the contract was] made . . .." (internal citation omitted)).

[4] *See., e.g., Johnson v. Occidental Fire and Cas. Co. of North Carolina*, 954 F.2d 1581, 1584 (11th Cir. 1992) (AWith regard to insurance contracts, Georgia law provides that the last act essential to the completion of the contract is delivery; consequently, insurance contracts are considered made at the place where the contract is delivered."); *Fortune Ins. Co. v. Owens*, 526 S.E.2d 463, 466 (N.C. 2000) ("With insurance contracts, the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract.").

2d 1351, 1358 (N.D. Ga. 2003) (citing *Convergys Corp. v. Keener*, 582 S.E.2d 84, 86 n.1 (Ga. 2003)) ("Georgia adheres to the traditional rule of *lex loci contractus*, that contracts are governed as to their nature, validity, and interpretation by the law of the place where they were made except where it appears from the contract itself that it is to be performed in a state other than that in which it was made."); *Solomon v. FloWarr Management, Inc.*, 777 S.W.2d 701, 705 n.5 (Tenn. App. 1989) ("The Tennessee Supreme Court has carved out two exceptions to the general rule which are not applicable in this case. First, the Court has recognized that parties can choose to be governed by the law of a state other than the state where the contract is made. Second, it has held that in certain situations, the law of the place of performance will be applied instead of the traditional rule." (internal citations omitted)).

In *Shapiro v. Associated Intern Ins. Co.*, 899 F.2d 1116, 1119 (11th Cir. 1990), an *Erie*-guess case, the 11th Circuit predicted that the Florida Supreme Court, if asked to determine the applicable law in a case where the insurance policy insured against occurrences at a property whose location was unchanging, would apply the law of the location of the risk. According to the court, in a coverage case where the "real property [the insured property] remains stationary and immobile," doubt about the predictability and stability of the contract "is dispelled," and the state of performance can rightfully regulate an insurance contract whose risks are located within the state. *Shapiro*, 899 F.2d at 1119; 1121. The *Shapiro* opinion challenged the Florida Supreme Court to carve out its own "stationary" risk exception to the *lex loci contractus* rule, which is the rule Florida

has traditionally followed.

In 2006, sixteen years after the 11th Circuit decided *Shapiro*, the Florida Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160 (Fla. 2006), issued an opinion seemingly reaffirming its commitment to *lex loci contractus*, even in cases where the insured risk is confined to a state other than the state in which the policy was delivered. Though *Roach* concerned a dispute over coverage under an auto insurance policy, the court discusses the applicability of *lex loci contractus* to all insurance contracts:

> [I]n determining which state's law applies to contracts, we have long adhered to the rule of *lex loci contractus*. That rule, as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage. *Sturiano v. Brooks*, 523 So.2d 1126, 1129 (Fla.1988) . . . In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement.
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> *Roach*, 945 So.2d at 1163.

Since the Florida Supreme Court decided *Roach*, Florida federal district courts have declined to follow the 11th Circuit=s predicted "state of performance" exception in *Shapiro*, with at least one district declaring the *Shapiro* court=s *Erie*-guess a dead letter. *See Valiant Ins. Co. v. Progressive Plumbing, Inc.*, No. 5:06-cv-410-Oc-10GRJ, 2007 WL 2936241, *3 (M.D. Fla. October 9, 2007) (citing *Roach*, 945 So.2d at 1164) ("Decided in 1990, *Shapiro* has governed this area of the law in the Circuit unquestioned

by the Florida Supreme Court until 2006. However, last year the Florida Supreme Court unequivocally reiterated the law of *lex loci contractus* as the controlling choice of law doctrine in contract cases in Florida - >We have never retreated from our adherence to this rule in determining which state's law applies to interpreting contracts.=@).

Despite the Florida Supreme Court=s recent decision in *Roach*, the judicial wind may be blowing against a strict application of *lex loci contractus*. When a policy insures a risk permanently located in a state other than the state in which the policy was delivered, courts may well apply a "state of performance" exception to the *lex loci* rule. However, in CGL coverage disputes concerning an insured with operations in multiple states, *lex loci* jurisdictions are likely to continue to apply the place-of- delivery rule.

### C. The Second Restatement

The Second Restatement, the more modern choice-of-law approach, is applied in more than twice the number of states that apply *lex loci contractus*.[5] For CGL insurers and their policyholders, the Second Restatement provides a two-step approach for determining which state=s law controls coverage, beginning either with the provisions of Restatement ' 193, and, if necessary, concluding with the provisions of Restatement ' 188, or starting from §188, and ultimately reaching §193. *See, e.g., Fireman=s Fund v. Structural System Technology, Inc.*, 426 F.Supp.2d 1009, 1023 (D. Neb. 2006)

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[5] Courts in the following states follow the Second Restatement when dealing with choice-of-law questions involving contract disputes: **Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas, Utah, Vermont, Washington, and West Virginia.** Other states, including California, Massachusetts, New Jersey and New York, follow combined modern approaches, which are guided by Second

("Nebraska courts are guided by the Restatement ' 193 to determine the choice of law with respect to an insurance contract."); *Beckler v. State Farm Mut. Auto. Ins. Co.*, 987 P.2d 768, 775 n.6 (Ariz. App. Div. 1 1999) ("Most cases that look to ' 188 for guidance do so only after determining that no principal location of risk exists under ' 193."); *St. Paul Fire and Marine Insurance Co. v. Building Construction Enterprises*, 484 F.Supp.2d 1004, 1008 (W.D.Mo. 2007), *aff=d* 526 F.3d 1166 (8th Cir. 2008)(analyzing choice of law under §188 and questioning whether "Section 193 is applicable to the present case at all.").

Section 6 of the Second Restatement sets forth the general considerations governing choice of law in all areas of the law:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Second Restatement § 6.

From there, §188 provides the following general rules for determining which state has the "most significant contacts" with a contract dispute:

> In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to

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Restatement principles.

> determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Second Restatement § 188.

Section 193 provides specific guidance for insurance contracts:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Under §193, when a court in a Second Restatement jurisdiction examines a conflict of law question concerning CGL coverage, it first looks at whether the parties understood there to be a principal location of the insured risk during the term of the policy. As noted in the Second Restatement ' 193, Comment b: "The location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state."

### D. Multiple State Operations

Section 193 can be difficult to apply in the construction defect context when, as

frequently occurs, the insured is a contractor that performs operations in multiple states. Under that circumstance, what is the principal location of the insured risk? The United States District Court for the Western District of Missouri confronted this question in *St. Paul Fire and Marine Insurance Co. v. Building Construction Enterprises*, 484 F.Supp.2d 1004 (W.D.Mo. 2007), *aff=d* 526 F.3d 1166 (8th Cir. 2008), where the insured, Building Construction Enterprises, was a Missouri-headquartered general contractor that performed operations throughout the Mid-West.

BCE was the subject of a claim arising out of work that it performed at Fort Riley, an Army base in Kansas. BCE claimed that coverage for the claim under its general liability policy was controlled by the law of Kansas, where the work was done and where the claim arose. It reasoned that the "principal location of the insured risk" was the place where the work giving rise to the claim was performed. Because Kansas law views defective construction that results in damage to the work itself as arising out of an occurrence, BCE contended that the claim against it was covered under its general liability policies.

St. Paul, BCE=s general liability insurer, contended that the law of Missouri, where BCE was headquartered (and where defective construction is not an "occurrence"), controlled BCE=s liability policies. St. Paul argued that when a contractor performs operations in multiple states, the principal location of the insured risk is the policyholder=s headquarters, that being the single location with the greatest connection to all of the policyholder=s operations.

The district court recognized the difficulty of identifying a principal location of the insured risk for a policyholder that conducts operations in multiple states. It noted that "where a policy covers risks in multiple states at the same time, the location of a single risk among many is not necessarily the most significant contact just because it is the only risk which gives rise to a lawsuit." *Id.* at 1008. The court concluded that "if Section 193 is applicable to the present case at all, it militates in favor of finding that Missouri [the location of the policyholder=s headquarters and the state where the policy was delivered] law controls." *Id.* The court explained that "Missouri is the only state >the parties [could have reasonably] understood . . . to be the principal location of the insured risk= given the facts before the Court." *Id.* at 1009.

Based on the reasoning in *Building Construction Enterprises*, it is likely that court=s applying the '193 "principal location of the insured risk" factor to policyholders with multi-state operations will conclude that the location of the policyholder=s headquarters is the "principal location of the insured risk."

In addition to the Restatement ' 193=s "principal location of the insured risk" consideration, the Restatement ' 193 also advises courts to apply the law of a state other than the state of the location of the insured risk if the "other state has a more significant relationship under the principles stated in ' 6 to the transaction and the parties." The "significant relationship" test is the second step in applying the principles of the Second Restatement to a choice-of-law question in a CGL coverage dispute. Courts, however, will generally not conduct a "significant relationship" test under the principles set forth in

Restatement ' 6 and Restatement ' 188 if the court=s application of Restatement ' 193=s "principal location of the insured risk" factor resolves the choice-of-law question. *See, e.g., Boardman v. United Services Auto. Ass=n*, 470 So.2d 1024, 1032-33 (Miss. 1985) ("Restatement ' 188 narrows the focus of ' 6. Section 188 sets forth certain principles to be applied in making choice of law determinations in contract actions generally . . . A dissertation on Restatement ' 188 would be less than helpful at this point as this is an action on . . . a liability insurance contract and Restatement ' 193 provides the starting point for the choice of law inquiry in such cases."). Thus, the choice-of-law analysis set forth in Restatement ' 188 is applied by some courts to liability insurance questions when there is no principal location of the insured risk under Restatement ' 193.

A recent 5th Circuit Court of Appeals case, *Hartford Underwriters Ins. Co. v. Foundation Health Services Inc.*, 524 F.3d 588 (5th Cir. 2008), discusses under what circumstances a state applying the Second Restatement, in this case, Mississippi, might find no principal location of the insured risk and apply Restatement ' 188. In *Foundation Health*, an insurer delivered to the Louisiana insured several nursing home liability policies that provided coverage in seven states, including Mississippi. The insured was later sued in an action arising from the insured=s operation of its nursing home business in Mississippi. Though the insurer defended the insured under a reservation of rights, the insured also paid for independent counsel. The insurer filed a declaratory judgment action seeking a ruling that it was not responsible for reimbursing the insured for its independent counsel=s attorney=s fees.

The Fifth Circuit, applying Mississippi choice-of-law rules, applied the Second Restatement to the choice-of-law question. *Id.* at 593. First, under Restatement ' 193, the court examined whether there was a principal location of the insured risk understood by the parties. Because the policies at issue covered risks in seven states, and there was no principal location of all the risks, the opinion considered whether ' 193 applied:

> It is undisputed that the insurance policies at issue cover risks in seven states. Section 193 comment allows separate consideration of risks for the purpose of determining the principal location of the insured risk when a policy insures multiple risks in several states that require a special statutory form to be incorporated into the policy. Relying on this provision, some courts treat "virtually any policy insuring multiple sites ... as a separate policy as to each insured location, regardless of whether there is an identifiable single 'principal' of the risk." Although it is not clear how Mississippi would interpret comment f, this Court has held that "' 193 is pertinent only if there is, in fact, a single state which can be identified as the 'principal' location of the risks insured by a policy" . . . Without controlling authority to the contrary, we feel compelled to apply the plain language section 193, which speaks in terms of one principal location of the insured risk . . . Thus, the location of the insured risk has "less significance" and section 193 does not compel us to apply Mississippi law. (internal citations omitted).
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> *Id.* at 594-95.

While the court recognized that other courts have found Restatement ' 193 applicable to a multiple-risk, multiple-state policy by treating the insured risk at each location as a separate policy, the court predicted that Mississippi would decline to extend ' 193 in that fashion.

Having found no principal location of the insured risk, the court next conducted a "significant relationship" test under the principles stated in Restatement ' 6 and as applied by Restatement ' 188. Restatement ' 188 sets forth a number of contacts for a court to

consider when determining which state has the most significant relationship with the transaction and the parties: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. Each factor should be evaluated according to its "relative importance with respect to the particular issue." Restatement ' 188 (2).

In *Foundation Health*, the court noted that Mississippi does not apply each contact mathematically or mechanically, but instead in a "practical way to determine the center of the gravity of a contract issue." *Id.* at 595. The court found that the location of the insured=s conduct, or place of performance - the Mississippi nursing homes - was particularly relevant, because the duty to provide independent counsel when an insured defends under a reservation of rights in Mississippi state courts "is directly related to Mississippi=s interest in preventing conflicts of interest in litigation . . . [and] is closely connected to Mississippi courts and policy." *Id.* at 597. Accordingly, the court found Mississippi law controlling under Restatement ' 188=s "significant relationship" test, even though it originally declined to apply Mississippi law under Restatement ' 193=s "principal location of the insured risk" test.

## IV. Additional Insured Issues

Additional insured issues, which frequently arise in CD coverage actions, can

complicate the choice-of-law analysis.[6] For example, Texas courts apply the Second Restatement=s "significant relationship" test in a way that places importance on a particular contact: where the policyholder maintains its place of business.[7] Thus, in a jurisdiction that applies this "policyholder's headquarters" approach, a question may arise as to whose headquarters B the named insured's or the additional insured's B matters.[8]

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[6] For a more in-depth discussion, see Steven M. Klepper, "Choice of Law in the Additional Insured Context," Mealey's Litigation Report: Insurance, Vol. 19, Iss. 18 (3/8/05) at pp. 28-31.

[7] *See W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 883 (5th Cir. 1990) (Texas law); *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 345-46 (Tex. App. - Houston [14th Dist.] 2004, writ denied).

[8] As indicated by the use of the phrase "policyholder's headquarters," rather than "insured's headquarters," I believe that the law of the named insured's principal place of business should control.

Few cases have examined this question. An Illinois federal court, in *Cincinnati Insurance Co. v. Dawes Rigging & Crane Rental, Inc.*, addressed coverage under a "blanket" additional insured provision that extended coverage to "[a]ny person or organization for whom [the named insured is] required in a written contract, oral agreement or oral contract where there is a certificate of insurance showing that person as an ADDITIONAL INSURED under this policy."[9] Dawes, a Wisconsin corporation seeking coverage under this endorsement, claimed that Wisconsin law governed its claim under the policy, even though the named insured was an Illinois corporation. The court disagreed, holding that "with the primary dispute being whether Dawes is an insured, Dawes's domicile or where Dawes received a copy of the insurance policy is not relevant. Accordingly, Illinois law will govern the analysis."[10] Similarly, in *APAC-Atlantic, Inc. v. Protection Services, Inc.*, a West Virginia federal court, reviewing a "blanket" additional insured clause, held that the principal place of business of the named insured, not of the additional insured, controlled.[11]

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[9] 321 F. Supp. 2d 975, 979 (C.D. Ill. 2004).

[10] *Id.* at 980.

[11] 397 F. Supp. 2d 792, 796-97 (N.D. W. Va. 2005).

By contrast, in *Gabe's Construction Co., Inc. v. United Capitol Ins. Co.*,[12] the court held that Iowa law governed coverage for a general contractor under an additional insured endorsement issued in conjunction with an Iowa construction project. The court declined to apply the law of Minnesota, where the named insured was headquartered. It first relied on the policy's "severability of interests" clause, which directed that the insurance "applied separately to each insured against whom claim is made or suit is brought."[13] From there, the court reasoned that the relationship between the insurer and the general contractor "was for the sole and express purpose of protecting [the additional insured] from liability arising from the project in Iowa."[14]

The decision in *Gabe's Construction* may have been based on the fact that the endorsement at issue was a scheduled AI endorsement specifically naming the additional insured. Where the alleged insured seeks coverage under a blanket endorsement that does not identify a particular additional insured, it is difficult to argue that the law of the additional insured's headquarters controls. In the context of a blanket endorsement, the person claiming coverage is a stranger to the insurer.[15] The blanket endorsements in *Dawes Rigging* and *APAC-Atlantic* used general terms to insure certain persons, wherever they resided, with respect to certain projects, wherever they were located. If the law of

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[12] 539 N.W.2d 144, 146-47 (Iowa 1995).

[13] *Id.* at 147.

[14] *Id.*

[15] *See Baker v. Casualty Indem. Exchange*, 561 So.2d 1314, 1316 (Fla. App. 4 Dist. 1990).

the additional insured's domicile or of the project were applied, the controlling law could be one that neither the insurer nor the policyholder contemplated at the time of the issuance of the policy.

A better argument for varying the controlling law exists when the policy specifically names the additional insured. In *Gabe's Construction*, the additional insured was not a stranger to the insurer, which issued an endorsement with respect to an identified additional insured. Nevertheless, the result in *Gabe's Construction* is subject to criticism. Applying the law of different jurisdictions to the same insurance policy can create problems, for example, with respect to the exhaustion of policy limits, which the named insured and the additional insured share. For instance, the additional insured's home state could apply a manifestation trigger (deeming all property damage to occur during one policy period), while the policyholder's home state applies an injury in fact trigger (potentially deeming the property damage to occur across policy periods). Applying the manifestation trigger would lump all covered losses into one policy period. That circumstance could lead to unexpected results for the named insured, such as the complete exhaustion of its insurance coverage in one year B or for the additional insured, who could lack coverage to the extent that limits were already exhausted in the year of manifestation. Thus, although there is some authority for applying different choice of law analyzes in the case of scheduled and blanket additional insured endorsements, one can fairly question whether doing so makes sense.

## V. Practical Considerations

### A. "Actual Conflict" Requirement

Before a court will undertake a choice-of-law analysis, a court must determine whether there is an actual conflict between the substantive law of the states whose law potentially applies. Thus, the outcome of a coverage dispute must differ depending on which state's substantive law is applied. If the outcome will be the same under any potential state's law, no conflict exists and the court is not required to engage in a choice-of-law analysis.

### B. Preserving Choice-of-Law Arguments

It is important that a party identify and raise any potential choice-of-law issues at an early stage in insurance coverage litigation. Failing to so creates the risk of waiving such arguments. In 2005, the 3rd Circuit Court of Appeals, in a case applying Pennsylvania law, found that a party to the case waived the choice-of-law issue by failing to raise the issue in its pleadings. *See National Grange Mut. Ins. Co. v. Goldstein, Heslop, Steel, Clapper, Oswalt & Stoehr*, 142 Fed. Appx. 117, 124 (3rd Cir. 2005) ("Under Pennsylvania law, issues involving choice of law are not jurisdictional and may be waived if not raised . . . [B]y failing to file a responsive pleading which raised the choice of law issue . . . [the party] waived its ability to invoke Virginia law." (internal citations omitted)).16 Although most jurisdictions are not so harsh, it is wise to identify and raise the choice-of-law issue early so that the opposing party cannot claim that it was waived. To be safe, a party seeking the application of another state's law should raise that