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Insurance Claim? Be Prepared For Insurance Company Forum Shopping

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Because the insurance industry is subject to different laws in different jurisdictions, it is possible for the same claim under the same policy language to be covered in one state, and not covered in another. Thus, insurers who write policies in different states identify which states are more favorable for certain types of claims or for certain policy language. So when they are placed on notice of a policyholder's claim from a jurisdiction that is not friendly to insurers in general, or to their policy language in particular, they may look to other possible jurisdictions in which to engage their policyholder in a coverage battle, hoping to defeat coverage by applying more favorable law, in a more favorable forum. This is the scenario ripe for insurance company forum shopping. Some insurers have become very aggressive when denying claims. They disregard the usual procedure of notifying their insured of a claim denial, and instead, simply file a lawsuit asking a court to agree with their conclusion that the policy provides no insurance coverage for the policyholder's claim. Of course they file their suit in a forum they choose precisely because they expect a favorable ruling in that jurisdiction. For a policyholder with operations (or even just sales) in several states, the insurer will select from any of several states with some connection to the policyholder. The insurer will choose a state with law that supports its denial of coverage. The "choice of law" rules (which also differ among the states) may dictate that a state other than the one chosen by the insurer is the proper state's law to apply. The battle over which state's law should apply is fact-sensitive and often uncertain. In many states which apply the Restatement (Second) of Conflicts of Laws, the choice of law question seeks to identify the "principle location of the insured risk," (§193) or relies on a balancing of interests, looking to the place of contracting, the place of negotiation, the place of performance, the location of the subject matter and the places of business of the parties. (§188). These considerations rarely point to an obvious result. In the end, the court often displays a bias toward applying its own state's law—which was the reason the insurer chose it in the first place. What can you do to avoid the potential of your insurer filing a coverage action in an unfavorable (from your standpoint) forum? Mostly, you need to take a good look at your insurance policy whenever you contemplate making a claim. If there is any question in your mind about whether your policy provides coverage for the claim, you should talk to a Policyholder lawyer about it, even before you hear back from your insurance company. When a policyholder is faced with the prospect of making a claim to an insurer, involving any uncertainty of coverage, there are several questions a policyholder needs to consider.

- Is there any connection to a forum with unfavorable law for this claim?

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- Do the “choice of law” rules clearly favor the application of only one state’s law?
- Does the policyholder have claims for damages against the insurer, besides simply a determination of coverage?
- Is coverage for the claim worth the expense of a coverage battle?

If there is a connection, regardless of how tenuous, to a jurisdiction whose law is different than the more likely forum for a coverage dispute, and whose law favors the insurer’s denial of coverage, a giant red flag is waiving for the policyholder. If the “choice of law” rules do not make it crystal clear that only one jurisdiction’s law applies to the claim, another red flag is waiving. These red flags should cause a policyholder to consider filing its own declaratory judgment action to avoid the insurer’s peremptory suit in an unfavorable jurisdiction—the “race to the courthouse.” Losing this race is not necessarily fatal to the policyholder’s quest for coverage, but the stakes go way up. Maintaining two coverage suits in two jurisdictions doubles the expense of the battle. Increased litigation costs favor the insurer. If the insurer has used improper tactics to obtain an advantage over its policyholder in its “race to the courthouse,” or if it has breached its duty of good faith toward the policyholder in some other way, the policyholder will likely have claims to assert, apart from a determination of coverage. These claims make the policyholder’s suit more comprehensive than the insurer’s competing coverage-only action, which should favor deferral by the court with the less comprehensive suit. Some courts have also favored the policyholder’s suit over the insurer’s suit because the policyholder is the “natural plaintiff,” and the insurer’s filing is an indication of disfavored forum shopping. And so, there is hope, even if the policyholder must litigate two lawsuits in two jurisdictions, just to get its insurer to live up to its obligations under the policy purchased. The final question then is whether the cost of proceeding in these two jurisdictions is worth the uncertainty of recovery for the defense and indemnity costs incurred on the original claim.