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TOPIC: New York Rather Than Foreign Law Applies in Fraud Case

CITE: *Fondation Dixhuit v. PRUCO,* 2014 WL 4230586, (U.S.D.C. , S.D. NY. No. 14–CV–2165 Aug. 27, 2014); *American National Insurance Company v. Conestoga Settlement Trust*, No. 04–13–00719–CV, 2014 WL 3734215 (Ct. App. TX July 30, 2014).

SUMMARY: A foreign entity, Fondation Dixhuit, sued Pruco Life Insurance Company of New Jersey ("Pruco") seeking payment of a $20,000,000 life insurance policy it issued on the life of Yaron Bruckner. Dixhuit, a private foundation formed under Liechtenstein laws to benefit Bruckner's family, was the policy beneficiary. It alleged Pruco breached the insurance contract when it refused to pay it the policy proceeds.

Pruco had already filed a declaratory judgment action in Liechtenstein to invalidate the policy on the basis of allegedly fraudulent representations made by Bruckner in procuring the policy. Pruco requested this court to abstain in favor of the Liechtenstein proceeding. Pruco had asked—if the court denied Pruco's motion to dismiss—for the court to stay this matter pending the outcome of the Liechtenstein proceeding.

The court denied both of Pruco's motions.

The case is important on many levels. It brings up numerous issues we visited recently in *ANICO* (*WRNewswire #14.8.12)*. High end producers will find concepts in this case especially useful.

FACTS: Yaron Bruckner was a resident of Monaco and a citizen of both Belgium and Israel. Bruckner bought the policy in question from Pruco on March 28, 2008. Bruckner died from a brain tumor on August 4, 2013.

Dixhuit filed a claim for the policy benefits. After investigating, Pruco uncovered facts that led it to believe Bruckner misrepresented his medical history in his application.

Specifically, Pruco learned he had undergone surgery to remove a brain tumor in 2006 and had received chemo and radiation therapy. However, on the application Bruckner denied that he had ever been treated for or diagnosed with cancer, tumors, or any disorder of the brain or nervous system.

Pruco initiated a proceeding in Lichtenstein, Dixhuit's home country, seeking a judgment that the policy was invalid due to fraud. Days later, Dixhuit filed its complaint in this New York court for breach of the insurance contract, claiming Pruco must pay the insurance proceeds because the policy's incontestability period had lapsed by the time the misrepresentation was uncovered.

The Pruco policy was not alone: Bruckner acquired it as part of a portfolio of policies totaling about $100 million. The portfolio was brokered by a New York agent and the policies were solicited and negotiated in New York. Pruco issued one of the policies, with a death benefit of $20 million, and delivered the policy in New York. The bottom of each page of the application was marked with a stamp that says "New York." Bruckner indicated in the application that his home and billing addresses were in Monaco; in the space for "current employer" Bruckner wrote "New York." He signed the application in New York on March 25, 2008 and Pruco issued the contract on March 28, 2008. Each page of the policy was stamped with the code "ULNT–2005–NY," indicating it was issued on a New York form.

The policy contains the standard incontestability clause—consistent with New York law—that reads:

> Except as we state in the next sentence, we will not contest this contract after it has been in force during the Insured's lifetime for two years from the issue date. The exceptions are: (1) non-payment of enough premium to pay the required changes; and (2) any change in the contract that requires our approval and that would increase our liability.

The policy also included an integration ("entire contract") clause:

> This policy and any attached copy of an application, including an application requesting change, form the entire contract. We assume that all statements in an application are made to the best of the knowledge and belief of the person(s) who make them; they are deemed to be representations and not warranties. We rely on those statements when we issue the contract and when we change it. We will not use any statement, unless made in an application, to try to void the contract, to contest a change, or to deny a claim.

This clause was consistent with New York law requiring policies delivered in New York to include a provision stating that "the policy, together with the application therefor if a copy of such application is attached to the policy when issued, shall constitute the entire contract between the parties."

The issue here is the same as the issue in the ANICO case: Can an insurer deny a beneficiary's claim to the policy proceeds if the insured applicant (here allegedly

Bruckner) intentionally made material misrepresentations in the application, but that fraud is not discovered until *after* the incontestability period had lapsed? And just as in the ANICO case, the outcome will depend almost entirely on the law of the jurisdiction that decides the case. As in ANICO, if it is decided that New York's law governs, an insurer win is almost impossible.

Here, Pruco asked the court to allow Liechtenstein law to be used to make the decision. Conversely, Dixhuit asked the Liechtenstein court to stay its hand in favor of the New York court.

The Liechtenstein court had decided to suspend Pruco's action for declaratory judgment action until the New York court reached a decision. Its reasoning was a resolution of the breach of contract claim by the New York court would be enforceable in New York against either party. It would also resolve the dispute in the Liechtenstein court, whereas a declaratory judgment in Dixhuit's favor by the Liechtenstein court would not be enforceable against Pruco in New York.

Pruco argued the insured was not a resident of New York and Bruckner's financial ties with New York were trivial compared to his overall wealth. According to Pruco, this meant that Liechtenstein had a greater interest in the outcome of the dispute as the beneficiary's domicile and is a more convenient forum because the witnesses and evidence are located around Europe.

The court held that New York rather than Liechtenstein law should govern. It noted that the policy does not contain either a "choice of law" or a "forum selection" clause. It was issued in compliance with New York insurance law requirements.

When a choice of law case arises, courts will usually consider: (1) the place of contracting; (2) the places of negotiation and performance; (3) the location of the subject matter; and (4) the domicile or place of business of the contracting parties. When life insurance is involved, a dispute is typically governed by the law of "the state which the parties understood to be the principal location of the insured risk or insured ... unless with respect to a particular issue, some other state has a more significant relationship ... to the transaction and the parties." Although many things are considered, generally no single factor will determine the outcome. Courts try to "detect and analyze what interest the competing states have in enforcing their respective rules."

As in many cases of this type, courts will focus strongly on "governmental interest" in the enforcement of a state's regulatory scheme, i.e. what public policy is at stake and how strong is the governmental interest in the enforcement of its regulatory scheme? It is an attempt to give "the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation," while still "giving effect to the probable intention of the parties and consideration to whether one rule or the other produces the best practical result."

Here, the court determined New York had the most significant relationship to the policy, and New York law should therefore govern this dispute. Bruckner solicited a

portfolio of life insurance from six New York companies including the one issued by Pruco through a New York agent. He signed the application on New York forms in New York; and Pruco delivered the Policy in New York. While his ties to New York were not extensive, Bruckner's intent seems to have been to procure insurance policies governed by New York law.

Returning to the reasoning behind the incontestability clause, New York's public policy was intended "to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, as soon as it reasonably can be done." According to this court, "That interest cannot be overcome merely because the insured was at all times a resident of a foreign country."

Note that the court is not blind or unsympathetic to the reality of this situation:

> As Pruco tells the story, Bruckner was an international billionaire who made a calculated decision "to purchase insurance in New York as part of a scheme to defraud multiple American insurers," resulting in a $100 million dollar fraudulent windfall to his already well-endowed estate. …Pruco further argues that the "attempted use of the incontestability clause as an absolute defense to fraud on these facts is egregious, against New York public policy, and should not be condoned. Whether Pruco can prove that Bruckner committed fraud and can find a compelling argument under New York law to defeat the incontestability clause in the Policy remains to be seen.

Even though it was abundantly clear Bruckner was not the "average consumer" needing protection from a powerful insurer, the court held that New York law applied.

RELEVANCE: If the insurer here loses its case, it will have cost $20,000,000 to learn the lesson we've been repeating: Life insurers need to do a much better job underwriting and investigating an applicant's statements at the time of and within the two year period following the issuance of coverage.

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