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Personal Jurisdiction of US Courts: The Price of Selling Worldwide Coverage

Squire Sanders and Herbert Smith are pleased to present you with this e-bulletin focusing on an important US court decision that will impact insurance companies offering worldwide coverage.

Insurance companies that offer worldwide coverage should take notice.[1] Contracting to provide such broad coverage may subject insurers to personal jurisdiction of the US courts in states where the insured resides or the covered event occurs – *even* if the insurance company has no employees, agents or offices in the state and does not otherwise conduct business there. In July 2012 the US Court of Appeals for the Fourth Circuit (the Court) ruled that a district court can exercise personal jurisdiction in precisely those circumstances. The Court reasoned that exercising personal jurisdiction over the insurer was a fair *quid pro quo* for the increased premiums the insured paid for worldwide coverage. Further, because the insurance company contracted to defend the insured throughout the policy territory, the exercise of personal jurisdiction was not unreasonable. While other means to avoid litigating in an undesirable forum remain available, insurance companies should not count on successfully challenging personal jurisdiction after agreeing to cover an insured anywhere in the world.

The Fourth Circuit's *ESAB* Decision

In *ESAB Group, Inc. v. Zurich Insurance plc,*[2] the US Court of Appeals for the Fourth Circuit affirmed the district court's exercise of personal jurisdiction over Zurich Insurance plc (Zurich). The decision is binding law on all federal district courts in Maryland, Virginia, West Virginia, North Carolina and South Carolina. Further, because it is a decision from one of the 11 US federal appellate courts, the *ESAB* decision will be persuasive, though not binding, legal precedent in the other federal district courts and state courts throughout the US. The Court's decision has significant implications for insurance companies that offer worldwide coverage.

Zurich had issued multiple global liability policies to ESAB. The policies covered occurrences "worldwide." The policies selected Swedish law for the resolution of disputes and were executed outside the US by foreign companies.

ESAB requested that Zurich defend and indemnify it in numerous product liability lawsuits filed in various state and federal courts throughout the US. When coverage was declined, ESAB filed a lawsuit against Zurich in South Carolina state court. Zurich removed the case to the US District Court for the District of South Carolina.

Zurich argued that it did not have the minimum contacts with South Carolina necessary to support personal jurisdiction and sought dismissal of the case. Specifically, Zurich: (i) had no employees, agents, offices or property in South Carolina; (ii) was not licensed as an insurer by South Carolina; and (iii) did not regularly conduct business in South Carolina. The district court rejected Zurich's argument, finding its contacts with South Carolina sufficient to exercise personal jurisdiction.

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1 The Fourth Circuit's decision in *ESAB Group, Inc. v. Zurich Insurance plc* does not address the more narrow question of whether contracting to provide nationwide coverage throughout the United States is sufficient to subject the insurance company to personal jurisdiction wherever an insured is located or a covered event occurs. Nevertheless, the Court's analysis suggests that nationwide coverage would compel a similar outcome.

2 *ESAB Grp., Inc. v. Zurich Ins. plc,* Nos. 11–1243, 11–1655, 2012 WL 2697020 (4th Cir. Jul. 9, 2012)

On appeal, the Fourth Circuit applied the three-part due process test to determine whether the exercise of personal jurisdiction over Zurich was proper. The test examined: (i) the extent to which Zurich "purposefully availed itself of the privilege of conducting activities" in South Carolina; (ii) whether ESAB's claims against Zurich arose from those activities; and (iii) whether exercising personal jurisdiction over Zurich was "constitutionally reasonable." Because Zurich did not dispute that ESAB's claims arose from conduct in ESAB's home state of South Carolina, the Court only addressed the first and third prongs of the test.

Citing its prior opinion in *Rossman v. State Farm Mutual Automobile Insurance,*[3] the Court recognized two "unique aspects of the business of insurance" relevant to the personal jurisdiction analysis. First, an insurer's agreement to defend an insured within a specified policy territory indicates the insurer's willingness to litigate in courts throughout that policy territory. Second, because a broad policy territory induces sales and increases premiums, the insurer's contacts with the policy territory are purposeful.

Focusing on those two aspects of insurance, the Court determined that both the first and third parts of the personal jurisdiction test were satisfied. The Court concluded that Zurich "targeted" South Carolina and "purposefully availed itself of the privilege of conducting business under South Carolina law" by contracting to provide worldwide coverage for occurrences and charging ESAB higher premiums for it. The exercise of personal jurisdiction was also reasonable because Zurich indicated that it would not be overly burdensome to litigate in South Carolina by contracting to cover ESAB worldwide. Additionally, the interest of South Carolina in protecting its own corporations and ESAB's interest in the convenience of litigating in its home state outweighed any inconvenience to Zurich. Accordingly, the Fourth Circuit affirmed the district court's decision to exercise personal jurisdiction. This ruling is consistent with decisions from other circuits in the US, further strengthening the majority view among the circuits of the US courts that insurance companies can be subjected to personal jurisdiction throughout the policy territory.[4]

Can Insurance Companies Do Anything to Avoid Litigating in an Undesirable Forum?

Yes. Insurance companies can minimize the risk of litigating in an undesirable forum. Consider incorporating mandatory forum selection (jurisdiction) clauses in future policies to dictate where disputes with an insured will be resolved. Courts in the US regularly enforce those clauses, making them a valuable and effective tool for preventing litigation in undesirable places. Another alternative to consider is an arbitration clause that requires the arbitration of any disputes with the insured, thereby avoiding the court system.

If a lawsuit is filed, the insurance company can seek to dismiss the case on *forum non conveniens* grounds or request a transfer to a more convenient district court. Pursuant to the doctrine of *forum non conveniens,* a court can decline to exercise its jurisdiction when the parties' convenience, the

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3 832 F.2d 282, 286-87 (4th Cir. 1987).

4 See, e.g., *Ferrell v. West Bend Mut. Ins. Co.,* 393 F.3d 786, 791 (8th Cir. 2005) (nationwide territory-of-coverage clause conferred personal jurisdiction over insurer, explaining that "[i]f [the insurer] wished to avoid lawsuits by a third party in any particular forum, then it could have excluded that forum from its territory-of-coverage clause, although such an exclusion likely would have made its policies less marketable"); *Payne v. Motorists'Mut. Ins. Cos.,* 4 F.3d 452, 456 (6th Cir. 1993) ("The fact that Motorists chose to provide coverage for all fifty states-indeed, such coverage is almost certainly the only kind of marketable auto insurance-constitutes purposeful availment of any individual state's forum"); but see *OMI Holdings, Inc. v. Royal Ins. Co. of Canada,* 149 F.3d 1086, 1095-98 (10th Cir. 1998) (nationwide territory-of-coverage clause established foreign insurers' minimum contacts with Kansas but was insufficient to confer personal jurisdiction on Kansas district court where "the forum state has virtually no interest in litigating the case, the dispute is governed by Canadian law, and Kansas would not provide a more efficient forum in which to litigate").

court's convenience, and the relevant public and private interests weigh in favor of litigating in a different forum.[5] Similarly, Section 1404(a) of the United States Code permits a federal district court to transfer a case to another appropriate district "for the convenience of parties and witnesses" and "in the interest of justice."[6]

Other alternatives may be available depending upon the particular circumstances of the matter. For more information, please contact:

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[5] *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947); *Pierre-Louis v. Newvac Corp.,* 584 F.3d 1052, 1056 (11th Cir. 2009).

[6] 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented").